APPENDIX

TABLE OF APPENDICES

Appendix A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-84,064-01

EX PARTE JAMES HARRIS, JR.,

Applicant

Filed: May 18, 2022

On Application for Writ of Habeas Corpus in Cause No. 67063-A in the 149th Judicial District Court Brazoria County

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ORDER

Per curiam.

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.

On January 14, 2012, Applicant went to the home of an elderly couple, Alton and Darla Wilcox, and forced his way into the home, demanding money. When Darla resisted his entry, Applicant stabbed her repeatedly. Alton, who was in the bedroom, heard Darla's screams and came to her aid. Applicant ran to Alton, stabbed him, and again demanded money.

Darla took money out of her purse, but she only had one dollar. When Applicant demanded more, she retrieved money hidden in a kitchen drawer and gave it to him. Applicant then tied up the couple and left, stealing Darla's car. Darla was able to get one hand free and she called 911. After emergency responders arrived, the couple was life-flighted to the hospital. Darla had been stabbed twenty-four times but survived. Alton died at the hospital from his injuries.

In December 2013, Applicant pled guilty to capital murder as alleged in the indictment. *See* TEX. PENAL CODE § 19.03(a)(2) (murder committed in course of robbery or burglary of habitation). Based on the jury's answers to the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, the trial court sentenced Applicant to death. *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(g). This Court affirmed Applicant's conviction and sentence on direct appeal. *Harris v. State*, No. AP-77,029, (Tex. Crim. App. Mar. 9, 2016) (not designated for publication).

In his application, Applicant presents twelve challenges to the validity of his conviction and resulting sentence. The habeas court held an evidentiary hearing on Claims 1, 2, 8 and 10 and entered findings of fact and conclusions of law recommending that we grant relief as to one subclaim of Claim 2 and deny relief on Applicant's remaining claims.

In Claim 1, Applicant asserts that he is intellectually disabled and therefore constitutionally ineligible for execution. *See Atkins v. Virginia*, 536 U.S. 304 (2002). Under the evidence presented in this case, Applicant has not established that he is

intellectually disabled according to the standards articulated by the United States Supreme Court. *See Moore v. Texas*, 137 S. Ct. 1039 (2017).

Applicant raises several allegations of ineffective assistance of counsel in Claim 2. He contends that his trial counsel were constitutionally ineffective for failing to: investigate and present mitigating evidence of Applicant's social history; provide their social history expert with necessary background materials; challenge extraneous offense evidence; and object to the State's closing jury argument. With regard to these particular allegations, Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984). He has failed to show by a preponderance of the evidence that his trial counsels' 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 counsels' deficient performance. *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing Strickland, 466 U.S. at 688–89).

Applicant also asserts in Claim 2 that his trial counsel were ineffective for failing to investigate his intellectual disability, which would have precluded the death penalty. The habeas court found that this allegation had merit and recommended that relief be granted. We disagree.

On post-conviction review of a habeas corpus application, the convicting court is the "original factfinder," and this Court is the "ultimate factfinder." *Ex parte Storey*, 584 S.W.3d 437, 439 (Tex. Crim. App. 2019); *see Ex parte Reed*, 271 S.W.3d 698, 727 (Tex. Crim. App. 2008). Because the habeas court is in the

best position to assess the credibility of the witnesses, in most circumstances, we defer to and accept the habeas court's findings of fact and conclusions of law when they are supported by the record. *Storey*, 584 S.W.3d at 439; *Reed*, 271 S.W.3d at 727. However, when our independent review of the record reveals circumstances that contradict or undermine the habeas court's findings and conclusions, we can exercise our authority to make contrary findings and conclusions. *Storey*, 584 S.W.3d at 439; *Ex parte Thuesen*, 546 S.W.3d 145, 157 (Tex. Crim. App. 2017).

It is Applicant's burden to prove, by a preponderance of the evidence, that his trial attorneys were constitutionally deficient with respect to their investigation of the possibility of intellectual disability before he is entitled to relief on a writ of habeas corpus. We conclude that he has failed to do so.

The record reflects that during their mitigation investigation, the defense team: spoke with Applicant's family members, friends, and co-workers; obtained and reviewed numerous records, including Applicant's school records, employment records, medical records, criminal history records, probation records, prison records, jail records, divorce records, and family records; and consulted with several expert witnesses, including some who testified at trial.

In their mitigation investigation, trial counsel discovered potential issues relating to possible cognitive impairment—Applicant's exposure to crop-dusting pesticides as a child, his participation in football, his involvement in a car accident, and his long-term alcohol and drug abuse—so they retained Mary Elizabeth Kasper, a neuropsychologist, to

evaluate Applicant and report her findings. She conducted a battery of neuropsychological tests—including IQ tests—and reported to trial counsel that Applicant suffered from "mild cognitive impairment," the precursor to "vascular dementia," which resulted from "chronic microvascular problems."[1] When asked about the viability of an intellectual disability claim, Kasper explicitly advised trial counsel that Applicant's case was *not* an intellectual disability case. Each time that trial counsel consulted Kasper about Applicant's concerning behaviors, she attributed his behaviors to early onset vascular dementia.

In addition, trial counsel retained Raymond Singer, a neuropsychologist and neurotoxicologist, to evaluate Applicant for neurotoxicity. Singer concluded that Applicant was exposed to numerous toxic substances over his lifetime—including pesticides during his childhood and occupational exposures at various jobs in his late teens and early adulthood—that damaged his brain resulting in a major neurocognitive disorder. Singer also considered cocaine toxicity given Applicant's long-term abuse of that substance (among others). His opinion corroborated Kasper's opinion and diagnosis.

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[1] Kasper did not advise the trial team to seek out additional mental health experts, which her referral letter unmistakably asked her to do if she felt it necessary, nor did she indicate that she needed additional information to complete her evaluation. Kasper did suggest some follow up on her diagnosis, including an MRI on Applicant. Trial counsel obtained funding for a neurologist and had the MRI done.

Trial counsel did not fail to investigate whether Applicant suffered from intellectual disability. Trial counsel determined, based on their mitigation investigation and the opinions of their mental health experts, that a diagnosis of intellectual disability was not supported. The record, which demonstrates that Applicant's cognitive impairment issues do not satisfy the criteria for a diagnosis of intellectual disability under the DSM-5, supports that determination. Trial counsel instead presented evidence of Applicant's "mild cognitive impairment" that was verified by their experts.

The record does not support the habeas court's conclusion that Applicant has proven, by a preponderance of the evidence, that his trial counsel provided constitutionally ineffective assistance of counsel with respect to their investigation of intellectual disability. We conclude, on this record, that Applicant has failed to meet his burden to prove both deficient performance and prejudice as required by *Strickland*.

In Claims 3 and 4, Applicant complains about juror misconduct and prosecutorial misconduct relating to one juror's answers on the jury questionnaire. Applicant alleges that the juror lied in her responses to questions concerning her experience as or with a crime victim and that the State failed to disclose that the juror withheld information. The evidence does not demonstrate that the juror lied or withheld material information. *See Armstrong v. State*, 897 S.W.2d 361, 364 (Tex. Crim. App. 1995) (explaining that defense counsel is obligated to ask questions sufficient to elicit pertinent information;

otherwise, purportedly material information that juror fails to disclose is not "withheld" so as to constitute misconduct); *see also Ex parte Chaney*, 563 S.W.3d 239, 266 (Tex. Crim. App. 2018) (explaining who constitutes "the State" for purposes of *Brady*).

In Claim 5, Applicant asserts that he was denied his due process right to an impartial jury when a juror relied on information outside the record, purportedly received during a phone conversation with her sister, to reach her verdict. Applicant has failed to demonstrate an unauthorized communication or an improper outside influence. *See Chambliss v. State*, 647 S.W.2d 257, 266 (Tex. Crim. App. 1983) (clarifying that it is defendant's burden to establish that unauthorized conversation occurred and that "the discussion involved matters concerning the specific case at trial"); *Colyer v. State*, 428 S.W.3d 117, 128–29 (Tex. Crim. App. 2014) (explaining that "outside influence must be 'improperly brought to bear' with an intent to influence the juror"); *see also* TEX. CODE CRIM. PROC. art. 36.22; Tex. R. Evid. 606(b).

Claim 6, in which Applicant asserts a Fourth Amendment violation, is procedurally barred because habeas is not a substitute for matters that should have been raised on direct appeal. *See Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal."); *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) (holding that even constitutional claim is forfeited if applicant had opportunity to raise issue on appeal).

In Claim 7, Applicant argues that trial counsel were constitutionally ineffective for failing to seek suppression of the murder weapon. Applicant has failed to meet his burden to show by a preponderance of the evidence that his trial counsels' 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 counsels' deficient performance. *See Overton*, 444 S.W.3d at 640 (citing *Strickland*, 466 U.S. at 688–89).

In Claim 8, Applicant alleges that his appellate counsel rendered constitutionally ineffective assistance by failing to appeal the exclusion of a former prison inmate's testimony. Applicant has not met his burden to demonstrate that appellate counsel's decision not to raise this claim was objectively unreasonable, or that there is a reasonable probability that, but for counsel's failure to raise that particular issue, Applicant would have prevailed on appeal. *See Ex parte Flores*, 387 S.W.3d 626, 639 (Tex. Crim. App. 2012); *see also Smith v. Robbins*, 528 U.S. 259, 285 (2000).

In Claims 9 through 12, Applicant raises various constitutional challenges to his death sentence. In Claim 9, he asserts that his death sentence is unconstitutional because "it was assigned based on Texas's arbitrary system of administering the death penalty." He asserts that, as a consequence of unfettered prosecutorial discretion, the system fails to provide a consistent statewide method for seeking the death penalty and results in disparities based on geography, race, and ethnicity. In Claim 10, Applicant contends that his constitutional rights were violated

when the trial court "was prohibited from instructing the jury that a vote by one juror would result in a life sentence" and that the "10-12 rule" is unconstitutional. In Claim 11, he alleges that his death sentence was "capriciously assigned" because the future dangerousness special issue is unconstitutionally vague and "fails to narrow the class of death-eligible defendants." In Claim 12, Applicant argues that his death sentence should be vacated because the punishment phase jury instructions "restricted the evidence that the jury could determine was mitigating."

These claims are procedurally barred as they could have been raised previously. *See Ex parte De La Cruz*, 466 S.W.3d 855, 864 (Tex. Crim. App. 2015) (recognizing that "this Court has long held that a convicted person may not raise a claim for the first time in a habeas-corpus proceeding if he had a reasonable opportunity to raise the issue at trial or on direct appeal and failed to do so"); *Ex parte Richardson*, 201 S.W.3d 712, 713 (Tex. Crim. App. 2006) (explaining that writ of habeas corpus should not be used to litigate matters that could have been raised at trial or on direct appeal). Furthermore, the same or similar claims have been repeatedly rejected by this Court, and Applicant raises nothing new to persuade us to reconsider those holdings. *See, e.g.*, *Soliz v. State*, 432 S.W.3d 895, 905 (Tex. Crim. App. 2014) (rejecting claim of arbitrary system based on prosecutorial discretion and disparate treatment); *Leza v. State*, 351 S.W.3d 344, 362 (Tex. Crim. App. 2011) (upholding "10-2 rule" and no jury instruction about failure to agree on special issues); *Russeau v. State*, 291 S.W.3d 426, 434 (Tex. Crim. App. 2009)

(concluding that undefined terms do not render future dangerousness issue unconstitutionally vague); *Mays v. State*, 318 S.W.3d 368, 396 (Tex. Crim. App. 2010) (holding that statutorily required instruction defining "mitigating evidence" does not unconstitutionally limit jury's consideration of mitigation evidence).

Based on our own review of the record, we deny relief on all of Applicant's claims.

IT IS SO ORDERED THIS THE 18th DAY OF MAY, 2022.

Do Not Publish

Appendix B

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-84,064-01

EX PARTE JAMES HARRIS, JR.,

Applicant

Filed: Jan. 10, 2023

NOTICE

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

Appendix C

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

JAMES HARRIS, JR.,

Applicant

Filed: Feb. 22, 2021

FINDINGS OF FACT AND CONCLUSIONS OF LAW

I. PROCEDURAL HISTORY

James Harris, Jr. is confined under a sentence of death pursuant to the judgment of the 149th District Court, Brazoria County, Texas, Case Number 67063, which was rendered on December 11, 2013. CR 4:186; RR 75:17.[1]

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[1]

- All references to CR are to the four (4) volume Clerk's Record filed on March 10, 2014 and supplemented on August 18, 2014.
- All references to RR are to the seventy-five (75) volume Reporter's Record of the original trial filed on August 13, 2014.
- All references to Trial Exhibits are exhibits admitted during Applicant's original trial in 2013.

A. **Trial Court Proceedings**

On January 14, 2012, Applicant was accused of the offense of murder. CR 1:7. On or about January 20, 2012, the Court appointed Thomas J. "Jay" Wooten to represent Applicant. RR 1:5-6. On March 19, 2012, Regional Public Defender's Office for Capital Cases (RPDO) was appointed to represent Applicant. Mr. Wooten was by that time an employee of RPDO and he, along with Philip Wiscbkaemper, were the attorneys assigned to the case. In August, 2012, Mary Conn was substituted as co-counsel for Mr. Wischkaemper.

The guilt/innocence phase of Applicant's trial began on November 11, 2013 with Applicant entering a plea of guilty. RR 57:37. That same day, the punishment phase of Applicant's trial commenced. *Id* at 53. The State presented its case for punishment and rested on November 22, 2013. RR 67:78. The Defense began its punishment case on December 2, 2013, and

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- All references to WRR are to the 31 Volume Reporter's Record filed August 23, 2019.
- All references to Ex. are to exhibits in the Initial Application for Writ of Habeas Corpus filed on March 15, 2016.
- All references to State's Ex. are to the State's Exhibits tiled on May 1, 2019 containing sixteen (16) Exhibits.
- All references to Attach. are to the affidavits and written declarations included in Applicant's Notice of Filing filed on April 15, 2019.
- All references to Def's Writ Ex. are to exhibits admitted by Applicant at the Writ Hearing.
- All references to State's Writ Ex. are to exhibits admitted by State at the Writ Hearing.
- All references to FOF are to the paragraphs in the Court's Findings of Facts and Conclusions of Law

concluded its presentation on December 9, 2013. RR 68:5; RR 73:133. The State then presented evidence on rebuttal and rested that same day. RR 73:198.

On December 10, 2013, the parties made their closing arguments to the jury. RR 74:154-159. Thereafter, the jury retired to deliberate, and it reached its verdict the next day on December 11, 2013. *Id.* at 160; RR 75:5-6. The jury's verdict answered "Yes" to Special Issue One and "No" to Special Issue Two. RR 75:6; CR 4:123-125.[2] Applicant was then formally sentenced to death. RR 75: 6-17.

B. **State Appellate Proceedings**

Jimmy Phillips, Jr. was appointed to represent Applicant in his direct appeal on December 11, 2013. On February 3, 2015, the opening appellate brief was filed in *James Harris Jr. v. The State of Texas*, Cause Number AP-77,029. The State filed its brief in response on August 4, 2015. Oral argument was waived, and the Court of Criminal Appeals (CCA) affirmed Applicant's conviction and sentence on March 9, 2016.

C. **State Habeas Proceedings**

On December 16, 2013, this Court appointed the Office of Capital and Forensic Writs (OCFW) to represent Applicant in his state habeas corpus proceedings pursuant to Article 11.071, Section 2, of the Code of Criminal Procedure.

On August 17, 2015, Applicant filed an Unopposed Motion for Ninety-Day

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[2] Per the Trial Court's instructions, the jury also returned a verdict of guilty. CR 4:122.

Extension of Time to File Initial State Habeas Application, which the Court granted. On Extension of Time to File Initial State Habeas Application Pursuant to Article 11.071, Section 4A, of the Texas Code of Criminal Procedure; on November 5, 2015, the Court of Criminal Appeals granted a ninety-day extension.

On March 15, 2016, Applicant filed his Initial Application for Writ of Habeas Corpus. On October 6, 2016, this Court ordered an evidentiary hearing to resolve Issues 1, 2, 8 and 10 from Applicant's Initial Application for Writ of Habeas Corpus and designated Issues 3, 4, 5, 6, 7, 9, 11, 12, and 13 (the Order Designating Issues) to be resolved *through the submission of affidavits*. (Emphasis by this Court)

On October 25, 2016, the Court signed an Order approving a Written Waiver of Applicant's Right to an Evidentiary Hearing within thirty (30) days of the signing of the Order Designating Issues.

On November 14, 2016, the Evidentiary Hearing commenced pursuant to the signed Waiver. The hearing was recessed for the Court to hear various motions. The Court granted applicant's Motion to stay the date of the actual Evidentiary Hearing.

On January 11, 2018, the Court granted Applicant's Motion to Continue Evidentiary Hearing and to Extend Time to File Affidavits. The Evidentiary Hearing related to Issues 'l, 2, 8, and 10 was resumed on January 23, 2019.

Pursuant to agreement of the parties after conclusion of oral arguments for the Evidentiary Hearing? Applicant was permitted 60 days to submit additional affidavits, and the State would have an

additional 30 days to file affidavits as well as objections to Applicant's affidavits. Applicant would then have 30 days to file any objections to the State's affidavits. WRR 20:165-168. Applicant filed his final affidavits and declarations on April 15, 2019. On May 1, 2019, the State filed its final affidavits relating to the non-hearing issues to be decided by this Court, as well as its objections to Applicant's affidavits. On May 31, 2019, Applicant filed his responses to the State's objections to his affidavits, as well as Applicant's objections to the State's affidavits. On June 6, 2019, the State filed its responses to Applicant's objections to the State's affidavits.

On August 22, 2019, this Court held a hearing to address all of the affidavits and the objections filed by either party relating to the non-hearing issues. At that hearing, by written stipulation, it was agreed that all prior objections to the affidavits were withdrawn, and the Court would give the evidence in the affidavits the weight the Court believed was proper.

At the August 22, 2019 hearing, the Court set October 7, 2019, as the final date for submission of all briefs and all findings of fact and conclusions of law related to both hearing and non-hearing issues. The Court was requested to take judicial notice of all exhibits, evidence, and testimony for Applicant's 2013 trial, as well as all ex parte motions, affidavits, and orders, without objection by Writ Counsel. WRR 19:5-6; 204.

D. **Affidavits and Declarations**

Several Issues were to be decided by affidavits, and at the Evidentiary Hearing several witnesses relied on out-of-court statements that were taken,

which were called either "Affidavits" or "Declarations." Therefore, before stating its Findings of Fact and Conclusions of Law, the Court finds it necessary to address these Affidavits and Unsworn Declarations as well as the credibility of the witnesses.

> An "Affidavit" is defined by Tex. Gov. Code §312.011 as follows: "Affidavit means a statement in writing of a fact or facts signed by the party making it, sworn before an officer authorized to administer oaths and officially certified to by the officer under his seal of office."

A few of the documents submitted by Applicant were sworn to before a party authorized to administer oaths. These were the affidavits of George W. Woods, M.D. (Dr. Woods) Jacqueline Jones, Ph.D. (Dr. Jones) Mary Conn (Ms. Conn), Philip Wischkaemper, (Mr. Wischkaemper), Joanne Heisey (Ms. Heisey), and James R. Patton, Ph.D. (Dr. Patton). All of the affidavits submitted by the State met the definition of an affidavit. An affidavit is generally not accepted for evidentiary purposes unless it is an unqualified statement of a fact that is subject to the penalties of perjury. *Burke v. Satterfield*, 525 S.W.2d 950 (1975); *Brownlee v. Brownlee*, 665 S.W.2d 111 (Tex. 1984).

Applicant also filed a number of documents that were not sworn to before an officer authorized to administer oaths, and all were executed based only to the "best of the knowledge" of the person signing the declaration. These were Declarations of Mary Elizabeth Casper, Ph.D., Dr. Walter Farrell, Jr., Danalynn Recer, Ricardo Jimenez, Nola Amey, Bonnie Clark, Carolyn Duplechin, Mack Griggs, Jr., Michael Kalina, Rose Lewis, Marcus Lincoln, Glenn McCoy,

Kenneth Murray, Shirley Rutherford, Jean Shaw, Annie Stafford, Roland Waddy, and Linda Wittig.

However, Section 132.001 of the Tex. Civ. Prac. & Rem. Code provides that an unsworn declaration may be used "in lieu of a written sworn declaration ... or affidavit, required by ... order." To be a valid unsworn declaration, it must be in writing subscribed by the person making the declaration under penalty of perjury; must include a jurat in substantially the form prescribed by the statute which requires inclusion of the first, middle and last name of the individual, date of birth, and address using a street, city, state and zip code; and must declare under penalty of perjury that the statements are true and correct. Finally, it must state the county and state in which it is executed as well as the day, month, and year when it was executed.

The case of *Texas Dept. Public Safety v. Caruana*, 363 S.W.3d 558 (Tex. 2012) held that unsworn declarations may be used in lieu of an affidavit as long as they are subscribed as true under penalty of perjury. In *Bahm v. State*, 219 S.W.3d 391 (Tex. Crim. App. 2007) the Court held that statements on information and belief were sufficient for the purposes of Section 132.001 Tex. Civ. Prac. Rem. Code. However, the declarations must meet the requirements of the Code. *Hays Street Bridge Restoration Group v. San Antonio*, 570 S.W.3d 697 (Tex. 2019).

The unsworn declarations of Dr. Walter C. Farrell, Bonnie Clark, Nola Amey, Carolyn Duplechin, Mack Griggs, Jr., Tamara Renee Harris, Michael Kalina, Rose Lewis, Marcus Lincoln, Glen McCoy,

Shirly Rutherford, Jean Shaw, Annie Stafford, Roland Waddy, and Linda Wittig comply with §132. 001 of the Tex. Civ. Prac. & Rem. Code. The declaration of Mary Elizabeth Kasper, Ph.D. (Dr. Kasper) dated March 12, 2016, does not comply with the statute as it fails to list Dr. Kasper's date of birth. However, the Court finds that it substantially complies with the statute although for the reasons stated below, the Court did not consider the contents of Dr. Kasper's Declaration for any Issues to Be Determined by Affidavit. Applicant did not offer Dr. Kasper's Declaration at the Evidentiary Hearing. WRR 20:157-158. The Declaration of Danalynn Recer dated March 14, 2016 wholly fails to comply with either Tex. Gov. Code §312.011 or §132.001 Tex. Civ. Prac. & Rem. Code, and was not considered by the Court for any purpose.

The purported affidavits of Carol Camp and Mary Conn are insufficient to qualify as an affidavit as it is only "to the best of my knowledge," and both fail to satisfy requirements of §132.001 of the Tex. Civ. Prac. & Rem. Code. In addition, as will be discussed in more detail, the Court did not find either Carol Camp or Mary Conn to be credible witnesses.

The Court did not consider any information contained in the unsworn Declaration of Ms. Recer or the purported affidavit of Ms. Camp due to their failure to comply with the Court's Order. This determination did not prevent Applicant's experts from relying on the unsworn declarations to the extent experts in their field are shown to have customarily relied on these types of documents in rendering their opinions, and the underlying information is shown to be reliable. *Coble v. State*, 330 S.W.3d 253 (Tex. Crim.

App. 2010); *Vela v. State*, 209 S.W.3d 128 (Tex. Crim. App. 2006).

In light of *Bahm v. State*, except for the Declaration of Ms. Recer, the Court considered the unsworn declarations as satisfying the Court's requirement in its Order Designating Issues to satisfy the requirements of an affidavit for purposes of this Writ Hearing. However, inasmuch as they were only to the best knowledge or the declarant, the Court examined those documents in a same manner that a court reviews the testimony of experts. *Vela, supra*. If the underlying information is incorrect, or if the belief is mistaken, or to the extent they are not based on personal knowledge of the declarant, or are based on conjecture, speculation, or hearsay, then the opinions or statements were not considered reliable and the Court did not afford weight to the information. The parties expressly provided the Court with that ability, if their consent was necessary, by the stipulation entered on August 22, 2019, that the Court could give the affidavits and the evidence in the affidavits such weight as the Court deemed proper. Although *Caruna* and *Bahm* have held the unsworn declarations on information and belief may be used in lieu of an affidavit, a person might in good faith sign a document stating that something is true based upon their knowledge, even if that knowledge is based solely on what they have been told or what they have read. Yet, that type of information would not be admissible or have reliability in a court.

The Order Designating Issues provided that the resolution of Issues 1, 2, 8, and 10 would be by an Evidentiary Hearing, and at the Evidentiary Hearing,

" ... the Court will accept testimony of live witnesses only, as well as documentary evidence, provided that affidavits may be used to prove medical or business records." To the extent a witness not only submitted an affidavit or a declaration, but also testified at the Evidentiary Hearing, the Court considered only the facts established in the Evidentiary Hearing for Issues 1, 2, 8, and 10, unless the testimony was inconsistent with the affidavit or unsworn declaration. If a witness submitted an affidavit or a declaration and also testified during the Evidentiary Hearing, the Court considered the testimony at the Evidentiary Hearing for Issues to Be Determined by Affidavit to the extent it supported, or contradicted, the affidavit or declaration. Also, for testifying witnesses, the Court considered the witness's demeanor, appearance of bias or lack thereof, and connection to the State or Applicant. The Court's determination of the truthfulness of the testimony during the Evidentiary Hearing and in evaluating the affidavit or declaration, was based on any conflicts between the testimony and the affidavit or declaration, and the weight to be given to the testimony or the information contained in the affidavit or declaration.

In reviewing Applicant's Affidavits and Declarations, much of their content focused on facts that would have been relevant to Issues 1, 2, 8, or 10 rather than the remaining Issues that were to be Decided by Affidavit. While certainly there is some overlap in facts that could be relevant to Issues 1 and 3, for reasons stated in the Findings and Conclusions relative to Issue 3, the Court found that some of the Affidavits and Declarations were not credible and were not relevant to Issues 3 or 4.

In addition, except for personal family information by family members or long-time friends, much of the content in the Declarations were based on conjecture and speculation, and in some instances were clearly incorrect, and therefore the Court did not give any weight to such content. In determining the weight to be afforded to information contained in the Declarations, deference has been given to lay persons who knew Applicant personally, but the Court did not consider as persuasive, information based on conjecture, or the assumptions, speculations, or statements made by persons not established to be entitled to assert expert opinions or which are in conflict with reliable Exhibits admitted in evidence.

Two of the Declarations that the Court found totally unreliable and without any probative value were the Declarations of Annie Stafford and Linda Wittig.

Ms. Annie Stafford was a long-time elementary school teacher in the Boling Independent School District and taught in the same school that Applicant attended. There is nothing in her Declaration that indicated that she ever knew Applicant, or any of his teachers. She did state that post-conviction counsel showed her Applicant's school records. She makes very few factual statements in her Declaration and she predicates many of the statements that she does make with phrases such as, "It is likely," "I believe," or "It was common." Although it appears that Applicant might be attempting to qualify Ms. Stafford as an expert in elementary education based upon her training and experience, even if she had been qualified, she fails to state any reliable opinions.

Instead, she speaks in terms of "my view" or "it is likely" or "I believe." These equivocal statements cannot form the basis for an opinion that is reliable. She also attempts to express her views on Applicant's inability to live independently as an adult, but she is not shown to have any qualifications make such statements.

In Paragraph 4 of her Declaration Ms. Stafford notes that Applicant's first grade teacher, Ms. Mason noted on his school record that Applicant was a poor risk. Ms. Mason did in fact write this comment, and it is shown on Def. Ex. 66, p.2. From this notation, without indicating any basis for her comment, Ms. Stafford goes on to explain that she believed Ms. Mason, "meant that Mr. Harris was not ready for the 2nd grade." This notation appears to have been made in January of 1965, and in May of that year Applicant was promoted to the 2nd Grade. Ms. Stafford then states, "Based upon his grades, Mr. Harris should not have been promoted to the second grade." The Court reviewed Applicant's school records. During the 1st grade, Applicant did receive a D- in arithmetic and a D+ in drawing, but he received a C+ in reading and writing and a B- in spelling. He did not fail any subject. What might have happened between January, when Ms. Mason made the entry, and May, when she promoted Applicant to the 2nd grade, no one except Ms. Mason would know. However, Applicant's school records show that in April, 1966, Applicant took an Achievement Test which Dr. Price testified reflected that Applicant was average or law average. FOF 216. Without setting forth any basis for her belief that his grades do not justify promoting Applicant, such statements by Ms. Stafford have no reliability.

Ms. Stafford does not stop with just interpreting what she "believed" that Ms. Mason meant, she goes on to criticize Ms. Mason and then misstate what was actually said. According to her Declaration, Ms. Stafford states, "Ms. Mason did however promote Mr. Harris to the 2nd grade in spite of the fact that *she noted that Mr. Harris was not academically ready*. (Emphasis by this Court). Nowhere in Defendant's Exhibit 66 is there any notation that Applicant was not "academically ready' for the 2nd grade, unless the notation "poor risk" could be construed to mean Applicant was not academically ready. Three other teachers, who actually taught Applicant, provided unsworn declarations, and none of them second guessed the decisions of any of Applicant's teachers to promote him. It is also noted that Jean Shaw, one of the teachers who actually taught Applicant, commented on the same entry by Ms. Mason, and Ms. Shaw stated that the comment Ms. Mason "meant that James was struggling academically and required additional support and that Ms. Mason was quite concerned about James learning abilities in the first grade." Attach. 22, ¶5.

Ms. Stafford then states, "In the 1st grade Mr. Harris was struggling *in nearly every subject. Throughout school, Mr. Harris grades were terrible. He was barely getting by and it is evident that he was having severe problems with academia all the way through*." (Emphasis by this Court). Looking at Defendant's Exhibit 66, it is difficult to see how Ms. Stafford could make this statement if she reviewed all of Applicant's school records. While Applicant did not have honor roll grades, the Court can find no basis for

the statement that he was struggling with nearly every subject or barely getting by.

Clearly Mr. Harris had some difficulty in arithmetic and math throughout most of his school years. In elementary school, excluding a D in English in his 2nd grade year, all of his grades, except for arithmetic, were B's and C's. Def. 66:1. In Junior and Senior High School Applicant's grades were all B's and C's except for a 65 in Related Math, and a 66 in World History for the first semester of the 1974-75 school year, and a 68 in Biology for the second semester of that year. Ex. 66:3-7. However, his grades for those subjects in the other semester of that year were all in then the mid to high 70's and an 81 in Related Math. He also received a 66 in Consumer Math for the first quarter of the 1975-76 school year, but Applicant received an 86 and a 79 in Consumer Math, for the second and third quarters of the 1975-76 school year. The Court does not know what type of a student Ms. Stafford was comparing Applicant's grades to when she stated that his grades were terrible, but to the Court, a student who received primarily B's and C's and never failed a grade cannot be considered to be have been "struggling in nearly every subject" or have terrible grades throughout school.

Ms. Stafford then states that it was common for teachers to allow a student to graduate to the next level when they were not academically ready, and "itis likely" that Ms. Mason promoted Applicant so she would not be blamed for Applicant's failure in school. Again, while Ms. Stafford or teachers that Ms. Stafford may have known may have engaged in this practice, without something to indicate that any of

Applicant's teachers were known to have engaged in this practice, this rank speculation by Ms. Stafford is not relevant or. reliable.

Ms. Stafford then, without stating any basis for her opinion, "In my view, there are multiple grades where Mr. Harris was allowed to graduate to when he was not academically strong enough. It is likely that these decisions were taken by teachers who simply wanted to pass Mr. Harris to the next grade regardless of his "*obvious intellectual deficits*." (Emphasis by this Court). Certainly, one of these grades would have had to have been the first grade since Ms. Stafford has already criticized Ms. Mason for promoting Applicant from the first grade, but Ms. Stafford fails to provide any basis for her statements for any grade, even the first grade. Her conclusions are totally contrary to the opinion of Dr. Farrell, Applicant's testifying expert at trial, that Applicant's grades were modest, and he had reviewed Applicant's school records and this Court's own review of Applicant's school records, saw no major problems. FOF 498, 502. Even Dr. Woods, Applicant's expert on intellectual disability testified that Applicant's grades were in the average range. FOF 121. When no specific grades are identified, coupled with the fact that no information is provided to the Court to support her statement that Applicant was not academically strong enough, and when a review of the records themselves do not, in the Court's opinion and in the opinion of Dr. Farrell, disclose any "obvious intellectual defects," the Court cannot find either of these statements relevant or reliable.

Ms. Stafford then, in an apparent attempt to place doubt on the value of achievement tests, states that

teachers would often "cheat" when giving these tests. Again, what might have been common among Ms. Stafford's friends who were teachers has no relevance to the issues at hand in this Court. Ms. Stafford failed to identified any of Applicant's teachers that she knew engaged in the practice of cheating. Ms. Stafford's speculation is not relevant or reliable.

Ms. Stafford, then in an apparent attempt to inject race into her statement, states that black families were not as supportive of their children as white families since black families did not come to parent teacher conferences as often. While this might have been her experience, it has no relevance in this case as Ms. Stafford had just said in the preceding sentence that she had no knowledge about the level of support Applicant had from his family.

Given that she had no basis for any statement as it applies to Applicant, it appears to the Court that Applicant is trying to use Ms. Stafford to introduce a laundry list of factors that could be relevant to the issues before this Court if they came from a qualified and reliable source.

Finally, and perhaps the most troubling to the Court, is the apparent attempt by Ms. Stafford to express her views on the need that Appellant would have for supports in his adult life. She stated that Applicant had a "low level of intellectual functioning would have led to him to struggle to live independently as an adult ... Sometimes, with slow individuals, such as Mr. Harris, people end up caring for them and doing things the individual cannot do for themselves for them, instead," While certainly those statements if made by someone who was qualified by education,

training, or experience to make them would be relevant to the issues before this Court, but there is nothing whatsoever in her Declaration that would in any stretch of the imagination qualify her to make such statements.

As will be subsequently discussed in more detail, the Court has several concerns with the manner in which the Declarations were obtained. Two separate witnesses testified that they believed the representative of OCFW who interviewed them was trying to trick them or to "lead someone someway to make it seem like something." WRR 13:119-120;589;620. In addition, many of the statements contained in the declarations are inaccurate, and many, as is the case of Ms. Stafford and Ms. Witting, failed to state facts, but engage in speculation and conjecture. Also concerning to the Court is that Ms. Stafford uses words like "not academically ready," "not ready academically," "intellectual defects," "low level of intellectual functioning," and "struggle to live independently as an adult." While certainly all of these could be what was referred to as "red flags" for intellectual disability during the Evidentiary Hearing, it seemed strange to the Court that these would be the words of a school teacher, who had been retired for approximately 26 years and who would have been 85 years old when the Declaration was signed. While the Court has certainly become acquainted with these words since the Writ was filed in this case, before that the Court would have had no familiarity with these terms.

While the Court is sure that Ms. Stafford must have been a good teacher based upon her length of

service, since Ms. Stafford's Declaration is so replete with so many statements that cannot be supported by the record and so full of conjecture and speculation, and attempts to state opinions that she is not qualified to make, the Court finds her declaration totally unreliable and of no probative value.

Ms. Linda Wittig was a teacher at Boling High School in the mid 1970's. She taught Related Math and Consumer Math, which were both remedial math classes. Applicant took Related Math and Consumer Math during his freshman and sophomore years in high school which were in 1974 and 1975, but Ms. Wittig had "no specific memory of him." Attach. 25 ¶4. Ms. Wittig does not indicate what she may have reviewed before signing her Declaration, but, apparently, she must have received some information as to Applicant's grades in Related Math because she states that "Related Math grades indicate to me that the low level class was the right choice for him. Higher grades would indicate that the class was too easy for him, on the contrary, *at all times this class was too difficult for him*."(Emphasis by this Court) Attach. 25, ¶ 14. She then goes on to make the statement, "James was not able to grasp the very basic practical math skills being taught in the class at a level aimed at slower students." Since Applicant received a score of 81 for the second semester of that year, she then speculates, without stating any basis for the speculation, that "It is likely that his mark of 81 in the second semester was artificially increased." Attach 25 ¶4, Since Ms. Wittig did not state what records she reviewed before signing her Declaration, it is possible that she was not shown Applicant's entire transcript. In the Related Math class, that she apparently taught,

Applicant received a grade of 80 for the first semester of the 1973-74 school year, and an 86 for the second semester of that year. Ex. 66:3. For the 1975-76 school year, Applicant received scores of 66, 86, and 79 in Consumer Math for the three quarters. See Ex. 66:7. No explanation is given why those higher grades, would not have indicated as she stated earlier, that Related Math and Consumer Math might have been too easy for him, nor is there any suggestion in her Declaration that the grades for those semesters or quarters were also artificially inflated.

Ms. Wittig then asserts that students from Related Math and Consumer Math "would probably not be able to get into college nor succeed in college undertaking an academic course. Based on James below-average performance in this already low functioning class, I do not think that he would have been able to successfully go to college." Even though expressed in terms of conjecture, there is another basic reason why the Court cannot give this statement any significance. It is based upon faulty underlying facts. The Boling I.S.D records clearly reflect that for the semesters or quarters that Applicant took Related Math or Consumer Math, in all but two he received the grades of 79 or above. To the Court this is not below average performance. Def. Ex 66:3, 7. As an aside, if math skills were a prerequisite for admission and success in college, there would be a lot fewer attorneys, including this Court.

Based upon the inconsistences and conjecture of Mr. Wittig's Declaration, the Court found the Declaration unreliable and of no probative value.

Some of the Applicant's proposed Findings on Issues 1, 2, 8, and 10 were based on information contained in the Declarations or the Affidavits. The Order Designating Issues clearly stated that no affidavits, except to prove medical or business records, would be received on Issues 1, 2, 8 and 10. The Court reaffirmed its position to its counsel after closing arguments. WRR 20:157-158. Therefore, none of Applicant's proposed findings for Issues 1, 2, 8, or 10 that were based on information contained in Affidavits or Declarations were included in the Court's Findings of Fact and Conclusions of Law, unless reliable testimony containing this information was received at the Evidentiary Hearing.

At the Evidentiary hearing Applicants experts made many references to the Affidavits and Declarations. While experts can rely on information that otherwise would be inadmissible, this can be done only if that type of information is what an expert in that field customarily relied on and the underlying information is not shown to be unreliable. While the proper predicate was laid concerning the tests that Dr. 'Kasper performed (WRR 17:91- 93) and the results of Dr. Fahey's examination (WRR 17:147-148), the Court could find no place in the Record where any of the experts testified, or stated in their affidavits, that it was customary for experts in their fields to rely on the type of unsworn declarations obtained by OCFW in this case. Here none of the Declarations were sworn to and all are made only to the best of the knowledge of the declarant. Dr. Patton "assumed" that they were notarized (WRR 16:169), and Dr. Woods assumed that Dr. Patton had spoken to the Declarants. WRR 17:167.

The Court also found it particularly troubling that two witnesses asserted that they felt that OCFW was acting inappropriately either in their interview or in the drafting of statements after their conversation. Keri Mallon testified that she received a call from OCFW to discuss the case while she was in trial in another capital murder case, and she felt that OCFW was "trying to trick me into saying things I did not say." WRR 14:116. Ms. Mallon was also "angry at the lies contained in the affidavits of Phillip Wischkaemper, Mary Conn, Carol Camp and Danalynn Recer." WRR 14:116. They were so "outrageously false." WRR 14:117. Ms. Mallon drafted her affidavit while still in trial in her other capital case. State's Ex. 2; WRR 14: 118-119. Ms. Henry, the other witness, testified she felt that Ms. Heisey was trying to "lead someone some way to make is seem like something ... " (WRR 13:119-120), that Ms. Heisey was pressuring her to sign the Affidavit (WRR 113:133), and in one instance inserted a phrase in a draft that Ms. Henry stated was false. WRR 113:125.

While it is not uncommon for the Court to have to choose between conflicting testimony as to what was or was not said by a particular witness, or concerning the circumstances surrounding how or why a statement is given, the above accusations present a different issue. Here the claims of pressure, undue influence, and mischaracterization of statements are made not only by a lay person, but also by Ms. Mallon, an attorney for Applicant at trial, who is also an officer of the Court. Although Ms. Mallon did not recall if the person who contacted her from OCFW was Ms. Joanne Heisey, who was the person who contacted Juror Deborah Henry, it was someone from the OCFW. It is

not important to the Court whether this was Ms. Heisey, or someone else in OCFW, as these allegations raised a question with the Court concerning the reliability of the information contained Declarations. Further inquiry revealed that some of the information set forth in the Declarations was clearly incorrect when compared to the documentary evidence admitted and actual testimony given during the evidentiary hearing and at Applicant's original trial. The Court previously had discussed the declarations of Ms. Stafford and Ms. Wittig. (See discussion of Ms. Tamara Harris, FOF 268-274, and Dr. Farrell at Applicant's original trial, FOF 498, 502.) These factors, coupled with the fact that so much of the information contained in the Declarations was based upon conjecture and speculation, required the Court to conclude that much of the information in the Declarations could not be considered as the type of reliable information an expert could use as a foundation for an opinion.

For all of the foregoing reasons, the Court found it necessary to examine all of the Declarations and Affidavits for accuracy and reliability in order to give the information contained therein the weight the Court believed it deserved.

With the exception of Jeri Yenne, Keri Mallon, Deborah Henry, Marcus Lincoln, and Marvin Lincoln, there were inconsistencies between the information contained in their Declarations or Affidavits and the testimony of all other persons who testified at the Evidentiary hearing. However, despite the inconsistencies, the Court found that all of the witnesses who testified at the Evidentiary Hearing

were credible except for Mary Conn, Philip Wischkaemper, Carol Camp and Tamara Harris. However, the Court considered the inconsistencies in the other witnesses' testimonies or affidavits in evaluating the evidence. Because Ms. Conn, Mr. Wischkaemper, and Ms. Camp had such a pronounced bias against RPDO, and especially Mr. Wooten, neither their testimonies or the information in their affidavits was not found credible or reliable by the Court, unless corroborated by other credible evidence. In addition, as to Ms. Camp, there were several inconsistencies with her testimony and other evidence admitted during the Evidentiary Hearing. FOF 425.

E. **Testimony, Affidavits, and Declarations of Expert Witnesses**

Although Dr. Woods, Dr. Patton, and Dr. Price were all very well credentialed and qualified to testify, the Court was surprised by the inconsistencies and errors in the information they presented to the Court. The Court was also surprised at what appeared to the Court to be the cavalier manner in which Dr Woods and Dr. Patton viewed the Declarations. Dr. Woods did not take any steps to verify the reliability or accuracy of the information that was contained in the declarations. He rather stated that Dr. Patton had relied on them, and he was sure that Dr. Patton must have talked to those persons though he had no information as to how the statements were obtained. WRR 17:167-168. Dr. Patton testified that he conducted 8 interviews but could only identify interviews with Applicant, his sister Carolyn, his niece Tamara, Marcus Lincoln, and Marvin Lincoln. WRR 16:166-167, 183. Dr. Woods interviewed only

Applicant and reviewed a conflicting number of unsworn declarations. Attach. 3, ¶8, 81.

Dr. Woods' Affidavit (Attach. 3) focuses almost entirely on the testimony given at the Evidentiary Hearing on Issue 1. However, like his testimony, Dr. Woods Affidavit contains contradictory statements. First, in Attach. 3 Dr. Woods states that he reviewed only sworn declarations Carolyn Duplechin, Kenneth Murray, Jean Shaw, Annie Stafford, and Linda Wittig (Attach. 3, ¶8), yet he contradicts himself in Paragraph 81 by stating that he reviewed many more statements. He references only Paragraphs 33-44 of Dr. Kasper's Declaration (Attach. 2); however, those paragraphs do not contain the Declarations themselves but rather only Dr. Kasper's summary of the Declarations. Dr. Woods then incorporated, almost verbatim, the language that Dr. Kasper used in her Declaration to summarize the information. Attach. 3, ¶¶81-92. The Court also noted that Dr. Kasper signed her Declaration on March 12, 2016, and only two days later on March 14, 2016, Dr Woods incorporated Dr. Kasper's verbiage to support his opinion. Initially, the Court thought Dr. Woods was only incorporating the summary made by Dr. Kasper, but on further review, the Court noted Dr. Woods stated, "Like Dr. Kasper, I conducted this analysis by reviewing statements ... " He then identified some ten persons. Attach. 3, ¶81.

It was surprising that Dr. Woods did not interject any independent observations into his Affidavits, but rather just quoted almost entirely from Dr. Kasper's Declaration. Dr. Woods also stated that he relied on the Affidavit of Dr. James Patton (Attach. 1) in reaching his opinions, but the Affidavit of Dr. Woods

is executed the same day as Dr. Patton's Affidavit. Dr. Woods also testified that he relied particularly on the declarations of" ... particularly those teachers that may have reviewed the records or were within that culture ... " WRR 17:72-73. While these teachers are not identified by name, in reviewing the declarations the only teachers who stated in their declarations that they had reviewed Applicant's records were Annie Stafford and Linda Wittig, which the Court has found previously to be unreliable.

Dr. Woods also testified, and stated in his Affidavit, that he reviewed Applicant's primary and secondary school records. WRR 17:26; Attach. 3, ¶8. Since Dr. Woods testified that Applicant's grades were average (WRR 17:13), it is surprising to the Court that his review would not have caused him to question Ms. Stafford's statement, "Throughout school, Mr. Harris' s grades were terrible. He was barely getting by, and it is evident that he was having severe problems with academia all the way through." Attach. 23, ¶7. Or Ms. Stafford's statement, " ... there are multiple grades Mr. Harris was allowed to graduate to when he was not academically strong enough." Attach. 23, ¶6. Even a casual review of Exhibit 66 demonstrates the errors in such statements. Also, these statements conflict with Dr. Farrells' testimony at Applicant's original trial that Applicant's grades were modest and that after reviewing his school records, he saw no major problems. FOF 498, 502. The Court's review of Exhibit 66 supports Dr. Farrell's conclusion rather than Ms. Stafford's and Ms. Wittig's.

It is also surprising that after Dr. Woods reviewed Applicant's school records, and he found Applicant had

what appeared to be average grades (FOF 121), he would not have questioned Ms. Wittig's statement that Applicant's grades for the second semester were "inflated" given the scores Applicant had in Related Math and Consumer Math for the other semesters in high school, or Ms. Stafford's statements about Applicant's grades that he would not relied so heavily on the Declarations without interviewing them.

Dr. Patton reviewed Applicant's school records. Attach. 1, ¶18. In reaching his opinion, Dr. Patton relied on affidavits a/k/a declarations that were provided, records he had, and his interviews. Dr. Patton did not know anything about how the unsworn declarations were obtained, except -he knew that they were conducted by a "team" from OCFW. WRR 16:169-170. While Dr. Patton did conduct 8 interviews, he could only name Applicant and 4 other people that he actually interviewed. WRR 16:166-167, 183. His testimony was unclear if he interviewed 8 separate people or conducted a total of 8 interviews, as he testified that he interviewed several people more than once. While Dr. Patton testified that all of his interviews were clinical interviews, there was no testimony that any of the other unsworn declarations were obtained by a clinical interview from the OCFW team even though much emphasis was placed by Writ Counsel on the need to conduct a clinical interview in questioning members of Applicant's trial team.

Reviewing Applicant's proposed Findings of Fact on Issues 3 and 4, it also appeared to the Court that Applicant is trying to use portions of the Declaration of Mary Elizabeth Kasper (Attach. 2) in support of those issues which considers whether trial counsel

was ineffective in failing to investigate and present evidence concerning Applicant's social history. However, almost all of Dr. Kasper's Declaration focuses on Intellectual Disability, which is Issue 1. She discusses the alleged failure of trial counsel to request that she consider the possibility that Applicant was intellectually disabled (Attach. 2, ¶¶7 and 15); that trial counsel did not inform her that TDCJ' s IQ score was a Beta Test (*Id.* at ¶9); that she felt that intellectual disability had already been ruled out by trial counsel; that typically she is provided with more information for an intellectual disability issue (*Id.*); the definitions of Intellectual Disability (*Id.* at 16); Applicant's deficits in intellectual functioning (*Id.* at 27-28); and the onset of Applicant's intellectual deficits (*Id.* at 30-47). Her conclusion deals exclusively with her unsupported conclusory statement that she would have been able to persuade at least one juror that Applicant was intellectually disabled. While this evidence might have been relevant to Issue 1, that issue was decided by the evidence at the Evidentiary Hearing, and pursuant to the Order Designating Issues, no evidence would be received by affidavits.

Dr. Kasper did not testify at the Evidentiary Hearing.

In Mr. Wooten's initial Affidavit he asserted that Dr. Kasper had told trial counsel that Applicant was not intellectually disabled during a telephone conference in July, 2013. Although Ms. Mallon could not remember the details of the conversation, Dr. Kasper told all the participants in the call what she had learned about Applicant and explained his behaviors. Dr. Kasper then explained why she did not

believe that Applicant was intellectually disabled. WRR 14:71-72; 75. All of the participants in the July 2013 telephone conversation, who testified at the Evidentiary Hearing, except for Mr. Wischkaemper, confirmed that Dr. Kasper had told counsel that they did not have an intellectual disability case. Mr. Wischkaemper could not remember the details of the conversation. WRR 14:43-44. Dr. Kasper never even attempted to refute that this is what she told trial counsel, even though the Court repeatedly advised counsel that additional or supplement affidavits could be filed. Also, during the evidentiary hearing there was testimony concerning the scope of Dr. Kasper's engagement. Dr. Kasper's testimony pertaining to both of these issues would also have been very helpful to the Court.

While an expert can rely on hearsay in formulating their opinion, Dr. Kasper conducted no personal interviews with anyone other than Applicant, and to support the "clinical judgment" stated in her Declaration to determine the onset of Applicant's intellectual functioning deficits, she considered the unsworn declarations that the Court has found not to be reliable. The Court also noted that Dr. Kasper has testified as an expert on many occasions and therefore is aware of the certainty necessary to express medical or psychological opinions, and she should have been aware of the fact that an affidavit needs to be sworn to and not merely be "to the best of her knowledge." In the Court's opinion, Dr. Kasper's Declaration failed to meet the certainty required to express a clinical opinion. Therefore, for this and other reasons stated by this Court, the Court did not consider Dr. Kasper's

Declaration to be relevant or reliable to the Issues to be Determined by Affidavit, and it was not offered at the Evidentiary Hearing.

Like Dr. Woods and Dr. Patton, there were also issues with Dr. Price's testimony. Dr. Price, the State's expert on Intellectual Disability, had some contradictions in is testimony and errors in his report that were clearly pointed out by Writ Counsel. On direct examination, Dr Price testified that in his report during his interview with Applicant, Applicant's attention and concentration were "grossly intact" and that Applicant was not "tangential." However, Dr. Price's handwritten notes (Def. Ex. 229) reflected that he had deleted the word "grossly" and had inserted the word "mildly" in front of tangential. WRR 18:111-113.

Dr. Price then testified that he had reviewed Dr. Kasper's test data, and she had made a clerical error in her raw scoring that had the effect of increasing Applicant's IQ score administered by her from a 75 to a 76. However, extensive cross examination by Writ Counsel pointed out a number of scoring errors that Dr. Price made in scoring the test he administered to Applicant. These were in the comprehension portion, the digital span portion, the spelling portion, and the arithmetic portion. Although Dr. Price testified that neither the spelling portion or the comprehension portion would have affected the IQ score, Dr. Price acknowledged the other areas pointed out would change the scoring of Applicant's IQ from an 85 to an 84, and that without considering the Age Effect, Dr. Price's scaled scores and Dr. Kasper's scaled scores would have been the same. WRR 18:123-149.

While the cumulative effect of each expert's missteps (except for Dr. Kasper whose Declaration was not considered by the Court for any purpose) were not of a magnitude that would affect their overall credibility, the performance of the experts was below what the Court would have expected given the issues in this case.

ISSUE 1

WHETHER MR. HARRIS IS EXEMPT FROM THE DEATH PENALTY BECAUSE HE IS INTELLECTUALLY DISABLED UNDER *ATKINS V. VIRGINIA*

ISSUE 2

WHETHER APPLICANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO CONDUCT AN INVESTIGATION INTO WHETHER THE APPLICANT WAS INTELLECTUALLY DISABLED AND FAILING TO RAISE THIS ISSUE WITH THE TRIAL COURT AND, IF SO, WHETHER APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE

FINDINGS OF FACT ON ISSUES 1 AND 2

Because there is a substantial overlap in the facts pertaining to Issues 1 and 2, the Court has combined the Findings of Fact of these Issues.

TESTIMONY OF EXPERTS

A. **DR. GEORGE WOODS**

1. Dr. George Woods is a physician who specializes in psychiatry. WRR 17:4. He has received training as a geriatric psychiatrist and as a neuropsychiatrist, specializing primarily in neurodevelopmental disorders. WRR 17:5.
2. Dr. Woods is well-trained in neuropsychiatry. Neuropsychiatrists are qualified to make medical diagnoses relating to intellectual disability. WRR 17:7-8.
3. A medical diagnosis can be made by either a neuropsychologist or a neuropsychiatrist. WRR 17:7.
4. Dr. Woods has also taught courses on intellectual disability. WRR 17:9.
5. Dr. Woods has had clinical experience treating and diagnosing patients with intellectual disabilities since 1982. WRR 17:9.
6. Dr. Woods has taught numerous courses on law and mental health. He has also taught

how to train people to diagnose intellectual disability. WRR 17:10-11.

7. Dr. Woods has evaluated hundreds of patients for the possibility of intellectual disability in his clinical practice. WRR 17:11.
8. Dr. Woods has been tendered and accepted as an expert in court in fields related to intellectual disabilities more than 40 times. In his forensic practice he has testified as an expert only for the defense in Atkin's cases. WRR 17:12-13.
9. Dr. Woods was accepted by the Court as an expert in the field of neuropsychiatry without objection. WRR 17:14-15.
10. Dr. Woods was asked to perform an evaluation of Applicant to determine whether Applicant suffers from an intellectual development disorder. WRR 17:15.
11. It is Dr. Woods' "opinion that within a reasonable degree of medical certainty Applicant suffers from intellectual disability." The Diagnostic and Statistical Manual, 5th Edition, describes the condition as an Intellectual Developmental Disorder. WRR 17:15.
12. Dr. Woods' diagnosis was that Applicant suffers from a mild intellectual disability. WRR 17:17. A mild intellectual development disorder and his deficits are directly related to intellectual functioning. WRR 17:86-87.
13. "Someone that has mild intellectual disability has significant impairments in being able to

function on a daily basis in the world." WRR 17:17.

14. There are "many things that a person with mild intellectual disability can accomplish, and that is what often makes it confusing to the layperson." WRR 17:17-18.
15. The Diagnostic and Statistical Manual, 5th Edition ("DSM-5") is "a manual that is put out by the American Psychiatric Association and it is a classification system that has been developed to enable practitioners to have what's called interrater reliability." WRR 17:18.
16. The DSM-5 is accepted as reliable and authoritative in the field of neuropsychiatry. WRR 17:20.
17. The User's Guide of Intellectual Disability, Definition, Classification, and Systems of Supports, 11th Edition, published by the American Association on Intellectual and Developmental Disabilities ("AAIDD"), is also accepted as reliable and authoritative in the field of intellectual disability. WRR 17:22.
18. A layperson cannot accurately diagnose a person with mild intellectual disability "[b]ecause there are no cues. There are no physical cues necessarily. You can't look at someone and determine if they have mild intellectual disability. You can't listen to someone. There is nothing in the way of their language that would tip you off to make you

think that this person has mild intellectual disability." WRR 17:20.

19. People with mild intellectual disability can perform many of the same tasks and activities as people without intellectual disability. A "person with mild intellectual disability can get a driver's license. A person with mild intellectual disability can often complete certain levels of school, certainly middle school, many times high school, occasionally a year or so in college. A person with mild intellectual disability can play sports. A person with mild intellectual disability can work a job." WRR 17:20-21.

20. Certain stereotypes often prevail about people with intellectual disabilities. "The most significant stereotypes is that they sound a certain way, that their language will tell you whether this person has intellectual disability, or that they can't marry, they can't have relationships, or that they can't work on— they can't work a job, or that they often do poorly, that they always do poorly in school. None of those in any way imply mild intellectual disability." WRR 17:21-22.

21. In a case involving mild intellectual disabilities, people can perform complex tasks. It may take them longer to learn the task, and it may have to be broken down into smaller steps, sometimes called "baby steps," but people with mild intellectual disabilities

"often can get to a point where they can do more complex tasks." WRR 17:22-23.

22. "The idea that a person with ID cannot get a driver's license, cannot buy a car, or cannot drive a car, that [is] not correct." WRR 17:23.
23. The idea that a person with intellectual disability does not and cannot support their families, is not correct. WRR 17:23.
24. Some people with mild intellectual disability can acquire the vocational and social skills for independent living. WRR 17:23.
25. In people with mild intellectual disabilities, strengths and weaknesses occur at the same time. WRR 17:24. Intellectual Disability is determined by the deficit that a person has and not by his strength. It is not a zero sum game. WRR 17:24.
26. When evaluating someone for intellectual disability, clinicians must "determine if a person is using supports because, when you want to make the diagnosis of intellectual disability, you want to evaluate that person without their use of supports." The clinician must examine how a person functions without a structure, without family, and without the extra help that might make a difference. They ask how the person functions without help and how they function independently. WRR 17:25.
27. Dr. Woods examined Applicant on March 5, 2016. He "reviewed the neuropsychological testing, as well as the intellectual functioning

testing of Dr. Kasper, as well as her testimony' and the evaluations of Dr. Price and Dr. Fahey. WRR 17:26. Dr. Woods also relied on the Affidavit of Dr. Patton (Attach. 1), but also his examination of Applicant in rendering his opinion. WRR 17:193-144.

28. Dr. Woods provided contradictory testimony as to what other information he reviewed. In one place in his affidavit, he stated that he only reviewed sworn declarations of Linda Wittig, Carolyn Duplechin, Kenneth Murray, Jean Shaw, and Annie Stafford. Attach. ¶8. However, later in his affidavit he swore that he reviewed the sworn declarations of some ten persons. Attach. 3, ¶81. Dr. Woods testified that he had reviewed some ten to twelve witness statements. WRR 17:166.

29. Since making his diagnosis, Dr. Woods testified that he "reviewed the evaluation of Dr. Price; and [he] reviewed the evaluation of Dr. Fahey, a speech pathologist." WRR 17:26.

30. According to the Diagnostic and Statistical Manual of Mental Disorders (DSM-5), there are three criterion that must be met in order for a person to be considered intellectually disabled. Criterion A, or Prong 1, is a deficit in intellectual functions confirmed by clinical assessments and individualized in standard intelligence testing. Criterion B, or Prong 2, is a deficit in one of three adaptive functioning areas. The adaptive areas are

conceptual domain, social domain, and practical domain.

> "To meet diagnostic criteria related to intellectual disability, the deficits in adaptive functioning *must be directly related* to the intellectual impairments described in Criteria A." (Emphasis added by this Court) Def's Writ Ex. 240:38.

Criterion C, or Prong 3, onset during the developmental period, refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence. Def's Writ Ex. 240:33, 37-38, which is DSM-5.

31. Dr. Woods describes Prong 1 as intellectual functioning. This includes skills such as problem solving, reasoning, sequencing one's thoughts, the ability to get along in the world, and mental flexibility. WRR 17:27.

32. Dr. Woods testified in detail about the different components that must be examined to determine if Prong 1 is satisfied. Dr. Woods discusses acquiesce (WRR 17:43-44); mental flexibility or multitasking, which is also important in the practical domain under Prong 2 (WRR 17:46-47); and repetition or "getting stuck," the technical term being "perseveration." Perserveration is important because it involves problem solving, which is a "core feature" of intellectual functioning (WRR 17:48-49). "This does not mean that a person cannot solve problems. We're saying that a person may not be as effective at

problem solving." Dr. Woods felt that Applicant was inappropriately up-beat in person given his circumstances." WRR 17:49. Continuing, Dr. Woods testified that insight is a component of intellectual functioning. Insight has two components: being aware of the situation and the ability to problem solve. Applicant has insight, but according to Dr. Woods, Applicant's insight is severely limited. WRR 17:51-55.

