Appendix A ("App.A."):

Order, *Ex parte Wells*, No. WR-86,184-01 (Tex. Crim. App. Dec. 15, 2021)

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,184-01

EX PARTE AMOS JOSEPH WELLS III, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. C-432-W011509-1405275-A IN THE 432ND JUDICIAL DISTRICT COURT TARRANT COUNTY

Per curiam.

O R D E R

This is an initial application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.[1]

In November 2016, a jury convicted Applicant of a 2013 capital murder in which he shot to death his girlfriend, Chanice Reed, who was eight months pregnant with Applicant's child, and Chanice's mother, Annette Reed, in the same criminal transaction.

[1]Unless otherwise specified, all further references to articles in this order refer to the Texas Code of Criminal Procedure.

See TEX. PENAL CODE § 19.03(a)(7). The unborn child did not survive, and Applicant also shot to death Chanice's ten-year-old brother, E.M., during this same criminal transaction. The jury answered the special issues submitted under Article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Wells v. State*, 611 S.W.3d 396 (Tex. Crim. App. 2020).

In his application, Applicant presents nine challenges to the validity of his conviction and sentence. The trial court did not hold a live evidentiary hearing. It entered findings of fact and conclusions of law and recommended that we deny the relief Applicant seeks.

We have reviewed the record regarding Applicant's allegations. In Claim 1, Applicant alleges that his "trial counsel rendered constitutionally ineffective assistance throughout their representation of [him]." In Claims 4 and 6, Applicant contends that trial counsel rendered constitutionally ineffective assistance because they did not: challenge the constitutionality of the future dangerousness special issue (Claim 4); and argue that the mitigation special issue unconstitutionally restricted the evidence that the jury could determine was mitigating (Claim 6). However, Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance. *See Ex*

parte Overton, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688).

In Claims 5, 7, and 9, Applicant avers that his appellate counsel rendered constitutionally ineffective assistance because appellate counsel failed to: "include the exclusion of Defense Exhibits 82A, 83A, & 84A in point of error four [on direct appeal], regarding the trial court's erroneous exclusion of constitutionally relevant mitigation evidence" (Claim 5); challenge the constitutionality of the "10-12 Rule" (Claim 7); and "raise a preserved issue challenging the arbitrary administration of the death penalty in Texas" (Claim 9). But Applicant has not shown that appellate counsel performed deficiently by unreasonably failing to discover and raise nonfrivolous issues or demonstrated a reasonable probability that, but for appellate counsel's allegedly deficient performance, the outcome of his appeal would have been different. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012). To the extent Applicant also contends that appellate counsel was ineffective on direct appeal for failing to raise the underlying constitutional allegation in habeas Claim 4, Applicant has similarly failed to show that he is entitled to relief. *See Robbins*, 528 U.S. at 285; *Flores*, 387 S.W.3d at 639 .

In Claim 2, Applicant asserts that the State's alleged misconduct at the punishment phase of his trial violated his rights to due process and a constitutionally reliable sentencing determination pursuant to the Eighth Amendment. However, Applicant has

failed to show by a preponderance of the evidence that the State presented false or misleading testimony and, if so, that such testimony was also material. *See Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). In addition, the record does not support a conclusion that the State made an improper argument to the jury during summation. *See Wells*, 611 S.W.3d at 422–23 (resolving a similar argument adversely to Applicant on direct appeal); *see also Ex parte Scott*, 541 S.W.3d 104, 119 (Tex. Crim. App. 2017) (discussing the four general areas of appropriate jury argument).

In Claim 3, Applicant contends that he was convicted and sentenced to death by jurors who engaged in misconduct. Applicant has failed to meet his burden to allege and prove facts which, if true, entitle him to relief on this juror misconduct claim. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985).

In Claim 8, Applicant argues that he is categorically ineligible for the death penalty due to his serious mental illness. We have rejected similar arguments in the past. *See Devoe v. State*, 354 S.W.3d 457, 473 (Tex. Crim. App. 2011); *Mays v. State*, 318 S.W.3d 368, 379–80 (Tex. Crim. App. 2010). We decline to revisit those decisions.

The trial court's Finding of Fact 61 on pages 64–65 of its findings of fact and conclusions of law reads:

> 61. Applicant submits unsworn habeas declarations from his mother Twyla, father Big Amos, stepfather Randy, brother Amron, sister Montoya [Walton], aunts Letrinda and Gaines, grandmother Russell, great-grandmother Fannie, and cousin Anthonysha to support his claims. *See* Application Exhibits 8, 9, 11-13, 19, 21-22, 25, 31. Each of these individuals were contacted by members of the defense team

> before trial; of these individuals, all but Amron, Fannie, Gaines, and Anthonysha testified during the punishment phase of Applicant's trial.

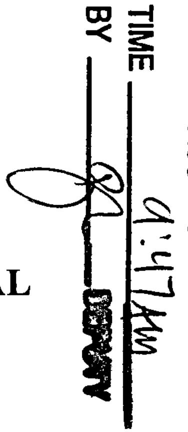
The habeas record does not support a finding that Walton testified before the petit jury which convicted Applicant of capital murder and answered the special issues in a manner requiring the trial court to sentence Applicant to death. Therefore, we decline to adopt Finding of Fact 61. We otherwise adopt the trial court's findings of fact and conclusions of law. Based upon the trial court's findings and conclusions that we adopt and our own review, we deny relief.

IT IS SO ORDERED THIS THE 15TH DAY OF DECEMBER, 2021.

Do Not Publish

Appendix B ("App.B."):

Order, *Ex Parte Wells*, No. C-432-W011509-1405275-A (432d Dist. Ct., Tarrant County, Tex. Aug. 10, 2021)



No. C-432-W011509-1405275-A

EX PARTE	§	**IN THE 432nd JUDICIAL**
	§	
	§	**DISTRICT COURT**
	§	
AMOS JOSEPH WELLS III	§	**OF TARRANT COUNTY, TEXAS**

ORDER

Having carefully reviewed the State's Proposed Memorandum, Findings of Fact, and Conclusions of Law filed on June 30, 2021, and having further determined that the proposed findings are supported by the record and that the conclusions are legally sound, the Court hereby orders, adjudges, and decrees that these proposed findings of fact and conclusions of law are adopted as the Court's own with the following modifications:

1. Conclusion of Law 38, Pg. 71, regarding the alleged failure to develop and present mitigating evidence is modified to read as follows:

   "Applicant does not present evidence to prove that there is a reasonable probability that he would have been sentenced to life without parole instead of death had his trial counsel found and presented all of the matters contained in his habeas exhibits that were not shown at trial. *See Wiggins*, 539 U.S. at 534; *Strickland*, 466 U.S. at 693; *Ex parte Flores*, 387 S.W.3d at 633."

2. Conclusion of Law 20, Pg. 89, regarding the alleged inadequate future dangerousness investigation is modified to read as follows:

   "As discussed in detail in the findings related to Applicant's Claim Two, the alleged "errors" identified in AuBuchon's declaration are based on his

singular interpretation and mischaracterizations of Rogers's testimony as a whole. *See, infra*, at IV. Claim Two."

The Court further orders and directs the Clerk of this Court to:

1. File these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals pursuant to Texas Code of Criminal Procedure Article 11.071, section 8(d).

2. Furnish a copy of this Order to Applicant's counsel, Ben Wolff, Benjamin.Wolff@ocfw.texas.gov; Ashley Steele, Ashley.Steele@ocfw.texas.gov; and Michelle E. Ward, Michelle.Ward@ocfw.texas.gov; and

3. Furnish a copy of this Order to the Post-Conviction Section of the Tarrant County Criminal District Attorney's Office.

SIGNED AND ENTERED this the 10th day of August, 2021.

JUDGE PRESIDING

Appendix C (“App.C.”):

Order, *Ex Parte Wells*, No. C-432-W011509-1405275-A (432d Dist. Ct., Tarrant County, Tex. Jun. 25, 2021)

FILED
TARRANT COUNTY
6/25/2021 4:30 pm
THOMAS A. WILDER
DISTRICT CLERK

No. C-432-W011509-1405275-A

EX PARTE	§	IN THE 432nd DISTRICT COURT
	§	
AMOS JOSEPH WELLS III	§	OF TARRANT COUNTY, TEXAS

MEMORANDUM AND ORDER ON APPLICANT'S REQUEST FOR THIS COURT TO RULE ON MR. WELLS'S MOTION FOR EVIDENTIARY HEARING AND ALTERNATIVE REQEUST FOR FACT-FINDING AND MOTION TO ENTER EXHIBITS

Having reviewed Applicant Amos Joseph Wells III's Request for this Court to Rule on Mr. Wells's Motion for Evidentiary Hearing and Alternative Request for Fact-Finding, Applicant's Motion to Enter Exhibits Into Evidence in Support of the Allegations in Mr. Well's Initial Application, and the State's Response thereto, this Court DENIES Applicant's request for an evidentiary hearing and fact finding, and DENIES Applicant's motion to enter exhibits into evidence.

The Court orders the Clerk of this Court to furnish a copy of this Memorandum and Order to Applicant's counsel, Ben Wolff, Benjamin.Wolff@ocfw.texas.gov; Ashley Steele, Ashley.Steele@ocfw.texas.gov; and Michelle E. Ward, Michelle.Ward@ocfw.texas.gov; and to the post-conviction section of the Tarrant County Criminal District Attorney's Office.

SIGNED AND ENTERED this the 25th day of June, 2021.

JUDGE RUBEN GONZÁLEZ, JR.

Appendix D ("App.D."):

State's Proposed Memorandum, Findings of Fact, and Conclusions of Law, *Ex parte Wells*, No. C-432-W011509-1405275-A (432d Dist. Ct., Tarrant County, Tex. Jun. 30, 2021)

D432-W011509-00

FILED
TARRANT COUNTY
6/30/2021 4:53 PM
THOMAS A. WILDER
DISTRICT CLERK

No. C-432-W011509-1405275-A

EX PARTE	§	IN THE 432nd DISTRICT COURT
	§	
AMOS JOSEPH WELLS III	§	OF TARRANT COUNTY, TEXAS

STATE'S PROPOSED MEMORANDUM, FINDINGS OF FACT, AND CONCLUSIONS OF LAW

COMES NOW, The State of Texas, by and through the Criminal District Attorney of Tarrant County, Texas, and files its proposed memorandum, findings of fact, and conclusions of law.

MEMORANDUM

A Tarrant County jury convicted Applicant of capital murder in the shooting deaths of his girlfriend, Chanice Reed, and her mother, Annette Reed, during the same criminal transaction. CR 1: 18; CR 2: 713, 763. The jury's answers to the special issues required imposition of the death penalty. CR 2: 756, 763-64. The Court of Criminal Appeals affirmed Applicant's conviction and sentence on November 18, 2020. *Wells v. State*, 611 S.W.3d 396 (Tex. Crim. App. 2020).

Applicant timely filed the current habeas application pursuant to Texas Code of Criminal Procedure Article 11.071 on April 18, 2019. Applicant's trial counsel, William H. Ray and Stephen Gordon, filed court-ordered affidavits to address Applicant's claims in August 2019. *See* Affidavit of William H. "Bill" Ray, filed 8/12/19 (Ray's Affidavit); Affidavit of Stephen Gordon in Response to Writ of Habeas Corpus, filed 8/19/19 (Gordon's Affidavit). Applicant's appellate counsel,

John W. Stickels, also filed a court-ordered affidavit to address Applicant's claims in August 2019. *See* Oath Before a Notary Public, filed 8/26/19 (Stickels's Affidavit).

The State timely filed its reply on October 15, 2019. Applicant filed his Reply to the State's Answer and Motion to Designate Issues of Fact to Be Resolved at an Evidentiary Hearing on October 29, 2019; this Court held a hearing on Applicant's motion on November 6, 2019. On September 9, 2020, the State filed its Motion for Court to Order Preparation of Proposed Findings of Fact and Conclusions of Law; Applicant replied to the State's motion on September 11, 2020. This Court did not rule on the State's motion.

On January 13, 2021, the Court of Criminal Appeals ordered this Court to resolve any remaining issues in this case by July 12, 2021. On May 24, 2021, the State filed its Second Motion for Court to Order Preparation of Proposed Findings of Fact and Conclusions of Law. This Court requested a thirty-day extension of time to resolve the issues in this case from the Court of Criminal Appeals on June 2, 2021. On June 23, 2021, the Court of Criminal Appeals granted this Court's extension request, thus requiring this Court to resolve the issues in this case by August 11, 2021. On June 25, 2021, this Court ordered the parties to submit proposed findings of fact and conclusions of law no later than thirty days from the date of the order.

This Court has considered the Initial Application for Writ of Habeas Corpus, the State's Reply to Application for Writ of Habeas Corpus, Applicant's Reply to the State's Answer, the exhibits filed by each party, and the entire trial and habeas records. Where appropriate, this Court has used its personal recollection as permitted under Texas Code of Criminal Procedure Article 11.071, § 9(a). Based on its review, this Court makes the following findings of fact and conclusions of law regarding Applicant's claims and recommends that relief be denied:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PRELIMINARY RULING REGARDING APPLICANT'S UNSWORN JUROR DECLARATIONS

Findings of Fact

1. Applicant relies on unsworn habeas declarations from jury foreman Michael Hay, juror Marquis Sadler, and first alternate juror Nathan Byers to support a number of his contentions in this habeas proceeding. *See* Application at 64, 191-92, 214-15, 217, 225, 253, 302, 309, 312, 321-23; Application Exhibits 32-34.

2. Hay's and Sadler's declarations detail their mental and deliberative processes, as well as those of other jurors, in reaching a punishment verdict at Applicant's trial. *See* Application Exhibits 33, 34.

3. Byers's declaration discusses the effect that certain facts had or would have had on his mental processes in evaluating the appropriate punishment verdict. *See* Application Exhibit 32.

4. Applicant does not challenge Hay's, Byers's, or Sadler's qualifications as jurors.

5. Hay's, Byers's, and Sadler's declarations do not suggest the existence of any influence originating from a source outside of the jury room or other than from the jurors themselves. *See* Application Exhibits 32-34.

6. Applicant does not cite Texas Rule of Evidence 606(b) or discuss its effect on his claims.

<u>Conclusions of Law</u>

1. Courts may not consider a juror's testimony, affidavit, or other statement "about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment." TEX. R. EVID. 606(b).

2. "[A] juror may testify: (1) about whether any outside influence was improperly brought to bear upon any juror; or (2) to rebut a claim that the juror was not qualified to serve." TEX. R. EVID. 606(b).

3. An outside influence for purposes of Texas Rule of Evidence 606(b) is "something originating from a source outside of the jury room and other than from the jurors themselves." *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012).

4. An inquiry under Rule 606(b) "is limited to that which occurs both outside of the jury room and outside of the jurors' personal knowledge and experience." *Colyer v. State*, 428 S.W.3d 117, 125 (Tex. Crim. App. 2014).

5. Juries must be protected from post-trial harassment or tampering. *McQuarrie*, 380 S.W.3d at 153 (citing *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 367 (Tex. 2000)); *see Tanner v. United States*, 483 U.S. 107, 120 (1987) ("The integrity of the jury proceedings must not be jeopardized by unauthorized invasions," such as when an applicant seeks to make a post-verdict inquiry "into the internal processes of the jury"); *McDonald v. Pless*, 238 U.S. 264, 267-68 (1915) (allowing jurors' testimony attacking their verdicts would allow juror harassment in effort to set aside verdicts and make private deliberation "the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference").

6. Texas Rule of Evidence 606(b) does not deprive Applicant of a fair trial or due process. *See Tanner*, 483 U.S. at 127 (rejecting constitutional challenge to Federal Rule of Evidence 606(b)); *Golden Eagle Archery, Inc.*, 24 S.W.3d at 375 (examining constitutionality of Texas Rule of Evidence 606(b) in civil context); *Dunklin v. State*, 194 S.W.3d 14, 19-20 (Tex. App.—Tyler 2006, no pet.) (rejecting challenge to constitutionality of Texas Rule of Evidence 606(b)).

7. Applicant's allegations relying on Hay's, Byers's, and Sadler's declarations do not fall within either exception to Rule 606(b); therefore, the Court is barred from considering them in disposing of Applicant's habeas claims. *See* TEX. R. EVID. 606(b); *see also Ex parte Garza*, 620 S.W.3d 801, 827 (Tex. Crim. App. 2021) (refusing, based on Rule 606(b), to consider jurors' statements of alleged misconduct during deliberations in resolving habeas claims); *Ex parte Para*, 420 S.W.3d 821, 827 (Tex. Crim. App. 2013) (refusing based on Rule 606(b) to consider juror affidavit); *Bjorgaard v. State*, 220 S.W.3d 555, 558 (Tex. App.—Amarillo 2007) (Rule 606(b) barred trial court from considering contents of juror affidavit describing jurors' collective thought process), *pet. dism'd, improv. granted*, 253 S.W.3d 661 (Tex. Crim. App. 2008).

8. This Court strikes Hay's, Byers's, and Sadler's declarations (Application Exhibits 32-34) and gives them no consideration in resolving Applicant's habeas claims.

II. EVIDENCE SUPPORTING THE JURY'S GUILT-INNOCENCE AND PUNISHMENT VERDICTS

Guilt-Innocence Evidence

1. On July 1, 2013, Applicant and Chanice Reed had been dating for several years, and Chanice was pregnant with Applicant's son. RR 33: 129-31, 134, 150, 165; RR 35: 168.

2. During an argument, Applicant shot and killed Chanice, her unborn son, her mother Annette Reed, and her ten-year-old brother E.M. RR 33: 56-66, 88-90, 155-56; RR 34: 96-97; RR 35: 16-17.

3. Shortly before the murders, seventeen-year-old K.S. called his mother Annette for permission to go swimming, but she did not answer. RR 33: 145-

47, 151-52. When he finally reached her, she was impatient and preoccupied. RR 33: 152-53. Applicant and Chanice were arguing and yelling in the background, and Chanice was saying, “Stop, Amos, you’re scaring me.” RR 33: 152-53. Annette started saying “[f]uck you, fuck you,” or something to that effect, and hung up the phone. RR 33: 153. K.S. and others headed to her house. RR 33: 154.

4. Around 6:00 p.m., Annette called her aunt, Joylene Parsons, sounding troubled, “very nervous,” and afraid; she asked Parsons to come to the house. RR 33: 132-33, 143. A man was yelling at the top of his voice like he had “snapped” – “it was like bone-chilling scream in the background.” RR 33: 133, 143. During the conversation, Annette said, “You not going in there,” and she told Parsons that she was talking to “Chanice’s boyfriend,” whom Parsons knew was Applicant. RR 33: 133-34, 144. At some point, Annette said, “She got to be the stupidest bitch to open the door to let that fool in,” and then she said, “Come on, come on.” RR 33: 133. The phone went dead, and Parsons immediately called family members who lived near the house. RR 33: 134.

5. At 6:09 p.m., Annette called 9-1-1 to ask for help; as the operator asked questions, Annette reported, “He’s going to his truck,” and the phone went dead. State’s Trial Exhibit 142.

6. Pascual Martinez, who was working on the driveway two houses away, heard a male and female arguing outside. RR 33: 55-59, 75-76. The argument started getting “bad, bad, bad.” RR 33: 81. The male retrieved a handgun from a Chevrolet Tahoe parked in front of the house, returned to the yard, and shot the female as she screamed, “No, no, no.” RR 33: 58, 61-63, 83. The male then walked over a little, and Martinez saw “the old lady” trying to hit the gun as the male moved it around. RR 33: 63-64. The male then shot her. RR 33: 64, 80, 83. At that point, Martinez hid at the corner of the house where he was working and heard more shots before the male fled in the Tahoe. RR 33: 64-65, 73.

7. When Martinez went to the house, he found a younger female lying outside the front door bleeding and nonresponsive. RR 33: 65-66. After a neighbor arrived, Martinez turned his head and saw “the old lady” lying in front of the house. RR 33: 66. Another neighbor came from across the street and said that he had called 9-1-1. RR 33: 67.

8. K.S., who arrived at the scene before police, found Annette on the ground choking on blood, Chanice lying in the doorway with a hole in her head, and E.M. in the hallway with three bullets in his chest. RR 33: 155-56.

9. When Fort Worth Police Officer Sean Nguyen arrived at the scene, he saw a female on the ground screaming, which surprised him because she had “half of her face pretty much shot at.” RR 33: 88. In the house by the doorway, paramedics and firefighters were tending to a pregnant, nonresponsive female. RR 33: 89. A young boy had been shot in the hallway. RR 33: 90. Sergeant Scott Sikes testified that the boy’s shooting had the appearance of rage, and he “didn’t personally see a reason that a ten-year-old boy should be shot in the hallway of a house.” RR 33: 110, 112.

10. Officer Nguyen talked to people at the scene and developed “Amos” as the possible suspect. RR 33: 91. A little later, Fort Worth Homicide Detective Matthew Barron had the full name of Amos Wells as the suspect and a vehicle description of a grayish-silver or gold Tahoe. RR 35: 210-11.

11. Parsons went to the police station, where she gave a statement, picked out Applicant in a photograph, and described his car as a champagne-colored Tahoe. RR 33: 139, 141-42.

12. Meanwhile, Applicant called Valricia Brooks, his ex-girlfriend with whom he shared a young daughter, while she was walking in the park with Brittany Minor. RR 34: 88-90, 92; RR 35: 12-13. Applicant said that he had shot and killed Chanice, her mother, and her little brother, and he did not know why. RR 35: 16-17. Applicant “sounded distraught”; he “was talking fast, frantic, remorseful, [and] crying.” RR 34: 108. When Applicant’s brother Amron Wells joined the call, it was clear that he knew about the shootings. RR 35: 18. Applicant asked Amron to take care of his daughter, and he kept saying that he did not know why he did it. RR 34: 95-96. Applicant wanted to talk to his daughter, so Brooks arranged for him to speak with her by telephone. RR 34: 95-96, 110; RR 35: 18-19. Applicant told Brooks that he was going to drive and shoot himself. RR 35: 19. Brooks told Applicant to turn himself in, and she ended the call feeling like he would do so. RR 35: 20.

13. Around 7:30 p.m., Applicant entered the Forest Hills Police Department. RR 34: 123-24. When Sergeant Christopher Hebert went to investigate the large commotion in the communications center, Sergeant William Glock had his service weapon drawn and was telling Applicant, “Don’t move; let me see

your hands." RR 34: 113-16, 119, 123. Applicant was blurting out things like "[p]ut me in jail; kill me." RR 34: 120. Applicant "was sweaty, big guy, muscular, [and] he had a dazed kind of spacey look on him," so Sergeant Hebert handcuffed him to find out what was happening. RR 34: 120.

14. Sergeant Hebert sat Applicant on a bench. RR 34: 121. When he would ask for Applicant's identifying information, Applicant would respond, "Y'all will know soon enough; they're looking for me . . . put me in jail, things like that." RR 34: 121. A couple of times, Applicant "almost went into a trance" – "like he went to another planet." RR 34: 130. Applicant had "nothing behind his eyes. He was just somebody there." RR 34: 130. His shoulders were slouched like something heavy was on his conscience. RR 34: 130.

15. Eventually, Sergeant Hebert determined Applicant's name and birthdate from a tattoo on Applicant's arm, and Applicant acknowledged it was his information. RR 34: 121-22. Forest Hills communication personnel called surrounding agencies and found out from the Fort Worth Police Department that Applicant was a murder suspect. RR 34: 122. The Fort Worth officers asked Forest Hills to detain Applicant so that they could transport him to the Fort Worth Police Department to question him. RR 34: 122.

16. Detective Barron met with Applicant at the Fort Worth Police Department. RR 35: 211. Based on assistant detectives' interviews with numerous witnesses that night, Applicant was the only suspect in the case. RR 35: 215-20.

17. Officer Jose Palomares photographed Applicant and collected items Applicant was wearing. RR 34: 15, 54; State's Trial Exhibits 97-99. The officer then went to the scene, where he collected .9-millimeter cartridge casings and bullets and an unfired round. RR 34: 18-20, 23-24, 55-56.

18. Shortly after 8:00 p.m., Fort Worth officers found the Chevrolet Tahoe at Applicant's house on Engblad Drive. RR 34: 179; RR 35: 216.

19. Detective Barron obtained search warrants for Applicant's house and vehicle and an arrest warrant for Applicant, whom he arrested around 4:00 a.m. on July 2. RR 35: 216, 220-21.

20. During the search of Applicant's house, officers found a security camera control box that recorded the front of the residence, a magazine loaded with

.9-millimeter ammunition, a box for fifty rounds of .9-millimeter ammunition with thirty-eight rounds left, and a plastic gun case containing a live .9-millimeter round, and an empty box of .9-millimeter rounds. RR 34: 139-40, 142, 146-50, 152. On the bathroom floor, there was a large bottle of bleach, which people sometimes use to destroy evidence, and there was a strong smell of bleach in the hallway. RR 34: 140-41. Bluestar Agent fluoresced on the bathroom sink, tub, and floor, which indicated something on the surfaces that caused a similar reaction to blood. RR 34: 141-42.

21. Video from the recovered security camera showed Applicant drive away alone from his house in the Chevrolet Tahoe at 5:39 p.m. on the day of the murders and Applicant's brother return home alone in the Tahoe at 7:16 p.m. RR 34: 176-79; State's Trial Exhibit 151.

22. The firearm case collected from Applicant's house bore the logo for Taurus manufacturing company, which manufactures one of the potential types of firearms that may have fired the bullets recovered in this case. RR 35: 74. The .9-millimeter magazine would fit into a semi-automatic weapon, which is one of the types of firearms Taurus manufactures. RR 35: 74-75. The head-stamp information on the ammunition found at Applicant's house was consistent with the head stamp on the items collected at the scene and during Chanice's and Annette's autopsies. RR 35: 31-39, 77. Officers searched for, but never found, the murder weapon. RR 35: 223.

23. The firearms examiner received bullets, projectiles, and cartridge casings recovered from the scene and during Chanice's and Annette's autopsies. RR 35: 31-39. The class characteristics of each projectile matched. RR 35: 65. All of the bullets and cartridge cases submitted were fired from the same pistol-type firearm. RR 35: 66, 68, 70, 78-79.

24. Gunshot residue was found on the black steering-wheel cover seized from Applicant's Chevrolet Tahoe and on Applicant's black t-shirt collected from him at the Fort Worth Police Department. RR 35: 88, 101-04.

25. The medical examiners who performed the autopsies on Chanice, Annette, and E.M. testified about their wounds and causes of death:

- Thirty-nine-year-old Annette suffered a fatal large-caliber gunshot wound to her mid-forehead that severed her anterior cerebral artery. RR 35: 126-27. The second fatal gunshot penetrated above her right

ear, inflicted enormous brain damage, and collapsed her left eye socket and eyeball. RR 35: 128-29, 139. The jury viewed photographs of Annette's wounds taken during her autopsy. RR 35: 133, 140-45; State's Trial Exhibits 119-24.

- Chanice was shot four times. RR 35: 163. One fatal shot entered right between her eyes and traveled through the right side of her brain. RR 35: 164, 167, 189-92. She was also fatally shot in her lower chest and again in her left abdomen, which injured her lungs, stomach, aorta, and thoracic spine. RR 35: 166-67, 191. The fourth gunshot to the left side of her back was a superficial through-and-through wound. RR 35: 166-67, 192. Chanice was pregnant with a normally-formed male fetus of twenty-six to twenty-eight weeks gestation. RR 35: 168. The jury saw photographs of Chanice's wounds taken during her autopsy. RR 35: 189-94; State's Trial Exhibits 125-28.

- E.M. suffered four gunshot wounds. RR 35: 170. One fatal shot went through his right ear, reentered the right side of his neck, injured his left subclavian vein and lung, and exited his chest through his left back. RR 35: 170, 188. A second fatal shot entered his left front chest; hit the lower part of his pericardial sac; continued through his diaphragm, liver, inferior vena cava, lung, and rib; and exited through his right back. RR 35: 170, 188. A third potentially survivable wound to his left chest went through his stomach, colon, mesentery, and left iliopsoas muscle before exiting his left back. RR 35: 171-72, 188. The fourth gunshot entered the back of his left forearm and exited through his front forearm. RR 35: 172. The jury saw photographs of E.M.'s wounds taken during his autopsy. RR 35: 194-96; State's Trial Exhibits 135-36, 139-41, 157.

Punishment Evidence

26. Brooks dated Applicant on and off for two or three years starting in high school. RR 37: 68-69, 74. During that time, Applicant had a full-time job, got along with his mother and stepfather, had a relationship with his father, was a regular churchgoer, and always had what he needed. RR 37: 75-77.

27. Applicant's pattern of abuse repeated itself during his relationship with Brooks. RR 37: 84. Applicant would cheat on Brooks, they would break up, and he would assault her. RR 37: 86.

28. On January 5, 2008, Fort Worth police officers responding to a family-violence call at Brooks's apartment found Brooks crying, agitated, afraid, and nervous. RR 37: 8, 10-11, 22-23, 42. Brooks had locked Applicant out of her apartment when he became violent during an argument over him wanting to borrow her father's truck. RR 37: 17, 79. Applicant kicked in the front door, punched and hit Brooks, kicked glass mirrors in the bedroom, and threw a chair through the patio door. RR 37: 14-15, 80-81; State's Trial Exhibits 172-75. Brooks's ear was swollen, and she had knots where Applicant had punched the back of her head multiple times with his fist. RR 37: 14, 17.

29. Applicant pled guilty to a class A misdemeanor for causing Brooks serious bodily injury, was placed on twelve months' deferred adjudication, and was ordered to take anger-management classes. RR 37: 83, 168-71; State's Trial Exhibit 187.

30. Brooks and Applicant remained together after the assault, and Brooks became pregnant with Applicant's daughter not long afterward. RR 37: 83.

31. Based on Brooks's responses to the family-violence packet when officers responded to the January 2008 assault, Applicant had eleven out of twenty-three factors considered to be associated with family violence for an escalation up to a homicide or serious bodily injury. RR 37: 21. For example, Brooks responded "yes" when a detective asked if things recently had become worse, more frequent, or more severe; if Applicant had been violent with her before; if Applicant had access to firearms or weapons; if Applicant had ever seriously injured her; if Applicant ever choked her; if Applicant seemed unusually jealous or possessive or considered her his property; and if Applicant was ever violent when she talked about leaving him. RR 37: 18-20. She also responded that Applicant had emotional problems and had threatened in the past to kill himself. RR 37: 30, 39.

32. Applicant again assaulted Brooks on November 28, 2010, while she was visiting his aunt Letrinda Lee's house during a time when he and Brooks were

broken up.[1] RR 37: 84-85. Applicant and Brooks argued on the telephone about something Applicant saw on her Facebook page. RR 39: 121, 132. Applicant went to Letrinda's house, grabbed Brooks around the neck with the crook of his arm, and dragged her outside. RR 37: 86-88, 132. Brooks blacked out and then awoke on the ground to Applicant beating her in the face. RR 37: 88-89. He stopped hitting her and cried, which was typical of him. RR 37: 89. However, the next thing Brooks knew, they were in a field next to Letrinda's house, and Applicant was kicking her in the face with his work boots. RR 37: 90-92. Brooks suffered bruising to her arms and shoulders from being kicked and injuries to her mouth and lip. RR 37: 95-97; State's Trial Exhibits 180, 182, 185.

33. Applicant pled guilty to the class A misdemeanor of assault causing bodily injury to a family member and was sentenced to fifteen days' confinement in the Tarrant County Jail. RR 37: 171-72; State's Exhibit 186. Brooks never reconciled with Applicant after this assault. RR 37: 98.

34. Brooks testified that Applicant was often irrational, sometimes became more angry and violent than circumstances warranted, and had a hard time calming down. RR 37: 110, 120-21. Applicant was either okay or out of his mind, and there was no consistent pattern of what set him off. RR 37: 111, 123. Although there was a lot of violence between Applicant and Brooks before 2010, it stopped after the November 2010 assault at Letrinda's house because they were no longer a couple. RR 37: 124, 127. According to Brooks, Applicant's violence stopped because she learned to manage him, not because he had changed. RR 37: 125. Brooks opined that someone who had not learned to manage Applicant would never be safe. RR 37: 125.

35. Applicant's violence continued during his relationship with Chanice. Chanice's good friend Tiffany Rose testified that she saw bruises and scratches on Chanice and that Chanice once missed work when Applicant hit her and gave her a black eye. RR 37: 137. In April 2013, Chanice called Rose after Applicant slapped her during an argument, but she asked Rose not to call the police because she did not want Applicant to go to jail. RR 37: 138, 141-42. Rose encouraged Chanice to end her relationship with Applicant, but she kept going back. RR 37: 143. Chanice had lived with Applicant, but she was

---

[1] Due to the number of individuals sharing last names in this case, Applicant's relatives who share a last name with another individual addressed in the findings will be referred to by their first names.

in the process of moving back to her grandmother's house when Applicant killed her. RR 37: 143-44.

36. Applicant's co-worker, Alex Castrillo, testified that one morning in the lunchroom before the shift started, Applicant was laughing and "watching a video [on his cell phone] of people getting decapitated." RR 37: 154, 158, 160. Applicant put his phone right in front of his coworkers' faces, and Castrillo saw "a man tied down to a chair, fingers in the right hand cut off, and he got his throat cut from left to right." RR 37: 159. Someone spoke Spanish briefly in the video, and Castrillo assumed it was some type of drug cartel. RR 37: 159.

37. On April 4, 2015, seventeen-year-old Tarrant County Jail inmate Dallas Theiss encountered Applicant, who was confined in the jail awaiting trial in this case. RR 38: 112-13, 117. Theiss stepped over Applicant's propped-up legs on the way to the dayroom, and Applicant wanted him to apologize. RR 38: 119-21. Theiss refused to apologize, and an angry Applicant asked, "Okay, do you want to do this in my cell or your cell?" RR 38: 121. Theiss responded, "We're not going to do it anywhere besides out here if you want to because it's not necessary." RR 38: 121. Applicant said, "OK, . . . I'll remember that," and the conversation ended. RR 38: 121.

38. Later in the day, Theiss's friend told him go talk to Applicant in a particular cell. RR 38: 122. When Applicant arrived, he ran in and started swinging at Theiss. RR 28: 124. Applicant "busted" Theiss's eye open, and Theiss's jaw "was messed up bad." RR 38: 124, 128, 130; State's Trial Exhibits 189-92. When Applicant realized what had happened, he shook Theiss's hand and left the cell. RR 38: 127. Theiss went to the hospital because his eye would not stop bleeding. RR 38: 127.

39. Applicant also had a fight with another inmate in the Tarrant County Jail while awaiting trial. RR 45: 154-55. Applicant claimed that the other inmate exited his cell, came toward Applicant with a towel in his hand, and a fight ensued. RR 45: 155.

40. Stephen Rogers, a former employee in the classification office of the Texas Department of Criminal Justice, informed the jury about how the prison system classifies the inmates it houses. RR 38: 33-34, 37. An inmate who is sentenced to life without parole is initially classified as a G3 general-population offender. RR 38: 40, 42, 69. G3 inmates are housed alongside

offenders at all custody levels and come into contact with unarmed correctional officers and civilians, some of whom are females. RR 38: 43, 45-46, 49, 51-55. They have privileges and can work certain jobs. RR 38: 56-58, 60. G3 inmates have escaped and have murdered or assaulted guards or other inmates. RR 39: 91. There is no guarantee that an inmate who has killed multiple people will not have the opportunity to commit assaults because the opportunity is there if the inmate wants to do it. RR 38: 96.

41. Forensic psychiatrist William Bernet, M.D., a defense expert at trial, concluded with a reasonable degree of medical and scientific certainty that Applicant's genetic makeup and history of childhood mistreatment increased his probability of acting in a violent or maladaptive manner. RR 43: 117. Applicant's risk of future violence is higher than average for the typical person. RR 43: 118, 137.

42. Defense neuroscientist Jeffrey Lewine, Ph.D., testified about abnormalities in the structure and functioning of Applicant's brain, which can be caused by genetics and/or the environment. RR 44: 31-33, 39, 49, 57, 61-65. Dr. Lewine opined that, faced with the same circumstances leading up to the murders, Applicant could have the same response. RR 44: 65.

43. Antoinette McGarrahan, Ph.D., a forensic psychologist and neuropsychologist for the defense at trial, testified that Applicant's records show aggression and repeated problems with anger and violence from an early age. RR 40: 92-93. Applicant has the potential to respond with acute outbursts of rage if he feels threatened, even if the threat is unintended or nonexistent. RR 40: 97. Even when Applicant was ordered to attend a batterers' intervention program after he assaulted Brooks in 2008, he did not complete the program, and he continued to abuse women and to blame the victim for his actions. RR 40: 118-19, 123.

44. Dr. Jolie Brams, a clinical and forensic psychologist hired by the defense at trial, testified that Applicant had significant behavioral and emotional problems as a child, and he was never treated for the underlying causes of his trauma-related behaviors. RR 44: 127-29.

45. Applicant's stepfather, Randy Franklin, was not surprised that Applicant assaulted Brooks or committed assaults in jail because Applicant got angry and had trouble controlling his anger at times. RR 44: 189, 192.

46. Letrinda testified that Applicant had a temper as he got older. RR 39: 119.

47. Applicant, who testified on his own behalf, acknowledged that he becomes violent at some point if he gets angry and that he sometimes acts out in violence and cannot control himself. RR 45: 87, 194. Applicant testified that he would never kill anyone again, but he agreed that actions speak louder than words. RR 45: 194-95.

III. CLAIMS ONE, FOUR, AND SIX

Applicant sets forth three claims for relief alleging that he was denied effective assistance of trial counsel throughout his trial: Claims One, Four, and Six. *See* Application at 14-277 (Claim One); 326-32 (Claim Four); 348-59 (Claim Six).

Findings of Fact Related to Claims One, Four, and Six

1. The Court appointed Stephen Gordon as first-chair counsel in Applicant's capital-murder trial on July 8, 2013, and William H. Ray as co-counsel the next day. *See* Gordon's Affidavit at 2, Exhibit 1; Ray's Affidavit at 2.

2. Gordon has been licensed to practice law in the State of Texas since May 1993. *See* State Bar of Texas' online attorney profile for Stephen E. Gordon.

3. Gordon was an assistant criminal district attorney in the Tarrant County Criminal District Attorney's Office from 1993 to 1998; he served as Chief Prosecutor from 1995 to 1998. *See* Gordon's Affidavit at 1.

4. Gordon has tried over 100 jury trials to verdict, with 25 of those being aggravated felony cases. *See* Gordon's Affidavit at 1.

5. Gordon has been trying capital-murder cases since 2006, including five death-penalty cases. *See* Gordon's Affidavit at 1.

6. Gordon is a member of the Criminal Defense Bar Board of Directors and has served as president of the Tarrant County Criminal Defense Lawyers Association in Fort Worth, Texas. *See* Gordon's Affidavit at 1.

7. Ray has been licensed to practice law in the State of Texas since November 1985. *See* Ray's Affidavit at 1; State Bar of Texas' online attorney profile for William H. Ray.

8. Ray served as a briefing attorney at the Court of Criminal Appeals following his law school graduation, then worked as a prosecutor for the Tarrant County Criminal District Attorney's Office. *See* Ray's Affidavit at 1.

9. Ray has had a private legal practice, practicing primarily in the field of criminal law, since 1990. *See* Ray's Affidavit at 1.

10. Ray has been board certified by the Texas Board of Legal Specialization in Criminal Law since 2010 and in Criminal Appellate Law since 2011. *See* Texas Board of Legal Specialization's online attorney profile for William H. Ray.

11. Both Gordon and Ray are highly experienced and were qualified to represent Applicant in this case. *See* Gordon's Affidavit at 2; Ray's Affidavit at 1-2; *see also* http://billraylawoffice.com; http://www.stevegordonandassociates.com/.

12. This Court finds Gordon's affidavit credible and supported by the record.

13. This Court finds Ray's affidavit credible and supported by the record.

Conclusions of Law Related to Claims One, Four, and Six

1. A defendant has a Sixth Amendment right to reasonably effective assistance of counsel. U.S. CONST. amend. VI; *see Strickland v. Washington*, 466 U.S. 668, 686 (1984).

2. To prevail on an ineffective-assistance claim, a habeas applicant must show by a preponderance of the evidence that counsel's performance was deficient and that the deficiency prejudiced him. *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Strickland*, 466 U.S. at 687; *Ex parte Chavez*, 560 S.W.3d 191, 203 (Tex. Crim. App. 2018); *Ex parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005).

3. The test "is the benchmark for judging . . . whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Gosch v. State*, 829

S.W.2d 775, 784 (Tex. Crim. App. 1991) (quoting *Strickland*, 466 U.S. at 686).

4. The reviewing court "must ascertain whether counsel's errors were so serious that counsel was not functioning in a manner envisioned by the Sixth Amendment." *Gosch*, 829 S.W.2d at 784 (quoting *Strickland*, 466 U.S. at 686).

5. To establish deficient performance under the first *Strickland* prong, an applicant must identify with particularity the acts or omissions of counsel that are alleged to constitute ineffective assistance and affirmatively prove that counsel's representation "fell below an objective standard of reasonableness" under prevailing professional norms. *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 690; *Ex parte Scott*, 541 S.W.3d 104, 115 (Tex. Crim. App. 2017); *Ex parte Garcia*, 486 S.W.3d 565, 569 (Tex. Crim. App. 2016); *Ex parte Briggs*, 187 S.W.3d at 466.

6. In order to prevail on an ineffective-assistance-of-counsel claim, an applicant must overcome the presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Strickland*, 466 U.S. at 689; *Ex parte Scott*, 541 S.W.3d at 115; *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008); *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim. App. 2007).

7. "This means that unless there is a record sufficient to demonstrate that counsel's conduct was not the product of a strategic or tactical decision, a reviewing court should presume that trial counsel's performance was constitutionally adequate 'unless the challenged conduct was so outrageous that no competent attorney would have engaged in it.'" *Morales*, 253 S.W.3d at 696 (quoting *Goodspeed v. State*, 187 S.W.3d 390, 392 (Tex. Crim. App. 2005)); *see Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004) ("[a] reviewing court can frequently speculate on both sides of an issue, but ineffective assistance claims are not built on retrospective speculation; rather, they must be 'firmly founded in the record'").

8. To overcome the presumption, an applicant must rely on evidence firmly rooted in the record, unless no reasonable trial strategy could justify counsel's conduct. *Ex parte Scott*, 541 S.W.3d at 115.

9. Judicial scrutiny of counsel's performance must be highly deferential. *See Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

10. Standards published by the American Bar Association and other similar sources are only "guides" for determining prevailing professional norms "because no set of detailed rules can completely dictate how best to represent a criminal defendant." *Ex parte LaHood*, 401 S.W.3d 45, 50 (Tex. Crim. App. 2013); *see Wiggins*, 539 U.S. at 521 ("the proper measure of attorney performance remains simply reasonableness under prevailing professional norms").

11. The test for reasonableness is not whether counsel could have done something more or different; an applicant must show that his counsel's performance fell outside the wide range of professionally competent assistance. *Payne v. Allen*, 539 F.3d 1297, 1317 (11th Cir. 2008).

12. The adequacy of counsel's assistance is viewed by considering the totality of the circumstances as they existed at the time of trial, without the benefit of hindsight or by relying on only isolated circumstances at trial. *Ex parte Scott*, 541 S.W.3d at 115.

13. Constitutionally competent legal representation is not a static thing: "[t]here are countless ways to provide effective assistance in any given case." *Ex parte Bowman*, 533 S.W.3d 337, 350 (Tex. Crim. App. 2017) (quoting *Strickland*, 466 U.S. at 689).

14. If an applicant succeeds in proving deficient performance, he must then satisfy the second *Strickland* prong by establishing that the deficiency prejudiced his defense. *Strickland*, 466 U.S. at 687; *Ex parte Garcia*, 486 S.W.3d at 569.

15. To prove prejudice, an applicant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 694; *Ex parte Garcia*, 486 S.W.3d at 569; *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012).

16. A "reasonable probability" is a "probability sufficient to undermine confidence in the outcome," meaning that "counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable." *Strickland*, 466 U.S. at 694.

17. An analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective. *Lockhart v. Fretwell*, 506 U.S. 364, 369 (1993).

18. An applicant must affirmatively prove prejudice, and it is not enough to show that the errors of counsel had some conceivable effect on the outcome of the proceedings. *Strickland*, 466 U.S. at 693; *Ex parte Flores*, 387 S.W.3d at 633.

19. An applicant has the burden to prove that he received ineffective assistance of counsel. *Jackson v. State*, 877 S.W.2d 768, 771 (Tex. Crim. App. 1994).

20. Such a claim must be proven by the preponderance of the evidence. *Bone*, 77 S.W.3d at 833.

21. The applicant must meet this burden with more than unsubstantiated or conclusory statements. *United States v. Turcotte*, 405 F.3d 515, 537 (7th Cir. 2005).

22. An allegation of ineffectiveness must be firmly founded in the record, and the record must affirmatively demonstrate the alleged ineffectiveness. *Ex parte Varelas*, 45 S.W.3d 627, 629 (Tex. Crim. App. 2001); *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999).

23. Reviewing courts must be highly deferential to trial counsel and avoid the deleterious effects of hindsight. *Ex parte Chavez*, 560 S.W.3d at 203; *Ex parte Ellis*, 233 S.W.3d at 330.

24. "Both prongs of the *Strickland* test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight." *Ex parte Flores*, 387 S.W.3d at 633-34.

25. "The fact that another attorney may have pursued a different tactic at trial is insufficient to prove a claim of ineffective assistance." *Ex parte Miller*, 330 S.W.3d 610, 616 (Tex. Crim. App. 2009) (quoting *Scheanette*, 144 S.W.3d at 510).

A. Claim One

In his first claim, Applicant alleges that trial counsel were ineffective for a myriad of reasons. *See* Application at 14-277. Specifically, Applicant alleges that his trial counsel rushed to judgment regarding his case; they made decisions based on a "cookie-cutter" approach to death penalty cases; their caseloads impaired their ability to prepare a defense for Applicant; they failed to investigate and present mitigating evidence at the punishment phase of Applicant's trial; they improperly presented evidence about Applicant's low-activity MAOA gene; they failed to discover and present evidence of Applicant's serious mental illness; they did not conduct an adequate investigation into evidence pertaining to the future-dangerousness special issue; and they were ineffective during jury selection. *See* Application at 14-277.

<u>Findings of Fact: Rush-to-Judgment Theory</u>

1. Applicant asserts throughout his first claim for relief that his trial counsel failed to fully investigate his case because they immediately decided that Applicant was a remorseless killer, which lead them to pursue defenses that supported their opinion and to overlook or reject those that did not. *See* Application at 14-15, 25, 47.

2. Applicant's rush-to-judgment claim is based on the premise that Ray decided from the beginning without investigation that Applicant had no remorse. *See* Application at 14.

3. Applicant cites Ray's handwritten notes of several jail calls between Applicant and his mother, Twyla Franklin, as support that his counsel had a preconceived impression of Applicant. S*ee* Application at 14; Application Exhibit 159.

4. Applicant claims Ray's handwritten notes were made on July 7, 2013, the date which appears at the top of the notes. *See* Application at 14; Application Exhibit 159.

5. Ray did not receive copies of the recorded calls until January 8, 2015, about a year and a half after Applicant claims the notes were made, and he did not review the calls until March 29, 2015. *See* Ray's Affidavit at 3.

6. The dates on Ray's notes are the dates of the calls, not the date that Ray listened to them. *See* Ray's Affidavit at 2-3.

7. Ray's notations of "no remorse" reflect his concern that Applicant and Twyla had not thought about the seriousness of the situation, and there was a lack of remorse from both of them. *See* Ray's Affidavit at 3-4.

8. Trial counsel did not prepare Applicant's case believing that he had no remorse. *See* Gordon's Affidavit at 2-3.

9. To support his rush-to-judgment theory, Applicant also points out that trial counsel discussed possible defensive theories; contacted MINDSET, a genetic testing and brain scanning company; and retained other experts early on in their representation. *See* Application at 14-16.

10. Competent experts experienced in death-penalty cases are highly sought after, and counsel must plan ahead to get on the experts' calendars to schedule meetings, examinations, and testimony. *See* Gordon's Affidavit at 4; Ray's Affidavit at 10.

11. MRI, genetics, EEG, and other scientific experts are not plentiful, and an attorney must plan ahead, even if the experts are not used at trial. *See* Ray's Affidavit at 10.

12. Because competent experts in the field are much sought after, Gordon routinely has experts appointed early on, usually within a week of his appointment to a capital-murder case. *See* Gordon's Affidavit at 4.

13. Pursuant to their usual practice in death-penalty cases, counsel took steps early in the case to retain experts to assist them. *See* Gordon's Affidavit at 4; Ray's Affidavit at 10.

14. There is no credible evidence that Applicant's counsel's decision to retain experts early on during their representation of him was unreasonable given the nature of this case.

15. Given the nature of Applicant's case and the availability of competent experts, it would have been unreasonable for Applicant's counsel not to begin securing experts early on in his case

16. There is no credible evidence that Applicant's counsel rushed to judgment in his case.

<u>Conclusions of Law: Rush-to-Judgment Theory</u>

1. Applicant's assertion that Ray decided on July 7, 2013, before he was even appointed to the case, that Applicant lacked remorse and was irretrievably dangerous "is completely without any basis in fact, and is contrary to [Ray's] efforts in this case." *See* Ray's Affidavit at 6.

2. Applicant has failed to prove that his trial counsel were ineffective for retaining defense-team members and marshalling potential experts to investigate all potential areas of mitigating circumstances early on in their representation. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

3. Applicant has failed to prove that his trial counsel rushed to judgment regarding his case and were, therefore, ineffective in their representation of him. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

<u>Findings of Fact: Trial Counsel's Caseloads</u>

1. Applicant asserts that his trial counsel's "crippling" caseloads impaired their ability to prepare an individualized defense in this case. *See* Application at 37-46.

2. Applicant claims that, instead of investigating his case, trial counsel brought in their "usual suspects in a cookie-cutter approach to defending capital cases." Application at 37, 48-56 (comparing Gordon's and Ray's strategies in representing him to their representation of Cedric Ricks and Steven Nelson, both of whom are on death row).

3. Applicant refers the Court to various guidelines about the appropriate caseload for attorneys handling death-penalty cases and compares his trial counsel's caseloads to those suggestions. *See* Application at 37-46.

4. The guidelines cited by Applicant are just that, guidelines; they are not a formula to which counsel must adhere to be effective.

5. That an attorney may carry a larger caseload than the guidelines recommend does not amount to *per se* ineffective assistance.

6. Gordon has obtained a life sentence for a death penalty client while maintaining a similar caseload to the one he had when he represented Applicant. *See* Gordon's Affidavit at 5 (emphasis added).

7. As demonstrated below, Applicant's trial counsel, despite little assistance from Applicant and his family, located numerous lay witnesses, retained expert witnesses, assembled a defense team to assist counsel, and collected thousands of pages of relevant records.

<u>Conclusions of Law: Trial Counsel's Caseloads</u>

1. Applicant fails to show, beyond pure speculation, that Gordon's or Ray's caseloads prevented them from providing Applicant with the level of effective assistance guaranteed by the United States Constitution. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

2. Applicant has failed to prove that his trial counsel were ineffective based on the caseloads they had while representing him. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

<u>Findings of Fact: Alleged Failure to Develop and Present Mitigating Evidence</u>

1. Applicant alleges that his trial counsel were ineffective for failing to develop and present significant mitigating evidence to inform the jury about: the "unsafe" environment he grew up in; his mental illnesses, which were impacted by the mental illnesses of several family members; his family history, notably the history of racial trauma, physical and sexual abuse, and

mental illness; and his desire to rise above the circumstances of his own upbringing. *See* Application at 109-89.

2. Due to their experience with death-penalty cases, counsel understood the need to find out as much as possible about Applicant's background in order to present the best defense possible. *See* Ray's Affidavit at 8.

3. Counsel sought to investigate such areas of Applicant's life as his school history, interpersonal relationships, work history, and genetics, among other factors, that could be presented to a jury. *See* Gordon's Affidavit at 3-4.

4. Ultimately, counsel assembled a defense team that included an investigator, a mitigation specialist, a mental-health specialist, a psychologist specializing in forensic psychology and neuropsychology to evaluate Applicant, and experts to conduct tests of Applicant's brain and genetics.

5. In most capital-murder cases, Gordon relies on the defendant's family to help the defendant understand the seriousness of the situation in order to assist in preparing a defense. *See* Gordon's Affidavit at 2.

6. Twyla refused to accept the seriousness of Applicant's circumstances, which interfered with counsel's representation up to and through the trial. *See* Gordon's Affidavit at 2.

7. During jail calls between Applicant and Twyla, the two seemed unconcerned that Applicant had killed three people, including his pregnant girlfriend. *See* Gordon's Affidavit at 2; Ray's Affidavit at 4.

8. Applicant had a previous violent incident for which he never went to jail, and Gordon believed Applicant and Twyla thought he would be released again. *See* Gordon's Affidavit at 2.

9. Counsel asked Twyla several times to assist the defense team with mitigation matters, particularly relating to mental illness that ran in the family, and especially her mental illness, and with the family's "dysfunctional matters," but she did not like that idea. *See* Gordon's Affidavit at 3; Ray's Affidavit at 5.

10. Counsel faced problems with Twyla throughout their representation of Applicant; Twyla was "unable and unwilling" to help counsel help Applicant. *See* Gordon's Affidavit at 2-3; Ray's Affidavit at 5.

11. Ray could never get the point across to Applicant's family that the defense team had to devote most, if not all, of its time to mitigation and to Applicant's background and family history. *See* Ray's Affidavit at 5.

12. On many occasions, Twyla voiced her opinion that Applicant had done nothing wrong. *See* Gordon's Affidavit at 2; Ray's Affidavit at 4.

13. Twyla asked Ray more than once when Applicant was coming home; Ray told her that Applicant was not going home and that Applicant's chances of getting the death penalty would increase if she did not start to realize the seriousness of the situation. *See* Ray's Affidavit at 5.

14. Ray believes that his clients and their families need to know his candid thoughts about their cases. Ray's Affidavit at 5.

15. The defense team reviewed witness lists often. *See* Ray's Affidavit at 13.

16. Counsel asked Applicant and his family to provide names and contact information of people who would be able to help Applicant. *See* Ray's Affidavit at 13.

17. Applicant never provided any information, and Twyla "refused" to do so; Gordon believed "[t]here was more interest in covering up the family history than in helping the Applicant avoid the death penalty." Gordon's Affidavit at 6.

18. Despite the unwillingness of Applicant and his family to assist counsel in locating potential witnesses, the defense team met with and/or called a number of people, including:

    - Applicant's mother, Twyla Franklin
    - Applicant's stepfather, Randy Franklin
    - Applicant's maternal aunt, Letrinda Lee
    - Applicant's maternal grandmother, Carolyn Russell
    - Applicant's maternal great-grandmother, Fannie Lee

- Applicant's father, Amos Wells Jr. (hereinafter "Big Amos")
- Applicant's brother, Amron Wells
- Amron's girlfriend, Latrice Hunt
- Applicant's sister, Montoya Walton
- Applicant's cousin, Anthonysha Amos
- Applicant's paternal aunt, Greta Gaines
- Applicant's half-brother, Amos Joseph Wells III
- Applicant's maternal uncle, Antonio Lewis, Sr.
- Applicant's former MHMR psychiatrist, Shashi Motgi
- Applicant's daughter's former elementary school teacher, Renee Jimmerson
- Applicant's elementary school teacher, Carol Lee
- Applicant's former MHMR counselor, August Klinkenburg
- Applicant's family friend and pastor, Hattie Johnson.

See Application Exhibits 8, 9, 11, 12, 13, 19, 20, 22, 25, 31; RR 38: 170, 224; RR 39: 5, 28, 41, 72, 85; RR 44: 194.

19. The defense team obtained thousands of pages of records that included Applicant's school records, mental-health records, juvenile probation records, various medical records, family members' mental-health records, offense records, police investigations, videos of the scene, and news reports. RR 40: 85; RR 44: 111-12.

20. Counsel wanted to show the jury that mental illness ran in Applicant's family by using family history from at least two generations before Applicant and one generation after Applicant. *See* Gordon's Affidavit at 3; Ray's Affidavit at 6.

21. Counsel had evidence that Applicant's daughter was having mental health problems and had thrown furniture in her elementary school classroom. *See* Ray's Affidavit at 13.

22. Applicant verbally instructed his counsel during trial not to present evidence about his daughter's mental health because he did not want to expose her to scrutiny and risk embarrassing her, even if it meant him getting the death penalty. *See* Gordon's Affidavit at 3; Ray's Affidavit at 6-7, 12-13.

23. After Applicant's genetic analysis, it was the general consensus of the defense experts that Applicant was born with genetic variations such as the low-activity MAOA gene which, coupled with a semi-traumatic childhood environment, could "lead to a greater likelihood that [Applicant] could have explosive and violent outbursts in his lifetime." Gordon's Affidavit at Exhibit 3.

24. Counsel reviewed the genetics issue in a team meeting and informed Applicant of the experts' opinions. *See* Gordon's Affidavit at 4.

25. Applicant signed a Memo of Understanding consenting to presentation of evidence that he may have been predisposed to violent behavior when he found himself in a stressful situation and that he was the victim of family trauma at a young age. *See* Gordon's Affidavit at 3, Exhibit 3; Ray's Affidavit at 7.

26. Ray views genetics that predispose a client to violence as akin to mental illness since the client has no control over whether he has those types of conditions. *See* Ray's Affidavit at 8.

27. Counsel considered, and informed Applicant, that disclosure of this information could either support a finding of future dangerousness or be a sufficiently mitigating fact that would improve his chances of avoiding the death penalty. *See* Gordon's Affidavit at Exhibit 3.

28. Applicant and counsel discussed that the investigation of Applicant's background revealed that he had been sexually abused as a child or teenager, although it had not been substantiated. *See* Gordon's Affidavit at Exhibit 2.

29. Applicant signed a Memo of Understanding stating that he did not want his sexual abuse presented to the jury or the Court. *See* Gordon's Affidavit at Exhibit 2.

30. As a result of Applicant's wishes, references to Applicant's sexual abuse had to be removed from every expert's presentation. *See* Ray's Affidavit at 6.

31. Counsel sought to admit recordings of Applicant's confession (Defendant's Trial Exhibit 81) and television interviews during the punishment phase of trial (Defendant's Trial Exhibits 82A, 83A, and 84A) because they believed

the evidence would be "extremely helpful" to Applicant's mitigation case. Ray's Affidavit at 12.

32. This Court sustained the State's objections for the recordings and excluded portions of the video of Applicant's police interrogation (Defendant's Trial Exhibit 81) and the videos of television interviews (Defendant's Trial Exhibits 82A, 83A, and 84A). RR 45: 20, 22-24.

33. Trial counsel tried to present all of the potentially mitigating evidence they could find. *See* Gordon's Affidavit at 5; Ray's Affidavit at 12.

34. As demonstrated below, Applicant's counsel called numerous lay witnesses at his trial on punishment to share their relationship with Applicant and their opinions on Applicant's home life, family history, and mental health; Applicant testified in his own behalf, as well.

35. Applicant testified to the following at his trial:

- Applicant's sister Montoya already lived with their great-grandmother Fannie when he was born; he lived with Twyla in the downtown housing projects. RR 45: 51-52.

- He remembers his father disappearing, asking his mother where his father was, and missing his father. RR 45: 53.

- Throughout his childhood, his family lived in several places before moving to Engblad Drive, and Applicant attended a lot of different schools. RR 45: 53-55. He had friends, but he did not make close friends because he moved a lot. RR 45: 55.

- Twyla loved her children and had good intentions, but she was not mentally ready to be a parent because she battled depression too much and was not stable with her emotions. RR 45: 56. One day they would be okay playing and the next day Twyla was running around with a belt because she was mad at them and they did not know what was going on. RR 45: 56.

- When he was younger, he and his siblings would get "a whooping" with a belt; Twyla hit them until she was tired or felt like she had

enough. RR 45: 56-57. He got a whooping every day from someone in his family, but mostly from Twyla. RR 45: 57-58. When he was twelve or thirteen and got in trouble in class, Twyla "whoop[ed] him" with an extension cord without letting him explain what happened. RR 45: 88-89.

- Things did not go well at school. RR 45: 58. In fifth or sixth grade, he fought with other students when they said something to him or called him "Anus" instead of Amos. RR 45: 58. He also fought to protect his brother Amron. RR 45: 59.

- His relationship with his father Big Amos has been "up and down." RR 45: 60. They were not close until Applicant became a man because his father's parents did not show him how to raise a child and because his father was so busy working. RR 45: 60-61. Big Amos would promise to pick him up, and Applicant would be "blowing up his phone" calling; sometimes Big Amos answered and sometimes he ignored it. RR 45: 61. Big Amos came only when he wanted to and when it was convenient for him, not when Applicant wanted him to. RR 45: 62, 64. He remembers looking out a window every five minutes as a child because Big Amos said he was down the street, but he never came. RR 45: 63.

- His relationship with Big Amos improved when he was an adult and Big Amos helped him get a job. RR 45: 92. Big Amos came back into his life when he was twenty and had lost his job in April 2011. RR 45: 90. Big Amos got him a job where he worked at Iron Tiger Logistics starting in November 2011. RR 45: 92. It was the best job he ever had, and he made good money. RR 45: 92.

- He was angry and detached as a child, but he did not know where the anger and sadness came from. RR 45: 65.

- Twyla always told him not to trust anyone because they will turn on you, and he took it to heart. RR 45: 65. Lack of trust was the foundation he was built on. RR 45: 66. He does not believe people right off the bat when he meets them. RR 45: 67.

- He felt abandoned by his parents and stepfather in middle school when they did not go to as many of his football games as they had in the past. RR 45: 67-68. When he was twelve or thirteen, he felt abandoned because no one picked him up after a home football game and he had to walk home. RR 45: 68-70. He first felt abandoned by Twyla when his father was in jail – her boyfriend would pick them up, take them to his apartment, and go into the bedroom with Twyla while Applicant sat in the living room alone looking at fish. RR 45: 70-71.

- He worked at Tom Thumb when he was seventeen and still in high school after he met his ex-girlfriend and mother of his child, Valricia Brooks. RR 45: 72, 75.