33. Dr. Woods summarized the factors he considered in concluding that Applicant was significantly deficient under Prong 1. These were:

    A. Difficulty in seeing the big picture;

    B. Comprehension**;**

    C. Gets stuck; problems with mental flexibility;

    D. Difficulty with attention; Problems with memory;

    E. Difficulty in multi-tasking; and

    F. Reading comprehension

34. DSM-5 states, "Individuals with intellectual disability have scores of approximately two standard deviations or more below the population mean, including a margin for measurement error (generally +5 points). On tests with a standard deviation of 15 and a mean of 100, this involves a score of 65-75 (70+ or -5)." Def's Writ Ex. 240:37. However, IQ test scores have been moved out of the

specific criteria for determining an intellectual deficit. It is now considered to be an "associated feature" because:

> "IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower score. Thus, clinical judgment is needed in interpreting the results of IQ tests." WRR 17:29, quoting Def's Writ Ex. 240: 37 (DSM-5).

35. According to DSM-5, intellectual disability has an overall general population prevalence of approximately 1%. Def's Writ Ex. 240:38 (DSM-5).

36. When examining Applicant, Dr. Woods used the criteria set forth in the DSM- 5. WRR 17:30.

37. The DSM-5 is distributed by the American Psychiatric Association. It is "the standard for any psychiatrist" who evaluates someone for intellectual disability. It is also used by Social Security as an appropriate authority on the issue. WRR 17:30.

38. "Because … intellectual disability was determined initially to provide services; so if

someone has certain strengths, they may not need services in those areas." WRR 17:32. In a clinical setting, an individual's strengths have very little role as clinicians focus on limitations, and what a person cannot do, in. order to provide services. In a forensic setting all that is required is to make the diagnosis. "And that a significant difference ... between the forensic setting and the clinical setting." WRR 17:32-33.

39. "Intellectual disability is, by definition, a neurodevelopmental disorder. It's an impairment of the brain." WRR 17:33.

40. Dr. Woods conducted a neuropsychiatric examination when he evaluated Applicant for intellectual disabilities. WRR 17:33.

41. Dr. Woods wrote a report detailing his findings when he evaluated Applicant. WRR 17:34. This report was marked for demonstrative purposes but not admitted into evidence.

42. Dr. Woods conducted his evaluation of Applicant face-to-face in a quiet room at the Polunsky facility. WRR 17:38.

43. Dr. Woods noted that Applicant's left arm was shorter than his right arm and that this likely developed during the second trimester when he was in the womb. WRR 17:39-40. Dr. Woods did not connect this testimony to his diagnosis.

44. When Dr. Woods examined Applicant, Applicant was able to attend to the

environment, and he was able to focus on Dr. Woods. Dr. Woods noted, however, that Applicant was easily distractible when guards walked by the window, and his "level of distractibility" was such that it "speaks to impaired focus" and "impaired attention." WRR 17:41-42.

45. During the examination, "Applicant was very cooperative. He was able to focus on the interview, but he was also acquiescent. He would ask [Dr. Woods] to repeat questions. He would want to make sure that the answer that he gave was okay. He was frequently unsure of certain answers." Dr. Woods believed Applicant was engaging in "masking," exhibiting a term psychiatrist refer to as "a cloak of competence." WRR 17:43.

46. Acquiescence and masking are signs of deficits in intellectual functioning and deficits in adaptive functioning in the social domain. WRR 17:43-44. All of the testifying experts opined that Applicant had no significant adaptive deficits in the social domain.

47. Dr. Woods found that Applicant had difficulties related to mental flexibility. He could follow one or two suggestions but would have problem with three and four step commands. This is multiple tasking. Mental Flexibility "is a core symptom of problem solving. In order to solve a problem, [you have] got to be able to take all of the factors,

all of the elements into consideration." In Dr. Woods' opinion, mental flexibility "is clearly related to intellectual functioning." WRR 17:45-48. Dr. Woods example of multi-tasking was that Applicant operated a forklift poorly. WRR 17:85.

48. Based upon Dr. Kasper's testing, Dr. Woods testified that Applicant's mental flexibility "is significantly impaired." WRR 17:46.

49. Dr. Woods found that Applicant demonstrated signs of "getting stuck." The technical term is deficits in perseveration. This did not mean that a person cannot solve problems, it just means that a person may not be as effective at solving problems. Perseveration is a core feature of intellectual functioning because it involves problem solving. WRR 17:47-49.

50. Dr. Woods found that Applicant's "internal mood state" was "inappropriately upbeat, given his circumstances." WRR 17:49.

51. Dr. Woods found that the prison system provides many supports for Applicant which make the prison life inappropriate for evaluating him for intellectual disabilities. For example, "[H]e doesn't have to cook. His meals are served to him. He's told when to shower. His clothes are given to him. He doesn't have to change. He doesn't have to do many of the functional academics of buying, taking, or having a credit card or a bank account ... And so consequently, he doesn't have to really order his books. His

commissary is given to him. So, he's able to do these things. He's able to order commissary. If he wants a book, he's able to order a book right there." He does not have to perform the various steps to accomplish these things that he would have to in the outside world. WRR 17:50.

52. Dr. Woods found that the need to live with structural supports is a sign of deficits in intellectual functioning and deficits in adaptive functioning in the practical and conceptual domains. WRR 17:50.

53. Dr. Woods found that Applicant demonstrated deficits related to independence, which is a sign of deficits in intellectual functioning and adaptive functioning in the practical domain. WRR 17:52-53.

54. Dr. Woods found that Applicant was unable to name his medications or the medical treatment Applicant had received in prison. Dr. Woods concluded this was a sign of adaptive deficits in the practical domain. WRR 17:53-54.

55. Dr. Woods found that Applicant had difficulty judging major social relationships and lived with family most of his life. When he was married, his wife handled financial transactions and complicated legal documents. Dr. Woods attributed this to Applicant's dependence on others is a sign of deficits in intellectual functioning and

adaptive functioning in the practical domain. WRR 17:54-55.

56. Additional significant deficits in the practical domain that Dr. Woods observed were the need to get help with his school work; being in Related and Consumer Math classes; not paying his own bills but instead allowing his wife to pay them; losing a car; over drafting his ATM account; not having a checking account; and not being able to remember his medications. WRR 17:141-143.

57. In his examination Dr. Woods chose to look at the working memory. Dr. Woods described Applicant's inability to recall basic facts about the books that Applicant claimed to have read. Working' memory is the memory that allows you to hold something in your mind while doing something else. WRR 17:56-57.

58. When looking at the Wechsler Adult Intelligence Test IV, Applicant scored well on the working memory portion, and his working memory was pretty good. However, Dr. Woods concluded that Applicant's working memory in real life does not work well. WRR 17:58-59. Dr. Kasper also performed the Boston Naming Test. This is designed to go into the memory bank looking for words that start with a certain letter or are in a certain category. Applicant's score on the Boston Naming Test was 1.5 deviation below the norm. WRR 17:58-59. There are different memories for numbers, different memories

for letters, different memories for figures, squares and cubes. When Dr. Kasper tested Applicant's memory for figures, it was impaired, but once Applicant was able to get it into his head, not only was he able to hold on to it, but he scored above average. WRR 17:59-60.

59. A person with mild intellectual disability can learn, but it takes them longer to learn. While they may not learn as fast, they can retain and bring these facts back once learned. WRR 17:58-60.

60. Visuospatial skills are a measure of whether we can see the "big picture." They are the "end result" of what psychiatrists refer to as "executive functioning." According to Dr. Woods, executive functioning is the key to intellectual functioning. WRR 17:61-62.

61. The "Clock Test" is a screening test for visuospatial skills. The test asks the subject to draw a clock set to a particular time. The test involves several elements, including the shape of the clock, the numbers, and the ability to draw the hands correctly. The clock test is merely a screening test designed to see if further testing is needed. WRR 17 :62-63.

62. Dr. Kasper did other tests of visuospatial functioning that were more complex. WRR 17:63-64.

63. Dr. Woods described Applicant's deficits in visuospatial skills as a sign of deficits in intellectual functioning and adaptive

functioning in the practical and conceptual domains. WRR 17:64-65.

64. Constructional ability is a right-brain function that is similar to visuospatial skills. When Applicant was given a cube, he was unable to draw the cube. Applicant displayed signs of constructional apraxia, which is a core symptom of brain dysfunction. WRR 17:65-66.

65. Dr. Woods detailed Applicant's difficulty with basic and functional mathematics. Mathematics was one of Applicant's poorest areas in achievement testing in both elementary and high school and one of his poorest areas on the Wide Range Achievement Tests that were administered. Dr. Woods rated his math skills at around a sixth-grade level. Dr. Woods characterized this as a sign of deficits in intellectual functioning and adaptive functioning in the conceptual and practical domain. WRR 17:67-69.

66. Dr. Woods's relied upon Applicant's performance on the Wide Range Achievement Test (WRAT) to evaluate his reading and concluded that Applicant read at a 7th grade level. After reviewing Dr. Fahey's conclusions, Dr. Woods adopted the analysis of Dr. Fahey. Dr. Fahey conducted her testing in December, 2018. WRR 16:53. Dr. Fahey's assessment shows that Applicant's reading comprehension is at a fourth-grade level. Id. The average for reading comprehension for

people who have graduated from high school is seventh or eighth grade, and the average comprehension is sixth-grade for all people in the United States. WRR 16:108-109.

67. Dr. Woods found that Applicant's poor performance on Dr. Fahey's reading tests corroborate the declarations that Applicant was slow and needed help. Dr. Woods found that Applicant's deficits in reading comprehension are a sign of deficits in intellectual functioning and adaptive functioning in the conceptual and practical domain. WRR 17:72-74.

68. The WAIS-IV is probably the closest in terms of the evolution of IQ tests in attempting to capture brain functions. WAIS-IV is a recognized test by DSM- 5 and the neurological community. WRR 17:74-75.

69. Dr. Woods administered another screening test to Applicant called the "Fishing Boy Test," on which he scored poorly. Dr. Woods found that Applicant displayed a level of concrete thinking that impairs comprehension. Dr. Woods found that these deficits in problem solving and executive functioning were signs of deficits in intellectual functioning and adaptive functioning in the conceptual and practical domains. WRR 17:78-81. The Court found the Fishing Boy Test to be a very confusing test, and until Dr. Woods explained the various

aspects, the Court's observations were similar to Applicant's.

70. "Abstraction" is the concept of being able to "put together pieces" and to "see the whole of the pieces," which is similar to "being able to solve a puzzle." WRR 17:82.

71. Dr. Woods found that Applicant thinks in concrete terms and has difficulty in dealing with abstraction. Dr. Woods found that this is a "significant impairment" in adaptive functioning in the practical domain. WRR 17:83-84.

72. Dr. Woods found that Applicant's intellectual functioning is significantly impaired in a number of areas:

> [H]as difficulty getting the big picture, has difficulty with comprehension, gets stuck, has real problems with mental flexibility. These impairments in intellectual functioning relate directly to the adaptive problems he has in terms of both conceptual and practical. He has real problems with attention. He needs support in order to function at age appropriate levels. He has problems with memory. He has difficulty seeing the big picture. He has problems with reading comprehension, and he has significant problems effectively problem solving. WRR 17:85.

73. Dr. Woods' interviews are always preliminary, and he has to review the neuropsychological testing, the IQ testing,

and the Adaptive Functioning before he can make an evaluation. WRR 17:84-88. Dr. Woods preliminary observation was that Applicant had a number of areas where his intellectual functioning is impaired. WRR 84-85.

74. The summaries of Dr. Woods' testimony concerning Intellectual Functioning and Adaptive Functioning were admitted into evidence as DX500 and DX501. WRR 17:87.

75. Based on the neuropsychological exam he performed on Applicant, Dr. Woods testified that Applicant exhibited deficits in the conceptual domain due to his inability to pay attention during the interview; inability to maintain one thought in his mind while working on something else (which Dr Woods defined as working memory); his executive functioning (which Dr. Woods described as the inability to see the big picture); his need for supports during his lifetime, in being inappropriately upbeat given his circumstances; and his deficiencies in math and reading comprehension. Def's. Writ Ex. 500 and 501.

76. Dr. Woods spent three hours interviewing Applicant and administering tests. WRR 17:155.

77. Dr. Price also interviewed Applicant at the Polensky Unit and did not find that Applicant had any issues with attention and concentration. Applicant was coherent and answered questions in a responsive fashion.

He understood what was going on in his case. He was not inappropriately upbeat. Applicant was no more distracted than Dr. Price was by the people walking by. Dr. Price with Applicant for 8 hours over 2 days. WRR 16:25, 41-46.

78. By the time of Applicant's original trial, Dr. Kasper, who was Applicant's expert neuropsychologist at his original trial, had spent over fifty (50) hours interviewing Applicant and reaching her diagnosis. RR 72:6-17.

79. IQ Testing is important in getting a general understanding of a person's intellect. It is helpful in determining how a person's intelligence works but less helpful in looking at their intellectual functioning. WRR 17:88.

80. Dr. Woods did not testify, or give any opinion, as to the age that the developmental period ends.

81. Long term use of alcohol can have a direct impact on the frontal lobe functioning of the brain on what is called executive functioning but not much impact on IQ. WRR 17:89.

82. Academic literature does not speak to cocaine being a drug that has an impact on IQ. WRR 17:89-90.

83. While other factors might have had an impact on Applicant's IQ scores, Dr. Woods found that there was no indication that substance

use had any impact on Applicant's IQ scores. WRR 17:89.

84. The WAIS IV administered by Dr. Kasper in 2012 and a more recent WAIS IV administered by Dr. Price in 2017 were the only IQ tests that Applicant had that were not group tests. WRR 17:90, 94-95.

85. Dr. Woods reviewed Applicant's Exhibit 193 which was a summary sheet of Dr. Kasper's IQ Test, her notes, and her neuropsychological testing. This is the sort of material that a neurophysiologist would reasonably rely on in the diagnosis of intellectual disability. WRR 17:91-93. Dr. Kasper's notes reflect Applicant was 52 years of age, had a 36-year history of alcohol and marijuana use, and a 23-year history of crack use. WRR 17:94. Dr. Kasper's neuropsychological evaluation was performed in August, 2012, at the Brazoria County Jail. Applicant had trouble following directions, frequently asked for instructions to be repeated, was cooperative, and showed no signs of psychiatric distress. WRR 17:95. These observations were consistent with Dr. Woods', and these are symptoms of a neurological disorder. These are consistent with intellectual functioning. WRR 17:96.

86. Dr. Kasper also performed a smell test on Applicant. Impairments in smell will give you clues about how an individual's frontal lobes

are working. Alcohol can directly impact the frontal lobe. WRR 17:99-100.

87. Applicant scored in the 73rd percentile for his age and gender on the smell test, which means he was in the normal range for age and gender in terms of that part of the frontal lobe. WRR 17:99-100.

88. Dr. Kasper conducted a WAIS-IV evaluation of Applicant. The WAIS-IV Index is the Wechsler Adult Intelligence Scale, which is made up of a battery of tests. WRR 17:101-102.

89. When Dr. Kasper conducted the WAIS-IV examination, Applicant scored a composite score of 75. This composite score is the 5th percentile- that is, 95 percent of the people that are normed with Applicant did better than he did in terms of IQ. WRR 17:101-102.

90. An IQ score of 75 is "within the range that is normally considered for Mild Intellectual Developmental Disorder." WRR 17:102.

91. IQ can range from 4 to 5 points below or above the scored number. Applicant's scores on the test administered by Dr. Kasper could be as low as 70 or as high as 80. WRR 17:102-103.

92. The Flynn Effect is generally accepted in the field of neuropsychology and neuropsychiatry. WRR 17:110. However, Dr. Woods acknowledged that the Flynn Effect is not recognized in Texas Courts. WRR 17:169.

93. Dr. Woods based much of his testimony on testing that was performed by Dr. Mary

Elizabeth Kasper, Ph.D., in 2012. Dr: Kasper has a Ph.D. in clinical psychology, had done internships in clinical psychology and neuropsychology, and postdoctoral fellowships in neuropsychology and behavioral medicine. She is also Board Certified in Clinical Psychology. A neuropsychologist is a psychologist that specializes in learning about the impact of neurological problems on the person's ability to function in their environment and what limitations are imposed by neurological disorders. RR 72:6-17.

94. Dr. Kasper prepared a Score Summary Sheet for the results of her testing. Def's Writ Ex. 193. While Dr. Kasper made some of the same observations concerning Applicant's demeanor, including "trouble following directions, frequently asked for instructions repeated," she interpreted the tests differently that Dr. Woods. On the Trails A and B test, Applicant made a perfect score and was "unimpaired on both H & H" (Heaton & Halstead). The same was true on the Speech Sounds Perception Test. Under "Category Errors" she noted, "most on Subtest 3 - typical pattern with reasoning difficulty," which was "average" on Heaton and severe impairment under Halstead. On BNT Spontaneous Naming, Applicant scored about 1.5 sd below his age. On Figure Memory, "mild to moderate for learning, Once Learned Visual info is encoded "above average." Her conclusions were "mild defects

in sustained attention, and acquisition over time in context of good, memory once it is learned on Verbal memory - suggest possible vascular issues." Dr. Kasper referred to Applicant's prior IQ test in TDCJ "parole records indicated a score of 83 in 9/1/00." Def's Writ Ex. 193.

95. Dr. Kasper also gave Applicant the Controlled Oral Word Association ("COW AT"), which is a test of recollection-specifically, it looks at different categories and how individuals can recall those categories. WRR 17: 116-117.

96. Dr. Kasper also administered a Category Test to Applicant. The Category Test is a series of subtests aimed at problem solving, which starts at relatively easy decisions and advances to more complex and difficult decisions. WRR 17:119-120. It is an important test of executive functioning and problem solving. WRR 17:121.

97. Applicant had seventy (70) errors on the Category Test. From a neuropsychological point of view, this test is an important test of executive functioning and of problem solving. Under the Heaton standard, the results were within the average, but if using the Halstead standard, Applicant was severely impaired. WRR 17:120-121; Def's Writ Ex. 193.

98. Dr. Kasper also administered a Textual Performance Test. According to the Heaton norms, Applicant had a mild to moderate impairment, but according to Halstead,

Applicant had severe impairment. WRR 17:124-125; Def's Writ Ex. 193.

99. Dr. Kasper also tested Applicant with the Ahasia Screen. Applicant had some errors on this screen. WRR 17:125-126.

100. The Halstead General Neuropsychological Deficit Scale (GDNS) is a score to try to get an understanding of how brain impaired the subject is. WRR 17:126.

101. Applicant scored a 35 on the GDNS. Eighty-five percent (85%) of brain damaged subjects have GNDS of 34 and above. Thus, Applicant - a person in the mildly impaired range - also exhibits signs of significant brain impairment. WRR 17:126, Def's Writ Ex. 193.

102. The Halstead Impairment Index is an index that goes from zero to one. Seven of the score tests of the Halstead-Reitan battery are used to determine the Halstead Impairment Index. A score of zero means no impairment, and the scale goes from zero to one. Kr. Kasper scored Applicant as a one on the Halstead Impairment Index which is the highest a person can get on the Index. WRR 17:127.

103. Dr. Kasper's summary also noted that "comparison to Halstead norms suggests greater impairment than Heaton." WRR 17:128. Dr. Woods explained that this is a comparison between the Dr. Heaton norming system and Dr. Halstead's norming system: while the Halstead norms want you to look at the person and their scores exactly the way

the scores are, the Heaton norms take norming into consideration. WRR 17:128.

104. At trial Dr. Kasper testified extensively at trial about the battery of tests she administered and the basis for her diagnosis. RR 72:22-34. Dr. Kasper also testified that Applicant had a low IQ but that surprised her based upon prior records. RR 72:22-34. Dr. Kasper did not indicate what records she was referring to.

105. While Defendant's Writ Exhibit 193 is not dated, Dr. Kasper had provided her diagnosis to Applicant's trial counsel by mid-October, 2012, as testimony showed that this diagnosis was discussed at the "Bring Your Own Case" seminar October 4-6, 2012. WRR 14:174; WRR 19:151-152.

106. By October 4, 2012 the theory of mitigation was that Applicant had a mild impairment due to vascular dementia. WRR 19:153.

107. Dr. Kasper testified at Applicant's original trial that Applicant had some impairment in visuospatial memory, and her diagnosis was mild cognitive impairment, which is a precursor of vascular dementia, but it was not significant enough to diagnose as vascular dementia. To have a diagnosis of dementia one must have memory impairment, and "Although I did find some areas of memory impairment, I do not think they were significant enough to warrant a full-blown diagnosis of dementia, and without the additional problem of memory impairment,

the diagnosis would be mild cognitive impairment." Dementia is a memory impairment plus a couple of other cognitive areas such as attention, self-regulation, ability to express, and motor functioning. Dr. Kasper found Applicant did not have sufficient memory impairment to diagnosis as dementia. RR 72:35-36. The symptoms Dr. Kasper saw on her testing were consistent with what Dr. Kasper heard about judgment problems, planning problems, ability to see right consequences from his actions, some fluctuating attention and sound situations where he has impaired functioning. RR 72:37-39. Dr. Kasper was "confident" in her diagnosis. RR 72:39.

108. Vascular dementia is a neurologic that has to do with vascular changes in the brain. It involves a "stepwise progression." RR 71: 194.

109. Dr. Kasper was very comprehensive in her testing. WRR 17: 115.

110. The neuropsychological tests that Dr. Kasper conducted provide a more comprehensive picture of Applicant's brain function than what can be ascertained exclusively from an IQ test. WRR 17:126; Def's Writ Ex. 193.

111. In Dr. Woods's professional opinion, Applicant has a mild intellectual disability. He can function on a superficial level. There are things that Applicant can do. There are things that he can memorize. There are things that he can read. There are things that he can write and things that he can say.

However, as tasks get more complex, it shows that it is difficult for Applicant to function. WRR 17:118.

112. Several times Dr. Woods speculates, without any supporting basis, that Dr. Kasper was not looking for Intellectual Disability. Dr. Kasper, who was the only person who could address this issue, did not testify at the Evidentiary Hearing, although the undisputed testimony at the Evidentiary Hearing was that Dr. Kasper advised the trial team Applicant was not intellectually disabled.

113. Several times Dr. Woods speculated that certain matters "could relate to Fetal Alcohol Spectrum Disorder." WRR 17:131-132. However, nowhere does Dr. Woods opine that Applicant suffered from Fetal Alcohol Spectrum Disorder.

114. Dr. Woods disagreed with Dr. Kasper's diagnosis of a mild cognitive disorder that could lead to vascular dementia. WRR 17:134.

115. Dr. Kasper surrounded her IQ testing with neuropsychological testing that supported her findings and supported Applicant's score of 75. WRR 17:135-136.

116. Dr. Woods had concerns about the Practice Effect pertaining to the test administered by Dr. Price. However, Dr. Woods could not

testify the Practice Effect should be applied to Dr. Price's test of Applicant. WRR 17:195.

117. Dr. Woods relied on Dr. Patton's sworn affidavit regarding adaptive functioning assessment in developing his diagnosis that Applicant had an intellectual disability. WRR 17:143.

118. Dr. Patton had determined that Applicant had significant deficits in both the conceptual and practical domains in terms of adaptive functioning or adaptive reasoning. WRR 17:143-144.

119. Dr. Woods relied on Dr. Fahey and on Dr. Patton to form his professional assessment. It is common for a treating physician to rely upon other professionals in reaching a diagnosis of intellectual disability. WRR 17:147-148.

120. Clinical judgment is an important part of Dr. Woods's diagnosis of Applicant. WRR 17:149-150.

121. Dr. Woods reviewed Applicant's school records and testified Applicant's grades were in the average range. WRR 17:72-73.

B. **DR. JAMES PATTON**

122. Dr. James Patton was asked to assess Applicant's adaptive functioning. Dr. Patton has a doctorate in Special Education with a focus on mild intellectual disability. WRR 16:116. Dr. Patton was tendered by Applicant as an expert in the field of adaptive

functioning as it related to the field of intellectual disability, without objection by the State. WRR 16:124.

123. Although Dr. Patton testified several times that it was very important to conduct personal interviews, he testified that he only conducted eight (8) interviews, but he could only identify Applicant, Carolyn Duplechin, Marcus Lincoln, and Tamara Harris as persons he personally interviewed. He stated he interviewed several persons multiple times, and he first talked to Tamara Harris on the phone but later had a face to face interview. WRR 16:166, 188.

124. Dr. Patton could not recall specifics about any of the interviews that he did conduct. WRR 16:166-167. Dr. Patton relied upon the "affidavits that were provided, records I had, and the interviews I conducted." WRR 16:169. With regard to the affidavits, he "assumed they were notarized," *Id*. The record reflects that none of the declarations proffered pertaining to intellectual disability were notarized. On redirect examination, Dr. Patton clarified that the "affidavits" he referred to were instead 14 unsworn declarations. WRR 16:188-189. Dr. Patton also did not know the circumstances OCFW conducted the witness interviews but knew that they had a "team" that conducted the interviews. WRR 16:169. There was no evidence that the written declarations Dr. Patton relied upon were obtained by clinical

interviews, or were taken by persons trained to conduct clinical interviews, or that is an accepted practice for experts in his field to rely on sworn or unsworn declarations of the type obtained in this case. All interviews in this case, except for the interviews Dr. Patton specifically testified he conducted, were conducted by Writ Counsel. WRR 16:169-170.

125. Dr. Patton stressed the importance of a personal interview. "I think it is essential that you talk to -- well, records don't give it all to you. So in adaptive functioning you want to know what someone can actually do in everyday life. And records are pretty, you know, silent on some of that. So you really need to talk to people who have observed the behaviors." WRR 16:132.

126. The Court found concern with the apparent significant reliance Dr. Patton placed on the written declarations. He references them many times in his affidavit. Attach. 1. Not only has the Court previously discussed reliability of these declarations, but much of the information is clearly contradicted by other evidence introduced. Dr. Patton quoted from Carolyn Duplechin's Declaration that Applicant had trouble in school, yet at the Evidentiary Hearing, when she was under oath, she testified Applicant was a B-C student. This also contradicts Dr. Woods' testimony that he found Applicant had average grades (FOF 121), and Dr. Farrell's testimony at trial that the grades were

modest and he found no problems with his school records (FOF 498, 502). Dr. Patton also relies on the declarations of Annie Stafford and Linda Wittig which the Court has found unreliable and incorrect. Although Dr. Patton in his affidavit states that he reviewed Applicant's school records from the Boling Independent School District (Attach. 2, ¶18.), he apparently did not notice the obvious inaccuracies in Ms. Stafford's statements. While Dr. Patton is certainly qualified to opine on adaptive deficits, it appeared to the Court that he was quick to form an opinion without evaluating the underlying records and evaluating the circumstances under which the declarations were obtained.

127. Criterion B, or Prong 2, concerns three domains only, one of which must be met to satisfy the criterion: conceptual, social, and practical. WRR 16:127.

128. The social domain includes interpersonal skills, social judgment, social perception, the ability to get along with people, and the ability to make and keep friends. WRR 16:128. Dr. Woods, Dr. Patton, and Dr. Price all agreed that Applicant has no significant defects in the social domain. WRR 16:143; WRR 18:70-71.

129. Skills within the conceptual domain include reading, writing, math, logical reasoning, and language, as well as the ability to set goals for

yourself and make decisions to direct your own life. WRR 16:128.

130. Skills that fall within the practical domain are general self-management skills that one uses in everyday life, including basic personal hygiene skills, home living, using community services, and taking care of one's health and safety, and employment. WRR 16:128-129.

131. Dr. Patton was tendered as an expert on Criterion B, adaptive functioning. WRR 16:127. He was not tendered, and was not qualified, to testify as to intellectual deficits. WRR 16:163, 181. However, on several occasions Dr. Patton attempted to render opinions relating to Criterion A. WRR 16:124-125; 144-146; 161-162; 194-195. Since Dr. Patton was not qualified as an expert in these areas, the Court disregarded Dr. Patton's testimony relating to Criterion A.

132. Common records reviewed during an adaptive functioning assessment include school records, medical records, employment records, and social security records. WRR 16:131-132. Dr. Patton also reviewed Applicant's school records from Boling ISD. Attach. 2, ¶ 18.

133. The DSM-5 does not require practitioners to use a formal instrument in assessing adaptive functioning. Dr. Patton did not use one for his assessment of Applicant because there were not enough individuals available

who knew Applicant to provide a comprehensive measure. WRR 16:134.

134. A person with intellectual disability can have both struggles and relative strengths. When assessing adaptive functioning, Dr. Patton identifies areas where the person struggles with the demands of everyday life, as well as their strengths. WRR 16:134-135.

135. There are four levels of intellectual disability: mild, moderate; severe, and profound. WRR 16:136.

136. People with profound intellectual disabilities cannot communicate, have little to no social interaction, and are entirely dependent on others for their everyday, basic needs. WRR 16:136-37.

137. With respect to individuals with mild intellectual disability, it is not possible to determine if someone has an intellectual disability just by looking at them. WRR 16:137-138. In the conceptual domain, people with mild intellectual may have difficulties learning, but can still learn. While they may have strengths in some academic subject areas, they will struggle in others, particularly in reading, writing, and math. They will struggle with self-determination and self-direction skills like problem solving. WRR 16:138-139.

138. In the practical domain, those with mild intellectual disabilities are likely able to take basic care of themselves. And they can often get jobs and keep them for extended periods.

Still, they will often need support with everyday tasks. WRR 16:139-140.

139. DSM-5 requires that to meet the diagnosis criteria for intellectual disability, the defects in adaptive functioning must be directly related to the intellectual requirement on the first prong (Criterion A). WRR 16: 181; Def's Writ Ex. 240:38.

140. In 2016 when he submitted his affidavit, Dr. Patton based his opinion on age 18 being the end of the developmental period. WRR 16:131. He testified that he found significant adaptive deficits before Applicant reached age 18. WRR 16:190. DSM-5 does not state an age cap for the developmental period. However, during the Evidentiary Hearing Dr. Patton testified that " ... in this particular case, I have applied a developmental period what will go into the 20's with 22 kind of being the target age." WRR 16:129-130. He based this on the fact that the Social Security Administration has issued a definition of Intellectual Disability that allows for the developmental period to extend to age 22. WRR 16:131. However, Dr. Patton did not opine that age 22 has been accepted by any courts or experts for purposes of DSM-5. Dr. Patton also acknowledged that the American Association on Intellectual and Developments Disabilities (AAID) suggests that the proper

age to determine onset is before age 18. WRR 16:175.

141. Adaptive deficits can be affected by factors other than Intellectual-Disability. WRR 16:174. The DSM requires that to meet the diagnosis for Intellectual Disability, the deficits in adaptive functioning must be directly related to the intellectual requirement in Criterion A. WRR 16:181; Def's Writ Ex. 240:38 (DSM-5).

142. Dr. Patton became involved in this case in 2015. WRR 16:116. He was asked to evaluate Applicant's adaptive functioning, which is a term used to describe how well an individual adapts to everyday life. WRR 16:117. At the time Dr. Patton prepared his first affidavit in Applicant's case, he referred to the DSM-5 and the AAID, which was the applicable standard at that time. WRR 16:125. Today, Texas law applies the DSM-5 definition. WRR 16:126- 127.

143. Dr. Patton also met with Applicant in person in February, 2016 for three hours. They discussed his daily routine and had a conversation about Applicant's interests. WRR 16:142; Attach 1, ¶19.

144. Since Dr. Patton submitted his affidavit in this case, he testified that he had re-interviewed a couple of the individuals he interviewed in 2016 and "had access to additional individuals." WRR 16:141-142.

145. During his testimony, Dr. Patton was careful not to testify that any of Applicant's teachers

had stated that Applicant should have been in special education. At one point he testified "teachers indicated" but quickly changed this to read "my assessment determined" that those teachers "felt" Applicant should be in special education. Even from a qualified expert, such speculation as to "feelings" of a person is not reliable. WRR 16:192-194. The Court had reviewed the declarations of Jean Shaw, Applicant's third grade teacher, and Michael Kalina, one of Applicant's high school teachers. While both stated that the school district had no special education classes, and that Applicant needed additional help, neither stated that Applicant should have been in special education, and the Court could find no basis in any of the declarations to support Dr. Patton's assessment that Applicant should have been in special education.

146. Dr. Patton testified that during the developmental period Applicant exhibited deficits in the practical domain because he could not cook and do laundry, and his other male siblings could. WRR 16:150. Dr. Patton found this to be significant because other males in the family could. WRR 16:149-150. However, Applicant's sister, Carolyn Duplechin refuted this when she testified at the Evidentiary Hearing that the other male siblings learned to cook from their wives after they were married. FOF 278. Dr. Patton then focuses on Applicant not being able to fix things around the house, do laundry, or clean

things around the house as evidence of deficits in the developmental period. Again, Carolyn Duplechin refuted this when she testified that the girls did inside chores and the boys did lawn work. FOF 279. Applicant must have had some ability to do some repairs as Applicant's sister Carolyn testified that the summer she and Applicant were employed by the Boling Independent School District to do " ... simple repairs, painting, stripping, waxing floors, lawn work to keep the school up for the summer." FOF 280.

147. Dr. Patton testified Applicant had money management issues during the developmental period and "money is related to math." He referenced the statement of Rose Lewis, Applicant's first wife, that she had to manage the paperwork to rent an apartment and pay the bills. WRR 16:151. However, Applicant did not meet Rose Lewis until 1982 and did not marry her until Applicant was almost 23. Attach. 17, ¶2-4. Finally, Dr. Patton then identifies as a deficit during the developments period that a relative helped Applicant get his first job. WRR 16:152.

148. Dr. Patton testified that during the developmental period Applicant had significant deficits in the conceptual domain. These primarily related to money management. "He had a difficult time in managing money." He could not save money or plan for the future, balance and keep a checkbook, pay bills, or even cash checks. Dr.

Paton attributed these struggles to Applicant's difficulty with math. WRR 16:145-146, 151. The only testimony at the Evidentiary Hearing concerning cashing checks came from Marlin Lincoln that he helped Applicant cash his check a couple of times. WRR 15:165. Marlin Lincoln was unaware if Applicant ever had a bank account. Id. Marlin Lincoln did not meet Applicant until he was working at Austin Industrial. His brother, Marcus, introduced them. WRR 15:159. Marlin and Marcus Lincoln did not meet Applicant until around 2002. FOF 240, 248. Applicant's sister also did not know if Applicant had a checking account as a teenager. WRR 15:140. Marcus Lincoln did testify that he helped Applicant open a bank account, which the bank quickly closed after Applicant overdrew his account. After the account was closed, Applicant cashed his checks at the comer story. WRR 15:187.

149. No reference to any of the facts Dr. Patton referred to in support his conclusions of conceptual domain could be found in the unsworn declarations of family member Mack Griggs, or childhood friends, Nola Army and Kenneth Murray. Co-worker Marcus Lincoln did not meet Applicant until 2002, and Bonnie Clark did not meet Applicant until the late 1980s when Applicant would be in his 30's. Attach. 12. Tamara Harris was not born until 1979, and even though she makes reference to Applicant not having a credit

card or being able to manage money (Attach. 13), there is no time frame given and it is not credible that she could have personal knowledge of these matters during Applicant's developmental years. Even assuming that the developmental period extends to age 22, to attribute these acts to Applicant's developmental period, Tamara Harris would be recalling facts when she was two years old or younger, which is not credible. (See further discussion of credibility of Tamara Harris at FOF 268-274.)

150. The only other family member to testify at the Evidentiary Hearing was his younger sister, Carolyn Duplechin, but none of her testimony concerned the developmental period except that Applicant was a B/C student, except for math, science, and English where he was a CID student. WRR 15:135. She also testified that Applicant did not clean the house or do his laundry, but she then explained "the girls basically cleaned inside and him being a boy, he would get to do the lawn work." FOF 279. Although Carolyn testified that she never saw Applicant read a book, "he usually was not there ... they like had like a neighborhood that they played games, football, and that type of thing, and they usually was doing that." WRR 15:138. Carolyn did testify that as a teenager, if Applicant had money, he would spend it. WRR 15:140.

151. All of the adaptive deficits that Dr. Patton concluded were relevant to deficits during the

developmental period were either explained or contradicted by other witnesses and had no basis in the declarations or clearly. occurred outside any possible developmental period, except that a relative helped him obtain his first job, and as a teenager Applicant would spend the money he had.

152. At trial Applicant's expert, Dr. Walter Farrell, came to a different conclusion concerning the timing of the onset of Applicant's problems. In his Power Point presentation, Dr. Farrell outlined the events in Applicant's life from birth until January 14, 2012. He addresses poverty, athletics, school attendance, home life, his school records which " ... suggested no major problems," his father's extra-marital affairs, his love of sports, his beginning to use drugs and alcohol at age 16, the lack of protective forces and positive role models, the life-changing automobile accident, his marriage, his checkered work history due to his addiction, Applicant's resolute desire to work, his involvement with the criminal justice system, and the loss of his sisters which escalated his drug use. RR 68:196-203. According to Dr. Farrell, Applicant's life was "... careening out of — off the path from normalcy. And this was — after high school, mid-20's, late 30's, you can see the crack use

escalated with alcohol which put him on a negative glide path." RR 68:202.

153. Dr. Patton also opined that Applicant demonstrated adaptive deficits in the conceptual domain during adulthood. He identified problems in goal setting, money management, bank account, and inability to pay his bills. WRR 16:146-147.

154. According to Dr. Patton, the inability to manage money was the key issue. He could not set up a bank account, and when people helped him to do so, he overdrew his account. He was not able to pay his own bills. He could not plan for the future. He was unable to manage important documents that are necessary in adulthood. WRR 16:147-148. Applicant was unable to fill out rental paperwork for an apartment, so his wife had to handle the paperwork for their new apartment. WRR 16:151. In his divorce from his first wife, she had to handle the paperwork for him. Applicant also had to rely on other people to manage his bills. WRR 16:148.

155. After the developmental period, Dr. Patton pointed to Applicant's. inability to cook anything other than simple meals, not being able to navigate grocery stores, having accidents in vehicles shortly after purchase, not indicating any desire to do any job other than manual labor positions, or obtaining

certification to drive a fork lift as severe adaptive deficits. WRR 16:152-155.

156. Dr. Patton testified from Demonstrative 4, which was not admitted into evidence. WRR 16:126.

157. According to Dr. Patton, Applicant had numerous jobs but they were all manual labor, entry-level jobs. Applicant never had a job that required a higher level of conceptual skills. Applicant was certified to drive a forklift, but it was difficult for him to operate it. WRR 16:153-155. Patrick Taylor testified at Applicant's original trial that he first met Applicant when Applicant was the overseer of elderly and mental health patients at the Sweetbriar Nursing Center in West Columbia. RR 70:218. Applicant worked there in the late 1980's. Attach 12, ¶2.

158. Applicant knew he was competent at laborer jobs, and he like that kind of work. WRR 16:155-156. Dr. Patton believed that this behavior is referred to as the "expectancy of failure." However, Dr. Patton further testified that this " ... will apply to all of us, but it is more common with persons with Intellectual Disability." WRR 16:156.

159. Applicant's sister, Ethel, was a mother figure to him. He sometimes lived with her after his mother passed away. WRR 16:157. When he didn't live with her, she supported him by cooking for him and doing his laundry. She

also co-signed a loan for a car for him. WRR 16:158.

160. Applicant's niece, Tamara, and Ethel would go grocery shopping for Applicant and bring the groceries to the motel. Applicant did not shop at the grocery store himself. He was able to go to the convenience store to get snacks. WRR 16:159.

161. Applicant was able to provide his own self-care and bathe himself, but family members would get personal hygiene items for him. WRR 16:159-160.

162. During the period Applicant was using drugs, the drugs did not affect his daily performance. Applicant was able to function during the day and took the drugs at night. WRR 16:191.

163. Dr. Patton testified only three percent (3%) of the population are considered intellectually disabled, but DSM-5 states this is only one percent (I%). WRR 16:171; Ex. 240:38.

164. Dr. Patton considered drug use in evaluating Applicants adaptive deficits, but he did not find any evidence to show that Applicant used drugs or abused alcohol during the developmental period. Dr. Patton was curious as to what extent did "this drug use affect adaptive functioning." WRR 16:192. This is contrary to the admissions Applicant made to Dr. Price and to Dr. Kasper, and to the testimony of Mr. Wooten that Applicant

began drug and alcohol use in high school. WRR 18:41; Def's Writ Ex. 193.

165. Dr. Patton testified that Applicant's adaptive deficits are related to his intellectual deficits. WRR 16:194-195. The Court disregarded such testimony as Dr. Patton was not qualified as an expert on intellectual deficits. WRR 16:163, 173-174, 181.

C. **DR. KATHLEEN FAHEY**

166. Dr. Kathleen Fahey is a speech language pathologist and professor at the University of Northern Colorado. She specializes in speech language pathology and has a minor in reading. Dr. Fahey's speech language pathology focuses on developmental speech and language development and disorders. Dr. Fahey was asked to testify on literacy. WRR 16:52-53.

167. Throughout her career, Dr. Fahey has worked with approximately 75 to 100 intellectually disabled clients. WRR 16:54-55. She has testified twice before in capital murder cases, always for the defense. WRR 16:96.

168. Dr. Fahey was tendered as an expert in the area of speech language pathology. She was accepted by the Court without objection from the State. WRR 16:59. Dr. Fahey performed tests only to determine Applicant's reading

level and not intellectual disability. WRR 16:97.

169. Dr. Fahey first met Applicant in December of 2018. WRR 16:53. She performed a retrospective analysis of Applicant's reading comprehension based upon the present evidence available to her. WRR 16:107.

170. Dr. Fahey testified referencing Demonstrative Exhibit 3, which was not admitted into evidence. She reached two opinions in her work on this case. Her first opinion was that Applicant has deficits in both oral and written language. Her second opinion was that Applicant's oral and written language deficits occurred during the "developmental years." WRR 16:59-60.

171. Dr. Fahey did not testify as to what ages were encompassed within "developmental years." However, one test she employed is normed for a cut off age of 23 years, 11 months. FOF 178.

172. Dr. Fahey's tests were performed to determine reading level, not intellectual disability. WRR 16:97. She acknowledged that a number of factors can affect a person's comprehension issue other than a person's intelligence. Dr. Fahey was unable to answer whether vascular dementia or long-term alcohol use can affect a person's reading comprehension. WRR 16:97-98.

173. Dr. Fahey performed her assessment of Applicant by administering both

standardized and procedural tests in oral and written language. WRR 16:60.

174. To test Applicant's reading ability, Dr. Fahey administered to Applicant the Gray Oral Reading Test, 5th Edition, also known as the GORT-5. The GORT- 5 is a standardized Assessment tool that looks at four primary areas that compromise reading. These would include reading rate, reading accuracy, reading fluency, and reading comprehension. WRR 16:60-61.

175. Reading rate is the reading speed that an individual is able to achieve. Reading accuracy is a measure of the ability to accurately read words. Fluency is a combination of reading rate and reading accuracy. Reading comprehension is the ability to understand what is read. Reading fluency determines a person's ability to decode words off the page-essentially to accurately and quickly read words. Reading comprehension, on the other hand, is the ability to understand the content of what one is reading. Decoding is the process in which people decipher words. It is the process in which people see letters-and words and decipher them on a page. WRR 16:61-62.

176. If someone is successful at reading fluency, the person is not necessarily good at reading comprehension. WRR 16:62.

177. Dr. Fahey administered the GORT-5 because it is a well-standardized, comprehensive test

that looks at reading. It is widely accepted in the field. WRR 16:62.

178. The GORT-5 is normed for ages 6 through 23 years, 11 months. The authors of the GORT-5 wanted to account for any post-secondary education beyond high school. WRR 16:63-64, 111.

179. When Dr. Fahey scored Applicant's GORT-5, she found that he had varied ability in terms of his skills across these areas of rate, accuracy, fluency, and comprehension as measured by grade equivalency and percentile. In reading rate, Applicant scored in the 5th percentile, with a grade equivalency of Grade 5 and 2 months. His accuracy was scored at Grade 11, with a percentile of 25. His fluency was a grade equivalency of 7.2 with a percentile rank of 9. Comprehension was Applicant's lowest score with a grade equivalency of 4.2 and percentile rank of 2. WRR 16:68-70.

180. Looking at Applicant's GORT-5 results, Dr. Fahey drew the conclusion that he fits the profile of someone who has specific comprehension deficit in reading. WRR 16:70-71.

181. Dr. Price disagreed with that Dr. Fahey's results, and Dr. Price testified that while the GORT-5 is an analysis of a "person's ability to read out loud" and how fast a person could read out loud and comprehend what he is reading, that does not represent the "totality of a person's ability to read." Rather this

demonstrates a person's weakness in reading out loud and comprehending what he reads out loud, and it is not an overall adaptive deficit in the conceptual domain. Rather it demonstrates a weakness in the ability to read out loud and comprehend what you have read. According to Dr. Patton, in the real world, we mainly read to ourselves, and the WRA T-4 test is a test that measures academic abilities. WRR 18:66-68. The WRAT-4 has been accepted as one way to measure academic abilities that is accepted by experts such as Dr. Price. WRR 18:68.

182. Dr. Fahey performed an analysis on 13 of the books found in Applicant's cell. There were four books she did not examine. These were a Bible, a study Bible, a Dictionary, and an editorial cartoon book. WRR 16:71.

183. Dr. Fahey did not know whether Applicant had read any of the books found in his cell. WRR 16:72.

184. To perform the readability analysis, Dr. Fahey selected samples from each book. She examined paragraphs that contained at least 100 words. She selected four paragraphs across the breadth of each book from different chapters. Each paragraph was then analyzed with a tool that is available online that uses eight readability formulas in order to provide statistics on the particular samples that correspond to grade level readability estimates. The readability tool and its formulas are commonly used in the area of

speech language pathology and reading. WRR 16:72-73.

185. As an example, the book "Live to See Tomorrow" had a readability index that is about grade 2 to 3, which means that 7 to 8-year-olds should be able to comprehend the text. WRR 16:76.

186. Stephen King's "Revival" contained mixed results. Of the four paragraphs, one was at grade level 4, another was at grade level 6, the third was at grade level 9, and the final paragraph was at grade level 10. Combining all paragraphs, the book had a readability level at grade 5 and an automated readability index at grade 5/6, which is comparable to a 10 or 11-year old. WRR 16:76.

187. Dr. Fahey concluded that Applicant would most likely have moderate success in reading books in his cell with a readability around grade 5 because some portions of those books would be accessible to second and third grade-level readers. Dr. Fahey concluded that the two nonfiction books found in Applicant's cell were written at the college level and that it is doubtful that he would be able to read them. WRR 16:77.

188. The average reading level for students in the United States that have graduated from high school is the 7th or 8th grade reading level. In the United States the average education level

for all people is 6th grade as it pertains to reading comprehension. WRR 16:108-109.

189. Dr. Fahey used the Bader Reading and Language Inventory to examine Applicant's listening comprehension by using graded paragraphs. The Bader Reading and Language Inventory is a criterion referenced collection of tasks that is used to examine a variety of aspects of literacy. Dr. Fahey used the graded passage section in order to get a measure of Applicant's listening comprehension. She measured his listening comprehension as a comparable measure to Applicant's reading comprehension because a person's reading level does not necessarily match their oral language ability. WRR 16:78.

190. Dr. Fahey concluded that Applicant's listening comprehension falls somewhere between the 2nd and the 4th grade level, and that this is consistent with his oral reading comprehension level which was at the 4th grade. WRR 16:80-82.

191. Applicant's reading accuracy level was the 11th grade. WRR 16:102.

192. Dr. Fahey also performed the Bader Inventory's spelling test. The spelling test features a series of word lists ranging from

the primer level to the 5th grade level. WRR 16:82-84.

193. Applicant accurately spelled all of the words on the Bader Inventory's spelling test. WRR 16:83-84.

194. Dr. Fahey also analyzed Applicant's writing and determined that it had a readability consensus that varied between the 3rd and 4th grade level for the letters he wrote and at about the 4th and 5th grade level for the jailhouse grievances that he wrote. WRR 16:85.

195. Dr. Fahey reached this conclusion by analyzing Applicant's letters based upon ideations and grammatical complexity. An ideation is one's ability to convey ideas through writing. In analyzing for grammatical complexity, Dr. Fahey was looking for the occurrence of grammatical errors, run-on sentences, and immaturity in written language looking at grammar. She also examined spelling, and the mechanics of his writing, such as capitalization, and punctuation. WRR 16:85-86.

196. Dr. Fahey concluded, in terms of ideation, that the themes of Applicant's writing are simple and repetitive. He uses standard openings and greetings as well as endings that are formulaic through all of his writings. They are very similar, if not word-for-word. Dr. Fahey found that Applicant's spelling was generally accurate, though he uses text language, especially for three words in

particular. He uses "U" for "you"; he uses "U-R" for "your" and "you're"; and he uses for emphasis a lot of quotation marks, underlining, and the use of smiley faces or frown faces. WRR 16:86-87.

197. Dr. Fahey summarized Applicant's writing as immature and comparable to a 3rd or 4th grade level. WRR 16:87.

198. Dr. Fahey analyzed Applicant's oral language ability by conducting a conversation with him. She analyzed the transcript of their conversation by determining the "mean length of utterance" of his language sample. The mean length of utterance allows experts to understand the developmental level of a person's language. WRR 16:87-90.

199. Based on her analysis of Applicant's oral language sample, Dr. Fahey concluded that he had an average of 6 words per utterance, which is comparable to children aged 6 to 7 and that Applicant averaged 6.51 morphemes per utterance, which is comparable to a 5 to 6-year-old child. WRR 16:90-91.

200. Dr. Fahey also analyzed the grammatical complexity of Applicant's oral language. Dr. Fahey found that his sentence structures were comparable to that of a 2nd or 3rd-grader, or a 7 to 8-year-old. WRR 16:91-92.

201. Several exhibits were introduced that demonstrated to the Court that even if Applicant had a simple writing style, he had a good knowledge of current events. See State's Writ Ex. 6 through 8, which are letters

Applicant wrote while incarcerated. In particular State's Writ Ex. 8 contains a letter written by Applicant on May 15, 2011 to Luisa Luzzard, a pen pal in London, UK. In the letter he inquired about the recent election of Sadiq Khan as mayor of London and asks is She voted for him. Another letter in Exhibit 8 is written to Nina, another pen pal, in Canada on May 17, 2016. In that letter Applicant inquired as to whether the wildfires were close to her, and reminded her she could to the commissary website to order items for home, but also reminded her the spending limit is $60.00. Another letter in Exhibit 8 is dated June 12, 2015 to Nina where Applicant instructs her on how to order magazines on Amazon. Other letters commented on the candidacy of Donald Trump and several commented on the NBA playoffs. Ex. 7, letter to Lawman on May 30, 2016. Also, in Exhibit 7 a letter to Nina dated June 15, 2016 commented on how good the authors were on the books she sent him.

202. Dr. Fahey assessed Applicant's effort throughout the battery of tests she administered to him. She found that his effort was very consistent through the time that she spent with him. When he was not sure of something, he displayed more frustration than he did for anything he was unable to answer. WRR 16:92.

203. Although the Wide Range Achievement Test, also known as the WRAT-4, includes a

sentence comprehension portion, speech and language pathologists do not use the WRA T-4 in their field to measure language because that subtest is not a comprehensive view of language comprehension. WRR 16:92- 93.

204. Dr. Fahey acknowledged that factors besides a person's intelligence, such as poverty and education, can contribute to a person's ability to comprehend what he reads. WRR 16:97-98.

205. Dr. Fahey opined that Applicant's listening, speaking, reading, and writing deficits occurred during the "developmental years" without indicating what age the developmental years encompass. WRR 16:93-94.

206. Dr. Fahey's analysis is a retrospective analysis based upon present evidence of Applicant's reading comprehension skills. WRR 16:107.

D. **DR. RANDALL PRICE**

207. Dr. Randall Price is a forensic psychologist and neuropsychologist, who is board certified in Forensic Psychology and Neuropsychology. WRR 18:4-6. Dr. Price conducted a clinical interview with Applicant. WRR 18:37, 107. Dr. Price rendered a clinical judgment. WRR 18:72-73. The DSM-5 requires clinical judgment and training to interpret IQ tests

and assess intellectual performance. Def's Writ Ex. 240:37.

208. The Court, over objection of Applicant's counsel, recognized Dr. Price as an expert on Intellectual Disability. WRR 18:4-15.

209. Dr. Price is not, and does not hold himself out to be, a speech pathologist. WRR 18:76-77. He does not have a degree in speech pathology and has never administered various tests related to speech pathology such as the GORT-5 or any other language assessment instruments. WRR 18:77.

210. Dr. Price is not, and does not hold himself out to be, a neuropsychologist or a medical doctor. He cannot offer any medical diagnosis, prescribe any medication, or offer any opinions to a reasonable degree of medical certainty. Dr. Price opined to a reasonable degree of clinical certainty that Applicant does not have an intellectual disability. WRR 18:78-80.

211. DSM-5 is the foundational text for Dr. Price's analysis of Applicant's intellectual disability, and it is a reliable and authoritative source within the field of neuropsychology. The Green Book and the Green Book User's Guide are also authoritative and reliable sources. WRR 18:74-76.

212. Dr. Price conducted a clinical interview with Applicant at the Polunsky Unit in February, 2017, as well as a mental status examination with behavioral observations and gave several tests, including the WAIS-IV and the

WRAT-4. He also reviewed the findings of Dr Kasper, data obtained at the request of Dr. Singer, criminal history of Applicant, offense reports, as well as copies of affidavits and unsworn declarations, school transcripts, prison records, Applicant's grievances, his letters, and requests for medical services. He also reviewed the video tapes of Applicants two statements when he was detained and some testimony from Applicant's original trial. WRR 18:25-27, 36; State's Writ Ex. 72.

213. Dr. Price did not find that Applicant had any issues with attention or concentration during his interview in 2017. Applicant was coherent and answered questions in a responsive fashion. He understood what was going on with his case and was not inappropriately upbeat. Applicant was no more distracted than Dr. Price was by people walking by. Dr. Price was with Applicant for eight hours over two days. WRR 16:41-46.

214. During the interview Applicant had good insight into his performance at school, and that he needed special help for his weakest subject, which was math. Applicant discussed with Dr. Price, Applicant's reason for living in a motel, because it gave Applicant a roof over his head and no bills to pay except a cell phone. In Dr. Price's opinion, this was not an adaptive deficit related to. intelligence, but

rather a choice to be around people who were interested in doing drugs. WRR 18:37-40.

215. Dr. Price compiled Applicant's overall grades and concluded from his transcripts that though Applicant struggled in the 1st grade and during his early elementary years his grade average was low, nevertheless, Applicant never failed a grade. His average grade from 1st grade through 4th was 72 and from 5th through 12th (excluding Health, P.E., Shop, or Drawing) was in the 70's and 80's. WRR 18:29-30. Ibis corroborates the testimonies of Applicant's sister that Applicant was a B/C student (FOF 277) and of Dr. Farrell that Applicant's grades were modest, and he saw no major problems. Dr. Woods testified Applicant's grades were in the average range. FOF's 121,488,489.

216. Dr. Price noted that Applicant struggled early in the 1st grade. At the beginning of the year, be scored very low on the Metropolitan Readiness Test. Later that school year, he was administered another standardized test which showed Applicant was average or low average. Ex. 66:4. In 2nd grade Applicant scored grade appropriate on another achievement test. WRR 18 :31.

217. In 9th grade Applicant took the Iowa Test for Educational Development and his composite score was at the 78% percentile. Ex. 66. His lowest scores were in math, but overall, the scores were in the average range. Dr. Price agreed that these tests cannot be used to

determine whether or not a person is intellectually disabled, but they were used by Dr. Price to indicate whether Applicant bad significant deficits in the conceptual domain of adaptive behaviors. WRR 18:32-33.

218. When Applicant was in 10th grade, he was given the California Test of Mental Maturity, and his IQ score was 77. WRR 18:33.

219. Dr. Price administered the WRAT-4 Test to Applicant. On the WRAT-4 test, Applicant's reading recognition, which Dr. Fahey described as decoding, is 103, which is average; sentence completion is 96 which is average; spelling is 115 which is high average; and math is 92 which is low average. By combining reading recognition and completion of sentences scores, Applicant scored a reading composite of 99 which is average. WRR 18:61-64.

220. Based upon Dr. Price's evaluations, Applicant's academic abilities are not deficient and they are inconsistent with an adaptive behavior defect in the conceptual area. WRR 18:64.

221. Dr. Price testified that if there is a lack of significant defects in intellectual functioning, then the adaptive defects would have to be severe and still related to intellectual functioning. If the deficits were not related to intellectual functioning, then that person would have difficulty in life, but it would not be due to intellectual disability. WRR 18:20-21. Dr. Price testified that Applicant did not

have significant adaptive deficits in the conceptual domain that were related to intellectual functioning. WRR 18:68-70.

222. Dr. Price administered the WAIS-IV Test to Applicant. The WAIS-IV Test is the current most accepted test of intellectual functioning. WRR 18:47. This is the same test Dr. Kasper administered to Applicant in 2012 in addition to neuropsychological tests she administered. WRR 18:50. Dr. Price found Applicant's full-scale IQ was 85 based on the composite scores. Applicant scored 85 on verbal comprehension, 82 on non-verbal problem solving, 97 on the working memory portions of the test, 92 on the portion dealing with a person's ability to perform in clerical tests. WRR 18:52-53.

223. An 85 places Applicant in the 16th percentile which means that Applicant scored lower than 84 percent of the standardized sample. WRR 18:54-53.

224. Applicant put forth proper effort which allowed Dr. Price to consider the test results valid. WRR 18:55.

225. Dr. Price's clinical interview was conducted over two (2) days. WRR 18:45. Dr. Price and Applicant were face to face for approximately eight hours. WRR 18:25.

226. Dr. Price agreed with Dr Patton's analysis of the problems that Applicant had in the practical domain: he did not cook; he did not do his own laundry; he did not manage money well; he did not pay his own bills; his cars

were repossessed; and he had trouble as it related to legal contracts. However, those problems were not due to intellectual functioning, as Applicant had the ability to do those things, he just chose not to. His lifestyle wasn't one that was amenable to planning ahead. It was more instant gratification that caused money problems, but those were not related to intellectual functioning. WRR 18:68-69.

227. Applicant liked his job and the flexibility of not having to work every day if he did not want to. He preferred manual labor to operating the forklift, and when he was out of a job, he could always get another job in a few days. Dr. Price did not consider his job performance as a deficit in the practical domain that was related to intellectual functioning. WRR 18:40-41.

228. Dr. Price concluded that rather being a deficit, Applicant's work choice of manual day labor was a benefit as it gave Applicant the freedom to do what he wanted, and living in a motel was economical and allowed Applicant to have more money to spend on his pleasures. His life style choices gave him the freedom and appetite to pursue his pleasures in life. WRR 18:39-41, 69-71, 80-81.

229. Dr. Farrell came to a similar conclusion for the reason for Applicant's lifestyle choices

during his testimony at the original trial. FOF 501-502.

230. Based upon Dr. Price's testing and clinical interview, opined that Applicant's intellectual functioning is low average, but that he did not have significant adaptive behavioral deficits in the conceptual domain that were related to intellectual functioning. WRR 18:68-71. Dr. Price agreed with Dr. Patton that Applicant does have significant deficits in the practical domain, but those are not related to his intellectual functioning, rather they are related to life style choices made by Applicant. WRR 18:38-40; 69-71; 80-81.

231. In the conceptual domain, the testing that Dr. Price performed reflected that Applicant's academic abilities were not significantly impaired. Although Applicant was weak in math, his abilities fell in the low average area. His reading recognition was average, sentence completion was average, spelling was high average, math was low average, and reading comprehension low average. WRR 18:61-64. Since Applicant did not have severe adaptive behavior problems that were related to intellectual functioning, Dr. Price opined that Applicant does not satisfy Prong B. As a result, that ruled out a diagnosis of Intellectual Disability. WRR 18:70-71.

232. Dr. Price also reviewed Dr. Kasper's scoring and found a clerical error in the scoring which

raised Applicant's IQ score to 76. WRR 18:35-36.

233. Applicant advised Dr. Price during the clinical interview that he had abused alcohol and cannabis since high school and had been addicted to crack for seven (7) years. WRR 18:41. This is consistent with what Applicant told Dr. Kasper. Def's Writ Ex. 193. However, Dr. Patton testified that he saw no evidence of alcohol or drug use in high school. FOF 164.

234. In limited circumstances the Practice Effect can enable a person to score higher. After a year the Practice Effect should not be an issue. WRR 18:55-56. Dr. Price administered his testing February 27, 2017, and Dr. Kasper tested Applicant in August, 2012. WRR 18:56-67, 120-122.