- When he was a high school junior, he and Brooks lived at Russell's house for a couple of months after Brooks's mother kicked her out. RR 45: 72-74. Then they got their own apartment at the Lofts on Hulen. RR 45: 74-75. After that, Brooks moved in with her father in Stop 6, and Applicant lived with a friend in Highland Hills. RR 45: 76. Brooks got pregnant when Applicant was seventeen, and they got an apartment together at Sycamore Hill. RR 45: 76.

- After he turned eighteen, the IRS started levying his checks for $100 a week for unpaid income taxes from 2002-05. RR 45: 77-78. He believes it was a result of Big Amos not filing his own taxes. RR 45: 80.

- When he was twenty, he went to criminal court, family court, and batterers' intervention classes for an incident that transpired with Brooks at Letrinda's house. RR 45: 82. RR 45: 83.

- On his intake form for a batterers' intervention program, he answered that his parents had never hit him because he was scared of losing custody of his daughter if he said he came from a violent family. RR 45: 84; State's Trial Exhibit 202.

- Regin Hooks, with whom he had a casual relationship, stabbed him, and he thought he was going to die. RR 45: 86, 152. He controlled

himself in that stressful situation. RR 45: 153. Hooks was charged with aggravated assault with a deadly weapon. RR 45: 86.

- He controlled his anger with Brooks, but she sometimes would not leave him alone when he was angry, which then made him very angry and made it hard to calm down. RR 45: 86-87. He gets violent at some point if he gets angry. RR 45: 87.

- After breaking up with Brooks, he spent as much time as he could with his daughter; they were very close. RR 45: 88. He wanted to be the best parent he could. RR 45: 88-89.

- His trial counsel successfully admitted twenty-nine photographs of Applicant and his daughter, which Applicant discussed during his testimony. *See* RR 45: 94-97; Defendant's Trial Exhibits 91-119.

- He and Chanice became friends in high school when he was fifteen years old. RR 45: 99. He got closer to Chanice as his relationship with Brooks became more toxic. RR 45: 100. He fell in love with Chanice. RR 45: 100.

- He was laid off from Iron Tire Logistics in June 2013, and his savings started dwindling. RR 45: 101-03.

- He was excited that Chanice was pregnant, but he was not 100 percent sure the baby was his. RR 45: 103-04.

- Applicant described events on the day of the murders as follows:

    - On July 1, 2013, he and Chanice woke up at the house on Engblad Drive because Chanice had a job interview. RR 45: 106. He fell asleep after she left and did not hear the telephone when she called for him to pick her up after her interview. RR 45: 106-07. Chanice went to her grandmother's house, and she accused him of "messing with some girl or something." RR 45: 108. They argued and he said he was through, which just meant he was mad and "breaking up with [her] for a day." RR 45: 108. When he tried to call her later, her number was disconnected, and he saw a Facebook message that made him

question, as he had earlier in the year, whether he fathered Chanice's baby. RR 45: 110-11. He was hurt and angry and could not reach Chanice by telephone, so he drove to her grandmother's house on Pate Street. RR 45: 112-13. He had his gun in his truck because he grew up making sure to protect himself. RR 45: 113-14.

- He knocked on the door, and E.M. let him inside. RR 45: 115. While he talked to Chanice, Annette came out of the room fussing. RR 45: 115-16. He and Chanice went outside to talk, and Annette followed about a minute later. RR 45: 116. He and Chanice continued arguing, and he asked Chanice to have Annette go inside. RR 45: 117. Annette was saying, "Fuck you, fuck you." RR 45: 118 Applicant asked her to just go inside, and she said, "No, fuck you, fuck you." RR 45: 118. Applicant became madder and asked Chanice to talk to him in his truck. RR 45: 118. Things got heated, and he was very emotional at this point. RR 45: 118-19. Chanice refused to get into Applicant's truck because he would not give her his gun. RR 45: 119-20. He exited the truck without the gun, and they continued talking. RR 45: 120.

- He became paranoid that the police were coming. RR 45: 120. He became anxious and could not calm down; his mind was "racing." RR 45: 120. The next thing he remembered, his gun jammed and he was standing by the living room door. RR 45: 121. Applicant said to himself, "No, I know this did not just happen, I know nothing just happened, I know nothing just happened." RR 45: 121. He was thinking, "No, no, this is not real, this is not real, this is not real." RR 45: 121. He then drove away. RR 45: 121.

- He did not remember raising the gun or shooting Chanice, Annette, or E.M. RR 45: 121. He snapped to when his gun jammed, and he was standing in the living room and thinking this was not real. RR 45: 122. He could not explain how it happened. RR 45: 123. He denied telling Dr. Price that Annette instigated this. RR 45: 173, 176. J. Randall Price, Ph.D., was the State's forensic psychologist and

neuropsychologist at trial and in this habeas proceeding. *See, generally*, State's Response Exhibit 1.

  - After the murders, he drove around and was scared. RR 45: 124. He called people and told them he loved them and that he was about to be gone. RR 45: 124. He called Brooks and talked to his daughter. RR 45: 124. He did not remember what he did with the gun. RR 45: 124. In Forest Hills, a man who appeared to be real to Applicant kept pointing and telling him where to go. RR 45: 125-26. He went to the Forest Hills Police Department, left his truck in the street, walked into the station, and said he had done something bad. RR 45: 126.

- If he could say something to the victims' family, he would say that he was sorry and that he loved Chanice, E.M., and his baby boy. RR 45: 126.

- Brooks's testimony about him assaulting her over her father's truck was not true – he kicked in the door, they fought, and he assaulted her, but the pictures show he did not beat her. RR 45: 137, 140. He also assaulted her at Letrinda's house, but he only hit her once. RR 45: 147-48. He never hit any woman after that. RR 45: 149.

- He and Chanice argued, but he never assaulted her. RR 45: 153-54, 177.

- Applicant denied putting his hands on Dallas Theiss in jail. RR 45: 154, 170. He only fought once in jail when someone came out of a cell toward him with a towel in his hand. RR 45: 155.

- He sometimes has a temper, is violent, and cannot control himself. RR 45: 169, 177, 194. He can control himself when he gets angry if he has time to calm down with nothing adding fuel to the fire. RR 45: 169. He has been an angry person since he can remember. RR 45: 193.

- He believed Annette saying, "Fuck you, fuck you," was disrespectful. RR 45: 178. He did not remember going to the Tahoe for the gun. RR 45: 179. He acknowledged that he could have gotten

in and driven away, but he chose not to. RR 45: 180. He did not know what happened, but he remembered when the gun jammed. RR 45: 184, 186.

- He did not take the opportunities he had to be a better parent than his and to not go away for a long time like his father. RR 45: 191. How he acts after someone does something to him is his choice. RR 45: 193.

- He would never kill anyone again. RR 45: 194. But he agreed that actions speak a lot louder than words. RR 45: 195.

36. Twyla testified about her own life struggles and how her family's struggles impacted Applicant:

- Her mother is Carolyn Russell, and her father is Howard Richardson. RR 44: 205.

- She, Letrinda, and Russell lived in the Butler housing project. RR 44: 205.

- Generally speaking, she had a tough time growing up. RR 44: 240.

- Russell was mentally ill, and Russell's boyfriend molested her and Letrinda multiple times, so she and Letrinda lived with her grandmother Fannie. RR 44: 205-06.

- Russell eventually lived off and on at Fannie's house when Twyla was in third or fourth grade. RR 44: 206. When Russell was "sick" from her mental illnesses, she took it out on Twyla and called Twyla the devil. RR 44: 207. She was often scared of Russell. RR 44: 207. One time Russell was acting strangely and would not let her leave the room; Russell ran bath water and made her get in it. RR 44: 207.

- Due to her hard times with Russell, she promised to be a better mother to her children. RR 44: 208. She was very protective of her children; she did not allow them to go anywhere with strangers, and she would not allow child maltreatment in her presence. RR 44: 208, 242.

- She got pregnant at age fourteen while living with Russell at the Butler housing project, and she had her first child, Montoya, at fifteen. RR 44: 209. One time, after Montoya was born, Russell had a breakdown and was "fussing" with Twyla and claiming that Montoya was her daughter, not Twyla's. RR 44: 210.

- She met Big Amos when Montoya was five months old. RR 44: 211. She lived with Big Amos at his sister's house before Applicant was born. RR 44: 213. She was in and out of high school, but she ultimately obtained her GED. RR 44: 210, 212. When Applicant was born, she stayed in the projects. RR 44: 213. Montoya continued living with Fannie because Twyla had run away and Fannie had threatened to "call the People" if Twyla did not return her. RR 44: 212.

- Applicant attended a lot of different schools. RR 44: 214.

- She and Big Amos fought all the time about everything in front of the children; their fights were physical. RR 44: 215, 249. At first, the children screamed and cried during the fighting, but then they got to the point that they stood there and watched like it was nothing. RR 44: 215. That was when she had to leave because she did not want her children to grow up thinking it was okay. RR 44: 216-17.

- She filed for divorce from Big Amos when he was in prison. RR 44: 217. Big Amos contested the divorce, and, when he was released from prison, he would not leave her house. RR 44: 217. He eventually left, and they divorced. RR 44: 217.

- During this time, Twyla went through mental-health issues. RR 44: 217. She could only remember being momentarily happy, like when she had her children and when they made her laugh. RR 44: 218.

- She met her current husband Randy at church. RR 44: 217. He was good for Applicant. RR 44: 223.

- She and Randy had some "situations," but not as much as with Big Amos. RR 44: 223.

- She has tried to commit suicide twice – once when she was ten or eleven years old and again the year before Applicant's trial. RR 44: 218.

- She has attention deficit disorder (ADD) and takes Seroquel, Celexa, and Concerta to treat it. RR 44: 218.

- She has never gotten over her depression. RR 44: 219. She hears voices in her head; she believes they are the real voices of God and his angels. RR 44: 219. She does not care if anyone believes her because the voices are real to her. RR 44: 219.

- Growing up, Applicant had nightmares all the time. RR 44: 220. He would "freak out" because "he would be at one place and then in another place and he couldn't explain how he got from one place to the other"; he did that at eighteen or nineteen years old, too. RR 44: 220.

- Applicant had issues in school when he was young. RR 44: 221. She had him evaluated at his school's request because he was disrupting the class. RR 44: 221. He took Ritalin and Methylene when he was at school, but she did not want to give him the medication because he was not himself when he was on it. RR 44: 221. She took him off the medication. RR 44: 222.

- Applicant always told her that he was sad, and she did not know how to fix it. RR 44: 222. She took him to MHMR and to counselors, but he just was not happy. RR 44: 222. What made Applicant happy was making other people happy. RR 44: 222.

- Applicant got into fights as a child because other kids bullied him and called him names; Applicant was not a bully. RR 44: 223.

- She "whooped" her children with a belt when they did something wrong; when they were teenagers, she "whooped" them with an extension cord. RR 44: 243. She feels that she over-disciplined her children at times. RR 44: 244. She testified in the grand jury that no one ever abused her children, but she did not think whipping her

children when they needed it was wrong. RR 44: 244. Now, she would do things differently. RR 44: 244.

- Applicant wanted to quit high school to be a manager at the grocery store where he worked. RR 44: 224. He shared the money he made with everyone to make them happy with no expectations in return. RR 44: 225.

- Applicant kept a lot inside. RR 44: 226.

- She was happy when Applicant and Chanice got together. RR 44: 237. Chanice spent time with them and came to their house. RR 44: 238. The idea was for them to be a family. RR 44: 238. She made preparations and bought things for the baby when she learned that Chanice was pregnant. RR 44: 238.

- Applicant's relationship with Brooks was "over the top," but she did not see Applicant beat Brooks. RR 44: 251-52, 254. She did not think Applicant ever assaulted Chanice. RR 44: 254.

- She had questions about whether Applicant shot Chanice. RR 44: 254.

- On the day of the murders, Applicant called her while he was standing outside his truck at the Forest Hills Police Department. RR 44: 256. She did not ask what he had done. RR 44: 257. Amron got Applicant's Tahoe from the street in Forest Hills, but she did not know what happened to the murder weapon. RR 44: 259.

37. Applicant's counsel introduced over 700 pages of Twyla's medical records into evidence. RR 44: 239 (Defendant's Trial Exhibit 46).

38. Applicant's father, Big Amos, testified as follows:

- He was born in Chicago, Illinois, and moved to Fort Worth at age thirteen. RR 40: 130. He grew up in Fort Worth and moved to Dallas, where he still lived and worked as the manager of a company that moves trucks. RR 40: 130-31.

- He came from nothing and got in trouble as a young man. RR 40: 184.

- He met Twyla when he was fourteen or fifteen years old. RR 40: 131. Twyla had Montoya shortly after he met her. RR 40: 132. Twyla lived with her grandmother Fannie, and Big Amos lived with his mother. RR 40: 132. They moved in with Twyla's cousin Sharon when he was sixteen after his mother kicked him out of the house because she wanted to get married and did not want him in her house. RR 40: 136.

- Applicant was born on August 20, 1990, and Amron was born one or two years later. RR 40: 133-34. He and Twyla married between Applicant's and Amron's births. RR 40: 135. Montoya mainly lived with Fannie; Applicant and Amron lived with Big Amos and Twyla. RR 40: 138.

- He and Twyla struggled as young parents; it was often chaotic and there "wasn't anything stable," but they did the best they could even though they lacked the maturity to deal with their situation. RR 40: 135-36. He did whatever work he could, and money was tight. RR 40: 134. Twyla stayed home with the children. RR 40: 134. They did not have their own place to live when Applicant and Amron were young, so they moved around a lot. RR 40: 135. There were always other people in and out of the places they lived. RR 40: 135.

- He dropped four-year-old Applicant off on his first day of pre-kindergarten and promised to pick up Applicant at the end of the day. RR 40: 139, 189. He then went to his federal sentencing hearing and was ordered to begin serving his eighteen-month sentence immediately, making it impossible for him to pick up Applicant. RR 40: 139, 151.

- Though he was incarcerated for less than a year, Twyla moved on with someone else while he was gone. RR 40: 151-52. She served him with divorce papers in prison. RR 40: 153. They tried to reconcile when he was released from prison, but there were too many issues for it to work. RR 40: 151-53, 192.

- After he returned from prison, the family moved around quite a bit, and Applicant moved to different schools. RR 40: 154-55.

- While he and Twyla tried to reconcile, there was a lot of turmoil, yelling, and screaming in the house. RR 40: 153. He and Twyla both have tempers. RR 40: 153-54. They were violent with each other, and the children were present once or twice. RR 40: 153. This situation continued for two or three years. RR 40: 154.

- Although Twyla was stable at times during their relationship, there was unhappiness, depression, and "other unstableness" going on as well. RR 40: 157.

- Until the divorce, Applicant was a smart, bright, intelligent young man. RR 40: 158. He did not notice Applicant have any mood swings, and he did not get the idea that Applicant was unsettled. RR 40: 159. He believes Applicant is like him in that he holds things in and does not let people see when he is upset or angry. RR 40: 159.

- He eventually moved in with his sister and tried to do better for himself. RR 40: 155. He saw the children, paid child support, worked hard, and gave the children whatever they wanted or needed. RR 40: 156, 185, 192.

- Twyla got involved with her current husband Randy a few years after the divorce. RR 40: 190, 168. Randy is a church pastor. RR 40: 168. Randy did a good job stepping in when Big Amos was not there, and Randy provided the emotional support Applicant needed. RR 40: 193.

- Applicant had behavior issues in school. RR 40: 159. He went to Applicant's school a number of times. RR 40: 159-60.

- He had no idea that anything violent occurred between Applicant and Brooks. RR 40: 160.

- Applicant and Chanice lived with him in Dallas when he arranged for Applicant to join the union and work for him. RR 40: 161-63. Applicant was a good, hardworking employee. RR 40: 163-64.

When Applicant lost his job, it created financial hardships because Applicant had a car payment and a baby on the way. RR 40: 167-68. At some point, Applicant and Chanice moved to Twyla's house on Engblad Drive in Fort Worth. RR 40: 168.

- Toward the end of June 2013, he got a lead for a new job for Applicant in Virginia or Pennsylvania. RR 40: 169, 182. He got final approval on the day of the murders. RR 40: 171.

- He was shocked to hear about the murders. RR 40: 173. He did not know about anything of a violent nature between Applicant and Chanice. RR 40: 173.

39. Applicant's step-father, Randy Franklin, testified about his relationship with Twyla and Applicant as follows:

- He came into Applicant's life in 1998 when Applicant was about eight years old. RR 44: 168, 186. He is a church pastor. RR 44: 168. He tried to be a good role model for Applicant by taking him to church and by showing him how to be a man of God and how to treat someone. RR 44: 186.

- After dating for a while, he and Twyla moved to a townhouse on Cooper Street in Arlington, and then to a house on Sahara Street for about a year. RR 44: 169-70. He was concerned about Applicant changing schools a good bit. RR 44: 170. They then moved to Engblad Drive, where they still lived at the time of trial. RR 44: 170.

- Early in his relationship with Twyla, he noticed that Applicant had a difficult time with his emotions. RR 44: 171. He believed that Applicant was unhappy, but he could not say whether Applicant was depressed. RR 44: 171. Applicant experienced up-and-down emotions, talked about not living, and cried for no reason when he was young. RR 44: 171. Applicant's downs were crying for no reason, and his highs were playing football and soccer. RR 44: 171.

- Applicant always sought acknowledgement and approval from his family. RR 44: 173-74. Big Amos was there financially, but he never attended the children's events. RR 44: 174.

- It was painful for Applicant when Big Amos did not follow through with picking up Applicant and his siblings. RR 44: 174-75. He saw the children's anticipation to see or hear from their father. RR 44: 175. Randy would take the children somewhere to distract them from their disappointment. RR 44: 175. This happened almost every weekend in the early years. RR 44: 175.

- Applicant "buried" his hurt and pain, but it still was there; Applicant needed something Randy could not provide as a stepfather. RR 44: 176.

- He occasionally disciplined Applicant, but Twyla mainly talked to or disciplined Applicant. RR 44: 177.

- Applicant worked very hard and did anything they asked him to do. RR 44: 177. Applicant tried to help people and to do good, and he tried to help family members make ends meet. RR 44: 177-78.

- He and Twyla fought verbally and had a lot of disagreements; the children heard them. RR 44: 178, 188. One time they got into a "pushing match," but he never slapped or hit her. RR 44: 178.

- Randy did romantic things for Twyla and, on occasion, he noticed Applicant do the same types of things, especially for Chanice. RR 44: 179.

- Applicant left home pretty young to be with Brooks. RR 44: 179-80. They argued a lot. RR 44: 180. He knew second-hand from Twyla about the assaults on Brooks, but not the details. RR 44: 181. He was not surprised that there was physical abuse because Applicant and Brooks argued a lot, and Randy noticed over the years that Applicant would get very angry at times. RR 44: 189.

- He has never seen a mother love her children like Twyla does. RR 44: 181. Twyla and Applicant are very close. RR 44: 181.

- Applicant loved Chanice; Randy and Twyla considered her to be their daughter-in-law and part of the family. RR 44: 182. Twyla had

purchased a baby bed, a bassinet, and everything for the baby. RR 44: 182. Applicant was happy about having a son. RR 44: 182.

- Applicant and Chanice eventually moved to Engblad Drive, but he could not recall how long they stayed. RR 44: 182. He saw a couple of disagreements, but no physical or verbal abuse between Applicant and Chanice. RR 44: 182.

- Applicant is a loving person with a lot of love in his heart; he does not deserve to die. RR 44: 183-84.

- If someone told him at the end of June 2013 that Applicant was maltreated and had a terrible childhood, he would not have believed it. RR 44: 186. Applicant had two loving parents in his home. RR 44: 187. Twyla was always there to help, protect, and support Applicant. RR 44: 187. They tried to attend school events. RR 44: 188.

- He was not surprised that Applicant was involved in assaults in jail because Applicant has a problem controlling his anger. RR 44: 192. He has not seen or heard of Applicant being the one to start whatever the issue is. RR 44: 192.

40. Applicant's maternal aunt, Letrinda Lee, testified about her family's history as follows:

- Her sister, Twyla, had Montoya at age fifteen, and Applicant was born two or three years later. RR 39: 111.

- Twyla, Big Amos, and Montoya lived together when Applicant was born. RR 39: 110. Later, Montoya stayed with Letrinda and Fannie most of the time, while Applicant and Amron lived with Twyla. RR 39: 110, 112.

- Twyla's house was chaotic. RR 39: 114. Twyla and Big Amos fought constantly and had physical altercations in front of the children. RR 39: 114. She intervened when she could to remove Applicant and his siblings from the house "to cool off or whatever."

RR 39: 114. Applicant was "troubled" from his parents fighting. RR 39: 115.

- Applicant was a good child; he was protective of his sister and brother. RR 39: 115.

- Twyla's and Big Amos's divorce hurt the family situation. RR 39: 116. Even with chaos in the house, children do not understand it when their parents separate. RR 39: 116.

- Twyla and Big Amos finally divorced when Applicant was ten or eleven years old, and Applicant's contact with Big Amos "dwindled." RR 39: 118.

- Applicant became troubled as he got older; he had a good side and a troubled side. RR 39: 119.

- Applicant had a temper and would become really upset about his relationships with girls as he got older. RR 39: 119.

- Applicant and Brooks had physical and verbal arguments. RR 39: 120. One night she took Brooks to the hospital after Applicant beat her up. RR 39: 121, 133.

- She and Twyla lived with their grandmother Fannie growing up because their mother Russell had mental-health issues. RR 39: 113-14.

- She battles depression, which she controls with medication. RR 39: 116.

- She and Twyla both have had ADD and depression since they were young. RR 39: 117. Twyla once tried to commit suicide at Fannie's house when they were young. RR 39: 117, 127. Twyla's suicide attempt happened when their mother was dealing with her own mental-health issues and was being admitted to the hospital for depression-related issues. RR 39: 117-18.

- She did not approve of how Applicant handled situations in his life, but she trusted him to look after her children many times because he is a protector of her family. RR 39: 123-24, 136.

- Applicant is "not a monster"; it is "just situations, certain time situations." RR 39: 124.

- She was around Applicant and Chanice many times; E.M. sometimes came over, too, and played with Letrinda's children. RR 39: 128-29.

41. Applicant's half-brother, Amos Joseph Wells III, testified about his life and experiences with Applicant and his family as follows:

- He and Applicant have the same father, Big Amos; he was born exactly four months after Applicant, and they have the exact same name. RR 38: 171.

- He and Applicant never lived in the same household or attended the same schools, but they would see each other. RR 38: 172, 174.

- He began going to MHMR at age five, and doctors diagnosed him with ADD, depression, bipolar, and sleeping problems. RR 38: 176-79. He was seeing MHMR at the time of trial for issues he still faced. RR 38: 177.

- Similar to Applicant, he was prescribed medication for ADD when he was young. RR 38: 178. Unlike Applicant, he took his medication every day. RR 38: 179-80. He believed it would have been better if Applicant's mother had gone through the process of taking Applicant to MHMR to get help with his issues. RR 38: 180.

- He did not know if Applicant suffered the same mental-health problems as he did when they were young. RR 38: 192.

- He, his younger brother Nicholas Williams, Amron, and Applicant would spend the night at Applicant's house and then go to the church where Randy preached; afterward, they had Sunday lunch. RR 38: 201-02.

- Applicant's family was kind to one another, supportive of one another, and took care of one another. RR 38: 203.

- Randy seemed to be part of Applicant's life and to treat Applicant well. RR 38: 190. Twyla and Randy seemed to get along and to treat Applicant well. RR 38: 190. Applicant was happy living in the home and was a happy child growing up. RR 38: 181.

42. Applicant's maternal grandmother, Carolyn Russell, testified extensively about her own mental illness and family history:

- She has two daughters, Twyla and Letrinda. RR 38: 205-07. Twyla's father is Howard Richardson, who was present in court at trial; they lived together but never married. RR 38: 207.

- She lived with Applicant for about six months when he was growing up. RR 38: 208, 218.

- She was diagnosed at age eighteen with schizoaffective disorder. RR 38: 209. She has taken Risperdal and Clonazepam for about three years. RR 38: 212. She took different drugs before, but they made her worse because she was overmedicated and "would just lose it" by becoming sad and crying. RR 38: 212-13. Applicant was not around her when she would "lose it" due to her mental illness. RR 38: 221.

- She has been hospitalized at John Peter Smith Hospital and has been to the Wichita Falls State Hospital three times. RR 38: 210.

- Due to her disorders, she hears voices and sees things. RR 38: 210. According to her, she saw "shadows, like figures or people, like I guess you could say ghosts or whatever." RR 38: 211.

- She was unaware of problems in Applicant's family; she believed that Twyla, Randy, and Applicant were "just a big happy family" and that "[e]veryone got along." RR 38: 217.

- She never saw or heard of Applicant being mistreated or physically abused. RR 38: 221. "He got whoopings," but not more than he should have. RR 38: 220.

- She has seen Applicant go to church quite often. RR 38: 219.

- Applicant cares for his daughter and appeared to care about his baby with Chanice. RR 38: 217.

43. Applicant's maternal uncle, Antonio Lewis, Sr., testified about his interactions with Applicant as follows:

- He has known Applicant for most of Applicant's life. RR 38: 224. During the past twenty years, they spent time visiting and getting to know each other three or four times. RR 38: 227.

- Applicant is "[v]ery respectful." RR 38: 227. His opinion about Applicant is positive. RR 38: 231.

- Applicant talked about his daughter in a way that made Lewis think he cared about her. RR 38: 228. Applicant put pictures of his daughter all over his Facebook page. RR 38: 228-29.

- He did not know that Applicant was expecting a child with Chanice. RR 38: 228.

- Applicant is well-adjusted with his family, has normal loving family relationships, and is warm and generous. RR 38: 231.

44. Dr. Shashi Motgi, a child and adolescent psychiatrist, testified about her treatment of Applicant through MHMR:

- She treated nine-year-old Applicant and his half-brother Amos Joseph Wells III for psychiatric issues at Tarrant County MHMR in 1999. RR 39: 6-8.

- She prescribed Ritalin and Imipramine for Applicant, and Ritalin and Clonidine for his half-brother. RR 39: 10-11. Prescribing Ritalin and Imipramine for a child is not uncommon. RR 39: 14.

- There is a genetic reason for attention deficit hyperactivity disorder (ADHD). RR 39: 25.

- A person with ADHD or another mental condition is more impulsive and can control decisions less than people without such conditions. RR 39: 24. They know what they are doing, but they have less ability to control their impulses; they have poor judgment. RR 39: 25.

- There is a relationship to being treated for ADHD early in life that makes a person more prone to commit murder. RR 39: 20. Young children diagnosed with ADHD have a history of being very impulsive and very reactive. RR 39: 20. Some of those symptoms continue if they are not treated in adulthood. RR 39: 20.

- Retrieving a firearm, chasing someone, and firing the weapon involves a thinking process; the person has free will and the ability to choose his actions every step of the way. RR 39: 22-24.

- When Applicant's ex-girlfriend Regin Hooks cut him with a knife, he made the rational decision not to act because he did not want to go to prison after recently being sentenced for beating up another girlfriend; this indicates Applicant's ability to think rationally. RR 39: 26-27.

45. Applicant's counsel introduced over 400 pages of Applicant's MHMR records. RR 39: 9; Defendant's Trial Exhibits 35 and 36.

46. Renee Jimmerson, who taught Applicant's daughter the year before trial, testified about an outburst the child had in March 2015:

- Applicant's daughter was not having a good day; it escalated to where she messed up desks, turned them over, and spilled stuff all over the floor. RR 39: 35.

- She sent photographs to the child's mother showing the destruction to the classroom. RR 39: 35, 37; Defendant's Trial Exhibits 4-10.

- Jimmerson had to remove the other students from the classroom with the principal's help. RR 39: 39.

47. Carol Lee, Applicant's fourth- and fifth-grade teacher at Greenbriar Elementary School, testified about her experiences with Applicant as follows:

- She taught Applicant's behavior improvement class (BIC), which is special education due to behavioral issues, not class-work issues. RR 39: 41-43, 46.

- Applicant was in BIC because he acted out and disrupted class. RR 39: 67. He "was a very academically sound student" and did not disrupt her class. RR 39: 46, 48, 66. She did not have a problem with him physically attacking other children. RR 39: 66.

- Applicant never said he was angry, but she believed he was angry because his parents were breaking up. RR 39: 46-47.

- One time at school another student accused Applicant of entering the student's bathroom stall. RR 39: 50. The incident angered Applicant. RR 39: 50.

- She does not think that Applicant's issues at an early age are the reason he was in trouble as an adult. RR 39: 70.

- She cried when she saw Applicant on television the day of the shootings because it was not the Applicant she knew. RR 39: 54-55.

- She visited Applicant once in the Tarrant County Jail for about ten minutes, but he did not look at her. RR 39: 53, 57-58.

48. MHMR counselor August Klinkenberg testified about his interactions with Applicant as follows:

- He counseled Applicant in 1998 when Applicant was eight years old. RR 39: 75. Twyla was getting divorced at the time. RR 39: 81.

- Applicant had already been receiving mental-health services through MHMR for some time. RR 39: 76. Applicant saw a psychiatrist through the program, followed up with nurses for medications, and saw counselors. RR 39: 76. Klinkenberg was the second or third therapist Applicant saw at MHMR. RR 39: 76.

- He saw Applicant three times in five weeks between April and June 5, 1998 – the first time Applicant had been suspended from school; the second and third times, Applicant was having trouble at the daycare he attended. RR 39: 78-79.

- Twyla was very involved in Applicant's life, had concerns, and brought Applicant to a counselor. RR 39: 81.

- Applicant said that he had no problems at home, and he did not indicate family violence. RR 39: 83. Twyla said Applicant was doing well at home. RR 39: 83.

- Applicant said that he got suspended for defending himself against other students who picked on him or for defending his brother. RR 39: 82. He was suspended one time for kicking a teacher who tried to escort him from the classroom when he was frustrated with an assignment. RR 39: 82. There is nothing uncommon about children having these types of issues. RR 39: 82.

49. Officer Ruby Williams, a confinement officer for the Tarrant County Sheriff's Department, testified about her experience with Applicant:

- Applicant was in her pod in the Tarrant County Jail; he was in general population and associated with other people. RR 39: 85, 87, 90, 106.

- Her experiences with Applicant were positive. RR 39: 90.

- Applicant did whatever she asked of him and never gave her an attitude. RR 39: 89-90. He was polite and caused no problems. RR 39: 98-99. She did not recall him having privileges taken away. RR 39: 92.

50. Pastor Hattie Johnson testified about her interactions with Applicant and his family after Applicant's arrest:

- She is a pastor and friends with Twyla and Randy from church. RR 44: 195-96. She was called in to counsel Applicant right after the murders. RR 44: 195.

- She talked to Applicant, but not about the murders. RR 44: 195. She did not know what had happened until she heard it in the courtroom. RR 44: 196.

- Applicant was quiet, sad, humble, and remorseful. RR 44: 197.

- She stopped visiting Applicant when he was not as responsive as he was in the beginning. RR 44: 199.

51. As demonstrated below, Applicant's counsel presented testimony from numerous experts during the punishment phase of his trial.

52. Dr. Antoinette McGarrahan, a psychologist specializing in forensic psychology and neuropsychology, testified about her evaluation of Applicant as follows:

    - Applicant's counsel asked her to evaluate Applicant. RR 40: 61-63. She administered a battery of cognitive and psychological tests. RR 40: 63. She provided her results, including the raw data, to the State's psychologist, Dr. Price. RR 40: 66-67.

    - She visited Applicant in the Tarrant County Jail on August 5 and 6, 2014, on June 8, 2015, and on September 8, 2016, for a total of ten hours. RR 40: 68. Applicant cooperated. RR 40: 69.

    - There are thousands of pages of records covering Applicant's mental-health history, family mental-health history, and the testing she performed. RR 40: 85.

    - She administered a variety of tests to determine the operation and function of Applicant's brain, and he did "very well overall." RR 40: 75-76. His IQ of 107 is at the upper end of the average range and three points from above average. RR 40: 101. These tests did not indicate that Applicant had any cognitive difficulties or impairments; all cognitive activities were at or above average with people in his age and educational background. RR 40: 76-77, 101. His judgment "was intact, was average." RR 40: 77. There was no indication on these tests that Applicant tried to "dumb down" his

performance, meaning that the cognitive results showing Applicant is average or above average are all valid and reliable. RR 40: 80.

- She tested Applicant's emotional functioning and personality characteristics with standardized psychological tests that tell how a person perceives the world, how they think people view them, what their personality characteristics are, and what their psychological or emotional functioning is. RR 40: 78. There were some indications that Applicant approached these tests "in a manner that may not have been completely forthright or accurate." RR 40: 80. There was some indication of warning signs of exaggeration and maybe some unusual responses in the personality and emotional tests. RR 40: 80-81.

- Applicant reported problems with depression and anxiety, but not at a level to diagnose severe mental illness, major depressive disorder, or generalized anxiety disorder. RR 40: 82.

- Applicant reported that he is quite paranoid in his interactions with people and that his suspiciousness makes him hostile. RR 40: 82. He is not a warm and fuzzy or friendly person. RR 40: 82. He is paranoid; he thinks the world is out to get him. RR 40: 102.

- Her report discussed marked distress and severe impairment dysfunction, prominent depression and hostility, and perception of negative circumstances attributed to shortcomings of others. RR 40: 83. From when Applicant was six to the time of trial, he has perceived things that go wrong in his life as being someone else's fault, and he would read negative or bad meaning into benign remarks. RR 40: 83, 94, 102, 109. He does not think he needs to change. RR 40: 94.

- Personality traits and the way a person interacts with the world come from a person's genetics and from what he learns growing up. RR 40: 87. If a child learns from watching his caregivers that anger is the way to solve problems and that you cannot trust the world, the child develops the same perception about the world. RR 40: 87. Applicant can view unintended behavior as an intentional affront. RR 40: 88. He goes through life expecting to be insulted or taken

advantage of, so he is constantly on the defensive, and he reacts offensively. RR 40: 102-03.

- If parents blame others for their circumstances or tell their children that things are the other person's fault, the children learn that things are not their fault. RR 40: 94. Applicant never told Dr. McGarrahan that he blamed someone else for the murders. RR 40: 127. However, he does not believe it is his fault that he is in this situation; he recognizes that he did something, but she thinks he finds there are contributions of other individuals to the situation. RR 40: 108. Applicant is not happy with his inability to negotiate the world, but he blames the world for his problems. RR 40: 120.

- Applicant has felt slighted or treated unfairly dating back to early childhood. RR 40: 83. His level of suspiciousness and paranoia in intimate relationships might make him think something nefarious is going on if he sees his girlfriend talking to another man across the room. RR 40: 84. His perception is a distortion of reality, particularly in his intimate relationships. RR 40: 84. Applicant endorsed depressive symptoms and findings of sadness, loss of interest in previously enjoyed activities, thoughts of worthlessness, hopelessness, and personal failure on testing and in her interview with him. RR 40: 85.

- Applicant has a great deal of anger, resentment, and mistrust; he holds grudges, even for unintended slights or insults, and he does not forget things. RR 40: 86, 103. He has some depressive symptoms; he probably has longstanding difficulty with depression that is considered more low-grade. RR 40: 109. He is not someone with a major depressive disorder that impairs his functioning over time, just general unhappiness with life. RR 40: 109-10.

- Applicant believes that his thoughts are plagued by confusion, distractibility, and indecision, but his cognitive testing does not support his belief. RR 40: 89-90.

- Applicant has poor self-esteem; he does not think of himself as very high functioning and does not have many high beliefs in himself. RR 40: 91.

- Applicant views relationships as a means to an end rather than a source of satisfaction. RR 40: 92, 104-05.

- Applicant reported having a lower than average social support system, having suicidal thoughts, and being prone to extreme displays of anger. RR 40: 92. He acknowledged being susceptible to very great expressions of anger, and he does not understand why. RR 40: 92. Dr. McGarrahan knows from the records that there have been other episodes of extreme anger and violence either unprovoked or minimally provoked. RR 40: 92. Records show repeated problems with anger going back to the age of six. RR 40: 92. Applicant's mental-health records show that he has always expressed aggression from an early age. RR 40: 93. He expresses problems controlling his anger, and the clinical history is consistent. RR 40: 93. At six years old in first grade, he was kicking teachers, punching other peers, and turning over chairs and desks to the point it frightened other children. RR 40: 93.

- At times, Applicant's belief is so strong and the reality is so inconsistent with his belief. RR 40: 95. It does not rise to the level of schizophrenia where a person hears voices and sees things, but it is getting close to losing touch with reality. RR 40: 95. Applicant would controvert any evidence contrary to his belief; it is almost the definition of a delusion like someone with schizophrenia might have. RR 40: 96. Applicant does not have that type of severe mental illness, but his belief system gets close to it. RR 40: 96.

- Applicant has a tendency to be moody, negative, and sometimes emotionally inappropriate; to keep others at an emotional distance; and to have feelings of inferiority and guilt. RR 40: 97. He has impairments in his thought processes and the potential to respond with acute outbursts of rage if he feels threatened. RR 40: 97. Even if the threat is unintended or non-existent, Applicant can respond with extreme displays of anger because he believes it, and his judgment gets impaired by these emotions. RR 40: 97. He has good judgment in non-stressful circumstances. RR 40: 97.

- Dr. McGarrahan's reports essentially say that Applicant has average and above-average abilities intellectually, above-average IQ, and no

detectable cognitive impairment in the neuropsychology sense. RR 40: 98. Emotionally, he has some signs of depression and anxiety. RR 40: 99. He does not trust people, he lacks close ties, and he does not have any friends. RR 40: 99. People do not find him engaging, warm, and friendly, which is an obstacle to establishing friendships and relationships. RR 40: 99.

- She took Applicant's history as part of her interview. RR 40: 111. Regarding familial violence, Applicant said that he had recently learned after his arrest about his father beating his mother, but he denied remembering it. RR 40: 111. Domestic violence affected Applicant even though he does not remember it. RR 40: 127. Applicant denied all types of abuse, whether physical or emotional, being inflicted on him. RR 40: 114. He did not recall physical abuse and denied other abuse. RR 40: 114.

- Applicant saw a psychiatrist and was treated with medication from ages six to nine. RR 40: 122.

- Applicant reported no conduct disorder behaviors such as fire-setting, cruelty to animals, gangs, etc. RR 40: 115-17. She saw no indication of a conduct disorder. RR 40: 115. He had an early history of behavioral problems in school and a long history of fights. RR 40: 116. Some of the fights are characterized in the records as assaults. RR 40: 117.

- Applicant reported no head injuries of any significance. RR 40: 118. He said he "may have had his bell rung . . . on a couple of occasions while playing football and had a motorcycle accident, but none in which he lost consciousness." RR 40: 118.

- Applicant lied to her about successfully completing a twenty-four-week batterers' intervention program; the records showed he was terminated for not showing up. RR 40: 118-19. This dishonesty caused her to question Applicant's other statements to her. RR 40: 119. But she does not take someone's word at face value if he has a motive not to be fully honest; that is why she reviewed thousands of pages of records to corroborate information. RR 40: 119.

- Applicant should have at least come away from the batterers' intervention program understanding not to beat up women, but he continued to do it and to blame the victim. RR 40: 123. Intellectually, Applicant likely understands the fallacy of that thinking. RR 40: 123.

53. Dr. William Bernet, a forensic psychiatrist and former full-time faculty member at Vanderbilt School of Medicine's Department of Psychiatry, testified about the results of Applicant's genetics testing as follows:

- He has studied the genetic makeup of people who tend to be violent. RR 43: 58.

- The MAOA gene influences the amount of serotonin in the brain, which influences how people behave. RR 43: 67, 72-73. Applicant, Twyla, and Russell have the low-activity variant of the MAOA gene. RR 43: 110, 113, 115.

- In 2002, the Caspi study found that a person with a low-activity MAOA gene, who had childhood adversity or maltreatment, had an increased risk of being a violent adult. RR 43: 58, 74. The gene does not force a person to be violent; it is a predisposition to violence. RR 43: 58, 76, 84-85. It makes it harder, but not impossible, for these people to control their anger. RR 43: 85. The Caspi study set out very specific factors to define maltreatment; Applicant would not have been considered maltreated under the criteria used in the study. RR 43: 142, 144.

- A New Zealand study of 442 boys found that eighty-five percent with the low-activity allele and maltreatment had some type of violence or antisocial behavior. RR 43: 78, 83-84. Only seven percent of the high-level allele group were convicted of a violent crime; thirty-two percent of children who were mistreated and had a low-activity gene were convicted of a violent crime. RR 43: 98. This reflects the degree of risk, but it is a very rough estimate. RR 43: 98.

- The research on the MAOA gene varies from study to study. RR 43: 99. Studies after Caspi differ in a number of ways like the number

of subjects, the ways of measuring childhood adversity, and the ways of measuring outcome in adulthood. RR 43: 99. Later studies accept maltreatment in a broad sense like childhood adversity. RR 43: 100. There are studies that support or partially support the original research, as well as studies that do not support it. RR 43: 101-04, 106. Taken together, the studies show that early adversity predicted an antisocial outcome more strongly with the low-activity MAOA compared to the high-activity MAOA. RR 43: 106.

- For the gene-environment interaction to happen, a person must have the low-activity MAOA gene combined with childhood adversity in the form of abuse, maltreatment, or other bad things that happen during childhood. RR 43: 112.

- Because Applicant has the low-activity MAOA gene, the question is whether he experienced childhood adversity or trauma. RR 43: 113. From birth until about age nine, Applicant witnessed a lot of domestic violence and arguing to the point at times the children were removed to another room or from the home for a while. RR 43: 113. There was no history of childhood abuse in the sense of Applicant being beaten by his parents, but it was child maltreatment in the sense that he witnessed domestic violence for an extended period of time. RR 43: 117. The other unusual thing was that his father abruptly went to prison on Applicant's first day of school; it happened suddenly, making it more traumatic. RR 43: 113-14.

- Applicant's personal history of violence indicates that the current murders were not the first time he became very angry and out of control. RR 43: 116. His school records and mental-health-center records indicate times when he got angry, was out of control, kicked or bit teachers, got suspended, and was twice arrested for assault. RR 43: 116. This indicates that the gene-environment interaction was happening through his childhood, adolescence, and young adulthood; it did not just show up when the murders happened. RR 43: 116.

- Applicant's level of fighting and violence were much higher than normal. RR 43: 117.

- He concluded with a reasonable degree of medical and scientific certainty that Applicant's genetic makeup and history of childhood mistreatment increased the probability that he would act in a violent or maladaptive manner. RR 43: 117.

- Applicant's risk factors for future violence make it harder for him to control his anger than for other people. RR 43: 118. His risk of future violence is higher than the average for a typical person. RR 43: 118. It does not mean he is more likely than not going to be violent in the future; it just means that he is more at risk than a regular person. RR 43: 118.

- A person's past behavior can predict his future behavior. RR 43: 120.

- Applicant's fight with Dallas Thiess in the Tarrant County Jail was not an immediate response. RR 43: 121. Applicant waited to engage in the fight, which seems to be violence with a purpose. RR 43: 121.

- Dr. Bernet did not perform a risk assessment for future violence, so he could not give a risk assessment of Applicant's future tendency for violence, but he would say Applicant is more likely to be violent than the average person. RR 43: 137.

54. Dr. Jeffrey Lewine, a neuroscientist who studies the relationships between brain structure, brain function, and behavior in health and disease, testified as follows about tests performed on Applicant's brain:

- Genetics and environment contribute to what the brain looks like structurally and how it functions. RR 44: 14. Environments with stress, physical abuse, emotional abuse, or psychological abuse all can lead to the release of corticosteroids that can ultimately alter the brain structure and function. RR 43: 15.

- He compared Applicant's brain to 212 age- and sex-matched control subjects. RR 44: 21. Applicant has thirty-eight of 116 brain regions that show statistically significant reduction in brain volume and density. RR 44: 31, 76. Based on available literature, the particular circuits involved have to do with visual-information processing,

emotional regulation of behavior, and impulse control. RR 44: 76. Over one-third of Applicant's brain is smaller than neuro-typical subjects. RR 44: 31-32. The likelihood of seeing that many areas being abnormal in a neuro-typical subject "is very, very, very, very small." RR 44: 31.

- Applicant has normal brain volume in parts of his brain involved in memory function; parts of his brain involved in executive functions "are mostly normal," so he can think and make decisions. RR 44: 33.

- Applicant's cognitive abilities are within the average to above-average range. RR 44: 67.

- Applicant's areas of "significant abnormality" are brain areas involved in visual-information processing, and, as a result, Dr. Lewine would expect Applicant to have some difficulty recognizing emotional content on faces. RR 44: 32-33. He has problems in the circuitry involved in the emotional regulation of behavior. RR 44: 33. The amygdala and parts of the frontal lobe at the bottom along the midline are significantly reduced in size, which play a role in emotional processing and regulation of emotional behavior, although he could not say with any degree of certainty what affect it would have on Applicant. RR 44: 33, 79. Applicant has "some reductions" in volume in circuitry involved in impulse control. RR 44: 34.

- Applicant has "significant abnormalities in several of the white-matter areas of the brain" that have fibers connecting the brain areas. RR 44: 35. There are twelve of forty-eight disruptions in connectivity between the brain areas. RR 44: 62. Only about five percent of people are actually worse than him statistically. RR 44: 36. The likelihood of seeing this many areas of abnormality in a neuro-typical subject is "very, very, very small." RR 44: 37. Applicant has abnormalities in the interconnection between the two halves of the brain, particularly the frontal parts. RR 44: 37. He has an abnormality in the fiber connections that go between the amygdala and the orbital frontal parts of his brain. RR 44: 37.

- Applicant not only has reduced size of the structures involved in emotional regulation of behavior, he has disruption of the integrity of the fibers that let those areas talk to each other. RR 44: 37. Imaging data suggests that Applicant has difficulty in the emotional regulation of his behavior. RR 44: 37.

- Applicant has problems with his impulse control system, meaning he has difficulty stopping behaviors based on what is happening emotionally. RR 44: 38. Twenty-five percent of Applicant's fiber tracts are abnormal. RR 44: 39.

- Applicant's brain has processing difficulty when his environment has a lot of stimuli; his brain does not properly filter out the extraneous matters, and he can go into sensory overload. RR 44: 57.

- He asked Dr. McGarrahan to administer the MSCEIT, which measures emotional intelligence. RR 44: 60. Applicant's overall score of 94 was within the normal range. RR 44: 61, 80. The only exception is on the MSCEIT he is not outside normal limits but he is at the "very, very bottom" for recognizing emotion from faces. RR 44: 61.

- Applicant has increased beta activity, which generally is associated with anxiety and impulse-control issues. RR 44: 62. He is unable to "sensory gate" information, which can lead to sensory overload and making bad decisions. RR 44: 62-63.

- Applicant's quantitative MRI showed no gross abnormalities. RR 44: 74, 78.

- Structural findings within Applicant will not change or improve. RR 44: 65. These conditions can be caused by genetics, environment, or a combination. RR 44: 64. Applicant has no control over his genetics, and young children typically have no control over their environment. RR 44: 65.

- Faced with the same circumstances, Applicant could have the same response given the right stressors and the right circuitry to his brain. RR 44: 65.

- His data showing Applicant's brain abnormalities "could be taken as mitigating, that could be taken as indicating there are problems that are permanent." RR 44: 101. He believes there are mitigating factors like brain damage that should be considered. RR 44: 102.

55. Dr. Jolie Brams, a clinical and forensic psychologist, testified as follows about the effect of Applicant's and his family's social and mental-health histories:

- She was asked to find issues regarding Applicant's childhood to explain the opportunities that he may or may not have had as a child to understand his background and to understand him as a fuller person. RR 44: 110. She had a lot of facts about every family member, the psychiatric histories, and Applicant's childhood; she had to rely on her own impressions, too. RR 44: 132.

- With help from the defense team, she obtained "literally thousands of pages of records regarding issues" that she reviewed. RR 44: 110. She reviewed school records and mental-health records for treatment Applicant received as a child. RR 44: 111. She looked at Applicant's juvenile probation records and various medical records. RR 44: 111. She looked at "voluminous records" regarding Applicant's grandmother's, mother's, and half-brother's mental health to name a few. RR 44: 112. She reviewed offense records, all the police investigations, videos of the scene, and news reports. RR 44: 112.

- She spent fourteen and a half hours with Applicant and had extensive and often multiple interviews with various family members, including Applicant's mother, stepfather, father, brother, sister, and grandmother. RR 44: 111. She collected mental-health information via interviews. RR 44: 112.

- Many traumatic events happened to Applicant within the family. RR 44: 113. She put it in the framework of complex developmental trauma, which is similar to childhood PTSD, but it is more toxic and broad-based than having just one event happen. RR 44: 113.

- There is no controversy about the fact that childhood mistreatment and lack of stability, among other factors, has a negative impact on young children. RR 44: 113.

- As she collected information, it became obvious that Applicant's development and developmental opportunities "were impaired in very significant ways." RR 44: 115. One problematic factor is Twyla's long history of major depression, ADD, and other environmental problems, and she came from a family that did not teach her to co-parent. RR 44: 116. Twyla's mother Russell has an extensive and serious history of mental illness, having been diagnosed with schizophrenia and schizoaffective disorder. RR 44: 116-17. Russell was not around much; she was a drug addict for many years and had many men. RR 44: 117. Twyla had Applicant at a very young age. RR 44: 117. Twyla was suicidal even as a ten- or eleven-year-old child. RR 44: 117.

- Maternal depression had a very strong impact on Applicant's ability to get the resources he needed as a young child and to develop trusting relationships with others. RR 44: 117. Part of Twyla's maternal depression is paranoia, and she has a profound lack of trust in the world. RR 44: 117. Starting in infancy, Twyla conveyed to Applicant a negative sense of the world. RR 44: 118. Not only did Applicant have a mother who was less responsive because she was very depressed during his developmental years, but she also conveyed things that influenced his view of the world and trust in others. RR 44: 118. Childhood trauma links with maternal depression because depressed mothers cannot give children the protection they need. RR 44: 119.

- Dr. Brams's impression was that Big Amos is narcissistic (selfish). RR 44: 123. During her interview with him, he was primarily concerned about himself; he was concerned about Applicant only in a general sense. RR 44: 123. Throughout Applicant's life, he visited Applicant only when he wanted to. RR 44: 123. Big Amos is impaired in terms of his ability to truly connect. RR 44: 124. Having a narcissistic parent makes a child angry because the parent only responds to his own needs. RR 44: 122. A child of a narcissistic parent has a sense of lack of power and anger and attachment issues

because the parent has no capacity to attach to them except in very superficial ways. RR 44: 122.

- In addition to a significantly narcissistic father, Applicant had an unresponsive, although well-intentioned, and impaired mother. RR 44: 123-24.

- Domestic violence never occurs in a vacuum; there are always parental and family issues related to domestic violence. RR 44: 125. Domestic violence causes several things – in some children, it causes a repeat of that behavior because that is how they learned to problem-solve. RR 44: 125. Boys tend to be more physical and impulsive in general, and many boys mimic that type of behavior. RR 44: 125. Domestic violence also causes a child to feel helpless because he sees two caregivers hurt each other. RR 44: 125. So instead of talking about and dealing with emotions, it comes out in violent behavior. RR 44: 125-26. Dr. Brams's investigation found evidence that Applicant observed violence with his parents and then with his mother and stepfather. RR 44: 126.

- Big Amos "disappeared in a very problematic way" when Applicant was about five years old. RR 44: 126. He has been an on-and-off-again presence, but he was in Applicant's life pretty consistently during his preschool years. RR 44: 126. He dropped Applicant off at school, said he would pick him up, then went to court and was locked up. RR 44: 126-27. The family did a very poor job of explaining what happened to Applicant's father; he just disappeared. RR 44: 127.

- During late preschool and early elementary school years, children rely on the security of family to master the world around them. RR 44: 127. Applicant moved often before that, at that time his mother was depressed, and his father disappeared with little explanation. RR 44: 127. When that happens, the child must master the larger world without a sense of security at home. RR 44: 127. Applicant's childhood school records show that he developed significant behavioral and emotional problems starting from about that time forward. RR 44: 127.

- Applicant was diagnosed with ADHD and oppositional defiant disorder (ODD). RR 44: 128. There were many parental reports of depression by his mother and stepfather, but Applicant was never diagnosed with depression. RR 44: 128. He was placed in special education because he was out of control and destructive; he hit peers and teachers, he ran away, and he did all types of things that interfered with his functioning in school. RR 44: 128. The things that happened in school are childhood traumas masked by other disorders – his behaviors are viewed as being ADHD or ODD, but many of the symptoms are trauma-related behaviors. RR 44: 129. What is significant is not that Applicant had these problems as a child, but that his treatment focused on symptoms rather than on the underlying cause. RR 44: 129.

- Applicant moved and changed schools "so many times." RR 44: 130. His school-based counseling had major interruptions because he would change schools or "fall off the radar." RR 44: 130. He had at least ten to twelve changes during preschool to high school, so he did not have a school community to support him in developing peer relations. RR 44: 131. Literature shows that children who experience such a degree of school mobility have real disruption educationally and in becoming part of a larger community. RR 44: 131.

- Twyla could not regulate her own emotions or teach Applicant how to solve interpersonal problems. RR 44: 132. Twyla and Russell did not have emotional regulation, and Applicant was not raised in that type of environment. RR 44: 134.

- Twyla allowed Applicant to live with Russell during formative periods of his life. RR 44: 134. Russell is "extremely mentally ill" – she has been suicidal, homicidal, and unable at times to take care of herself. RR 44: 134. Russell has had numerous psychiatric hospitalizations (three or four at the state hospital, and about ten at local hospitals). RR 44: 134. She is chronically mentally ill – she would beat people up when she was younger, and she was a drug addict. RR 44: 134. Marijuana use has been on Russell's diagnosis forever, so she was clearly using marijuana while taking care of Applicant. RR 44: 135. She was a hard-drug user before that. RR 44: 135.

- Regarding emancipation into adulthood, Applicant did not live with adults who had the capacity to teach him how to negotiate the broader world. RR 44: 135. There are a lot of issues about the lack of adult preparation from the emotional perspective. RR 44: 135.

56. Despite the myriad of mitigation evidence outlined above, Applicant alleges that his trial counsel failed to investigate and present mitigating evidence related to his family life at the punishment phase of his trial. *See* Application at 103.

57. Applicant argues that his trial counsel was focused on the "warrior gene," i.e., the low-activity MAOA gene, and failed to discover the "wealth of mitigating evidence" and rich social history that Applicant and his family had to offer. *See* Application at 103.

58. "Warrior gene" is a term employed by Applicant during the habeas proceedings to describe the low-activity MAOA; it was not used at Applicant's trial.

59. Applicant's application outlines numerous unsworn habeas declarations to show his troubled childhood, struggle with mental illnesses, "tragic" family history, and inability to overcome those obstacles. *See* Application at 104-89.

60. Applicant alleges that the following information was not discovered and adequately presented at his sentencing trial:

    - Applicant grew up in an unsafe environment;
    - Applicant and his family have a history of severe mental illness;
    - Applicant's family history, including physical and sexual abuse, instability, and the racial trauma of slavery that continues to impact the family.

    See Application at 104-89.

61. Applicant submits unsworn habeas declarations from his mother Twyla, father Big Amos, stepfather Randy, brother Amron, sister Montoya, aunts Letrinda and Gaines, grandmother Russell, great-grandmother Fannie, and cousin Anthonysha to support his claims. *See* Application Exhibits 8, 9, 11-13, 19, 21-22, 25, 31. Each of these individuals were contacted by members of the

defense team before trial; of these individuals, all but Amron, Fannie, Gaines, and Anthonysha testified during the punishment phase of Applicant's trial.

62. Gaines's statement in her unsworn declaration that she was never contacted or asked to testify is not supported by the record; Gaines was subpoenaed to testify Applicant's trial. *See* Ray's Affidavit at 15 (citing and attaching Gaines's served subpoena); *see also* Application Exhibit 31 at ¶ 34.

63. While Ray cannot remember the specifics of why Gaines did not testify, he states, "I believe we felt she was uncooperative as we had sent her a te[x]t message asking for her to help with the family tree, as per information I received from Vince Gonzales, our mitigation specialist." *See* Ray's Affidavit at 15.

64. Applicant ignores that many of the matters discussed in the unsworn habeas declarations were, in fact, covered during the punishment phase of the trial by the declarants themselves or by other witnesses.

65. Applicant expressly prohibited his defense team from raising the issue of his own sexual abuse and his daughter's mental illness at trial. *See* Gordon's Affidavit at 3; Ray's Affidavit at 9.

66. Applicant also submits unsworn declarations from Xavier Young, Jacqueline Wells, Willie Jewell Hallmen, Waymon Smith, Amadeo Roberts, Jordan Patton, Adrian Latrice Hunt, Jasmine Franklin, Brandon Henderson, Anthony Amos, Lisa Lee, Kentrel Wheeler, and Johnny Young; each of whom state that they never talked to Applicant's defense team before trial. *See* Application Exhibits 7, 10, 14-17, 20, 24, 26-30.

67. Brandon Henderson's claim in his unsworn declaration that he was not contacted is not supported by the record; Applicant's trial team sent him a letter and a card in October 2016, but he never responded. *See* Ray's Affidavit at 15; *see also* Application Exhibit 26 at ¶ 11.

68. Applicant and his family did not make his defense team aware of the individuals whom they did not contact, nor did those individuals come forward on their own. *See* Ray's Affidavit at 15.

69. If the defense team did not contact someone, it was because they did not know about them. *See* Gordon's Affidavit at 6.

70. Applicant's counsel discovered and presented evidence of the unsafe environment Applicant grew up in, Applicant's and his family's history of severe mental illness, and Applicant's family history of abuse and instability.

71. This is not a case in which trial counsel failed altogether to present mitigating evidence at trial.

Conclusions of Law: Alleged Failure to Develop and Present Mitigating Evidence

1. One necessary facet of professional assistance is the investigation of the facts and law applicable to a case. *Ex parte LaHood*, 401 S.W.3d at 50.

2. While the courts broadly view claims that an attorney failed to properly investigate a case through the lens of the two-pronged *Strickland* test for ineffective assistance of counsel, the focus of each prong of the test is slightly different when assessing a claim of deficient investigation in the context of the punishment phase of a capital-murder trial. *See Wiggins*, 539 U.S. at 522-23, 534-35.

3. Under the first prong of the inquiry, a reviewing court must assess whether the alleged failure to conduct a more thorough investigation was reasonable under the circumstances. *See Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

4. "Strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins*, 539 U.S. at 521-22 (quoting *Strickland*, 466 U.S. at 690-91).

5. This "reasonableness" standard "does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533.

6. Counsel is not required "to scour the globe on the off chance something will turn up." *Rompilla*, 545 U.S. at 383.

7. Such requirements would interfere with the "constitutionally protected independence of counsel" at the heart of *Strickland*. *Wiggins*, 539 U.S. at 533 (quoting *Strickland*, 466 U.S. at 689).

8. "[R]easonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla*, 545 U.S. at 383.

9. In judging the defense's investigation, as in applying *Strickland* generally, hindsight is discounted by pegging adequacy to "counsel's perspective at the time" investigative decisions were made. *Rompilla*, 545 U.S. at 381.

10. In evaluating an attorney's judgments about whether to pursue evidence, courts must consider "whether the known evidence would lead a reasonable attorney to investigate further" and apply a "heavy measure of deference to [an attorney's] judgments" about whether additional evidence might be adduced by further investigation. *Wiggins*, 539 U.S. at 527.

11. Counsel's conscious decision not to pursue a defense or to call a witness is not insulated from review, but, unless an applicant overcomes the presumption that counsel's actions were based in sound trial strategy, counsel will generally not be found ineffective. *Ex parte Flores*, 387 S.W.3d at 633.

12. To the extent an investigation revealed that further research would not have been profitable or would not have uncovered useful evidence, counsel's failure to pursue particular lines of investigation may not be deemed unreasonable. *Strickland*, 466 U.S. at 690-91.

13. Though not dispositive, the level of cooperation of the accused with his counsel may also be taken into account in assessing whether counsel's investigation was reasonable. *Ex parte Martinez*, 195 S.W.3d 713, 728-29 (Tex. Crim. App. 2006).

14. Applicant's counsel presented a strategic and cohesive mitigation case through a variety of lay and expert witnesses in an attempt to have the jury spare Applicant's life.

15. Applicant's trial counsel were not required to present cumulative mitigation evidence. S*ee Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007) (counsel not ineffective for failing to present largely cumulative evidence); *Beuke v. Houk*, 537 F.3d 618, 645 (6th Cir. 2008) (no prejudice in failing to present cumulative mitigation evidence; to establish prejudice, new evidence presented in habeas proceeding must differ in substantial way in strength and subject matter from evidence actually presented at sentencing).

16. Applicant has failed to prove that his counsel were ineffective in their mitigation investigation or presentation of mitigation evidence. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

17. Even if an applicant establishes that counsel's failure to investigate was unreasonable under the circumstances, he must further establish that counsel's failure prejudiced his defense. *Wiggins*, 539 U.S. at 534.

18. In order to demonstrate prejudice, an applicant must show that "counsel's errors were so serious as to deprive [him] of a fair trial, a trial whose result is reliable." *Ex parte Martinez*, 195 S.W.3d at 730 (quoting *Strickland*, 466 U.S. at 687).

19. To accomplish this, the applicant must prove a reasonable probability that, absent counsel's unprofessional errors, the outcome of the proceeding would have been different. *Rompilla*, 545 U.S. at 390 (quoting *Strickland*, 466 U.S. at 694); *Wiggins*, 539 U.S. at 534; *Ex parte Martinez*, 195 S.W.3d at 730.

20. The proper inquiry is whether there is a "reasonable probability" the jury would not have sentenced him to death if the post-conviction mitigation evidence had been presented at trial. *Strickland*, 466 U.S. at 694-95.

21. To answer that question, the court considers "the totality of the evidence – 'both that adduced at trial, and the evidence adduced in the habeas proceedings.'" *Wiggins*, 539 U.S. at 536 (quoting *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

22. "If, after introducing [the applicant's] post-conviction mitigating evidence into the punishment-phase evidentiary mix, [the court] concludes that there is a reasonable probability that at least one juror would have answered the

mitigation special issue in his favor, then he is entitled to relief." *Wiggins*, 539 U.S. at 537.

23. Even if Applicant's trial counsel were deficient in failing to discover and introduce the additional mitigation evidence offered now by Applicant, Applicant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

24. "To show prejudice resulting from counsel's deficient mitigation investigation, the petitioner must present new evidence that differs both in strength and subject matter from the evidence actually presented at sentencing, not just cumulative mitigation evidence[.]" *Goodwin v. Johnson*, 632 F.3d 301, 327 (6th Cir. 2011).