235. There is no test to determine whether an adaptive behavior problem is related to intellectual functioning or is caused by something else. The clinician must review all available information, the test results, the IQ result, and the academic test results, and then form a clinical judgment. WRR 18:80.

236. Dr. Price did have inconsistencies in his testimony, that Writ Counsel pointed out, concerning the scoring of his tests and failure to include certain items. Dr. Price was also inconsistent in his own records. WRR 18:112-113. In addition, Dr. Price failed to maintain a copy of the video of the testing he conducted

on Applicant as required by the Order of this Court. WRR 18:15-16.

TESTIMONY OF APPLICANT'S FRIENDS AND FAMILY

A. MARLIN LINCOLN

237. Marlin Lincoln has worked for the International Longshoremen's Association ("ILA") since 2007, and currently serves as its Business Agent. As Business Agent, Marlin Lincoln determines which union members get assigned to specific jobs at the Port of Freeport based on employer needs on a daily basis. WRR 15:152-153.

238. There are a number of skilled positions at the Port of Freeport that are considered specialty positions. These include positions such as truck driver, crane operator, and forklift operator. WRR 15:154.

239. There are also a number of positions at the Port of Freeport that are considered labor positions that do not require any skills. WRR 15:154.

240. Marlin Lincoln knows Applicant because they worked together. He did not meet Applicant until Applicant worked at a company called Shintech. Marlin Lincoln was introduced to Applicant by Marcus Lincoln, when Applicant and Marcus Lincoln worked at Shintech. This would have had to have been after 2002, since Marcus Lincoln testified that he did not meet

Applicant until 2002. FOF 248. Therefore, Applicant would have been over 40 years old when Applicant met Marcus and Marlin Lincoln. WRR 15:156-157.

241. When Marlin Lincoln first got a job at the ILA, Applicant was already working there. WRR 15:158.

242. Applicant only held unskilled labor positions throughout the time he worked with Marlin Lincoln at the ILA and at Shintech. No special training was required for any of the jobs that Applicant held. WRR 15:156-160.

243. Marlin Lincoln once witnessed Applicant attempt to operate a forklift. Applicant could not operate the forklift adequately. WRR 15: 162.

244. Applicant never drove himself to work. He always got a ride with a coworker. WRR 15:163, 188.

245. Members of the ILA get paid by check weekly. Applicant would not deposit his checks in a bank account. A couple of times; Marlin Lincoln took Applicant to the comer store where Applicant cashed his check. Marlin Lincoln is not aware whether Applicant ever held a bank account. WRR 15:165.

246. Applicant had lived in four different motels since Marlin Lincoln met him. The rooms had a little ice box, a hot plate, and a microwave. WRR 15:169-171, 190.

247. Marlin Lincoln testified at Applicant's trial and met with the trial team a couple times

before trial. Had Applicant's trial team asked Mr. Lincoln about Applicant's shortcomings, he would have been willing to testify about them at the trial. WRR 15:172.

B. **MARCUS LINCOLN**

248. Marcus Lincoln is Marlin Lincoln's uncle, but they refer to each other as brothers. WRR 15:173. Marcus Lincoln has been friends with Applicant since he met him in 2002. WRR 15:175.

249. Marcus Lincoln is currently the secretary/treasurer of the contract committee of the International Longshoremen's Association ("ILA"), Local 30 in Freeport, Texas. WRR 15:175. In that role, he supervises the work gangs and distributes paychecks. WRR 5:175. Marcus Lincoln has been a supervisor at the ILA since 2006 and has been on the contract committee since 2011. WRR 15:174.

250. Marcus Lincoln was a foreman and supervisor at Austin Industrial and supervised Applicant when he worked as a temporary worker loading hand stacks. WRR 15:174-175.

251. "Handstacking" is the process by which a worker stacks 50-pound bags in order to fill a 20-foot trailer from bottom to top. WRR 15:175. Handstacking is a manual labor job.

It requires no skills or certification. WRR 15:176.

252. Although less labor intensive jobs were available, Applicant only handstacked. WRR 15:176.

253. Working a forklift requires a certification. WRR 15:176. Normally, anyone seeking a forklift certification at Austin Industrial was required to take a written exam. WRR 15:176-77. The foremen, including Marcus Lincoln, gave Applicant the forklift certification even though they did not believe he was proficient in driving the forklift. WRR 15:177-178. They gave Applicant the certification because they liked him, and as a temporary worker he would lose the job if he did not receive the forklift certification. WRR 15:178.

254. Even after obtaining the certification to drive a forklift, Applicant would only handstack. WRR 15:178. Marcus Lincoln and the other foremen would never assign Applicant to the forklift because he was extremely slow. In the time it would take an average person to load three containers, Applicant would load one. WRR 15:177.

255. Marcus Lincoln left Austin Industrial in 2004 and got a job at ILA. WRR 15:178. When Marcus Lincoln became a supervisor in 2006,

he secured a laborer job for Applicant. WRR 15:179-180.

256. Everyone at ILA begins as a laborer. WRR 15:180.

257. As a laborer, Applicant "handled the whip." WRR 15:180. That required Applicant to stand on the side of the dock as pallets were being unloaded by cranes off the ship and grab the ropes holding the pallets so the pallets did not spin. WRR 15:180. Applicant's only responsibility in that role was making sure the pallets landed straight. WRR 15:181.

258. Although Applicant would occasionally drive the forklift, he never operated it, and would only drive it three or four feet. Applicant did not need a certification to drive the forklift three or four feet. WRR 15:181-182.

259. Applicant never received certification or performed any other jobs available at ILA, nor did he express any interest in performing any of the better paying jobs. WRR 15:183-184. Applicant was satisfied with being the whip man because he was good at that position, and he would "get a job every day." WRR 15:186.

260. Marcus Lincoln encouraged Applicant to get certifications in these more advanced positions, but Applicant would tell him he was satisfied being the whip man. *Id.*

261. Marcus Lincoln helped Applicant open a bank account at the local bank. Marcus Lincoln and Applicant sat together at the table and

Marcus Lincoln filled out the paperwork. Marcus Lincoln had to fill in the numbers on the direct deposit slip for Applicant so Applicant could have his paychecks deposited. WRR 15:187.

262. Just two weeks after opening his bank account, Applicant over drafted the account. Two weeks after that, the bank closed the account. After the bank closed Applicant's account, Applicant would cash his paycheck at a corner store along with a number of other ILA members. WRR 15:187.

263. Marcus Lincoln helped Applicant buy a car. He drove Applicant to the dealership, picked out the car, and test drove it for him. Two weeks after purchasing the car, Applicant wrecked it. WRR 15:188.

264. Marcus Lincoln helped Applicant buy another car. He took Applicant to a dealership and arranged for Applicant to use his income tax return to pay for the car. Two weeks after he purchased the second car, Applicant wrecked it. WRR 15:189.

265. Marcus Lincoln never knew Applicant to live anywhere on his own, except in a motel. When Applicant was not living in a motel, he lived with his sister. WRR 15:189.

266. Marcus Lincoln never saw Applicant cook. He only had beans and weenies and noodles in the hotel room. WRR 15:190.

267. Marcus Lincoln testified at Applicant's trial. Marcus Lincoln was upset with the trial team

contacting Marvin before contacting him. Def's Writ Ex. 171.

C. **TAMARA HARRIS**

268. Ms. Tamara Harris is Applicant's niece. WRR 15:192. Tamara Harris took special education classes in school and was a member of the Special Olympics. She now is a certified Nurse Assistant. WRR 15:192-193.

269. The Court did not find Tamara Harris's testimony or Declaration to be credible.

270. While Tamara Harris is probably an honest person, and that she did not intentionally provide unreliable testimony, or an unreliable unsworn declaration, the Court could not find her testimony or declaration to be credible due to her age when certain events she related would have had to occur and due to conflicts between her testimony at the Evidentiary Hearing and in her Declaration.

271. At the Writ hearing, in one place, Tamara Harris testified that she lived with Applicant at her grandmother's house while she was in school. WRR 15:194-195. In her unsworn declaration, she identified her grandmother as Applicant's mother Olivia. Attach. 15, ¶3. Olivia died in 1990. Attach. 15, ¶11. At the Evidentiary Hearing she testified that she was very young when Applicant moved from her grandmother's house, and she never lived with Applicant again until Applicant came to stay with her mother Ethel when Tamara

was an adult. WRR 15:197. This would have been no earlier than 1997 if she considered herself an adult at age 18. At that time, Applicant would have been over 40 years of age. This is consistent with her unsworn declaration, as Tamara did not live with her mother until after her grandmother died in 1990. Attach. 15, ¶11.

272. Applicant moved from Olivia's house in 1982 when he married Rose Lewis. Applicant did not meet Rose Lewis until 1981. At that time Applicant was living with his mother, who was Tamara Harris's grandmother. Applicant married Rose Lewis in April, 1982 and lived with her until their divorce in 1985. Attach. 17, ¶2-5. At the time Applicant moved out in 1982, Tamara Harris would have been less than 3 years old. In her Declaration, Ms. Harris refers to her grandmother's financial problems, to Applicant's work history in 1985 (when Ms. Harris would only have been 6 years old), and foreclosure of the family home in 1989. Attach. 15, ¶¶10 and 12. While a person could, based on her knowledge, in good faith sign her name containing these statements if they had been related to her over the years, or if they were a part of family lore, but the Court cannot be convinced that she could have had personal knowledge of this information.

273. Tamara Harris was 39 years old at the time of the Evidentiary Hearing. WRR 15:192. She was born March 2, 1979. Attach. 15, ¶7. At

the Evidentiary Hearing she testified in detail as to many things that Applicant did not do while living *at her grandmother's house* (emphasis by this Court), such as cleaning bathrooms, doing chores, washing dishes, and doing laundry, and that Applicant did not pay any bills or buy any groceries or do any cooking. She also testified that Applicant did not have a key to her grandmother's house, and he would have to knock on the door for her grandmother to let him in. WRR 15: 194-197. She recounted many of the same incidents in her unsworn declaration. However, in her Declaration, with the exception of the incident involving the key to the house, all of these occurred when Applicant was living with his sister Ethel in the 1990's. Ethel was Tamara's mother. Attach. 15, ¶¶9, 13,14,15,16,17. Tamara states in her Declaration that Applicant moved into Ethel's home after he and Bonnie Clark separated, which was in the early 1990's. Attach. 12, ¶1-29.

274. Given the concern that the Court has previously expressed concerning the manner in which the declarations were obtained by Writ Counsel, and given the inconsistencies between her testimony and her Declaration, the Court cannot find as credible such detailed testimony from a child about events that occurred when she and Applicant both lived at her grandmother's house. At that time, Tamara Harris would have been less than 3 years old. Tamara Harris did not live

in the same house as Applicant again until she was an adult, according to her testimony under oath at the Evidentiary Hearing, or until the early 1990's according to her Declaration. Tamara Harris also testified to a number of things her mother Ethel did for Applicant after he moved into Ethel's house until Ethel died in January, 2008. The Court did not include any of these in its Findings of Fact due to the lack of credibility, and the Court disregarded in entirety her unsworn declaration.

D. **CAROLYN DUPLECHIN**

275. Carolyn Duplechin is Applicant's youngest sister. WRR 15:132. She is an occupational health nurse for the United States Postal Service and has worked for the postal service for 22 years. WRR 15:132.

276. Ms. Duplechin grew up in Iago, Texas. Her family was poor. WRR 15:134-135.

277. Applicant was two grades ahead of Ms. Duplechin in school. Ms. Duplechin testified that Applicant generally received Bs and Cs in most classes, but he received Cs and Ds in math. Her testimony is consistent with what Applicant's school records (Ex. 66) demonstrate, and contradicts the declaration of Ms. Stafford that "throughout school Mr. Harris's grades were terrible. He was barely getting by, and it is evident that he was having severe problems with academia all the way through." Attach. 23, ¶7. Ms. Duplechin

was an A student in school. Despite having some books at the home, Ms. Duplechin has never observed Applicant reading a book, as he was usually in the neighborhood playing football and other games. WRR 15:135-138.

278. At home, Ms. Duplechin learned how to cook from her mother. Her older brothers learned how to cook from their wives later in life. WRR 15:136-137. This is contrary to Dr. Patton's reliance on Applicant's inability to cook in childhood as a basis for his conclusion of onset of a deficit during the developmental period. According to Dr. Patton, the other male siblings learned to cook from their mother but Applicant did not. FOF 146.

279. Ms. Duplechin, as well as the other girls in the family, had chores around the house, which included doing the laundry. Applicant, "being a boy, he would get to do lawn work." WRR 15:137. Again, this refutes Dr. Patton's contentions that since Applicant did not do chores around the house, this shows a practical deficit in the developmental period.

280. As a teenager, Applicant worked in the summer for the Boling Independent School District doing simple repairs, stripping and waxing floors, painting, and lawn work. WRR 15:138-139. This also refutes another of Dr. Patton's contentions that Applicant was incapable of performing tasks around the home.

281. If Applicant had money, he would spend it and was not good at managing money. Ms.

Duplechin did not know if Applicant ever had a checking account while he was a teenager. WRR 15:140-141.

282. Ms. Duplechin moved out of her mother's house once she graduated from high school. Once Applicant became an adult, she saw Applicant only during holidays and family gatherings. Although she did not provide any dates, she knew that he stayed with his sister Ethel and lived with his girlfriends and wives. She did not know if Applicant ever lived on his own. WRR 15:141- 143.

283. Ms. Duplechin acknowledged that letting other people take care of you can be a matter of choice. WRR 15:145.

TESTIMONY OF RPDO ATTORNEYS AND STAFF

A. TRIAL TEAM FOR APPLICANT

284. RPDO was appointed by the Court as trial counsel for Applicant. WRR 20:153.

285. Although RPDO has to label attorneys as first or second chair, they do not actually consider attorneys in specific roles. They all share responsibility. WRR 14:62. The work on a "team concept." The team votes on everything. All memos are sent to Mr.

Stoffregen, Mr. Wischkaemper, as well as a copy to all team members. WRR 19:30-34.

286. The initial defense counsel were Mr. Jay Wooten and Mr. Philip Wischkaemper, Deputy Director of RPDO. Mary Conn replaced Mr. Wischkaemper in August, 2012. Keri Mallon joined the trial team in July, 2013 to assist with voir dire, but she later actively participated in the trial. WRR 14:94-95.

287. The defense hired Dr. Elizabeth Kasper to perform a full neuropsychological workup on the Applicant. WRR 19:23-26, 64-69. Dr. Kasper was informed of her responsibilities in a letter which stated, in part, that she was to, "Advise the team as to any additional mental health experts that maybe helpful and what requests we (defense counsel) should make of these experts. You will need to provide evidence, by testimony or affidavit, to establish the threshold showing of necessity for the funding of these additional experts." Dr. Kasper completed her examination of Applicant and concluded that he might be in the early stages of vascular dementia that could be due to crop dusting or just age and drug use. WRR 19:25-26. Dr. Kasper also found Applicant to have an IQ score of 75. WRR 18:34-36; WRR 19:27. At no time did Dr. Kasper ever bring up or suggest the Applicant was intellectually disabled. WRR 15:14-16.

288. Dr. Kasper was retained to look at organic developmental brain dysfunction which

involves exposures to toxins or pathogens that might affect brain development, and traumatic or organic brain injury. WRR 19:68-69.

289. Prior to retaining Dr. Kasper in August, 2012, trial counsel had not conducted a rigorous investigation into adaptive defects. WRR 19:71-72.

290. In July, 2013, RPDO attorneys and staff along with Kathryn Kase and Carlos Garcia from Texas Defender Service, met at Hobby Airport in Houston to discuss Applicant's case. Present were RPDO attorneys, Jack Stoffregen, Philip Wischkaemper, Jay Wooten, and Keri Mallon; mitigation specialist Nicole Williams (now Jackson), and Investigator Rudy O'Brien. During a "brainstorming session" concerning mitigation, Kathryn Kase, asked counsel about a possible Intellectual Disability (ID) defense and was told that their investigation had not found any adaptive defects, and Dr. Kasper had never mentioned ID. When told that they had no recommendation from their expert concerning Intellectual Disability, Ms. Kase suggested they call Dr. Kasper. WRR 19:27-28. The call lasted 15 to 20 minutes. Dr. Kasper was asked if there was a viable Intellectual Disability case and, "she said no." WRR 14:71-72. Dr. Kasper was "very adamant that it was not ID or MR." WRR 19:28-29. Dr. Kasper was asked why she had come to that conclusion. IQ Testing was

discussed, but Ms. Mallon did not remember the exact conversation though she specifically remembered Dr. Kasper saying that "we don't have a viable IQ case, because that was what was most devastating to us." WRR 14:71-73. Although not being able to recall what Dr. Kasper stated was the basis of her analysis, Ms. Mallon was sure that they inquired as to the reason why Dr. Kasper did not believe it was an ID case. "We're not going to just- She's not going to say we have no ID case and not explain why. I mean, I remember her explaining why. Just can't tell you what exactly she said." WRR 14:75. Ms. Jackson remembered more details concerning the telephone call. FOF 341. Mr. Wooten testified that Dr. Kasper opined that the vascular dementia could have been caused by crop dusting or just due to his age and drug use. They went on to discuss trial issues, including how to "spin" at trial chronic masturbation issues at TDCJ and at the Brazoria County Jail, and Dr. Kasper advised that is "classic vascular dementia behavior." Dr. Kasper went on to explain that she ran a dementia clinic in Florida for a long time and that patients would be engaging in that conduct in the waiting room. WRR 19:28-29.

291. The decision not to pursue an Intellectual Disability claim came after the call to Dr. Kasper, which was made by all of the persons present, not just one person. While there was no vote, after Dr. Kasper said Applicant was lower functioning but not ID, no one, not even

Ms. Kase or Mr. Garcia, pushed back on the idea not to pursue an ID claim. WRR 14:28-30. There were no voices of dissent in the room. WRR 14:77-79.

292. Had there been any suggestion by Dr. Kasper of a need for further investigation concerning intellectual disability or adaptive defects, trial counsel would have used it as a basis for a motion to continuance. WRR 19:29-30.

293. After the conversation with Dr. Kasper, RPDO along with Ms. Kase prepared a list of what needed to be done before trial, and further investigation of Intellectual Disability was not on the list. WRR 19:29.

294. Trial counsel later called Dr. Kasper to seek her advice concerning Applicant's refusal to take his medication and Dr. Kasper again stated that this behavior was expected of a person with vascular dementia. WRR 19:36-37.

295. Dr. Kasper did recommend that trial counsel hire a neurologist and have an MRI. The MRI was a "normal study." No other experts were recommended by Dr. Kasper. WRR 19:26.

296. At the July, 2013 meeting, Ms. Kase, gave the team the name of Dr. Walter Farrell, a sociologist who was retained and who testified at Applicant's trial. WRR 14:69-70.

297. Except for decisions during trial, the entire trial team voted on what course of action to follow. Mr. Wooten was outvoted several times by the team. WRR 19:30-31. All team

members except for the legal assistant got an equal vote on all issues under the RPDO system. WRR 19:87.

298. Dr. Kasper testified at trial that Applicant suffered from cognitive impairment, which is a precursor of vascular dementia, but it was not significant enough to diagnose as vascular dementia. To have a diagnosis of dementia there must be memory impairment. Although Dr. Kasper did find some areas of memory impairment, she testified at trial that they were not significant enough to warrant a full-blown diagnosis of dementia. Without the additional problems of memory impairment, the diagnosis would be mild cognitive impairment. Dementia is memory impairments, plus impairment in a couple of other areas such as attention, self-regulation, and ability to express motor function. The symptoms Dr. Kasper saw in her testing of Applicant were consistent with what she had heard about Applicant's judgment problems, planning problems, ability to see right consequences, some fluctuating attention,

and some situations where Applicant has impaired function. RR 37:10-21; 39.

299. At trial Dr. Kasper testified that she was confident in her diagnosis. RR 72:35.

300. The trial team had differences in judgment that affected the functioning of the team. WRR 19:76-77.

301. The trial team had significant issues with turnover in personnel. WRR 19:86.

302. The trial team could not locate any of Applicant's teachers but they did review his school records. WRR 19:113-114.

303. Generally, Applicant's family was not cooperative with investigators or RPDO staff. WRR 15:92. However, Applicant's sister Carolyn became more cooperative as it got closer to trial. WRR 19:33

304. All records obtained during the investigation relevant to Applicant's education, employment, and how his friends and family perceived him were provided to experts Dr. Walter Farrell, Dr. Mary Elizabeth Kasper, and Dr. Raymond Singer. RR 68:68-76; RR 71:187-188, 193; RR 72:12, 19-20; RR 73:13-14, 32, 55-57, 70, 106-107; WRR 19:25-26.

305. The trial team's investigation did not show he had any trouble living independently. It indicated that any difficulties he had in managing money was caused by his use of drugs, alcohol, and prostitution. WRR 14:99, 113-116; WRR 19:16-17. None of his family told them he was slow, could not function in

life, or needed to be taken care of. No family member, friend, or coworker gave the trial team reason to believe he was intellectually disabled. WRR 14:85-86; WRR 19:58-59, 109-110.

306. Although Ms. Mallon spoke to Applicant on many occasions, neither she, now any other team member, saw indications from Applicant that he was intellectually disabled. WRR 14:92-93.

307. Carol Camp never told Mr. Wooten that they should investigate intellectual disability. WRR 19:36-37, 52-53, 108. While this is contrary to Ms. Camps testimony, the Court did not find Ms. Camp to be a credible witness. Moreover, no corroboration could be found for Ms. Camp's claims as Ms. Camp never wrote anything about intellectual disability in any of her memos, or in the list of things that needed to be done that she prepared when she left, or in any of the affidavits she prepared in connection with the motions for continuance that were filed. WRR 19:35-38.

308. Mr. Wooten did not tell Ms. Camp who she should interview and did not prevent her from investigating an intellectual disability claim. WRR 19:33-35.

309. If Carol Camp or anyone else had concerns about how the investigation was being handled, she could have complained directly to Mr. Wischkaemper, the Deputy Director, or

to Mr. Stoffregen, the Director. WRR 19:34-36.

310. Trial counsel never conducted an investigation specific to intellectual disability. WRR 19:52, 64.

B. **THOMAS J. (JAY) WOOTEN**

311. Mr. Wooten has worked for the Galveston County District Attorney's Office, twice with Brazoria County District Attorney's Office, and in private practice where 90% of his practice was criminal law. He was Board Certified in Criminal Law in 2003, and had tried between 85 and 100 criminal jury trials. Initially Mr. Wooten was appointed by the Court to represent Applicant. In February, 2012 he was employed by RPDO, and RPDO was appointed to represent Applicant on March 19, 2012. Applicant's capital murder case was Mr. Wooten's first capital murder case. WRR 19:7-10; WRR 14:59-60.

312. Mr. Wooten testified that the Applicant never exhibited any signs that would indicate, or cause investigation into, intellectual disability. WRR 19:110. Mr. Wooten's conversations with the Applicant revealed him to be a very smart, funny and clever individual who definitely was able to, and did, make all his decisions himself. Mr. Wooten visited with the Applicant on multiple occasions. During these visits at the jail, and in the courtroom, he never remembered the Applicant's responses to any questions

wandering from subject to subject or being incoherent or irrational. In reviewing the numerous memos of the other team members' meetings with the Applicant, he did not remember anyone saying that that the Applicant's responses were incoherent, irrational, or wandered from subject to subject. WRR 19:10-13, 16-19, 37. Mr. Wooten believed that the trial team conducted a full life history investigation on Applicant. WRR 19:114.

313. Mr. Wooten testified that the mitigation investigation of the Applicant's family did not reveal that any of his family members felt that he was slow or mentally retarded. No family members told defense investigators that he could not function well or needed special care. WRR 19:13-16.

314. Mr. Wooten told Ms. Camp to conduct a full mitigation investigation which would include looking for adaptive deficits. WRR 19:53.

315. Applicant told Mr. Wooten that he liked living in a motel as it afforded him good access to cocaine which he would then offer to women for sex. WRR 19:15-16.

316. Mr. Wooten did not instruct any of the investigators or mitigators to use a formal instrument. WRR 19:53. However, Dr. Patton testified that in Applicant's case the use of a formal instrument would not have been appropriate. FOF 133.

317. Mr. Wooten understood that school records that reveal failing grades, non-promotion,

tracking to lowest academic group, placement in special education or an alternative school program, low (below 80) IQ scores, persistent below grade-level achievements scores, family members who have intellectual disabilities or other brain-based disability are all red flags indicating intellectual disability. Mr. Wooten admitted that Applicant's case had many of these red flags that were not followed up on. WRR 19:165-168.

318. Mr. Wooten was candid in his testimony. He acknowledged that the Trial Team did only a preliminary investigation into intellectual disability. WRR 19:64. There were significant issues with turnover on the Trial Team. WRR 19:86. There were differences on the Trial Team that impaired the functioning of the team. WRR 19:17.

319. Mr. Wooten agreed that the American Bar Association Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("ABA Mitigation Guidelines") are binding and authoritative. WRR 19:101-102; Def's Writ Ex. 119. He also agreed that as an RPDO attorney, he must follow the ABA Mitigation Guidelines. Mr. Wooten agreed that under the ABA Mitigation Guidelines, lead trial counsel bears overall responsibility for the conduct of a capital case. Mr. Wooten testified that as lead trial counsel, he ultimately had responsibility for the decisions that were made, including the strategic decisions with

regards to investigation. Mr. Wooten agreed that the ABA Mitigation Guidelines required him to identify a mental health associate who is qualified by training and experience to screen individuals for presence of mental or psychological disorders or impairments. He also agreed that the ABA Mitigation Guidelines imposed upon him an obligation to conduct a thorough and independent investigation relating to the issues of both guilt and penalty. Mr. Wooten agreed that this included conducting a review of the client's possible mental retardation. He also understood that the client may attempt to mask his mental condition. He understood that special expertise in recognizing actual mental retardation is required. Mr. Wooten understood that the ABA Mitigation Guidelines advise him to pursue pretrial hearings to challenge any attempt by the State to seek death if there is credible evidence of mental retardation. He understood that under the ABA Mitigation Guidelines, he had a continuing duty to investigate issues extending through the trial. WRR 19:101-104.

320. Mr. Wooten agreed that the Guidelines and Standards for the Mitigation Function of defense team in Texas Capital Cases ("Texas State Guidelines") and Supplementary Guidelines and Standards for Mitigation Function of Defense Teams in Texas Capital Cases are binding and authoritative. WRR 19:101-102; 195-106, Def's Writ Ex. 120, 122.

All members of the defense team are agents of defense counsel. The guidelines provide that it is the duty of counsel to provide each member of the defense team with the, necessary legal knowledge for each individual case. This includes providing mitigation specialists with knowledge of the law directing their work. He agreed that counsel bears ultimate responsibility under the Texas State Guidelines for the performance of the defense team and their decisions affecting the client in the case. WRR 19:106-107; Def's Writ Ex. 122:33.1 and 10.4.

321. Mr. Wooten also agreed that under the Texas State Guidelines regarding mitigation, it is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. WRR 19:107-108.

322. The ABA Mitigation Guidelines and the Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation/Intellectual Disability, Third Edition ("Practitioner's Guide") outline the protocol for investigating intellectual disability. Defense counsel must investigate the possibility of intellectual disability as potential grounds for an Atkins defense. Def's Writ Ex. 119, 121, 122.

323. On April 7, 2013, Applicant wrote a letter to Mr. Wooten from jail. WRR 19:147. In the letter, Applicant had pictures of sad faces with tears streaming from the eyes. Applicant mentioned that he was "having major

problems up in here and that he doesn't have hygiene to keep his body smelling good and his fellow inmates are not having it." Mr. Wooten agreed that Applicant did not have good penmanship, but the sad pictures were the result of a code that clients were to use to request a meeting with counsel. WRR 19:147-149.

324. On April 11, 2013, Applicant wrote another letter to Mr. Wooten from jail. WRR 19:149. In the letter, Applicant wrote, "So I just want to say one more time thank U, thank U, so very, very much!!" Def's Writ Ex. 200. Applicant then wrote "Thank U" on five entire lines. Mr. Wooten agreed that this style of writing is "unusual." WRR 19:150.

325. Mr. Wooten agreed that if Applicant was low functioning, that fact would have been considered a red flag that would prompt an-investigation into intellectual disability. WRR 19:122.

326. Mr. Ward was a mitigation specialist who worked on Applicant's case. Mr. Ward was a competent mitigation specialist and Mr. Wooten relied on him. Mr. Ward prepared a memo. Def's Writ Ex. 189. Mr. Wooten agreed that Mr. Ward's statements that Applicant presents as a person of low intellect with minimal formal education, which could have been red flags, but the entire team watched

Applicant's confession video and had different opinions. WRR 19:123-129.

327. Mr. Wooten agreed that in the confines of prison, Applicant still had difficulty budgeting money. WRR 19:100.

C. **KERI MALLON**

328. Ms. Keri Mallon was an attorney with RPDO who was added to the trial team in the summer of 2013. Ms. Mallon had tried two capital death penalty cases. Mr. Wooten had not tried a capital case and Ms. Conn had tried one capital case more than ten years prior. Ms. Mallon helped with the mitigation investigation. WRR 14:58-63.

329. Ms. Mallon was not qualified to make a scientific determination of whether Applicant is intellectually disabled. Ms. Mallon believed that Applicant was "lower functioning ... It wasn't ID, but he did have difficulty understanding things that ... I think probably the average person would not have difficulty in understanding." WRR 14:92-93.

330. Most of Ms. Mallon's clients are lower functioning, and she has represented one who is intellectually disabled. As with her other clients, she wanted to make sure Applicant understood what his attorneys were saying. She used basic language, and sometimes she

would need to say things multiple times. WRR 14:93.

331. Ms. Mallon was present at a team brain storming meeting in August of 2013 where Mr. Wischkaemper "blew up" at Mr. Wooten because he felt Mr. Wooten had not answered his question. Ms. Mallon felt Mr. Wooten had answered the question and that Mr. Wischkaemper was inappropriate in his behavior. WRR 14:64-68.

332. Applicant never appeared to be "slow" to Ms. Mallon, but rather low functioning. He was able to make decisions by himself. WRR 15:110-111.

333. Applicant was living independently at the Economy Inn in Angleton because drugs were not hard to obtain. WRR 15:114.

334. Ms. Mallon became upset when a representative of OCFW contacted her while she was in trial in another capital murder case and tried to trick her into saying something she did not say. She also felt she needed to file an affidavit because of the lies contained in the affidavits of Ms. Conn, Mr. Wischkaemper, Ms. Camp, and Ms. Recer. WRR 14:116.

335. Ms. Mallon had participated in the conference call with Kr. Kasper in July, 2013. FOF 290-291, 296.

336. No friend, family member or co-worker gave any member of the trial team any reason to

believe Applicant was intellectually disabled. WRR 14:85-86.

337. In observing Ms. Mallon's expressions and mannerisms while testifying, it was obvious to the Court that her testimony and feelings were completely genuine and credible.

D. NICOLE DENISE JACKSON, FORMERLY NICOLE WILLIAMS

338. Nicole Denise Jackson, formerly Nicole Denise Williams, conducted mitigation investigation work on Applicant's case. Ms. Jackson was a mitigation specialist and a member of Applicant's defense team. She succeeded Carol Camp in 2013 and worked on the case from May, 2013 through the trial. WRR 15:6-10.

339. When Ms. Jackson arrived in May, 2013, there was no member of the core team qualified by training and experience to screen persons for the presence of mental or psychological impairments. WRR 15:27.

340. The trial team operated on a collaborative concept with no first or second chairs. No one individually made all the decisions. If Ms. Jackson had a question she went to the attorneys. If only one attorney was present, she talked to that attorney whether it be Mr. Wooten, Ms. Conn, or Ms. Mallon. WRR 15:25-27.

341. While the decision not to pursue an intellectual disability claim preceded her

involvement in the case, the issue was still under consideration and open for discussion until a conference call with Dr. Kasper in early July, 2013. During the discussion with Dr. Kasper, she remembered a discussion concerning the two IQ scores of 75 and 83 and that Dr. Kasper said they did not have an intellectual disability claim and that Applicant's test numbers were due to early stage dementia, drug use, and risky behaviors during his life. WRR 15:14-15, 102-103, 129.

342. Mr. Ward was a mitigation specialist who had worked on Applicant's case before Ms. Jackson joined the team. WRR 15:44.

343. Ms. Jackson considered Mr. Ward's work product reliable when she conducted her investigation. WRR 15:45.

344. Ms. Jackson conducted mitigation investigation work on Applicant's case. She met with Applicant at least once a week beginning in May, 2013. There was nothing in the way Applicant interacted with her that made her suspect he was intellectually disabled. During Ms. Jackson's visits with Applicant, he was able to properly articulate what he was thinking and how he was feeling. At times, Applicant provided the proper spelling of the names of mitigation witnesses and never indicated. that he was not clear about a given concept when asked. He asked appropriate questions and responded appropriately as he engaged in conversations

with her. The Applicant's family, friends, and coworkers did not indicate that the Applicant suffered from any lack of cognitive functioning. WRR 15:9-14.

345. Ms. Jackson agreed that drug abuse is not necessarily "an exclusive cause of having a subject break with reality." WRR 15:48.

346. Drug use can be consistent with an intellectual disability. Drug abuse can be comorbid with intellectual and the existence of drug abuse or substance abuse in a suspect's history does not rule out intellectual disability. WRR 15:48-49.

347. The presence of substance abuse could be a red flag that an individual has an intellectual disability. WRR 15:49.

348. The presence of drug withdrawal in a subject does not mean intellectual disability is ruled out. WRR 15:53.

349. If an individual has a fanciful view of what his lawyer may be able to do, that is a red flag that would warrant following up on the presence of intellectual disability. WRR 15:52.

350. If a person appears naïve, exhausted, and somewhat detached, these can be considered as red flags. These signs are consistent with both drug withdrawal and intellectual disability. WRR 15:52-53.

351. Not appreciating the consequences of talking to detectives and confessing can be a red :flag

that should prompt additional investigation into intellectual disability. WRR 15:53.

352. By the time Ms. Jackson became involved in the case, the defense mitigation strategy was focusing on drug use, toxicology, poverty, and racial history. WRR 15:53.

353. During her investigation as a mitigation specialist, Ms. Jackson interviewed Carolyn Duplechin, Applicant's step-brother Matt Griggs, Tamara Harris, and several co-workers. None ever characterized Applicant as slow. They did say he was dependent but they attributed this to his drug use. WRR 14:13.

354. Ms. Jackson met with Ms. Carolyn Duplechin, Applicant's younger sister, on May 30, 2013. WRR 15:62-63; Def's Writ Ex. 169.

355. Younger sisters are also likely to know the subject's adaptive functions during the developmental phase. WRR 15:62-63.

356. An interview with a younger sister is fairly important for an intellectual disability investigation. WRR 15 :63.

357. During her interview with Ms. Duplechin, Ms. Jackson inquired as to Applicant's adaptive functioning. She also asked Marlin Lincoln about adaptive functioning. She did not use any formal or informal instruments. WRR 15:59-60, 65. Dr. Patton also did not use a formal instrument in this case "because there were not enough individuals available

who knew Applicant to provide a comprehensive measure." FOF 133.

358. Ms. Duplechin told Ms. Jackson things that might be coterminous or comorbid with the fact that Mr. Harris might have an intellectual disability. WRR 15:69; Def's Writ Ex. 169.

359. Ms. Jackson sent memos of her conversations with Ms. Duplechin to the experts for Applicant because Ms. Duplechin was an important witness. WRR 15:69.

360. Ms. Jackson met with Applicant's niece, Tamara Harris on August 7, 2013. She memorialized that meeting in a memo. WRR 15:70-72; Def's Writ Ex. 182.

361. A critical piece of mitigation investigation is to determine the incidents of intellectual disability among family members. The investigation should go back three generations to look for the presence of mental illness or mental disability. WRR 15:72.

362. Ms. Jackson did not conduct any investigation into whether Ms. Tamara Harris has an intellectual disability. WRR 15:72.

363. The existence of a niece with an intellectual disability is a red flag necessitating a follow-up for intellectual disability investigation. WRR 15:73. However, there was no credible evidence presented at the evidentiary hearing that Ms. Tamara Harris was ever diagnosed with an intellectual disability. There was

evidence Tamara was in special education and participated in Special Olympics, which should have been cause for further investigation, but there was no testimony from any witness that she had been diagnosed as intellectually disabled.

364. When Ms. Jackson was on Applicant's defense team, she visited him in jail several times. WRR 15:76-77.

365. Applicant had difficulty managing his money while in jail. WRR 15:79-80.

366. Difficulty managing money could be a red flag that supports an investigation into intellectual disability. WRR 15:80.

367. The structure of prison life makes it more difficult to determine practical adaptive deficiencies than in the world itself. Prison provides structure that addresses some adaptive deficiencies, particularly in the practical domain. WRR 15:80.

368. Applicant threatened to abstain from participating in his trial if he did not receive money for hygiene products. This behavior should have been a red flag. WRR 15:82; Def's Writ Ex. 162. Although Applicant later stated he was just "mad ... but had no intentions of actually going there with it." Def's Writ Ex. 154.

369. Ms. Jackson spoke to Marcus Lincoln June, 2013. Marcus Lincoln was upset that the Harris defense team was contacting him so late. Marcus Lincoln was a friend and co-

worker with Applicant and viewed himself as an important witness for Applicant's defense. WRR 15:85-86; Def's Writ Ex. 171.

370. Marlin Lincoln had been contacted by Robin Buggs prior to June, 2013, and Marcus Lincoln was upset that the defense counsel were talking to Marlin more than him. Def's Writ Ex. 171.

371. Coworkers can be particularly relevant to an adaptive workplace deficit assessment. Ms. Jackson contacted Marcus and Marlin Lincoln, but she did not contact any other coworkers. WRR 15:86.

372. Ms. Jackson did not speak with Marcus Lincoln about Applicant's adaptive deficits. WRR 15:88; Def's Writ Ex. 171.

373. Ms. Jackson did not administer either a formal or an informal instrument to Marlin Lincoln. WRR 15:88.

374. There are statements in Ms. Jackson's memoranda that supported the need for an intellectual disability investigation. WRR 15:92-95.

375. Applicant's IQ score of 75 supports the need for an intellectual disability investigation. WRR 15:94.

376. Whether a subject can articulate appropriately and in sporadic conversations, does not foreclose the need for an intellectual disability analysis. WRR 15:95.

377. Applicant's problems with masturbation could be related to vascular dementia or could

support a red flag with respect to intellectual disability. WRR 15:96. Although Dr. Kasper advised trial counsel that this behavior was a classic sign of vascular dementia. WRR 19:28-29.

378. Ms. Jackson submitted an affidavit in connection with the Harris proceedings on September 6, 2016. Ms. Jackson alone prepared the affidavit without assistance from anyone. WRR 15:91.

379. Ms. Jackson's affidavit said that Applicant "never exhibited any behaviors that were indicative of an intellectual disability in [my] presence." Def's Writ Ex. 225. During her January 25, 2019 testimony, Ms. Jackson testified that she did not agree totally with that sentence at the time of the hearing. WRR 15:92-93; 96-97.

380. Ms. Jackson no longer agrees with the statement on her affidavit that "Mr. Harris's family never provided any information and/or concern that alluded to delayed or lack of cognitive functioning, deficits, or any factors that correlate with intellectual disability," and would not have signed her name to that sworn statement if she were to resubmit her affidavit. WRR 15:96-97.

381. The trial team was still considering and investigating an intellectual disability defense until Dr. Kasper "explained her expert opinion." WRR 15:14-15, 96, and 129.

Prior references to testimony show this telephone conference took place in July, 2013.

382. Ms. Jackson testified that Dr. Kasper was the only expert "truly ... qualified to" offer an opinion on intellectual disability, although the other experts "would have been able to speak to it." WRR 15:96-99.

383. All of the memos in the file were sent in a bulk file to Dr. Kasper. WRR 15:89.

384. Ms. Jackson conducted a general, but not targeted adaptive deficit investigation. WRR 15: 103.

385. The existence of significant cognitive deficits as an adult is a red flag indicating that investigation is warranted in Applicant's case with respect to onset intellectual disability. WRR 15:104.

386. Ms. Jackson visited Applicant on June 4, 2013. She informed him that she was there to "fill in the gaps of missing information relating to his case." WRR 15:109-110; Def's Writ Ex. 154.

387. During the meeting on June 4, 2013, Ms. Jackson asked Applicant about the people in his life. WRR 15:111; Def's Writ Ex. 154.

388. Larry Williams was Applicant's cousin. Mr. Williams had a reported hearing disability in the 1970's and 1980's that rose to the level of social security disability, which is a red flag that supports the need for investigation into

Applicant's intellectual disability. WRR 15:112-113.

389. June, 2013 was the first time Ms. Jackson discussed these particular witnesses with Applicant. WRR 15:114.

390. Applicant said that he had the opportunity to go to college, an "electric school" in Dallas, Texas, on a grant scholarship. Ms. Jackson was "never able to substantiate the scholarship information and never found any evidence to confirm the scholarship after looking at his school records and talking to family members. WRR 15:114-116.

391. Looking back on the case, and with more training, Ms. Jackson said these are things she would have looked further into with respect to intellectual disability. WRR 15:130.

E. **MARY CONN**

392. The Court did not know Ms. Conn or Ms. Mallon prior to this case. During voir dire and trial, the Court had the opportunity to observe both of these attorneys.

393. While Ms. Conn had more experience in capital cases than Ms. Mallon, it was the Court's observation that Ms. Mallon was more skilled at voir dire and presentation of objections and legal arguments. As indicated by Ms. Conn in Attach. 6, ¶l4, Ms. Mallon, after a time, took a more active role in voir dire than did Ms. Conn although at that time the Court did not know the reason for the

change. It was not until the Evidentiary Hearing that the Court understood the reason. Apparently, Applicant also notice Ms. Conn's performance during voir dire as Applicant wrote "letters to Lubbock criticizing her and saying that he didn't think she was doing a good job." Mr. Stoffregen came to voir dire to observe Ms. Conn and then removed Ms. Conn from voir dire. WRR 19:18-19.

394. Although Ms. Conn was a member of the trial team for more than a year before trial, she did not undertake a personal investigation into any intellectual disability claim. WRR 13:179.

395. Ms. Conn was unhappy that she had been removed from voir dire, and she believed that Mr. Wooten was responsible for her being fired. WRR 19:39-40. Ms. Conn was bothered by being excluded from some of the decisions made during trial. WRR 13:175-176, 196-198.

396. Additionally, in her affidavit (Attach. 6, 116), Ms. Conn also states that she was advised that one of the jurors by Writ Counsel "lied in jury selection" and then continued to specify the nature of the lie. The Court determined, after hearing the testimony on Issue 8, that Ms. Henry did not make any false or misleading statements in the answers to her questionnaire and certainly did not lie. Ms. Conn was an experienced attorney. Her willingness to accept at face value, without independent investigation, the

characterization of these statements and repeat them in an affidavit underscores what was evident to the Court during her oral testimony, that she was not an unbiased witness but rather had a great degree of animosity toward RPDO and Mr. Wooten.

397. This was not the only instance where Ms. Conn authored something that was filed with the Court that was inaccurate. Ms. Conn was given the responsibility to prepare the motion that Applicant filed which requested additional peremptory challenges after Applicant exhausted his allotted peremptory challenges. The Trial Team made it known to the Court before the twelfth juror was seated that Applicant had exhausted his peremptory challenges and that the venire person was unacceptable. A motion was filed, and the Court was given a courtesy copy of the motion. Clerk's Index - Supplemental, p. 4. The State first objected to the motion because it made reference to answers in the questionnaire that were not developed on the record. Mr. Wooten then stated that although he signed it, Ms. Conn prepared it and she had all of their notes. Ms. Conn was not in Court that day. RR 45:209-215.

The Court then commented after reading its courtesy copy of the motion that the motion listed objections that were "erroneously denied," but Applicant did not object for cause to all fifteen venire persons. Mr. Wooten apologized for the error and requested time to

correct the motion. RR 45:216-218. A recess of approximately 1-1/2 hours was taken to allow the parties to review the motion. Mr. Wooten made an oral motion to reduce the request to eleven because there were four jurors that no objection for cause was raised. One of the jurors eliminated was Juror 19, Jamie Wardlow. The record reflects that the Trial Team did not lodge a challenge for cause to Jamie Wardlow, but Applicant himself requested that a peremptory challenge be used. And it was used. RR 45:218-220. Mr. Wooten also had to advise the Court that the case of Jones v. State was not " ... as strong a case as is cited in our motion." RR 45:222-223. On the record the Court stated it did not hold the errors and inconsistencies in the motion against Applicant. RR 45:230-231.

398. It was obvious during her testimony that Ms. Conn harbored substantial hard feelings and ill will toward RPDO and Mr. Wooten, in particular. This was confirmed by inattention and lack of investigation of actual facts before preparing her affidavit and in preparing the motion which requested additional peremptory challenges. The Court determined that Ms. Conn was biased and her testimony was not reliable. The Court did not consider her testimony unless it was corroborated by other independent, credible evidence. The Court did not consider any

information in her affidavit since it was sworn to only to the best of her knowledge.

F. **PHILIP WISCHKAEMPER**

399. Prior to his employment with RPDO in October, 2010, Mr. Wischkaemper had been employed by the Texas Criminal Defense Lawyers Association and he had training on mitigation and mental health. He trained attorneys that "you need to do mitigation work before you start hiring experts." He testified that he followed this practice at RPDO. WRR 14:26, 36, 39, 40.

400. He was hired as the Deputy Director of RPDO and in that capacity he proof-read all memos from all of the teams as well as funding requests before sending them on to Mr. Stoffregen. WRR 14:31-34.

401. Although Mr. Wischkaemper did not acknowledge that he was a member of the trial team, he was assigned to the case as a second chair. WRR 19:11. He served as "de facto second chair" until Ms. Conn was brought in at the end of August, 2012. WRR 14:83; 19:44.

402. Mr. Wischkaemper was critical of Mr. Wooten's involvement in the mitigation investigation. Although he stated in his affidavit that you need to do mitigation work before hiring experts in order to know which experts to hire (WRR 14:35-36), Mr. Wischkaemper must have been satisfied with

the progress of the mitigation investigation early in August of 2012 when Dr. Kasper was hired, as he would have had to review the memoranda and the funding request.

403. As a member of Applicant's trial team, he would also have reviewed all of the memoranda from the Trial Team and the need to hire experts. The sealed Ex Parte Motion for Funding for Services of Expert was filed on August 27, 2012. This Motion requested funding for Dr. Kasper.

404. It was evident from his demeanor on the stand that he had a personal animosity toward Mr. Wooten and that he was unhappy with the way he had been treated by RPDO. One clear example concerning RPDO was his testimony that he felt said, "I was so marginalized and underutilized at RPDO at the time that I felt like it was time to move on." WRR 14:57. He also felt that Mr. Wooten did not put forth sufficient effort and was lazy. WRR 14:41. Mr. Wischkaemper was more direct in his affidavit where he stated that it was a mistake for RPDO to hire Mr. Wooten. Attach. 9, ¶6.

405. Mr. Wischkaemper acknowledged that he attended the planning meeting in Houston in July, 2013 where the conference call was placed to Dr. Kasper, but unlike all of the other participants in that conference call he

had no recollection of the discussion about intellectual disability. WRR 14:44-45.

406. Mr. Stoffregen, Mr. Wischkaemper, and all those at the meeting compiled a list of the things that need to be completed before trial, and further investigation into Intellectual disability was not on the list. WRR 19:29. There was no pushback from anyone at the meeting, nor any voices of dissent to drop the ID claim. WRR 14:79.

407. Mr. Wischkaemper testified that the Houston meeting in 2013 was his first in depth interaction with the team. WRR 14:42-43, 50.

408. Although he admitted that he "blew his top" with Mr. Wooten at the RPDO annual retreat in Lubbock, Texas in August of 2013, he could not remember what prompted his response. Ms. Mallon testified that this occurred when Mr. Wischkaemper asked Mr. Wooten a question, which Mr. Wooten had answered, but Mr. Wischkaemper just did not like his response. FOF 331. Shortly after the August 2013 retreat, Mr. Wischkaemper left RPDO. WRR 14:29, 47-48, 67.

409. Based upon Mr. Wischkaemper obvious animosity toward Mr. Wooten and his resentment with the way RPDO used his talents, the Court did not find Mr. Wischkaemper to be a credible witness. The Court considered Mr. Wischkaemper to be biased and the Court did not consider his testimony or his affidavit unless it was

corroborated by other independent, credible evidence.

G. **CAROL CAMP**

410. Carol Camp is an attorney who has been involved in representing capital defendants since 2001. WRR 14:126-128, 162.

411. Ms. Camp was hired by RPDO as a mitigation specialist and was assigned to the Angleton office around June of 2012. WRR 14:129. RPDO documents reflect that she first met Applicant on May 24, 2012. Def's Writ Ex. 208.

412. Prior to being hired as a mitigation specialist she had attended numerous conferences that dealt with mitigation, including intellectual disability. WRR 14:131.

413. Ms. Camp described that as the mitigation specialist she was responsible for meeting members of Applicant's family and developing a relationship with them and then finding people as many people as she could who knew Applicant, whether family members, teachers, coaches or supervisors. WRR 14:129.

414. As the mitigation specialist her primary duty was to put together a biopsychosocial history of Applicant and do a family history going three generations back. WRR 14:129-130.

415. Ms. Camp testified that she had interviewed family members to see if there were family members who had a history of mental illness,

addictions, cancer or other illnesses. Apparently, she did not interview Tamara Harris as there was testimony from other witnesses that Tamara Harris was in special education classes. WRR 15:192. She also examined Applicant's school records and talked to two of his ex-wives. There is no evidence that she interviewed any of Applicant's teachers. After compiling this information, she became curious about the possibility of Applicant being intellectual disabled and "we needed to do a comprehensive intellectual disability study." WRR 14:134-135.

416. Apparently, all of the information that Ms. Camp compiled that raised her concerns about intellectual disability was compiled prior to the BYOC seminar in October, 2012 as Ms. Camp testified that she did no investigation concerning intellectual disability after that conference. WRR 14:144-145. On August 22, 2012 Ms. Camp signed an affidavit to support the retention of Dr. Kasper which was attached to an Ex Parte Sealed Motion for Funding for Services of Expert requesting funds to retain Dr. Kasper. The Affidavit states, "Mitigation investigation conducted .... thus far indicates several potential sources of brain damage, injury or insult, including but not limited to, childhood exposure to organochlorides and organophosphates, a history of addition to both crack cocaine and alcohol that spans at

least three decades, and possible chronic traumatic brain injury. (CBTI)"

417. Ms. Camp then testified that she sought permission to do a "comprehensive intellectual disability study" but first Mr. Wooten would not allow it, so she then sought help from Bob Cowie, who was also an attorney with RPDO but at that time was the supervisor of all mitigation specialists, and then from Philip Wischkaemper, who was the deputy director of RPDO. Even after speaking to them she was not able to do the intellectual disability investigation in the way she felt it should be conducted, although she "did try to find out as much as I could about his limitations from the people I talked to." WRR 14:135-137, 160. Mr. Wooten denied being asked by Ms. Camp to do an intellectual disability study (FOF 307), and Mr. Wischkaemper did not discuss this request. Although Ms. Camp authored numerous memoranda and at least one "to do" list, there was noting in any of the memoranda or the "to do" list that corroborated Ms. Camp's contention that she was not allowed to conduct an intellectual disability study.

418. Ms. Camp did not approach Mr. Stoffregen with her inability to get approval to do more investigation into intellectual disability because "he would not have listened." WRR 14:161.

419. According to Ms. Camp she wanted to do more investigations into adaptive deficits using a

checklist that she had obtained at one of her training conferences that explained how to interview persons about adaptive deficits and to talk to more witnesses, but Mr. Wooten would not allow this. She also wanted to bring in an expert such as Dr. Jim Patton who could administer tests to family members to obtain information about adaptive deficits. WRR 14:139-140. No credible evidence was submitted at the Evidentiary Hearing that corroborated Ms. Camp's testimony that she ever made a request to Mr. Wooten, Mr. Cowie, or Mr. Wischkaemper or was prevented from conducting the type of mitigation investigation she felt was necessary.

420. From her testimony, it appeared that Ms. Camp believed that an intellectual disability investigation was separate and apart from what a mitigation specialist should do as a part of her primary responsibilities. This was contrary to the testimony of Danalynn Recer. Ms. Recer testified that the "adaptive functioning piece" is part of the life history investigation that should be conducted in every case. It is a part of the biopsychosocial history that the mitigation specialist is to conduct. "Now the adaptive functioning piece of that is woven throughout. It's not an entirely separate sort of investigation. It is the evidence you would find as a part of your life history investigation. And you don't just do it when you already suspect that you have an intellectual disability. You do it in every

case and you get the evidence of intellectual disability in the course of it if it's there. And if it doesn't rise to the level of intellectual disability, it's still hugely mitigating." WRR 13:217-218. There is no specific adaptive deficits investigation but it is "woven thru" the life history investigation. FOF 440,448.

421. This process was discussed with the team at the BYOC conference held in October, 2012 where Ms. Recer was a presenter. WRR 13:210-218. Ms. Camp attended that conference.

422. RPDO hired Ms. Mary Conn in August, 2012 to work on Applicant's case as one of the trial team. WRR 13:168, 171-172.

423. Ms. Camp did not believe that Ms. Conn had enough capital defense experience to serve on the trial team. WRR 14:163.

424. Ms. Camp was unhappy that she had not been selected to serve on the trial team instead of Ms. Conn. A litigator with RPDO earns about double what a mitigation specialist earns. WRR 19:38-39. Apparently, Ms. Camp and Ms. Conn did not get along, and this resulted in Ms. Conn notifying the RPDO office in Lubbock that she had safety concerns and feared violence from Ms. Camp. *Id*.

425. Ms. Camp resigned from RPDO in March, 2013. Upon her departure she prepared a check list of items that needed to be done before trial "if a plea deal is not reached." Def's Writ Ex. 150. The list did not contain

any mention of further investigation concerning adaptive deficits or intellectual disability, nor did she mention a need for further investigation of intellectual disability in the affidavit she prepared to be filed in connection with a Motion for Continuance that trial counsel was filing. WRR 14:159, 163; WRR 19:40; State's Writ Ex. 100; Def's Writ Ex. 150.

426. Ms. Camp did not inform RPDO or Mr. Wooten that a reason for her leaving was that she was prevented from pursuing intellectual disability as a part of her mitigation investigation. WRR 19:39-40.

427. Based upon her testimony and her demeanor, it was apparent to the Court that Ms. Camp had a bias against RPDO because of the way she was treated while employed there and against Mr. Wooten. Other testimony demonstrated that she also had a conflict with Ms. Conn. By Ms. Camp's own admission, she did not conduct any investigation into adaptive deficits after the BYOC conference in 2012. She did not include further investigation on intellectual disability on the "To Do" list she prepared when she left. The Court determined that Ms. Camp was biased and that her testimony was not reliable. Therefore, the Court did not consider her testimony unless it was corroborated by other independent, credible evidence. Her affidavit was defective because

it was sworn to only to the best of her knowledge.

TESTIMONY OF OTHER CAPITAL DEFENSE ATTORNEYS

A. JOANNE HEISEY

428. Joanne Heisey graduated from law school in 2013 and began work with OCFW in the fall of 2013. She left OCFW in September, 2017. WRR 13:7.

429. Ms. Heisey was first assigned to work on Applicant's case in the summer of 2014. She reviewed the trial record and was part of the OCFW team that put together a list of witnesses, jurors, and members of the trial team that needed to be interviewed, as well as identified claims to be raised in the Habeas Application. She interviewed four or five jurors in this case with one of them being Deborah Henry on February 13, 2016. WRR 13:7-9.

430. Ms. Heisey took notes during the interview of Ms. Henry which lasted about an hour and a half. The interview covered many areas such as Ms. Henry's impression of the evidence, of Applicant, of the attorneys on both sides of the case as well as the Judge. Ms. Henry related to her how she had struggled with the deliberations and how she had placed a call to her sister. Ms. Henry told her that she had been scammed by a former co-worker that she

considered a friend and she felt betrayed. Ms. Heisey specifically remembered that Ms. Henry used the word scammed rather than the word fraud. She also told Ms. Heisey that when she heard evidence that Applicant had scammed an older man out of some money that she could relate to that experience. Ms. Henry also informed her that she had gone to church with Ms. Yenne and related to her the discussion after church in 2010. WRR 13:11-13, 16.

431. Before she left, Ms. Heisey asked if she could get a statement from Ms. Henry and was told she could "as long as it was accurate and in her words." WRR 13:15.

432. Ms. Heisey returned a few days later with a draft declaration that Ms. Heisey had prepared. Ms. Henry briefly read over the draft and then told Ms. Heisey that she would not sign it. According to Ms. Henry, she refused to sign the declaration because it omitted certain things and overemphasized others, and in at least one place, Ms. Henry said a purported statement was false. According to Ms. Heisey, Ms. Henry refused to sign it because she did not want to help Applicant. WRR 13:17-18. A more complete description of the conversation is found in FOF 589, 617-629. After observing both Ms. Heisey and Ms. Henry testify, the Court

found Ms. Henry's testimony concerning the conversation to be the correct version.

433. Prior to her meeting with Ms. Henry, Ms. Heisey had been made aware that Ms. Yenne had forwarded to OCFW documentation concerning a criminal action that had been filed against the man who had scammed Ms. Henry. After receiving this information, Ms. Heisey said that she reviewed Ms. Henry's juror questionnaire and saw that she had said that she had answered, "No," to the question as to whether "she or anyone close to her had been a victim of a crime." WRR 13:13-14. This was not the question asked on the questionnaire. For the exact question that was asked see Def's Writ Ex. 79:7 (sealed).

434. Ms. Heisey, or someone else with OCFW involved in the investigation, apparently jumped to the conclusion, without completely investigating the facts, that Ms. Henry had "lied" on her jury questionnaire. In her affidavit Mary Conn stated, "James" post-conviction counsel informed me that one of the jurors lied in jury selection" by not disclosing that she "was the victim of fraud and that the juror had a friend whose husband had been murdered." Attach. 6. The original Writ Application filed by Applicant also alleged that Ms. Henry lied.

435. After reviewing all of the testimony and examining the questionnaire, the Court has found that the conclusions reached by Ms. Heisey and OCFW had no basis. (See

Conclusions of Law on Issues 8 and 9.) As stated in Findings of Facts 432, 592 and 622, the Court accepted as true Ms. Henry's version of the conversations rather than Ms. Heisey's. However, the Court does not believe that Ms. Heisey intentionally prepared the draft knowing it was not correct. Rather the Court believes that in her zeal to represent her client, she drafted a statement based upon what she believed she heard, inserting and emphasizing certain words and phrases in a way to benefit Applicant. Subject to the foregoing sentence, the Court found Ms. Heisey to be a credible witness.

B. **DANALYNN RECER**

436. Danalynn Recer is an experienced capital defense attorney and mitigation specialist. Personally, and through an advocacy center she founded, she provided training, consulting, and mitigation services to attorneys handling capital cases. She has personally served as lead counsel on forty-five (45) capital trial cases. WRR 13:203-205, 208.

437. She is on the faculty of numerous national trainings for capital attorneys, including the National Capital Voir Dire College, National Capital Trial College, National Training for Mitigation Specialists, and numerous regional trainings in Texas, Louisiana, Mississippi, Pennsylvania, California,

Arizona, Ohio, Florida, Georgia, North Carolina, and South Carolina. WRR 13:206.

438. In October, 2012, she provided a "Bring Your Own Case" (BYOC) workshop in Houston. The RPDO team, consisting of Jay Wooten, Mary Conn, mitigation specialist, Carol Camp, and Investigator Soto, attended. WRR 13:201-202.

439. Trial counsel, the mitigation specialist, and the investigator in this case were all employees of RPDO, and Jack Stoffregen, the Chief Public Defender, approved all hiring of employees. Mr. Wischkaemper was the Deputy Director of RPDO who did the "due diligence" on all applications for positions with RPDO. WRR 14:30-31.

440. The BYOC workshop emphasized the importance of conducting a thorough life history evaluation from independent sources going back for three generations. There is no specific adaptive defects investigation, but adaptive functioning is "woven" through the life history examination. WRR 13:218-219. The adaptive deficit investigation is a part of the life history examination that counsel should be conducting. WRR 13:254.