25. The Court of Criminal Appeals has previously addressed claims that trial counsel were ineffective for conducting an investigation that failed to uncover *all* of the mitigating evidence available. *See Ex parte Martinez*, 195 S.W.3d at 724-30; *Ex parte Gonzales*, 204 S.W.3d 391 (Tex. Crim. App. 2006).

26. In *Ex parte Martinez*, trial counsel presented evidence at the punishment phase of a capital-murder trial that Martinez had suffered abandonment and neglect and had been physically abused as a child. 195 S.W.3d at 725. In post-conviction proceedings, Martinez was able to add "more extensive evidence" of physical abuse, along with evidence that his own mother had also abused him sexually, to the evidentiary mix. *Id*. at 725-26, 730.

27. Although the Court in *Ex parte Martinez* characterized Martinez's added mitigation as "strong," it nevertheless reasoned that, because the aggravating evidence in the case was "severe," and "the jury was privy to some of the severe abuse [Martinez] suffered during his childhood, there is not a reasonable probability that the unadmitted alleged mitigating evidence would have tipped the scale in [his] favor." 195 S.W.3d at 731.

28. In support of its holding in *Ex parte Martinez*, the Court cited (among other cases) *Hill v. Mitchell*, 400 F.3d 308, 319 (6th Cir. 2005), which supports the proposition that, in order to satisfy the prejudice prong of *Strickland/Wiggins*, mitigating evidence presented at the post-conviction stage "must differ in a

substantial way—in strength and subject matter—from the evidence actually presented at sentencing." *Ex parte Martinez*, 195 S.W.3d at 731.

29. In contrast, in *Ex parte Gonzales*, decided only a few months after *Ex parte Martinez*, the Court of Criminal Appeals concluded that Gonzales had established prejudice. *Ex parte Gonzales*, 204 S.W.3d at 399-400.

30. In *Ex parte Gonzales*, Gonzales produced mitigating evidence at trial in the form of testimony from his sister that he had been bullied in school; had experienced difficulty learning; was of only borderline intelligence; and suffered from epilepsy, ADD, and depression. 204 S.W.3d at 395, 398. In post-conviction proceedings, Gonzales demonstrated that additional mitigating evidence had been available to show that he had suffered chronic physical and sexual abuse at the hands of his father. *Id*. at 395, 399. Psychiatric evidence also established that he suffered from PTSD as a result of the abuse. *Id*. at 399. Moreover, the psychiatrist also could have testified that Gonzales' low intelligence "would lead to poor processing of information and probably lower level of control of behaviors which included antisocial behaviors and impulsive behaviors at an early age." *Id*.

31. In concluding that Gonzales had established prejudice, the Court in *Ex parte Gonzales* found that "the mitigating evidence presented at the habeas hearing [was] substantially greater and more compelling than that actually presented by the applicant at his trial." 204 S.W.3d at 399. The Court concluded that there was "at least" a reasonable probability of a different result had this additional evidence been presented at trial. *Id*. at 399-400.

32. Trial counsel's presentation of *some* mitigating evidence at the punishment phase does not "foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant." *Sears v. Upton*, 561 U.S. 945, 955 (2010).

33. When trial counsel has presented some mitigating evidence, the failure to conduct an adequate mitigation investigation will not result in prejudice if "the new mitigating evidence 'would barely have altered the sentencing profile presented' to the decisionmaker[.]" *Sears*, 561 U.S. at 954 (quoting *Strickland*, 466 U.S. at 700).

34. The additional evidence contained in Applicant's unsworn habeas declarations is best characterized as "more extensive evidence" of his family

history and mental illness than what was presented at Applicant's punishment trial. *See Ex parte Martinez*, 195 S.W.3d at 730.

35. During the punishment phase of the trial, the jury heard evidence of Applicant's unstable upbringing, the violent environment in which he grew up, his mental-health diagnosis, and the mental illnesses of several family members. Applicant's habeas evidence reiterates that information and adds colorful details.

36. As was the case in *Ex parte Martinez*, the "jury was privy" to a substantial portion of the mitigating evidence Applicant presents now. 195 S.W.3d at 731. The additional information presented in Applicant's habeas exhibits may provide a more detailed view of the struggles Applicant's family has faced and the symptoms of their various mental illnesses, but "it is unlikely that" this "more extensive evidence" "would have any effect on the jury's verdict" in Applicant's case. *Id*. at 730.

37. Applicant's habeas evidence does not differ in a substantial way from the evidence his trial counsel presented at the punishment phase of Applicant's trial. Any evidence now presented that was not admitted at Applicant's trial "probably would have no effect on the jury's answer to the mitigation special issue." *Ex parte Martinez*, 195 S.W.3d at 731; *see Hill*, 400 F.3d at 319.

38. Applicant does not make any effort whatsoever to prove that there is a reasonable probability that he would have been sentenced to life without parole instead of death had his trial counsel found and presented all of the matters contained in his habeas exhibits that were not shown at trial. *See Wiggins*, 539 U.S. at 534; *Strickland*, 466 U.S. at 693; *Ex parte Flores*, 387 S.W.3d at 633.

39. Applicant has failed to meet his burden to affirmatively prove that he suffered prejudice as a result of his trial counsel's mitigation investigation or presentation of mitigating evidence. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

Findings of Fact: Presentation of MAOA Gene Evidence

1. Applicant attacks trial counsel's decision to present evidence at the punishment phase that he has the low-activity MAOA gene which, when coupled with his childhood trauma or mistreatment, predisposed him to

violence and aggression. Specifically, he claims that: (1) no reasonable attorney would have presented evidence that he was genetically and inherently violent, thus conceding that he is a future danger; (2) trial counsel based his sentencing defense on junk science presented by unqualified experts; (3) counsel "advanced an argument rooted in scientific racism and eugenics;" and (4) the genetics testimony prejudiced him by tying his immutable characteristics to his prospect for future dangerousness. Application at 75-102, 216-22.

2. Applicant's trial counsel pursued genetics testing as a source of mitigating evidence at the punishment phase of Applicant's trial. *See* Gordon's Affidavit at 3.

3. Trial counsel discussed the genetics issue with the trial team. *See* Gordon's Affidavit at 4; Ray's Affidavit at 9.

4. Trial counsel advised Applicant that the evidence could be sufficiently mitigating to avoid a death sentence because neither his genetic makeup nor his childhood environment were things he could control; however, they also told Applicant that the evidence could help prove his future dangerousness. *See* Gordon's Affidavit at Exhibit 3; Ray's Affidavit at 9.

5. Applicant agreed to the submission of the genetic evidence regarding the MAOA gene. *See* Ray's Affidavit at 9; Gordon's Affidavit at Exhibit 3.

6. Ray views genetics as akin to mental illness because the client has no control over whether he has those types of conditions. *See* Ray's Affidavit at 8.

7. Ray believes that the decision to present the genetics evidence was correct under the circumstances. *See* Ray's Affidavit at 9.

8. Applicant contends that his trial counsel were ineffective for basing his sentencing defense on junk science presented by unqualified experts. *See* Application at 75-91.

9. Applicant's counsel believed that evidence of Applicant's low-activity MAOA gene, coupled with childhood trauma and maltreatment, could be considered mitigating. *See* Gordon's Affidavit at Exhibit 3.

10. Defense attorneys in other cases have presented evidence of the low-activity

MAOA gene, including an Italian case in which the evidence likely lead to a sentencing reduction. *See* Ray's Affidavit at 9; Gordon's Affidavit, Exhibit 4.

11. After a hearing conducted pursuant to Rule 705 of the Texas Rules of Evidence, this Court found that Dr. Bernet's testimony about Applicant's low-activity MAOA gene was admissible at the punishment phase of the trial. *See, generally,* RR 42.

12. In these habeas proceedings, Applicant's habeas counsel present a new expert, Kathryn Harden, Ph.D., to dispute the validity of the scientific theory regarding the MAOA gene and the testifying experts' qualifications. *See, generally,* Application Exhibit 1.

13. Applicant argues that presenting the genetics testimony fell below professional norms because his trial counsel advanced an argument "rooted in scientific racism and eugenics" and directly tied Applicant's immutable characteristics to his prospect for future dangerousness. Application at 95, 222.

14. Dr. Bernet's testimony never attached racial connotation to the low-activity MAOA gene, nor did he testify or imply to the jury that Applicant's race predisposed him to future violence or that Applicant should be executed because of his race. RR 43: 53-146.

15. Dr. Bernet's testimony focused on scientific studies and the implications for Applicant having the low-activity MAOA gene. RR 43: 53-146. He acknowledged that some studies support the original theory regarding the impact of low-activity MAOA gene coupled with childhood adversity or maltreatment, while others do not. RR 43: 101-04, 106. He never testified that Applicant was violent because of his race or that Applicant should be executed because of his race. RR 43: 53-146.

16. Dr. Bernet told the jury that having the low-activity MAOA gene does not mean that Applicant will more likely than not be violent in the future; it just means he is more at risk than a regular person. RR 43: 118.

17. Dr. Bernet's testimony that Applicant had risk factors making it harder for him to control his anger than for other people was premised on Applicant's *risk* for violence based on having the low-activity MAOA gene, not the certainty of violence, and the testimony was presented to the jury without any

racial overtones or implications whatsoever. *See, generally,* RR 43: 53-146.

18. Testimony about the low-activity MAOA gene was presented to the jury without any indication of the racial stereotypes or eugenics discussed by Dr. Harden or set forth in Applicant's application. RR 43: 53-146.

19. The jury was never made aware of the matters regarding race and eugenics now brought forth by Applicant in this habeas proceeding.

20. Applicant argues that he was prejudiced by his trial counsel's concession of the future-dangerousness special issue through the presentation of his genetic predisposition to be violent. *See* Application at 216-22.

21. Applicant overlooks the other compelling and overwhelming evidence of his future dangerousness presented during the punishment phase of his trial. This evidence included: Applicant's propensity for violence; the facts of Applicant's vicious murders of his pregnant girlfriend Chanice, Annette, and ten-year-old E.M.; Applicant's history of brutal violence against Brooks; his violence against Chanice; and his violence while confined in the Tarrant County Jail awaiting trial. *See, generally*, *Wells*, 611 S.W.3d at 419-22.

22. Applicant also testified that he was angry and detached as a child, that he has been angry as long as he could remember, and that he becomes violent and cannot control himself. RR 45: 65, 87, 169, 177, 193-94. He acknowledged that, on the day of the murders, he could have left the premises in his truck, but he chose not to do so. RR 45: 180.

23. Brooks opined that someone who had not learned to manage Applicant would never be safe with him. RR 37: 125.

24. Randy was not surprised that Applicant had assaulted Brooks or committed assaults in jail because Applicant would get angry and have trouble controlling his anger at times, and Letrinda testified that Applicant had a temper as he got older. RR 39: 119; RR 44: 189, 192.

25. Dr. Lewine testified about the effects of Applicant's abnormal brain structure and that Applicant could have the same response he had at the time of the murders if he were faced with the same circumstances. RR 44: 65.

26. Dr. McGarrahan testified that Applicant has a history of aggression and

violence from an early age; that he has the potential to respond with acute outbursts of rage if he feels threatened, even if the threat is unintended or nonexistent; and that he blames the world for his problems. RR 40: 92-93, 97.

27. Even when Applicant was ordered to attend a batterers' intervention program after he assaulted Brooks in 2008, he did not complete the program, and he continued to abuse women and to blame the victim for his actions. RR 40: 118-19, 123.

28. Dr. Bernet's testimony did not dominate the trial's punishment phase.

29. Applicant's trial counsel presented testimony of numerous lay witnesses, including Applicant, and of other expert witnesses to build the strongest mitigation case possible based on the evidence they had.

30. The jury, however, rejected Applicant's contention that the evidence warranted a "yes" answer to the mitigation special issue.

Conclusions of Law: Presentation of MAOA Gene Evidence

1. Applicant's trial counsel performed as they should have by investigating all facts that could potentially be mitigating. *See Baldwin v. Maggio*, 704 F.2d 1325, 1332-33 (5th Cir. 1983) (obligation to investigate requires counsel undertake reasonably thorough pretrial inquiry into defenses that are possibly mitigating and ground strategic selection among potential defenses on informed, professional evaluation of relative prospects for success).

2. That Applicant's new found expert, Dr. Harden, disputes Dr. Bernet's conclusions and testimony does not establish ineffective assistance of counsel because it is nearly always possible to find one expert who disagrees with another. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998).

3. Applicant's reliance on the opinion of another attorney criticizing trial counsel's strategic decision to rely on their experts and to present this evidence does not meet Applicant's burden to prove deficient performance. *See Strickland*, 466 U.S. at 687, 689-90 (test is not whether another attorney with benefit of hindsight would have acted differently; "Even the best criminal defense attorneys would not defend a particular client the same way" (citation omitted)); *Campbell v. Wood,* 18 F.3d 662, 673 (9th Cir. 1994) ("We will neither second-guess counsel's decisions, nor apply the fabled twenty-twenty

vision of hindsight"); *Ex parte Miller*, 330 S.W.3d at 616 ("The fact that another attorney may have pursued a different tactic at trial is insufficient to prove a claim of ineffective assistance" (quoting *Scheanette*, 144 S.W.3d at 510)); *see, generally,* Application Exhibit 4.

4. "To inaugurate a constitutional or procedural rule of an ineffective expert in lieu of the constitutional standard of an ineffective attorney . . . is going further than the federal procedural demands of a fair trial and the constitution required." *Wilson*, 155 F.3d at 401.

5. It is not unreasonable or against prevailing professional norms for counsel to rely on experts and their reports, and their deficiencies are not automatically imputed to counsel. *Wilson*, 155 F.3d at 401, 403.

6. Applicant's trial counsel reasonably believed after consulting with their retained trial experts, the trial team, and Applicant that the evidence about Applicant's low-activity MAOA gene could provide mitigating evidence to spare him the death penalty.

7. Applicant has not met his burden to show that trial counsel's strategic decision to present the evidence after considering its pros and cons fell outside the wide range of reasonable professional assistance. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

8. Trial counsel had "no duty to ensure the trustworthiness" of Dr. Bernet's conclusions. *Babbitt v. Calderon*, 151 F.3d 1170, 1174 (9th Cir. 1996).

9. Trial counsel's reliance on a psychiatrist who has studied the genetic makeup of people who tend to be violent, RR 43: 58, was within the wide range of professionally competent assistance. *See Harris v. Vasquez*, 949 F.2d 1497, 1525 (9th Cir. 1990) (it is certainly in wide range of professionally competent assistance for attorney to rely on properly selected experts).

10. Strategic decisions, like which expert witnesses to call and what evidence to present at trial, are left to counsel's discretion and deserve "a heavy measure of deference." *Turner v. Calderon*, 281 F.3d 851, 876 (9th Cir. 2002) (quoting *Strickland*, 466 U.S. at 691).

11. Defense counsel in death-penalty cases are often faced with the decision to present evidence that, like the genetic evidence Applicant presently complains

of, is a double-edged sword that jurors could consider either as sufficiently mitigating evidence or as powerful evidence of future dangerousness. *See, e.g.*, *Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (explaining mitigating evidence is "double-edged" when it might permit inference defendant not as morally culpable for his behavior but also might suggest, as product of his environment, he is likely to continue being dangerous in future); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) ("Although the evidence of Ladd's inadequate supervision as a child might permit an inference that he is not as morally culpable for his behavior, it also might suggest Ladd, as a product of his environment, is likely to continue to be dangerous in the future"); *Royal v. Taylor*, 188 F.3d 239, 249 (4th Cir. 1999) ("we have recognized that reliance on evidence of psychological impairments or personal history as mitigating factors in sentencing can be a 'double-edged sword'").

12. Applicant's trial counsel made the strategic decision to present, as part of their mitigation case, evidence that Applicant had a low-activity MAOA gene which, combined with his childhood trauma or mistreatment, increased his susceptibility to violence and aggression.

13. Applicant fails to meet his burden to overcome the presumption that trial counsel's carefully considered decision to present the genetic evidence at issue, a decision which they discussed with experts and Applicant, fell within the wide range of reasonable professional assistance. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

14. Even if Applicant's trial counsel were deficient for presenting testimony that Applicant's low-activity MAOA gene predisposes him to violence, Applicant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

15. The alleged deficiency of counsel in presenting the genetics evidence as mitigation did not render the result of the proceeding unfair or unreliable.

16. Given the strong evidence of Applicant's future dangerousness, there is no reasonable probability that absence of the genetic evidence from Applicant's trial would have persuaded the jury to answer the future-dangerousness issue

"no" instead of "yes."

17. Applicant has failed to meet his burden to affirmatively prove that any prejudice resulted from his trial counsel's decision to introduce evidence that Applicant's low-activity MAOA gene increased his risk of violence. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

Findings of Fact: Alleged Failure to Discover and Present Evidence of Serious Mental Illness

1. Applicant contends that his trial counsel were ineffective for not presenting evidence that he suffers from PTSD and psychotic depression as evidence of insanity, as evidence to negate the intent element of the capital-murder offense, or as mitigating evidence. *See* Application at 190-211, 234-53.

2. Applicant alleges that his trial counsel were ineffective for failing to present expert testimony to educate the jury about the degree of trauma, mental-health struggles, psychosis, instability, brain damage, and neuropsychological effects he suffered throughout his life. *See* Application at 190-91.

3. Trial counsel attempted to present everything they could find that might be mitigating for Applicant's case. *See* Gordon's Affidavit at 5; Ray's Affidavit at 12.

4. As previously set forth, Applicant's trial counsel called numerous lay witnesses, including Applicant, and expert witnesses to testify about Applicant's and his family's social history and mental health, as well as their effects on Applicant and his other family members.

5. As previously set forth, Dr. McGarrahan testified about the results of Applicant's neuropsychological evaluations; Dr. Lewine informed the jury about Applicant's brain abnormalities and their effects on him; Dr. Bernet testified about Applicant's low-activity MAOA gene; and Dr. Brams explained how Applicant's and his family's social and mental-health histories negatively impacted Applicant throughout his life.

6. Trial counsel presented the jury with a well-rounded picture of Applicant's and his family members' lives, their struggles, and their mental-health issues.

7. Applicant further alleges that, had his trial counsel properly investigated, they could have presented evidence of his severe mental illness at the guilt-innocence or punishment phases of his trial. *See* Application at 234-53.

8. Applicant relies on a psychological assessment from clinical psychologist Frederic Sautter, Ph.D., concluding that Applicant suffers from PTSD and psychotic depression that affected his behavior at the time of the homicides. *See* Application at 191-213; Application Exhibit 2.

9. Dr. Sautter's psychological assessment discusses the effects of Applicant's alleged sexual abuse, which Applicant's trial counsel discovered, but which Applicant did not want presented or included in his experts' presentations at trial. *See* Application Exhibit 2; Gordon's Affidavit at Exhibit 2; Ray's Affidavit at 6.

10. Dr. Sautter relies heavily on self-reports by Applicant and his family stating facts that appear to have been disclosed for the first time post-conviction. *See, generally,* Application Exhibit 2.

11. Dr. Sautter's assessment may not necessarily reflect the testimony that he or any other expert would have been able to present at the time of Applicant's trial.

12. Dr. Price, the State's forensic psychologist and neuropsychologist at trial and in this habeas proceeding, details at length the shortcomings of, and his disagreement with, Dr. Sautter's diagnoses of PTSD and psychotic depression. *See* State's Response Exhibit 1 at 14-30, 31-35.

13. Trial counsel retained Dr. McGarrahan, a highly qualified forensic psychologist and neuropsychologist, who conducted a comprehensive and acceptable neuropsychological evaluation of Applicant, interviewed Applicant, and reviewed thousands of pages of records that included Applicant's and his family's mental-health histories. RR 40: 68, 85.

14. Dr. McGarrahan's trial testimony shows that she took into account not only her own evaluations and test results, but other social and mental-health information she had received as well. *See, generally,* RR 40: 60-129.

15. Applicant fails to delineate exactly what evidence Dr. McGarrahan did not

have in her evaluation or that any such additional information would have changed her evaluation of him.

16. "Dr. McGarrahan determined that [Applicant] had some problems with depression and anxiety, but those problems did not rise to the level of severe mental illness or a major depressive disorder." *Wells*, 611 S.W.3d at 413.

17. Although Dr. McGarrahan did not diagnose Applicant with a severe mental illness such as PTSD or psychotic depression, she did testify about Applicant's mental-health issues and his resulting struggles. For example, Dr. McGarrahan testified that Applicant reported problems with depression and anxiety, although not at a level to diagnose severe mental illness, major depressive disorder, or generalized anxiety disorder; he is paranoid and thinks the world is out to get him; he endorsed some depressive symptoms; he has poor self-esteem; and his beliefs are so strong and the reality is so inconsistent with his beliefs to a point that gets close to losing touch with reality. RR 40: 82, 91, 95-96, 102.

18. Applicant, relying on a forensic neuropsychological evaluation report from neuropsychologist Robert H. Ouaou, Ph.D., criticizes Dr. McGarrahan's neuropsychological evaluation of Applicant as incomplete and premature without an adequate social history. *See, generally,* Application Exhibit 3.

19. Applicant makes an unsupported assertion that Dr. McGarrahan discounted his obvious signs of mental illness because she, like Ray, believed that he was inherently violent. *See* Application at 64.

20. Dr. Price reviewed the underlying data for the tests administered by Dr. McGarrahan and Dr. Ouaou and concluded that Dr. McGarrahan's neuropsychological test selection is consistent with current best practices in forensic neuropsychology, follows the appropriate guidelines, and is as reliable and valid as Dr. Ouaou's. *See* State's Response Exhibit 1 at 7.

21. Dr. McGarrahan's chosen test for the assessment of executive function is more accepted by the neuropsychological community than those selected and used by Dr. Ouaou. *See* State's Response Exhibit 1 at 7.

22. Dr. McGarrahan's evaluation was consistent with current best practices in forensic neuropsychology and more comprehensive than Dr. Ouaou's evaluation. *See* State's Response Exhibit 1 at 8.

23. In rescoring Dr. Ouaou's raw test data, Dr. Price found several inconsistencies and one major issue in the scoring of the Proverbs Subtest of the D-KEFS. *See* State's Response Exhibit 1 at 10-11.

24. Responding to Dr. Ouaou's criticism of Dr. McGarrahan for not administering all of the subsets of the WMS-IV and suggestion that the results of the WMS-IV could not be used to make direct comparisons to scores from the WAIS-IV, Dr. Price states, "I know of no reason why not, and I frequently see comparisons made when only the Logical Memory and Visual Reproductions subtests are administered." State's Response Exhibit 1 at 14.

25. Dr. Price was uncertain why Dr. Ouaou reported only the lowest *relative* scores on each of the tests to support his assertion that Applicant is impaired regarding executive functioning. *See* State's Response Exhibit 1 at 12.

26. Based on Dr. Price's review of Dr. McGarrahan's and Dr. Ouaou's reports of their evaluations and their underlying raw test data, Dr. Price's opinion is that Applicant's executive functioning falls in the range of low-average to high-average with one score in the superior range. *See* State's Response Exhibit 1 at 12-13.

27. Dr. Price's assessments of Dr. Sautter's, Dr. McGarrahan's, and Dr. Ouaou's reports are credible and supported by the record.

28. Applicant points to Ray being found ineffective in 2006 in an unrelated non-death-penalty case as evidencing Ray's alleged "deep skepticism" of mental illness, which Applicant alleges inhibited trial counsel's mitigation investigation of his case. *See* Application of 59-60; Application Exhibit 158.

29. The issue before the Court is Ray's representation in Applicant's case, not in an unrelated past case.

30. Applicant further cites Dr. Brams's allegations in her unsworn declaration that Ray impeded her investigation and presentation of evidence by placing limitations on her work if she could not provide a foundation for her opinions. *See* Application at 61-63; Application Exhibit 23.

31. Regarding Dr. Brams's allegations, trial counsel agree that she was required to redact portions of her trial presentation. See Gordon's Affidavit at 4; Ray's Affidavit at 10.

32. Contrary to Dr. Brams's assertions, this decision was not made by trial counsel; rather, this Court specifically ordered the parties to list out the factual data supporting their experts' opinions. *See* Gordon's Affidavit at 4; Ray's Affidavit at 10.

33. Dr. Brams's declaration admits that she did not do as she was instructed by this Court, *i.e.*, she did not back up her observations and opinions. *See* Gordon's Affidavit at 4; Ray's Affidavit at 10.

34. According to Ray, "The reality is Dr. Brams only got mad when I wouldn't let her dictate the terms and limits of her testimony, which was ordered by the court." Ray's Affidavit at 11.

35. Dr. Brams's description of her resulting trial testimony as "rushed" and "lacking and disorganized" is contradicted by the fact that her testimony covered many aspects of Applicant's and his family's social and mental-health histories and their effects on Applicant. RR 44: 106-166; Application Exhibit 23 at ¶7.

36. Dr. Brams fails to state exactly what she was unable to investigate or present, and she testified at trial that she had obtained "literally thousands of pages of records regarding issues" that she reviewed. RR 44: 110-12; Application at 23.

37. Applicant argues that he was prejudiced by his trial counsel's alleged failure to investigate mental illness and to raise it as evidence of an insanity defense, evidence negating his intent for the capital-murder offense, or evidence supporting a finding of mitigating circumstances. *See* Application at 248-55.

38. As previously set forth, Applicant's trial counsel conducted an extensive mitigation investigation and focused their efforts on presenting the mitigating evidence that they could find.

39. Through lay and expert witnesses, as well as Applicant himself, trial counsel sought to humanize Applicant and to inform the jury of the social and mental-health histories and struggles Applicant and his family had endured.

40. Trial counsel relied on Dr. McGarrahan, who diagnosed no severe mental illness after evaluating Applicant. RR 40: 82.

41. Dr. Price's affidavit sets forth in detail compelling evidence undermining the reliability of Dr. Sautter's diagnosis of PTSD and psychotic depression. *See* State's Response Exhibit 1 at 14-30, 31-35.

42. Dr. Price would have further offered the alternative diagnosis of anti-social personality disorder with moderately severe signs of psychopathy and would have opined that Applicant knew his conduct of shooting and killing the victims was wrong. *See* State's Response Exhibit 1 at 33, 35.

43. Had Applicant's trial counsel presented Dr. Sautter's opinion at the punishment phase of the trial, his diagnoses would have been subject to attack by the State's retained forensic psychologist and neuropsychologist, Dr. Price.

44. Dr. Sautter's assessments and diagnoses rely on inconsistent and unreliable post-conviction self-reports of Applicant and his family members. *See* State's Response Exhibit 1 at 16-19.

45. Applicant and his family seem to have provided information in their post-conviction self-reports that they did not disclose to trial counsel or their trial experts. *See* State's Response Exhibit 1 at 16-19.

46. Applicant's and his family's failure to disclose information is consistent with Gordon's opinion that there was more interest in covering up the family's history than helping Applicant avoid the death penalty. *See* Gordon's Affidavit at 6.

47. Counsel provided all known and available information to their qualified experts.

<u>Conclusions of Law: Alleged Failure to Discover and Present Evidence of Serious Mental Illness</u>

1. The pertinent question in determining whether Applicant's counsel rendered ineffective assistance of counsel by failing to discover and present evidence of serious mental illness is whether Applicant's counsel pursued the possibility of mental illness. *See Earp v. Cullen*, 623 F.3d 1065, 1077 (9th Cir. 2010).

2. "Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a

reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." *Smith v. Cockrell*, 311 F.3d 661, 676-77 (5th Cir. 2002), *abrogated on other grounds by Tennard v. Dretke*, 542 U.S. 274 (2004).

3. Applicant's trial counsel, in proper reliance on Dr. McGarrahan, had no basis to believe that Applicant suffered from PTSD, psychotic depression, or any other severe mental illness or that further investigation would be beneficial. *See Winfield v. Roper*, 460 F.3d 1026, 1041 (8th Cir. 2006) (counsel not required to shop for experts who will testify a certain way).

4. Counsel retained Dr. McGarrahan, a qualified mental-health expert, who conducted an appropriate neuropsychological evaluation of Applicant and diagnosed no severe mental illness; Applicant's trial counsel were entitled to rely on Dr. McGarrahan's conclusions. *See Smith*, 311 F.3d at 676-77; *Dowthitt v. Johnson*, 230 F.3d 733, 748 (5th Cir. 2000) (counsel entitled to rely on experts' opinions and not required to "canvass[] the field to find a more favorable defense expert").

5. Counsel's failure to present evidence of PTSD, psychotic depression, or any other severe mental illness at either phase of Applicant's capital-murder trial when Dr. McGarrahan made no such diagnosis did not fall outside the wide range of reasonable professional assistance. *See Pruett v. Thompson*, 996 F.2d 1560, 1573-74 (4th Cir. 1993); *Dowthitt*, 230 F.3d at 748.

6. Applicant's complaints about Dr. McGarrahan's evaluation and conclusions in this case do not demonstrate ineffective assistance of *counsel*, and Applicant has no constitutional guarantee of effective assistance of expert witnesses. *See Earp*, 623 F.3d at 1077; *Wilson*, 155 F.3d at 401.

7. "While there may be a duty to seek out psychiatric evaluation of a client where appropriate, there is no duty to ensure the trustworthiness of the expert's conclusions." *Babbitt*, 151 F.3d at 1174.

8. As the Ninth Circuit Court of Appeals has stated:

> To now impose a duty on attorneys to acquire sufficient background material on which an expert can base reliable psychiatric conclusions, independent of any request for

> information from an expert, would defeat the whole aim of having experts participate in the investigation. An integral part of an expert's specialized skill at analyzing information is an understanding of what information is relevant to reaching a conclusion. Experts are valuable to an attorney's investigation, then, not only because they have special abilities to process the information gathered by the attorney, but because they also are able to guide the attorney's efforts toward collecting relevant evidence. To require an attorney, without interdisciplinary guidance, to provide a psychiatric expert with all information necessary to reach a mental health diagnosis demands that an attorney already be possessed of the skill and knowledge of the expert.

Hendricks v. Calderon, 70 F.3d 1032, 1038-39 (9th Cir. 1995).

9. Through their presentation of evidence, counsel acted well within the wide range of reasonable professional assistance; Applicant has not proven otherwise. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

10. Applicant has failed to meet his burden to demonstrate that his trial counsel acted unreasonably with regard to investigating and presenting mental-health evidence. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

11. The fact that Applicant has found experts to disagree with or criticize Dr. McGarrahan in hindsight does not demonstrate that trial counsel's investigation and presentation of mental-health evidence at Applicant's trial were unreasonable within the meaning of *Strickland* and *Wiggins*. *See, e.g.*, *Pruett*, 996 F.2d at 1573-74; *Daugherty*, 839 F.2d at 1432; *see also Winfield*, 460 F.3d at 1040 ("Counsel is not required to shop for experts who will testify in a particular way, and penalty counsel's decision not to investigate further was reasonable given the two concurring opinions of different doctors.").

12. The fact that Applicant has found experts who disagree or criticize Dr. McGarrahan does not render her opinion and testimony untrustworthy. *See Wilson*, 155 F.3d at 401.

13. Even if this Court had not required Dr. Brams and others to provide the factual data supporting their opinions, trial counsel in a capital-murder case would not be unreasonable for wanting to present only expert testimony that was based on verifiable facts.

14. Applicant fails to prove that any of Dr. Brams's allegations that trial counsel hindered her work or testimony was the result of counsel's deficiency rather than her own. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

15. It is nearly always possible to find one expert who disagrees with another expert, and to entertain claims of ineffective assistance of counsel based on the effectiveness of an expert witness "would immerse federal judges in an endless battle of experts to determine whether a particular psychiatric examination was appropriate." *Wilson*, 155 F.3d at 401.

16. Applicant has failed to meet his burden to prove that his trial counsel acted outside the wide range of reasonable professional assistance by failing to discover or offer evidence that Applicant suffered from PTSD and psychotic depression when Dr. McGarrahan made no such diagnosis following her comprehensive neuropsychological evaluation. *See* RR 40: 82; *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

17. Even if Applicant's trial counsel were deficient for failing to discover and present evidence that Applicant suffers from previously undiagnosed PTSD and psychotic depression, Applicant must "show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

18. "In determining prejudice, the reviewing court must consider all the relevant evidence that the jury would have considered if defense counsel had pursued a different path – both the additional mitigation evidence and any aggravating evidence that would have come in with it[.]" *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

19. Under the circumstances of Applicant's case, Dr. Sautter's opinions may not

necessarily reflect the testimony that he or any other expert would have been able to present at the time of Applicant's trial. *See, e.g.*, *Daugherty*, 839 F.2d at 1432 (mere fact expert who would give favorable testimony discovered five years after sentencing insufficient to prove reasonable investigation at time of sentencing would have produced same expert or another expert willing to give same testimony).

20. Under the circumstances of Applicant's case, any deficiency of counsel in not presenting evidence that Applicant suffers from previously undiagnosed PTSD and psychotic depression did not render the proceedings fundamentally unfair or unreliable.

21. Applicant fails to meet his burden to show a reasonable likelihood that trial counsel's failure to discover or introduce expert testimony that Applicant suffered from previously undiagnosed PTSD and psychotic depression would change the outcome of his punishment trial. Applicant has not affirmatively established prejudice. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

Findings of Fact: Alleged Inadequate Future-Dangerousness Investigation

1. Applicant alleges that his trial counsel were ineffective for failing to investigate his lack of future dangerousness and "actively" conceding his future dangerousness because they believed he would always be dangerous. *See* Application at 67-69, 222-25, 229-30.

2. Specifically, Applicant complains that his trial counsel failed to: (1) interview jail guards about his time in jail; (2) contact State's witness Dallas Theiss about his fight with Applicant in jail; and (3) rebut Stephen Rogers's testimony about TDCJ's inmate classification system and Applicant's potential for future violence if he were sentenced to life without parole. *See* Application at 67-69, 222-25, 229-30.

3. Applicant contends that his trial counsel's failure to interview jail guards, such as Jordan Patton, left only the State's narrative of him as a bully. *See* Application at 67, 222-24, 226.

4. In an unsworn declaration, Patton states that Applicant protected him from racist and violent attacks by other Tarrant County Jail inmates. *See*

Application at 67, 222-24; *see, generally,* Application Exhibit 17.

5. Patton worked at the jail for about two months (April to June 2014); he never saw Applicant again after that. *See* Application Exhibit 17 at ¶¶ 1, 9.

6. Applicant did not identify Patton as someone whom counsel should contact. *See* Gordon's Affidavit at 6; Ray's Affidavit at 13, 15.

7. Applicant offers no explanation how his trial counsel would or should have known otherwise to contact Patton.

8. Applicant overlooks that his trial counsel presented testimony from Ruby Williams, a Tarrant County Jail confinement officer who had Applicant in her pod. RR 49: 85, 87.

9. Williams testified that Applicant was in general population, that he did anything she asked of him, that her experience with him was positive, that he was polite and caused no problems, and that she never saw him lose his temper. RR 39: 89-90, 92, 98-99, 101.

10. Applicant further complains that his trial counsel did not contact and interview State's witness Theiss about the fight he had with Applicant in the Tarrant County Jail. *See* Application at 223-26.

11. Based on Theiss's unsworn declaration, Applicant claims that Theiss would have provided helpful information had trial counsel asked him about his history of violent behavior and getting into fights. *See* Application at 223; *see, generally,* Application Exhibit 18.

12. Applicant's trial counsel were not allowed by either Theiss or his attorney to visit with Theiss before trial. *See* Gordon's Affidavit at 6; Ray's Affidavit at 18.

13. Theiss's claim that he would have provided helpful information if asked appears to be false.

14. Theiss's unsworn habeas declaration does not state that he instigated the altercation with Applicant or recant his sworn trial testimony that Applicant assaulted him in a Tarrant County Jail cell and caused his injuries depicted in the photographs introduced at trial. *See* Application Exhibit 18.

15. Applicant testified at trial that he never touched Theiss; he did not claim that Theiss instigated their fight or that he was merely defending himself from Theiss's aggression. RR 45: 154, 170.

16. Evidence that Theiss had a history of violence and fighting would have been unlikely to change the jury's assessment of Theiss' trial testimony.

17. Applicant admitted to engaging in a separate fight in jail when another inmate came out of his cell with a towel in his hand, RR 45: 155; thus, Applicant's fight with Theiss was not the only evidence of Applicant's violence in jail while awaiting trial.

18. Applicant further argues that trial counsel were deficient for failing to rebut Rogers's testimony about TDCJ's inmate classification system and Applicant's potential to commit future violent acts if he were sentenced to life without parole. *See* Application at 229-30.

19. Applicant relies on an unsworn declaration from Frank G. AuBuchon, a former TDCJ employee who claims to have found "significant errors" in Rogers's testimony. *See, generally,* Application Exhibit 6.

20. As discussed in detail in the findings related to Applicant's Claim Two, the alleged "errors" identified in AuBuchon's declaration are based on his myopic view and mischaracterizations of Rogers's testimony as a whole. *See, infra*, at IV. Claim Two.

21. As discussed in detail in the findings related to Applicant's Claim Two, Rogers's testimony, when viewed fully in context, was not inconsistent with what AuBuchon claims it should have been; therefore, Applicant's trial counsel would have had no basis to dispute Rogers's testimony on the bases alleged by Applicant. *See, infra*, at IV. Claim Two.

<u>Conclusions of Law: Alleged Inadequate Future-Dangerousness Investigation</u>

1. Applicant has not shown that his defense team's failure to locate and/or talk to Patton resulted from an inadequate investigation that did not comply with prevailing professional norms. *See Payne*, 539 F.3d at 1317 (test for reasonableness not whether counsel could have done something more or different; an applicant must show counsel's performance fell outside wide range of professionally competent assistance).

2. Applicant cannot fault his trial counsel in hindsight for failing to uncover a potential witness whom he never mentioned despite ample opportunity to do so. *See Ex parte Martinez*, 195 S.W.3d at 728 (failure to present alleged sexual abuse "is borne primarily by applicant, as he had ample opportunity to divulge this evidence to his lawyer and at least one of his agents before trial"); *Perez v. State*, 5 S.W.3d 398, 400 (Tex. App.—Houston [14th Dist.] 1999, no pet.) ("[e]ven the most efficacious trial attorney must depend on the client to provide factual information that will aid in the defense").

3. Applicant has failed to meet his burden to show that his trial counsel were deficient with regard to their investigation of the future-dangerousness issue by failing to call Patton as a witness, to interview Theiss before trial, or to rebut Rogers's testimony. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

4. Applicant has not met his burden to affirmatively establish resulting prejudice in any deficient investigation of the future-dangerousness issue because his trial counsel presented testimony from another jail correctional officer regarding Applicant's positive behavior in jail, were prevented from talking to Theiss by Theiss or his attorney before trial, and did not allow inaccurate testimony from Rogers to go unchallenged. *See Jackson*, 877 S.W.3d at 771 (defendant has burden to prove he received ineffective assistance of counsel).

Findings of Fact: Alleged Failure to Challenge or Strike Juror Hakizimana

1. Applicant alleges that his trial counsel were ineffective for failing to challenge for cause or use a peremptory strike on juror Abdu Hakizimana because he favored the death penalty for anyone convicted of murder and because he displayed confusion about the capital-sentencing scheme and questions asked in his juror questionnaire. *See* Application at 256, 259-63.

2. Applicant contends that no competent defense attorney would have failed to challenge for cause or exercise a peremptory strike on a veniremember who would automatically vote for death, especially after exercising only eleven peremptory challenges. *See* Application at 256, 267; RR 32: 19.

3. Neither party challenged Hakizimana for cause or exercised a peremptory strike against him, and he was seated on Applicant's jury. RR 32: 10-23; 47.

4. The record does not affirmatively demonstrate that Hakizimana would

automatically vote for the death penalty.

5. Although Hazikimana vacillated or appeared confused at times during voir dire, the overall tenor of his voir dire showed that he could and would answer the special issues based on the law and the evidence presented. *See, e.g.*, RR 17: 30-32, 38, 45, 48, 55, 59, 61, 63-64.

6. Although Applicant's trial counsel did not like Hakizimana as a juror, "[j]ury selection is not a cut and dry process; it is frequently making the less bad choice." Gordon's Affidavit at 6; *see* Ray's Affidavit at 17 (jury selection is a decision in taking lesser of the bad).

7. Applicant's trial counsel believed that striking Hakizimana could have led to allowing someone worse to be placed on Applicant's jury. *See* Gordon's Affidavit at 6.

8. In Applicant's trial counsel's opinion, the worst thing a defense attorney can do is run out of peremptory strikes "because the State will then use its strikes to get to someone much worse." Ray's Affidavit at 17.

9. According to Ray, striking African-American jurors can present a problem if the defense wants to later claim a *Batson* violation by the State. *See* Ray's Affidavit at 17.

10. Additionally, Ray recognizes that a person's questionnaire is not always indicative of how he presents himself during voir dire. *See* Ray's Affidavit at 17.

<u>Conclusions of Law: Alleged Failure to Challenge or Strike Juror Hakizimana</u>

1. The right to trial by an impartial jury, like any other right, is subject to waiver (or even forfeiture) by the defendant in the interest of overall trial strategy. *State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008).

2. Because the right to an impartial jury is a right which is to be exercised at the option of the defendant, it is also subject to the legitimate strategic or tactical decision-making processes of defense counsel during the course of trial. *Morales*, 253 S.W.3d at 697.

3. "Consistently with *Strickland*, [an appellate court] must presume that counsel

is better positioned than the appellate court to judge the pragmatism of the particular case, and that he 'made all significant decisions in the exercise of reasonable professional judgment.'" *Delrio v. State*, 840 S.W.2d 443, 447 (Tex. Crim. App. 1992) (per curiam) (quoting *Strickland*, 466 U.S. at 690).

4. In *Delrio v. State*, the Court of Criminal Appeals found that counsel's failure to challenge for cause or peremptorily strike a juror who plainly stated on the record that he could not be impartial did not establish ineffective assistance. 840 S.W.2d at 443-45. The Court could not say that there were no circumstances which would justify a defense counsel's failure to exercise a challenge for cause or a peremptory strike against a venireman who deemed himself incapable of serving on the jury in a fair and impartial manner. *Id*. at 446.

5. Unlike the juror who admitted to an actual bias in *Delrio*, Hakizimana's overall voir dire showed that he could render a punishment verdict based on the law and the evidence presented. *See, e.g.*, RR 17: 30-32, 38, 45, 48, 55, 59, 61, 63-64.

6. It was within trial counsel's discretion based on strategy not to challenge for cause or exercise a peremptory strike against Hakizimana. *See Delrio*, 840 S.W.2d at 443-47.

7. Applicant's trial counsel were in a better position than his habeas counsel to judge first-hand Hakizimana's demeanor and tone while responding to questioning. *See Delrio*, 840 S.W.2d at 447.

8. Applicant fails to overcome the presumption that his trial counsel made all significant decisions during voir dire in the exercise of their reasonable professional judgment that Hakizimana may have been preferable to other prospective jurors yet to come. *See Morales*, 253 S.W.3d at 697 ("Waiver of [trial counsel's] right to insist that every juror in the case be in all things fair and impartial may in counsel's best professional judgment have been an acceptable gamble") (quoting *Delrio*, 840 S.W.2d at 447)).

9. Applicant has not met his burden to establish deficient performance or prejudice based on trial counsel's acceptable strategic decision to accept Hakizimana as a juror rather than risking having a less desirable juror be seated down the line. *See Morales*, 253 S.W.3d at 697 ("Waiver of [trial counsel's] right to insist that every juror in the case be in all things fair and

impartial may in counsel's best professional judgment have been an acceptable gamble") (quoting *Delrio*, 840 S.W.2d at 447)).

Final Conclusions of Law Related to Claim One

1. Neither *Strickland* nor *Wiggins* nor any other precedent required Applicant's trial counsel to investigate every conceivable line of mitigating evidence or to discover and call to testify every possible witness who may have known something about Applicant's life history. *See Rompilla*, 545 U.S. at 383 (counsel not forced "to scour the globe on the off chance something will turn up"); *Payne*, 539 F.3d at 1317 (test for reasonableness not whether counsel could have done something more or different; an applicant must show counsel's performance fell outside wide range of professionally competent assistance).

2. The basis of Applicant's claims in Claim One – that trial counsel should have investigated more, called different or additional expert or lay witnesses to testify, or asked the called lay witnesses different questions in order to develop the same or similar defensive theories – is unpersuasive. *See Smith*, 311 F.3d at 669 (courts "must be particularly wary of 'arguments that essentially come down to a matter of degrees'" involving questions of whether counsel investigated enough or presented enough mitigating evidence; "[t]hose questions are even less susceptible to judicial second-guessing").

3. Trial counsel's reliance on the opinions of their retained trial experts in deciding what avenues of investigation to pursue and what evidence to present was reasonable and appropriate. *See Dowthitt*, 230 F.3d at 748 (counsel entitled to rely on experts' opinions and not required to "canvass[] the field to find a more favorable defense expert").

4. Any alleged shortcomings in the experts' performance do not establish a claim of ineffective assistance of counsel. *See Earp*, 623 F.3d at 1077; *Wilson*, 155 F.3d at 401; *Babbitt*, 151 F.3d at 1174.

5. Trial counsel were not ineffective in their investigation of the future-dangerousness special issue.

6. Applicant's claims that his trial counsel rendered ineffective assistance are not firmly founded in the record. *See Scheanette*, 144 S.W.3d at 510 (claim of ineffective assistance must be firmly founded in record).

7. Applicant has failed to meet his burden to prove that his trial counsel were deficient in any of the ways he alleges in Claim One. *See Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 688; *Ex parte Briggs*, 187 S.W.3d at 466.

8. The alleged deficiencies of trial counsel in Claim One did not render the proceedings fundamentally unfair or unreliable, and Applicant has not met his burden to prove a reasonable probability that he would have been sentenced to life without parole instead of death had his trial counsel acted in the manner he claims they should have. *See Wiggins*, 539 U.S. at 534; *Strickland*, 466 U.S. at 687; *Ex parte Flores*, 387 S.W.3d at 633.

9. This Court recommends that Applicant's first claim for relief be denied in its entirety.

B. Claim Four

Applicant alleges that his trial and appellate counsel were ineffective in failing to challenge the constitutionality of the future-dangerousness special issue, which he argues is unconstitutionally vague and fails to narrow the class of death-eligible defendants because it does not define "probability" and "criminal acts of violence." Application at 326-31 (Claim Four).

Findings of Fact

1. The Court's punishment-phase jury charge included the following statutory special issue: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant would commit criminal acts of violence that would constitute a continuing threat to society?" CR 2: 751; *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).

2. The Court's jury charge on the future-dangerousness special issue complied with the requirements of Texas Code of Criminal Procedure Article 37.071, section 2. *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).

3. Applicant's trial counsel did not object to the Court's future-dangerousness special issue at trial. RR 46: 4.

4. This Court would have overruled an objection that the future-dangerousness special issue failed to narrow the class of death-eligible defendants because it did not define the terms “probability” and “criminal acts of violence.”

5. Applicant’s appellate counsel did not raise an issue with the future-dangerousness special issue on direct appeal.

<u>Conclusions of Law</u>

1. The Court of Criminal Appeals has rejected Applicant’s challenge to the future-dangerousness special issue. *See, e.g.*, *Gardner v. State*, 306 S.W.3d 274, 302-03 (Tex. Crim. App. 2009); *Luna v. State*, 268 S.W.3d 594, 609 (Tex. Crim. App. 2008); *Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007).

2. The Supreme Court of the United States has upheld the constitutionality of Texas’ future-dangerousness special issue. *See Jurek v. Texas*, 428 U.S. 262, 274-75 (1976).

3. Trial counsel were not deficient for failing to raise a meritless challenge to the future-dangerousness special issue. *See Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) (“reasonably competent counsel need not perform a useless or futile act”); *Mooney v. State*, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991) (“[c]ounsel is not required to engage in the filing of futile motions”).

4. Alternatively, there is no reasonable probability that the outcome of the punishment proceedings of Applicant’s trial would have been different if trial counsel had advanced a meritless challenge to the constitutionality of the future-dangerousness special issue. *See Barrera v. State*, 978 S.W.3d 665, 668-69 (Tex. App.—Corpus Christi 1998, pet. ref’d) (no prejudice resulted from counsel’s failure to raise objection that lacked merit).

5. Appellate counsel was not deficient for failing to raise a meritless challenge to the future-dangerousness special issue. *See Ex parte Miller*, 330 S.W.3d at 323-24 (“An attorney need not advance every argument, regardless of merit, urged by the appellant.”).

6. Alternatively, there is no reasonable probability that Applicant would have prevailed on appeal had appellate counsel advanced a meritless challenge to

the constitutionality of the future-dangerousness special issue. *See Ex parte Miller*, 330 S.W.3d at 323-24 ("To show that appellate counsel was constitutionally ineffective for failing to assert a particular point on appeal, an applicant must prove that … there is a reasonable probability that, but for counsel's failure to raise that particular issue, he would have prevailed on appeal.").

7. Applicant has failed to meet his burden to allege and prove facts which, if true, entitle him to relief on his fourth claim for relief alleging ineffective assistance of trial counsel. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985) (in post-conviction collateral attack, applicant has burden to allege and prove facts which, if true, entitle him to relief).

8. This Court recommends that Applicant's fourth claim for relief be denied.

C. Claim Six

Applicant alleges that his trial counsel were ineffective for failing to assert that the mitigation special issue unconstitutionally restricted the evidence that the jury could determine was mitigating. *See* Application at 348-59 (Claim Six).

Findings of Fact

1. The Court's punishment charge contained the following statutory mitigation special issue:

> Taking into consideration all of the evidence, including the circumstances of the offense, the Defendant's character and background, and the personal moral culpability of the Defendant, do you find from the evidence that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?

CR 2: 751; *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).

2. The Court further instructed the jury to "consider mitigating evidence to be evidence that a juror might regard as reducing the Defendant's moral

blameworthiness." CR 2: 752; *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(f)(4).

3. The Court's jury charge on the mitigation special issue complied with the requirements of Texas Code of Criminal Procedure Article 37.071, section 2. *See* TEX. CODE CRIM. PROC. art. 37.071, §§ 2(e)(1), 2(f)(4).

4. Applicant's trial counsel did not object to the Court's mitigation special issue at trial. RR 46: 4.

5. This Court would have overruled an objection that the mitigation special issue unconstitutionally restricted the evidence that the jury could determine was mitigating.

<u>Conclusions of Law</u>

1. The Court of Criminal Appeals has held that the mitigation special issue does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness. *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007); *Perry v. State*, 158 S.W.3d 438, 449 (Tex. Crim. App. 2004); *Ladd v. State*, 3 S.W.3d 547, 574 (Tex. Crim. App. 1999).

2. The United States Supreme Court's holding in *Tennard v. Dretke*, 542 U.S. 27 (2004), which was decided under another statutory scheme that did not include the mitigation special issue, does not hold otherwise. *Perry*, 158 S.W.3d at 449.

3. Applicant's trial counsel were not deficient for failing to raise an issue that clearly lacked merit. *See Ex parte Chandler*, 182 S.W.3d at 356 ("reasonably competent counsel need not perform a useless or futile act"); *Mooney*, 817 S.W.2d at 698 ("[c]ounsel is not required to engage in the filing of futile motions).

4. Alternatively, Applicant cannot meet his burden to show resulting prejudice because there is no reasonable probability that the outcome of the punishment phase of his trial would have been different had his trial counsel advanced a meritless challenge to the definition of the term mitigation in the jury charge. *See Barrera*, 978 S.W.3d at 668-69 (no prejudice resulted from counsel's failure to raise objection that lacked merit).

5. This Court recommends that Applicant's sixth claim for relief be denied.

IV. CLAIMS FIVE, SEVEN, AND NINE

Applicant alleges that he received ineffective assistance of counsel on direct appeal because counsel failed to raise: (1) the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A (videos of Applicant's television interviews) in point of error four, which challenged the erroneous exclusion of constitutionally relevant mitigation evidence (Claim Five); (2) the constitutionality of the "10-12" rule (Claim Seven); and (3) a preserved issue challenging the arbitrary administration of the death penalty in Texas (Claim Nine). *See* Application at 333-47, 360-68, 398-411.

Findings of Fact Related to Claims Five, Seven, and Nine

1. John W. Stickels was appointed to represent Applicant on direct appeal from his capital-murder conviction and death sentence in cause number 14055275D. *See* Stickels's Affidavit at 1.

2. Stickels was licensed to practice law in the State of Texas in May 1983. *See* State Bar of Texas' online attorney profile for John William Stickels.

3. Stickels has been board certified by the Texas Board of Legal Specialization in Criminal Law since 1995 and in Criminal Appellate Law since 2011. *See* Texas Board of Legal Specialization's online attorney profile for John William Stickels.

4. Stickels thoroughly reviewed the reporter's record, exhibits, and clerk's record from Applicant's trial. *See* Stickels's Affidavit at 1.

5. On May 22, 2018, Stickles filed Applicant's direct-appeal brief in the Court of Criminal Appeals. *Wells v. State*, No. AP-77,070 (Tex. Crim. App. May 22, 2018) (white card).

6. Stickels raised thirteen points of error on direct appeal:

- Points of error one through three: The trial court erred in overruling Applicant's motion to suppress evidence seized from his Engblad Drive residence and from his Chevrolet Tahoe in violation of the Fourth and Fourteenth Amendments to the United States Constitution; Article I, sections 9 and 10 of the Texas Constitution; and Article 38.23 of the Texas Code of Criminal Procedure. *See* Appellant's Brief on Appeal at 4, 55-71.

- Point of error four: The trial court erred when it refused to admit Applicant's statement (Defendant's Trial Exhibit 81) as constitutionally mitigating evidence. *See* Appellant's Brief on Appeal at 4, 72-77.

- Points of error five through ten: The trial court erred in refusing to admit Applicant's expert testimony about the 5HTTLPR gene, the rs25531 gene, the STin2 gene, the rs4680 gene, the rs1800955-SNP (T/C) gene, and the DRD4-2/11-VNTR gene. *See* Appellant's Brief on Appeal at 4-5, 78-86.

- Points of error eleven through thirteen: The trial court erred in denying Applicant's motion to quash the jury panel due to noncompliance with proper jury procedure when, without a presiding judge and outside of his presence, the prospective jurors submitted juror cards and were granted purported disqualifications and excuses, which violated Applicant's rights under the Sixth and Fourteenth Amendments to the United States Constitution and Article I, section 14 of the Texas Constitution. *See* Appellant's Brief on Appeal at 5-6, 87-92.

7. Stickels raised all of the points of error that he determined to have merit on direct appeal. *See* Stickels's Affidavit at 1.

8. The State filed its brief in the Court of Criminal Appeals on December 4, 2018. *Wells v. State*, No. AP-77,070 (Tex. Crim. App. Dec. 4, 2018) (white card).

9. On January 7, 2019, the Court of Criminal Appeals denied Applicant's motion for leave to file a supplemental brief challenging the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A as mitigating evidence at the punishment phase of his trial. *See Wells v. State*, No. AP-77,070 (Tex. Crim. App. Jan. 7,

2019) (white card); *see also* Appellant's Motion for Leave to File Supplemental Briefing at 2-5; Appellant's Supplemental Brief at 1-31.

10. On January 15, 2019, Applicant filed a reply brief further addressing his claim in point of error four that the exclusion of Defendant's Trial Exhibit 81 as mitigating evidence was harmful error. *See Wells v. State*, No. AP-77,070 (Tex. Crim. App. Jan. 15, 2019) (white card); Appellant's Reply Brief at 4-16.

11. On January 30, 2019, Stickels and counsel for the State presented oral argument in the Court of Criminal Appeals on point of error four challenging the exclusion of Defendant's Trial Exhibit 81 at the punishment phase of Applicant's trial. *See* Court of Criminal Appeals' submission schedule for 1/30/2019 at http://www.txcourts.gov/media/1443055/1-30-19.pdf; Court of Criminal Appeals' oral argument archive at https://www.texasbarcle.com /CLE/CCAPlayer5.asp?sCaseNo=ap-77,070&bLive=&k=&T=.

Conclusions of Law Related to Claims Five, Seven, and Nine

1. The *Strickland* standard applies to allegations of ineffective assistance of appellate counsel. *Amador v. Quarterman*, 458 F.3d 397, 411 (5th Cir. 2006).

2. To prevail on an ineffective-assistance claim, a habeas applicant must show by a preponderance of the evidence that counsel's performance was deficient and that the deficiency prejudiced him. *Strickland*, 466 U.S. at 687; *Ex parte Chavez*, 560 S.W.3d at 203; *Ex parte Briggs*, 187 S.W.3d at 458, 466.

3. An applicant can establish deficient performance by showing that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, considering the facts of the case viewed from counsel's perspective at the time of the representation. *Strickland*, 466 U.S. at 688, 690; *Ex parte Garza*, 620 S.W.3d at 808-09.

4. An applicant who succeeds in proving deficient performance must further affirmatively prove prejudice by showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *Strickland*, 466 U.S. at 693-94; *Ex parte Lopez*, 607 S.W.3d 341, 349 (Tex. Crim. App. 2020).

5. To establish that appellate counsel was ineffective for failing to assign a particular point of error on appeal, an applicant must prove that: (a) counsel's decision not to raise a particular point of error was objectively unreasonable; and (b) there is a reasonable probability that, but for counsel's failure to raise the particular issue, he would have prevailed on appeal. *Smith v. Robbins*, 528 U.S. 259, 285 (2000); *Ex parte Flores*, 387 S.W.3d at 639; *Ex parte Miller*, 330 S.W.3d at 623.

6. Appellate counsel need not advance every argument, regardless of merit, urged by his client. *Ex parte Flores*, 387 S.W.3d at 639; *Ex parte Miller*, 330 S.W.3d at 623-24.

7. If appellate counsel fails to raise a claim that has "indisputable merit under well-settled law and would necessarily result in reversible error," then counsel is ineffective for failing to raise it. *Ex parte Flores*, 387 S.W.3d at 639 (quoting *Ex parte Miller*, 330 S.W.3d at 624).

A. Claim Five

Applicant alleges that his appellate counsel was ineffective for failing to include the exclusion of Defendant's Exhibits 82A, 83A, and 84A in point of error four on direct appeal, challenging the trial court's erroneous exclusion of constitutionally relevant mitigation evidence. *See* Application at 331-47 (Claim Five).

<u>Findings of Fact</u>

1. During the trial's punishment phase, Applicant offered Defendant's Trial Exhibit 81, an eight-hour video of Applicant in the Fort Worth police station interview room after his arrest for the murders, which included two hours pf his police statements and a six-hour period when he was alone in the room. RR 45: 11; Defendant's Trial Exhibit 81; *see Wells*, 611 S.W.3d at 407.

2. During the trial's punishment phase, Applicant offered Defendant's Trial Exhibits 82A and 83A, television news broadcasts with edited portions of his media interview conducted the day after the murders, and Defendant's Trial

Exhibit 84A, his uncut seven-minute media interview. RR 45: 22-23; Defendant's Trial Exhibits 82A, 83A, 84A.

3. Applicant argued at trial that Defendant's Trial Exhibits 81, 82A, 83A, and 84A were admissible as relevant mitigating evidence to show his mental state shortly after the murders, and the State objected that the exhibits were inadmissible self-serving hearsay. RR 45: 11-24.

4. Applicant's fifth claim for relief in this habeas proceeding is based almost exclusively on his allegations that Defendant's Trial Exhibits 82A, 83A, and 84A, like Defendant's Trial Exhibit 81, contained relevant mitigating evidence of his remorse and that he would have prevailed on appeal had Stickels alleged that this Court erroneously excluded this remorse evidence. *See* Application at 340-45.

5. Applicant never argued at trial that Defendant's Trial Exhibits 81, 82A, 83A, and 84A were admissible to show his remorse for the murders. RR 4: 11-24 (raising identical arguments for admission of Defendant's Trial Exhibits 81, 82A, 83A, and 84A at trial); *see Wells*, 611 S.W.3d at 422 (remorse argument forfeited on appeal as to Defendant's Trial Exhibit 81 because not raised at trial).

6. This Court excluded the portion of Defendant's Trial Exhibit 81 showing Applicant alone in the police interview room while not being interviewed and the entirety of Defendant's Trial Exhibits 82A, 83A, and 84A. RR 45: 20, 23-24.

7. Applicant did not offer the portion of Defendant's Trial Exhibit 81 that the Court held was admissible into evidence. RR 43: 25-26.

8. Based on his thorough review of the appellate record, Stickels thought that a point of error challenging the exclusion of Defendant's Trial Exhibit 81 had the best chance of obtaining a reversal of his death sentence from the Court of Criminal Appeals. *See* Stickels's Affidavit at 1.

9. Stickels opined that, if the Court of Criminal Appeals did not reverse Applicant's death sentence based on his arguments challenging the exclusion of Defendant's Trial Exhibit 81, it would not reverse based on the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A. *See* Stickels's Affidavit at 1.

10. The Court of Criminal Appeals on direct appeal agreed with the State that the exclusion of Defendant's Trial Exhibit 81 as relevant mitigation evidence was harmless beyond a reasonable doubt and could not have affected the jury's verdict because Applicant presented other evidence that was more probative of his mental state following the murders and because the mitigating value of the excluded portion of Defendant's Trial Exhibit 81 was slight in light of the entire record. *Wells*, 611 S.W.3d at 410.

11. The Court of Criminal Appeals concluded that the exclusion of Defendant's Trial Exhibit 81 was harmless:

> In light of the State's evidence, including the gravity of the offense in which Appellant killed Chanice, Annette, E.M., and Chanice's unborn child; Appellant's history of violence; and his potential for future violence; and Appellant's mitigation case and the evidence he presented, we are convinced, beyond a reasonable doubt, that the trial court's exclusion of the six-hour portion of the video did not contribute to the jury's verdict on the mitigation special issue and therefore Appellant's punishment.

Wells, 611 S.W.3d at 422.

12. The Court of Criminal Appeals' reasons for concluding that the exclusion of Defendant's Trial Exhibit 81 was harmless beyond a reasonable doubt would also have applied to determining whether the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A was harmless had their exclusion been raised on direct appeal. *See Wells*, 611 S.W.3d at 410-22.

13. During the guilt-innocence phase of Applicant's trial, Jolene Parsons testified that when Annette called her right around the time of the murders, she heard "bone-chilling" screaming from Applicant yelling at the top of his voice like he had "snapped." RR 33: 133-34, 143-44.