441. Ms. Recer pointed out that §11.1(2)i of The Guidelines and Standards for Texas Capital Counsel (The Texas Standards) requires that "Counsel conduct a review of the client's possible mental retardation and that this might not be easily determined by attorneys' interviews with the client. Special expertise

in recognizing active mental retardation is required." WRR 13:242-243; Def's Writ Ex. 120.

442. Texas Standards further require that lead counsel, in consultation with associate counsel should apply to the Court for a qualified mitigation expert if the defense team does not have present expertise in obtaining and evaluating mitigation evidence and a mental health associate qualified by training and experience to screen individuals for the presence of mental or psychological disorders. Def's Writ Ex. 120, §10.1B2. A similar provision is found in Guideline 4.1 of The Guidelines for Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines). Def's Writ Ex. 119. The Texas Standards in some instances imposes the duty on lead counsel, but in other cases it is imposed on all counsel or all members of the defense team. Def's Writ Ex. 120, §10.1A2.

443. Both ABA Guidelines and The Texas Standards state that a defense team should have a minimum of two attorneys, an investigator, and a mitigation specialist. In addition, the defense team should contain at least one member qualified by training and experience to screen individuals for the presence of psychological disorders or

impairments. ABA 4.1; The Texas Standards 4.1; Def's Writ Ex. 119, 120, and 122.

444. Dr. James Patton, an expert who focuses on intellectual disability, spoke at the October, 2012 BYOC conference as well. Ms. Recer testified capital defenders need a significant amount of training from mental health experts about how to build a case, how to spot signs and symptoms, and how to determine what experts are needed. The BYOC planners bring experts in intellectual disability to these conferences to provide that training. Dr. Patton presented on Intellectual Disability and *Atkins* Claims. WRR 13:213-214.

445. Ms. Recer taught Mr. Harris' RPDO trial team strategies to employ in an intellectual disability investigation in a capital case. She explained that counsel must do a life history investigation in every capital case to the same degree of thoroughness because they are not aware of what could be uncovered. "You don't know what you don't know. So you can't prejudge whether or not to do that investigation." WRR 13:217; WRR 14:19-21; Def's Writ Ex. 120:71-72. An intellectual disability investigation into adaptive functioning is a part of the life history investigation. *Id*. Ms. Recer explained: Before intellectual disability was an exclusionary category it was still a mitigator ... that many state and federal courts had identified as inherently mitigating. So it is something that

you investigate before you know whether or not it meets the standard." WRR 14:20.

446. Ms. Recer stated this investigation must not be aimed at confirming biases of what counsel thinks they will find. The investigation must be "from the ground up" and based on independent sources, such as school records and property records. WRR 13:217-218. Ms. Recer testified, "[Y]ou're not supposed to be looking for anything. You're supposed to be looking at everything." WRR 14:20-21.

447. Counsel should conduct a multigenerational biopsychosocial history investigation in every case. This requires very thoroughly collecting records and talking to witnesses about the client's life history and family, back at least three generations. Counsel must get this investigation substantially underway before beginning to develop themes or decide what mental health experts are needed for the specific case. WRR 13:217-218.

448. Ms. Recer explained that evidence of adaptive deficits and intellectual disability are found through this life and social history investigation. If evidence is found, but does not rise to the level of intellectual disability, this evidence is still useful for mitigation purposes. WRR 14:19-20. Therefore, defense counsel must conduct a life history investigation in every case—not just cases where intellectual disability is suspected. Furthermore, this investigation must begin

immediately due to its time-consuming nature. WRR 13:218-230.

449. Prior to the BYOC Seminar, Dr. Kasper had rendered her opinion of vascular dementia. WRR 13:250; WRR 14:9. At BYOC, trial counsel completed a questionnaire and then informed Ms. Recer of Dr. Kasper's diagnosis. Ms. Recer discussed their theory of mitigation, trace matter brain injury, brain imaging, vascular dementia, and Dr. Kasper's evaluation. Based upon Ms. Recer learning that Applicant's IQ score from Dr. Kasper was a 75, and that the prior 83 IQ score was prison administered, Ms. Recer recommended that trial counsel do a " ... more thorough life history investigation about adaptive deficits. That's within the standard of error measurement for intellectual disability, so then it puts an even greater burden on getting the adaptive functioning investigation." WRR 13:250-252. According to the evidence presented at the evidentiary hearing, a more thorough life history investigation into adaptive deficits was not performed.

450. Once a red flag is raised, it is incumbent on counsel to investigate that issue completely. WRR 13:253.

451. According to Mr. Wooten, Ms. Recer did not strongly urge trial counsel to pursue an intellectual disability defense, but she did advise the trial team to keep their "eye out for any adaptive defects because if you have

some, you might be able to attack the 83 and move forward on ID or MR." WRR 19:154. Because Ms. Camp, the mitigation specialist, and Mr. Soto, the investigator, were at the meeting, Mr. Wooten did not specifically instruct them to search for adaptive deficits, nor did he do anything after the meeting to confirm that they were looking for adaptive deficits. WRR 19:155.

C. **KATHRYN KASE**

452. Ms. Kathryn Kase had tried three capital murder cases and participated in several non-death penalty cases. She conducted 8 to 10 trainings per year on a variety of subjects including intellectual disability. She was a speaker at the October, 2012 BYOC workshop attended by Applicant's trial counsel. She presented a session discussing intellectual disability. Ms. Kase participated in a breakout session with Applicant's trial counsel and discussed mental health issues and intellectual disabilities. She always begins her brainstorming sessions with the topic of intellectual disability because it is a bar to the death penalty. She defined intellectual disability and its elements and the range of IQ score for intellectual disability. She advised as to risk factors and how to gather information. WRR 14:169-181.

453. Ms. Kase explained that the entire team was responsible for developing mitigation and evidence of intellectual disability, but Mr.

Wooten, as the team leader, had the ultimate responsibility to see that a thorough investigation was conducted and the evidence used properly. She emphasized that all had an obligation in gathering the information. WRR 14:182-184.

454. Ms. Kase testified that she had asked the team to tell her what evidence they had developed at that point. She got the impression that the team was very new to the case and had very little information about Applicant's life and potential adaptive deficits. She gathered that the team had not developed much mitigation. She recalls emphasizing, "[Y]ou've got to do this investigation into intellectual disability. You have to do it. It's out there. And it's clear to me based on what you're telling me now, you haven't yet done it." WRR 14:182-183.

455. Ms. Kase encouraged the trial team to pursue intellectual disability because even if turned out that he was not intellectually disabled, the team would gather valuable mitigation evidence in the course of the investigation that they could present, either to the prosecution to try to get the death penalty waived, or at trial in front of a jury. This was in line with how Ms. Camp was trained to always pursue an investigation into intellectual disability until you're able to rule it out. WRR 14:145.

456. At the October, 2012 BYOC training, the Defendant's trial team received a draft of a

motion that for continuance they could use to seek additional time to conduct a thorough investigation into intellectual disability. WRR 13:255.

457. Ms. Kase met with the team again in the summer of 2013 at a hotel conference room in Houston. This meeting has previously been discussed in FOF 290. Although other witnesses testified that the experts were provided copies of all interviews and records concerning mitigation, Ms. Kase testified that she came to the conclusion that trial counsel had not provided Dr. Kasper with sufficient information to rule out intellectual disability. However, Ms. Kase apparently did not inquire of Dr. Kasper whether she received sufficient information to rule out intellectual disability. WRR 14:188-191. Since Ms. Kase is a very experienced capital defense attorney and had testified at length about the importance of an intellectual disability defense, the Court finds it difficult to believe that she would not have made such an inquiry. The Court, therefore, did not include her speculation in its Findings of Fact.

458. Ms. Kase advised the trial team that more investigation was needed concerning intellectual disability and that they should seek a continuance. WRR 14:191-192.

459. The Court accepts the testimony of Ms. Kase as credible to the extent of those portions of

her testimony that are included in these Findings of Fact.

CONCLUSIONS OF LAW ON ISSUE 1

INTELLECTUAL DISABILITY

1. Applicant has the burden of proof to prove, by a preponderance of the evidence, that Applicant is intellectually disabled. *Ex Parte Briseno*, 135 S.W.3d 1, (Tex. Crim. App. 2004).
2. The U. S. Supreme Court held that imposing the death penalty on mentally retarded individuals, referred to by this Court in its Findings of Fact as "intellectual disability," (ID) violates the Eighth Amendment, reasoning that executing such persons is an excessive sanction prohibited by the Eighth Amendment. *Hall v. Florida*, 572 U.S. 701, 134 S.C. 1986 (2014). As a child, many of Mr. Hall's teachers indicated that he was mentally retarded. A prior attorney, who represented Mr. Hall for another crime, testified that Mr. Hall could not really understand anything, and his attorney in the murder trial said Mr. Hall could not assist in his own defense. Also in Hall his attorney compared Mr. Hall's mental level to his own four-year-old daughter. A number of medical professionals testified that Mr. Hall had levels of understanding typically seen in toddlers. As a child he was slow to speak, slow to learn, and had great difficulty forming his words.

   In *Atkins v. Virginia*, 536 U.S. 304 (2002), the Court left it up to the individual states to enact rules and procedures for determining which defendants may not be executed because they are

intellectually disabled, with the caveat that those rules or procedures must generally conform to the scientifically accepted and recognized clinical definitions. *Id*.

Applicant did not manifest in his formative years, any of the issues found in *Hall*. There is no evidence that anyone ever called or considered him to be retarded. While some experts testified that his abilities were of a fourth-grade level, his grades were average or modest. It is clear that he was able to assist in his defense as on one occasion he requested that a peremptory challenge be used even though the trial team did not object for cause. He also had the perception to recognize that one member of the trial team was not performing satisfactorily, and after his complaint to RPDO that person was removed from voir dire.

3. The Texas Court of Criminal Appeals has adopted the framework set forth in the American Psychiatric Association's DSM-5. *Thomas v. State*, 2018 WL 6332526 (Tex. Crim. App. 2018). As defined in the DSM-5, intellectual disability requires three basic elements sometimes referred to as prongs or domains be established. These are (1) deficits in intellectual functions confirmed by clinical assessments and individualized standard intelligence testing, often measured by an intelligent quotient (IQ) two standard deviations below the mean; (2) concurrent impaired adaptive functioning that are directly related to Prong 1; and (3) onset during the developmental period.
4. DSM-5 does not define what or specify an age for the developmental period. In *Moore v. Texas*, 139 S.Ct. 666 (2019) (hereafter referred to as Moore 2)

the Court, citing to its prior opinion in *Moore v. Texas*, 137 S.Ct. 1039 (2017) (hereafter referred to as Moore 1) agreed that the defects must have occurred while defendant was still a minor. In *Thomas* the jury was instructed that mental retardation is a disability characterized by " ... onset of which occurs prior to age 18." The Court noted that the jury instruction contained essentially the equivalent of the requirements of DSM-5. *Thomas, supra at *16*.

5. An IQ score alone is insufficient to rule out ID as an individual with an IQ score over 70 can be ID. *In re Johnson*, 935 F.3d 284 (5th Cir. 2019). Applicant had an IQ score of 75 as scored by Dr. Kasper in 2012 or a 76 if Dr. Price's rescoring of Dr. Kasper's test is accepted, and an 85 on an exam administered by Dr. Price in February, 2017. Applying the Standard Error of Measurement (SEM) recognized in *Hall*, *supra*, Dr Kasper's score could be as low as 70 or as high as 80, and Dr. Price's could be as low as 80 and as high as 90. Given these test results, counsel for Applicant argued that the Flynn effect could reduce Applicant's score of 75 to 73. However, the Flynn Effect has not been recognized in Texas, and this Court will not recognize it here. Whether or not the Flynn Effect is recognized, DMS-5 recognized that "a person with an IQ score above 70 may have such *severe* (emphasis by this Court) adaptive behavior problems that the person's actual functioning is comparable to that of individuals with a lower IQ score." As quoted in *Hall*, *supra*, at 712.

Irrespective of which score is used, it would have been reversible error for the trial court to have denied Applicant the right to an evidentiary hearing on an Atkins claim based solely on the IQ score. *Brumfield v. Cain*, 135 U.S. 2269 (2015). A score of 70-75 generally indicates sub-average intellectual functioning. *Ex Parte Modden*, 147 S.W.3d 293 (Tex. Crim. App. 2004). Where a score is close to but above 70, the Court must take into consideration the SEM. *Moore 2*, citing *Hall v. Florida*, *supra at 712*.

6. To find that an individual is intellectually disabled, Applicant must prove by a preponderance of the evidence that he has significant deficits in three areas. These are commonly referred to as Intellectual Functioning, Prong 1 or Domain A; Adaptive Deficits, Prong 2 or Domain B; and that the Adaptive Deficits are directly related to Intellectual Functioning, Prong 1, and Prong 3, or Domain C, that the Adaptive Deficits had their onset during the developmental period.

   A. *Prong I or Domain A — Intellectual Functioning*. This Prong involves a deficit in intellectual functions confirmed by a clinical analysis and individualized testing. Intellectual functions consider skills and problem solving, reasoning, sequencing one's thoughts, the ability to get along in the world, and mental flexibility.

   B. *Prong 2 or Domain B — Adaptive Functions.* The second Prong is a deficit in Adaptive Functioning. Adaptive behavior is the collection of conceptual, social, and practical

skills that have been learned and performed by people in their everyday lives. A deficiency in one adaptive deficit is sufficient to establish intellectual disability, provided it is directly related to Prong A, intellectual functioning. All testifying experts concerning intellectual disability agreed that Applicant had no significant deficits in the social domain.

C. Prong 3 or Domain C — Occurrence During Developmental Period. The 3rd Prong which Applicant had the burden to prove is that the adaptive deficits occurred during the developmental period. Although there were many references in the testimony to the term "developmental period" by the various experts, the only expert who testified as to what this term means was Dr. Patton. While Dr. Patton was using age 18 as the end of the developmental period when he prepared his original report. at the evidentiary hearing Dr.' Patton suggested that according to the literature, the developmental period may extend to age 22. While this might be applicable in determining whether a person is intellectually disabled for the purposes of needing services, Applicant failed to cite any case authority adopting this position in a forensic setting. In addition, in 2019 the Supreme Court stated that onset took place when Moore was a minor in referring to Prong 3. *Moore 2* at 668. The Court could find no more recent authority by the United States Supreme Court that identified Prong C in any

other manner. In *Thomas* the Court indicated that age 18 was the proper age to use. This Court therefore concludes that onset must occur before reaching age 18.

7. There are two ultimate questions of fact to be decided by this Court. Did Applicant satisfy his burden of proof to show that Applicant has severe adaptive deficits that are directly related to intellectual functioning, Prong 1, and, if so, did any of these manifest themselves before Applicant reached age 18.
8. Since Dr. Price, the State's expert, agreed with Dr. Patton that Applicant had significant deficits in the practical domain, Applicant satisfied his burden of proof on Prong 2 concerning deficits in the practical domain. This Court therefore must determine if Applicant has satisfied his burden to prove that these deficits in the practical domain are directly related to Prong 1. And if so, whether these occurred during the developmental period.
9. Dr. Patton set out many alleged deficits in the practical domain. He first discussed Applicant's inability to cook since other males in his family could cook, not being able to fix things around the house, not do his own laundry, and not do chores around the house. He then identified money management and the facts that his first wife had to handle all of the rent house paperwork and that his uncle helped him get his first job, which, according to Dr. Patton, occurred during the developmental period. Then as an adult, according to Dr. Patton, he could not navigate in a grocery store; he had to have assistance in buying cars; he held only manual unskilled entry level jobs; he

"almost always lived with someone else during his adult years;" and his family would purchase his personal hygiene items. Dr Patton provided no guidance as to how these related to Prong 1, other than to say that "money is related to math."

However, Dr. Patton was not qualified as an expert in intellectual disability but only in adaptive deficits. Therefore, the Court looked to the testimony of Dr. Woods to see how the evidence relates to each alleged deficit in Prong 1 as required by DSM-5.

10. Dr. Woods identified several deficits in the practical domain. Applicant would "get stuck" and could not multitask. One example of multitasking was not being able to successfully operate a forklift. From his neuropsychological interview, Dr. Woods identified several deficits in the practical domain. These were impaired attention, Applicant's acquiescence to the questions as a form of masking; Applicant's inability to multitask or have mental flexibility; his preservation or getting stuck and not being able to move to the next issue. He also found that Applicant was inappropriately upbeat considering the circumstances Applicant was in, which Dr. Woods attributed to the fact that in prison he did not have to cook or have a bank account or a car. Dr. Woods also noted that Applicant could not name his medical prescriptions or describe the medical care he needed in prison, and he could not remember anything about the. books he had read, except for his current one which points to Applicant's working memory being impaired. In Dr. Woods' opinion Applicant was also unable to effectively weigh and deliberate and to

problem solve. Dr. Woods rated his math skills to be around 6th grade level, and his reading comprehension, which Dr. Woods first found to be at a 7th grade level but after reading Dr Fahey's report, adopted her conclusion to be a 4th grade level. Dr. Woods specifically pointed out that he relied on two declarations that this Court has found to be unreliable. While the persons who prepared the declarations are not named, they are described by Dr. Woods as other teachers who had reviewed his records and taught at the school and understood its culture. These were Ms. Stafford and Ms. Wittig.

When asked to give specific examples of deficits in the practical domain, Dr Woods pointed to Applicant's need to have additional help from his teachers, taking related and consumer math classes, his wife paying his bills, his loss of a car for failing to pay a note (although according the testimony at the evidentiary hearing, Applicant lost his cars because he wrecked them), overdrawing his account at the ATM, having no checking account, his inability to remember his medications in prison, and the fact that family members helped with his homework. Dr. Woods also pointed to Applicant's lack of desire to operate a forklift (multitask); his inability to see the big picture on the clock test (executive functioning); not being able to write checks or use math in everyday occurrences (functional mathematics); in his reading comprehension as he needed to get extra help in school work in elementary school and high school. Dr. Woods summarized these as significant deficits in the practical domain.

11. Dr. Price characterized Applicant's alleged deficits in the practical domain, not as deficits, but rather as choices he made that enabled him to spend his time and money on things that provided him instant gratification. This is very similar to the conclusions of Dr. Farrell, Applicant's expert at trial. Certainly, the evidence supports the conclusions that Applicant's mother, sister, and even his niece helped him by allowing him to live with them from time to time, and they cooked and washed his clothes for a part of Applicant's adult life. However, there were substantial periods when Applicant lived apart from family and apparently managed without supports. While in later years, Applicant mainly worked as a laborer, the evidence from his original trial demonstrated that at one time Applicant was the overseer of elderly and mental patients at a nursing home. Clearly his family enabled Applicant to live a life style he wanted, and there was no evidence that Applicant ever missed a meal, was homeless, was unable to work because he did not have sufficient nourishment, that he could not maintain his personal hygiene, or was unable to cash his checks or pay his bills. Even Dr. Patton agreed that Applicant was able to provide self-care and bathe himself.

    After evaluating all of the evidence, the Court concludes that while it may have been difficult for Applicant to perform some of these tasks, Applicant failed to prove by a preponderance of the evidence that he was unable to perform these tasks.

12. Applicant also failed to prove by a preponderance of the evidence that the deficits in the practical domain were directly related to Prong 1. While Applicant does have some deficits in the practical domain, they are not so severe that Applicant is intellectually disabled. Applicant failed to demonstrate that he is sufficiently impaired that ongoing support is needed in order for him to perform adequately in one or more life settings at school, at work, at home, or in the community as required by DSM-5.
13. Turning now from deficits in the practical domain to the alleged deficits in the conceptual domain. Dr. Patton was Applicant's primary expert for this area. Dr. Woods relied on Dr. Patton's report in formulating his opinion, but he also relied upon his own examination. Most of Dr. Patton's examples of deficits in the conceptual domain occurred after he was no longer a minor. According to Dr. Patton money management was Applicant's main deficit. The examples cited by Dr. Patton were that Applicant could not set up a bank account, he needed help in paying bills, he could not plan for the future, and he needed help with legal documents.
14. Dr. Patton also reviewed Applicant's school records, but, apparently, he also did not consider the discrepancies in some of the declarations that have previously been discussed, to Applicant's actual school records. Dr. Patton relied on the unsworn declarations in forming his opinion, but neither he nor Dr. Woods testified or stated in their affidavits, that the type of unsworn declarations submitted by Writ Counsel in this case were of the

type, or in the form, that experts in their field customarily rely on. With regard to the reports of Dr. Kasper and Dr. Fahey, the proper predicate for relying on their reports was made during the Evidentiary Hearing.

15. In the conceptual domain, Dr. Woods focused on Applicants inability to see the "big picture" or executive functioning, his memory by not being able to recall the plot of the books he read, not remember his medications, his low reading comprehension, his inability to write checks, or manage money or plan for the future, which Dr. Woods referred to as functional mathematics. Dr. Kasper, Applicant's expert at trial, found some areas of memory impairment in her examination in 2012, but she did not find sufficient impairment in cognitive areas such as ability to express and motor functioning (FOF 107) to be able to diagnose Applicant with dementia. Dr. Kasper did not testify at the Evidentiary Hearing, and at the Evidentiary Hearing Dr. Woods did not address why he and Dr. Kasper reached different conclusions concerning cognitive function. Dr. Woods merely testified that Dr. Kasper was wrong in her diagnosis.
16. By the time all of the experts examined Applicant, he had abused alcohol, marijuana for more than 32 years, and crack for 23 years and had been addicted to crack for 7 years. He was dependent on friends, family and coworkers for transportation. He was mainly working day to day jobs and had lived in motels for a number of years. It is not surprising, due to his life choices, that Applicant had difficulties in executive functioning, and problem

solving and had a low self-esteem. It is also not surprising that a person addicted to drugs and alcohol would not be responsible in his management of money and his personal affairs. The experts for Applicant appear to stress his weaknesses in math and reading as the root source of all the deficits.

Certainly, math was Applicant's weakest subject through his formal schooling. Balancing a checkbook, managing a bank account, managing money, paying bills, and buying and maintaining a car could be attributable to deficiencies in math. They also could be attributable to Applicant's years of abusing his body and his brain. Even Dr. Woods acknowledged that alcohol abuse can affect brain function, and Dr. Farrell, Applicants' social history expert at trial, attributed Applicant's issues to his life style and drug and alcohol addictions.

17. After considering all the evidence, the Court finds that Applicant failed to sustain his burden of proof that any of Applicant's alleged deficits in the conceptual domain were directly related to intellectual functioning.

18. The Court has several reasons for its conclusions that none of Applicant's alleged deficits were directly attributable to Prong 1. First, although IQ scores are only a factor to be considered in determining whether a person is intellectually disabled, Applicant's two IQ scores were a 75 and an 85. Applying the SEM, Applicant's score could be as low as a 70 or as high as a 90. While Applicant needed additional help in some areas during elementary and high school, according to his school records, Applicant never failed a grade and only

failed two subjects during one grading period but his overall yearly average was passing. To accept Applicant's argument, the Court would have to believe that all of Applicant's grades were substantially inflated as Applicant did not have grades in the low CID range, but rather in high school were mainly in the B/C range, except for math.

Next, two experts, Dr. Price and Dr. Kasper, were of the opinion that Applicant was not intellectually disabled. While Dr. Woods attempted to discredit Dr. Kasper's conclusions based upon his assumption that Dr. Kasper did not have sufficient information upon which to base her diagnoses, Dr. Woods has no way of knowing what information Dr. Kasper actually had. In her Declaration, Dr. Kasper did not state that she was not provided sufficient information upon which to base her conclusion that this was not an intellectual disability case, but rather she only states that, "typically, for intellectual disability to be considered, I am presented with volumes of school records, affidavits of school performance, collateral sources from childhood, results of prior full-scale intelligence tests or other sources indicative of functioning during the period." Attach. 2, ¶9, The testimony of RDPO staff was that Dr. Kasper was sent all of the information RPDO collected, which was the same information that Writ Counsel characterized as "red flags" during the evidentiary hearing. But of more significance to the Court is that neither Dr. Kasper, nor any person that participated in the July 13, 2013 telephone

conference refuted that Dr. Kasper advised counsel that this was not an intellectual disability case.

In addition, the affidavits filed by Applicant's trial counsel in 2016 clearly stated that Dr. Kasper advised them that this was not an intellectual disability case. Although the Writ Application had been on file for almost three years when the Evidentiary Hearing was held in January-February, 2019, and more than three years when the time to file Applicant's affidavits expired in April, 2019, Dr. Kasper did not controvert or attempt to explain the statements made in the July 13, 2013 telephone conference.

19. Although Dr. Woods and Dr. Patton were eminently qualified to testify, the reliability of their opinions were put in question by their reliance on information that was obtained by OCFW in a manner that the Court found questionable, by the conflicts in the statements made in their Affidavits and their actual testimony, and by their inability to see that the school records they both reviewed clearly demonstrated that some of the information in the declarations they relied upon was clearly incorrect. Even though both Dr. Woods and Dr. Patton reviewed Applicant's school records, they both apparently failed to notice that the information in the records demonstrated that some of the information in the declarations they relied on were clearly incorrect when compared to Applicant's school records. Dr. Woods also specifically referred to the declarations of Ms. Stafford and Ms. Wittig that contained obvious errors. Although Applicant was weak in math throughout his life, Ms.

Stafford's statement that Applicant's grades were "terrible" and that he was "barely getting by" and "having trouble with academia all the way through" are not supported by Applicant's school records and contradicts the testimony of Dr. Farrell, Applicant's social history expert at trial. This even conflicts with Dr. Woods own testimony that Applicant's grades were average.

Both Dr. Woods and Dr. Patton relied extensively on the declarations, although they were not notarized, as Dr. Patton had assumed. Dr. Woods did not question them because he assumed Dr. Patton had spoken to the declarants. However, Dr. Patton testified that he had spoken to only a few of the declarants, and Dr. Patton was able to identify only four persons he interviewed. Furthermore, there was no testimony, or any statement in the affidavits of either interviewed. Furthermore, there was no testimony, or any statement in the affidavits of either Dr. Patton or Dr. Woods that the type, or form, of the declarations submitted by Writ Counsel in this case were of the type that experts in their fields customarily rely on, though there was testimony laying this predicate for other out of court statements that the testifying experts relied on.

Given the doubt in the Court's mind concerning the manner in which OCFW obtained the statements and the testimony of Ms. Mallon, an officer of the Court, that OCFW interviewer was trying the get Ms. Mallon to say things she did not say, and Ms. Henry's assertion that Ms. Heisey used words that attempted to make things seem more important than they were, the Court had a very difficult time

affording credibility to much of the information contained in the declarations. Where an expert relies on information that is not reliable, or is not of the type that is commonly relied upon by an expert in their field, the reliability of their opinion is put into question.

20. Although this Court has found that Applicant failed to satisfy his burden that any adaptive deficits were directly related to intellectual functioning in Prong 1, in the event the Court erred in this conclusion, the Court has examined Prong 3. While all of Applicant's experts that testified used the language in DSM-5 and referred to Prong 3 as onset during the developmental period, the United States Supreme Court, in *Moore 1* and *Moore 2*, used the term "minor." This Court could find no more recent authority that identified Prong 3 in any other manner, so it will address Prong 3 in the language used by the Supreme Court in *Moore 1* and *Moore 2*. *Thomas*, *supra*, indicated that the trial court gave a proper instruction that onset must occur before reaching age 18.
21. Applicant produced very little evidence concerning adaptive deficits that manifested themselves before Applicant reached age 18, or even before age 22, if the developmental period is extended to that age as proposed by Dr. Patton in his testimony. Clearly, as a student, Applicant needed additional help in some subjects, particularly mathematics, but his overall educational transcript reflects what Dr. Farrell described as modest grades or by Dr. Woods as average grades. Unlike Mr. Moore, there was no evidence that he was ever called slow or stupid, and he never failed a grade. Nor was there

any testimony, or anything in his school records, that indicated that Applicant was considered retarded as was present in both the Moore and Thomas cases. While some of the declarations mentioned that Applicant's school district did not have special education, there was no testimony at the evidentiary hearing, or any assertion in a declaration that Applicant should have been in special education.

Unlike Bobby James Moore, who as a child could not understand or answer to family members, or even occasionally to his own name; who was often separated from the class and told draw pictures when others were reading; who by the sixth grade struggled to read at a second-grade level, the evidence did not demonstrate that Applicant had similar issues. At age 13 Moore lacked basic understanding of the days of the week, the months of the year, and the seasons, and he could scarcely tell time or comprehend that subtraction is the reverse of addition. In addition, Moore's father, teachers, and peers called him stupid for his slow reading and speech. Mr. Moore was characterized as mentally retarded by his teachers. In the 9th grade Moore failed every subject and dropped out of school. He survived on the streets eating from trash cans. There was no evidence of anything in Applicant's childhood that was comparable to Mr. Moore.

In contrast, Applicant did not demonstrate significant mental or social difficulties at an early age.

22. Dr. Patton focused on his testimony of occurrence during the developmental period on his mistaken

belief that all of Applicant's other male siblings were taught to cook by their mother, and he did not do chores around the house. Applicant's sister, Carolyn Duplechin, clearly refuted these premises when she testified that the other male siblings were taught to cook by their wives after they were married, and that the girls did inside chores and the boys did yard work.

Dr. Woods points to Applicant's inability to read at higher than a 4th grade level as found by Dr. Fahey which would support a finding that deficits under Prong 3 had their onset while Applicant was a minor. Dr. Woods first concluded that Applicant's reading skills were at the 7th grade level, but later, after reading Dr Fahey's report, Dr. Woods changed his reading comprehension level to 4th grade level. In Conclusion 27 the Court held that Dr. Fahey's test results were not reliable.

23. The only testimony based upon personal knowledge concerning Applicant's reading ability came from Applicant's sister, Carolyn Duplechin, who stated that she never saw Applicant read a book, but then explained that Applicant usually was not home as he was outside playing football and other games. Applicant's transcript does not show a problem in reading as he scored a 90 in American Novels in his Senior year, and his grades in English and History were among his highest throughout high school.
24. Applicant's primary evidence concerning his reading abilities came from Dr. Fahey's retrograde study of Applicant's oral reading and comprehension skills. Dr. Fahey found that Applicant's reading rate was that of Grade 5, 2

months, with an accuracy rate of 11th grade and a fluency rate of 7.2 grade. Dr. Fahey then performed a writing ability analysis and concluded that his writing ability was at a 3rd or 4th grade level. Dr. Fahey concluded that Applicant's listening, speaking, reading, and writing did not go beyond a 4th grade level. However, Dr Fahey did not know if long term drug or alcohol use could affect reading or reading comprehension, and she was unable to testify whether vascular dementia would have an effect on his scores.

Dr. Patton contended that support for the deficit he found in money management by stating "later in the developmental period" his first wife provided support in money management. However, the evidence demonstrated that Applicant was approaching age 23 when he got married to his first wife in 1982.

25. Under the category of applied skills deficits in the developmental period, Dr. Patton's primary concern was there "was some problems with math concepts," and "a lot of issues related to money management." Dr. Woods addressed deficiencies in check writing and being in remedial math classes. Dr. Patton concluded that Applicant did not have the ability to save and plan for the future, was not able to balance a checkbook or keep a checkbook, was not able to pay bills, and in the "early stages" he needed some help in cashing checks. The only evidence pertaining to this issue that could have occurred before Applicant reached age 18 would have been the testimony of Carolyn Duplechin that if Applicant had money, he would spend it, and that as a teenager his money management was not

good. The Court wonders how many young persons would not have done the same? To paraphrase a scripture, "Let he who is without sin of spending all he earns when he is an adolescent cast the first stone." As to the other contentions that Applicant could not balance a checkbook or pay bills and did not cash his own checks, these have no support in the Record as occurring before Applicant reached 18 or even before reaching age 22. Applicant's sister, Carolyn, testified that she did not know if Applicant even had a checking account. A minor living at home would not have responsibility to pay bills, and there was no evidence that Applicant was ever paid with a check while he was a minor. While some of Applicant's coworkers provided testimony about his banking and money management issues, they did not meet Applicant until 2002.

26. Dr. Woods testified concerning statements by Applicant's 3rd grade teacher and his vocational teacher in high school in their Declarations that Applicant needed extra help, and there was also evidence that his siblings helped him with his school work. While the Court accepted those statements as they were made by persons with personal knowledge of Applicant, the Court rejected the unsupported conjecture of other teachers, who did not know Applicant, and did not indicate in their declarations that he knew his teachers, that there was wide spread cheating and social promotions by the teachers in the Boling Independent School District. While such allegations might have had some basis if Applicant's school records showed that he was barely passing most of his subjects, this is not the

case. The records show, consistent with what his sister testified, that Applicant was a B/C student, except for math. This is also consistent with the testimony of Applicant's expert, Dr. Farrell, that Applicant's grades were modest, but he saw no problem with Applicant's school records and the testimony of Dr. Woods that Applicant's grades were average. While it is true that Applicant lived at home with his mother after graduating from high school, in reviewing the record in its entirety, it was not uncommon during that time for multiple generations to live together. There is very little credible evidence in the record concerning Applicant's life from the time he graduated from high school until he married Rose when Applicant was almost 23 years of age.

27. Dr. Fahey's studies, while interesting, were a retrograde study of a man who acknowledged in 2012 to Dr. Kasper that he had a 32-year history of alcohol and marijuana use and a 23-year history of crack use, Dr. Fahey administered her test almost 7 years after Dr. Kasper. Dr. Fahey was not able to testify as to what effect dementia or long-term drug and alcohol use had on her study. As a result, the Court did not find Dr. Fahey's test results to be reliable.
28. After examining the laundry list of deficits pointed out by Dr. Patton and Dr. Woods concerning adaptive deficits, the only ones for which there was some credible evidence that could have occurred before Applicant reached age 18 was the allegation that he could not cook and other males in his family could; that Applicant needed some help from his teachers; that he took related math; that his

siblings helped him with his homework; and that his uncle helped him get bis first job.

Although Dr. Price agreed that not being able to cook was a practical deficit, the evidence demonstrated that this was not because the other male siblings were taught at home as Dr. Patton surmised, but rather, as Carolyn testified at the evidentiary hearing that the other males learned to cook after they were married. Apparently, neither of Applicant's wives taught him how to cook. It is correct that two of Applicant's teachers stated in their declarations that Applicant needed extra help, but needing extra help does not render someone intellectually disabled. With regard to siblings that helped him do homework, this just corroborates that Applicant needed extra help, but does not support a finding that he was intellectually disabled. To the contrary, it appears that after Applicant received extra help, he succeeded in school. While Applicant's uncle did help Applicant obtain his first job, it is not uncommon for someone to help family members, especially young family members, to get a job. References are important even in today's world. The Court believes that the contemporary phrase is networking. While some alleged deficits, pertaining to paying bills, doing handy work around the house, and preparing legal documents came from the declaration of Rose Lewis, she did not marry Applicant until 1982 when Applicant was almost 23 years of age. Also, his estranged wife, Bonnie Clark, stated in her declaration, that Applicant could only do simple chores, but she did not marry Applicant until 1990 when Applicant

would have been around 41 years of age. The rest of the deficits found by Dr. Patton and Dr. Woods pertained to money management, and this information came from Marcus and Marlin Lincoln, who did not meet Applicant until 2002.

29. Since Applicant had the burden of proof to demonstrate that the deficits in the practical domain had their onset while before age 18 when Applicant was a minor, the Court cannot find that a weakness in math, or a teenager spending all of the money he made, is sufficient to sustain Applicant's burden on this issue. The Court therefore finds that Applicant has also failed to satisfy his burden of proof that the onset of any adaptive deficits occurred before age 18, or at any time in the developmental period, even if the developmental period is extended to age 22.
30. Since there was no evidence that either of the IQ tests administered by Dr. Kasper or Dr. Price were invalid, the Court did not apply the Flynn Effect. *Ex Parte Cathey*, 451 S.W.3d 1 (Tex. Crim, App. 2014), (*cert. den.*)
31. Since more than 4 years had elapsed between the IQ Test given by Dr. Kasper in August, 2012 and the test administered by Dr. Price February 27, 2017, the Practice Effect would not have had a significant effect on the results.
32. By letter dated March 2, 2020, Writ Counsel requested that this Court review *Brownlow v. State*, 2020 WL 718026 (Tex. Crim. App. 2020) (not designated for publication) apparently for the purpose for suggesting that this Court disregard the testimony of Dr. Price, as the fact finder cannot "explicitly *nor implicitly* (emphasis by Writ

Counsel), rely on the Briseno factors or perceived strength of an individual to evaluate the individual for intellectual disability." The Court has reviewed the opinion in *Brownlow* and the record in this case. Nowhere in Dr. Price's testimony is there any mention of the Briseno factors. While Dr. Price did review and testify concerning Applicant's school records and achievement test scores, he did so only to determine whether, as tested, Applicant's academic abilities were related to an adaptive behavior deficit in the conceptual domain. Also, in *Brownlow*, the State argued the importance of lay opinion testimony and argued that the jury in that case should consider Mr. Brownlow' s adaptive strengths. While in closing argument the State did point out that Applicant had the ability to manipulate and defraud the individuals, the Court did not include any such evidence in its Findings of Fact.

Although in this case, the State urged that the Court should consider Applicant's letter writing ability and knowledge of current events demonstrating Applicant's ability to read and effectively communicate, which the Court did in its Findings of Fact, this was in response to Dr. Fahey's analysis of Applicant's simple style of communication, and her contention that Applicant was unable to comprehend the reading material in his cell. By contesting and attempting to refute the testimony of Applicant's experts, the State did not explicitly or implicitly urge the Court to rely on the Briseno factors or Applicant's strengths in determining intellectual disability.

Brownlow, however, is instructive as to the age for onset in that it states that, "The framework for analyzing the 1st and 3rd Prongs of the Intellectual Disability test (measuring IQ and determining whether the onset occurred before 18) was properly provided to the Jury consistent with the definitions set forth in the DSM-5." *Brownlow, supra at 20*.

33. Because Applicant addressed the failure of Dr. Price to comply with the Court's Order to video tape bis testing, after hearing the testimony, the Court finds that the failure of Dr. Patton to preserve the video had no effect on his test results. Neither Dr. Kasper's nor Dr. Fahey's tests were video taped, and the Court can find no authority that requires any such video taping. The Court was satisfied with Dr Patton's explanation of what happened to the recording and finds that its loss or destruction was not intentional. Being of the generation that started practicing law well before computers and video taping, and having inadvertently permanently erased drafts and videos before, the Court is perhaps more sympathetic than someone more well versed in modem technology would be.

CONCLUSIONS OF LAW ON ISSUE 2

INEFFECTIVE ASSISTANCE OF COUNSEL

1. To establish ineffective assistance of counsel, a petitioner must show that (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is reasonable probability that, but for counsel's unprofessional

errors, the result of the proceeding would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984). The reasonableness of counsel's performance is based on "prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In a capital case defense counsel must thoroughly investigate the possibility of intellectual disability as potential grounds for an *Atkins* defense.

2. An ineffective assistance of counsel claim has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is not reliable." *Strickland v. Washington*, *supra* at 687; *Porter v. McCollum*, 558 U.S. 30, 38-39 (2009); *Wiggins, supra at 521*; *Virgil v. Dretke*, 446 F.3d 598 (5th Cir. 2006); *Ex parte Bryant*, 448 S.W.3d 29 (Tex. Crim. App. 2014); *Ex parte Overton*, 444 S.W. 3d 632 (Tex. Crim. App. 2014) (granting habeas relief pursuant to *Strickland*); *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999)
3. To establish deficiency, Applicant must show by a preponderance of evidence that his counsel's representation fell below an objective standard of reasonableness. Porter, supra at 38-39 (quoting *Strickland*, *supra* at 688); *Ex parte Bryant*, *supra* at 39; *Thompson*, *supra* at 813. Each case will be decided on a "case-by-case approach to determining

whether an attorney's performance was unconstitutionally deficient under *Strickland*." *Rompilla v. Beard*, 545 U.S. 374 (2005) (O'Connor, J., concurring) (citing *Strickland*, *supra* at 668). The proper measure of reasonableness "... remains simply reasonableness under prevailing professional norms ... Prevailing norms of practice as reflected in the American Bar Association standards and the like ... are guides to determining what is reasonable, but they are only guides." *Strickland supra* at 688; *see also Padilla v. Kentucky*, 559 U.S. 356,367 (2010) noting that the ABA Standards are only guides, not " ... 'inexorable commands' ... these standards may be valuable measures of the prevailing professional norms of effective representation ... " *Rompilla*, *supra* at 387 "[W]e long have referred [to these ABA *Standards*] as 'guides to determining what is reasonable.'" (quoting *Wiggins*, *supra* at 524). They are instructive and serve only as " ... guides 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); *cf Rompilla supra* at 387.

"The question is whether an attorney's representation amounted to incompetence under 'prevailing professional norms,' hot whether it deviated from best practices or most common custom." *Strickland*, *supra* at 690 as cited in *Harrington v. Richter*, 562 U.S. 86, 105 (2011). These sources of norms include the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, ("*ABA Guidelines*"), the ABA *Standards for Criminal*

Justice (3d ed. 1993) ("*ABA Standards*"), and the National Legal Aid & Legal Defender Association, *Standards for the Appointment of Counsel in Death Penalty Cases* ("*NLADA Standards*"); State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966 (2006) ("*Texas Guidelines*").

However, "The Strickland standard must be applied with scrupulous care, lest 'intrusive post trial inquiring' threatened the integrity of the very process that right to counsel is meant to serve." *Harrington*, *supra* at 106. "Unlike a later reviewing court, the attorney observed the relevant proceedings, knew of the materials outside of the record, and interacted with the client, with opposing counsel and with the judge. It is "all too tempting" to second guess counsel's assistance after conviction or adverse sentences." *Strickland*, *supra*, at 689, as quoted in *Harrington*, *supra* at 105.

Counsel for Applicant cites the Court to *Wiggins v. Smith*, *supra*, to support its ineffective assistance of counsel claim, but that case is clearly distinguishable since in *Wiggins* "the defendant's Trial Counsel specifically acknowledged a standard practice for capital cases in Maryland that was inconsistent with what he had done." *Cullen v. Pinholster*, 563 U.S. 170 (2011).

Counsel for Applicant also cites *Porter* to support its contentions that trial counsel was ineffective. *Porter* is also distinguishable in that in *Porter*, counsel for the defendant introduced almost no evidence on the defendant's background or social history. For the post trial writ, counsel discovered

that Mr. Porter had an abusive home life, was a decorated military hero who, was wounded and had suffered from nightmares, and all experts testified that they could not rule out a brain abnormality. In Applicant's case, the jury heard from both lay and expert witnesses about his automobile accident, his growing up in poverty, his difficulty in school, his family and work history, and his medical diagnoses of cognitive impairment, a precursor to vascular dementia.

4. By Notice of Supplemental Authority, Applicant requested the Court to consider *Andrus v. Texas*, 590 U.S. __ (2020), as it "provides additional guidance on trial counsel's duty to investigate and present mitigating evidence." Unlike trial counsel in *Andrus*, Applicant's trial team talked to a number of witnesses concerning Applicant's early home and school life. Witnesses for Applicant at his original trial testified concerning Applicant's home and school life. Four of the witnesses who testified at the original trial also testified at the evidentiary hearing. Unlike Mr. Andrus, there was no evidence that Applicant had an abusive and neglectful childhood, nor did he suffer from pronounced trauma or post traumatic stress disorders. Although the information obtained by OCFW was more detailed than the information presented at the original trial, much of this information was cumulative of testimony received at the original trial, and much of the information was based on speculation or was clearly incorrect. There were, however, several instances of 'red flags' that Applicant's trial team failed to follow up on.

5. Both the ABA Guidelines and the Texas State Guidelines place the responsibility on all counsel to ensure that a thorough mitigation investigation is conducted. The entity appointed to represent Applicant by Court Order was RPDO. While RPDO does designate an attorney who serves as lead counsel, this attorney does not perform the traditional role of a lead counsel who controls all aspects of a case. The evidence clearly reflected that RPDO functions on a "team" concept in that all of their offices receive copies of all information that the trial team compiles, and all major decisions are made collectively by RPDO. Even on the trial team, no person has more authority than another team member, and the designated lead counsel can be out voted by other team members. The testimony reflected that this occurred several times. All attorneys and other members of the trial team are employees of RPDO, and RPDO assigns the attorneys, investigators, and mitigation specialists to each team.

   Thus, it is the Court's opinion that RPDO is responsible to ensure that the duties assigned to counsel in both the ABA Guidelines and the Texas State Guidelines are complied with. Although throughout the Writ Hearing several members of the trial team, including Mary Conn, Philip Wischkaemper, and Carol Camp, attempted to deflect responsibility from themselves and pointed to Thomas J. Wooten as the attorney responsible for everything in the case, this is not consistent with the evidence. However, if this Court is incorrect in finding RPDO as the entity responsible, and that it is necessary to name an

individual attorney or attorneys, then, based on the evidence, Mr. Wooten, Mr. Wischkaemper, and Ms. Conn would equally be responsible as they were on the trial team since the Guidelines place the responsibility on all counsel to see that a complete life history investigation is completed. In addition, although never on the pleadings, Mr. Jack Stoffregen, Chief public defender at RPDO, would also be responsible, as the testimony was that not only did he make all of the decisions concerning personnel at RDPO, he also participated in strategic decisions, including the July, 2013 conference call to Dr. Kasper. The Court would not include Keri Mallon, as all decisions that were alleged to form the basis for the ineffective assistance of counsel claim were decided before she became actively involved in the case. Also, while the evidence showed that apparently Carol Camp did not fully understand that the investigation concerning intellectual disability should have been conducted by her as a part of performing her duties as mitigation specialist to prepare a thorough life history investigation, the Court did not include Carol Camp, although she is an attorney, because she was serving only as the mitigation specialist in this case.

6. Both the ABA Guidelines and the Texas State Guidelines provide that a trial team should consist of no fewer than two qualified counsel, an investigator, and a mitigation specialist. In addition, the team should have at least one member qualified by training and experience to screen for mental or psychological impairments.

ABA Guidelines 4.lA, 10.4; Texas State Guidelines 3.1, 10.1.

The evidence at the Writ Hearing clearly demonstrates that RPDO failed to comply with both the letter and the spirit of both the ABA and State Guidelines in many respects.

First, although Mr. Wischkaemper was a member of the trial team for Applicant until Mary Conn was hired in August, 2012, he testified that he had no substantive contact with any of the trial team until July of 2013. Ms. Conn testified that she was hired by RPDO to work on Applicant's case in August of 2012. Thus, for at least five months, Applicant essentially had only one attorney actively working on his case.

Next, although Ms. Camp testified that she was qualified by training and experience to screen for mental or psychological functions to impairments, based upon the testimony of the two highly experienced capital defense attorneys, Danalynn Recer and Kathryn Kase, doubt is shed on Ms. Camp's understanding of the role of a mitigation specialist. Both Ms. Recer and Ms. Kase informed the defense team that they were obligated to conduct a complete mitigation investigation. Throughout her testimony, Ms. Camp claimed that she wanted to conduct an intellectual disability investigation, and had informed both Mr. Wooten and Mr. Wischkaemper of her desire. Mr. Wooten denied that Ms. Camp ever made a request to conduct an intellectual disability investigation, and no inquiry was made of Mr. Wischkaemper on this point. Since the Court has found Ms. Camp to not be a credible witness, there was no credible

evidence that any such request was ever made by Ms. Camp. However, according to both Ms. Recer and Ms. Kase, an investigation into intellectual disability is not a separate investigation, but is part and parcel of a thorough mitigation investigation. Therefore, if Ms. Camp had been conducting a thorough life history investigation, she would not have had to have obtain the approval of anyone, as this should have been part of her life history investigation. Ms. Camp testified that she never conducted any investigation into adaptive deficits. Ms. Conn and Mr. Wooten both testified they did not conduct an investigation into adaptive deficits. While Ms. Jackson did testify that she asked Applicant's sister about any adaptive deficits, this was the only testimony that anyone on the trial team inquired about adaptive deficits. Developing a multi-generational, biopsychosocial history and collection of documents should have been one of the first duties of a mitigation specialist as this directs the investigation and people who should be interviewed. When Ms. Camp left in April of 2013, this still had not been completed. Although she listed it on her list of things that still needed to be completed, there was no evidence that a formal genome was ever completed by Applicant's trial team. The "To Do" list that Ms. Camp prepared when she left said nothing about investigation for intellectual disability or adaptive deficits.

Although Mr. Wischkaemper testified that he had trained attorneys for a number of years on how to conduct a thorough mitigation investigation. and arguably was qualified to screen for mental or

psychological impairments, according to his testimony he had no direct involvement with the trial team until July, 2013. Therefore, his experience, and serving as counsel to Applicant in name only, whatever expertise he may have had involving mitigation, was of little value to Applicant.

The Court could find nothing in the Guidelines as to the need for continuity of the mitigation specialist and fact investigators. However, Applicant had no fewer than four different mitigation specialists and at least three fact investigators assigned to the trial team by RPDO. In addition, for at least the months of March, April, and most of May, 2013, with a trial date rapidly approaching, RPDO had no mitigation specialist working on Applicant's case. The mere fact of multiple mitigation specialists and fact investigators would not in and of itself demonstrate a deficiency, but it appeared to the Court from the evidence presented, that there was no effective system in place to ensure that existing information relative to the mitigation investigation had been obtained was then transferred to the next mitigation specialist or fact investigator.

7. RPDO failed to provide the trial team with mitigation specialists that were qualified by training and experience to conduct a thorough mitigation investigation. While Ms. Camp purported to have this experience, her failure to understand that the investigation into possible intellectual disability was a part of the life history examination demonstrates that she did not have a complete understanding of the responsibilities of a

mitigation specialist. The mitigation investigation that was done was fragmented and the trial team, the mitigation specialist, and the investigators failed to pursue the type of mitigation investigation that, even if it were not sufficient to support a finding of intellectual disability, would certainly have uncovered more information that could have been mitigating. *Tennard v. Dretke*, 542 U.S. 274 (2004).

8. RPDO's failure to cause a thorough mitigation investigation, which at the very least have shown Applicant had red flags indicating some adaptive deficits, was objectively unreasonable and did not comply with prevailing professional norms for capital defense counsel. See *Strickland* supra at 688; *Wiggins*, *supra* at 521.
9. Having found that RPDO's failure to conduct a proper mitigation investigation into Applicant's possible intellectual disability, the Court must now address whether there was a reasonable probability that had Applicant trial's team properly investigated whether Applicant suffered from an intellectual disability, the result of Applicant's capital murder trial would have been different. Since the Court has found in response to Issue 1 that Applicant failed to establish by a preponderance of the evidence that Applicant was intellectually disabled, if the burden of proof were the same, Applicant would also fail on this issue. However, under *Strickland* "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland*, *supra* at 694.

10. As a result of RPDO's failure to provide properly trained and experienced mitigation specialists, the jury did not hear any testimony concerning possible intellectual disability or learning issues of Applicant's siblings or his niece, his difficulties in managing money, and in financial matters, his living with family members for part of his adult life, or his reliance on others to assist him in understanding complex documents, just to name a few. Even the State own expert, Dr. Price, agreed that Applicant had significant deficits in the practical domain. In addition, the jury also did not hear that defendants with intellectual disabilities can sometimes "create an unwarranted impression of lack of remorse for their crimes." *Atkins*, *supra* at 321. Ms. Deborah Henry, did not see any remorse from Applicant. WRR 13:17.
11. While prior to the verdict, it was apparent that Applicant's friends and family members were reluctant to cooperate with the trial team, the Court is of the opinion that had RPDO provided properly trained and experienced mitigation specialists on a consistent basis, and had the trial team taken a more active role in interviewing potential witnesses, more information could have been obtained concerning Applicant's life, especially his early childhood years, which might have provided the jury with a better understanding of the circumstances surrounding Applicant's formative years. While this probably would not have had any effect on the future dangerousness issue, this " ... might well have influenced the jury's appraisal of his moral culpability." *Williams v. Taylor*, 529 U.S. 362, 398 (2000), citing *Boyde v.*

California, 494 U.S. 370, 387 (1990). The Supreme Court has cautioned that " ... reliance on mental retardation as a mitigating factor can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury." *Atkins*, *supra* at 321, referencing *Penry v. Lynaug*, 492 U.S. 302 (1989).

12. *Andrus* quoting from *Williams*, *supra*, requires the reviewing court to consider the "totality of the available mitigation evidence — both adduced at trial and the evidence adduced in the habeas proceeding." — and "reweigh[h] it against the evidence in aggravation." *Williams*, *supra* at 397-398.

    Unlike in Andrus, there was very little direct mitigating evidence presented at the Evidentiary Hearing. Almost all of the testimony relevant to mitigation came from experts who were relying in part on information contained in declarations in addition to the tests they performed in their clinical judgment. The Court has previously expressed its concern over the reliability of the information obtained by OCFW due to the manner in which it was obtained. As is discussed in more detail in the Conclusions of Law for Issues 3 and 4, Applicant's social history expert, Dr. Farrell did not refer to any of these declarations in his Declaration.

13. However, as the Court stated in *Neal v. Puckett*, 286 F.3d 230, 244 (5th Cir. 2002),

    > "Our inquiry is obviously very difficult, but given the amount of character. and mitigating evidence in this case, we believe that there is a reasonable probability that a jury would not

> have been able to agree unanimously to impose the death penalty if this additional evidence had been presented and explained to the sentencing jury."

Even Dr. Price, the State's expert, agreed that Applicant had deficits in the practical domain. The original trial jury could not hear any of the evidence that caused Dr. Patton to reach his conclusions on adaptive deficits, nor Dr. Woods' opinion that Applicant was intellectually disabled. Although the experts for Applicant and the State disagreed as to whether Applicant had deficits in the conceptual domain and whether the deficits in the practical domain or the alleged deficits in the conceptual domain were directly related to intellectual functioning, these were contested issues. Because the issue of intellectual disability was not presented to the jury, the jury did not have the opportunity to decide whether Dr. Patton, Dr. Woods, or Dr. Price were correct in their opinions. Also, the additional evidence, even if not being sufficient for a jury to find that Applicant was intellectually disabled, still would have been evidence a jury could have considered for mitigation.

14. The State argued that since trial counsel's own investigation did not reveal any indication of intellectual deficits, and Dr. Kasper stated in the July, 2013 telephone conference that Applicant was not intellectually disabled, the trial team should be entitled to rely on the opinion of their retained experts. *Segundo v. Davis*, 831 F.3d 345 (5th Cir. 2016) and *Smith v. Cockrell* 3l1 F.3d 661 (5th Cir. 2002), abrogated on other grounds 542

U.S. 274 (2004). In *Segundo*, the claim was made on a Federal Habeas Petition that his counsel had failed to fully investigate his intellectual disability claim. The Fifth Circuit noted that Mr. Segundo had assistance of a mitigation investigator, a fact investigator, two mental health experts and another mental health expert at the state habeas proceeding and that all the experts agreed that the defendant was not intellectually disabled. "Because none of the experts reported that they were unable to make a determination of intellectual disability due to incomplete information. The district court found that *Segundo* failed to show ineffective assistance of counsel." *Segundo* at 349. It was not disputed that Dr. Kasper advised trial counsel that Applicant was not intellectually disabled in the July, 2013 telephone conference. While Dr. Woods speculated that Dr. Kasper would not have been competent to make such a diagnosis since she did not have sufficient information concerning adaptive deficits, Dr. Woods had no way of knowing exactly what information Dr. Kasper had. The record in the Evidentiary Hearing is silent as to what formed the basis for her opinion. There is evidence in the record that Dr. Kasper was provided with all information obtained by the trial team, which included the numerous "red flags" pointed out by writ counsel in questioning the members of the RPDO trial team.

However, Applicant's case differs from *Segundo*. In the Writ Hearing in Applicant's case, the issue of whether Applicant was intellectually disabled was a very contested issue.

Even though this Court has found much of the information contained in the declarations filed in this case to be cumulative and unreliable based upon the manner in which the statements were obtained, the inconsistencies in some, and rank speculation in others, there apparently was sufficient information for the State's expert, Dr. Price, in conjunction with his testing and clinical interview, to agree that Applicant had significant adaptive deficits in the practical domain. Since the trial team only conducted a preliminary investigation into intellectual disability, it would be improper to absolve the RPDO for the failure of the trial team to conduct a thorough mitigation investigation solely because of the opinion given by Dr. Kasper, which was given only two months before Applicant's trial began.

After considering the entire record, this Court is required to come to the same conclusion as the Fifth Circuit in *Neal*.

15. Applicant's trial counsel, RPDO, failed to provide Applicant's trial team with properly trained mitigation specialists, failed to conduct a reasonable investigation as to whether Applicant was intellectually disabled, and failed to raise this issue with the trial court. This failure violated Applicant's Sixth Amendment rights to effective assistance of counsel, and Applicant was prejudiced by such ineffective assistance.

ISSUE 3

WHETHER APPLICANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO INVESTIGATE AND PRESENT ADDITIONAL EVIDENCE REGARDING THE APPLICANT, AND, IF SO, WHETHER THE APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE.

FINDINGS OF FACT ON ISSUE 3

460. Trial counsel hired Dr. Walter Farrell as a social history expert to present a social history of Applicant. State's Ex. 1, ¶4. The referral letter informed Dr. Ferrell that, "as our appointed sociologist, we ask you to provide your expert opinions as to the following issues: How culture, race, poverty, in Texas in the 1960's and 1970's, would or could, impact the psychological and emotional development throughout the course of that individual's life". Paragraph 4 of Applicant's referral letter further required Dr. Farrell to. "Advise the team as to any additional expert that may be helpful and what requests we should make of these experts." State's. Ex. 1, ¶4. Dr. Farrell never advised the team that he needed additional information or experts. State's Ex 8, 14. Trial Counsel relied on Dr.

Farrell to determine what additional evidence was necessary. State's Ex. 8, ¶22.

461. If Mr. Wooten believed it was a mistake to interject race into a case with an African-American defendant in Brazoria County to what would almost certainly be an all white or mostly white jury, but he was overruled by other members of the defense team. State's Ex. 8, ¶4.

462. The trial team had trouble locating Applicant's family, as many family members had passed away and many were reluctant to cooperate. State's Ex. 2, ¶2. Substantial effort was made into the investigation of Applicant's social history. State's Ex. 3, ¶4; State's Ex. 2, ¶3. This investigation uncovered evidence of poverty, domestic abuse between parents while Applicant was a child, pesticide exposure, substance abuse, racial inequality, and other disparities. State's Ex. 3, ¶3. All relevant information obtained by the trial team was timely turned over to Dr. Farrell, State's Ex. 3, ¶4, and he never indicated that he needed additional information. State's Ex. 8, ¶4.

463. Neither Dr. Farrell nor Dr. Jacqueline Jones made reference to any of the unsworn declarations obtained by Writ Counsel from family, friends, coworkers, or teachers in

their filings with the Court. FOF 517 and Conclusion of Law 1 for Issue 3.

SOCIAL AND CHARACTER EVIDENCE PRESENTED AT APPLICANT'S ORIGINAL TRIAL

TESTIMONY OF FAMILY, FRIENDS, AND COWORKERS

464. Carolyn Duplechin, Applicant's younger sister, was employed as an occupational health nurse. RR 68:49. She described how their family grew up poor in Boling and Iago, Texas. In Iago, the eight-member family lived in a four room house. There was no indoor plumbing. Their father was a sharecropper and their mother a housekeeper for white people. Race was an issue. Restaurants would not serve them because of their race. They did not always have enough money and sometimes had to rely on charity. At one point, the family took care of three children from a deceased aunt. RR 63:6-7. Their father would sometimes spend family money drinking and going out with other women. RR 68:13. The father later abandoned the family when Applicant was 17 years old, and he died a few years later. Applicant was very upset about his death. RR 68:14, 17-18.

465. Ms. Duplechin told the mitigation specialist during a pretrial interview that poverty and domestic violence were not major issues in

their childhood. She said the family had everything they needed and that their mother would not let them slack on their education. Ms. Duplechin attributed Applicant's issues to drug use. State's Ex. 16, ¶2.