14. Applicant testified at the punishment phase to his version of events leading up to the murders, which included evidence of his mental state:

- While arguing with Chanice, Applicant became paranoid that the police were coming, he became anxious and could not calm down, and his "mind [was] just like racing, racing, racing." RR 45: 120.

- The next thing Applicant remembered was that his gun jammed, and he was standing by the front door telling himself "I know nothing just happened" and thinking "this is not real." RR 45: 121-22.

- Applicant felt like he was going crazy. RR 45: 122.

- Applicant did not remember shooting the victims and could not explain how the shootings happened. RR 45: 121, 123.

- Shortly after the murders, Applicant called Brooks and confessed to the killing the victims, RR 34: 96-97; RR 35: 16-17; said he did not know why he killed the victims, RR 34: 96; RR 35: 17; and "made comments about no one listens, no one loves him, no one cares." RR 34: 101.

- During his phone call with Brooks, Applicant "sounded distraught. He was talking fast, frantic, remorseful, [and] crying." RR 34: 108.

- Applicant drove around for an hour after the murders and contemplated fleeing and committing suicide. RR 34: 19; RR 35: 101-02; RR 45: 124.

- When Applicant entered the Forest Hills Police Department over an hour after the murders, he was saying things like, "Put me in jail; kill me." RR 34: 120-22.

- Sergeant Hebert testified that, while Applicant was at the Forest Hills Police Department, he "had a dazed kind of spacey look on him," he "almost went into a trance" a couple of times "like he went to another planet," and he had "nothing behind his eyes." RR 34: 120, 130.

15. The exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A did not prevent the jury from being made well aware of Applicant's mental state and demeanor before, during, and shortly after the murders.

16. Applicant's mitigation case was premised on a theory that he had a propensity for violence due to factors beyond his control, including his genetics, brain structure, family history of mental illness, and childhood environment. RR 38:

170-234; RR 39: 5-144; RR 40: 60-194; RR 43: 10-88; RR 44: 5-260; RR 45: 50-195; *see Wells*, 611 S.W.3d at 411.

17. Applicant presented extensive evidence through numerous mitigation witnesses, including family members, others who interacted with him, experts, and himself. RR 38: 170-234; RR 39: 5-144; RR 40: 60-194; RR 43: 10-88; RR 44: 5-260; RR 45: 50-195; *see Wells*, 611 S.W.3d at 411-18.

18. Applicant offered evidence that he has a genetic variation which may increase his risk for violence, that his brain structure and function are abnormal, that he has a family history of mental illness, that he was treated as a child by MHMR for ADHD, that he has a history of anger and aggression which began in early childhood, and that his early childhood was unstable and traumatic. RR 38: 170-234; RR 39: 5-144; RR 40: 60-194; RR 43: 10-88; RR 44: 5-260; RR 45: 50-195; *see Wells*, 611 S.W.3d at 411-18.

19. Applicant fully argued his mitigation case to the jury at the close of the punishment evidence. RR 46: 44-67; *see Wells*, 611 S.W.3d at 418.

20. Applicant presented the substance of his punishment-phase defense to the jury despite the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A. RR 38: 170-234; RR 39: 5-144; RR 40: 60-194; RR 43: 10-88; RR 44: 5-260; RR 45: 50-195; *see Wells*, 611 SW.3d at 423 (exclusion of Defendant's Trial Exhibit 81 did not prevent presentation of substance of Applicant's mitigation defense).

21. The State's punishment-phase evidence and jury arguments focused primarily on Applicant's future dangerousness based on the brutal facts surrounding the murders of Chanice, Annette, and E.M.; his history of violence against Brooks; his violent altercation with Theiss in the jail while awaiting trial; and the fact that, if he received a life sentence, he would be housed in general population with offenders of all levels and would have contact with unarmed correctional officers and civilian staffers and volunteers. RR 37: 8-172; RR 38: 33-159; RR 45: 199-230; RR 46: 24-43, 67-99; *see Wells*, 611 S.W.3d at 418-22.

22. On balance, and in light of the overwhelming evidence supporting the jury's answer to the mitigation special issue, the jury would not have answered the mitigation special issue "yes," instead of "no," had it watched Applicant's media interview as depicted in Defendant's Trial Exhibits 82A, 83A, and 84A.

Conclusions of Law

1. In a capital sentencing trial, "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." *Lockett v. Ohio*, 438 U.S. 586, 604 (1979).

2. Mitigating evidence is relevant if it has "'any tendency' to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." *Tennard*, 542 U.S. at 284 (quoting *McKoy v. North Carolina*, 494 U.S. 433, 440 (1990)).

3. Once the threshold test for relevance is met, the trial court should admit evidence that a juror could reasonably find warrants a sentence less than death and must allow for consideration of the mitigating evidence. *Tennard*, 542 U.S. at 285.

4. The jury may consider a defendant's mental condition as a mitigating factor in a death-penalty case. *Wells*, 611 S.W.3d at 409.

5. The fact that a capital defendant was unable to present his mitigation case in the exact form he desired does not amount to constitutional error if he was not prevented from presenting the substance of his defense to the jury. *Valle v. State*, 109 S.W.3d 500, 507 (Tex. Crim. App. 2003).

6. Any error in excluding Defendant's Trial Exhibits 82A, 83A, and 84A as relevant mitigating evidence would have been subject on direct appeal to a constitutional harmless-error analysis. TEX. R. APP. P. 44.2(a); *Wells*, 611 S.W.3d at 410; *Renteria v. State*, 206 S.W.3d 689, 698 & n.7 (Tex. Crim. App. 2006).

7. A constitutional error requires reversal on appeal unless the reviewing court determines, beyond a reasonable doubt, that the error did not contribute to the conviction or punishment. TEX. R. APP. P. 44.2(a).

8. The Court of Criminal Appeals on direct appeal would have been guided by the following considerations to determine whether the error, if any, in

excluding Defendant's Trial Exhibits 82A, 83A, and 84A as relevant mitigating evidence was harmless beyond a reasonable doubt:

> The analysis should not focus on the propriety of the outcome at trial. "[T]he question for the reviewing court is not whether the jury verdict was supported by the evidence." "Instead, the question is the likelihood that the constitutional error was actually a contributing factor in the jury's deliberations in arriving at that verdict." In other words, the reviewing court asks whether "the error adversely affected 'the integrity of the process leading to the conviction.'" To that end, the reviewing court "should calculate as much as possible the probable impact of the error on the jury in light of the existence of other evidence." Stated alternatively, "the reviewing court must ask itself whether there is a reasonable possibility that the . . . error moved the jury from a state of non-persuasion to one of persuasion on a particular issue." A ruling that an error is harmless is, in essence, an assertion that the error could not have affected the jury.
>
> In deciding whether an error of constitutional dimension contributed to the conviction or punishment, factors to consider include, but are not limited to, the nature of the error (e.g., erroneous admission or exclusion of evidence, objectionable jury argument, etc.), whether the error was emphasized by the State, the probable implications of the error, and the weight the jury would likely have assigned to the error in the course of its deliberations. Furthermore, the presence of overwhelming evidence supporting the jury's verdict can also be a factor in the harmless error calculation. Reviewing courts are to take into account any and every circumstance apparent in the record that logically informs the harmless error determination, and the entire record is to be evaluated in a neutral manner and not in the light most favorable to the prosecution.

Wells, 611 S.W.3d at 410-11 (citations omitted).

9. Applicant forfeited his habeas allegations that Defendant's Trial Exhibits 82A, 83A, and 84A were admissible as mitigating evidence of remorse because he failed to raise the argument at trial. *See* TEX. R. APP. P. 33.1(a)

(argument must be raised at trial to be preserved for appellate review); *see also Wells*, 611 S.W.3d at 422 (remorse argument not raised at trial as ground to admit Defendant's Trial Exhibit 81 forfeited on appeal).

10. Stickels's failure on direct appeal to raise a forfeited argument that Defendant's Trial Exhibits 82A, 83A, and 84A were admissible as mitigating evidence of remorse was not objectively unreasonable under prevailing professional norms. *See Ex parte Miller*, 330 S.W.3d at 623-24 (appellate counsel need not advance every argument, regardless of merit); *see also Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) ("reasonably competent counsel need not perform a useless or futile act"); *Mooney v. State*, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991) ("[c]ounsel is not required to engage in the filing of futile motions").

11. Stickels's strategic decision, based on his thorough review of the appellate record, to raise only those points of error that he believed had the greatest chance of success on direct appeal was not objectively unreasonable under prevailing professional norms. *See Ex parte Flores*, 387 S.W.3d at 639 (applicant must prove counsel's decision not to raise particular point of error was objectively unreasonable to show deficient performance).

12. There is no reasonable probability that Applicant would have succeeded on direct appeal had Stickels raised a forfeited argument that Defendant's Trial Exhibits 82A, 83A, and 84A were admissible as mitigating evidence of remorse. *See Ex parte Flores*, 387 S.W.3d at 639 (applicant must prove reasonable probability that, but for counsel's failure to raise particular point of error, he would have prevailed on appeal to show prejudice); *see also Wells*, 611 S.W.3d at 422 (remorse argument not raised at trial as ground to admit Defendant's Trial Exhibit 81 forfeited on appeal).

13. Evidence before the jury about events before, during, and after the murders provided better, more compelling evidence of Applicant's mental state shortly after the offense than Applicant's media interview the following day. *Cf. Wells*, 611 S.W.3d at 423 (stating with regard to exclusion of Defendant's Trial Exhibit 81: "Better evidence of Appellant's post-offense mental state came in through a variety of other sources, and the exclusion of the video segment [Defendant's Trial Exhibit 81] could not have affected the jury on the mitigation issue").

14. Considering the totality of the aggravating and mitigating evidence before the jury, the other admitted evidence of Applicant's mental state shortly after the murders, and the overwhelming evidence supporting the jury's answer to the mitigation special issue, the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A as mitigating evidence did not contribute to the jury's verdict on the mitigation special issue or to Applicant's punishment beyond a reasonable doubt. *See Wells*, 611 S.W.3d at 421-22 (exclusion of Defendant's Trial Exhibit 81 as relevant mitigating evidence of Applicant's mental state shortly after the murders did not contribute to jury's verdict on mitigation special issue).

15. The contents of Defendant's Trial Exhibits 82A, 83A, and 84A were not critical to Applicant's punishment-phase defense, and this Court's exclusion of the evidence did not deprive Applicant of a fundamentally fair trial. *See Wells*, 611 S.W.3d at 423 (Defendant's Trial Exhibit 81, offered as mitigating evidence to show Applicant's mental state shortly after murders, not critical to punishment-phase defense and exclusion did not deprive him of fundamentally fair trial) (citing *Green v. Georgia*, 422 U.S. 95, 97 (1979) (due process violated when excluded testimony highly relevant to critical punishment-phase issue); *Chambers*, 410 U.S. at 302-03 (defendant denied fair trial when trial court excluded critical evidence of, and witnesses to, another's confession and refused cross-examination of recanting witness)).

16. Any error in this Court's exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A as relevant mitigating evidence was harmless beyond a reasonable doubt. *See* TEX. R. APP. P. 44.2(a); *see also Wells*, 611 S.W.3d at 411-22 (exclusion of Defendant's Trial Exhibit 81 as mitigating evidence of mental state shortly after murders was harmless beyond a reasonable doubt).

17. Applicant fails to allege or establish a reasonable probability that he would have prevailed on direct appeal but for Stickels's failure to challenge the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A on the preserved ground that the exhibits contained mitigating evidence of his mental state shortly after the murders. *See Wells*, 611 S.W.3d at 421-22 (exclusion of Defendant's Trial Exhibit 81 as relevant mitigating evidence to show mental state shortly after murders did not contribute to jury's verdict on mitigation special issue).

18. Applicant has not demonstrated that Stickels overlooked a claim on direct appeal that had "indisputable merit under well-settled law and would

necessarily result in reversible error." *Ex parte Flores*, 387 S.W.3d at 639 (quoting *Ex parte Miller*, 330 S.W.3d at 624).

19. Applicant has not met his burden to show by a preponderance of the evidence that Stickels's failure to raise points of error on direct appeal challenging the exclusion of Defendant's Trial Exhibits 82A, 83A, and 84A was deficient and that the deficiency prejudiced him. *See Strickland*, 466 U.S. at 687; *Ex parte Chavez*, 560 S.W.3d at 203; *Ex parte Briggs*, 187 S.W.3d at 458, 466.

20. This Court recommends that Applicant's fifth claim for relief be denied.

B. Claim Seven

Applicant alleges that his appellate counsel was ineffective for failing to raise a point of error challenging the constitutionality of Texas' "10-2" rule on direct appeal. *See* Application at 360-68 (Claim Seven).

Findings of Fact

1. Special issue two of this Court's punishment charge instructed the jury regarding its consideration of mitigating evidence and that it "may not answer Special Issue Number 2 'Yes' unless ten or more jurors agree." CR 2: 751-52.

2. This Court's mitigation special issue fully complied with the requirements of Texas Code of Criminal Procedure Article 37.071, sections 2(e) and (f). *See* TEX. CODE CRIM. PROC. art. 37.071 §§ 2(e), 2(f).

3. This Court denied Applicant's pretrial motion to declare the "10-12 rule" unconstitutional. CR 1: 105-34.

4. This Court did not instruct the jury that a hold-out vote by one juror would result in a life sentence. CR 2: 751-52.

5. Stickels decided not to raise a point of error on direct appeal challenging this Court's denial of Applicant's pretrial motion to declare the "10-12 rule" unconstitutional because the Court of Criminal Appeals has ruled multiple times that the claim is meritless. *See* Stickels's Affidavit at 2.

6. Stickels "elected not to waste time and energy" on a "meritless and frivolous claim" challenging the constitutionality of the "10-12 rule." *See* Stickels's Affidavit at 2.

<u>Conclusions of Law</u>

1. The trial court, the State, the defendant, and the defendant's attorney may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on the mitigation special issue. TEX. CODE CRIM. PROC. art. 37.071, § 2(a)(1).

2. There is no constitutional violation in failing to inform jurors of the effect of their failure to agree on special issues. *Soliz v. State*, 432 S.W.3d 895, 904 (Tex. Crim. App. 2014); *Leza v. State*, 351 S.W.3d 344, 361-62 (Tex. Crim. App. 2011).

3. The Fifth Circuit Court of Appeals has held that the "10-12 rule" does not violate the Eighth or Fourteenth Amendments. *Reed v. Stephens*, 739 F.3d 753, 779 (5th Cir. 2014); *Sprouse v. Stephens*, 748 F.3d 609, 623 (5th Cir. 2014); *Druery v. Thaler*, 647 F.3d 535, 544 (5th Cir. 2011).

4. Stickels's decision not to raise a meritless challenge to the constitutionality of the "10-12 rule" was not objectively unreasonable under prevailing professional norms. *See Ex parte Miller*, 330 S.W.3d at 623-24 (appellate counsel need not advance *every* argument, regardless of merit); *see also Ex parte Chandler*, 182 S.W.3d at 356 ("reasonably competent counsel need not perform a useless or futile act"); *Mooney*, 817 S.W.2d at 698 ("[c]ounsel is not required to engage in the filing of futile motions").

5. There is no reasonable probability that, but for Stickels's decision not to challenge the constitutionality of the "10-12 rule," Applicant would have prevailed on direct appeal. *See Soliz*, 432 S.W.3d at 904; *Leza*, 351 S.W.3d at 361-62.

6. Applicant has not demonstrated that Stickels overlooked a claim on direct appeal that had "indisputable merit under well-settled law and would necessarily result in reversible error." *Ex parte Flores*, 387 S.W.3d at 639 (quoting *Ex parte Miller*, 330 S.W.3d at 624).

7. Applicant has not met his burden to show by a preponderance of the evidence that Stickels's failure to raise a point of error on direct appeal challenging the

constitutionality of the "10-12 rule" was deficient and that the deficiency prejudiced him. *See Strickland*, 466 U.S. at 687; *Ex parte Chavez*, 560 S.W.3d at 203; *Ex parte Briggs*, 187 S.W.3d at 458, 466.

8. This Court recommends that Applicant's seventh claim for relief be denied.

C. Claim Nine

Applicant alleges his appellate counsel was ineffective for failing to raise a preserved issue challenging the arbitrary administration of the death penalty in Texas on direct appeal. *See* Application at 398-411 (Claim Nine).

Findings of Fact

1. Applicant provides no evidence that he was singled out for selective prosecution. *See* Application at 398-411.

2. Applicant provides no evidence that the death-penalty statute was applied against him in an unconstitutionally arbitrary or capricious manner. *See* Application at 398-411.

3. The materials cited and relied on by Applicant do not support his arbitrary-administration claim. *See* Application at 398-411.

4. Stickels elected not to raise a point of error on direct appeal challenging the arbitrary administration of the death penalty because the Court of Criminal Appeals has ruled multiple times that such claims are meritless. *See* Stickels's Affidavit at 2.

5. Stickels "elected not to waste time and energy" on a "meritless and frivolous claim" that Texas' death-penalty scheme is arbitrary. *See* Stickels's Affidavit at 2.

Conclusions of Law

1. Texas' death-penalty scheme satisfies constitutional requirements. *See Sonnier v. Quarterman*, 476 F.3d 349, 366 (5th Cir. 2007).

2. The discretion afforded the State to seek the death penalty is not unconstitutional. *Ladd v. State*, 3 S.W.3d 547, 574 (Tex. Crim. App. 1999); *see Gregg v. Georgia*, 428 U.S. 153, 199 (1976).

3. Applicant's challenge to the constitutionality of Texas' death-penalty scheme based on the geographic and racial reasons he asserts would not have succeeded on appeal. *See Threadgill v. State*, 146 S.W.3d 654, 671-72 (Tex. Crim. App. 2001) (varying decision-making between counties regarding seeking death penalty does not violate right to equal protection); *Allen v. State*, 108 S.W.3d 281, 285-87 (Tex. Crim. App. 2003) (rejecting disparate-application claim based on county's financial constraints or ability to seek death penalty); *Brooks v. State*, 990 S.W.2d 278, 289 (Tex. Crim. App. 1999) (rejecting claim based on statistical studies that Texas death sentences are disproportionately imposed in racially discriminatory manner).

4. Stickels's decision not to raise an issue on appeal that lacked merit was not objectively unreasonable under prevailing professional norms. *See Ex parte Miller*, 330 S.W.3d at 623-24 (appellate counsel need not advance *every* argument, regardless of merit); *see also Ex parte Chandler*, 182 S.W.3d at 356 ("reasonably competent counsel need not perform a useless or futile act"); *Mooney*, 817 S.W.2d at 698 ("[c]ounsel is not required to engage in the filing of futile motions").

5. There is no reasonable probability that, but for Stickels's decision not to raise a point of error claiming arbitrary administration of the death penalty, Applicant would have prevailed on appeal.

6. Applicant has not demonstrated that Stickels overlooked a claim on direct appeal that had "indisputable merit under well-settled law and would necessarily result in reversible error." *Ex parte Flores*, 387 S.W.3d at 639 (quoting *Ex parte Miller*, 330 S.W.3d at 624).

7. Applicant has not met his burden to show by a preponderance of the evidence that Stickels's failure to raise a point of error on direct appeal alleging that Texas' death-penalty scheme is arbitrarily administered was deficient and that the deficiency prejudiced him. *See Strickland*, 466 U.S. at 687; *Ex parte Chavez*, 560 S.W.3d at 203; *Ex parte Briggs*, 187 S.W.3d at 458, 466.

8. This Court recommends that Applicant's ninth claim for relief be denied.

V. CLAIM TWO

Applicant claims that the State's misconduct at the penalty phase violated his rights to due process and a constitutionally reliable sentencing determination pursuant to the Eighth Amendment. *See* Application at 278. Specifically, Applicant asserts that the State: (1) falsely painted him as remorseless; (2) presented false and misleading testimony related to prison security and housing classifications to exaggerate his opportunity to commit future acts of violence; and (3) presented a misleading picture of his jailhouse altercation with Dallas Theiss, another inmate, in which Applicant was allegedly the aggressor. *See* Application at 278.

<u>Findings of Fact</u>

1. Applicant alleges that the State falsely painted him as remorseless during the punishment phase of his trial. *See* Application at 278.

2. During the State's cross-examination of Applicant at the punishment phase of his trial, the State asked Applicant why he blamed his father for not being there for him despite the fact that he had a great stepfather. RR 45: 162. When Applicant responded that he was not blaming his father, the State replied, "That's the way you made it seem when you're up there crying, talking about your stepdad not showing up to a middle school game. . . . You know, you didn't cry a single time when you described shooting anybody." RR 45: 162. Applicant agreed with the prosecutor: "[Y]ou can say that." RR 45: 162.

3. The State argued in closing at the punishment phase that Applicant "never shed a tear, not a single tear unless you talked about his daughter. All right? He didn't shed a tear in describing what he saw when, if you use his words, [he] came to. He didn't shed a tear. He didn't shed a tear about talking – walking over Chanice, seeing what he did to [E.M.]." RR 46: 98.

4. The State's argument referenced Applicant's testimony before the jury and summarized Applicant's demeanor on the stand, as well as a portion of the State's cross-examination where Applicant agreed that, during his testimony, he did not cry a single time when he talked about shooting anyone. RR 45: 162; *see also Wells v. State*, 611 S.W.3d 396, 422 (Tex. Crim. App. 2020) ("The State's reference to Appellant's failure to 'shed a tear' appears to be a reminder to the jury of Appellant's in-court testimony.").

5. There is no evidence that the State intentionally fought to exclude Applicant's out-of-court statements during the punishment phase so that it could argue that Applicant was remorseless.

6. When Applicant sought to admit his out-of-court statements from his police interrogation and television interviews into evidence (Defendant's Trial Exhibits 81, 82A, 83A, and 84A), he argued that the evidence was mitigating and showed his mental state shortly after the murders; he did not characterize it as evidence of remorse. RR 45: 9-24; *Wells*, 611 S.W.3d at 422.

7. The State objected to the admission of the eight-hour video containing Applicant's police interviews (Defendant's Trial Exhibit 81) on the grounds that it was hearsay and that it was inadmissible under *Allridge v. State*, 762 S.W2d 146 (Tex. Crim. App. 1988). RR 45: 13-19.

8. The State objected to the admission of the television interviews (Defendant's Trial Exhibits 82A, 83A, and 84A) under *Allridge v. State* and under Texas Rules of Evidence 401, 402, and 403. RR 45: 22-24.

9. After hearing the State's objections and the parties' arguments, this Court excluded portions of the video of Applicant's police interrogation (Defendant's Trial Exhibit 81) and the videos of television interviews (Defendant's Trial Exhibits 82A, 83A, and 84A). RR 45: 20, 22-24.

10. The Court of Criminal Appeals held that it was harmless error for this Court to exclude a six-hour segment of the eight-hour video offered into evidence as Defendant's Trial Exhibit 81. *Wells*, 611 S.W.3d at 407, 410-23. The six-hour segment that this Court excluded depicted Applicant alone in an interview room in between the police interviews. *Id*. at 407.

11. The Court of Criminal Appeals noted, "Based upon the cold record before us, the State's [closing] argument was in reference to Appellant's testimony and

did not mislead the jury into believing that Appellant had never shed tears regarding the shootings at some other time, such as during the recorded interview with Barron." *Wells*, 611 S.W.3d at 423.

12. There is no evidence that the State attempted to undermine defense efforts to introduce evidence of Applicant's remorse through other witnesses.

13. Applicant presented evidence of Applicant's remorse through Brittany Minor, Forest Hills Sergeant Chris Hebert, and Pastor Hattie Johnson. *See* RR 34: 103-10; 35: 120-130; 44: 194-99,

14. Minor testified that Applicant called Brooks after the murders. RR 34: 88, 90-94. She heard Applicant talking to Brooks because he was on speakerphone. RR 34: 94, 108. During Applicant's cross-examination of Minor, she described his voice as "distraught" and further explained that Applicant was "talking fast, frantic, remorseful, crying." RR 34: 108. The State did not question Minor about her characterization of Applicant. RR 34: 111.

15. When asked about Applicant's demeanor when Applicant turned himself in at the Forest Hills Police Department, Sergeant Hebert described Applicant as somber and distraught, like "something heavy was on his conscience." RR 34: 112-13, 115-16, 120-21, 130-31. Sergeant Herbert explained that "there was a couple of times where he almost went into a trance," "like he went to another planet," and that he blurted out "[p]ut me in jail; kill me." RR 34: 120, 130. The State did not question Sergeant Hebert about his characterization of Applicant. RR 34: 132. The jury also had the opportunity to view the video of Applicant walking into the police department. RR 34: 116-18.

16. The State cross-examined Johnson about her characterization of Applicant's remorse in that the State asked whether "[p]eople can be remorseful about the circumstances they find themselves in but not necessarily sorry or remorseful for what they did?" and whether Applicant was possibly just "sad about the fact that he was being locked up and didn't have the opportunity to leave and go do the things he normally would do?" RR 44: 199-200.

17. Johnson did not agree that people could be remorseful about their circumstances but not about their actions, and she never directly answered the State's other questions regarding whether Applicant showed remorse. RR 44: 199-201.

18. Applicant has failed to show that the State falsely painted him as remorseless during its presentation of punishment evidence or in its closing arguments.

19. Applicant alleges that the State presented false and misleading testimony related to prison security and housing classifications through Stephen Rogers in order to exaggerate his opportunity to commit future acts of violence. *See* Application at 291-95.

20. Rogers, a former TDCJ employee, testified during the punishment phase of trial about the custodial circumstances of offenders convicted of capital murder and serving life without parole. RR 38: 33-99.

21. Applicant presents this Court with an unsworn declaration from Frank AuBuchon, another former TDCJ employee, who claims to have found "significant errors" in Rogers's testimony such that the errors "falsely inflate and exaggerate the level of risk associated with housing a person who is sentenced to life without parole (LWOP) for capital murder in TDCJ." Application Exhibit 6 at ¶ 6.

22. AuBuchon identifies the "errors" that he found in Rogers's testimony in paragraphs seven through thirteen of his declaration. *See* Application Exhibit 6 at ¶¶ 7-13.

23. The "errors" that AuBuchon identifies in his declaration mischaracterize Rogers's testimony.

24. In paragraph seven of his declaration, AuBuchon states that offenders serving a LWOP sentence "*can* live and work in general population without posing an undue risk of harm to others." Application Exhibit 6 at ¶ 7 (emphasis added). AuBuchon criticizes Rogers's testimony and claims that it was misleading because it suggested that there was no valid reason for placing offenders serving a LWOP sentence in contact with other people and that it was not reflective of Rogers's knowledge or experience. Application Exhibit 6 at ¶ 7; RR 38: 68. AuBuchon states that "[t]he training Mr. Rogers received provides that neither an offender's offense record nor sentence length alone would be indicative of what their institutional behavior would be." Application Exhibit 6 at ¶ 7.

25. Rogers never testified that an offender serving a LWOP sentence could not live and work in the general population without posing an undue risk of harm to others.

26. Rogers testified that the prison system does not classify people based on the crime they committed but that, instead, offenders are classified based on how they behave once they are in prison. RR 38: 42, 65-66, 69. Rogers explained: "Well, the way the prison system classifies offenders, it's not based on what a guy did. When he comes into the prison system, it's – most of the time it's a clean slate per se." RR 38: 69.

27. Rogers's testimony regarding classification of inmates is reflective of what AuBuchon claims is TDCJ policy.

28. In paragraph eight of his declaration, AuBuchon states that "[t]he prosecutor creates a misleading impression with the jury that it is somehow dangerous to house offenders serving sentences for both aggravated and non-aggravated crimes together." Application Exhibit 6 at ¶ 8.

29. The State did not ask whether, nor did Rogers testify that, it was *dangerous* to house offenders who committed aggravated crimes with offenders who committed non-aggravated crimes.

30. The State's questioning of Rogers established that, generally, offenders serving sentences for both aggravated and non-aggravated crimes could be housed together, that offenders serving a LWOP sentence could be housed with offenders who were serving a lesser sentence, and that offenders classified at the G3 level could be housed with offenders classified at the G2 level. RR 38: 43-50. AuBuchon does not claim that this representation of housing assignments was false.

31. In paragraph nine of his declaration, AuBuchon claims Rogers's testimony that "if he is sentenced to life without parole, he's going to be a general population offender" is also misleading because, while it is likely that an offender sentenced to LWOP will be classified as a general population offender, determining whether an offender requires the more restrictive level of administrative segregation involves the consideration of numerous factors. Application Exhibit 6 at ¶ 9.

32. Rogers's explanation of the general classification process for someone sentenced to LWOP was as follows:

> If he's sentenced to life without parole, he's going to be a general-population offender. Information gathering will occur. Everything about his criminal record, his medical history, his psych history, his educational and social background, all that information will be gathered. That's usually done at the Byrd Unit, which it -- formerly called the diagnostic unit, as well as the Goree Unit.
>
> Once all the information's gathered, all the interviews have been done for the offender, . . . his name will come out on a docket for a state classification committee member to review. At that point, they say -- state committee member will review the offender's record and then make a decision as to where to assign that offender within those 111 facilities.
>
> * * *
>
> Those [general population] levels start out at G1. The G stands for general. It goes from G1, G2, G3, G4, G5. The best of the best, the cream of the crop behavior-wise, it would be a G1 offender. The worst of the worse in population will be a G5 and everyone else in between.
>
> * * *
>
> There's several other specific custodies, but administrative segregation is . . . 23 hours a day and seven days a week a guy's confined to a cell.
>
> RR 38: 40-41.

33. Rogers explained why a person convicted of capital murder would not automatically be sent to administrative segregation:

> Because administrative segregation, the way you can look at it is it's prison within prison. If you're – if you're a well-behaved offender in the regular general population, you stay there if you

> don't have any kind of discipline written up on you by the correctional staff.
>
> However, if you commit a serious offense within that population, then those individuals will be placed in administrative segregation, and they're in a cell all the time.
>
> RR 38: 41-42.

34. The overall tenor of Rogers's testimony was that numerous factors are considered when classifying someone to a specific general population level or to administrative segregation.

35. Rogers's testimony reflects exactly what AuBuchon claims it should: "determining whether an offender requires the more restrictive level of administrative segregation involves the consideration of numerous factors." Application Exhibit 6 at ¶ 9.

36. AuBuchon declares in paragraphs ten and eleven of his declaration that Rogers misstated TDCJ regulations regarding the age requirements for housing offenders together, specifically that Rogers testified that the age of the offender was a factor that the unit looked at, "but that's not a firm rule or policy for a – for a prison unit," and that seventeen-year-old offenders would be routinely housed with older offenders. Application Exhibit 6 at ¶¶ 10, 11; RR 38: 48.

37. AuBuchon declares that TDCJ does have a policy regarding housing persons together in a two-person cell and that the policy provides guidelines for age as well as several other factors. *See* Application Exhibit 6 at ¶ 10.

38. AuBuchon declares that seventeen-year-old offenders cannot be housed with older offenders because "federal law and agency policy require that all offenders under the age of 18 must be kept separate, with sight and sound separation, from adult offenders" and that TDCJ has the Youthful Offender Program to comply with such requirements. Application Exhibit 6 at ¶ 11.

39. TDCJ Administrative Directive 04.17 (rev. 3), the policy to which AuBuchon cites, does not set out an age that an offender must be in order to be housed with a G3 offender. *See* State's Response Exhibit 2.

40. TDCJ Administrative Directive 04.17 (rev. 3) provides a list of criteria that should be considered when making housing decisions, and age is one of those factors. *See* State's Response Exhibit 2 at 5-6. The main focus in placing offenders is "that the safety, security and treatment needs of all offenders are being met, and the safety and security of the public, staff and the unit/facility are maintained." *See* State's Response Exhibit 2 at 5.

41. Rogers testified that the units "look at pairing ages and height and weight together for safety reasons" but that there was not a specific age requirement for an offender to be a cellmate of a G3 offender. RR 38: 48.

42. Rogers testified that it was the overall take of the offender that helped guide his assignment, not one specific thing. RR 38: 40-41, 74-75, 78-79, 98-99.

43. Rogers testified that an individual did, however, have to be at least seventeen years old before he or she could be housed in an adult unit. RR 38: 37-38.

44. Rogers did not testify that seventeen-year-old offenders would be housed with older offenders on a routine basis; instead, he testified that it was "conceivably possible" for a seventeen-year-old offender to be placed within the same *pod* as a G3 offender; he did not specifically testify that they could be placed within the same cell. RR 38: 38 (emphasis added).

45. Rogers testified that there was a youthful offender program at TDCJ and that it handled younger ages, but he was not asked by the State or defense to expound on the parameters of the program. RR 38: 38.

46. Rogers's testimony regarding the age requirements for housing offenders together was consistent with TDCJ Administrative Directive 04.17 (rev. 3).

47. In paragraph twelve of his declaration, AuBuchon states that the prosecutor gave a "false impression that correctional officers dealing with a prisoner sentenced to life without parole would be unaware of the prisoner's offense of capital murder" because Rogers testified that the guards and correctional officers would not know that the offender whom they were dealing had been convicted of capital murder. Application Exhibit 6 at ¶ 12.

48. AuBuchon claims that Rogers's testimony was incorrect because TDCJ does have a policy that provides for designating certain offenders, including those

who are serving a sentence for LWOP, and making staff aware of such designations. Application Exhibit 6 at ¶ 12.

49. TDCJ Administrative Directive 04.11 provides that LWOP offenders are designated as “LWOP” on a designation card within the offender’s travel card and that TDCJ policy is to inform staff of “LWOP” designated offenders, as well as other designated offenders such as “Escape Precaution,” “Hostage Precaution,” and “Staff Assault Precaution.” *See* State’s Response Exhibit 3 at 1-2, 5-7, 10-11 (TDCJ Administrative Directive 04.11: Security Precaution Designators).

50. Rogers did not testify that the staff would be unaware that an offender was serving a LWOP sentence.

51. Rogers testified that general correctional officers, support staff, and vendors would not know that an offender had committed capital murder or, more specifically, that the offender had killed more than two people; “[o]nly certain officials on the unit would be privy to that information,” such as “classification staff, the warden, anybody with the need to know.” RR 38: 66-67, 77.

52. Capital murder is not the only offense a person who is sentenced to LWOP could have committed. *See* TEX. PENAL CODE §12.42(4) (providing for mandatory sentence of LWOP on conviction of an offense under Section 20A.03, or of a sexually violent offense, when previously convicted of such offense).

53. Rogers’s testimony that staff would generally not know that someone committed capital murder by killing more than two people was not false.

54. AuBuchon declares in paragraph thirteen that Rogers gave a false impression of the current staffing levels at TDCJ. *See* Application Exhibit 6 at ¶ 13.

55. AuBuchon cites to “Board Policy BP 11.50”; however, according to TDCJ personnel, TDCJ does not have a “Board Policy 11.50.” *See* State’s Response Exhibit 4.

56. AuBuchon declares that one can look to TDCJ’s website to determine the ratio of offenders to employees by looking at the maximum number of offenders that can be assigned to a facility compared to the number of authorized

security personnel. *See* Application Exhibit 6 at ¶ 13. AuBuchon gives an example of 5.85 offenders per employee. *See* Application Exhibit 6 at ¶ 13.

57. AuBuchon's example does not consider that the number of employees listed are spread over two to three shifts making the ratio higher.

58. Rogers testified that the required ratio was "one to six, but how that's apportioned out in a 24-hour period is subject to speculation and lots of argumentation." RR 38: 50-51.

59. Rogers's ratio of six to one was only .15 offenders more than AuBuchon's example. RR 38: 51.

60. Rogers explained that he had worked as a correctional officer and had "850 prisoners locked up with two officers in a *controlled area*, myself and another officer working runs and supervising offenders going to chow and places like that." RR 38: 51 (emphasis added).

61. AuBuchon declares that this account by Rogers would have taken place over thirty years ago, when Rogers was a new correctional officer, and is in "no way relevant to current TDCJ staffing patterns and polices." Application Exhibit 6 at ¶ 13. AuBuchon did not declare that Rogers's account was false.

62. AuBuchon's declarations mischaracterize Rogers's testimony and present individual lines of Rogers's testimony out of context.

63. Rogers did not represent that his personal experience when he was a new correctional officer was reflective of how TDCJ was currently operating. Rogers's testimony was merely an example of what he experienced with staffing when he was a correctional officer thirty years prior and how staff could be spread over several shifts making the ratio appear lower than it was.

64. Rogers's testimony regarding TDCJ's current staffing levels was not false or misleading.

65. Applicant also claims that the State presented false and misleading testimony that Applicant was a violent aggressor in jail through the testimony of Theiss, who testified about an incident in which Applicant attacked him. *See* Application at 296.

66. Applicant alleges that Theiss had a strong motivation to testify against Applicant because Theiss was a methamphetamine addict who was experiencing drug withdrawals at the time of his testimony and did not want to go back to jail where he would not have access to methamphetamine and because Theiss was under the false impression that he had to cooperate with the State in his own criminal case. *See* Application at 296, 298-300.

67. Applicant claims that "[t]he State knew or should have known that Mr. Theiss's ability to accurately testify and recall information was seriously diminished by his long-term abuse of methamphetamine." Application at 300.

68. Applicant claims that the State presented a false narrative of the incident by eliciting testimony that Theiss did not like to fight when Theiss had a history of violence that was not presented to the jury. Application at 297-98.

69. Theiss declares that he frequently picked fights and was repeatedly expelled from school for attacking students and teachers. *See* Application Exhibit 18 at 7, ¶¶ 24-25.

70. At the punishment phase of Applicant's trial, Theiss testified to the following:

- On his way to the dayroom on April 4, 2015, he stepped over Applicant's legs, which were outstretched from one table to another. RR 38: 116-20.

- Applicant told him that he needed to say "excuse me" or apologize, and he refused. RR 38: 118, 121.

- Later in the day, on April 4, 2015, another inmate told him that he needed to go to the inmate's cell to talk to Applicant. RR 38: 122.

- He went to the cell and, after waiting in the cell for a few minutes, Applicant came around the corner and started swinging. RR 38: 122-24.

- Applicant "busted [his] eye open," and his "jaw was messed up bad." RR 38: 124.

- He was later taken to John Peter Smith Hospital to receive treatment for his injuries. RR 38: 127, 132.

71. Photographs of Theiss's injuries shown to the jury corroborated his testimony regarding his injuries. *See* RR 38: 27-130; State's Trial Exhibits 189-192.

72. Applicant has not shown that Theiss's testimony that Applicant summoned him to a cell and attacked him was false. *See* RR 38: 122-24.

73. Theiss does not assert in his declaration that Applicant did not attack him in the Tarrant County Jail. *See* Application Exhibit 18.

74. Theiss's alleged withdrawal from methamphetamine at the time of his testimony does not make his testimony false or make his testimony incredible.

75. According to Theiss, the incident with Applicant started because Theiss stepped over Applicant's feet when, even though it would have been out of his way, he could have gone around Applicant. RR 38: 118-19, 141; Application Exhibit 18 at ¶ 23.

76. Theiss's testimony that he did not "like getting into altercations" and did not "like to fight" is immaterial to whether Applicant caused Theiss's injuries on April 4, 2015.

77. Theiss's own account of the incident at trial did not depict him as an innocent bystander. RR 38: 126.

78. Theiss does not now claim that he attacked Applicant first or started the physical altercation. *See* Application Exhibit 18.

79. Theiss's trial testimony about the injuries that he suffered on April 4, 2015, at the hands of Applicant was not false or misleading.

<u>Conclusions of Law</u>

1. An applicant's due-process rights under the Fifth and Fourteenth Amendments to the United States Constitution are violated when the State uses material, false testimony to obtain a conviction, regardless of whether it does so knowingly or unknowingly. *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015); *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex.

Crim. App. 2014); *Ex parte Chavez*, 371 S.W.3d 200, 207-08 (Tex. Crim. App. 2012); *Ex parte Chabot*, 300 S.W.3d 768, 770-72 (Tex. Crim. App. 2009); *see* U.S. CONST. amends. V, XIV.

2. In order to be entitled to relief, the applicant must establish, by a preponderance of the evidence, that the testimony is indeed false and material. *Ex parte Weinstein*, 421 S.W.3d at 664-65.

3. The proper inquiry in a false-testimony, due-process claim is whether the testimony, taken as a whole, gives the factfinder a false impression. *Ex parte Weinstein*, 421 S.W.3d at 666; *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011).

4. Testimony need not be perjured to constitute a false-testimony, due-process violation. *Ex parte Weinstein*, 421 S.W.3d at 665-66; *Ex parte Ghahremani*, 332 S.W.3d at 477.

5. False testimony is material only if there is a reasonable likelihood that the testimony affected the judgment of the factfinder. *Ex parte Weinstein*, 421 S.W.3d at 665; *Ex parte Ghahremani*, 332 S.W.3d at 478.

6. Materiality is reviewed in light of the entire record. *Ex parte Chavez*, 371 S.W.3d at 209-10.

7. The State did not leave a false impression during its closing arguments to the jury about what the evidence showed regarding whether Applicant was remorseful at trial for his actions. *See Wells*, 611 S.W.3d at 422-23.

8. Applicant has failed to show by a preponderance of the evidence that the State falsely painted Applicant as remorseless. *See Wells*, 611 S.W.3d at 422-23.

9. AuBuchon's criticisms of Rogers's testimony are without merit and do not support Applicant's claim that the State presented false and misleading testimony through Rogers regarding prison security and housing classifications.

10. Applicant has failed to show by a preponderance of the evidence that the State presented material, false or misleading testimony through Rogers. *See Ex parte Weinstein*, 421 S.W.3d at 664-65.

11. Theiss's testimony that he did not like to fight, when considered with his account of the April 4, 2015 fight in which he admitted that he stepped over Applicant's legs when he could have gone around and then did not apologize for his conduct, did not leave the jury with a false impression of Theiss's character.

12. Given the photographs that corroborate Theiss's injuries and the fact that Theiss has not recanted his trial testimony that Applicant assaulted him, there is no reasonable likelihood that a false impression, if any, left by Theiss's testimony that he did not like to fight affected Applicant's sentence.

13. Applicant has not demonstrated that his right to due process under the Fifth and Fourteenth Amendments was violated by the presentation of material, false or misleading testimony. *See Ex parte Weinstein*, 421 S.W.3d at 664-65.

14. Applicant has not demonstrated that his right to an accurate sentencing proceeding under the Eighth Amendment was violated. *See Ex parte Maldonado*, 688 S.W.2d at 116 (in post-conviction collateral attack, applicant has burden to allege and prove facts which, if true, entitle him to relief).

15. This Court recommends that Applicant's second claim for relief be denied.

VI. CLAIM THREE

Applicant alleges that he was convicted and sentenced to death by jurors who engaged in misconduct by failing to engage in the deliberative process because they took a life-or-death vote instead of answering the special issues during sentencing deliberations. *See* Application at 319-25.

Findings of Fact

1. Applicant supports his third claim for relief with unsworn declarations from jury foreman Hay and juror Sadler, which the Court has stricken pursuant to TEX. R. EVID. 606(b). *See* Application at 321-24; Application Exhibits 33, 34.

2. This Court read the entire punishment charge to the jury before deliberations began, RR 46: 17-25; hence, the jurors were aware of the requirements of the special issues when they deliberated.

3. Even if this Court could consider Hay's and Sadler's stricken declarations, they provide no indication that the jurors ignored the special issues in submitting paper votes, and Applicant offers no other evidence to support his contention. *See* Application Exhibits 33, 34; Application at 319-25.

4. Even if this Court could consider Hay's and Sadler's stricken declarations, they provide no indication that the jury did not discuss the evidence and issues between the first and last paper vote or in answering the special issues, and Applicant offers no other evidence to support his contention. *See* Application Exhibits 33, 34; Application at 319-25.

Conclusions of Law

1. The Court is barred from considering Hay's and Sadler's stricken declarations detailing their mental and deliberative processes in reaching a punishment verdict at Applicant's trial. *See* TEX. R. EVID. 606(b); *see also Ex parte Garza*, 620 S.W.3d at 827 (refusing based on Rule 606(b) to consider jurors' statements of alleged misconduct during deliberations in resolving habeas claims); *Ex parte Para*, 420 S.W.3d at 827 (refusing based on Rule 606(b) to consider juror affidavit); *Bjorgaard*, 220 S.W.3d at 558 (Rule 606(b) barred trial court from considering contents of juror affidavit describing jurors' collective thought process).

2. Applicant has failed to meet his burden to allege and prove facts which, if true, entitle him to relief on his juror-misconduct claim. *See Ex parte Maldonado*, 688 S.W.2d at 116 (in post-conviction collateral attack, applicant has burden to allege and prove facts which, if true, entitle him to relief).

3. This Court recommends that Applicant's third claim for relief be denied.

VII. CLAIM EIGHT

Applicant alleges that he is ineligible for the death penalty due to his serious mental illness. *See* Application at 369-98.

Findings of Fact

1. Applicant claims that the evolving standards of decency inherent in the Eighth Amendment prohibit the execution of individuals with serious mental illness. *See* Application at 369. Applicant compares the qualities of mental illness with those qualities found in individuals with an intellectual disability and argues that, because the death penalty is unconstitutional for individuals with an intellectual disability, the death penalty must also be unconstitutional for individuals with severe mental illness. *See* Application at 373-74.

2. Applicant also argues that he should be exempt from the death penalty based on his serious mental illness because there is a growing national and international consensus against executing the mentally ill. *See* Application at 382-91.

3. According to Dr. Sautter, who was retained by Applicant in these habeas proceedings, Applicant suffers from previously undiagnosed PTSD and major depressive disorder with psychotic symptoms (psychotic depression). *See* Application at 369-71; Application Exhibit 2 at 1-2, 7-10.

4. Dr. McGarrahan, who was retained by Applicant at trial, did not diagnose Applicant with PTSD, psychotic depression, or any other severe mental illness when she evaluated him as part of the trial defense team. RR:40 60-128.

5. "Dr. McGarrahan determined that [Applicant] had some problems with depression and anxiety, but those problems did not rise to the level of severe mental illness or a major depressive disorder." *Wells*, 611 S.W.3d at 413.

6. Dr. Price, the State's forensic psychologist and neuropsychologist at trial and in these habeas proceedings, does not concur with Dr. Sautter's diagnoses. *See* State's Response Exhibit 1 at 2, 14-26, 31-35.

7. In his affidavit, Dr. Price details at length the shortcomings of, and his disagreement with, Dr. Sautter's diagnoses of PTSD and psychotic depression. *See* State's Response Exhibit 1 at 14-30, 31-35.

8. Dr. Price does not agree that Applicant suffers from a serious mental disorder and instead opines that Applicant suffers from anti-social personality disorder with moderately severe signs of psychopathy. *See* State's Response Exhibit 1 at 24-25, 33-34.

9. Dr. Price further opines that Applicant suffers from Persistent Depressive Order, which can elevate to a Major Depressive Disorder during times of stress or loss, but disagrees that Applicant's depression is accompanied by psychotic symptoms. *See* State's Response Exhibit 1 at 31.

10. Dr. McGarrahan's trial testimony and Dr. Price's affidavit testimony are credible and supported by the record.

<u>Conclusions of Law</u>

1. In *Atkins v. Virginia*, the Supreme Court of the United States held that the execution of intellectually disabled offenders constitutes cruel and unusual punishment under the Eighth Amendment. 536 U.S. 304, 321 (2002).

2. In *Atkins*, the Court expressly limited its holding to the intellectually disabled, as reflected in the Court's statement that individuals who are not intellectually disabled "are unprotected by the exemption and will continue to face the threat of execution." 536 U.S. at 320.

3. *Atkins*' prohibition was based on a national consensus developed in state legislatures that death is an excessive punishment for those who are intellectually disabled. *Atkins*, 536 U.S. at 311-16.

4. The Court of Criminal Appeals of Texas has rejected the argument that the rule or rationale of *Atkins* extends to exempt persons with mental illness from imposition of the death penalty. *Devoe v. State*, 354 S.W.3d 457, 473 (Tex. Crim. App. 2011) ("there is no authority from the Supreme Court or this Court suggesting that mental illness that is a 'contributing factor' in the defendant's actions or that caused some impairment or some diminished capacity, is enough to render one exempt from execution under the Eighth Amendment"); *Mays v. State*, 318 S.W.3d 368, 379 (Tex. Crim. App. 2010).

5. Other courts addressing the issue have refused to extend the *Atkins* ruling to those with mental illnesses or disorders. *See, e.g.*, *Franklin v. Bradshaw*, 695 F.3d 439, 455 (6th Cir. 2012); *In re Neville*, 440 F.3d 220, 221 (5th Cir. 2006); *People v. Mendoza*, 365 P.3d 297, 336-339 (Cal. 2016); *Long v. State*, 271 So.3d 938, 947 (Fla. 2019); *Lewis v. State*, 620 S.E.2d 778, 786 (Ga. 2005); *State v. Dunlap*, 313 P.3d 1, 36 (Idaho 2013); *Matheney v. State*, 833 N.E.2d 454, 458 (Ind. 2005); *Dunlap v. Commonwealth*, 435 S.W3d 537, 615-16 (Ky. 2013), abrogated on other grounds by *Abbott, Inc. v. Guirguis*, --- S.W.3d ---

, No. 2018-SC-0577-DG, 2021 WL 728860 (Ky. Feb. 18, 2021); *State v. Johnson*, 207 S.W.3d 24, 51 (Mo. 2006); *State v. Hancock*, 840 N.E.2d 1032, 1059-60 (Ohio 2006); *Malone v. State*, 293 P.3d 198, 216 (Okla. Crim. App. 2013).

6. The Texas Legislature has not passed a bill that exempts an individual with a serious mental illness from being executed.

7. Applicant has not shown by a preponderance of the evidence that he suffers from a serious mental illness. *See See Ex parte Maldonado*, 688 S.W.2d at 116 (in post-conviction collateral attack, applicant has burden to allege and prove facts which, if true, entitle him to relief).

8. Even if Applicant does suffer from a serious mental illness, he is not categorically exempt from the death penalty. *See Atkins*, 536 U.S. at 311-16.

9. Applicant has not shown that his death sentence violates the Eighth Amendment. *See Ex parte Maldonado*, 688 S.W.2d at 116 (in post-conviction collateral attack, applicant has burden to allege and prove facts which, if true, entitle him to relief).

10. Evidence that there is a growing national or international consensus against executing the mentally ill does not provide authority for this Court to find that Applicant's death sentence violates the Eighth Amendment.

11. This Court recommends that Applicant's eighth claim for relief be denied.

WHEREFORE, PREMISES CONSIDERED, the State prays that the Court adopt its proposed memorandum, findings of fact, and conclusions of law and recommend that each of Applicant's claims for relief be denied.

Respectfully submitted,

SHAREN WILSON
Criminal District Attorney
Tarrant County, Texas

JOSEPH W. SPENCE
Chief, Post-Conviction

s/ Victoria A. Ford Oblon
VICTORIA A. FORD OBLON
Assistant Criminal District Attorney
State Bar Number 24101763

/s/ Jeanette E. Walston Strange
JEANETTE E. WALSTON STRANGE
Assistant Criminal District Attorney
State Bar Number 24079407

Tim Curry Criminal Justice Center
401 W. Belknap
Fort Worth, Texas 76196-0201
(817) 884-1687
ccaappellatealerts@tarrantcountytx.gov

CERTIFICATE OF SERVICE

On June 30, 2021, the State's Proposed Memorandum, Findings of Fact, and Conclusions of Law were served on the following counsel for Applicant:

Ben Wolff, Benjamin.Wolff@ocfw.texas.gov

Ashley R. Steele, Ashley.Steele@ocfw.texas.gov

Michelle E. Ward, Michelle.Ward@ocfw.texas.gov

s/ Victoria A. Ford Oblon
VICTORIA A. FORD OBLON

No. C-432-W011509-1405275-A

EX PARTE	§	IN THE 432nd DISTRICT COURT
	§	
AMOS JOSEPH WELLS III	§	OF TARRANT COUNTY, TEXAS

ORDER

Having carefully reviewed the State's Proposed Memorandum, Findings of Fact, and Conclusions of Law filed on June 30, 2021, and having further determined that the proposed findings are supported by the record and that the conclusions are legally sound, the Court hereby orders, adjudges, and decrees that these proposed findings of fact and conclusions of law are adopted as the Court's own. The Court further orders and directs the Clerk of this Court to:

1. File these findings and transmit them along with the Writ Transcript to the Clerk of the Court of Criminal Appeals pursuant to Texas Code of Criminal Procedure Article 11.071, section 8(d).

2. Furnish a copy of this Order to Applicant's counsel, Ben Wolff, Benjamin.Wolff@ocfw.texas.gov; Ashley Steele, Ashley.Steele@ocfw.texas.gov; and Michelle E. Ward, Michelle.Ward@ocfw.texas.gov; and

3. Furnish a copy of this Order to the Post-Conviction Section of the Tarrant County Criminal District Attorney's Office.

SIGNED AND ENTERED this the ____ day of ___________, 2021.

____
JUDGE RUBEN GONZALEZ, JR.

Appendix E ("App.E."):

Texas Code of Criminal Procedure, Article 11.071

Vernon's Texas Statutes and Codes Annotated
Code of Criminal Procedure (Refs & Annos)
Title 1. Code of Criminal Procedure
Habeas Corpus
Chapter Eleven. Habeas Corpus (Refs & Annos)

Vernon's Ann.Texas C.C.P. Art. 11.071

Art. 11.071. Procedure in death penalty case

Effective: September 1, 2015
Currentness

Sec. 1. Application to Death Penalty Case

Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. Representation by Counsel

(a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section, the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., ch. 781, § 11.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code. [1]

Sec. 2A. State Reimbursement; County Obligation

(a) The state shall reimburse a county for compensation of counsel under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of $25,000.

Sec. 3. Investigation of Grounds for Application

(a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. Filing of Application

(a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b) constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. Untimely Application; Application Not Filed

(a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

WESTLAW © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Sec. 5. Subsequent Application

(a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. Issuance of Writ

(a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. Answer to Application

(a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. Findings of Fact Without Evidentiary Hearing

(a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Sec. 9. Hearing

(a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. Rules of Evidence

The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. Review by Court of Criminal Appeals

The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

Credits

Added by Acts 1995, 74th Leg., ch. 319, § 1, eff. Sept. 1, 1995. Amended by Acts 1997, 75th Leg., ch. 1336, §§ 1 to 5, eff. Sept. 1, 1997; Acts 1999, 76th Leg., ch. 803, §§ 1 to 10, eff. Sept. 1, 1999; Acts 2003, 78th Leg., ch. 315, §§ 1 to 3, eff. Sept. 1, 2003; Acts 2005, 79th Leg., ch. 787, § 13, eff. Sept. 1, 2005; Acts 2005, 79th Leg., ch. 965, § 5, eff. Sept. 1, 2005; Acts 2007, 80th Leg., ch. 593, § 3.06, eff. Sept. 1, 2007; Acts 2009, 81st Leg., ch. 781, §§ 2 to 5, eff. Sept. 1, 2009; Acts 2009, 81st Leg., ch. 781, § 11, eff. Jan. 1, 2010; Acts 2011, 82nd Leg., ch. 1139 (H.B. 1646), § 1, eff. Sept. 1, 2011; Acts 2013, 83rd Leg., ch. 78 (S.B. 354), § 2, eff. May 18, 2013; Acts 2015, 84th Leg., ch. 1215 (S.B. 1743), §§ 1 to 5, eff. Sept. 1, 2015.

Notes of Decisions (200)

O'CONNOR'S CROSS REFERENCES

See also CCP art. 46.05.

O'CONNOR'S ANNOTATIONS

Ex parte Barbee, 616 S.W.3d 836, 839 (Tex.Crim.App.2021). "The likelihood of a claim's success is irrelevant to determining whether its legal basis was previously unavailable [under art. 11.071, §5(d)]. But a legal basis was previously unavailable if subsequent case law makes it easier to establish the claim and renders inapplicable factors that had previously been weighed in evaluating its merits."

Ex parte Medina, 361 S.W.3d 633, 640 (Tex.Crim.App.2011). See annotation under CCP art. 11.07, *Generally*.

Ex parte Reynoso, 257 S.W.3d 715, 722 (Tex.Crim.App.2008). "[W]e hold that [Gov't Code] §311.014 and [TRAP] 4.1 do not apply to the calculation of an original due date under [CCP] art. 11.071 §4(b) when an extension has been granted under that provision."

Ex parte Alba, 256 S.W.3d 682, 685 (Tex.Crim.App.2008). "A writ application filed pursuant to Art. 11.071 must seek 'relief from a judgment imposing a penalty of death.' A death-penalty writ application that does not challenge the validity of the underlying judgment and which, even if meritorious, would not result in immediate relief from a capital-murder conviction or death sentence, is not a proper application for purposes of Art. 11.071. *At 686:* Habeas corpus serves to remedy existing constitutional violations; it is not for claims that a statute may potentially be applied in a way that may possibly be determined to be unconstitutional in the future. We do not grant habeas corpus relief on an abstract proposition." *See also* ***Ex parte Kerr***, 64 S.W.3d 414, 419 (Tex.Crim.App.2002).

Ex parte Blue, 230 S.W.3d 151, 154 (Tex.Crim.App.2007). "We hold that, having afforded the applicant one opportunity to raise his ***Atkins*** claim in a post-conviction setting, the Texas Legislature may legitimately limit any second chance it may afford him to raise it again, notwithstanding the absolute nature of the prohibition against executing the mentally retarded. We conclude that through Art. 11.071, §5(a)(3), the Legislature has provided a mechanism whereby a subsequent habeas applicant may proceed with an ***Atkins*** claim if he is able to demonstrate to this Court that there is evidence that could reasonably show, to a level of confidence by clear and convincing evidence, that no rational finder of fact would fail to find he is mentally retarded."

Ex parte Hood, 211 S.W.3d 767, 774 (Tex.Crim.App.2007), *modified on other grounds*, 304 S.W.3d 397 (Tex.Crim.App.2010). "[T]he [unavailability] exception requires that the claim in question be unavailable not only for the first habeas application but *also* for any 'previously considered application.' *At 775:* Thus, to satisfy the exception, applicant's claim must have been unavailable as to *both* of his previous applications. [¶] [T]he structure of the statutory provision requires that availability be

negated for all the types of courts listed. For a legal basis to be unavailable, then, it must be true that no decision from any of these types of courts makes the claim available (either by explicit recognition or reasonable formulation). Stated another way, if the legal basis for the claim was recognized by or could have been reasonably formulated from a Supreme Court decision, any federal court of appeals decision, or any state appellate court decision, then the applicant has failed to meet the unavailability exception. It is not enough, for example, for an applicant to show that the legal basis could not have been derived from any Texas state court decision if there existed a federal appellate decision from which the legal basis could be derived. [¶] Another point that deserves emphasis is that lack of recognition is not enough to render a legal basis unavailable. If the legal basis *could have been reasonably formulated* from a decision issued by a requisite court, then the exception is not met."

Ex parte Medellín, 223 S.W.3d 315, 321 (Tex.Crim.App.2006), *aff'd*, 552 U.S. 491 (2008). Applicant "filed this subsequent application, alleging that the International Court of Justice ***Avena*** decision and the President's memorandum directing state courts to give effect to ***Avena***, require this Court to reconsider his Art. 36 Vienna Convention claim because they (1) constitute binding federal law that preempt [CCP] §5, Art. 11.071 and (2) were previously unavailable factual and legal bases under §5(a)(1). We hold that ***Avena*** and the President's memorandum do not preempt §5 and do not qualify as previously unavailable factual or legal bases."

Ex parte Briseno, 135 S.W.3d 1, 11 (Tex.Crim.App.2004), *overruled on other grounds*, ***Moore v. Texas***, ___ U.S. ___, 137 S.Ct. 1039 (2017). "[W]e hold that, when an inmate sentenced to death files a habeas corpus application raising a cognizable ***Atkins*** claim, the factual merit of that claim should be determined by the judge of the convicting court. His findings of fact and conclusions of law shall be reviewed by this Court in accordance with art. 11.071, § 11." Held: Applicant has burden of proof to establish intellectual disability by a preponderance of evidence. *See also* ***Petetan v. State***, 622 S.W.3d 321, 332-33 (Tex.Crim.App.2021) (criteria for establishing person is intellectually disabled are (1) deficits in intellectual functions, (2) deficits in adaptive functioning that are directly related to intellectual impairments, and (3) onset of intellectual and adaptive deficits during childhood or adolescence); ***Ex parte Hearn***, 310 S.W.3d 424, 426 (Tex.Crim.App.2010) (alternative assessment measures cannot be substituted for full-scale IQ scores in measuring intellectual functioning).

Ex parte Graves, 70 S.W.3d 103, 105 (Tex.Crim.App.2002). "Because we find that competency of prior habeas counsel is not a cognizable issue on habeas corpus review, applicant's allegation cannot fulfill the requirements of art. 11.071 §5 for a subsequent writ. Therefore, we dismiss applicant's writ under art. 11.071 §5(c) as an abuse of the writ."

Ex parte Mines, 26 S.W.3d 910, 915 (Tex.Crim.App.2000). There is "no justification in inferring a statutory requirement that the applicant be mentally competent for habeas corpus proceedings in the way that a defendant must be mentally competent for trial."

Ex parte Ramos, 977 S.W.2d 616, 617 (Tex.Crim.App.1998). Applicant "met an incorrectly-calculated deadline that the court had entered and, on which he relied in good faith…. [¶] [W]e hold that, on these specific facts, [CCP art. 11.071, §4] cannot be constitutionally applied to require the dismissal of the application."

Graham v. Board of Pardons & Paroles, 913 S.W.2d 745, 751 (Tex.App.--Austin 1996, writ dism'd). "Upon a showing of new evidence that undermines confidence in the jury verdict, [applicant] will be entitled to an evidentiary hearing in accordance with statutory post-conviction habeas corpus procedures. A post-conviction habeas hearing affords the essential requisites of due process: an evidentiary hearing before a district-court judge, the right to counsel, time to prepare for the hearing, transcription of the hearing by a court reporter, and written findings of fact and conclusions of law by the court."

 © 2022 Thomson Reuters. No claim to original U.S. Government Works.

Footnotes

1 V.T.C.A., Government Code § 78.051 et seq.

Vernon's Ann. Texas C. C. P. Art. 11.071, TX CRIM PRO Art. 11.071

Current through the end of the 2021 Regular and Called Sessions of the 87th Legislature.

End of Document © 2022 Thomson Reuters. No claim to original U.S. Government Works.