466. When Applicant was in high school, he was in a car accident in which his ankle was crushed. He had been a good football player with a potential for a scholarship, but he was not able to play after the accident. The accident also prevented him from attending his father's funeral. RR 68:20-23. Applicant worked in the fields for three years from the time he was seven years old until he was ten. RR 68:25-27. A number of people in his family died, including his sisters Ethel, Doris, and Chloe. Applicant was particularly upset by Ethel's death as she had taken the place of his mother after she died. Relatives Irma Jean and Larry Rutherford also died. RR 68:13-14, 28-30.

467. Ms. Duplechin suspected that Applicant was a crack addict. RR 68:33.

468. In January of 2012 Applicant worked as a longshoreman and did odd jobs. RR 68:36.

469. Applicant did not get into fights at school nor was he violent, and he was well liked. RR 68:37, 38.

470. Tamara Harris is Applicant's niece. She stated that he took her mother's death hard. RR 71:83.

471. Carmen Harris, Applicant's niece, stated that when she was young, Applicant lived with her family. It was common knowledge that he used crack, but he used to give her family money. He always made the family laugh. She said he was a kind, gentle person and never was violent or aggressive. He would pay her light bill when she was unable to do so. RR 71:92-98.

472. Floyd Owens, Applicant's cousin, could not believe Applicant was the type of person who would commit this type of crime. No one is their family committed crimes because they were raised not to. Applicant came from a good family. He did note that there had been instances of drug abuse. RR 68:93, 100-102.

473. David Laws, a childhood friend, said that Applicant was a happy, fun-loving guy who had a great personality. Mr. Laws was a couple of years older than Applicant, and Boling schools were desegregated when Mr. Laws was in the third grade. When they were young, certain businesses would not allow a black person to enter. The job market was not good in the area. There were no 4-H clubs for blacks and the school counselors did not encourage blacks to go to college. RR 68:106-110. The family had all the necessities growing up, but nothing more. Applicant was not aggressive or violent in school. He was always jovial and had a good personality. RR 68:110-114. Mr. Laws heard Applicant was addicted to crack, but he could not believe

Applicant committed the murder. RR 68:111, 121. He said that if Applicant had needed something, he would have been there for him. Applicant's family took care of one another. RR 68:113.

474. Travis Farris had a relationship with Applicant for almost a year around 1995. She testified that he never assaulted her. He did not complain of mental problems or being exposed to chemicals or toxins, but he did drink quite a bit. RR 70:98-101.

475. Mirk Adams owned a mobile home park and the Applicant worked doing odd jobs at the park for about 6 or 7 years beginning in 2005. RR 68:125-126, 130. Applicant would borrow money from him and then work if off. RR 68:131. Sometimes Applicant got a little desperate for money, but he was not angry or violent. Mr. Adams had no firsthand knowledge of any drug problem. None of the residents complained about him. RR 68:138. He did have to watch Applicant because he would do work for other people when he was supposed to be working for Mr. Adams. RR 68:133-134.

476. Bobbie Franklin, Cheryl McDonald, Wilkins McDonald, George and Catherine Bettany were all consistent in their testimonies that Applicant had done yard work for them. He was friendly and never showed any violent

tendencies. RR 68:149-150, 152-154, 229, 239-243, 249-250, 262.

477. Horace Lemons knew Applicant for six years and worked with him at the Port of Freeport. RR 70:167-168. Applicant was jovial and kind, got along with everybody, and was a good worker. RR 70:169-170. Mr. Lemons never saw him violent or angry. He had a way of making people laugh. He could not believe Applicant committed the offense. RR 70:171. Applicant was a forklift operator, and would fill in for the foreman leading a work gang if the foreman was not there. RR 70:174.

478. Pastor Kenneth Murray was also a longshoreman at the Port of Freeport. He grew up with and worked with Applicant. RR 70:180-182. Applicant was a good worker and they kidded around a lot. He got along with everyone and was not violent or aggressive and did not get into fights. RR 70:182-183. Mr. Murray heard that Applicant was a crack addict but he had no personal knowledge of it. He found it unbelievable that Applicant committed this offense. RR 70:184.

479. Longshoreman Santos Aluiso also worked with Applicant. RR 70:192-194. Applicant was friendly, a good worker, playful, and never violent. He was always on time. He never saw any problems with him. RR 70:195-196. Mr. Aluiso had loaned Applicant money,

but Applicant always paid him back. RR 70:196-197.

480. Longshoreman Tyrone Ward also worked with Applicant. He said he was jovial and popular, and he was not violent and did he get into fights. RR 70:205-207. He had heard that Applicant was a crack addict but did not know it. RR 70:207.

481. Longshoreman Patrick Taylor worked with Applicant. He knew him as outgoing, funny, popular, and a good worker. He was not violent or aggressive. RR 70:214-216. When he first met Applicant, Applicant was the overseer of the elderly and mental patients at the Sweetbriar Nursing Center in West Columbia. RR 70:215. He never saw Applicant under the influence of drugs. RR 70:218.

482. Longshoreman Mike Rivas worked with Applicant. He said Applicant was normally a good worker, but. he did not come to work every day. He was friendly and made a lot of jokes, and was not violent and did not get into fights. Mr. Rivas was surprised to hear he committed this offense. RR 70:225-228. He said there were times he thought Applicant was under the influence of drugs but he never saw him use drugs. RR 70:229-230.

483. Pastor Marcus Lincoln worked with Applicant at the Port of Freeport. Prior to dedicating his life to God, Pastor Lincoln sold drugs including drugs to Applicant. RR 70:252-253. In his opinion, Applicant was a

crack addict. RR 70:253. He was not, however, violent or aggressive. RR 70:257. Applicant would help others at work and give away fruit. RR 70:257. He had friends at the port who would have lent him money if he needed it. RR 70:265. He was a certified forklift operator and had a TWIC card. To be a certified forklift operator, you have to get training. RR 70:264. Applicant was physically able to do his job. RR 70:265.

484. Longshoreman Marlin Lincoln also knew Applicant. Applicant was a hard worker and a nice guy. He was held in high esteem. He never saw him lose his temper or be aggressive or violent. RR 70:234-236. Applicant did use drugs. RR 70:234. He was helpful to other people and would sometimes give away fruit. RR 70:237-239. Marlin Lincoln could not believe Applicant committed the offense. RR 70:239. Applicant had a good job at the Port. RR 70:243.

485. Michael Anderson used to work with Applicant in the 1980's and 1990's. He knew Applicant as a steady and good worker. RR 71:59.

486. Jail inmate Shane McCain said that Applicant was kind to him and would read to Mr. McCain the letters Mr. McCain received. Applicant helped to calm down an inmate by the name of Robert Moore and told him not to

feed into negativity and get himself in trouble. RR 71:14-20.

487. Jail inmate Marquis Thomas said that Applicant was very helpful in keeping him out of trouble and fights. He said that Applicant would refer him to passages in the Bible and calm him down. They had prayer circles before going to court. RR 71:22-26.

488. Jail inmate Juan Morales said Applicant calmed him down and ran their prayer circle. He read the Bible every day and prayed. He was not violent or aggressive. RR 71:35.

489. Jail inmate Troydrick Hill said Applicant helped him keep his cool. Mr. Hill's brother was shot while he was in prison and Applicant helped him deal with it. Applicant participated in the prayer circle and was not violent or aggressive. RR 71:45.

TESTIMONY OF SOCIAL EXPERT AT TRIAL

490. Dr. Walter Farrell holds a Bachelor's Degree in Geography with minors in English and Education, a Master's in Urban Geography, and a Ph.D. in Urban Social Geography, with minors in American History, Sociology, and Education. He is a diplomat in Psychotherapy with the American Psychotherapy Association and a diplomat in the College of Addictionology and Compulsive Disorders. He is also certified addiction professional for the College of Addictionology and Compulsive Disorders. RR 68:162-164. Dr Farrell

reviewed the documents relating to Applicant, including investigation interviews, offense reports, profiles and screenings, and Applicant's past record with the criminal justice system. He reviewed the census data of the towns in which Applicant grew up to look at the socioeconomic status of his environment from birth to the time of the offense. Dr. Farrell examined Applicant's employment records within the construct of the challenges that face low income African-American males. RR 68:171. Using accepted principles, Dr Farrell analyzed Applicant's life and put it in sequential order. RR 68:63-67.

491. Dr. Farrell reviewed all the records that he felt necessary to reach the opinion he testified to. RR 68:171.

492. Dr. Farrell did not factor race into his opinion. RR 68:73.

493. Applicant lived in what social scientists would define as an area of concentrated poverty where more than 40% of all residents were living below the federal defined poverty level. The housing was dilapidated. Large numbers of people were residing in small spaces and they were surrounded by other individuals similarly situated. It was a community where there was a preponderance of crimes, drugs, and antisocial behavior. RR 68:172.

494. Dr. Farrell attempted to testify as to the racial discrimination which occurred at the

time and in the area Applicant was raised, but following objection, the Court denied the admission of this evidence. RR 68:172-182.

495. Applicant's family lived in poverty; his father was a sharecropper and his mother had no sustained employment. RR 68:183. The children did not have structure; they did not live in a safe nurturing environment; they were not instructed to respect right and wrong or how to comport themselves; and they were not made to feel love, or develop self-confidence and self-efficacy. RR 68:183. Applicant's family was dysfunctional and there was no positive paternal presence. RR 68:183-184. There was conflict between Applicant's mother and father because of the father's womanizing. This led to a split in the family. RR 68:184. Applicant began to drift into negative peer groups. Between the ages of 10 and 14 he began to experiment with alcohol, marijuana and was left adrift by his family. They were not supportive. RR 68:184. Applicant's father was in and out of his life and the family's life. His father's support of the family was intermittent. RR 68:185.

496. Dr. Farrell outlined events in Applicant's life from birth until January 14, 2012. He covered poverty, athletics, school attendance, home life, his father's extra marital affairs, his love of sports, the beginning of drug and alcohol use at age 14, the lack of positive forces and positive role models, the life changing automobile accident, his marriages, his

checkered work history due to drug addiction, and the loss of his sisters which escalated his drug use. RR 68:196-203.

497. Dr. Farrell gathered facts concerning Applicant and compared them to similarly situated African-American males. RR 68:73-75.

498. Dr. Farrell believed that Applicant had diligently pursued a road out of his dysfunctional environment because he attended school regularly with almost perfect attendance, and his grades were modest. RR 68:186-187. Applicant finished high school, became gainfully employed, and got married. However, the car accident and loss of his father and other close family members caused a pattern of spinning out of control which resulted in Applicant turning to alcohol, methamphetamines, and other drugs, with cocaine eventually becoming his drug of choice. RR 68:186-190.

499. In Dr. Farrell's opinion Applicant did not begin careening off the path of normalcy until Applicant was out of high school and in his mid-twenties. This accelerated when Applicant was in his late thirties due to increased crack use. RR 68:189-202.

500. The last job Applicant had was a good job but his addiction prevented him from holding the job. As an addict's addiction grows, they need more money and that causes them to steal from family and friends. Their psychological

need for drugs causes them to do almost anything to get it. RR 68:190-192.

501. Applicant began working day jobs because he received immediate gratification, as he was paid daily, so he could buy his drugs. It was typical for addicts to live in motels or with family or even remain homeless. RR 68:191-193.

502. Dr. Farrell reviewed Applicant's educational records and saw no major problems. RR 68:198. According to Dr. Farrell, after Applicant moved to Boling sports was a positive factor in his life. In Dr. Farrell's opinion Applicant thought if, "I can get that scholarship I can get out of this place," but an automobile accident prevented Applicant from realizing his aspiration of receiving a college football scholarship. RR 68:199. While Dr. Farrell stated that this thinking may have been unrealistic, it is not uncommon for boys to think they may be the "next LeBron James." RR 68:186.

503. Dr. Farrell opined that Applicant suffered from low self-esteem, the effect of poverty, negative relationships, unrealized dreams, family. deaths, drugs, economic issues and a tenuous connection with reality occasioned by drug use which caused Applicant to spin out of control. RR 68:202.

504. In support of Issue 3, Applicant proposed some 253 separate findings of fact and an additional 39 proposed Findings of Fact for Issue 4. Many were duplicative, and to the

best of its ability, the Court has attempted to combine them into general categories where possible. Where the Court believes that the proposed findings were relevant and reliable as to Issue 3, they have been included in its Findings of Fact. The Court has also refused to include other proposed findings for several reasons. First, if they were based on declarations of persons that the Court has found not to be reliable, such as Annie Stafford, Linda Wittig, or Tamara Harris, the Court did not include any of the proposed findings, unless corroborated by other credible evidence. The Court also did not include any findings that were based upon affidavits of Ms. Conn, Mr. Wischkaemper, or Ms. Camp, as the Court has determined that they had an inherent bias against Mr. Wooten and RPDO, unless their statements were otherwise corroborated by affidavit or testimony the Court has found to be credible.

505. Several of Applicant's proposed findings on Issue 3 are attributable to the declaration of Dr. Mary Elizabeth Kasper, who was Applicant's primary medical expert at trial. However, a review of Dr. Kasper's Declaration demonstrated that the focus of her Declaration was not to support Issue 3, but was instead to support her contention in her Declaration that, with the additional information, there is a reasonable probability that she could have persuaded at least one juror to conclude Applicant was intellectually disabled. Attach. 2, ¶48. While this

information might have been relevant to Issues 1 or 2, the Court's Order Designating Issues clearly states that no evidence pertaining to those issues could be received by affidavit, except for medical records. While the additional information might have been presented in connection with Issues 1 or 2, Dr. Kasper did not testify at the Evidentiary Hearing, and the Court will not allow the references in her Declaration to be introduced through the back door, that allegedly pertained to Applicant's social history, where, in fact, it contained in a declaration that addressed whether or not Applicant was intellectually disabled.

506. The Court also did not allow any findings pertaining to Issue 3 as to any matters set out in the Affidavit of Jacqueline Jones, Ph.D. Attach. 4. Dr. Jones was qualified to present the scholarly presentation set forth in her affidavit concerning "the economic, political and social opportunities faced by African-American men and women residing in the region prior to the Civil Rights Movement," and her conclusion that "blacks who lived in the counties of Brazoria, Ft. Bend, Matagorda, and Wharton suffered widespread discrimination even after the formal abolition of slavery in 1865" Attach. 4, ¶6. However, as shown by his Declaration, and the testimony he presented at trial, Dr. Farrell testified to all of these issues at trial, except for the issue of "*the powerful effects on James which resulted from his, his parents'*

and his extended family's experiences coping with widespread, systemic and localized racism and racial discrimination. Although my education and professional background include the subject of racial injustice in the United States, my familiarity with the economic, political and social conditions of the specific areas where James and his parents grew up, specifically, Wharton County, Texas ... " (emphasis by this Court) Attach. 5, ¶4. Dr. Farrell was prepared to testify concerning racial discrimination but was prevented from doing so when the Court sustained the State's objection to testimony concerning racial discrimination. Attach. 5, ¶¶4-5. Dr. Farrell was not only qualified by training and experience to testify, but "*attempted to make similar points during my testimony but was not permitted to do so by the trial court*" Attach. 5, ¶5 (emphasis by this Court). However, it should also be noted that Dr. Farrell also testified at trial that he did not factor race into his opinion. RR 68:73.

507. Although Dr. Farrell quotes extensively from Dr. Jones Affidavit, Dr. Farrell does not state that he needed any of the information from Dr. Jones' Affidavit to either support his planned testimony on racial discrimination or enhance his opinion. The closest he comes to inferring that any of the information would have assisted him is his statement that "Dr. Jones affidavit sheds still further light on the societal forces at work on the Harris family in

the early half of the twentieth century." Attach. 5, ¶8.

508. In the event the Court is in error in not including more of Applicant's Proposed Findings on Issues 3 or 4, the Court did review all of Applicant's proposed findings concerning Issue 3 and 4 and attempted to locate the proposed findings at, or near, the pages indicated. The Court's compilation of these proposed findings is shown on the attached Exhibit 1 which is attached to these Findings of Fact and Conclusions of Law. Where the Court was unable to locate support for the required finding at, or near, the page indicated, the Court did not include it in Exhibit 1. In addition, the Court has attempted to group into general categories, the requested proposed findings. However, Exhibit 1 is not a part of the Court's Findings of Fact concerning any of the Issues.

WITNESSES NOT CALLED

509. In his Writ, Applicant provided the affidavits of witnesses who could have been called to show Applicant's social history. The Trial Team interviewed some of these witnesses and elected not to call them. The reasons for trial counsel's decision not to call these witnesses are as follows:

A. **Mack Griggs, Jr.**

Mack Griggs, Jr. was interviewed twice by Applicant's defense team. Mr. Griggs

indicated that he did not really know much about Applicant's upbringing and early life. State's Ex. 8, §24; State's Ex. 16, §2b. He only knew of one incident of domestic violence in Applicant's household when he was growing up. He also stated that the racial issues in the community had ceased by the time Applicant was in school. State's Ex. 16, §2b. Mr. Griggs did not really ask about "issues" that they may have had in the family because he did not want to be involved. He did remember that Applicant was an easy-going child and did not get in a lot of trouble. Applicant started getting in trouble when he lived in West Columbia and became friends with people who did drugs. Mr. Griggs ultimately believed the drugs took over Applicant's life. State's Ex. 8, §24.

In his second interview Mr. Griggs specifically stated that he did not believe that crop dusting was used when Applicant worked in the fields. However, through defense investigation, it was revealed that crop dusting was used while Applicant tended the fields. Exposure to toxins was part of the defense team's trial strategy. For these reasons, trial counsel decided to not call Mr. Griggs to testify at trial. State's Ex. 8, §24. The Declaration of Mack Griggs, Jr. is Attach. 14.

B. **Shirley Rutherford**

Shirley Rutherford was married to Applicant's older brother. They were married from 1988 through 2003. When the defense team interviewed Ms. Rutherford, she stated that although she has "heard about" Applicant and knew his ex-wife, she did not meet him until she started dating his older brother. Ms. Rutherford's Affidavit is Attach. 21, and states that she did not start dating Larry until sometime in the late 80's. Applicant's date of birth is 1959. This corroborated the defense team's investigation which showed that Shirley Rutherford did not meet Applicant until sometime in his late 20's or early 30's. Therefore, she could not have seen how he was treated by his family while growing up. Since she knew nothing about Applicant's early life, trial counsel saw no reason to call her as a witness. State's Ex. 8, §25.

C. **Rose Lewis**

Rose Lewis was Applicant's ex-wife. She was interviewed by the defense team. She was asked about her marriage to Applicant, but she never indicated that she had to care for Applicant as stated in her unsworn declaration. Trial counsel did not call her because the main mitigation theme at the trial was Applicant's addiction to cocaine and Ms. Lewis told the defense team that she had

never seen him use cocaine. State's Ex. 8, §27. Rose Lewis' Declaration is Attach. 17.

D. **Bonnie Clark**

Bonnie Clark was Applicant's estranged wife. She met him in the 1980s and never knew him when he was growing up. She made it clear to the defense team that Applicant stole money from her often, and the reason she handled all the money was that Applicant would take it and use it to buy drugs. This was such a problem that she had to hide all their money from him. In fact, in her interview, she recounted that theft by the Applicant from her is what broke up their marriage. The trial team made a strategic decision not to put Ms. Clark on the stand to try to keep this evidence from the jury as it conflicted with the mitigation: theme of him being a good, hard-working man. State's Ex. 8, §29. Ms. Clark's Declaration is Attach. 12.

CONCLUSIONS OF LAW ON ISSUE 3

1. At trial, Applicant presented substantial evidence concerning Applicant's social history through his relatives, friends, coworkers, and employers, and the testimony of Dr. Walter Farrell. Applicant's social history expert, Dr. Walter Farrell, testified in detail concerning Applicant's social history and

the challenges and issues that Applicant faced growing up in rural Wharton County, Texas.

Dr. Farrell expressed several opinions concerning the reasons underlying Applicant's careening off the path of normalcy in his mid-20's and late 30's.

Dr. Farrell reviewed all information necessary for him to reach his opinions at trial. There was nothing in his Declaration (Attach. 5) that in anyway refuted this testimony. There was no evidence that any of the information in Dr. Jones's Affidavit was necessary or would have enabled Dr. Farrell to provide additional, or stronger testimony concerning racial discrimination than he was already prepared to provide to the jury. Also, conspicuously absent from Dr. Farrell's Declaration and Dr. Jones's Affidavit is reference to any of the information contained in any of the unsworn declarations filed by Writ Counsel in this case.

2. Dr. Farrell's Declaration, and the summary of his testimony at trial, reflects that he testified concerning the issues that were raised in the declarations filed by Writ Counsel, except for the issue of racial discrimination. Dr. Farrell's Declaration states he was prepared to testify concerning racial discrimination, but that testimony was not permitted when the Court sustained the State's objection to that testimony. This testimony is somewhat confusing since Dr. Farrell testified at trial that he did not factor race into his opinion. Nevertheless, no issue was raised, either on direct appeal or in the Writ filed in this case, that the Court erred in its ruling excluding testimony of racial discrimination. Since no issue

has been raised challenging the Court's ruling, Applicant is attempting to indirectly raise this issue by alleging that trial counsel's social history investigation was inadequate. Applicant has failed in his burden.

3. Since Dr. Farrell was already prepared to testify to the points raised by Dr. Jones in her Affidavit, the information from Dr. Jones' Affidavit would have been cumulative. There comes a point where information from persons who are distant relatives, or who did not know Applicant well, if at all, can only be considered as cumulative and add little of any probative value. *Bobby v. Van Hook*, 558 U.S. 4 (2009).
4. In order to show ineffective assistance of counsel, Applicant must show by a preponderance of the evidence that trial counsel's actions were not reasonable and that Applicant was prejudiced as a result of these unreasonable acts. *Strickland*, *supra*. As a result of investigations by the trial team, Dr. Farrell was able to present a thorough overview of Applicant's social history. Trial counsel, as a part of its trial strategy, had good reasons not to call Mack Griggs, Shirley Rutherford, Rose Lewis and Bonnie Clark. The Court has found the declarations of Annie Stafford and Linda Wittig to be unreliable. The balance of the information contained in the remaining declarations, while being more detailed, would have been largely cumulative, if it had been offered at trial. *Worthing v. State*, No. 01-94-00593-CR, 1995 WL 241714 (Tex. App. — Houston [1st Dist.] 1995). In addition, a substantial portion of the information in the declarations were not based on

personal knowledge, but rather on conjecture, speculation, and belief, so there would be a question about its admissibility, even if attempts were made to introduce any such information at trial.

5. Considering the totality of the information collected and presented to the jury pertaining to Applicant's social history, Applicant has failed to satisfy his burden of proof to prove by a preponderance of the evidence that trial counsel's performance deviated from prevailing professional norms by failing investigate and present additional evidence regarding Applicant's social history. *Strickland*, *supra*, *Thompson v. State*, 9 S.W.3d 808 (Tex. Crim. App. 1999). Moreover, Applicant has failed to demonstrate that there was a reasonable probability, had the additional information been presented, that the result of the proceedings would have been different. *Strickland*, *supra*.

ISSUE 4

WHETHER APPLICANT'S TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE IN FAILING TO PROVIDE HIS SOCIAL HISTORY EXPERT WITH ADDITIONAL EVIDENCE REGARDING THE APPLICANT AND, IF SO, WHETHER THE APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE.

FINDINGS OF FACT ON ISSUE 4

510. In connection with the filing of the Original 11.071 Writ in this case, Applicant filed 15 Unsworn Declarations from persons who were either siblings, relatives, former spouses, coworkers, or childhood friends. All but four unsworn declarations were signed prior to February 25, 2016, and the last was signed on March 7, 2016. These are as follows:

1. Nola Amey, who was almost 12 years older than Applicant and a good friend of Applicant's older half-sister. Attach. 11.
2. Bonnie Clark, who first met Applicant in the late 1980's, married him in the early 1990's, and separated from him about one year later though they were never divorced. Attach. 12.
3. Carolyn Duplechin, Applicant's sister who was about 16 months younger than Applicant. Attach. 13.
4. Mack Griggs, Applicant's brother who was about 15 years younger than Applicant. Applicant's mother, Olivia, was also his mother, but they did not share the same father. When Mack Griggs was 19 or 20 years old he married and moved to Houston. Attach. 14.
5. Tamara Harris, Applicant's niece who was born in 1979 and was almost 20 years younger than Applicant. Her

trial testimony revealed Ms. Harris lived in her grandmother's home with Applicant only until Applicant married in 1982. At that time Tamara Harris did not live in the same house with Applicant again until she was an adult. Ms. Harris was in special education classes beginning in the fifth grade and she participated in the Special Olympics. Attach. 15.

6. Michael Kalina, who taught Applicant Vocational Agriculture and Power Mechanics for three years and drove the school bus that Applicant rode. Attach. 16.
7. Rose Lewis, who met Applicant in 1981 while he was working at the nursing home and married him in April 1982. Attach. 17.
8. Marcus Lincoln, who had been a co-worker with Applicant at various jobs. In 2016 Marcus Lincoln and Applicant had been friends for about 16 years. Attach. 18.
9. Glen McCoy who was about 6 years older than Applicant, and he lived near the Harris family in Boling, Texas. He had a common law marriage with Applicants older sister Doris, beginning in 1980 for a period of about 8 years. Attach. 19.
10. Kenneth Murray, who knew Mr. Harris when there were growing up. He is about 5 years older than

Applicant. He did not know Applicant's parents and only knew Applicant and his siblings through school. Mr. Murray was also a co-worker with Applicant at the Port of Freeport. Attach. 20.

11. Shirley Rutherford, who was married to Applicant's older half-brother, Larry Rutherford. She first met Mr. Rutherford in the late 1980's and they were married in 1994. She met Applicant during weekend visits to visit Mr. Rutherford's mother Olivia, who was also Applicant's mother. Attach. 21.
12. Jean Shaw who was Applicant's third grade school teacher. Attach 22.
13. Annie Stafford, who taught at the same school where Applicant attended elementary school, but did not know Applicant. Attach. 23.
14. Roland Waddy, who was a childhood friend of Applicant, Ex. 24, was also the driver of the car when Applicant suffered the injury that ended his football career. Def's Writ Ex. 154.
15. Linda Wittig, who taught Related Math and Consumer Math at Boling High School. Applicant took both of those courses but she had no specific recollection of Applicant. Attach. 25.

511. Notwithstanding the Court's concerns as to the accuracy and reliability of many of these declarations, Dr. Walter Farrell, Applicant's

social history expert at trial, failed to make reference to any of these unsworn declarations in his Declaration dated March 14, 2016 (Attach. 5), even though Dr. Farrell signed his Declaration more than a week after the last declaration described in FOF 510 was signed, and over a month after the most were signed.

512. The majority of Dr. Farrell's Declaration either quotes verbatim, or paraphrases, what is in Dr. Jones' Affidavit. Nowhere in his Declaration does Dr. Farrell even mention that any of the information contained in the 15 declarations would have assisted him in rendering his opinions at trial or that with any of this information his opinions would have carried more weight with the jury.

513. Nowhere in his Declaration does Dr. Farrell indicate that trial counsel had any responsibility to provide him with any additional information, including information similar to that contained in the Affidavit of Dr. Jones.

514. Dr. Farrell's referral letter required him to "Advise the team as to any additional experts that may be helpful and what requests we should make of these experts." State's Ex. 1, ¶4. Trial Counsel relied on Dr. Farrell to determine what additional evidence was necessary. State's. Ex. 8, ¶22. Dr. Farrell

made no requests for additional experts or information. State's Ex. 8, ¶4.

515. Dr. Farrell assured Trial Counsel that he could become an expert the conditions in Wharton County by doing research. State's Ex. 8, ¶22.

516. The Original Order Designating Issues, dated October 6, 2017, provided that the parties could' file additional evidence by January 21, 2017 on Issues to Be Resolved by Affidavit. By agreement of Counsel for Applicant and the State, this date was extended until April, 2019 for Applicant and May, 2019 for the State. Dr. Farrell did not supplement or amend his Declaration.

517. Applicant proposed some 39 Proposed Findings of Fact for Issue 4 that pertain to the information contained in the Affidavit of Dr. Jacqueline Jones. Attach. 4. For the reasons stated in the Findings of Fact and Conclusions of Law for Issue 3, this Court did not consider any of the information contained in Dr. Jones' Affidavit. The only evidence before the Court concerning Dr. Farrell's need for any additional information concerning Applicant's social history, is Dr. Farrell's testimony at the original trial that he had reviewed all of the information necessary for him to testify to the opinions he offered at trial. RR 68:171. His prior testimony was never explained, modified, or refuted.

CONCLUSIONS OF LAW ON ISSUE 4

1. Dr. Farrell was Applicant's social history expert at trial. There is no evidence that any of the information contained in the 15 declarations that Writ Counsel obtained would have useful or needed in order for Dr. Farrell to provide his testimony on Applicant's social history or render his opinions.
2. There was no evidence that it was trial counsel's responsibility to provide him with additional information concerning Applicant's social history, or to provide information such as was contained in the Affidavit of Dr. Jacqueline Jones.
3. Dr. Farrell's referral letter required him to advise Trial Counsel as to "any additional expert that may be helpful" and what requests should be made of these experts. Dr. Farrell assured the trial counsel that he could become an expert on Wharton County by doing research.
4. Dr. Farrell did not request any additional expert help or additional information from trial counsel.
5. Although Applicant provided a number of declarations, Applicant also failed to demonstrate that any of the information in the declarations would have been helpful or used by Dr. Farrell.
6. While Trial Counsel cannot completely abdicate a responsibility to conduct a pretrial investigation by hiring an expert, " ... counsel should be able to rely on that expert to alert counsel to additional needed information." *Turner v. Epps*, 412 Fed. Appx. 696, 704 (5th Cir. 2011), as cited in *Segundo v. Davis*, 831 F3d 345, 352 (5th Cir. 2016). Counsel should also be entitled to rely upon objective, reasonable evaluations and opinions of experts without

worrying whether a reviewing court will subject its own judgment based upon the hindsight that bad outcomes create. *Segundo*, *supra*. Applicant's Trial Team was entitled to rely on the assurances by Dr. Farrell and his failure to request additional information or assistance.

7. In addition to the reason stated in Conclusion 3 above, there is another reason why the Affidavit of Dr. Jones was not considered by this Court. Dr. Farrell was the designated expert on social history, and he assured Trial Counsel that he could become an expert on Wharton County by doing research. In reviewing Dr. Jones' Affidavit, the Court notes that almost all of the publications she cites as references were published prior to December, 2013, which is when Dr. Farrell testified at trial. As an expert in the field, all of these publications were also readily available for him to review and rely on before testifying. While it might have been helpful for Dr. Farrell to have had Dr. Jones' scholarly work as a reference, there is nothing in the record, or in Dr. Farrell's Declaration, that attributes any failure on the part of trial counsel to provide a report such as that provided by Dr. Jones. In the letter retaining the services of Dr. Farrell, trial counsel asked Dr. Farrell to inform them if they needed to provide further experts, Dr. Farrell should advise counsel of any additional experts that might be helpful to him. Dr. Farrell did not request any additional experts, such as Dr. Jones. Moreover, Dr. Farrell testified at trial that he had reviewed all information necessary to form his opinions. Nothing was presented by Writ Counsel either at the Evidentiary Hearing or in Dr.

Farrell's Declaration that would change that testimony.

8. Probably everyone involved in a trial, from the Court to Trial Counsel and experts, would like to have a "do-over" concerning certain parts of the trial. Nevertheless, trial counsel is entitled to rely on its experts. Applicant cannot assert years after Applicant's trial is over, that his trial counsel was ineffective in failing to provide an additional expert or additional information, when the designated expert failed to inform counsel that an additional expert or more information was needed, or even that the additional information would have enabled him to provide more persuasive testimony than he was already prepared to present to the jury.
9. Considering the totality of the information collected and presented pertaining to the information provided to Applicant's social history expert, Applicant has failed to satisfy his burden of proof to prove by a preponderance of the evidence that trial counsel's performance deviated from prevailing professional norms by failing to provide additional evidence to Applicant's social history expert. *Strickland, supra, Thompson, Supra.* Trial counsel was entitled to rely upon their expert's failure to request additional information. *Segundo, supra.* Moreover, Applicant has failed to demonstrate that there was a reasonable probability, had the additional information been provided, that the result of the proceedings would have been different. *Strickland, supra.*

ISSUE 5

WHETHER APPLICANT'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S ADMISSION OF THE APPLICANT'S PRIOR CONVICTION FOR INJURY TO A CHILD, AND IF SO, WHETHER THE APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE

FINDINGS OF FACT ON ISSUE 5

518. Applicant was convicted of misdemeanor injury to a child in Cause No. 29,011, on October 16, 1995. Applicant was represented by court appointed attorney, Jim Coate. State's Ex. 9.

519. On December 3, 1987, Mr. Coate and the State Bar of Texas entered into an Agreed Judgment whereby Mr. Coate's license to practice law was suspended for a two (2) year period, but suspension was probated for a period of two (2) years. Ex. 76:3-6.

520. In 1989 a Motion to Revoke Mr. Coate's probation was filed. Mr. Coate's license to practice law was suspended for a thirty (30) day period, and his probation was extended for an additional thirty-six (36) month period. Ex. 76:7-11.

521. In 1991 Mr. Coate's probation was revoked for a violation of his probation, and he was

suspended for a period of thirty-six (36) months commencing July 1, 1991, with an actual suspension of six (6) months. The remainder of the suspension was probated. Ex. 76:19-24.

522. On September 28, 1995, a Disciplinary Petition was filed against Mr. Coate by the Commission for Lawyer Discipline alleging Mr. Coate refused to communicate with his client and for failed to appear at a hearing. He subsequently received a public reprimand on February 12, 1996. Ex. 76:26-32.

523. On June 17, 1996 the Evidentiary Panel for the State Bar District No. 05C2 entered a Default Order of Disbarment of Mr. Coate. Ex. 76:33-40.

524. At the time of Applicant's plea in Cause 29,011, Mr. Coate was not under probation and his license to practice law was-not suspended.

525. The primary witness in Cause No. 29,011 was Elozia Johnson. Applicant admitted his guilt during his plea of guilty. State's Ex. 9, ¶¶1, 8. In addition, Applicant pled true to this offense as part of a Motion to Adjudicate in a prior case, Cause No. 21,777. The complaint upon which the injury to a child charge is based was entered in the Court's record at his plea of guilty. State's Ex. 9, ¶1. In relevant part, it states,

> "Your Affiant also has in his possession a sworn statement from Elozia Johnson which states that on the Monday before

> Thanksgiving he was over at the Manor Apartments #17 located at 1000 N. 13th Street, West Columbia, Brazoria County, Texas ... And while he was there he observed the suspect bum his nephew, Deries Scott, with a cigarette and showed. no concern over the wellbeing of the baby ... He further states that he saw the suspect have the baby picked up in the air and was hitting the baby with a belt. He further states that he told the suspect to put the baby down and the suspect drops the baby to the ground." *Id*.

526. In his sworn statement to police, Elozia Johnson states that he observed Applicant bum the child with a cigarette. He further states that he later heard the child scream; and when he went to investigate, he saw Applicant holding the child in one hand whipping him with a belt. When Mr. Johnson asked Applicant what he was doing, Applicant said he was whipping the child because he "peed" on himself. Mr. Johnson told Applicant to put the baby down and Applicant dropped him. State's Ex. 9A, ¶6.

527. Before trial in Applicant's capital murder case, Mr. Johnson was interviewed by Applicant's trial counsel, and at that time he stated that he did not witness Applicant bum the child. However, he did state that he witnessed Applicant drop the child. Further, both in his statement to the defense investigator and in his original statement,

Mr. Johnson said that Applicant admitted to burning the child. Finally, according to Mr. Johnson, Applicant also whipped the two-year-old with a belt. State's Ex. 8, ¶6; State's Ex. 2, ¶5.

528. Both during the defense interview of Mr. Johnson and the State interview (which were disclosed to Applicant pre-trial), Mr. Johnson stated that, in his opinion, Applicant should be shot for what he did to the child. State's Ex. 8, ¶6.

529. Trial Counsel, as part of its trial strategy, concluded that Mr. Johnson could very well change his story on the stand to spite Applicant. In addition, trial counsel was concerned if it tried to attack the conviction based upon recanting of testimony concerning the burning with a cigarette, the entire incident would come into evidence. State's Ex. 8, ¶6; State's Ex. 2, ¶5.

530. Rather than try to go behind the conviction and the finding of true to burning a two-year-old child, Trial Counsel opted to try to keep the age of the child from the jury. The only documentation alleged the victim being "a child younger than 14 years old." Trial counsel was concerned that if the jury had known the child was only two years old, the jury would more likely find him to be a future danger than if the child was, in the jury's eyes, possibly 9 through 14 years old. *Id.*

CONCLUSIONS OF LAW ON ISSUE 5

1. Trial Counsel considered challenging the prior conviction but decided against it due to a concern that the complaining witness might change his story, and the risk that if the jury learned the age of the child this might influence their decision on future danger. This was a reasonable trial strategy.
2. In addition, a prior conviction may be collaterally attacked if it is void, or if it is tainted by a constitutional defect. Lesser infirmities in a prior conviction may not be raised by a collateral attack even if they would have resulted in a reversal had they been presented on appeal. *Houston v. State*, 916 S.W.2d 705 (Tex. App. —Houston [14th Dist.] 1996), *no pet*. When prior convictions are collaterally attacked, the judgments reflecting those convictions are presumed to be regular, and the accused bears the burden of defeating that presumption. *Robinson v. State*, 739 S.W.2d 795 (Tex. Crim. App. 1987); *James v. State*, 997 S.W.2d 898 (Tex. App. —Beaumont 1999). The defendant has the burden to show that the prior judgment is void. *Acosta v. State*, 650 S.W.2d 827 (Tex. Crim. App. 1983). Here Applicant asserts that the evidence in this case was insufficient because the primary witness stated he did not observe the offense, but a collateral attack may not be raised on the question of the sufficiency of the evidence where a voluntary plea of guilty was entered and defendant was represented by counsel. *Owens v. State*, 540 S.W.2d 324 (Tex. Crim. App. 1976); *Gaines v. State*, 501 S.W.2d 315 (Tex. Crim. App. 1973).

3. Counsel for Applicant relied on *Mitchell v. State*, 931 S.W.2d 950 (Tex. Crim. App. 1996); *Mann v. State*, 13 S.W.3d 89 (Tex. App. — Austin, 2000), *aff'd*; 58 S.W.3d 132 (Tex. Crim. App. 2001) to support their contention that Trial Counsel should have challenged the conviction because it is the Court's decision as to whether extraneous offenses should, or should not, be admitted. These cases are clearly distinguishable as the issue in each of these cases was whether an unadjudicated offense should be admitted. In Applicant's case the offenses were convictions more than 10 years old.
4. Trial Counsel did not attempt to collaterally attack the prior judgment as a matter of sound trial strategy.
5. There is no allegation that Mr. Coate's representation of Applicant in Cause No. 29,011 was deficient in any manner, nor was there any evidence the prior ethical issues Mr. Coate had with the State Bar of Texas had any relevance to Issue 5.
6. Considering the totality of the information collected and presented pertaining to trial counsel's failure to object to the State's admissions of Applicant's prior conviction for injury to a child, Applicant has failed to satisfy his burden of proof to prove by a preponderance of the evidence that trial counsel's performance deviated from prevailing professional norms by failing to object to the State's admissions of Applicant's prior conviction for injury to a child. *Strickland, supra, Thompson, supra.* Moreover, Applicant has failed to demonstrate that there was a reasonable probability, had an objection then

made, that the result of the proceedings would have been different. *Strickland*, *supra*.

ISSUE 6

WHETHER APPLICANT'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO PRESENT EVIDENCE THAT THE APPLICANT WAS SUBJECTED TO ALLEGED RACIAL INSULTS IN JAIL AND, IF SO, WHETHER THE APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE.

FINDINGS OF FACT ON ISSUE 6

531. In September of 2013, the Brazoria County Sheriff's Department began a disciplinary investigation into the actions of Deputy Joshua Locke after receiving reports from Deputy Locke's coworkers that he had been using foul and extremely unprofessional language during the course of his duties at the Brazoria County Jail. Many of these were directed to female employees. One allegation involved Applicant. Ex. 75:2, 4.

532. On September 21, 2013, Deputy Locke was passing out medication through the food ports. *Id*.

533. It was alleged that after Deputy Locke gave Applicant his medication. and after the food port was closed, Deputy Locke turned to

another employee, Crystal Sanders, and said, "I hate that fucking nigger ... He said it loud enough that I am sure Harris heard him." Ex. 75:7.

534. While Deputy Locke admitted that he said he did not like Applicant, he denied using the "N word." Ex. 75:4.

535. Several other allegations of inappropriate language within the hearing of female members of the Sheriff's Department were also made. Ex. 75:2, 5, 6-7.

536. Section 26.2 of the Sheriff's Code of Conduct provides that "an officer will not use coarse, violent, or insolent language or gestures." A separate sentence deals with expressing prejudice concerning "race, religion, politics, national origin, or similar characterizations." Ex. 75, ¶1.

537. After investigation, it was recommended that Deputy Locke be terminated for "using coarse, profane, and insolent language on several occasions." See Ex. 75, Results of Investigation. The report does not state that Deputy Locke was terminated because of any comments concerning race, religion, politics, national origin, or similar characteristics.

538. Applicant filed numerous grievances against the Brazoria County Sheriff's Department. State's Trial Exhibit 194 contains 62 pages of grievances, but there is no grievance filed over this alleged incident. State's Trial Ex. 194. Given Applicant's history of filing grievances, either it was not said as Deputy

Locke contended, or it was not said loud enough for Applicant to hear as stated by Ms. Sanders.

539. The is no evidence Applicant was prejudiced by trial counsel failing to go in to the matter, even if the statement was, in fact, made.

CONCLUSIONS OF LAW ON ISSUE 6

1. The Disciplinary Investigation did not find that Deputy Locke made any comments concerning race. Instead Depute Locke was terminated for "using coarse, profane, and insolent language on several occasions."
2. Although Deputy Locke admitted that he said he did not like Applicant, he denied using the "N-word."
3. Considering the totality of the information collected and presented pertaining to the alleged racial insult at the Brazoria County Jail, Applicant has failed to satisfy his burden of proof to prove by a preponderance of the evidence that the alleged comment was made or that trial counsel's performance deviated from prevailing professional norms by failing investigate and present additional evidence regarding alleged racial insult at the Brazoria County Jail. *Strickland, supra, Thompson, supra*. Moreover, Applicant has failed to demonstrate that there was a reasonable probability, had the additional information been presented, that the result of the proceedings would have been different. *Strickland*, *supra*.

ISSUE 7

WHETHER APPLICANT'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO OBJECT TO THE STATE'S CLOSING ARGUMENT REGARDING THE SENTENCE THE APPLICANT RECEIVED FOR HIS PRIOR CONVICTION FOR INJURY TO A CHILD, AND, IF SO, WHETHER THE APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE.

FINDINGS OF FACT ON ISSUE 7

540. During closing argument, the State's attorney stated the following:

> "I would like you to look at the Exhibits. Okay? Now let's go a little further on future danger. Okay? Let's go to his past. I went back now. He has a reported pattern of criminal behavior starting in 1980. He's a convicted felon and a thief out of Wharton County. Do you think that two years' supervision would have helped him in his thirties? But no. 1991 he gets a deferred.
>
> " ... That his probation is revoked in 1995. He committed the offense of injury to a child and was convicted in 1995.
>
> " .. .If you look what he was convicted of was dropping a child, burning a child

with a cigarette, and hitting a child with a belt. He's a child abuser. He injured a child. And Mr. Wooten thinks that's not a history of violence? By the way, what was so convenient when he talked about a sentence like that is that - and that's Derrick Scott- is that that caused him to be sent to prison. Nobody mentioned that. His probation officer basically testified his probation was revoked and he was sent to prison for 4 years because of the injury to a child. And that's in the records. If you look at the exhibit you will see his probation was revoked. He was sent to prison for that injury to a child. It's an allegation in the revocation. There wasn't just 30 days done. He was sent to prison. It violated his probation. Four years. Okay?

"The Defendant is an elder stalker and an abuser of the elderly. He's a child abuser. He's convicted of injury to a child. And let's go a little further. There we go. Because of the injury to a child, a new offense, he deserves four years in prison.

" .. .I just want to show you here as I'm putting on State's Exhibit 186 the reason for the revocation just so you see it. Okay? You see the injury to a child in the probation revocation? I just want to

make sure he was sent for felony TDC time for that." RR 74:135-137.

541. Applicant was-sentenced to four (4) years in the penitentiary in a prior case in Brazoria County, Cause 21,777, on a Motion to Adjudicate on a charge of Forgery. State's Ex. 10; RR 64:200.

542. Applicant's probation officer testified that one of the reasons the Motion to Adjudicate was filed was Applicant's new charge of Injury to a Child. RR 64:99-200.

543. Trial Counsel addressed Applicant's prior criminal history in his closing argument as follows:

> "Believe it or not, they want you to find future danger on a man who has no prior violent felonies. And believe it or not, they want you to execute a man, based on future danger, with no prior violent felonies.
>
> "Now he does have prior convictions. Oh, we've heard about the connections, every witness heard about the convictions.
>
> "Let's talk about the Injury to a Child we've heard about. The dropping of the child, whipped with a belt, burnt with a cigarette. Misdemeanor. Misdemeanor. Criminal negligence, misdemeanor assault, for which the Defendant received 30 days in jail, 30 days in jail. That's it." RR 74:66-67.

CONCLUSIONS OF LAW ON ISSUE 7

1. The State's closing argument was somewhat confusing, but it was not essentially incorrect. The injury to a child conviction was one of the grounds for revocation of his prior burglary conviction.
2. Mr. Wooten addressed this issue in his closing argument by pointing out that the injury to a child case resulted only in a misdemeanor conviction with a punishment of 30 days in jail.
3. The trial jury had before it, State's Trial Exhibits 9 and 10 which recited the sentence in each case.
4. The trial jury heard the evidence and had the Exhibits to review.
5. There is no evidence that the alleged errors were so serious that Applicant was deprived a fair trial.
6. Considering the totality of the information presented concerning trial counsel's failing to object to State's closing argument regarding the sentence Applicant received for his prior conviction for injury to a child, Applicant has failed to satisfy his burden of proof to prove by a preponderance of the evidence that trial counsel was ineffective. *Strickland, supra, Thompson, supra*. Moreover, Applicant has failed to demonstrate that there was a reasonable probability, had the additional information been presented, that the result of the proceedings would have been different. *Strickland*, *supra*.

ISSUE 8

WHETHER JUROR DEBORAH HENRY ENGAGE IN JURY MISCONDUCT BY

CHECKING TWO BOXES IN HER JURY QUESTIONNAIRE WHICH INDICATED: 1) SHE HAD NOT BEEN THE VICTIM OF A CRIMINAL ACT AND 2) SHE DID NOT HAVE A FRIEND WHO HAD BEEN A VICTIM OF A CRIME, AS IF SO, WHETHER ANY DISCREPANCY WAS MATERIALS OR SHOWED BIAS ON THE PART OF THE JUROR.

FINDINGS OF FACT ON ISSUE 8

544. Deborah Henry was a juror in Applicant's capital murder trial. On September 3, 2013 Ms. Henry completed the mandatory juror questionnaire. Ex. 79 (sealed). She signed the questionnaire and affirmed that her responses were true and correct. Her individual voir dire was conducted on October 4, 2015. RR 40: 10-98.

545. Question 45 of the jury questionnaire asked, "Have you, any member of your family, or a friend ever been the victim of a crime?" Question 135 asked, "Have you or your spouse even been the victim in any crime?". Ms. Henry checked the "no" box in response to both of these questions. Ex. 79 (sealed).

546. No questions were asked of Ms. Henry regarding these matters during questioning by the attorneys at voir dire. RR 40:10-98.

547. Ms. Henry became acquainted with a man by the name of Alan Jernigan when both worked at the same company, Thrombovision, in

2008. Ms. Henry left Thrombovision at the end of 2008, but she remained in contact with Mr. Jernigan. WRR 13:34.

548. Ms. Henry's husband had previously died and she received insurance money as a result of his death. WRR 13:35.

549. In 2008 Mr. Jernigan contacted Ms. Henry to see if she would provide him with some "seed money" for him to start a business in Manila. Ms. Henry initially provided Mr. Jernigan with $8,000. WRR 13:35-36.

550. Ms. Henry documented all of the advances she made to Mr. Jernigan. WRR 13:39-43; Def's Writ Ex. 129.

551. Ms. Henry considered Mr. Jernigan a friend and she trusted him. Even late in the process she trusted him as a friend and believed that friends do not betray friends. WRR 13:35, 43.

552. Ms. Henry eventually realized that Mr. Jernigan was committing a scam on her. WRR 13:36.

553. Shortly after October of 2009, Mr. Jernigan vanished and never repaid Ms. Henry as he had promised to do. WRR 13:45-47.

554. Ms. Henry attended the same church as Jeri Yenne, the District Attorney of Brazoria County. While Ms. Henry knew that Ms. Yenne was "a DA, but I did not know much about because I just heard she was DA." She did not know what a DA did. WRR 13:53-54.

555. After Ms. Henry realized that she had been scammed. she briefly talked to Ms. Yenne

concerning her situation with Mr. Jernigan for a few minutes after church. This occurred sometime in 2010. She did not mention Mr. Jemigan's name or give Ms. Yenne any specifics about the situation. Ms. Henry did not remember how Ms. Yenne responded, and she did not get any information about what she should do. *Id*. Ms. Yenne did not recall the conversation. WRR 12:153-155.

556. Ms. Henry then contacted a private attorney in Freeport, Texas to see what, if anything, she could do. The attorney reviewed her case and informed her that she could bring legal action against Mr. Jernigan, but it was unlikely she would recover anything from him. The attorney informed her that Mr. Jernigan had filed for bankruptcy prior to obtaining the money from her. At that point Ms. Henry realized that there was nothing that she could do. WRR 13:51-52, 68-69. *Cf*. Def's Writ Ex. 103:4, captioned "Attorney Package." "This package includes information when I was referred to a lawyer by my bank to see what I could do about getting my money back ... of course, it went nowhere."

557. Ms. Henry did not consider what Mr. Jernigan did to be a crime but rather considered it to be a scam or a betrayal. In her eyes, she thought a crime was something different. She thought of a crime as something violent, someone getting shot or

someone breaking into a house where violence is involved. WRR 13:84-87.

558. Ms. Henry considered what Mr. Jernigan did to her to be a betrayal. It was something emotional that people have to deal with every day. Ms. Henry acknowledged to Applicant's Writ Counsel that her interpretation may sound stupid to him, but she considered what Mr. Jernigan did to be a betrayal. WRR 13:84-87 .

559. Ms. Henry was not an attorney and had no legal background. She did not know the difference between a criminal offense and a civil suit. WRR 13:129. She did not know that Mr. Jernigan's actions were a crime until the State's Writ Attorney, Mr. Bosserman, informed her when he took her statement after Applicant's Writ had been filed. WRR 13:84-85.

560. Ms. Henry was steadfast in her belief that what Mr. Jernigan did was not a crime to her and she did not consider herself a victim. She felt the word crime was very subjective. WRR 13:86-89.

561. When she stated in her jury questionnaire that she had not been a victim of a criminal offense, she thought the statement was true. WRR 13:129. Although she later found out that Mr. Jernigan received probation, she did

not know that this was a criminal sentence. WRR 13:87.

562. While Mr. Jernigan's actions hurt her emotionally, it did not hurt her financially. WRR 13:83.

563. Ms. Henry was aware that another victim, Mr. Fiducia, filed a civil case against Mr. Jernigan. WRR 13:59-60, 87.

564. Sometime around 1991, Ms. Henry was working at Intermedics. She heard "through the grapevine" that the husband of a person who also worked at Intermedics, had been murdered. She did not know the lady well but only knew who she was and did not know her husband. The lady's name was Cathy Harrell. Ms. Henry considered Ms. Harrell as a co-worker but not a friend since they did not socialize and did not talk to each other on a regular basis. She considered Ms. Harrell as an acquaintance. WRR 13:129-131.

565. To Ms. Henry a friend is someone you do things with outside of work. The murder of Ms. Harrell's husband occurred in 1991 and Ms. Henry filled out her Jury Questionnaire in 2013. The incident with Ms. Harrell's husband did not come to mind when Ms. Henry was filling out her questionnaire. WRR 13:131-132.

566. Ms. Henry no longer works for Intermedics. Later, Ms. Harrell and Ms. Henry again worked for the same company, After Applicant's trial was completed, and about two months before Joanne Heisey contacted

Ms. Henry in February of 2016, Ms. Henry was in the copy room with Ms. Harrell, and she noticed that Ms. Harrell was upset. Upon inquiry, Ms. Harrell said that her husband's murderer was coming up for appeals again and every time that happened, the family had to go in and it upset her. WRR 13:130-134. Ms. Henry did not recall the incident with Ms. Harrell until she felt Ms. Heisey was pressuring her to sign the affidavit in February, 2016. WRR 13:132-134.

567. Applicant's trial counsel and counsel for the State were aware of the distinction between a friend and an acquaintance. See Questions 34, 39, and 40. Ex. 79 (sealed), which ask about an acquaintance. Neither question 45 nor 13 5 asked about an acquaintance.

568. The juror questionnaire did not inquire as to whether the prospective juror, any member of their family, a friend, or an acquaintance had ever been the victim of any scam or a fraud and no questions were asked of Ms. Henry concerning these issues at voir dire. Ex. 79 (sealed); RR 40:10-98.

569. Almost four (4) years after Ms. Henry realized that Mr. Jernigan had scammed her, and three (3) years after speaking to an attorney, Ms. Henry was contacted by attorneys from the State Securities Board in May of 2013. WRR 13:55, 58-59, 63. Ms. Henry was not

sure how the attorneys got her name. WRR 13:60.

570. Gretta Cantwell and Matthew Leslie work for the State Securities Board as enforcement attorneys. They handled the Alan Jernigan investigation in 2013. Mr. Jernigan was indicted in June, 2014. WRR 12:79, 127; Def's Writ Ex. 111.

571. The State's Securities Board first contacted Ms. Henry by email on May 30, 2013. WRR 12:90-91, 113; Def's Writ Ex. 101. They found Ms. Henry's email address through Lee Ann Latham, another victim of Mr. Jernigan. WRR 13:85. They had found out about Ms. Henry's involvement with Mr. Jernigan by reviewing his bank records. WRR 12:85-86, 92. The State Securities Board contacted Ms. Henry; she did not contact them. WRR 12:115.

572. Ms. Henry was asked to provide documentation for her advances and fill out an investigator questionnaire/complaint. State Ex. 13, 13; Def's Writ Ex. 101, 103, 105, 106.

573. Ms. Cantwell usually tells investor victims that there are administrative, civil, and criminal penalties for violating securities laws. She also usually tells them that all of their investigations are confidential and they cannot provide them any information about what is happening in the case or what they think about the case. She does not specifically remember telling Ms. Henry this, but she has

no reason to believe she did not. WRR 12:96-97.

574. Ms. Cantwell never told Ms. Henry that the State Securities Board was pursing any type of criminal action, or that the action against Mr. Jernigan was criminal in nature, or of Ms. Henry ever expressing to her that she believed the investigation was criminal in nature. WRR 12:113-114.

575. It is not unusual that victims do not know whether the investigations are criminal or civil because in most cases they have written the debt off in their heads and no one has ever heard of the State Securities Board. WRR 12:114.

576. Mr. Leslie had no recollection of informing Ms. Henry that she had been a victim of a crime prior to Mr. Jernigan's indictment. State's Ex. 14, ¶5.

577. Prior to the time of indictment, the attorneys for the State Securities Board were precluded from telling Ms. Henry that they are conducting a criminal investigation. WRR 12:121.

578. Ms. Cantwell wanted to set up a meeting with Ms. Henry in June of 2013 after an exchange of emails. By email dated May 21, 2013 at 11:34 AM, Ms. Cantrell advised Ms. Henry that she would get back with her concerning

the time and place of the meeting. Def's Writ Ex. 103.

579. The first time Ms. Cantwell physically met with Ms. Henry was December 19, 2013. She was with Matthew Leslie from their office. This is when they first found out that Ms. Henry had been a juror in a capital murder case. WRR 12:81, 111-112.

580. Applicant was sentenced to death on December 11, 2013. RR 75:17; CR 4:186.

581. Ms. Cantwell did not remember any contact with Ms. Henry from the time of the initial email until the time they talked in person on December 19, 2013. WRR 12:110-111. There is nothing in the record to indicate any contact between Ms. Cantwell and Ms. Henry from June 2013 until December 19, 2013.

582. The first time Matthew Leslie talked to Ms. Henry was on December 3, 2013 and this call was to set up an in-person meeting. The contact was by telephone with an email follow-up. Def's Writ Ex. 115. When he first talks to a victim, he generally keeps his conversations a little vague because Section 28 of the State Securities Act contains a confidentiality provision that makes any information gathered in an investigation confidential. They are not allowed to discuss with anyone the status of their investigations without being ordered to do so by a court. WRR 12:120-121, 136-137, 149. He is careful not to disclose more information than necessary in contacting victims. If asked, he

would tell the victim that there could be criminal, civil or administrative penalties as a result of their investigation, but he does not commit to a specific remedy. WRR 12:136-137, 149.

583. When Ms. Cantwell and Mr. Leslie met with Ms. Henry on December 19, 2013, they had not completed their investigation and had not decided whether or not they were going to recommend a criminal referral. They made this decision after they met with Ms. Henry and Ms. Latham on December 19, 2013. WRR 12:122.

584. The first contact that the State Securities Board had with Ms. Yenne or any member of her staff concerning the Jernigan matter was December 20, 2013. WRR 12:116, 119, 173, 175.

585. On December 20, 2013, Ms. Cantwell and Mr. Leslie advised Ms. Yenne that they were going to recommend a criminal referral in the Jernigan matter. A formal written referral was later prepared to document the oral referral. WRR 12:142, 144; Def's Writ Ex. 116.

586. Ms. Yenne requested that the attorneys for the State Securities Board serve as special prosecutors in connection with Mr. Jernigan's case. Ms. Yenne distanced herself from the case because it involved Ms. Henry who had just served as juror for Applicant's trial and because she wanted the case to be objectively presented by people "who were experts in the field of securities prosecution as to whether or

not this was criminal." WRR 12:155-157, 163-164.

587. In June of 2014, Mr. Jernigan was indicated by a Brazoria County Grand Jury for securities fraud, money laundering, and aggregated theft. The offenses took place over a period of time from June, 2008 to October, 2009. Jernigan pled guilty to securities fraud. Jernigan defrauded investors of $463,000. Of this amount $254,000 was from Debra Henry. There were a total of six investors listed in the indictment. WRR 12:81-84, 115; Def's Writ Ex. 111.

588. The fraud of an elderly man did remind Ms. Henry of her own experiences with Mr. Jernigan, but it had little impact on her. Her experiences with Mr. Jernigan did not cause her to vote for the death penalty. WRR 12:109-110. Ms. Henry voted for the death penalty because of the severity of the crime and because she thought Applicant would continue to be a threat to other people. Ms. Henry would not vote for the death penalty just because someone committed a fraud on someone else. WRR 12: 126-127.

589. Ms. Henry refused to sign an affidavit presented to her by Ms. Heisey who was with OCFW. It omitted many things, such as her statement that Applicant had a fair trial, and Ms. Henry began to feel like she was "a pawn." WRR 13:114. Also, she felt the language of the affidavit took her words out of context, omitted matters, and improperly

emphasized certain matters. WRR 13:112-113, 124-125; State's Ex. 12, ¶9:7. She particularly referenced the use of the word "especially." "It looks to me like someone is trying to lead someone someway to make it seem like something ... because 'especially' means to me a major impact. It wasn't a major impact when I heard it." WRR 13:119-120. Ms. Henry also said one statement in the affidavit was false. WRR 113:125.

590. Ms. Henry answered "yes" to question 46 of the jury questionnaire. Ex. 79 (sealed).

591. Ms. Henry answered "No" to question 40 on the jury questionnaire, "Have you, any member of your family or *any acquaintance* (emphasis by this Court) ever been a witness in a criminal or civil case?" Ex. 79 (sealed).

592. The Court finds that Ms. Henry was the most credible witness to testify at the evidentiary hearing despite the repeated, but very professional, attempts by Writ Counsel at the evidentiary hearing, to have Ms. Henry waiver from her firm convictions that all of her answers were true. Ms. Henry was steadfast in her convictions that she had not been the victim of a crime and that Cathy Harrell was not a person she considered to be a friend at the time she answered the jury questionnaire in September, 2013.

CONCLUSIONS OF LAW ON ISSUE 8

1. It is difficult for the Court to understand how Applicant can contend that Ms. Henry was being untruthful when she answered "No" to Question 44 on the Jury Questionnaire which inquired whether she or any member of her family or a friend had been the victim of any crime insofar as that argument pertains to Mr. Jernigan. There was no definition given in the questionnaire as to what was meant by the word "crime," nor was there any definition of the term "friend." Ms. Henry was not an attorney and she believed that a crime involved some form of physical violence. Ms. Henry had contacted an attorney who did not suggest that she could pursue any actions against Mr. Jernigan. Even the attorneys for the State Securities Board, who were investigating the matter, did not come to the conclusion to recommend a criminal prosecution until December 19, 2013, which was after Applicant had been sentenced to death.
2. Although, in hindsight, all of the acts to establish a crime had been committed prior to September 3, 2013, it was not until after June, 2014, that Mr. Jernigan was formally charged with a crime. While on September 3, 2013 when Ms. Henry filled out the juror questionnaire, an attorney who had a complete knowledge of all of the facts might have believed that Mr. Jernigan's acts could be considered criminal in nature, the attorneys investigating the matter had not come to this conclusion, and Mr. Jernigan was not indicted until 9 months later. It is the responsibility of the attorneys preparing the questionnaire to make sure the questions are clear and "Counsel should

never assume that the respondents will understand each question as were intended by counsel to be understood. As this case illustrates, written questions are by nature vulnerable to misinterpretation, even questions that appear to be subject to only one interpretation." *Gonzales v. State*, 3 S.W.3d 913, 917 (Tex. Crim. App. 1999). The questionnaire did not ask if anyone had been the victim of a scam or a fraud. It is unreasonable to require a lay person to conclude that Mr. Jernigan's actions were criminal in nature when even the attorneys investigating the matter did not believe there was sufficient evidence that a crime had been committed until December 19, 2013 at the earliest.

3. Knowing what was known at the time of the evidentiary hearing in February, 2019, it was apparent that Ms. Henry had been the victim of a criminal fraud, as Mr. Jernigan had been indicted and pled guilty to this offense. However, even though he had pled guilty, Ms. Henry still did not understand that this was a criminal offense until after Applicant had filed his Writ when Mr. Bosserman with the Brazoria County District Attorney's office told her that Mr. Jernigan's actions were criminal in nature.
4. A person does not commit jury misconduct by not answering a question that is not asked. It is defense counsel's obligation to ask questions calculated to bring our information that might indicate a juror's inability to be impartial or truthful. *Armstrong v. State*; 897 S.W.2d 361 (Tex. Crim. App. 1995). Unless defense counsel asks such questions, then information that a juror fails

to disclose is not really withheld so as to constitute misconduct which would warrant a reversal. *Gonzales, supra.* In Gonzales, as in this case, the question on a questionnaire was subject to interpretation. The question asked if a potential juror had been an accused complainant or witness in a criminal case. The juror checked "no." The juror had, in fact, been a complainant, but the case did not go to trial. Because trial counsel did not follow up with more specific questions, there was no showing of diligence and the juror did not withhold information.

McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845 (1984) further explains the problem:

> "The varied responses to respondents' questions on voir dire testify to the fact that jurors are not necessarily experts in English usage. Called as they are from all walks of life, many may be uncertain to the meaning of terms which are relatively easily understood by lawyers and judges. Moreover, the statutory qualifications for jurors require only a minimal competency in the English language (28 U.S.C. §1865) ... To invalidate the result of a three-week trial because of a juror's mistaken, though honest response to a question is to insist on something closer to perfection than our system can be expected to give." *Id.* at 555.

6. There were no questions on the questionnaire concerning being a victim of a scam or a fraud. A juror does commit jury misconduct when she fails to answer a question that is not asked. *Armstrong*, *supra.*

7. To the extent that Applicant argues that Ms. Henry was being untruthful as it pertained to the murder of Ms. Harrell's husband, based upon the testimony and a review of the jury questionnaire, the Court finds that Applicant also fails to meet his burden of proof on this issue. The terms used in Question 45 in the jury questionnaire were subject to interpretation. There was no definition of the terms, "friend," and Ms. Henry was honest in her answer to the question.

   Ms. Henry was steadfast in her testimony that at the time of the voir dire in September 2013, her relationship with Cathy Harrell was only that of a coworker in 1991. According to Ms. Henry they were not what she considered to be friends at that time, or even at the time of the evidentiary hearing. Ms. Henry and Ms. Harrell had only recently become co-workers again but were still only acquaintances. Applicant put forth no evidence to dispute Ms. Henry's characterization of her relationship with Ms. Harrell. Ms. Henry said that the incident with Ms. Harrell's husband, which occurred over 20 years prior to the voir dire, did not come to mind when she was answering the questions on the juror questionnaire. *McDonough, supra*.

8. Further support for the slight connection between Ms. Harrell and Ms. Henry is found in the fact that Ms. Henry only recalled the conversation she had with Ms. Harrell in the copy room, that had occurred only a couple of months prior to meeting with Ms. Heisey in 2016, after Ms. Heisey began pressuring Ms. Henry to sign the affidavit. In *Sypert v. State*, 196 S.W.3d. 896 (Tex. App. —

Texarkana) (*pet. ref'd*) a juror in an armed robbery case failed to disclose that her brother had been a robbery victim 20 years earlier. When she recalled this, she informed the Court and stated that she had merely forgotten about the offense. The trial court denied a mistrial. The Court of Appeals found the error harmless because there was an insufficient showing of bias or prejudice. Given the slight connection Ms. Henry had with Ms. Harrell, it is understandable that she did not remember on September 2, 2013, that a former coworker's husband had been murdered in 1991. In fact, she did not even recall the incident until Ms. Heisey was pressuring Ms. Henry to sign the affidavit. There was no showing of any bias or prejudice, and the murder of a co-worker's husband over 20 years before Applicant's trial had no bearing on any of Ms. Henry's duties as a juror in this case.

9. The Court believed Ms. Henry when she testified that the murder of Ms. Howell's husband some 20 years before her voir dire did not come to mind when she answered the questionnaire. In order to find misconduct, the Court would have to not believe Ms. Henry's testimony, which the Court has found entirely to be credible. Initially it was somewhat hard to believe Ms. Henry's testimony that losing the amount of money she lost with Mr. Jernigan did not have a financial impact on her. However, it became apparent from her demeanor and her sincerity, that she is a woman of strong Christian beliefs, and to her, relationships are more valuable than money.

   Although the questionnaire also fails to define that term "acquaintance," the attorneys preparing the

questionnaire were aware of the distinction between friends and acquaintances, as some questions asked about acquaintances. Had the questionnaire asked if any of a prospective juror's acquaintances, or their spouses, ever been the victim of a crime, the murder of Ms. Harrell's husband, might have been a closer question. Although from Ms. Henry's testimony it appeared clear to the Court that she and Ms. Harrell had only become coworkers again after Applicant's trial, and were only coworkers in 1991. Therefore, it would have been difficult to find misconduct for the failure to recall an incident involving a co-worker's husband that occurred more than 20 years earlier.

10. Applicant argued that Ms. Henry was a biased juror, and this bias violated Applicant's fundamental right to trial by a fair and impartial jury and to due process under State and Federal Constitutions citing *McDonough Power Equip., Inc*., *Supra* and *Von January v. State*, 576 S.W.2d 43 (Tex. Crim App. 1978). McDonough's holding is that the respondents are not entitled to a new trial unless the failure to disclose denied them the right to a fair and impartial jury. *Von January* is clearly distinguishable as in that case the juror clearly knew a party and yet answered counsel's question that he did not know him.

    Although the Court has found that Ms. Henry was truthful in all of her answers, the Court now addresses Applicant's legal argument that Ms. Henry was biased and her failure to disclose denied them a right to a fair and impartial jury.

11. Under Federal Law the Applicant has the burden to prove actual bias by showing that (1) the juror failed to answer a material question honestly during voir dire; (2) a correct response would have provided a valid basis for a challenge for cause; and (3) proof of the juror's failure to disclose bias must come from a source other than jury deliberation. *United States v. Bishop*, 264 F.3d 535 (5th Cir. 2001) citing and applying *McDonough*, *supra*.
12. In *Uranga v. State*, 330 S.W.3d 301 (Tex. Crim App. 2010), the Court stated that, "Under Texas law the defendant must show that the juror withheld material information question during voir dire, and the information was withheld despite due diligence exercised by the defendant. So 'it is not necessary that the concealed information show actual bias; just that it has a tendency to show bias.'" *Uranga*, *supra* at 305, Citing *Franklin v. State*, 138 S.W.3d 351, 355-356 (Tex. Crim. App. 2004).
13. In examining the facts of this case, Applicant has failed in his burden of proof under either standard for several reasons. First, Ms. Henry did not fail to disclose or withhold information during voir dire. At the time of her voir dire, no one, not even the attorneys who were representing the State Securities Board who were investigating Mr. Jernigan, had come to a conclusion that the facts were sufficient to support a criminal referral. Additionally, Ms. Henry had contacted an attorney concerning Mr. Jernigan and had been told, in essence, that there was nothing she could do. Finally, although not realizing what a district attorney's responsibilities were, she had spoken

with Ms. Yenne, the District Attorney of Brazoria County, in general terms concerning Mr. Jernigan at church one Sunday (though Ms. Yenne did not remember the conversation), but Ms. Yenne made no recommendations to her. Although no information was concealed, Applicant also failed to produce any credible evidence that any answers on the questionnaire had a tendency to show bias, or that any of Ms. Henry's actions on the jury tended to show bias, or that Applicant was in any way denied the right to have a fair and impartial jury hear the case.

14. With regard to Applicant's argument that Ms. Henry failed to answer a question honestly as it pertained to Ms. Harrell under the Federal or State standards, Applicant also failed in his burden of proof for many of the same reasons. First, in September, 2013, Ms. Henry and Ms. Harrell were no longer coworkers. They had been coworkers in 1991 when Ms. Harrell's husband had been murdered. However, in 1991, Ms. Henry only knew who Ms. Harrell was and they did not socialize or spend time together. Applicant contends that this brief work contact over 20 years prior to the voir dire, would require Ms. Henry to conclude that Ms. Harrell was a friend. Ms. Henry was clear that she did not consider Ms. Harrell a friend in 1991, or at the time she answered the questionnaire in September, 2013, or even at the time of the evidentiary hearing. It is obvious that the attorneys who prepared the questionnaire recognized the distinction between an acquaintance and a friend although neither term was defined. Ms. Henry provided a logical coherent

description of whom she considered to be her friend. Counsel should not have assumed that all prospective jurors would interpret the question as broadly as Writ Counsel now contend *Gonzales, supra*. Given the slight connection Ms. Henry had with Ms. Harrell 20 years before September 3, 2013, it is understandable that Ms. Henry did not remember the event. But of more significance is that she did not think of it until Ms. Heisey was pressuring her to sign the affidavit. Therefore, it had no impact on Ms. Henry's ability to be a fair and impartial juror.

15. Applicant next urged the Court to find that Ms. Henry had an implied bias which does not require a showing of intentional concealment. The Implied Bias Doctrine originated in a concurring opinion by Justice O'Connor in *Smith v. Phillips*, 455 U.S. 209 (1982). In her concurring opinion, Justice O'Connor recognized that his doctrine would only be applied in "extreme situations." Some examples given are that a juror is an actual employee of the prosecuting agency, or the juror is a close relative of one of the participants or of someone involved in the criminal event, or that the juror was a witness or somehow involved in the criminal event. Applicant produced no evidence that could remotely be considered to be the type of an extreme situation that Justice O'Conner referred to.
16. Applicant failed in his burden to demonstrate any facts to the Court that would be so extreme to enable this Court to find that Juror Henry had an implied bias.
17. In *Uranga*, *supra*, the Court, quoting from *Phillips*, stated, "the Court has long held that the

remedy for allegations of juror partiality is a hearing in which the defendant has the opportunity to prove actual bias." *Uranga*, supra at 306, quoting from *Smith v. Phillips*, 455 U.S. at 215. An evidentiary hearing was held in this case in January-February, 2019. At the evidentiary hearing Applicant had the opportunity to prove that Ms. Henry was biased. There was no evidence produced that would indicate actual bias or implied bias or that Ms. Henry withheld material information. While Applicant contends in his brief that Ms. Henry's testimony during the evidentiary hearing "admitted to this Court that her experience as a fraud victim directly affected the way she viewed the evidence at Mr. Harris' trial." See Applicant's Brief on Evidentiary Issues, p. 76, there is no evidence to support this argument. In fact, the testimony shows exactly the opposite.

18. In reviewing the references to Ms. Henry's testimony, not only did Ms. Henry not admit that the referenced testimony directly affected her, to the contrary she denied that it had any impact on her.

    A. "But that to me was not a key point. It was not. It was just a fact." FOF 620.

    B. "Yes, my mind related. But that was it. It was just a fact. Yeah, it made me think of, oh, I was scammed too you know." FOF 620.

    C. Then, in explaining why she felt Joanna Heisey was trying to "lead someone some way to make it seem like something ... Because

> especially means to me like it's a major impact. FOF 620.

Viewing all of her testimony, and seeing her demeanor and body language on the stand, the effect of the testimony concerning Applicant obtaining funds from others actually gave Ms. Henry a sense of relief and she testified, "it was actually like, oh, it actually made me feel better of myself that I'm not the only bleeding heart out there when I heard that. That's the only thing that crossed my mind during trial." FOF 620.

19. Deborah Henry answered truthfully, fully, and completely the questions asked as she understood them. While counsel might have intended for the questions to be understood in a more comprehensive fashion, this cannot in hindsight be used to cast doubt on the truthfulness, completeness, or accuracy of her answers on September 3, 2013.

    Applicant has failed to satisfy his burden of proof to prove by a preponderance of the evidence that Ms. Henry engaged in jury misconduct by checking two boxes in her juror questionnaire which indicated that she had not been a victim of a criminal act and that she did not have a friend who had been a victim of a crime. In addition, there was no evidence that showed any bias or implied bias, on the part of Ms. Henry. The questions presented to Ms. Henry were insufficient to elicit the information that Applicant now contends should have been disclosed by Ms. Henry.

ISSUE 9

WHETHER THE STATE ENGAGED IN PROSECUTORIAL MISCONDUCT IN FAILING TO INFORM THE DEFENSE THAT INFORMATION JUROR DEBORAH HENRY HAD SET OUT IN HER JURY QUESTIONNAIRE MAY HAVE BEEN INACCURATE, AND IF SO, DID THIS VIOLATE APPLICANT'S DUE PROCESS RIGHTS.

FINDINGS OF FACT ON ISSUE 9

While many of the Findings of Fact on this Issue are similar to the Findings of Fact on Issue 9, this Issue is to be decided on affidavits rather than evidence admitted during the Evidentiary Hearing. This Court has tried to restrict the Findings on Issue 8 to the Evidentiary Hearing and on Issue 9 to the affidavits except where testimony at the Evidentiary Hearing either corroborates or conflicts with the information in the affidavits.

593. Jeri Yenne, the District Attorney of Brazoria County, Texas, was unaware that Deborah Henry was a victim of a crime during voir dire. State's Ex. 15, ¶l-2. She was not aware Deborah Henry was a victim of a crime until after the trial was over. *Id*. The voir dire of Ms. Henry occurred some 9 months prior to indictment of Alan Jernigan, the perpetrator of the fraud, and Applicant was convicted and

sentenced almost 6 months before the indictment. State's Ex. 13, ¶10; RR 75:17; CR 186.

594. Deborah Henry briefly talked to Mrs. Yenne about her situation with Mr. Jernigan at church in 2010, but she did not mention Mr. Jernigan's name or any specifics about the incident. State's Ex. 12, ¶4. Ms. Henry did not remember exactly what she said or how Mrs. Yenne responded. *Id*. She never discussed this situation with Ms. Yenne afterward. *Id*.

595. Mrs. Yenne did not remember any such conversation. State's Ex. 15, p. 2. In closing arguments counsel for Applicant abandoned the contention that Mrs. Yenne should have remembered the conversation. WRR 20:150-155.

596. Ms. Henry did not know the fraud on her was a crime until the State's writ attorney informed her when he took her statement after the Writ was filed by Applicant. State's Ex. 12, ¶2; WRR 13:84-85.

597. When Ms. Henry set out in her jury questionnaire that she was not a victim of a criminal offense, she thought the statement was true. State's Ex. 12, ¶2; WRR 13:129. This belief is supported by her testimony at the evidentiary hearing that she did not understand that Mr. Jernigan received a criminal sentence although she knew he got probation. WRR 13:87.

598. Greta Cantwell and Matthew Leslie work for the Texas State Securities Board as

enforcement attorneys. State's Ex. 13, ¶1; State's Ex. 14, ¶1. They handled the Alan Jernigan investigation in 2013 and the case was indicted in June, 2014. State's Ex. 13, ¶¶3, 8; State's Ex. 14, ¶¶2, 5; WRR 12:79. Jernigan was convicted of securities fraud. He had also been charged by Indictment in June, 2014, with money laundering and aggregated theft. State's Ex. 14, Exhibit B; WRR 12:81-82; Def's Writ Ex. 111.

599. The first time Ms. Cantwell physically met with Ms. Henry was December 19, 2013. State's Ex. 13, ¶7. She was with Matthew Leslie from their office. State's Ex. 13, ¶1; State's Ex. 14, ¶4. This is when they first found out that Ms. Henry had been a juror in a capital murder case. State's Ex. 13, ¶1; State's Ex. 14, ¶4, Applicant had been sentenced to death on December 11, 2013. RR 75:17; CR 186.

600. Ms. Cantwell did not remember any contact with Ms. Henry from the time of the initial email to the time they talked to her in person. State's Ex. 13, ¶7; WRR 12:110-111, 113.

601. The attorneys for the State Securities Board had not finished their investigation when they met with Ms. Henry on December 19, 2013 or with Ms. Yenne on December 20,

2013. State's Ex. 13, ¶¶9, 10; State's Ex. 14, ¶¶6-7.

602. The first contact with Mrs. Yenne, or any member of her staff, was December 20, 2013. State's Ex. 13, ¶9.

603. Ms. Cantwell and Ms. Leslie met with Ms. Yenne on December 20, 2013 to see if she "would have any interest in prosecuting a securities fraud case against Mr. Jernigan once we were finished with our investigation." State's Ex. 13, ¶9; State's Ex. 14, ¶6. A formal memorandum confirming this was prepared January 16, 2014. Ex. 86. Ms. Cantwell recalled Mrs. Yenne being surprised to hear Ms. Henry had been involved in a fraudulent investment

604. The statements made by Ms. Yenne, Ms. Henry, Ms. Cantwell, and Mr. Leslie in their affidavits are consistent with their testimony at the Evidentiary Hearing.

605. There is no evidence that the District Attorney of Brazoria County, nor any member of her staff, would have had any reason to believe that any information on Ms. Henry's questionnaire may have been inaccurate at any time prior to December 20, 2013, at the earliest.

CONCLUSIONS OF LAW ON ISSUE 9

1. The Court has reviewed Applicant's arguments in its Brief of Issues to be Tried by Affidavit. Applicant brings forth three basic arguments in

support of this Issue, although these arguments contain many subparts.

The first argument is that Ms. Henry either concealed, lied, or failed to disclose material facts during voir dire which Ms. Yenne, the District Attorney for Brazoria County, knew, or should have known, were false, yet Ms. Yenne failed to speak up or correct the alleged false statements.

The second argument is the District Attorney's office committed prosecutorial misconduct when it failed under *Brady v. Maryland*, 373 U.S. 83 (1963) to inform Defense counsel that the State of Texas Securities Board, an independent agency of the State of Texas, was conducting an investigation into financial transactions an individual, who is not in any way involved with or related to the case that Applicant was being tried for, but one of the potential victims of the individual, who was being investigated, was selected as a juror in Applicant's trial. Applicant puts forth two arguments for this expansion of *Brady*. The first argument is that the information obtained by the State Securities Board was within the State's possession, and therefore, within the possession of the District Attorney of Brazoria County who was prosecuting Applicant. The second argument is based on the theory of agency.

Finally, Applicant puts forth a Due Process argument that attempts to distinguish this case from *Smith v. Phillis*, *supra*.

20. Applicant produced no evidence that Ms. Yenne, or any member of her staff, knew, or should have known of the financial transactions between Mr. Jernigan and Ms. Henry at any time prior to

December 20, 2013, at the earliest. Applicant's Writ Counsel conceded this point in his closing argument.

21. The State did not violate any of its duties under *Brady v. Maryland, supra.* Although it is undisputed that the State Securities Board was conducting an investigation of Alan Jernigan to determine whether or not any violations had occurred in the State's securities laws prior to September 3, 2013, the State Securities Board is an independent State agency that is mandated by statute to operate under strict confidentiality. If a violation is found, the remedy could either be criminal, administrative, or civil. Neither Jeri Yenne, nor any member of her staff was aware of the Jernigan investigation prior to December 20, 2013, which was after Applicant had been sentenced to death.

    Applicant cites several cases for the proposition that prosecutors have an affirmative duty to learn any information favorable to criminal defendants known to others or agencies acting in the State's behalf. These cases are distinguishable in that the information that the other agencies possessed was at least related to the issues or the witnesses in the case being tried. Applicant is apparently urging the Court to expand *Brady* to such an extent that it is difficult to put into words. Applicant seeks to impose a duty on a local District Attorney that is trying a criminal defendant to make inquiry of every investigating agency of the State of Texas. The purpose of that inquiry would be to determine whether or not that agency might be conducting an investigation of an any individual, though not

related in any way to a witness or issue in the case being tried, to determine whether the person being investigated is a potential juror in the criminal case or that a potential juror in the criminal case may be a potential victim. Apparently, Applicant believes this should be conducted, even though investigations of the State Securities Board are confidential. *Brady* does not require such an investigation. *Pennsylvania v. Richie*, 480 U.S. 39 (1987). In *Pennsylvania*, *supra*, the other agency had actually conducted an investigation of the victim in the criminal case. However, this Court believes that the Ritchie case supports the Court's conclusion that there is no Due Process or *Brady* violation, where it states:

> "A defendant's right to discover exculpatory evidence does not include the unsupervised authority to search thru Commonwealth files ... There is no Constitutional right to discovery in a criminal case, and *Brady* does not create one." *Ritchie*, *supra* at 59-60.
>
> Applicant's argument for the expansion of *Brady* fails.

22. Applicant next argues that the State knew or should have known that Juror Henry made false statements on her juror questionnaire that concealed her bias against Applicant. This argument centers on the agency theory. Since both the State Securities Board and the Brazoria County District Attorney's Office are agents of the State of Texas, Applicant argues that the knowledge of both is imputed to the other. Where the scope of an agency's duties and responsibilities are limited, the information they obtain should not

be imputed to other instrumentalities of the State. To hold otherwise could jeopardize the confidentiality of the investigation which the State Securities Board is conducting. Applicant cites a number of cases to support its imputed agency theory. *Giglio v. U.S.*, 405 U.S. 150 (1972) is clearly distinguishable as it involved the criminal record of a testifying witness. The same is true of *Carriger v. Stewart*, 132 F.3d 463 (9th Cir. 1997).

Similarly, *Moore v. Gibson*, 195 F.3d 1152 (10th Cir. 1999) is also clearly distinguishable as that held the imputation of the knowledge of the police and investigators that actually investigated the case being tried would be imputed to the prosecutors. *Martinez v. Wainwright*, 621 F. 2d 184 (5th Cir. 1980) is also distinguishable as in that case the medical examiner's office actually had a copy of the defendant's rap sheet.

In this case, Applicant wants knowledge of an agency of the State of Texas, investigating a transaction not related to Applicant's trial, where it has yet to be determined whether any criminal, civil, or administrative sanctions would be imposed, be imputed to the District Attorney trying the case. *Brady* or Due Process is not that broad. Rather, the Court finds that the duty is more properly stated in *Crivins v. Roth*, 172 F.3rd 991,995 (7th Cir. 1999) citing *Kyles v, Whitley*, 514 U.S. 419,432,437 (1995) which states that prosecutors "have an affirmative duty to learn of such evidence known to those acting on the government's behalf *in the case*, including police." (Emphasis by this Court.)

Applicant's argument based on the theory of the agency also fails.

23. Applicant then shifts to the allegation that Ms. Yenne "had actual knowledge that Juror Henry was concealing a flagrant bias against Mr. Harris since D.A. Yenne knew, as of 2009, that juror Henry had been the victim of a financial scam; knew, at the time of the *voir dire* in September, 2013, that Juror Henry had given false testimony on her jury questionnaire by denying that she had ever been a crime victim." See Applicant's Brief in Support of Issues to be Tried by Affidavit at 146. In Conclusion 2 to this Issue 9, the Court found no evidence to any prior knowledge by Ms. Yenne, and, in fact; Writ Counsel stipulated in his closing argument that Ms. Yenne had no prior knowledge of Ms. Henry's problems with Mr. Jernigan based upon a brief discussion at church in 2009. Applicant brought forth no evidence at the evidentiary hearing that would impose any knowledge of Mr. Jernigan's financial dealings with Ms. Henry on Ms. Yenne or the Brazoria County District Attorney's office at any time prior to December 20, 2013, at the earliest.

    In addition, for the reasons stated in Conclusion 18 to Issue 8, Applicant failed to prove by a preponderance of the evidence that any of Ms. Henry's statements on her questionnaire were inaccurate, or that Ms. Henry had any duty to disclose her prior financial dealings with Mr. Jernigan because the questions presented to her were not sufficient to elicit any type of information concerning Mr. Jernigan.

24. Applicant failed to satisfy his burden of proof that Ms. Yenne knew, or should have known, of Ms. Henry's involvement with Mr. Jernigan. Applicant seeks to distinguish this case from *Smith v. Phillips*, 455 U.S. 209 (1982) stating that, "the juror bias and prosecutorial disclosure failure at issue here are markedly different from the facts of *Smith v. Phillips*, 455 U.S. 209 (1982)." Applicant's Brief on Issues to be Tried by Affidavit at 154. The first distinction Applicant seeks to establish is that the information in *Smith* was not a "concealed bias known to the State at the outset of voir dire." *Id.* Not only did Writ Counsel stipulate that Ms. Yenne had no knowledge based on the 2009 meeting at church, Applicant produced no evidence that could in any way show that Ms. Yenne or the District Attorney's office could have had any knowledge whatsoever of Ms. Henry's financial transactions with Mr. Jernigan at any time prior to December 20, 2013, at the earliest, which was after the Applicant's trial was completed. The second distinction concerns the timing of the disclosure. Again, asserting incorrectly that Ms. Yenne and the District Attorney's office had knowledge during voir dire, Applicant attacks the failure to disclose the information for more than a year and a half. Applicant contends that this timing precluded Applicant from seeking to immediately get a hearing on the issue of juror bias.

In reviewing *Smith v. Phillips*, it appears that the Supreme Court was more concerned with the issue of whether the juror was biased, rather than the timing of the disclosure or whether the prosecutor acted in an improper manner. Applicant's

argument again begins with the incorrect premise that Ms. Henry concealed something from the Applicant's Trial Counsel that the Brazoria County District Attorneys' office was aware of in September, 2013. It then proceeds to allege facts which have no basis in the Record. It was not until December 19, 2013, the attorneys for the State Securities Board concluded that they would recommend a criminal referral in the Jernigan matter. However, they had not completed their investigation and the actual indictment was not returned until June, 2014. It was only at that time that Mr. Jernigan was charged with a crime.

Since the investigations of the Securities Board, are by statute required to be confidential, certainly none of the attorneys for the State Securities Board could have disclosed any of the information about the investigation. While there was no evidence as to the amount of information that was disclosed to Ms. Yenne on December 20, 2013, it appears that she knew from the meeting that Ms. Henry was a potential victim and that the case would be presented to a Brazoria County Grand Jury by the special prosecutors. Assuming, without deciding, that Ms. Yenne could legally have disclosed information concerning a confidential investigation of Mr. Jernigan by another state agency sooner than she did, there has been no showing of any harm.

Applicant received a full Evidentiary Hearing in this case in January and February of 2019 on the issue of whether Ms. Henry held any bias, whether she incorrectly withheld or concealed information during her *voir dire*, and whether her relationship

with Mr. Jernigan had any impact on either her verdict or her ability .to be a fair or impartial juror in the case. This Court heard the original trial, would have heard any hearing had it been held in late 2013 or 2014, or at any time thereafter, and did hear the Evidentiary Hearing in this case in 2019 where the issue of bias was raised. Applicant did not have just a few weeks or months to compile and prepare his evidence, as he would have had if the hearing had been held shortly after the original trial, but instead OCFW who had been appointed to represent Applicant in this Habeas proceeding in 2013 had over 5 years to prepare for the evidentiary hearing held in 2019. The Court heard all the evidence that Applicant presented on these issues and found that Ms. Henry did not answer incorrectly; did not conceal any information required to be answered by the questionnaire or by questions during *voir dire*; that her financial transactions with Mr. Jernigan did not affect or impair in any way her ability to be a fair and impartial juror; that her involvement with Mr. Jernigan did not affect her decision to vote for the death penalty; and that she was not a biased or impartial juror. Thus, even if Ms. Yenne should have disclosed the information sooner than she did, Applicant suffered no harm as he received a full and complete hearing by the same Court that would have heard the matter had the hearing been held in 2014.

25. Applicant failed to satisfy his burden of proof to prove by a preponderance of the evidence that the State engaged in prosecutorial misconduct in failing to inform the defense that information

Juror Deborah Henry had set out in her jury questionnaire may have been inaccurate. There was no evidence that Applicant's due process rights had been violated.

ISSUE 10

WHETHER JUROR DEBORAH HENRY BASED HER DECISION TO SENTENCE THE APPLICANT TO DEATH ON OUTSIDE INFLUENCES FROM HER SISTER OR ANY OTHER INDIVIDUAL

FINDINGS OF FACT ON ISSUE 10

606. Before closing arguments of Applicant's trial, based on the facts she had heard, Ms. Henry was leaning toward the death penalty, but she was concerned because she was raised not to judge others. The trial was starting to take its toll on her and she needed emotional support, so she called her oldest sister who had always been her "go-to" person. WWR 13:103-04, 106.

607. The purpose of Ms. Henry's phone call to her sister was that the trial had become emotionally difficult. She was crying "Because it's just like, who am I to judge someone or say, you know, you know, life in prison or death penalty." Ms. Henry had a problem with that. She told her sister that she was depressed and the trial was very

upsetting to her, but they did not talk about the trial or discuss details. Ms. Henry's sister reminded her that she was called to do a job and that "Like God put government — gave us government — to keep order in society. And I was called by the government to go in and do a job as a jury. And look at it that way, just black and white, which is how I perceived, just look at the facts. Keep your emotions out. And that's basically the extent of our phone call." WRR 13:103-104.

608. Ms. Henry called her sister because she was depressed and she always called her sister when things upset her. She told her that she was on a case and was feeling really low. Ms. Henry did not discuss the case or tell her sister any details. Ms. Henry needed someone to talk to and was having a "low moment." She was on her hands and knees crying because she needed someone to talk to. WRR 13:105. Hearing her sister say she loved her provided Ms. Henry with the emotional support to realize that she would get through the experience of the trial. Her sister also told her she would be thinking about Ms. Henry and praying for her. WRR 13:106-107.

609. Ms. Henry reiterated how difficult it was for her to sit in judgment of another person, " ... by the way I was brought up, I do not have the right to judge someone else. And that bothered me. You know, you go with that, your Christian thing. But we were given the job to be here on jury to, you know, take the

facts and do our best with the facts to come up with what we thought was the right thing to do." WRR 13:124.

610. Ms. Henry talked to no one, no coworkers, nor family, no one about the details of the case until Ms. Heisey visited her in 2016. WRR 13:105-106, 113-114.

611. Ms. Henry related to the man who testified about Applicant defrauding him out of $40,000 because she saw him as a fellow person who had trusted someone and got scammed. Ms. Henry had been embarrassed by what had occurred with Mr. Jernigan. She viewed herself as a fool because she had thought she was a pretty good judge of people. Ms. Henry gave "kudos" to the witness because he had the guts to admit that he had been scammed after willingly lending money to someone. WRR 13:109.

612. Ms. Henry related to the fact that "... here is another human being that is a trusting person that got taken care of. That's it. As far as anything else, it really did not have much of an impact ... But to me that was not a key point. It was not: it was just a fact." WRR 13:109-110.

613. Ms. Remy related to the witness because he had undergone a similar experience, similar to how someone who has children can relate to another individual with children, but it did not sway her decision. WRR 13:110-111.

614. During the trial, Ms. Remy heard from several witnesses who talked about how

Applicant had stolen from people who had helped him. That reminded her of how she had been scammed by someone she thought was her friend. WRR 13:119.

615. Joanne Heisey was at the time of the evidentiary hearing, a licensed attorney and worked as a research and writing specialist in the Capital Habeas Unit as the Federal Community Defender for the Eastern District of Pennsylvania. WRR 13:6.

616. Ms. Heisey had worked for the OCFW from the fall of 2013 until September, 2017. During her time working for the OCFW, Applicant was one of the office's clients, and Ms. Heisey worked on his case. WRR 13:7.

617. Ms. Heisey's duties included interviewing witnesses and jurors. WRR 13:7-8.

618. On February 13, 2016, she interviewed Juror Deborah Henry at Henry's home. WRR 13:9.

619. Ms. Heisey had told Ms. Henry that her office often likes to get statements from jurors or other witnesses that they speak to. Ms. Henry stated that she would be open to doing that, as long as it was accurate and in her words. Ms. Heisey drafted a document for Ms. Henry to sign based on her notes of the conversation with Ms. Henry and took it to Ms. Henry's home on February 15, 2016. WRR 13:17-18.

620. The context in which Ms. Henry related to the witness at trial was that he was "another person who trusted people: That's the context I related to him." WRR 13:120. However,

when Ms. Heisey inserted the word "especially" in the draft document that Ms. Heisey prepared for Ms. Henry to sign, Ms. Henry testified, " ... my red flag started going up in my head as I'm looking at those words. You have adjectives and different things and different parts of sentences that looks to me- and that's where I told her this is out of context. Because it looks to me like somebody is trying to lead someone some way to make it seem like something. And I didn't know what they were up to ... Because 'especially' means to me it's like a major impact. It wasn't a major impact when I heard that. It was like, oh, it actually made me feel better to realize that I am not the only bleeding heart out there. That's the thing that crossed my mind during the trial." WRR 113:110, 119-121.

621. While Ms. Henry agreed that several portions of the draft affidavit which Ms. Heisey prepared were accurate, she pointed out Ms. Heisey' s statement in Attach. 26 that God put her in a role as a juror was not accurate. "God didn't put us in the role as jurors. He created government and the government is the one that picked us as jurors to help uphold the law." That was an important distinction to Ms. Henry. WRR 13:124-125.

622. Ms. Heisey strongly rejected as "false" the language that Ms. Heisey inserted in the draft which was, "It was difficult for me, though, because I felt uncomfortable about making a judgment to sentence someone to

death. I talked to my sister about it, and she assured me that God put us in this role as jurors to make the decision. That made me feel much better about being able to decide on a death verdict." Attach. 26; WRR 13:123-126. While it probably is apparent from the record, the emphasis and manner in which Ms. Henry disputed Ms. Heisey's language made it clear to the Court these were Ms. Heisey's words and not Ms. Henry's. Ms. Henry's actual testimony about the effect of the conversation with her sister was, "Because I'm not like that to say that I'm for the death penalty. It helped me feel better that I go take the facts and I do the sentence based on facts, not the death penalty, but by the rules were given me by the Court, black and white. We were given orders that if I felt the person, you know, committed the murder, was a threat to society, that was when you vote for the death penalty. We were told several times — otherwise life in prison." WRR 13:125.

623. Ms. Henry emphatically stated that her experience with Mr. Jernigan did not cause her to vote for the death penalty. "I voted for the death penalty because of the severity of the crime and because I believed Mr. Harris would continue to be a threat to other people. I would not vote for the death penalty just because he committed a fraud on someone." WRR 13:126-127.

624. Ms. Henry started to lean towards voting for a death sentence after she heard from the

witness who talked about how Applicant would be in general population if he was given a life sentence. WRR 13:123.

625. After scanning the draft, Ms. Henry noted inconsistencies in what Ms. Heisey had typed and became suspicious of her embellishing certain things and misstating others. The affidavit was not complete and some things were taken out on context. Ms. Heisey tried to pressure Ms. Henry into signing the affidavit. Ms. Henry then became irritated and realized that "something is going on." WRR 13:132-133. Ms. Henry "... was starting to feel she was a pawn." WRR 13:114.

626. It was at that time Ms. Henry told Ms. Heisey about Ms. Harrell's experience. Shortly before her meeting with Ms. Heisey, Ms. Harrell was in the copy room at Ms. Henry's job, and Ms. Henry asked Ms. Harrell if she was okay. That was when Ms. Harrell told Ms. Henry that she "goes through hell" whenever the defendant in her husband's case comes up for appeal. WRR 13:132-134.

627. Ms. Henry was reminded of her conversation with Ms. Harrell because she had welcomed Ms. Heisey into her home and answered questions about the trial. "They turn around and nitpick certain things, and then they start pressuring me because I am not going to sign to help Mr. Harris. I was done with my duty. I do not want anything more to do with it. And by that pressure, that's what made me think of her, and that's why I said that, you

know, she had to deal with this all the time. I felt sorry for her to have to go back and forth with the court." WRR 13:132-134.

628. Ms. Heisey offered to make some changes, but Ms. Henry said that there was nothing that could be put in that she would sign because Ms. Henry wanted nothing to do with Ms. Heisey. WRR 13:134.

629. Ms. Heisey initially testified that Ms. Henry told her she had been a victim of a "... fraud by a man named Mr. Jernigan ... and had also impacted how she viewed the evidence in Mr. Harris' case." WRR 13:12. Ms. Heisey then testified Ms. Henry did not use the word "fraud" but instead used the word "scammed." WRR 13:13, 84, 121-122.

630. When the State originally approached Ms. Henry about signing an affidavit for the *Harris* habeas appeal, Ms. Henry made changes to the draft affidavit. The original draft did not state why Ms. Henry called her sister. Ms. Henry made sure that Mr. Bosserman added the part about God putting government in place to keep order in society. It was very important to Ms. Henry that it be included because it helped her "put things into perspective." WRR 13:111-112.

631. Ms. Heisey, or someone else with OCFW, without apparently doing any investigation concerning the time line of Mr. Jernigan's indictment and the time of Ms. Henry's juror questionnaire and *voir dire*, or spending time to actually review the questions asked on the

questionnaire, jumped to the conclusion that Ms. Henry had provided false information on her jury questionnaire when she answered that she had never been the victim of a crime. See Attach. 6, ¶16. Ms. Heisey based this upon her review of some documentation that Ms. Yenne's office had sent to OCFW, "It may have been a criminal complaint but I am not exactly sure what document it was." WRR 13:13-14.

632. After Applicant's Writ was filed, Ms. Henry became upset when she realized that she was being accused of "lying" on the jury questionnaire. She saw the word "lied" in a document. WRR 13:98-100. In reviewing the exhibits, the accusation of lying appears in Ms. Conn's Affidavit. Attach. 6, ¶16. The accusation that Ms. Henry lied also appears in Claim Three, Page 228 of Applicant's original application for Writ of Habeas Corpus.

CONCLUSIONS OF LAW ON ISSUE 10

1. The Court repeatedly instructed the jurors that they were not to discuss the case with anyone, including their fellow jurors, until the Court sends the charge and instructs them to begin deliberations.
2. Just before closing arguments, Ms. Henry was struggling emotionally with the stress occasioned by the trial and how she, as a woman of the Christian faith, could sit in judgment of another human being, whether that judgment be life

imprisonment or death. She placed a telephone call to her older sister and, without discussing anything about the case, explained her concerns from a religious perspective. Her sister advised Ms. Henry that God allowed governments to exist in order to provide order in society, and the government had called her to do her job as a "jury". She was advised by her sister to base her decision on the facts and to keep her emotions out of it.

3. Ms. Henry spoke to no one about the case, not even coworkers or family, until Ms. Heisey approached her in February, 2016. Ms. Henry based her decision on this case solely on the facts and followed the Court's instructions concerning punishment. Because the Court has previously expressed its opinion concerning the credibility of Ms. Henry, the Court accepts her testimony as true and where it conflicts with Ms. Heisey' s the Court accepts Ms. Henry's version as correct.
4. However, the fact remains that Ms. Henry did speak to her sister during the trial concerning her emotional and religious concerns.
5. Clearly, the famous Sam Sheppard case cited by Applicant is distinguishable as the pretrial publicity in that case was enormous. *Sheppard v. Maxwell*, 384 U.S. 333 (1966). Applicant also cited *Granados v. State*, 85 S.W.3d 217 (Tex. Crim. App. 2002) for the proposition that "a juror must rather use the law, the evidence, and the trial court's mandates as his ultimate guides in arriving at decisions as to guilt or innocence and as to punishment. *Granados*, *supra* at 235. Based upon Ms. Henry's testimony, these were the only factors that she relied upon in making her decision.

Granados actually supports the Court's conclusion on Issue 10 as in that case a juror asked for the trial court's permissions to share some personal Bible verses with the jury. These verses related to murder and the penalty of death. The trial court stated that it would be unconstitutional or improper to instruct jurors that they cannot consult books of faith in time of general need. After examining the juror, the Court found that he was not predisposed to vote for the death penalty and had no bias toward the defendant. In reviewing all of Ms. Henry's testimony, this Court finds that she was not predisposed toward the death penalty, and the Court has already found in Issue 9 that she had no bias.

6. Ms. Henry testified that she was leaning toward the death penalty after hearing the testimony from Paul Wilder who had served on the State Classification Committee, but her concern was her ability to judge another, whether the sentence be life in prison or death. Nothing in the advice given by her sister could be construed to steer her toward either verdict. The Court has observed over the years that many jurors struggle with the reality of actually sitting in judgment of another person, but the key is whether they can overcome the struggle and decide the case solely upon the facts, the law, and instructions from the Court. The Court finds Ms. Henry based her decision solely upon the facts, the law, and instructions of the Court, and did so in full compliance with her oath as a juror.
7. However, the mere fact of contact with her sister, while not violating the letter of the Court's instruction not to discuss the case, gives the

appearance of a possible outside influence that would not be permitted. *Mayo v. State*, 708 S.W.2d 854 (Tex. Crim App. 1986). *McMahon v. State*, 382 S.W.2d 786 (Tex. Crim. App. 1978) cert. den. sub. nom., *McCormick v. Texas*, 444 U.S. 919 (1979) holds that injury is presumed when a juror converses with an unauthorized person but this presumption is rebuttable. The record is clear that nothing about the case was discussed between Ms. Henry and her sister, and nothing prejudicial to Applicant was discussed. Ms. Henry repeated several times that she decided the case based upon the evidence and the Court's instructions. Even her sister advised her to keep her emotions out of any decision. Any appearance or presumption of impropriety was rebutted by Ms. Henry's clear and convincing testimony that nothing about the case was discussed and nothing prejudicial to Applicant was said. Applicant was not harmed by Ms. Henry's conversations with her sister. *Thomas v. State*, 699 S.W.2d 845 (Tex. Crim. App. 1985); *Green v. State*, 840 S.W.2d 394 (Tex. Crim. App. 1992), (*cert. den.*), 570 U.S. 1020 (1993) (*abrogated other grounds*), 991 S.W. 2d 849 (Tex. Crim. App. 1999).

8. Applicant failed to prove by a preponderance of the evidence that Deborah Henry based her decision to sentence the Applicant to death on outside influences from her sister or any other individual. Even though the telephone call by Ms. Henry gives rise to a presumption of injury, this presumption was convincingly rebutted by the testimony from Ms. Henry that nothing about the case was

discussed, and Ms. Henry based her decision on the facts of the case and the Court's instructions.

ISSUE 11

WHETHER THE APPLICANT'S FOURTH AMENDMENT RIGHTS WERE VIOLATED BY THE WARRANTLESS SEARCH OF HIS MOTEL ROOM, AND, IF SO, WHETHER THE APPLICANT WAS HARMED BY ANY SUCH VIOLATION.

FINDINGS OF FACT ON ISSUE 11

633. Shortly before 1:00 P.M. on January 14, 2012, Mr. and Mrs. Alton Wilcox were assaulted at their home in Angleton, Texas, and robbed. After tying up the Wilcox's in their kitchen, the assailant fled in the Wilcox's gray Impala. Not long thereafter, Ms. Wilcox managed to get free of her restraints and called 911. RR 60:30, 53-82, 86-93.

634. The 911 call was received by Angleton Police Department at 12:59 PM. RR 50:99-102.

635. Ms. Wilcox told the dispatcher what had happened and provided information concerning the stolen vehicle, including its make, model, and license plate number. State's Trial Ex. 3. Law Enforcement was notified to look for a 2005 Gray Chevrolet Impala that had been stolen during the home

invasion and robbery at the Wilcox residence. RR 7:11-12; RR 58:67-71.

636. Kevin Simoneau with the Brazoria County Sheriff's Office was dispatched about 1:00 PM on January 14, 2012 to help look for a black 2005 Chevrolet Impala stolen from the victims' house. RR 7:11-16; RR 58:67-70. This was shortly after the home invasion at the victims' house. RR 7:16; RR 58:71.

637. Deputy Simoneau observed a car meeting that description near the De Biz Bar. He called in the license plate to dispatch and was informed that it was the same vehicle taken from the home invasion. RR 7:13; RR 58:69-72, 78.

638. The vehicle was found between five and seven minutes after the dispatch of the car description. RR 7:27; RR 58:72. The De Biz Bar is located in the same parking lot as the Economy Inn Motel. RR 58:78. Fresh tire tracks were found near the vehicle. RR 7:14-15.

639. Dispatch gave officers a suspect description as a large or muscular build, black male. RR 7:20.

640. Additional law enforcement officers began arriving on the scene. Among them was K-9 Officer Ian Patin who arrived at the scene with his K-9 tracking dog around 1:35 PM. RR 7:80-84. His dog was trained to track disturbed vegetation, locate narcotics, and apprehend criminals. RR 7:15; RR 58:81-83. The dog tracked a trail from the driver's side

door of the victim's car to the south row of rooms at the Economy Inn Motel. RR 7:16-17; RR 58:82. The dog indicated that he picked up a good track scent. RR 7:17, 78-82.

641. The dog tracked in the direction of Rooms 34, 35, and 36 of the motel, but at one point lost the trail because of contamination with other tracks. RR 7:17, 82-84. When his dog lost the trail, Officer Patin returned with his dog to the Impala to pick up the scent again and then ran the dog around the perimeter of the property to see if the dog alerted to the scent of the person leaving the property. No scent was detected of a person leaving the property, and this led Office Patin to believe that the person was still on the property. RR 7:84.

642. Law enforcement obtained a key from the motel manager to check the rooms to see if anyone was injured, stabbed, or taken hostage. RR 7:15-18, 44-45; RR 58:83-86. Officers considered this a public safety emergency. RR 7:18, 43, 49, 67-68; RR 58:83-84, 100.

643. The crime was a home invasion that had just been committed involving the severe stabbing of two victims. RR 7:15-16, 47-48, 84-85; RR 58:38. Law enforcement was looking for a

fleeing felon with a weapon and other potential victims. RR 7:20-21.

644. Law enforcement had reason to believe the perpetrator was still on the property. RR 7:54.

645. Law enforcement was also concerned that evidence might be destroyed, so they began clearing rooms. RR 7:17, 67, 85; RR 58:41-42.

646. Applicant had been renting a room at the motel since September, 2011. RR 61:8. Although he had fallen behind on his rent, he had settled his debt with the manager shortly before officers entered the manager's office. RR 61:16-18. The money Applicant used to pay the rent at the Economy Motel on January 14, 2012, had a substance on it that was later determined to be the victim's blood. State's Trial Ex. 39; WRR 19:214.

647. Applicant happened to be in the manager's office when law enforcement arrived. When Applicant inquired as to what was going on, he at first did not want them to search his room, but then said "but you are going to go in anyway, so go ahead." RR 7:45-48, 69-70;

RR 58:85; RR 64:94-95. Applicant said he resided in Room 35. RR 7:46-47.

648. The officers started a search and searched several rooms before coming to Room 35. RR 7:48-49.

649. The officers cleared the rooms with their weapons drawn. RR 7:21, 23; RR 58:84-85.

650. Law enforcement had not obtained a warrant when it entered Applicant's room for the first time. RR 58:56.

651. While checking Room 35 one officer went in the bathroom. RR 7:22-24; RR 58:50, 91-94. The officer entered the bathroom to determine if anyone was hiding in there. RR 7:24, 36; RR 58:88, 90-91. The whole bathroom was not visible from the main living area. The shower curtain was closed and needed to be opened to determine if anyone was hiding in there. RR 7:24-25, 36; RR 58:91-94. As the officer left the bathroom after checking the shower, the officer observed a fold up pocket knife in the toilet. RR 7:25-26: RR 58:50-51, 94-96. The toilet lid was up. The water in the toilet was clear and the knife was easily seen. RR 7:26, 53-54; RR 58:51, 94. The officer did not touch the knife but backed out and made arrangements to get a warrant. RR 7:26, 54; RR 58:94. The officers continued to

search each of the rooms in the motel. RR 7:27; RR 58:87.

652. After a warrant was obtained, the knife and other evidence were collected. RR 59:149-151.

653. Angleton Detective Kirk Coleman arrived on the scene about 1 :30 PM, and Applicant was taken into custody about an hour later. RR 7:109-110. Applicant gave his confession to Detective Coleman at 5:02 PM on January 12, 2012. RR 7:185.

654. There is no evidence that Applicant was pressured to confess because of the evidence obtained by the search warrant. Applicant told trial counsel that God had told him to tell the truth and confess. Applicant said once he confessed, it was always guilty all the way. State's Ex. 8, ¶7.

CONCLUSIONS OF LAW ON ISSUE 11

1. The claim that the Applicant's Fourth Amendment rights were violated by the search of his motel is an issue which should have been raised before the trial court or on appeal, but is not cognizable by the use of a writ of habeas corpus. Habeas corpus is an extraordinary remedy and is available only when there is no other adequate remedy at law. *Ex parte Cruzata*, 220 S.W.3d 518 (Tex. Crim. App. 2007). Consequently, habeas corpus may not be used to assert claims that could have been asserted on direct appeal. *Id.*; See *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989). The Appellant's had

his remedy in law of proceeding on a motion to suppress and taking the matter up on appeal.

2. In addition, in order to be cognizable in a writ of habeas corpus, the Applicant must first preserve error at both the trial court and appellate level. *Ex parte Kirby*, 492 S.W.2d 579 (Tex. Crim. App. 1973) (claim of insufficient probable cause in search warrant was not preserved at trial); *Ex parte Bagley*, 509 S.W.2d 332 (Tex. Crim. App. 1974) (claim of violation of Fifth Amendment not preserved at trial); *Ex parte Grigsby*, 137 S.W.3d 673 (Tex. Crim. App. 2004) (claim of violation of Fourth Amendment was not preserved on appeal). Applicant failed to preserve error either at trial or on appeal. It cannot be addressed by the use of a writ of habeas corpus.
3. Applicant can raise this issue only indirectly as an ineffective assistance of counsel issue, which is raised in Issue 12.

ISSUE 12

WHETHER APPLICANT'S TRIAL COUNSEL WERE INEFFECTIVE IN FAILING TO OBJECT TO EVIDENCE RESULTING FROM THE SEARCH OF THE APPLICANT'S MOTEL ROOM AND, IF SO, WHETHER THE APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE.

FINDINGS OF FACT ON ISSUE 12

All Findings of Fact on Issue 11 are hereby incorporated verbatim as if copied herein in their entirety by reference. The Court makes the following additional Findings of Fact concerning Issue 12.

655. Trial counsel filed a Motion to Suppress the Evidence obtained from Applicant's motel room based upon the initial entry into the room without a warrant. Trial Counsel's theory was it was not necessary for officers to physically enter the small bathroom to see if anyone was hiding there, and had they not entered, the knife in the toilet would not have been visible. However, at the suppression hearing the two officers both testified that the shower curtain was closed. RR 7:25; RR 58:93. Therefore, it was necessary for them to enter the bathroom to pull back the curtain. State's Ex. 1, ¶ ¶11 and 12; State's Ex. 8, ¶8. This was corroborated by the testimony of the officers at the original trial. FOF 651.

656. Since this testimony demonstrated a reason why the officers needed to enter the bathroom, which refuted Trial Counsel's primary reason for filing the motion to suppress, Trial Counsel requested and was granted additional time. State's Ex. 8, ¶¶8, 11.

657. After reviewing the testimony at the suppression hearing, trial counsel believed that, as a matter of trial strategy, they should concede the legal point which was not in their

client's favor so as to not affect counsel's credibility with the Court. *Id*.

CONCLUSIONS OF LAW ON ISSUE 12

1. On January 13, 2012, Applicant occupied Room 35 at the Economy Inn Motel and he had Fourth Amendment protection against warrantless searches. A motel occupant is entitled to Constitutional protections against unreasonable searches and seizures of his room. *Minnesota v. Olsen*, 495 U.S. 91 (1990); *Stoner v. California*, 376 U.S. 483 (1964).
2. Law enforcement did not obtain a warrant to search Room 35 of the Economy Inn Motel prior to their entry on January 14, 2012 at approximately 2:30 PM.
3. Absent a warrant, the state must demonstrate that the circumstances surrounding the search satisfy one of the exceptions to justify a warrantless search. *Stoner*, at 486; *Jones v. U.S.* 357 U.S. 493 (1958).
4. The state must demonstrate that both probable cause and exigent circumstances exist in order to enter Applicant's motel room without a warrant. *Gutierrez v. State*, 221 S.W.3d 680 (Tex. Crim App. 2007); *McGee v. State*, 105 S.W.3d 609 (Tex. Crim App. 2003).
5. The Court cannot accept Trial Counsel's reason for not going forward with the suppression hearing as sound trial strategy. While certainly all counsel want to make sure that they correctly recite facts and case law to every court, this Court has known Judge Teri Holder for many years. Judge Holder

was the trial judge handling the case at that time, and continuing with the hearing would not, in this Court's opinion, have affected trial counsel's credibility with Judge Holder. Therefore, this Court cannot hold that failing to complete the suppression hearing was a matter of sound trial strategy.

6. The Court must now address whether Applicant was harmed by trial counsel's failure to pursue the motion to suppress.
7. While there was some evidence that Applicant gave his consent to search his room, the Court does not find that this consent was sufficiently, unequivocal to authorize a search without a warrant. However, the search was proper under both the emergency and fleeing felon doctrines.
8. Law enforcement had probable cause to believe that the perpetrator of the assault against Mr. and Mrs. Wilcox was on the premises. The officers on the scene knew that the victim's vehicle was parked next to the motel, and a tracking dog tracked from the car to the vicinity of Applicant's room. The tracking dog then circled the property and found no indication that the person who left the victim's car had left the area of the motel. The peace officers knew a violent assault had been committed with a deadly weapon and had reasonable cause to believe that absent an immediate search, serious bodily injury or death might result to occupants of the rooms in the motel. *Brimage v. State*, 918 S.W.2d 466 (Tex. Crim. App. 1996), *cert. denied*; 519 U.S. 838 (1996); *Rangel v. State*, 972 S.W.2d 827 (Tex. App. — Corpus Christi 1998), (*pet. ref'd.*)

9. The facts of Applicant's case are similar to *Warden v. Hayden*, 387 U.S 294 (1967). In *Hayden* the defendant robbed a cab company with a weapon, and a witness followed a suspected robber to a particular house. The witness gave a description of the suspect, and the company dispatcher forwarded this to law enforcement. The police arrived within 5 minutes, and without a warrant, they searched the house and found a weapon and clothing similar to that used in the robbery. In Applicant's case, law enforcement had a description of the assailant and were aware that a knife was used in the vicious attack. The victims' car was found parked next to the motel less than 10 minutes after the assault was reported, and the K-9 tracking dog had indicated the driver of the vehicle was still on the premises. The language of the Court in *Hayden* would apply to this case.

    "The Fourth Amendment does not require police officers to delay in the course of an investigation if to do so would gravely endanger their lives or the lives of others. Speed here was essential, and only a thorough search of the house for persons and weapons could have insured that Hayden was the only man present and that the police had control of all weapons which could be used against them or to effect an escape." *Id.*; 387 U.S. at 298-299.

26. The facts in Applicant's case are also very similar to the facts in *U.S. v. Holland*, 511 F.2d 38 (5th Cir. 1975), (*cert. denied*). There police followed footprints in the snow from a bank that had been robbed to a location from which a car recently departed. They were able to locate the owner of the

vehicle who gave them the name of the person who entered who entered the vehicle where the footprints stopped. Law enforcement proceeded to the house that they knew was occupied by a convicted felon. Upon hearing a noise, they entered without a warrant. About 30 minutes had expired and the Court found probable cause to search without a warrant.

27. The perceptions of the officers for their need to search without a warrant were objectively reasonable. *Laney v. State*, 117 SW.3d 854 (Tex. Crim. App. 2003).
28. Once the entry without a warrant is permissible the officers can seize anything that is in plain view. *Rangel, supra.* Here there was a demonstrated need to enter the bathroom to see if anyone was hiding behind a closed shower curtain. Once in the bathroom the knife was in plain view in the toilet. At that point the officers vacated and obtained a warrant.
29. The evidence at Applicant's trial demonstrated that officers had a probable cause to search, and exigent circumstances existed that allowed them to enter Applicant's motel room without a warrant. Once the entry was justified, the knife was in plain view in the toilet. No evidence was removed until a search warrant was obtained.
30. Prevailing professional norms would have required trial counsel to proceed and obtain a ruling in connection with the motion to suppress they filed or object when the evidence was attempted to be introduced. They did neither. Trial counsel's reason for not proceeding with the hearing was not based on sound trial strategy.

However, Applicant can show no harm as Applicant was not coerced to confess, and he would not have prevailed on his motion to suppress.

ISSUE 13

WHETHER APPLICANT'S APPELLATE COUNSEL WAS INEFFECTIVE IN FAILING TO RAISE THE CLAIM ON APPEAL THAT THE JUDGE ERRED BY REFUSING TO PERMIT INMATE JOHNNY PINCHBACK TO TESTIFY AS TO PRISON CONDITIONS IN THE TEXAS DEPARTMENT OF CRIMINAL JUSTICE AND, IF SO, WHETHER THE APPLICANT WAS PREJUDICED BY ANY SUCH INEFFECTIVE ASSISTANCE.

FINDINGS OF FACT ON ISSUE 13

658. Outside the presence of the jury, Applicant attempted to qualify Johnny Pinchback as an expert witness on Texas prison conditions in the Texas Department of Criminal Justice (TDCJ). At this hearing, Mr. Pinchback stated that he had spent 27 years in prison and was later exonerated of the charges against him. He served his time entirely in one prison. Initially he was housed inside the unit, but later was housed outside as a trustee. RR 69:169-170, 173.

659. Mr. Pinchback had been convicted of aggravated sexual assault; he was not a life

sentence inmate. He testified, outside the presence of the jury, that he could present evidence of his experiences in prison, the conditions in the prison, its housing, the conditions of the unit, supervision, privileges, climate, what it was like sharing a cell, lockdowns, and regimentation. His classification was a S3 or S4 when he went in, but he was reclassified to a higher level three (3) years later. He was not allowed to be outside of the prison without supervision, and he was tightly supervised. RR 69:171-175.

660. Mr. Pinchback knew nothing about the Applicant or his charges. He had not met the Applicant during the Applicant's prior incarcerations. He did not know how the prison system would treat Applicant, who was being charged with an entirely different crime than Mr. Pinchback had been convicted of. RR 69:175-177.

661. There was no evidence that Mr. Pinchback knew anything about how the classification system in TDCJ would apply to Applicant.

662. Applicant sought to admit this evidence to show the severity of life in prison. Defense counsel stated that they would keep the testimony limited to the experience of Mr. Pinchback. RR 69:178-179. Trial Counsel claimed the testimony was needed to counter the possible misconception that inmates, "just

basically spend all their time working out and watching TV." RR 69:181.

663. The Court found that Mr. Pinchback's testimony would not pertain to any issue at punishment and would be confusing because Mr. Pinchback could not testify how the Applicant would be treated in prison. Trial counsel was permitted to make a Bill of Exception. RR 69:188-190.

664. In his offer of proof, Mr. Pinchback stated that he was imprisoned for 27 years for aggravated sexual assault at the unit located at Tennessee Colony. He was later exonerated of this offense. He stated that he was housed in a 4 foot by 8-foot cell that he shared with another inmate. The toilet was in the cell, so there was no privacy. He said the prison had a smell and was filthy with roaches and rats. The mattresses were only four inches thick, made of plastic, and uncomfortable. There was no air conditioning and it was hot. It was also very noisy, which made it difficult to listen to the television. In addition, the food was bad. Sometimes the inmates got bitten by spiders and infections would spread through the units. The inmates got one short shower each day, but the inmates could get a wash rag to wipe off. There were times the facility was on lockdown and the inmates could not get out of their cell. The lockdowns could last for as long as a month. Visitations occurred only once a week and sometimes there were no

visitations. Life is regimented and there are consequences for breaking the rules. Sometimes the guards beat up the inmates and privileges would be taken away. The inmates were heavily supervised outside the building. Mr. Pinchback did agricultural work. Some of the guards were physically and verbally abusive. RR 70:124-136.

665. The State had previously presented Paul Wilder, who had served on the State Classification Committee from 2005-2012. The State Classification Committee reviews each inmate and places them in units and classifications where they need to be for the benefit and security of the institution. Mr. Wilder explained the different classifications from G-1 through G-5, the latter being known as administrative segregation. A person sentenced to Life Without the Possibility of Parole (Life Sentenced Inmates) could enter TDCJ as a G-3 and could never rise any higher. G-3 offenders have contact with G- 1, G-2, G-3, and G-4 when walking, eating, recreation, during educational or religious activities, medical, and in day to day activities. They also are permitted either contact or non-contact visitation once a week. RR 65:60-68.

666. All Life Sentenced offenders are required either to have a job or be in school, unless medical issues prevent. RR 65:86-87.

667. Death Row inmates are housed like inmates in administrative segregation. They are

housed in a single cell and have no contact with other inmates. They are kept in restraints when they move about. RR 65:73-74.

668. Assault incidents occur in the penitentiary. RR 65:72.

669. They can occur in the general population as well as administrative segregation. RR 65:72, 16-20.

670. Weapons can be made by inmates out of "literally anything, such as pens, utensils can be melted down, razor blades, newspapers, locks and cans put in socks, homemade knives, or shanks. A G-3, Life Sentenced Offender can have access to those objects. RR 65:74-76. In some instances, G-3, Life Sentenced Offenders can be housed in the same housing area with G-2 offenders. RR 65:85.

CONCLUSIONS OF LAW ON ISSUE 13

1. Ineffective assistance of appellate counsel claims are governed by *Strickland*. *Smith v. Robbins*, 528 U.S. 259 (2000) ("[T]he proper standard for evaluating [a petitioner's] claim that appellate counsel was ineffective ... is that enunciated in *Strickland v. Washington*"); *Evitts v. Lucey*, 469 U.S. 387 (1985) (holding that the Fourteenth Amendment requires the assistance of counsel to appellants for their first appeal as of right); *accord Ries v. Quarterman*, 522 F.3d 517, 531-32 (5th Cir. 2008); *Ex parte Santana*, 227 S.W.3d 700 (Tex.

Crim. App. 2007). Appellate counsel has a duty to review the record and present any potentially meritorious claims. Applicant "must first show that appellate counsel was objectively unreasonable in failing to discover non-frivolous issues and to file a brief raising them. *Smith v. Robbins*, 528 U.S. 259 (2000). If Applicant meets this burden, he must then show a reasonable probability that but for appellate counsel's errors the result would have been different. *Smith*, at 285.

2. In his brief Applicant argues that the trial court erred in refusing to allow Mr. Pinchback to testify because he had specialized knowledge of Texas prison conditions. However, Mr. Pinchback's testimony outside the presence of the jury demonstrated that he had knowledge of prison conditions in only the one prison unit where he was incarcerated for the entire 27 years. It was not shown he had knowledge of the conditions in any other units, much less of the entire Texas prison system. He did not know how the prison system would treat Applicant or how Applicant would be classified by TDCJ. Furthermore, there was no testimony proffered that there were any life sentence inmates at the Tennessee Unit, or that he had even known or spoken with life sentenced inmates concerning prison conditions.
3. Applicant argues that Mr. Pinchback should have been permitted to testify as to the conditions on confinement experienced by life sentenced inmates in Texas prisons are directly relevant to the decision to extend mercy to a capital defendant because a juror may be more willing to vote in favor of a life sentence knowing that "life sentenced

inmates' living conditions are far from luxurious." Applicant's Brief on Issues Tried by Affidavit, pp. 182-83. However, Mr. Pinchback was not a life sentenced inmate, and the scope of his expertise was that the conditions were bad in the one prison unit where he was incarcerated for 27 years. He could not testify as to conditions in other units.

4. Applicant argues that "life sentence prison conditions are relevant to this inquiry because such evidence discredits "popular public perception" that federal prisons are like country clubs. Applicant's Brief on Issues Tried by Affidavit, p. 182. Mr. Wilder's testimony specifically showed this was not the case, as he testified that all life sentenced inmates are required to have a job or be in school, unless medial issues prevent this.
5. Applicant next argues that Mr. Pinchback's testimony was relevant to the future dangerousness issue to rebut Mr. Wilder's testimony that there were an insufficient number of corrections officers, and the officers "could not be everywhere at all times." Applicant argues that this testimony somehow intimated that prisoners serving a life sentence "would not be supervised." Applicant's Brief on Issues Tried by Affidavit, pp. 185-186. It is difficult for the Court to understand how Mr. Wilder's testimony would have left the intimation Applicant suggests. No expert is needed to explain to a jury that, whether in the context of a peace officer in the free world, or a correctional officer in a prison setting, there are never enough officers present at all times to prevent violence from occurring. One only needs to read a

newspaper or hear a newscast to know that violence occurs every day in all places as there are never enough officers to prevent violence from happening.

6. The Court recognizes that an expert, such as Mr. Pinchback, could be qualified by his experience to testify as to the prison conditions at the Tennessee Unit due to his experiences there. However, he was not qualified to testify as to prison conditions in all of the TDCJ prison units, and he had no knowledge of conditions that would be encountered by life sentenced inmates. Therefore, his testimony was not based on a reliable foundation.
7. Applicant failed to show that appellate counsel was objectively unreasonable in failing to discover a non-frivolous issue and filed a brief raising the issue concerning Mr. Pinchback's testimony.
9. In addition, Applicant has failed to demonstrate that Applicant was harmed because Mr. Pinchback did not testify.

TRIAL COURT'S SUMMARY OF ITS CONCLUSIONS OF LAW

The Court makes the following summary of its CONCLUSIONS OF LAW:

ISSUE 1: Applicant is not exempt from the death penalty because he is not intellectually disabled under the standard set out by the United States Supreme Court in *Atkins v. Virginia*, *supra*, or *Moore v. Texas*, *supra*.

ISSUE 2: Regional Public Defenders Office for Capital Cases (RPDO), who was appointed to serve as Applicant's trial counsel, did provide ineffective assistance of counsel by failing to furnish properly trained mitigation specialists to Applicant's trial team, and by failing to conduct a thorough mitigation investigation that could have provided evidence, which, even if it were not sufficient to demonstrate that Applicant was intellectually disabled under the *Atkins* standard, could still have been mitigating evidence that the jury could have considered. The deficient performance was sufficient to undermine confidence in the outcome of the trial.

ISSUE 3: Trial Counsel did not provide ineffective assistance of counsel in failing to present additional evidence regarding Applicant's social history. Applicant was not prejudiced by failure to investigate and present such additional evidence.

ISSUE 4: Applicant's trial counsel did not provide ineffective assistance of counsel in failing to provide his social history expert with additional evidence regarding Applicant. Applicant was not prejudiced by any such alleged omission by trial counsel.

ISSUE 5: Applicant's trial counsel was not ineffective for failing to object to the State's admission of Applicant's prior conviction of Injury to a Child. Applicant was not prejudiced by any such alleged omission by trial counsel.

ISSUE 6: Applicant's trial counsel was not ineffective in not presenting evidence that Applicant was subjected to alleged racial insults in jail. Applicant was not prejudiced by an such alleged omission by trial counsel.

ISSUE 7: Applicant's trial counsel was not ineffective in failing to object to the State's closing argument regarding the sentence Applicant received for his prior conviction for Injury to a Child. Applicant was not prejudiced by any such alleged omission by trial counsel.

ISSUE 8: Juror Deborah Henry did not engage in juror misconduct by checking two boxes in her jury questionnaire which indicated (1) she had not been the victim of a criminal act, and (2) she did not have a friend who had been a victim of a crime. Juror Henry was not shown to have any bias, either direct or implied, toward Applicant.

ISSUE 9: The State did not engage in prosecutorial misconduct in failing to inform the defense that information which Juror Deborah Henry had set out in her jury questionnaire was inaccurate. Applicant's Due Process Rights were not violated.

ISSUE 10: Juror Deborah Haney did not base her decision to sentence Applicant to death on outside influences from her sister or any other individual. Any appearance or presumption of impropriety concerning the discussion with her sister was rebutted by the clear and convincing testimony of Ms. Henry.

ISSUE 11: Applicant's Fourth Amendment Rights were not violated by the warrantless search of his motel room, as this claim is not cognizable by use of a writ of habeas corpus, but rather was asserted under Issue 12.

ISSUE 12: Trial counsel's reason for not pursuing the motion to suppress was not based on sound trial strategy. However, Applicant was not prejudiced by any such alleged omission by trial counsel.

ISSUE 13: Appellate counsel was not ineffective by failing to claim on appeal that the Judge erred by refusing to permit inmate Johnny Pinchback to testify as to prison conditions in the Texas Department of Criminal Justice. Applicant was not prejudiced by any such alleged omission by appellate counsel.

THE TRIAL COURT RECOMMENDS THE COURT OF CRIMINAL APPEALS DENY APPLICANT'S WRIT OF HABEAS CORPUS ON ALL ISSUES EXCEPT ISSUE 2. THE TRIAL COURT RECOMMENDS YOUR HONORABLE COURT GRANTS APPLICANT'S WRIT OF HABEAS CORPUS ON ISSUE 2 AND REMAND THIS MATTER FOR A NEW TRIAL ON PUNISHMENT.

EXHIBIT 1

SUMMARY OF WRITTEN DECLARATIONS SUBMITTED BY WRIT COUNSEL AND EXHIBITS WHICH WERE NOT CONSIDERED BY THE COURT FOR REASONS STATED IN THE FINDINGS OF FACT AND CONCLUSIONS OF LAW FOR ISSUES 3 AND 4.

APPLICANT'S ANCESTRY

1. Applicant's maternal great-grandmother, Polly Allen, (hereafter Polly) was born around 1875. Her father was born in Africa and her mother was born in Virginia. Polly lived in Fort Bend County, Texas, where she had ten children, six of whom survived.

Polly was illiterate, and her children could only read but not write English. Ex. 28.

2. Applicant's maternal grandmother, Katie Sanders, (hereafter Katie) was born in Needville, Fort Bend County, Texas. Attach. 13, ¶2.
3. In 1910, when Katie was 6 ½ years old, she, her mother, and her siblings lived and worked as farm laborers. Katie attended school for a period of time. Polly was a widow. Ex. 28.
4. At age 16, Katie was married and had a child. By the age of 25 in 1930, she was divorced with four children under the age of 10. Katie worked as a farmer in unincorporated Needville to support her family. Ex. 35.
5. Katie's daughter Olivia, Applicant's mother, was born on June 6, 1929. Olivia's father was Leon Bell, a married man living in Needville with his wife and two children. Leon Bell was not the father of Katie's other children. Attach. 13, ¶2; Ex. 33; Ex. 42.
6. Katie and James Sanders got married and had two children together and moved to Boling, Texas. Ex. 41.
7. The only available work for most poor black people in the area was in the fields, and in later years, both Katie and James "worked as sharecroppers in Needville, Texas" on land they rented. Attach. 13, ¶3.
8. When Olivia was in the in elementary school, Katie and James pulled her out of school to work in the fields to help them meet their quota of cotton. *Id*.
9. Carolyn Harris Duplechin (hereafter Carolyn) Applicant's sister, noted that "When the landowners wanted my grandparents to pick a

certain number of pounds, they had to pull together whatever resources they had to get the cotton picked. That included their young children. Education was a luxury that they could not afford. They picked cotton, com, alfalfa, and any other crops the landowners had. That was the only work for poor black people back then." *Id*.

10. Life working in the fields was difficult, and no less so because Katie was a harsh disciplinarian to her children. *Id*., p. 4.
11. Olivia got married when she was very young to her first husband, Mack Griggs, Sr. He was a much older than she was as he was born in 1911. Ex. 50. They had their first child, Mack Griggs, Jr. (hereafter Mack, Jr.) in 1944. Attach. 14, ¶1. Olivia was 14 years old when she had Mack Jr. Eighteen months later, she had her second child, Erma Jean Griggs (hereafter Erma Jean). They divorced after Erma Jean was born. Attach. 13, ¶5.
12. After Olivia's divorce from Mack Griggs, Sr., she and her two young children moved in with Olivia's parents, Katie and James, who lived in a small, three-bedroom house in Dinsmore, Texas, shared also with one of Olivia's cousins. Attach. 14, ¶7; Attach. 13, ¶2.
13. In late 1949, Olivia started a relationship with R. H. "Buck" Rutherford (hereafter Buck). Attach. 14, ¶8.
14. "Buck lived in Houston," and Mack, Jr. did "not remember ever meeting him and did not know much about him." Attach. 14, ¶8.
15. In 1951, Olivia met James Harris, Sr. (hereafter James Sr.), the father of Applicant. They were married November 5, 1951. Ex. 47; Attach. 13, ¶7.

16. James Sr. was born in 1931 to Annie and Tommie Harris and was the oldest of five children. Ex. 39.
17. Annie and Tommie Harris were married on December 16, 1930, and seven months later their son, James Sr., was born. Ex. 46.
18. Tommie Harris worked as a laborer on a farm, and Annie did domestic work for white families in the area. Ex. 39, Attach. 13, ¶7.
19. Tommie Harris and Annie had nine more children after James Sr. was born. Attach. 13, ¶8.
20. Annie died in 1944. Ex. 62.
21. Tommie was a heavy drinker. Attach. 13, ¶7.
22. James Sr. grew up working in the fields just as his family had for generations. The work was rough and exhausting. After a long day, he frequented the beer joins in Dinsmore. Attach. 13, ¶31.

APPLICANT'S PARENTS AND SIBLINGS

23. Olivia, James Sr., Mack, Jr., and Erma Jean moved to Iago, Texas. Iago was a tiny community just outside of Boling, which was a very small town itself. There were no jobs there. Most people either drove to Houston for work or worked at the sulfur plant in Newgulf. There were no hospitals or schools there either." Attach. 14, ¶10.
24. The Harris family and the Amey family lived on property owned by the Mick family. The daughter, Nola Amey, recalls, "My mother, my grandmother, and Olivia all worked inside the Micks' home, cleaning, to earn money." Both families "had to work a great deal because neither of our families had much money." Attach. 11, ¶¶2-3.

25. Though she had been pulled from school at an early age, Olivia valued education and made sure that her children were educated. Mack, Jr. and Erma Jean attended the segregated black school housed in the Boling Community Center. Attach. 14, ¶25.
26. Mack, Jr. and Erma Jean started school before schools were integrated. Mack, Jr.'s entire education was in the segregated black school, though Erma Jean was young enough to transfer to the newly integrated Boling High School for her senior year. *Id*.
27. Nine months after James Sr. and Olivia got married, their daughter Ethel Jewel Harris (hereafter Ethel) was born. Attach. 13, ¶9.
28. Ethel graduated from school in the bottom 5% of her class. At home, however, she excelled as a caretaker for her siblings. Olivia relied heavily on Ethel around the house, and "Ethel became like a second mother to her younger siblings." Ex. 65; Attach. 13, ¶9.
29. Doris Marie Harris (hereafter Doris) was born in 1954 to James Sr. and Olivia. Attach. 13, ¶10.
30. Doris did not do well in school and she dropped out before she graduated. Attach. 20, ¶3.
31. Eighteen months after Doris was born, in 1956, Olivia had another daughter, Clorie Lee Harris (hereafter Clorie). Attach. 13, ¶10; Ex. 43.
32. Clorie was "nice to everyone and more on the quiet side." Attach. 14; ¶15.
33. Two years after Clorie was born, in 1958, Olivia had another daughter, Wanda Faye Harris (hereafter Wanda). Attach. 13, ¶12.

34. Wanda was sent to live with James Sr.'s grandparents. Attach. 13, ¶12. In those days, if a family was struggling to raise a child, it was normal to send the child to be raised by other family members. Families had to help each other out. Attach. 11, ¶4, Attach 19, ¶2; Attach. 20, ¶6.
35. In those days in the town of Iago, the "white people lived on one side of town and the black people lived on the other side. The black people avoided the prejudice of the white people by staying segregated." Attach. 11, ¶5.
36. The small neighborhood the Harris family joined, called "The Hill," was "a small close-knit community of black families." Attach. 13, ¶21.
37. Olivia gave birth to Applicant on August 7, 1959, in El Campo, Texas at 6:43 PM. Ex. 44.
38. Applicant's birth certificate listed two "colored" parents who worked as farm laborers with seven other children. Ex. 44.
39. Applicant was quiet like his father. Attach. 11, ¶11.
40. Eighteen months after Applicant was born, Olivia had another daughter, Carolyn Jean Harris Duplechin (hereafter Carolyn). Attach. 13, ¶12.

APPLICANT'S CHILDHOOD HOME AND COMMUNITY

41. The Harris family's rental house on The Hill, where Applicant spent his childhood was very small and had only a family room, kitchen and two bedrooms. Applicant slept on a small bed near a door in Olivia and James Sr.'s room. The house did not have an indoor bathroom or indoor plumbing,

and the family had to travel three miles to Boling to get jugs of drinking water. Attach. 13, ¶¶23-24.

42. The people who worked in the fields were mostly black, and the people who owned the fields were normally white farmers. The Harris family did not own the land, and the family received one paycheck regardless of how many of the children helped. To earn extra money for the family, Olivia cleaned and ironed for white families in the area. Attach. 14, ¶9; Attach. 13, ¶25.
43. Applicant's mother, Olivia, was a heavy drinker, and she would sit on the front porch drinking beer while the children played in the yard. She had been raised to believe that if children were given alcohol at a young age, they would not become alcoholics later in life. Olivia also gave her children beer in their baby bottles to help them sleep. As they grew older, Applicant's sister Carolyn recounted, "When we were young, before we were even ten years old, our parents regularly gave us cups of beer." Attach. 11, ¶10; Attach. 13, ¶¶31-32; Attach. 14, ¶20.
44. For Mack, Jr. and Applicant, this early exposure to alcohol spurred drinking. "James (Applicant) started drinking alcohol regularly when he was in high school." Attach. 13, ¶32; Attach 19, ¶8.
45. 45. James Sr. also smoked cigarettes, and he would let his children light his cigarettes for him and "get a taste" before handing them over." Attach. 13, ¶31.
46. James Sr. often times did not come home and would stay out drinking and seeing other women, and his family would not see him until Sunday. If he did not come home Friday with his paycheck, his children would to bed hungry on Friday, had

nothing to eat all day, and did not get any food until Sunday. The local store, sometimes gave Olivia necessary items on credit, and Olivia started doing cleaning for a while to earn extra money. Attach. 14, ¶9; Attach. 13, ¶24, 26.

47. In 1962, when Carolyn was a year old and Applicant 3, two of Olivia's siblings met violent deaths. Her brother, Robert "Buddy" Lawrence's died from a gunshot wound of the back. Olivia's sister, Erma Lee Williams, died after a man threw a brick at her, hitting her in the chest. Attach. 14, ¶5, Ex. 57.
48. Olivia was the disciplinarian in the family. She "had a short fuse." "Today," Carolyn said, "people might call it abuse, but to use it was just a part of life." Olivia was "'quick to whoop her children," and would pop the children on the back of the head if they got an answer wrong. "She also kept a leather strap on the back of her recliner so that she could just reach for it if [the] kids upset her." Attach 13, ¶¶14, 33; Attach. 15, ¶4.
49. Olivia frequently beat James Sr. Their relationship had been volatile from the beginning. Their fights frequently erupted into violet altercations in front of the children when James Sr. would come home drunk. Olivia could not control James Sr. who frequently and openly cheated on her with other women. Attach. 13, ¶35.
50. Restaurants in Boling persisted in refusing service to black patrons. "Black people had to go into restaurants through the back door, and oftentimes were not allowed to eat in restaurants at all and instead had to be handed food out of the window," according to Nola Amey. She remembered one

barbecue restaurant, "where we had to go the back of the restaurant to order and wait for food, and it was extremely hot back there because that was where the fire pits were." Attach. 11, ¶5.

51. There were few jobs available to black workers in the area of Newgulf, which is near Iago and Boling, where Applicant grew up. The only positions available to black people were removing trash or mowing lawns at the plant. Some black adults were fortunate to get jobs at the Phillips 66 plant in Old Ocean, Texas. Attach. 20, ¶4; Attach 22, ¶13.
52. Applicant's school bus driver said it was plain to see that the Harris family was very poor. The children wore second-hand clothes, there were many small children at the house, and the interior of the house on Raymond Road was unfinished. Attach 16, ¶10.
53. In an attempt to help needy families, the school district instituted a program that allowed school children to work over the summer to earn some money for their families. Both Applicant and Carolyn took advantage of the program. Attach. 13, ¶42.
54. In 1972, Erma Jean, Olivia's first daughter, died from an asthma attack. Ethel rushed her to the hospital but she died along the way. Throughout her life, Erma Jean was plagued with poor health and a severe respiratory condition. On the day Erma Jean died, Carolyn and Applicant were playing in the house, and they knocked over and broke a vial of Erma Jean's asthma medicine. They felt confused and guilty because they broke her vial of medicine, but their mother Olivia told them it was part of God's plan. Attach. 13, ¶28.

55. Around 1973 or 1974 James Sr. left his family, and after he left, Olivia would not allow any of her children to visit him. Attach. 13, ¶37; Attach. 14, ¶23.
56. On September 3, 1976 Applicant's father died of "renal failure due to hypertension." Applicant was distressed by his father's death. Attach. 13, ¶41; Ex. 53.
57. Olivia found it ever more difficult to make ends meet. Her granddaughter went to the local food pantry in Boling twice a month to get free food such as cheese, cereal, rice, and beans. Attach. 15, ¶6.

APPLICANT'S EDUCATIONAL HISTORY

58. The month that Applicant entered first grade, his teacher administered the Metropolitan Readiness Test. He received low grades on the Metropolitan Achievement Test, which was used to assess how prepared a student was for the academic rigors of first grade. Applicant's first-grade teacher was concerned about his academic progress and noted Applicant was a "poor" risk next to his raw test score. Applicant was also given the Basic Pre-Primer and Basic Primer tests, and his first-grade teacher noted his scores as "Very Low" and "V. Low." Ex. 66; Attach. 22, ¶5; Attach. 23, ¶4.
59. Applicant's report card reflected that he was struggling academically in first grade. Attach. 22, ¶5; Attach. 23, ¶7.
60. Applicant's third-grade teacher, Ms. Jean Shaw, (hereafter Ms. Shaw) lived near the Harris family and remembered Applicant as a polite boy who respected his teachers and classmates. Because

Ms. Shaw taught her students in a self-contained classroom, she identified, "James needed more attention and help from me than most of my other students." Attach. 22, ¶¶4,5,7.

61. Ms. Shaw was able to provide one-on-one help to students, like Applicant, who were struggling in school. It was easiest to bring a student's grade up in a subject like spelling because all it required was memorization. Spelling was Applicant's strongest subject throughout school. Attach. 22, ¶¶7, 8; Attach 23; ¶¶7, 13.
62. Special Education did not exist in the district where Applicant was in school. Attach. 22, ¶11.
63. Applicant's sister, Carolyn was stronger than Applicant academically. Her teachers remembered that she was bright. She graduated and went to Blinn College and became a nurse. Attach. 14, ¶18; Attach. 22, ¶12.
64. Applicant had few hobbies in high school aside from football, and his only plan for his future was to play football. Attach. 24, ¶7.
65. Boling High School did not have special education classes when Applicant entered. The school used teacher recommendations and tests to determine the classes that best suited each student. Placements into remedial classes were not intended to be permanent, and students could join the regular classes once they had caught up. Attach. 16, ¶¶7,8; Attach. 25, ¶3.
66. In high school, Applicant took Vocational Agriculture I, II, and Ill. Michael Kalina (hereafter Mr. Kalina), who taught Applicant all three years, did his best to "reach out to students who were struggling in school and gave them extra help if

they needed it." Mr. Kalina remembered that Applicant struggled to complete his assignments, and often needed additional help from him. Mr. Kalina did not assign homework which allowed students who were struggling to complete their work during class. Attach 16, ¶¶3-6.

67. Applicant graduated from high school, but it was uncommon for students from Boling High School to go to college. Attach. 13, ¶18; Attach. 24, ¶8.

APPLICANT'S ADULTHOOD

68. Applicant's Uncle Charlie got him a job working at his construction company. After working with his uncle for a year, Applicant went on to work for Brown & Root, a subcontractor of the Phillips 66 plant in Old Ocean, Texas. Attach. 14, ¶30.
69. Applicant lived on and off with his mother through the late 1990s. His mother treated Applicant like a child and his sisters babied him. There is no evidence indicating that Applicant could cook anything other than simple meals. Attach. 11, ¶11; Attach. 15, ¶¶13-15; Attach 21, ¶3.
70. Applicant married Rose Abbott (hereafter Rose) at the Matagorda County Courthouse in 1982. Attach. 17, ¶4.
71. Rose paid the bills because when James would try to pay them, he did not understand what they said and he would give them to her to interpret. Rose, who worked nights, would leave Applicant pre-cooked dinners because "he did not know how to make dinner for himself." When something in the house broke, Rose handled it and called the landlord because she could explain the problem.

Applicant did not know how to do any handy work around the house. Attach. 17, ¶¶4-6.

72. When Rose set up a joint bank account for her and Applicant, Rose stated, "I do not think he would have been able to create his own checking account." Applicant could not balance a checkbook, so it was easier for him to use cash. Rose used to go to the bank with Applicant to cash his paychecks for him and he would give her all the money to handle. Attach. 17, ¶6.
73. Applicant and Rose remained very close with his family, visiting most weekends. Applicant drank and smoked marijuana sometimes but did not do harder drugs while they were together. She noticed that Applicant was especially reliant on Ethel, who she described as the "backbone of the family" and "like a mother figure." Ethel bought food and clothes for her mother and siblings since the family remained very poor. Attach. 17, ¶¶8-9, 11.
74. In 1985, Rose and Applicant divorced. Rose took care of the paperwork and money to get the divorce. Attach. 17, ¶12.
75. Applicant lived with a girlfriend after he and Rose divorced. When that relationship ended after about a year, Applicant moved back in with his mother, who was at that time raising four of her grandchildren. Attach. 15, ¶9.
76. In the late 1980s Olivia's health began to fail and she fell behind on the mortgage. In 1989, the Harris house was foreclosed. Attach. 15, ¶10.
77. Applicant, Olivia, and the four grandchildren moved in with Ethel who lived in Houston at this time. In 1990 Olivia passed away. Attach. 14, ¶33.

78. Ethel was working at a residential facility for people with severe disabilities called Sweetbriar Development Center in West Columbia, Texas. Applicant got a job there in the late 1980s where he met Bonnie Clark (hereafter Bonnie). Bonnie and Applicant became friends and later started dating. Attach. 12, ¶2.
79. In the early 1990s Bonnie and Applicant married. Bonnie managed all of the money, paid all bills, and bought the groceries and other necessities. Applicant did not have a car so Bonnie drove him to work. Bonnie also did most of the cooking because Applicant was not able to cook an actual meal although he would occasionally help Bonnie with the cooking. When he did, it would always be something very simple, such as making rice or wieners. Bonnie gave Applicant basic chores around the house to help out. *Id*., ¶¶4-5.
80. During their relationship, Bonnie realized that Applicant was addicted to crack, and though "When he was high, he became very hyper," he was still a nice person even when he was on drugs. Bonnie believed she and Applicant would still be together if it was not for the severity of his drug addiction. *Id*., ¶¶6-7.
81. After Applicant and Bonnie separated, he moved back in with his sister Ethel. *Id*., ¶8.
82. Ethel treated Applicant like a child though he was an adult. She did his laundry, bought his socks and underwear, or reminded him that he needed to buy those things himself. She also managed his money, and he did not have a bank account or a credit card. When he got his paycheck, he would cash it himself, pull out a few bills without counting first,

and give the rest to Ethel to keep for bills. However, because Applicant could not budget his money, Ethel would count out what she needed to pay the bills and give Applicant additional pocket money when he asked her for it. Attach. 15, ¶¶5, 16, 17.

83. After Applicant was released from prison in 2002, he had difficulty in renewing his driver's license. Ex. 70 and 71.
84. A year after Applicant was released from prison, in 2003, his half-brother Larry died at the age of 53 of a sudden heart attack caused by end-stage renal failure. Ex. 59. Not long afterwards, Applicant's grandfather, Tommie Harris, also passed away. He died of respiratory failure due to lung cancer. Ex. 55.
85. Applicant was closer to Ethyl that to any of his other siblings. She died of a heart attack in January, 2008, caused by end-stage renal failure at the age of 55. At the funeral, Applicant could not bear to look at her in the casket, and he left soon after he arrived. Attach. 15, ¶22; Attach. 18, ¶19; Attach. 17, ¶9.
86. After Ethel's death, Applicant's drug use got worse. He hung out with the wrong crowd and went to work less and less. Attach. 14, ¶33; Attach. 18, ¶19.
87. Applicant began to depend on his niece Tamara the same way he had depended on her sister, Ethel. Since fifth grade, Tamara had been in special education and was in the Special Olympics program until 2003 when she gave birth to her son in Ethyl's bathroom. Tamara did her best to help

Applicant by letting him stay with her and giving him money, though he resisted. Attach. 15, ¶¶8, 27.

88. Tamara moved out of her mother's trailer and into a one-bedroom apartment in Angleton, Texas. Applicant, Doris, Carmen, and Carmen's twins moved with Tamara and her son. Each month, Applicant would give Tamara his paycheck and Tamara gave him pocket money, the same way her mother had done. Attach. 15, ¶¶26-27.

89. Eventually Applicant moved into the Economy Inn Motel in Angleton, Texas. Tamara would come by once a month, collect his clothes, and wash them for him. Each week, she went to the grocery store and bought him groceries and things like deodorant, toothpaste, and underwear. *Id.*

Appendix D

IN THE 149TH JUDICIAL DISTRICT COURT
BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

Filed: October 7, 2019

APPLICANT JAMES HARRIS, JR.'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW ON ISSUES TO BE DETERMINED BY EVIDENTIARY HEARING

Mr. Harris, through his attorneys, submits these Proposed Findings of Fact and Conclusions of Law ("FFCL"), which accompanies a legal brief describing the procedural history of this case and provides appropriate argument for why the Court should adopt these FFCL. The Court, having considered James Harris's Initial Application for Writ of Habeas Corpus filed under Article 11.071 of the Texas Code of Criminal Procedure (Initial Application), the State's Answer, and briefing and exhibits from both parties, and having heard evidence and argument offered by the parties at an evidentiary hearing, makes the following Findings of Fact and Conclusions of Law under Article 11.071, Section 9.

Intellectual Disability

I. Significant Deficits in Intellectual Functioning and Diagnosis of Intellectual Disability

1. Dr. George Woods is a physician who specializes in psychiatry. Hr'g Tr. 17:4. The Court finds Dr. Woods's testimony to be credible.

2. Dr. Woods completed his undergraduate studies at Westminster College in Salt Lake City, Utah, and obtained his medical degree at the University of Utah Medical Center in Salt Lake City. He performed his medical surgical internship at Alameda County Hospital in Oakland, California and his psychiatric residency at Pacific Medical Center in San Francisco, California. He subsequently held a fellowship with the National Institute of Mental Health and the American Psychiatric Association in geriatric psychopharmacology. He has practiced medicine for more than 36 years. Hr'g Tr. 17:5-6.

3. Dr. Woods is well-trained in neuropsychiatry. Neuropsychiatrists are qualified to make medical diagnoses relating to intellectual disability. Hr'g Tr. 17:7-8.

4. Dr. Woods's education includes formal training in diagnosing intellectual disability, including courses with the American Association of Intellectual and Developmental Disability ("AAIDD"), and the International Society for the Scientific Study of Intellectual and Developmental Disability. Hr'g Tr. 17:8-9.

5. Dr. Woods has also taught courses on intellectual disability. Hr'g Tr. 17:9.

6. Dr. Woods has had clinical experience treating and diagnosing patients with intellectual disabilities since 1982. Hr'g Tr. 17:9.

7. Dr. Woods has taught numerous courses related to the diagnosis of intellectual disability. Hr'g Tr. 17:10-11.

8. Dr. Woods has evaluated hundreds of patients for the possibility of intellectual disability in his clinical practice. Hr'g Tr. 17:11.

9. Dr. Woods has been tendered and accepted as an expert in court in fields related to intellectual disabilities more than 40 times. Hr'g Tr. 17:12-13.

10. Dr. Woods has authored numerous book chapters and peer-reviewed articles in fields related to intellectual disability. Hr'g Tr. 17:14. Dr. Woods was accepted by the Court as an expert in the field of neuropsychiatry without objection. Hr'g Tr. 17:14-15.

11. Dr. Woods was asked to perform an evaluation of James Harris to determine whether Mr. Harris suffers from an intellectual development disorder. Hr'g Tr. 17:15.

12. It is Dr. Woods's "opinion that within a reasonable degree of medical certainty Mr. Harris suffers from intellectual disability." The Diagnostic and Statistical Manual, 5th Edition, describes the condition as an Intellectual Developmental Disorder. Hr'g Tr. 17:15.

13. "Intellectual disability can be looked at as mild, moderate[,] and severe." Hr'g Tr. 17:17.

14. "Someone that has mild intellectual disability has significant impairments in being able to function on a daily basis in the world." Hr'g Tr. 17:17.

15. If someone has a mild intellectual disability, he may not have "necessarily physical manifestations but will have even greater impairments of language, may have even greater impairments of being able to problem solve, [and] may have even greater impairments of independence." Hr'g Tr. 17:17.

16. There are "many things that a person with mild intellectual disability can accomplish, and that [can be] confusing to the layperson." Hr'g Tr. 17:17-18.

17. The Diagnostic and Statistical Manual, 5th Edition ("DSM-5") is "a manual that is put out by the American Psychiatric Association and it is a classification system that has been developed to enable practitioners to have what's called interrater reliability." Hr'g Tr. 17:18.

18. The DSM-5 is accepted as reliable and authoritative in the field of neuropsychiatry. Hr'g Tr. 17:20.

19. The User's Guide of Intellectual Disability, Definition, Classification, and Systems of Supports, 11th Edition, published by the American Association on Intellectual and Developmental Disabilities ("AAIDD"), is also accepted as reliable and authoritative in the field of intellectual disability. Hr'g Tr. 17:22.

20. A layperson cannot accurately diagnose a person with mild intellectual disability "[b]ecause there are no cues. There are no physical cues necessarily. You [cannot] look at someone and determine if they have mild intellectual disability. You [cannot] listen to someone. There is nothing in the way of their language that would tip you off to make you think that this person has mild intellectual disability." Hr'g Tr. 17:20.

21. People with mild intellectual disability can perform many of the same tasks and activities as people without intellectual disability. A "person with mild intellectual disability can get a driver's license. A person with mild intellectual disability can often complete certain levels of school, certainly middle school, many times high school, occasionally a year or so in college. A person with mild intellectual disability can play sports. A person with mild intellectual disability can work a job." Hr'g Tr. 17:20-21.

22. "Pleateauing" is a phenomenon that can occur in people with mild intellectual disability. Hr'g Tr. 17:21.

23. "Plateauing" indicates:

> [T]hat a person will often be able to get to a certain place in their academic career or get to a certain place in their professional career, but they really [cannot] go any further. Where you might see someone else that might want to become a foreman or take extra training in order to get further, someone with mild intellectual disability may not be able to do that. But to work at an everyday job, particularly today with technology where you've got many, many types of support, you would never be able to just look or listen, see how someone writes. Even someone with intellectual disability would be able to read. They would be able to do mathematics to a certain degree.

Hr'g Tr. 17:21.

24. Certain stereotypes often prevail about people

with intellectual disabilities. "The most significant stereotypes is that they sound a certain way, that their language will tell you whether this person has intellectual disability, or that they can't marry, they can't have relationships, or that they can't work on—they can't work a job, or that they often do poorly, that they always do poorly in school. None of those in any way imply mild intellectual disability." Hr'g Tr. 17:21-22.

25. The AAIDD User's Guide states that these types of stereotypes "must be dispelled." Hr'g Tr. 17:22.

26. In a case involving mild intellectual disabilities, people can perform complex tasks. It may take them longer to learn the task, and it may have to be broken down into smaller steps, sometimes called "baby steps," but people with mild intellectual disabilities "often can get to a point where they can do more complex tasks." Hr'g Tr. 17:22-23.

27. "The idea that a person with ID cannot get a driver's license, cannot buy a car, or cannot drive a car, that [is] not correct." Hr'g Tr. 17:23.

28. The idea "[t]hat a person with intellectual disability do not and cannot support their families, [that is] not correct." Hr'g Tr. 17:23

29. The idea "[t]hat a person with intellectual disability cannot romantically love or be romantically loved. We know better than that; and we certainly see persons with mild intellectual disability that have families, that have wonderful families and relationships." Hr'g Tr. 17:23.

30. Some people with mild intellectual disability can acquire the vocational and social skills for

independent living. Hr'g Tr. 17:23.

31. In people with mild intellectual disabilities, strengths and weaknesses can coexist at the same time. Hr'g Tr. 17:24.

32. When evaluating someone for intellectual disability, clinicians must "determine if a person is using supports because when you want to make the diagnosis of intellectual disability you want to evaluate that person without their use of supports." The clinician must examine how a person functions without a structure, without family, and without the extra help that might make a difference. They ask how the person functions without help and how they function independently. Hr'g Tr. 17:25.

33. Dr. Woods examined James Harris in March of 2016. He "reviewed the neuropsychological testing, as well as the intellectual functioning testing of Dr. Kasper's, as well as her testimony." He "reviewed the declarations of teachers that both taught Mr. Harris but also teachers that evaluated his school records. [He] reviewed his school records. [He] reviewed the very brief findings of some non- standardized testing, intellectual testing that had been done. [He] reviewed medical records of Mr. Harris. [He] reviewed an affidavit of Dr. James Patton who is an intellectual disability specialist." Hr'g Tr. 17:26; Applicant's Ex. 3 at ¶ 8

34. Since making his diagnosis, Dr. Woods has "reviewed the evaluation of Dr. Price; and [he] reviewed the evaluation of Dr. Fahey, a speech pathologist." Those materials "have reinforced [his] diagnosis." Hr'g Tr. 17:26.

35. In order to diagnose someone with an intellectual

disability, that person must show deficits in intellectual functioning and in adaptive functioning, and those deficits must be onset during the developmental period. Hr'g Tr. 17:27-28, 30.

36. Deficits in adaptive functioning can occurring in any one of the conceptual, social, or practical domains. Hr'g Tr. 17:28.

37. In the DSM-5, an IQ score is relevant to intellectual functioning, but it has been moved out of the specific criteria for determining an intellectual deficit. It is now considered to be an "associated feature." This is because:

> IQ test scores are approximations of conceptual functioning but may be insufficient to assess reasoning in real life situations and mastery of practical tasks. For example, a person with an IQ score above 70 may have such severe adaptive behavior problems in social judgment, social understanding, and other areas of adaptive functioning that the person's actual functioning is comparable to that of individuals with a lower score. Thus, clinical judgment is needed in interpreting the results of IQ tests.

Hr'g Tr. 17:29.

38. "IQ scores are not the best judgment of intellectual functioning and are clearly not the best judgment of brain functioning." There are "better tools today" than an IQ to measure intellectual functioning. Hr'g Tr. 17:29.

39. When examining James Harris, Dr. Woods used the criteria set forth in the DSM- 5. Hr'g Tr. 17:30.

40. The DSM-5 is distributed by the American Psychiatric Association. It is "the standard for any psychiatrist" who evaluates someone for intellectual disability. It is also recognized by the government as an appropriate authority on the issue. Hr'g Tr. 17:30.

41. "The Briseno Factors were factors that were developed outside of a clinical setting that were designed to be utilized [within] a court setting in terms of determining intellectual [disability]." The Supreme Court of the United States has rejected the Briseno Factors. "No other non[-]forensic setting, clinical setting where people are making the diagnosis of intellectual disability are those factors utilized." Hr'g Tr. 17:31.

42. Acknowledging an individual's strengths has very little role in making a diagnosis for intellectual disability. Hr'g Tr. 17:32.

43. Instead of focusing on strengths, clinicians focus on limitations and what "a person cannot do." Hr'g Tr. 17:32.

44. "Intellectual disability is, by definition, a neurodevelopmental disorder. It's an impairment of the brain. And so consequently the tools of neuropsychiatry and neuropsychology, as well as developmental psychology, are the most important tools to apply when making this diagnosis." Hr'g Tr. 17:33.

45. Dr. Woods conducted a neuropsychiatric examination when he evaluated James Harris for intellectual disabilities. Hr'g Tr. 17:33.

46. Dr. Woods wrote a report detailing his findings when he evaluated James Harris. Hr'g Tr. 17:34; Applicant's Ex. 3

47. Dr. Woods conducted the evaluation face-to-face in a quiet room at the Polunsky facility. Hr'g Tr. 17:38; Applicant's Ex. 3.

48. Dr. Woods noticed that James Harris's left arm was shorter than his right arm. That is "significant because it was not secondary to an injury." "[H]is hand was in intact. His fingers were intact. And so it speaks to a neurodevelopmental disorder.

This is clearly something that occurred during the neurodevelopmental period." Hr'g Tr. 17:39.

49. This difference in Mr. Harris's arms likely developed during the second trimester when he was in the womb, and it is a sign of a neurodevelopmental problem. Hr'g Tr. 17:40.

50. James Harris has a "flattened philtrum," which is in the area just above the upper lip. This is a sign of neurodevelopmental setback, often associated with fetal alcohol spectrum disorder. Fetal alcohol spectrum disorder is a sign of a deficit in intellectual functioning. Hr'g Tr. 17:41.

51. When Dr. Woods examined James Harris, Mr. Harris "was able to attend to the environment," and he "was able to focus on" Dr. Woods, "but he was easily distractible." James Harris's "level of distractibility" was such that it "speaks to impaired focus" and "impaired attention." Impairments of attention are a sign of deficits in intellectual functioning, but also of adaptive functioning in both the conceptual and practical domains. Hr'g Tr. 17:41-42.

52. During the examination, "Mr. Harris was very cooperative. He was able to focus on the interview, but he was also acquiescent. He would ask [Dr. Woods] to repeat questions. He would want to make sure that the answer that he gave was okay. He was frequently unsure of certain answers." In his professional opinion, Dr. Woods believes James Harris was engaging in "masking," exhibiting a term psychiatrists refer to as "a cloak of competence." Hr'g Tr. 17:43.

53. Acquiescence and masking are signs of deficits in intellectual functioning and deficits in adaptive functioning in the social domain. Hr'g Tr. 17:43-44.

54. Acquiescence is sometimes mistaken for a strength when in actuality it is an adaptive and intellectual deficit. Hr'g Tr. 17:44.

55. Dr. Woods found that James Harris had difficulties related to mental flexibility. Mental Flexibility "is a core symptom of problem solving. In order to solve a problem, [you have] got to be able to take all of the factors, all of the elements into consideration." Mental flexibility "is clearly related to intellectual functioning." Hr'g Tr. 17:45-46.

56. James Harris's mental flexibility "is significantly impaired." Hr'g Tr. 17:46.

57. James Harris also demonstrated deficits in multitasking, which is evidence of deficits of adaptive functioning in the practical domain. Hr'g Tr. 17:46-47.

58. James Harris demonstrated signs of "repetition" and "getting stuck." Dr. Woods found that James Harris demonstrated deficits in multitasking, which is a sign of deficits in intellectual functioning. Hr'g Tr. 17:47-48.

59. Dr. Woods found that James Harris demonstrated signs of deficits in perseveration, which means that an individual "may not be as effective at solving problems." Hr'g Tr. 17:48.

60. Dr. Woods found that James Harris's "internal mood state" was "inappropriately upbeat, given his circumstances." Hr'g Tr. 17:49.

61. Dr. Woods found that the prison system provides many supports for James Harris which make the prison life inappropriate for evaluating him for intellectual disabilities. For example, "[h]e doesn't have to cook. His meals are served to him." "[He is] told when to shower." "His clothes are given to him. He [does not] have to change. He [does not] have to do many of the functional academics of buying, taking, or having a credit card or a bank account." Things that he had difficulty with in the outside world have been taken over. "And so consequently, he [does not] have to really order his books. His commissary is given to him. So he's able to do these things. [He is] able to order commissary. If he wants a book [he is] able to order a book right there." He does not have to perform the various steps to accomplish these things that he would have to in the outside world. This is why prison life is not an appropriate measure for whether someone has intellectual disabilities. Hr'g Tr. 17:50.

62. Dr. Woods found that the need to live with structural supports is a sign of deficits in intellectual functioning and deficits in adaptive functioning in the practical and conceptual domains. Hr'g Tr. 17:50.

63. Dr. Woods found that James Harris demonstrated deficits related to independence, which is a sign of deficits in intellectual functioning and

adaptive functioning in the practical domain. Hr'g Tr. 17:52-53.

64. Dr. Woods found that James Harris could not adequately describe his medical needs or medical condition, which is a sign of adaptive deficits in the practical domain. Hr'g Tr. 17:53-54.

65. Dr. Woods found that James Harris required serious assistance from others in order to get by in the world. Mr. Harris's dependence on others is a sign of deficits in intellectual functioning and adaptive functioning in the practical domain. Hr'g Tr. 17:54-55.

66. Dr. Woods described serious difficulties in James Harris's "working memory," including an inability to recall basic facts about the things in books that he had claimed to have read. Hr'g Tr. 17:56-57.

67. Dr. Woods characterized James Harris's difficulty with memory as a sign of deficits in intellectual functioning and adaptive functioning in the conceptual and practical domains. Hr'g Tr. 17:58-60.

68. Visuospatial skills are a measure of whether we can see the "big picture." They are the "end result" of what psychiatrists refer to as "executive functioning." Hr'g Tr. 17:61-62.

69. The "Clock Test" is a screening test for visuospatial skills. The test asks the subject to draw a clock set to a particular time. This is a "deceptively elegant" test because even though it sounds very simple, the test involves several elements, including the shape of the clock, the numbers, and the ability to draw the hands correctly. Hr'g Tr. 17:62-63.

70. Dr. Woods described James Harris efforts on the

clock test as "significantly impaired," such that he has "real impairments" in visuospatial functioning. Hr'g Tr. 17:63-64.

71. Dr. Woods described James Harris's deficits in visuospatial skills as a sign of deficits in intellectual functioning and adaptive functioning in the practical and conceptual domains. Hr'g Tr. 17:64-65.

72. Constructional ability is a right-brain function that is similar to visuospatial skills. When James Harris was given a cube, he was unable to draw the cube. James Harris displayed signs of constructional apraxia, which is a core symptom of brain dysfunction. Hr'g Tr. 17:65-66.

73. Dr. Woods detailed James Harris's difficulty with basic and functional mathematics. Dr. Woods characterized this as a sign of deficits in intellectual functioning and adaptive functioning in the conceptual and practical domain. Hr'g Tr. 17:67-69.

74. Dr. Woods's original expert report relied upon James Harris's performance on the Wide Range Achievement Test to evaluate his reading. However, Dr. Woods found that Dr. Fahey's comprehensive reading test—especially its test of comprehension—is a much more useful test of reading for purposes of evaluating intellectual disability than the reading subpart of the Wide Range Achievement Test. Hr'g Tr. 17:70-72. Dr. Woods testified that Dr. Fahey's assessment of Mr. Harris's reading comprehension is more accurate than the Wide Range Achievement Test, which found that Mr. Harris read at a seventh grade reading comprehension level, but Dr. Fahey's assessment shows that Mr. Harris's reading comprehension is really at a fourth grade level. *Id.*

75. Dr. Woods found that James Harris's poor performance on Dr. Fahey's reading tests corroborate the affidavits and evidence the difficulty James Harris had throughout his time in school. Dr. Woods found that James Harris's deficits in comprehension are a sign of deficits in intellectual functioning and adaptive functioning in the conceptual and practical domain. Hr'g Tr. 17:73-74.

76. Dr. Woods administered another executive functioning test to James Harris called the "Fishing Boy Test," on which he scored poorly. Dr. Woods found that James Harris displayed a level of concrete thinking that impairs comprehension. Dr. Woods found that these deficits in problem solving and executive functioning were signs of deficits in intellectual functioning and adaptive functioning in the conceptual and practical domains. Hr'g Tr. 17:78-81.

77. "Abstraction" is the concept of being able to "put together pieces" and to "see the whole of the pieces," which is similar to "being able to solve a puzzle." Hr'g Tr. 17:82.

78. Dr. Woods found that James Harris has extreme difficulties in dealing with abstraction. Dr. Woods found that this is a "significant impairment" in adaptive functioning in the practical domain. Hr'g Tr. 17:83-84.

79. Dr. Woods found that James Harris:

> [H]as difficulty getting the big picture, has difficulty with comprehension, gets stuck, has real problems with mental flexibility. These impairments in intellectual functioning relate directly to

> the adaptive problems he has in terms of both conceptual and practical. He has real problems with attention. He needs support in order to function at age appropriate levels. He has problems with memory. He has difficulty seeing the big picture. He has problems with reading comprehension, and he has significant problems effectively problem solving.

Hr'g Tr. 17:85.

80. Dr. Woods also found that "[p]ractically [James Harris's] problems with attention cause him to get distracted. He has difficulty multitasking." "[H]e was able to learn how to drive a forklift but he did it poorly." These types of shortcomings are typical of:

> [P]eople that have intellectual disability that are able to get licenses. But the literature says that people that have intellectual disability have about four times the number of accidents [than] people that don't have intellectual disability. So they can pass the test. [It is] out there in real life in ecological validity that they have problems. He certainly was dependent for a great deal of his life. He certainly has difficulty, not in the structured setting, asking for medical help. But even then not being -- not remembering his medications.
>
> Hr'g Tr. 17:85-86.

81. Dr. Woods concluded that James Harris displayed significant deficits in adaptive functioning in two of

the three domains—practical and conceptual. He found that the "deficits in those domains relate directly, are related directly to the problems he has in intellectual functioning." Hr'g Tr. 17:86.

82. Dr. Woods found that the connection between James Harris's deficits in intellectual functioning and adaptive function correspond just as the DSM-5 states that they should. Hr'g Tr. 17:86.

83. Based on the battery of tests he applied to James Harris and the inventory he collected, Dr. Woods diagnosed James Harris with mild intellectual development disorder, a mild intellectual disability. Hr'g Tr. 17:87; Def's Ex. 3.

84. Dr. Woods testified that alcohol has negligible effect on intelligence and on IQ. Hr'g Tr. 17:89.

85. Academic literature does not speak to cocaine being a drug that has an impact on IQ. Hr'g Tr. 17:89-90.

86. Dr. Woods found that there was no indication that substance use had any impact on James Harris's IQ scores. Hr'g Tr. 17:89.

87. Dr. Woods reviewed another IQ test administered to Mr. Harris: a group IQ test called a Beta IQ test. Hr'g Tr. 17:90. Beta IQ tests are group tests. Group tests are not methodologically appropriate for measuring an individual's IQ. They are not methodologically appropriate because you cannot know if a participant is cheating or being influenced by others in the testing room. This is why they are rejected by the AAIDD. Hr'g Tr. 17:90-91.

88. The WAIS IV administered by Dr. Kasper in 2012 and a more recent WAIS IV administered by Dr. Price

were the only IQ tests that Mr. Harris had that were not group tests. Hr'g Tr. 17:90, 94-95.

89. Dr. Woods found that Dr. Kasper performed neuropsychological testing that was not meant to discover whether or not a patient has an intellectual disability. Specifically, "Dr. Kasper was not looking for intellectual disability. Dr. Kasper really was looking for possibly other types of impairments. And her diagnoses really are aimed at predemential illnesses, disorders like mild cognitive impairment or mild behavioral impairment." Hr'g Tr. 17:95-99.

90. Dr. Kasper also performed a smell test on Mr. Harris. Impairments in smell will give you clues about how an individual's frontal lobes are working. And alcohol can directly impact the frontal lobe. Hr'g Tr. 17:99-100.

91. Mr. Harris scored in the 73rd percentile for his age and gender on the smell test, which means he was in the normal range for age and gender in terms of that part of the frontal lobe. Hr'g Tr. 17:99-100.

92. Dr. Kasper conducted a WAIS-IV evaluation of Mr. Harris. The WAIS-IV Index is the Wechsler Adult Intelligence Scale, which is made up of a battery of tests. Hr'g Tr. 17:101-02.

93. When Dr. Kasper conducted the WAIS-IV examination, Mr. Harris scored a composite score of 75. She noted that this composite score is the 5th percentile— that is, 95 percent of the people that are normed with Mr. Harris did better than he did in terms of IQ. Hr'g Tr. 17:101-02.

94. Dr. Woods testified that an IQ score of 75 is "within the range that is normally considered for Mild

Intellectual Developmental Disorder." Hr'g Tr. 17:102.

95. IQ scoring is not hard and fast. It can range from 4 to 5 points below or above the scored number. Thus, Dr. Woods testified that Mr. Harris's scores could be as low as 70 or as high as 80. Hr'g Tr. 17:102-03. Accounting for the Flynn Effect, Dr. Kasper concluded that Mr. Harris's IQ score falls within a range of 69.18 and 78.18, to a 95% degree of confidence. Applicant's Ex. 193.

96. Neuropsychological testing is a better determinant of brain function than IQ testing, and it can provide context to understand how an IQ score can be skewed. Hr'g Tr. 17:103.

97. Dr. Woods testified that Dr. Kasper's neuropsychological testing demonstrates that Mr. Harris has "pretty significant neuropsychological defects." Not only that, but his neuropsychological defects are in problem solving, a vulnerable area of comprehension, which tends to skew his IQ scores lower, rather than higher. Hr'g Tr. 17:103-04.

98. Dr. Woods explained the categories included in the WAIS-IV, which include: verbal comprehension, perceptual reasoning, working memory, processing speed, vocabulary, digit span, recalling digits, information, letter number sequencing, comprehension, picture completion, coding, block design, visual puzzles, figure weights, symbol search, and cancellation. Hr'g Tr. 17:103-06.

99. Dr. Woods testified that, as a diagnosing medical doctor who is a neuropsychiatrist, Mr. Harris's relative weaknesses from this testing include Similarities and Matrix Reasoning—two areas where he scored a 3—as well as others like Information and

Comprehension. Mr. Harris's relative strengths include Symbol Search, Coding, Vocabulary, and Letter Number Sequencing. Hr'g Tr. 17:107.

100. As a diagnosing neuropsychiatrist, Dr. Woods testified that he would analyze Mr. Harris's relative strengths and weaknesses by observing whether the WAIS scores are consistent with the highs and lows of other instruments administered to that individual. In Mr. Harris's case, Dr. Woods gave the example of abstracts: when Mr. Harris took the Similarities test, he did not do well. Taken together with his history of difficulty in the Abstract test, that provides Dr. Woods with an important clue. Hr'g Tr. 17:108.

101. Dr. Woods testified that the WAIS-IV was an initial step for his diagnosis for James Harris, especially because his scores were within the range for mild intellectual disability. However, the WAIS-IV score is not the end of the diagnosis. Hr'g Tr. 17:108.

102. For example, the Flynn Effect would decrease Mr. Harris's scores slightly. Hr'g Tr. 17:108. The Flynn Effect is a statistical phenomenon that every year after a test has been normed, the IQ score will increase by .3. So, for example, if a test were scored 10 years ago, one would adjust that score down 3 points. Hr'g Tr. 109.

103. James Harris's scores were normed in 2008. By 2012, then, the normed score would decrease by 1.2, making the score 73.8. Hr'g Tr. 17:108-11.

104. The American Psychological Association suggests that the Flynn Effect is a real phenomenon and it is important to adjust the scores, especially in situations like Mr. Harris's, where the Flynn Effect can make a difference between whether someone has

intellectual disability or not. Hr'g Tr. 17:109.

105. The views that Dr. Woods expressed about the Flynn Effect are generally accepted in the field of neuropsychology. These views are also generally accepted in the field of neuropsychiatry. Hr'g Tr. 17:110.

106. Dr. Kasper also performed a Wide Ranging Achievement Test, or WRAT-4, which tests academic functioning and academic achievement. Hr'g Tr. 17:110. The WRAT is an exam of academic functioning and academic achievement. It looks at sight reading, reading comprehension, spelling, and math. Hr'g Tr. 17:111; Applicant's Ex. 193.

107. In light of Dr. Fahey's testing, Dr. Woods revised his neuropsychiatric mental status with respect to Mr. Harris's reading ability. Dr. Woods testified that Dr. Fahey's assessment of Mr. Harris's reading comprehension is more accurate than the Wide Range Achievement Test, which found that Mr. Harris read at a seventh grade reading comprehension level. Dr. Fahey's assessment shows that Mr. Harris's reading comprehension is at a fourth grade level. Hr'g Tr. 17:112-13.

108. Dr. Woods testified about the declarations he reviewed, including Mr. Harris's teachers' declarations. Hr'g Tr. 17:113. In those declarations, one of his former teachers stated that he likely received higher scores than he achieved, and that his school scores were likely higher than his abilities. Hr'g Tr. 17:113.

109. Dr. Woods testified that Dr. Fahey's examination of Mr. Harris's reading comprehension at a fourth grade level aligns with these artificially

inflated scores. Hr'g Tr. 17:113.

110. It is Dr. Woods's opinion that Mr. Harris's reading comprehension is within the range for intellectual disability. Hr'g Tr. 17:113.

111. Dr. Kasper performed additional tests on Mr. Harris. Those tests included the Controlled Oral Word Association ("COWAT"), which is a test of recollection— specifically, it looks at different categories and how individuals can recall those categories. Hr'g Tr. 17:116-17.

112. When Mr. Harris took this test, he had three intrusion errors on the COWAT, which means he added words that were not on the original list to his list of words. Dr. Woods testified that intrusion errors are problematic because they show that the subject is not recalling the words that are on the list. Dr. Woods testified that these intrusion errors are an intellectual functioning problem. Hr'g Tr. 17:117.

113. In Dr. Woods's professional opinion, Mr. Harris has a mild intellectual disability. As someone with a mild intellectual disability, he can function on a superficial level. That is, there are things that Mr. Harris can do. There are things that he can memorize. There are things that he can read. There are things that he can write and things that he can say. However, as his testing continues into effective complexity, it shows that it is difficult for Mr. Harris to function. Hr'g Tr. 117-18.

114. Dr. Kasper also administered a Category Test to Mr. Harris. The Category Test is a series of subtests aimed at problem solving, which starts at relatively easy decisions and advances to more complex and difficult decisions. Hr'g Tr. 17:119-20. It is an

important test of executive functioning and problem solving. Hr'g Tr. 17:121.

115. Mr. Harris had seventy errors on the Category Test. Mr. Harris's score of seventy is a "pretty significant error rate." Hr'g Tr. 17:120-21; Applicant's Ex. 193. He testified that the cutoff on the Category Test is closer to a score of 34 or 35 errors. Hr'g Tr. 17:120-21; Applicant's Ex. 193.

116. Mr. Harris also took a Tactual (sic) Performance Test. In that test, the individual is blindfolded and has cutout of shapes and a board with corresponding shapes. The series of shapes are placed into the individual's hand and the individual puts them into the corresponding spot on the board. The subject performs this task with both his dominant hand and his non-dominant hand. Hr'g Tr. 17:123.

117. Mr. Harris's performance on the TPT indicated that he had problems with the location of the blocks. Hr'g Tr. 17:123. While the test shows the ability to sequence, weigh, and deliberate,, Mr. Harris had difficulty with those tasks. Mr. Harris's performance revealed severe impairment according to the Halstead norms. Hr'g Tr. 124-25; Applicant's Ex. 193.

118. Dr. Kasper also tested Mr. Harris with the Aphasia Screen. Two of the main types of Aphasia are expressive Aphasia and receptive Aphasia. Expressive Aphasia can cause garbled speech, while receptive Aphasia is more when a person hears something but cannot quite understand it. Hr'g Tr. 17:125.

119. Mr. Harris is able to hear but cannot fully understand what he hears, which Dr. Woods classified as Receptive Aphasia. Mr. Harris also has constructional dyspraxia. Hr'g Tr. 17:126.

120. The neuropsychological tests that Dr. Kasper conducted provide a more comprehensive picture of Mr. Harris's brain function than what can be ascertained exclusively from an IQ test. Hr'g Tr. 17:126; Applicant's Ex. 193. All of the core tests that Dr. Kasper administered to Mr. Harris demonstrated that Mr. Harris is impaired. *Id.*

121. Mr. Harris's testing showed that he had errors in his Aphasia screening. Hr'g Tr. 17:125-26.

122. The Halstead General Neuropsychological Deficit Scale is a score that shows how brain impaired the subject is. Hr'g Tr. 17:126.

123. Mr. Harris scored a 35 on the Halstead General Neuropsychological Deficit Scale ("GDNS"). Eighty-five percent of brain damaged subjects have GNDS of 34 and above. Thus, Mr. Harris—a person with mild intellectual disability—also exhibits signs of *significant brain impairment*. Dr. Woods noted this is a very important point. Hr'g Tr. 17:126; Applicant's Ex. 193.

124. The Halstead Impairment Index is an index that goes through from zero to one. Seven of the score tests of the Halstead-Reitan battery are used to determine the Halstead Impairment Index. A score of zero means no impairment, and the scale goes from zero to one. Mr. Harris received a score of one on the Halstead Impairment Index, *the highest score on the Index*. Hr'g Tr. 17:127.

125. A score of one on the Halstead Impairment Index means that all of the core tests showed some level of impairment. The cumulative effect of these scores gets you the impairment index of one. Hr'g Tr. 17:128.

126. Dr. Kasper's summary also noted that "comparison to Halstead norms suggests greater impairment than Heaton." Hr'g Tr. 17:128. Dr. Woods explained that this is a comparison between the Dr. Heaton norming system and Dr. Halstead's norming system: while the Halstead norms want you to look at the person and their scores exactly the way the scores are, the Heaton norms take norming into consideration. Hr'g Tr. 17:128.

127. Dr. Kasper also says that Heaton "assumes lower IQ due to ses/race that is not n-e-s-c warranted due to NAART, [the] high spelling score." Hr'g Tr. 17:128-29. Dr. Woods explained that Dr. Kasper assumed that the lower IQ is really due to socioeconomic status and race. Hr'g Tr. 17:128-29.

128. While Dr. Kasper took Mr. Harris's high spelling scores into consideration, Dr. Fahey's testing showed that his high spelling scores are much more a function of memorization than a function of coding. Hr'g Tr. 17:129.

129. Dr. Kasper's summary also noted that "[m]ild deficits in sustained attention and acquisition over time in context of good memory once it is learned on verbal memory, suggest possible vascular issues." Hr'g Tr. 17:129-30. Dr. Woods explained that meant Mr. Harris has the ability to recall things that he gets into his mind.

130. Mr. Harris had difficulty identifying numbers on his right hand and his left hand, which is called graphesthesia. Hr'g Tr. 17:131. Graphesthesia, in addition to Mr. Harris's math problems and notable facial problems, indicate that Mr. Harris has problems in transferring information between his right and left

brain hemispheres. Hr'g Tr. 17:131-32. These impairments, according to Dr. Woods, could relate to Fetal Alcohol Spectrum Disorder. Hr'g Tr. 17:131-32.

131. Dr. Woods explained that while Mr. Harris may have a good memory but he has difficulty transferring information between hemispheres of his brain. That kind of skill set becomes problematic with a test that he has never taken before. Hr'g Tr. 17:133.

132. Dr. Woods testified that Dr. Kasper diagnosed Mr. Harris with a mild cognitive disorder that could lead to vascular dementia. But Dr. Woods testified that a number of factors lead him away from a diagnosis of vascular dementia, including: *first*, the fact that Mr. Harris had exhibited these same problems during the developmental period, including his problems with math, reading, and handling money; and *second*, Mr. Harris's IQ testing between 2012 and 2017 did not exhibit a decrease in the screening functions. Hr'g Tr. 17:134.

133. As a diagnosing physician, Dr. Woods believes that Dr. Kasper surrounded her IQ testing with neuropsychological testing that supports her findings and supports Mr. Harris's score of 75. Hr'g Tr. 17:135-36.

134. Dr. Woods explained that Dr. Kasper did exactly what the DSM-5 prescribes: she was analyzing an IQ score of 75, and the DSM-5 says that neuropsychological testing can be very valuable in looking at intellectual functioning. Dr. Kasper did neuropsychological testing to corroborate her intellectual functioning tests. Hr'g Tr. 17:136.

135. The Practice Effect is very important. It can occur in IQ testing as well as neuropsychological

testing and can last up to thirteen years. Hr'g Tr. 136-37. Dr. Price administered the *same* WAIS-IV to Mr. Harris as Dr. Kasper had earlier administered. When Mr. Harris took the same test the second time with Dr. Price, his score increased. Hr'g Tr. 17:137. Dr. Woods explained that someone administering the same test must "at least take into consideration the Practice Effect." Hr'g Tr. 17:137. Dr. Woods testified that he has concerns that the Practice Effect impacted the score, and cited to articles that discuss the extended practice effects. Hr'g Tr. 17:194

136. After reviewing Dr. Kasper's summary and raw data, in addition to Dr. Price's report and materials, it is Dr. Woods's professional opinion that to a reasonable degree of medical certainty, Mr. Harris has an intellectual disability, also referred to as Intellectual Developmental Disorder. Hr'g Tr. 17:138.

137. Dr. Woods opined that James Harris has significant adaptive deficits in two domains: the practical domain and the conceptual domain. Hr'g Tr. 17:140-43.

138. Dr. Woods relied on Dr. Patton's adaptive functioning assessment as well as Dr. Fahey's functional academic testing to reach his conclusion that James had significant adaptive deficits in two domains, the practical domain and the conceptual domain. Hr'g Tr. 17:143.

139. Dr. Patton also determined that Mr. Harris had significant deficits in both the conceptual and practical domains in terms of adaptive functioning or adaptive reasoning. Dr. Woods testified that his own examination of Mr. Harris supported problems and deficits in adaptive functioning directly related to Mr.

Harris's adaptive functioning. Hr'g Tr. 17:143.

140. Dr. Woods testified that the neuropsychological testing and Dr. Fahey's testing both give significant support to the witness declarations about Mr. Harris's adaptive deficits. Hr'g Tr. 17:145.

141. Dr. Woods also reviewed Dr. Price's examination of Mr. Harris. Dr. Woods noted that Dr. Price considered Mr. Harris's past criminal behaviors in his evaluation. Hr'g Tr. 17:146. Neither the AAIDD nor the Diagnostic and Statistical

Manual suggest including criminal behavior in an adaptive deficit investigation. Hr'g Tr. 17:145-46.

142. Criminal behavior is not included in the DSM-5, and criminal behavior is not adaptive behavior. Hr'g Tr. 17:146. The AAIDD manual instructs to not use past criminal behavior or verbal behavior to infer level of adaptive behavior. Criminal behavior cannot be normed. Hr'g Tr. 17:146-47.

143. After assessing Dr. Price's investigation into adaptive deficits, it is still Dr. Woods's professional opinion that Mr. Harris meets the criteria of Intellectual Developmental Disorder, or intellectual disability. Hr'g Tr. 17:147.

144. Dr. Woods relied on Dr. Fahey and on Dr. Patton to form his professional assessment. It is common for a treating physician to rely upon other professionals in reaching a diagnosis of intellectual disability. Consultation with other professionals facilitates more accurate evaluations and diagnosis of intellectual disability. Hr'g Tr. 17:147-48.

145. The AAIDD User's Guide embraces the

importance of clinical judgment. Clinical judgment is considered to be a special type of judgment rooted in a high level of clinical expertise and experiences that emerge directly from extensive data. Clinical judgement was an important part of Dr. Woods's diagnosis of Mr. Harris. Hr'g Tr. 17:149-50.

146. Individuals with mild intellectual disability cannot be immediately identified. For instance, the way someone talks is not an indication of whether they have intellectual disability. Hr'g Tr. 17:150.

147. After exercising his clinical judgment, Dr. Woods diagnosed Mr. Harris with Intellectual Developmental Disorder (mild intellectual disability). Hr'g Tr. 17:150.

148. To diagnose intellectual disability under the DSM-5, one must first determine whether an individual exhibits deficits in intellectual functioning such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. Hr'g Tr. 17:198-99. Second, the individual must exhibit deficits at adaptive functioning, such that without ongoing support, the adaptive deficits limit functioning in one or more of daily life activities, such as communication, social participation, and independent living across multiple environments, such as home, school and community. Hr'g Tr. 17:199. Third, intellectual and adaptive deficits must have onset during the developmental period. Hr'g Tr. 17:199.

149. Dr. Woods testified that IQ tests do not provide much insight into an individual's ability to problem solve, plan, reason, learn from experience, and other important items to an intellectual disability

assessment. Hr'g Tr. 17:199-200.

150. The DSM-5 instructs that an intellectual disability diagnosis is based on both clinical assessment and standardized testing of intellectual and adaptive functioning. Hr'g Tr. 17:200-01.

151. The DSM-5 does not sanction isolation of singular traits when diagnosing intellectual disability; one must collaboratively understand how the symptoms impact every day function. Hr'g Tr. 17:202-03.

152. The DSM-5 recommends that multiple areas and multiple resources be relied on to determine either intellectual functioning or the adaptive functioning. Hr'g Tr. 17:203.

II. MR. HARRIS HAS SIGNIFICANT ADAPTIVE DEFICITS IN BOTH THE PRACTICAL AND CONCEPTUAL DOMAINS

A. Dr. James Patton

153. Dr. James Patton was asked to assess Mr. Harris's adaptive functioning in this case. Dr. Patton specializes in special education with a focus on mild intellectual disability. Hr'g Tr. 16:116. The Court finds Dr. Patton's testimony to be credible.

154. Dr. Patton specializes in special education and focuses on individuals with mild intellectual disabilities. Hr'g Tr. 16:116. Dr. Patton received a Bachelor's Degree at the University of Notre Dame

and then joined the military. After his service, he received a Master's Degree in special education at the University of Virginia. He taught special education in Charlottesville public schools before returning to the University of Virginia for a Doctorate in special education. Hr'g Tr. 16:117.

155. Dr. Patton has worked in the field of intellectual disability for 46 years. Hr'g Tr. 16:117-18. He has taught courses on special education at the University of Virginia, the University of Hawaii, and internationally for over ten years. Hr'g Tr. 16:117. He currently teaches at the University of Texas, where he has been for over 28 years. Hr'g Tr. 16:118-19.

156. Dr. Patton has been published extensively. He has been involved with over 60 books and written 50 chapters in 50 different books. He has also authored or co- authored approximately 60 journal articles in professional journals. Hr'g Tr. 16:119. Dr. Patton has been involved in two books specifically focused on intellectual disability. Hr'g Tr. 16:119-20. He is currently an associate editor for a journal called Intellectual and Developmental Disabilities. Hr'g Tr. 16:120. Adaptive functioning has been a part of the professional definition of intellectual disability for many years. Hr'g Tr. 16:121. Dr. Patton has clinical experience with individuals with intellectual disabilities. In addition to working in a school with intellectually disabled students, he ran a program that offered courses for adults with intellectual disabilities. For the last ten years, he has been the faculty advisor for an organization called Best Buddies, which pairs university students with adults in the community with intellectual disabilities. Hr'g Tr. 16:121-22. That

program allows Dr. Patton to interact with intellectually disabled people every day. Hr'g Tr. 16:122.

157. Dr. Patton has led trainings on intellectual disability and specifically adaptive functioning for mitigation specialists in death penalty cases. Hr'g Tr. 16:122-23.

158. Dr. Patton has been involved in over 60 capital cases and testified in thirteen. In the cases where he did not testify, he did not find significant deficits or sufficient impairment in adaptive functioning. Hr'g Tr. 16:123-24.

159. Dr. Patton became involved in this case in 2015. Hr'g Tr. 16:116. He was asked to evaluate Mr. Harris's adaptive functioning, which is a term used to describe how well an individual adapts to everyday life. Hr'g Tr. 16:117. During the evidentiary hearing, the Court accepted Dr. Patton as an expert in the field of adaptive functioning as it relates to the field of intellectual disability.

160. Dr. Patton found that Mr. Harris has adaptive functioning deficits that were evident during the developmental period. Hr'g Tr. 16:124-25.

161. At the time Dr. Patton wrote his first affidavit in Mr. Harris's case, he referred to the DSM-5 and the American Association on Intellectual and Developmental Disabilities, which was the applicable standard at that time. Hr'g Tr. 16:145. Today, Texas law applies the DSM-5 definition. Hr'g Tr. 16:126-27.

162. The DSM-5 definition of intellectual disability has three criteria: deficits in intellectual functioning, deficits in adaptive functioning, and evidence of some

of those deficits during the developmental period. Hr'g Tr. 16:127.

163. Dr. Patton focused his analysis on Mr. Harris's adaptive functioning. Hr'g Tr. 16:127.

164. The adaptive functioning criterion envelops three domains, one of which must be met to satisfy the criterion: conceptual, social, and practical. Certain skills fall within each of these domains. Hr'g Tr. 16:127.

165. The social domain includes interpersonal skills, social judgment, social perception, the ability to get along with people, and the ability to make and keep friends. Hr'g Tr. 16:128.

166. Skills within the conceptual domain include reading, writing, math, logical reasoning, and language, as well as the ability to set goals for yourself and make decisions to direct your own life. Hr'g Tr. 16:128.

167. Skills that fall within the practical domain are general self-management skills that one uses in everyday life, including personal hygiene skills, home living, using community services, and taking care of one's health and safety, and employment. Hr'g Tr. 16:128-29.

168. The DSM does not set an age cap for the developmental period. Dr. Patton said that the developmental period may extend to up to 22 years old. Hr'g Tr. 16:129-30. Dr. Patton explained that the neuroscience research suggests that the brain develops into the mid-twenties. The Social Security Administration has even issued a definition of intellectual disability that includes the adaptive

functioning criterion with an age range up to twenty-two years. Hr'g Tr. 16:130. But even so, Dr. Patton found significant adaptive deficits in the developmental period at age 18. Hr'g Tr. 16:190.

169. To assess adaptive functioning, Dr. Patton looks at an individual's records, interviews people who know them, and performs a formal assessment. Hr'g Tr. 16:131-32.

170. Common records reviewed during an adaptive functioning assessment include school records, medical records, employment records, and social security records. Hr'g Tr. 16:131.

171. Because records are silent as to a person's actual behavior, you also need to interview individuals who observed how the subject of the adaptive functioning assessment acted in everyday life. Hr'g Tr. 16:132.

172. An assessment of the individual alone can also be insufficient because many people "mask" their weaknesses and will report that they are better at something than they really are. Hr'g Tr. 16:132-33. There are two types of masking: active masking and passive masking. Passive masking refers to a person's ability to come across as capable and almost-naturally hide their weaknesses. Active masking occurs when someone actively makes an effort to say that they are more competent than they actually are. Hr'g Tr. 16:133-34.

173. Dr. Patton interviews the subject themselves in the early stages of his adaptive functioning assessment because it is important for him to be able to tell the other individuals he interviews that he knows the subject. Hr'g Tr. 16:133.

174. The DSM-5 does not require practitioners to use a formal instrument in assessing adaptive functioning. Dr. Patton did not use one for his assessment of Mr. Harris because there were not enough individuals available who knew Mr. Harris during the developmental period to provide a comprehensive measure. Hr'g Tr. 16:134.

175. A person with intellectual disability can have both struggles and relative strengths. Hr'g Tr. 135. When assessing adaptive functioning, Dr. Patton identifies areas where the person struggles with the demands of everyday life, as well as their strengths. Hr'g Tr. 16:134-35. This method is supported by manuals published by the AAIDD. Hr'g Tr. 16:135.

176. There are four levels of intellectual disability: mild, moderate, severe, and profound. Hr'g Tr. 16:136.

177. People with *profound* intellectual disabilities cannot communicate, have little to no social interaction, and are entirely dependent on others for their everyday, basic needs. Hr'g Tr. 16:136-37.

178. On the other hand, with respect to individuals with *mild* intellectual disability, it is not possible to determine if someone has an intellectual disability just by looking at them. Hr'g Tr. 16:137-38. In the conceptual domain, people with mild intellectual may have difficulties learning, but can still learn. While they may have strengths in some academic subject areas, they will struggle in others, particularly in reading, writing, and math. Further, although it may take a close examination to notice, they will struggle with self-determination and self-direction skills like problem solving. Hr'g Tr. 16:138-39.

179. In the practical domain, those with mild

intellectual disabilities are likely able take basic care of themselves. And they can often get jobs and keep them for extended periods. Still, they will often need support with everyday tasks. Hr'g Tr. 16:139-40.

180. Dr. Patton assessed Mr. Harris's adaptive functioning according to the standards and principles that are commonly used in the field: examining his records, reviewing statements in his case, and interviewing individuals who know Mr. Harris. Hr'g Tr. 16:141.

181. Dr. Patton also met with Mr. Harris in person in 2016 for three hours. They discussed his daily routine and had a conversation about Mr. Harris's interests. Hr'g Tr. 16:142.

182. Since Dr. Patton submitted his affidavit in this case, he re-interviewed a few individuals he interviewed in 2016 and interviewed additional individuals. Hr'g Tr. 16:141-42.

183. Dr. Patton found Mr. Harris functions well in the social domain, but that doesn't rule out intellectual disability because the DSM-5 only requires that the subject display deficits in one of the three domains. Hr'g Tr. 16:143.

184. Dr. Patton found that Mr. Harris demonstrated significant adaptive deficits in the conceptual domain during the developmental period, primarily in math and reading. Hr'g Tr. 16:145.

185. Mr. Harris did show strength in one area of the conceptual domain: spelling. But that did not affect Dr. Patton's assessment because there were other areas that were more problematic. Hr'g Tr. 16:144-45

186. Mr. Harris had an extremely difficult time

managing money during the developmental period. He could not save money or plan for the future, balance and keep a checkbook, pay bills, or even cash checks. These struggles are with applied math. Hr'g Tr. 16:145-46.

187. Mr. Harris had supports during the developmental period in the conceptual domain from his teachers and family members. Two teachers Dr. Patton interviewed indicated that Mr. Harris was given extra help at school. Family members told Dr. Patton that Mr. Harris needed help from his other siblings to complete his homework. Hr'g Tr. 16:146. Mr. Harris was unable to fill out rental paperwork for an apartment, so his ex-wife had to handle the paperwork for their new apartment. Hr'g Tr. 16:151.

188. These issues continued into adulthood. Mr. Harris was not able to do any applied math. Hr'g Tr. 16:145. He could not set up a bank account and when people helped him to do so, he quickly overdrew his account. He was not able to pay his own bills. He was unable to manage important documents that are necessary in adulthood. Hr'g Tr. 16:147-48.

189. Mr. Harris had a lot of support in the conceptual domain as an adult from family members, spouses and girlfriends. For example, when he was divorcing his first wife, she had to handle the paperwork for him. Mr. Harris also had to rely on other people to manage his bills. Hr'g Tr. 16:148.

190. The DSM-5 lists more complex daily living skills that fit into the practical domain of mild intellectual disability. They include the ability to organize your home, child care, food preparation, and money management. Hr'g Tr. 16:149.

191. Based on Dr. Patton's interviews with family members, his assessment of Mr. Harris, and documents, Dr. Patton found significant adaptive deficits in the practical domain. Hr'g Tr. 16:152. Mr. Harris could not cook and could not do his own laundry. Dr. Patton found that to be significant because other individuals in Mr. Harris's family, including males, knew how to cook. Hr'g Tr. 16:149-50. Mr. Harris could only cook very simple meals like opening up tuna and putting it on bread. He could not follow step-by-step instructions.

192. Mr. Harris could not do his own laundry. Hr'g Tr. 16:152-53. Mr. Harris also could not shop or navigate a grocery store. He needed assistance to purchase the cars he owned and crashed them quickly after buying them. Hr'g Tr. 16:153.

193. Mr. Harris also struggled with work. He had numerous jobs but they were all manual labor, entry-level jobs. He was able to do those low-level jobs because they only required physical stamina. Mr. Harris never had a job that required a higher level of conceptual skills. Hr'g Tr. 16:153-54.

194. Mr. Harris worked at the docks for many years but remained an entry-level laborer. While he was certified to drive a forklift, it was difficult for him to operate it. He did not obtain certifications for more advanced positions. Hr'g Tr. 16:154- 55.

195. Based on Dr. Patton's expertise, he believes Mr. Harris knew he was not good at driving the forklift so he did not want to do it. And Mr. Harris did not want to get certifications for more advanced positions because he did not believe he had the skills to do those either. Mr. Harris knew he was competent at laborer

jobs, so he did not want to veer from that occupation. Hr'g Tr. 16:155-56. In the literature, this behavior is referred to the "expectancy of failure." It is common for individuals with intellectual disabilities because they have often encountered failure in school and other places and lack interest in pursuing things they believe they will fail at. Hr'g Tr. 16:156.

196. Dr. Patton found significant evidence that Mr. Harris had deficits in applied practical skills during the developmental period. When he and his first wife were looking for an apartment, she had to handle all of the rental paperwork because he could not. Hr'g Tr. 16:150:-51.

197. Mr. Harris received support in the practical domain during the developmental period. Mr. Harris was also heavily reliant on his mom and continued to live with her into his early twenties. After Mr. Harris's mother passed away, he relied on his sisters to help him, including his younger sisters. His uncle helped him get his first job. Hr'g Tr. 16:151-52.

198. Mr. Harris had practical supports to help him with skills in the practical domain in adulthood. He almost always lived with someone else as an adult, including his first wife and his sister Ethel. Hr'g Tr. 16:151. Even in the periods where he lived at the motel, people took care of him: they would bring him food, do his laundry, and care for him when he was sick. Further, in one payment a month to the motel, Mr. Harris could cover utilities, rent and everything else. So he did not have to manage bills. Hr'g Tr. 16:157.

199. Mr. Harris's sister, Ethel, was a mother figure to him. He lived with her after his mother passed

away. Hr'g Tr. 16:157. When he didn't live with her, she supported him by cooking for him and doing his laundry. She also co-signed a loan for a car for him. Hr'g Tr. 16:158.

200. Mr. Harris's niece, Tamara, also supported Mr. Harris. When her mother Ethel died, she provided the same supports her mother did, like providing food and laundry. Hr'g Tr. 16:158-59.

201. Tamara and Ethel would go grocery shopping for Mr. Harris and bring the groceries to the motel. Mr. Harris did not shop at the grocery store himself. He was able to go to the convenience store to get snacks. Hr'g Tr. 16:159.

202. Mr. Harris also did not shop for his own personal hygiene items. His family members needed to go and get those for him. Hr'g Tr. 16:159-60.

203. Mr. Harris never procured employment by himself. During the developmental period, his uncle and his sister, Ethel, found jobs for him. As an adult, Mr. Harris's friend got him a job on the docks. Hr'g Tr. 16:160.

204. Dr. Patton was originally contacted in 2015 and all of the information regarding Mr. Harris's adaptive deficits was available at that time. Hr'g Tr. 16:161.

205. Dr. Patton concluded that Mr. Harris has sufficient impairment in both the conceptual and practical areas. Those were present during the developmental period and continued into adulthood. Mr. Harris's adaptive functioning satisfies Prong B of the definition of intellectual disability in the DSM-5. Hr'g Tr. 16:161-62.

206. Dr. Patton takes an objective approach to looking at adaptive deficits. Hr'g Tr. 16:163-64.

207. Dr. Patton interviewed eight people who knew Mr. Harris and interviewed some witnesses multiple times. He also reviewed 14 declarations from witnesses that were collected by the OCFW. For those who he interviewed who had also provided declarations to the OCFW, the interviews and declarations were consistent. Hr'g Tr. 16:188-89.

208. Dr. Patton did not tell the interviewees that he was conducting an adaptive behavior assessment to determine if Mr. Harris had intellectual disability. Dr. Patton does not typically tell witnesses he is conducting an adaptive deficit assessment because he does not want to influence their answers. Hr'g Tr. 16:189-90.

209. Dr. Patton considered Mr. Harris's drug use in his assessment. Mr. Harris's drug uses was not a problem in his early years. Dr. Patton considered whether the drug use affected Mr. Harris's adaptive functioning later in life. Hr'g Tr. 16:190- 91.

210. Dr. Patton determined that during the period Mr. Harris was using drugs, the drugs did not affect his daily performance. Mr. Harris was able to function during the day and took the drugs at night. Hr'g Tr. 16:191. For example, Mr. Harris was able to perform his job at the docks during the day and would use drugs at night. Hr'g Tr. 16:191-92.

211. Dr. Patton did not find any evidence to show that Mr. Harris used drugs or abused alcohol during the developmental period. Hr'g Tr. 16:192.

212. When Dr. Patton examined Mr. Harris's school

records, he learned that there was no special education in the school system when Mr. Harris was in school. Dr. Patton interviewed teachers who believed that Mr. Harris should have been in special education. Hr'g Tr. 16:192-93. He also learned that one of Mr. Harris's teachers graded on effort, rather than on performance, such that a student could get a good grade without grasping the content. Hr'g Tr. 16:193. Because of that and other factors, he testified that grades can be misleading, including his ranking of 57 out of 74 students, such that he had to "get under the hood" to understand Mr. Harris's performance in school. Hr'g Tr. 16: 172, 193.

213. In Dr. Patton's expert opinion, Mr. Harris's adaptive deficits are related to his intellectual deficits. Hr'g Tr. 16:194-95.

B. DR. KATHLEEN FAHEY

214. Dr. Kathleen Fahey is a speech language pathologist and professor at the University of Northern Colorado. She specializes in speech language pathology and has a minor in reading. Dr. Fahey's speech language pathology focuses on developmental speech and language development and disorders. Dr. Fahey focuses on the language characteristics of children with language and learning disorders, and she focuses on literacy assessment and remediation. Hr'g Tr. 16:52-53. The Court finds Dr. Fahey's testimony to be credible.

215. Dr. Fahey earned her undergraduate degree from Bowling Green State University, majoring in speech language pathology. She earned a master's degree in speech language pathology from Kent State University. She earned a PhD in speech language

pathology from Michigan State University. Hr'g Tr. 16:53-54.

216. While at Michigan State, Dr. Fahey worked in a clinical setting. At the clinic, she was responsible for a caseload of clients from the community. Her primary role was to serve those clients in addition to or in support of the education of undergraduate and graduate students that are getting degrees in speech language pathology. Her work at the clinic involved about 30 to 40 clients who were intellectually disabled. Throughout her career, Dr. Fahey has worked with approximately 75 to 100 intellectually disabled clients. Hr'g Tr. 16:54-55.

217. Dr. Fahey was tendered as an expert in the area of speech language pathology. She was accepted by the Court with no objection from the State. Hr'g Tr. 16:59.

218. Dr. Fahey first met Mr. Harris in December of 2018. Hr'g Tr. 16:53.

219. Dr. Fahey reached two opinions in her work on the Harris case. Her first opinion was that Mr. Harris has deficits in both oral and written language. Her second opinion was that Mr. Harris's oral and written language deficits occurred during the developmental years. Hr'g Tr. 16:59-60.

220. Dr. Fahey performed her assessment of Mr. Harris by administering both standardized and procedural tests in oral and written language. Specifically, she administered the Gray Oral Reading Test, 5th Edition; a book readability analysis; the Bader Reading and Language Inventory's graded passages for listening comprehension; the Bader Reading and Language Inventory's spelling test; a

writing sample analysis; and an oral language sample analysis. Hr'g Tr. 16:60.

221. To test Mr. Harris's reading ability, Dr. Fahey administered to Mr. Harris the Gray Oral Reading Test, 5th Edition, also known as the GORT-5. The GORT-5 is a standardized assessment tool that looks at four primary areas that compromise reading. These would include reading rate, reading accuracy, reading fluency, and reading comprehension. Hr'g Tr. 16:60-61.

222. Reading rate is the reading speed that an individual is able to achieve. Reading accuracy is a measure of the ability to accurately read words. Fluency is a combination of reading rate and reading accuracy. Reading comprehension is the ability to understand what is read. Reading fluency determines a person's ability to decode words off the page—essentially to accurately and quickly read words. Reading comprehension, on the other hand, is the ability to understand the content of what one is reading. Hr'g Tr. 16:61-62.

223. Decoding is the process in which people decipher words. It is the process in which people see letters and words and decipher them on a page. Hr'g Tr. 16:62.

224. If someone is successful at reading fluency, the person is not necessarily good at reading comprehension. Hr'g Tr. 16:62.

225. Dr. Fahey administered the GORT-5 because it is a well-standardized, comprehensive test that looks at reading. It is widely accepted in the field. Hr'g Tr. 16:62.

226. Dr. Fahey administered the GORT-5 to Mr. Harris in accordance with the standards that are accepted in the area of speech and language pathology. Hr'g Tr. 16:63.

227. The cutoff age for the GORT-5 is 23 years, 11 months. The authors of the GORT-5 wanted to account for any post-secondary education beyond high school. Hr'g Tr. 16:63-64.

228. When Dr. Fahey scored Mr. Harris's GORT-5, she found that he had varied ability in terms of his skills across these areas of rate, accuracy, fluency, and comprehension as measured by grade equivalency and percentile. In reading rate, Mr. Harris scored in the 5th percentile, with a grade equivalency of Grade 5 and 2 months. His accuracy was scored at Grade 11, with a percentile of 25. His fluency, was a grade equivalency of 7.2 with a percentile rank of 9. Comprehension was Mr. Harris's lowest score with a grade equivalency of 4.2 and percentile rank of 2. Hr'g Tr. 16:68-70.

229. Looking at Harris's GORT-5 results, Dr. Fahey drew the conclusion that he fits the profile of someone who has specific comprehension deficit in reading, which means that his comprehension score is significantly lower than his ability to read in terms of accuracy and rate. Hr'g Tr. 16:70-71.

230. Dr. Fahey performed an analysis on 13 of the books found in Mr. Harris's cell. There were four books she did not examine. One was the Bible, and she was unable to determine which version of the Bible it was. She did not perform an analysis on a study guide of the Bible that she was not able to obtain. She did not perform the analysis on the dictionary because it is not

appropriate to perform a readability analysis on a dictionary. She also did not perform the analysis on a book of editorial cartoons because it is also not appropriate to perform a readability analysis on that type of book. Hr'g Tr. 16:71.

231. Dr. Fahey does not know whether Mr. Harris read any of the books found in his cell. Hr'g Tr. 16:72.

232. To perform the readability analysis, Dr. Fahey selected samples from each book. She examined paragraphs that contained at least 100 words. She selected four paragraphs across the breadth of each book from different chapters. Each paragraph was then analyzed with a tool that is available online that uses eight readability formulas in order to provide statistics on the particular samples that correspond to grade level readability estimates. Specifically, the eight formulas that the readability tool utilizes are the Flesch Reading Ease Formula, the Flesch-Kincaid Grade Level Formula, the Gunning FOG Formula, the SMOG Index, the Coleman-Liau Index, the Automated Readability Index, and the Linsear Write Formula. The readability tool and its formulas are commonly used in the area of speech language pathology and reading. Hr'g Tr. 16:72-73.

233. As an example, the book "Live to See Tomorrow" had a readability index that is about grade 2 to 3, which means that 7 to 8-year-olds should be able to comprehend the text. Hr'g Tr. 16:76

234. Stephen King's "Revival" contained mixed results. Of the four paragraphs, one was at grade level 4, another was at grade level 6, the third was at grade level 9, and the final paragraph was at grade level 10. Combining all paragraphs, the book had a readability

level at grade 5 and an automated readability index at grade 5/6, which is comparable to a 10 or 11-year old. Hr'g Tr. 16:76.

235. Dr. Fahey concluded that Harris would most likely have moderate success in reading books in his cell with a readability around grade 5 because some portions of those books would be accessible to second and third grade-level readers. Dr. Fahey concluded that the nonfiction books found in Harris's cell were written at the college level and that it is doubtful that he would be able to read them. Hr'g Tr. 16:77.

236. Dr. Fahey found that for the books found in Mr. Harris's cell, as difficulty increased, his ability to comprehend would suffer. Hr'g Tr. 16:77-78.

237. Dr. Fahey used the Bader Reading and Language Inventory to examine Harris's listening comprehension by using graded paragraphs. The Bader Reading and Language Inventory is a criterion referenced collection of tasks that is used to examine a variety of aspects of literacy. Dr. Fahey used the graded passage section in order to get a measure of Mr. Harris's listening comprehension. She measured his listening comprehension as a comparable measure to Mr. Harris's reading comprehension because a person's reading level does not necessarily match their oral language ability. Hr'g Tr. 16:78.

238. Dr. Fahey concluded that Mr. Harris's listening comprehension falls somewhere between the 2nd and the 4th grade level, with this instructional goal in mind, and that this is consistent with his reading comprehension level which was at the 4th grade. Hr'g Tr. 16:80-82.

239. Dr. Fahey also performed the Bader

Inventory's spelling test. The spelling test features a series of word lists ranging from the primer level to the 5th grade level. The Bader Inventory's spelling test stops at the 5th grade level because by the 5th grade students have learned the skills of spelling—using phonics, using visual memory for silent letters, and using the knowledge of rules and conventions. Some teachers continue practicing spelling beyond the 5th grade, but not by much because students at the 5th grade level are expected to know how to spell words. Hr'g Tr. 16:82-84.

240. Mr. Harris accurately spelled all of the words on the Bader Inventory's spelling test. Those results did not surprise Dr. Fahey because spelling is the mirror opposite of decoding. Because Mr. Harris's accuracy in decoding is relatively good, it was not surprising to her that he would be able to use those phonic skills in order to spell. Hr'g Tr. 16:83-84.

241. Dr. Fahey also analyzed Mr. Harris's writing and determined that it had a readability consensus that varied between the 3rd and 4th grade level for the letters he wrote and at about the 4th and 5th grade level for the jailhouse grievances that he wrote. Hr'g Tr. 16:85.

242. Dr. Fahey reached this conclusion by analyzing Mr. Harris's letters based upon ideations and grammatical complexity. An ideation is one's ability to convey ideas through writing. In analyzing for grammatical complexity, Dr. Fahey was looking for the occurrence of grammatical errors, run-on sentences, and immaturity in written language looking at grammar. She also examined spelling, and the mechanics of his writing, such as capitalization,

and punctuation. Hr'g Tr. 16:85- 86.

243. Dr. Fahey concluded, in terms of ideation, that the themes of Mr. Harris's writing are simple and repetitive. He uses standard openings and greetings as well as endings that are formulaic through all of his writings. They are very similar, if not word-for-word. Dr. Fahey found that Mr. Harris's spelling was generally accurate, though he uses text language, especially for three words in particular. He uses "U" for "you"; he uses "U-R" for "your" and "you're"; and he uses for emphasis a lot of quotation marks, underlining, and the use of smiley faces or frown faces. Hr'g Tr. 16:86-87.

244. Dr. Fahey summarized Mr. Harris's writing as immature and comparable toa 3rd or 4th grade level at the highest. Hr'g Tr. 16:87.

245. Dr. Fahey analyzed Mr. Harris's oral language ability by conducting a conversation with him. She analyzed the transcript of their conversation by determining the "mean length of utterance" of his language sample. Hr'g Tr. 16:87. She first segmented his language sample into "C units" or "utterance[s]," which are essentially independent clauses and any accompanying modifiers, including dependent clauses. Hr'g Tr. 16:87-88. Next, Dr. Fahey counted the number of morphemes in each utterance. A morpheme is a specific unit of meaning that has a grammatical component to it. After calculating the number of utterances and morphemes in Mr. Harris's conversation, Dr. Fahey was able to calculate the "mean length of utterance" in his conversation. The mean length of utterance allows experts to understand the developmental level of a person's language. Hr'g

Tr. 16:87-90.

246. Based on her analysis of Mr. Harris's oral language sample, Dr. Fahey concluded that he had an average of 6 words per utterance, which is comparable to children aged 6 to 7 and that Mr. Harris averaged 6.51 morphemes per utterance, which is comparable to a 5 to 6-year-old-child. Hr'g Tr. 16:90-91.

247. Dr. Fahey also analyzed the grammatical complexity of Mr. Harris's oral language. Dr. Fahey found that his sentence structures were comparable to that of a 2nd or 3rd-grader, or a 7-to-8-year-old. Hr'g Tr. 16:91-92.

248. Dr. Fahey assessed Mr. Harris's effort throughout the battery of tests she administered to him. She found that his effort was very consistent through the time that she spent with him. He was very alert. He was very engaged. He was cooperative on all tasks. He paid close attention. He appeared to give his best effort. When he was not sure of something, he displayed more frustration than he did for anything he was unable to answer. Hr'g Tr. 16:92.

249. Although the Wide Range Achievement Test, also known as the WRAT-4, includes a sentence comprehension portion, speech and language pathologists do not use the WRAT-4 in their field to measure language because that subtest is not a comprehensive view of language comprehension. Hr'g Tr. 16:92.

250. The tests that Dr. Fahey performed provide a comprehensive look at a person's ability to comprehend language. Hr'g Tr. 16:93.

251. Dr. Fahey found that the deficits Mr. Harris

displayed exist not only through the standardized test that he took, but also throughout the procedures Dr. Fahey used to evaluate him. Hr'g Tr. 16:93.

252. Dr. Fahey was confident that Mr. Harris's deficits took hold during the developmental period. She specifically noted that in Mr. Harris's case it is very striking that he made gains up to about the 4th grade level across all language domains—listening, speaking, reading, and writing—and that he did not go beyond that level in any of those domains. Dr. Fahey found that Mr. Harris's language development simply plateaued at that level. Hr'g Tr. 16:93-94.

253. The analysis that Dr. Fahey performed does not involve subjective judgment. It is a very objective process. Hr'g Tr. 16:101.

254. Dr. Fahey does not believe that Mr. Harris's results were potentially a product of dementia as dementia does not necessarily affect reading comprehension in all people. Hr'g Tr. 16:107-08.

255. Although she has not been asked to do so, Dr. Fahey would be willing to serve as a witness for the prosecution in a capital case. Hr'g Tr. 16:110.

256. In Dr. Fahey's 40 years of experience with clients in the area of speech and language pathology, she has never encountered a case where a client's alcohol or drug use caused him to lose oral reading or language abilities. Hr'g Tr. 16:110.

257. Dr. Fahey saw no evidence that Mr. Harris had read the newspapers or nonfiction books found in his cell. Dr. Fahey found that the nonfiction books would be very difficult for Mr. Harris to understand. Hr'g Tr. 16:110-11.

258. The GORT-5 tops out at the age of 23 years, 11 months because it is assumed that post-secondary education is the highest level needed to evaluate the development of reading. It is perfectly acceptable to perform the GORT-5 on someone whose age is in the 50s. Hr'g Tr. 16:111.

III. MR. HARRIS'S FAMILY AND FRIENDS TESTIFY ABOUT HARRIS'S ADAPTIVE DEFICITS

A. Marlin Lincoln

259. Marlin Lincoln has worked for the International Longshoremen's Association ("ILA") since 2007, and currently serves as its Business Agent. As Business Agent, Marlin Lincoln determines which union members get assigned to specific jobs at the Port of Freeport based on employer needs on a daily basis. Hr'g Tr. 15:152-53.

260. There are a number of skilled positions at the Port of Freeport that are considered specialty positions. These include positions such as truck driver, crane operator, and forklift operator. Hr'g Tr. 15:154. The Court finds Marlin Lincoln's testimony to be credible.

261. There are also a number of positions at the Port of Freeport that are considered "labor" positions that do not require any skills. Hr'g Tr. 15:154.

262. Union members get to choose their daily assignments based on seniority. Each day, union members with the most years of experience get to choose their daily assignment before union members with fewer years of experience. Hr'g Tr. 15:155- 56.

263. Marlin Lincoln knows Mr. Harris because they worked together. Hr'g Tr. 15:156.

264. Marlin Lincoln was introduced to Mr. Harris by Marcus Lincoln, when Mr. Harris and Marcus Lincoln worked at a company called Shintech. Throughout Mr. Harris's time at Shintech, Marlin Lincoln never saw Mr. Harris work any job other than an unskilled labor job, even though Shintech had both skilled and unskilled positions. Hr'g Tr. 15:156-57.

265. When Marlin Lincoln first got a job at the ILA, Mr. Harris was already working there. Hr'g Tr. 15:158.

266. Marlin Lincoln is not aware of Mr. Harris achieving any certifications while working at the ILA. Hr'g Tr. 15:158.

267. Mr. Harris only held unskilled labor positions throughout the time he worked with Marlin Lincoln at the ILA. No special training was required for any of the jobs that Mr. Harris held. Hr'g Tr. 15:158-60.

268. It is not difficult to get promoted at the ILA. You only need to want to do more complex work. Most people want to do more complex work because those positions get paid more than the unskilled positions. Despite this, Mr. Harris never sought to gain any certifications or to work more complex jobs. Hr'g Tr. 15:160- 61.

269. Marlin Lincoln once witnessed Mr. Harris attempt to operate a forklift. Mr. Harris could not operate the forklift adequately. Hr'g Tr. 15:162.

270. Despite gaining five or six years of seniority, Mr. Harris only ever worked in unskilled labor positions at the Port of Freeport because he was not

able to do skilled work. Hr'g Tr. 15:162-63.

271. Mr. Harris never drove himself to work. He always got a ride with a coworker. Hr'g Tr. 15:163.

272. Members of the ILA get paid by check weekly. Mr. Harris would not deposit his checks in a bank account. On multiple occasions, Marlin Lincoln took Mr. Harris to the corner store to help Mr. Harris cash his check. Marlin Lincoln is not aware whether Mr. Harris ever held a bank account. Hr'g Tr. 15:165.

273. Mr. Harris never acquired the skills or certifications to complete skilled labor positions. Hr'g Tr. 15:166.

274. Marlin Lincoln and Marcus Lincoln were friends with and socialized with Mr. Harris. The three friends often went on trail rides together. Even though Marcus Lincoln and Marlin Lincoln rode horses on trail rides, Mr. Harris did not participate in riding a horse. Hr'g Tr. 15:166-67.

275. Mr. Harris never mentioned to Marlin Lincoln that he played high school football, and Marlin Lincoln never witnessed Mr. Harris attempt to play football. Hr'g Tr. 15:167-68.

276. Marlin Lincoln played football at the University of Nebraska. Hr'g Tr. 15:149.

277. Marlin Lincoln noted that playing football is more difficult than working an unskilled laborer position at the Port of Freeport. Playing football is also more difficult than driving a forklift. Hr'g Tr. 15:168.

278. Mr. Harris lived in a series of hotel rooms. Marlin Lincoln visited a number of Mr. Harris's hotel rooms. Mr. Harris only kept very simple foods such as ramen noodles. Marlin Lincoln never witnessed

Harris cook an actual meal. Hr'g Tr. 15:169-71.

279. Marlin Lincoln was surprised to hear that Mr. Harris had graduated from high school. Mr. Harris had never mentioned high school or high school activities once throughout their years as friends and coworkers. Hr'g Tr. 15:170.

B. MARCUS LINCOLN

280. Marcus Lincoln is Marlin Lincoln's uncle, but they refer to each other as brothers. Hr'g Tr. 15:173. Marcus Lincoln has been friends with James Harris since he met him in 2002. Hr'g Tr. 15:175. The Court finds Marcus Lincoln's testimony to be credible.

281. Marcus Lincoln is currently the secretary/treasurer of the contract committee of the International Longshoremen's Association ("ILA"), Local 30 in Freeport, Texas. Hr'g Tr. 15:175. In that role, he supervises the work gangs and distributes paychecks. Hr'g Tr. 15:175. Mr. Lincoln has been a supervisor at the ILA since 2006 and has been on the contract committee since 2011. Hr'g Tr. 15:174.

282. Mr. Lincoln met Mr. Harris in 2002 when they were working construction at Austin Industrial. Hr'g Tr. 15:174. Mr. Lincoln was a foreman and supervisor at Austin Industrial and supervised Mr. Harris when he worked as a temporary worker loading hand stacks. Hr'g Tr. 15:174-75.

283. "Handstacking" is the process by which a worker stacks 50-pound bags in order to fill a 20-foot trailer from bottom to top. Hr'g Tr. 15:175. Handstacking is a manual labor job. It requires no skills or certification. Hr'g Tr. 15:176.

284. Although less labor intensive jobs, like forklift

operating, were available, Mr. Harris only handstacked. Hr'g Tr. 15:176.

285. Working a forklift requires a certification. Hr'g Tr. 15:176. Normally, anyone seeking a forklift certification at Austin Industrial was required to take a written exam. Hr'g Tr. 15:176-77. Marcus Lincoln was easily able to obtain certification to drive a forklift. Hr'g Tr. 15:177. Although Mr. Harris obtained a certification to drive a forklift, he never passed the written exam. The foremen, including Marcus Lincoln, gave Mr. Harris the certification even though they did not believe he was proficient in driving the forklift. Hr'g Tr. 15:177-78. They gave Mr. Harris the certification because they liked him, and as a temporary worker he would lose the job if he did not receive the forklift certification. Hr'g Tr. 15:178.

286. Even after obtaining the certification to drive a forklift, Mr. Harris would only handstack. Hr'g Tr. 15:178. Marcus Lincoln and the other foremen would never assign Mr. Harris to the forklift because he was extremely slow. In the time it would take an average person to load three containers, Mr. Harris would load one. Hr'g Tr. 15:177.

287. Marcus Lincoln left Austin Industrial in 2004 and got a job at ILA. Hr'g Tr. 15:178. When Marcus Lincoln became a supervisor in 2006, he secured a laborer job for Mr. Harris. Mr. Harris did not need to fill out a job application or interview for the job. Hr'g Tr. 15:179-80.

288. Everyone at ILA begins as a laborer. Hr'g Tr. 15:180.

289. As a laborer, Mr. Harris "handled the whip." Hr'g Tr. 15:180. That required Mr. Harris to stand on

the side of the dock as pallets were being unloaded by cranes off the ship and grab the ropes holding the pallets so the pallets did not spin. Hr'g Tr. 15:180. Mr. Harris's only responsibility in that role was making sure the pallets landed straight. Hr'g Tr. 15:181.

290. Although Mr. Harris would occasionally drive the forklift, he never operated it, and would only drive it three or four feet. Hr'g Tr. 15:181. Mr. Harris did not need a certification to drive the fork lift three or four feet. Hr'g Tr. 15:182.

291. There were many other more desirable jobs available at ILA: forklift operator, truck driver, heavy lift operator and crane operator. All of these jobs required certification. Hr'g Tr. 15:183. As the difficulty of the job increases, so does the pay and benefits. Hr'g Tr. 15:183. Marcus Lincoln is certified to perform all of the jobs at ILA. Hr'g Tr. 15:183. But, Mr. Harris never received certification or performed any of them, nor did he express any interest in performing any of the better paying jobs. Hr'g Tr. 15:183-84.

292. By the time he left ILA, Mr. Harris had obtained level 6 seniority. Workers at ILA gain a level of seniority for every year they work more than 300 hours. Those with higher seniority are chosen for jobs before less senior workers. Hr'g Tr. 15:184.

293. Mr. Harris never received any promotions while he worked at ILA. Hr'g Tr. 15:185. Marcus Lincoln received many promotions, including during the time Mr. Harris worked there: he was made a supervisor, became a forklift driver, a truck driver, and a heavy lift operator. Hr'g Tr. 15:185:-86.

294. Marcus Lincoln encouraged Mr. Harris to get certifications in these more advanced positions but

Mr. Harris would tell him he was satisfied being the "whip man," which is the lowest available position. Hr'g Tr. 15:186:6.

295. Marcus Lincoln helped Mr. Harris open a bank account at the local bank. Marcus Lincoln and Mr. Harris sat together at the table and Marcus Lincoln filled out the paperwork and directed Mr. Harris to fill out the direct deposit slip. Marcus Lincoln had to fill in the numbers on the direct deposit slip for Mr. Harris so Mr. Harris could have his paychecks deposited. Hr'g Tr. 15:187.

296. Just two weeks after opening his bank account, Mr. Harris over drafted the account. Two weeks after that, the bank closed the account. Mr. Harris did not have other bank accounts. After the bank closed Mr. Harris's account, Mr. Harris would cash his paycheck at a corner store. Hr'g Tr. 15:187.

297. Marcus Lincoln never saw Mr. Harris do any math. Hr'g Tr. 15:188.

298. Mr. Harris did not drive himself to work or take a bus. Instead, he would get rides from Marcus or Marlin Lincoln. Hr'g Tr. 15:188.

299. Mr. Harris was a bad driver. Hr'g Tr. 15:188-89. Mr. Lincoln helped Mr. Harris buy a car. He drove Mr. Harris to the dealership, picked out the car, and test drove it for him. Two weeks after purchasing the car, Mr. Harris wrecked it. Hr'g Tr. 15:188

300. Marcus Lincoln helped Mr. Harris buy another car. He took Mr. Harris to a dealership and arranged for Mr. Harris to use his income tax return to pay for the car. Two weeks after he purchased the second car,

Mr. Harris wrecked it. Hr'g Tr. 15:89. Mr. Harris never owned another car. Hr'g Tr. 15:189.

301. Marcus Lincoln never knew Mr. Harris to live anywhere on his own, except in a motel. When Mr. Harris was not living in a motel, he lived with his sister. Hr'g Tr. 15:189. Mr. Harris's motel room included one bedroom with a TV, a hot plate, and a microwave. There was no refrigerator. Hr'g Tr. 15:190.

302. Marcus Lincoln never saw Mr. Harris cook. He only had beans and weanies (sic) and noodles in the hotel room. Hr'g Tr. 15:190.

303. Marcus Lincoln never saw Mr. Harris read. Hr'g Tr. 15:190.

C. TAMARA HARRIS

304. Ms. Tamara Harris is Mr. Harris's niece. Hr'g Tr. 15:192. The Court finds Tamara Harris's testimony to be credible.

305. Tamara Harris took special education classes in school and was a member of the Special Olympics. Hr'g Tr. 15:192-93.

306. Mr. Harris lived with Tamara Harris when she was younger and living at her grandmother's house. Hr'g Tr. 15:194. No other adults lived in the house other than Mr. Harris and his mother, Olivia Harris, who was also Tamara's grandmother. Hr'g Tr. 15:194.

307. When Tamara Harris lived at her grandmother's house, three of her cousins lived there as well. Hr'g Tr. 15:194. They were all required to do chores. Hr'g Tr. 15:195. Ms. Harris's chores were to clean the bathrooms and make the beds. Hr'g Tr. 15:195.

308. Mr. James Harris had no chores. Hr'g Tr. 15:195. Mr. Harris did not do the dishes. Hr'g Tr. 15:195-96. Mr. Harris did not do the laundry. Hr'g Tr. 15:196. Mr. Harris did not clean the bathroom. Hr'g Tr. 15:196. Mr. Harris did not fix things around the house. Hr'g Tr. 15:196. Mr. Harris did not pay the bills. Hr'g Tr. 15:196. Mr. Harris did not do the grocery shopping. Hr'g Tr. 15:196. Mr. Harris did not cook food. Hr'g Tr. 15:196.

309. Mr. Harris did not have a key to get into his mother's house when the door was locked. Hr'g Tr. 15:196. If Mr. Harris wanted to enter the home where he lived, he would have to knock to have his mother let him in. Hr'g Tr. 15:196-97.

310. When Mr. Harris no longer lived at his mother's house with his nieces and nephews, he lived with his sister Ethel Harris, Tamara's mother. Hr'g Tr. 15:197.

311. Mr. Harris did not drive himself to work. Hr'g Tr. 15:199. A coworker would always pick him up. Hr'g Tr. 15:199-200. While at Ethel Harris's home, Mr. Harris was not responsible for paying the household bills. Hr'g Tr. 15:198. Instead, he would give his sister his paychecks for her to hold for him. Hr'g Tr. 15:198. When he needed money, he would ask his sister for the exact amount. Hr'g Tr. 15:198. Mr. Harris did not own any credit cards. Hr'g Tr. 15:198.

312. While Mr. Harris lived with his sister, Ethel Harris would cook for him. Hr'g Tr. 15:199. She would also clean for him. Hr'g Tr. 15:199. She bought him underwear and socks when he needed them. Hr'g Tr. 15:199. Tamara Harris and Ethel Harris would work together to do Mr. Harris's laundry. Hr'g Tr. 15:199.

They would also do the grocery shopping if he needed something. Hr'g Tr. 15:199. Mr. Harris did not own a car at this time. Hr'g Tr. 15:200.

313. Ethel Harris passed away on January 19, 2008. Hr'g Tr. 15:201. After her death, Tamara Harris became responsible for helping Mr. Harris in the ways that her mother had done before. Hr'g Tr. 15:201. Her responsibilities included making sure he had underwear, socks, personal items, and food readily available. Hr'g Tr. 15:201.

314. When Mr. Harris would get sick, Tamara Harris would bring him his medications. Hr'g Tr. 15:201. Tamara Harris did not know Mr. Harris to ever have gone to the doctor. Hr'g Tr. 15:202. Tamara Harris testified that she felt as though she had to continue taking care of Mr. Harris after her mother had passed away. Hr'g Tr. 15:202. She was not sure what could have happened to Mr. Harris if she ever stopped. Hr'g Tr. 15:202.

D. CAROLYN DUPLECHIN

315. Carolyn Duplechin is Mr. Harris's youngest sister. Hr'g Tr. 15:132. She is an occupational health nurse for the United States Postal Service and has worked for the postal service for 22 years. Hr'g Tr. 15:132. She received an associate's degree in nursing and certifications in IV therapy and occupational health nursing. Hr'g Tr. 15:132-33. The Court finds Carolyn Duplechin's testimony to be credible.

316. Ms. Duplechin grew up in Iago, Texas. Hr'g Tr. 15:134-5. Her family was poor. Hr'g Tr. 15:134.

317. Ms. Harris was two grades ahead of Ms. Duplechin in school. Hr'g Tr. 15:135. Ms. Duplechin

testified that Mr. Harris generally received B's and C's in most classes, but he received Cs and Ds in math. Hr'g Tr. 15:135-36. Ms. Duplechin was an A student in school. Hr'g Tr. 15:136. Despite having some books at the home, Ms. Duplechin has never observed Mr. Harris reading a book. Hr'g Tr. 15:138.

318. Ms. Duplechin took college admissions examinations and visited schools before going to college. Hr'g Tr. 15:146. Mr. Harris did not take any college admissions examinations or visit colleges. Hr'g Tr. 15:146.

319. At home, Ms. Duplechin learned how to cook from her mother. Hr'g Tr. 15:136. Some of her brothers learned how to cook from her mother as well. Hr'g Tr. 15:137. Her other brothers learned how to cook from their wives later in life. Hr'g Tr. 15:137. But her brother Mr. James Harris did not learn how to cook other than basic breakfast foods, such as eggs. Hr'g Tr. 15:137.

320. Ms. Duplechin had chores around the house, which included doing the laundry. Hr'g Tr. 15:137. Mr. Harris never did any laundry. Hr'g Tr. 15:137.

321. When Ms. Duplechin and Mr. Harris were teenagers, they worked for the Bowling Independent School District doing simple, manual labor. Hr'g Tr. 15:139. These jobs were only given to low-income teenagers. Hr'g Tr. 15:139. Their mother filled out the application. Hr'g Tr. 15:139. No résumé or interview was required to get any of these positions. Hr'g Tr. 15:139-40.

322. Mr. Harris was paid for his manual labor at the Bowling Independent School District. Hr'g Tr. 15:140. Ms. Harris testified that Mr. Harris was never

any good at saving his money. Hr'g Tr. 15:140. Whenever he was paid for his work, Mr. Harris would always give the money to his mother for safekeeping. Hr'g Tr. 15:140. Whenever he needed money, he would ask his mother for money. Hr'g Tr. 15:140. He could not otherwise manage money as a teenager. Hr'g Tr. 15:140. Ms. Duplechin never observed Mr. Harris visit the bank as a teenager. Hr'g Tr. 15:140-41.

323. Ms. Duplechin moved out of her mother's house once she graduated from high school. Hr'g Tr. 15:141. Mr. Harris moved to their sister Ethel Harris's house. Hr'g Tr. 15:141. Ms. Duplechin testified that when Mr. Harris lived with Ethel Harris, "besides providing a place to live, she would do the cooking, the cleaning. She washed his clothes. Basically like what it was when we were at home with Mom." Hr'g Tr. 15:142. Aside from living with Ethel Harris, Ms. Duplechin knew Mr. Harris lived with at least two other women as an adult. Hr'g Tr. 15:142.

IV. MR. HARRIS'S ORIGINAL DEFENSE TEAM SAW EVIDENCE OF MR. HARRIS'S INTELLECTUAL DISABILITY

A. Jay Wooten

324. Mr. Wooten understood that school records revealing failing grades, non- promotion, tracking to lowest academic group, placement in special education or an alternative school program, low (below 80) IQ scores, or persistent below grade- level achievements scores are all red flags indicating intellectual disability. Mr. Wooten admitted that Mr. Harris's case had many of these red flags. Hr'g Tr. 19:168. Based on

conflicting testimony from other members of the Harris trialteam and based upon admissions on cross-examination, the Court finds Mr. Wooten's direct examination testimony relating to ineffective assistance of counsel to be not credible.

325. On April 7, 2013, Mr. Harris wrote a letter to Mr. Wooten from prison. Hr'g Tr. 19:147; Applicant's Ex. 199. In the letter, Mr. Harris had pictures of sad faces with tears streaming from the eyes. Hr'g Tr. 19:147. Mr. Harris mentioned that he was "having major problems up in here and that he doesn't have hygiene to keep his body smelling good and his fellow inmates are not having it." Hr'g Tr. 19:147. Mr. Wooten agreed that Mr. Harris's penmanship style was an immature writing style. Hr'g Tr. 19:149.

326. On April 11, 2013, Mr. Harris wrote another letter to Mr. Wooten from prison. Hr'g Tr. 19:149; Applicant's Ex. 200. In the letter, Mr. Harris wrote, "So I just want to say one more time thankU, thankU, so very, very much!!" Applicant's Ex. 200. Mr. Harris also wrote, "U, have made everything alright for me and I can't say it enough thankU, thankU, thankU, thankU, thankU, thanksU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU, thankU!!" Applicant's Ex. 200. Mr. Wooten agreed that this style of writing is "unusual" and that it could be "immature." Hr'g Tr. 19:149.

327. Mr. Wooten agreed that if Mr. Harris was low functioning, that fact would have been considered a red flag that would prompt an investigation into intellectual disability. Hr'g Tr. 19:122.

328. Mr. Wooten admitted that Mr. Ward was a

competent mitigation specialist and that he relied on him. Hr'g Tr. 19:123. He also agreed that Mr. Ward's findings were red flags that would have prompted additional investigation into intellectual disability. Hr'g Tr. 19:128-29. In a March 19, 2012, memorandum written by Joseph D. Ward, a stand-in mitigation specialist on the Harris trial team, Mr. Ward wrote:

> James in the video appears to have had minimal formal education. He presents as a person of *low intellect*. Even somewhat childlike despite his chronological age. I also see some evidence of this in his perhaps somewhat fanciful expression of faith in what Jay as his lawyer can do for him, in James' view of the incident itself, his view of the possible outcomes. James appears [naïve], exhausted, even somewhat detached from the interview at times, nodding off at times.

Applicant's Ex. 189 (emphasis added); Hr'g Tr. 19:122.

329. Mr. Wooten admitted that Mr. Ward had "thrown up at least one red flag there that this might be fertile ground for investigation." Hr'g Tr. 19:129.

330. Mr. Wooten agreed that in the confines of prison, Mr. Harris still had difficulty budgeting money. Hr'g Tr. 19:100.

B. KERI MALLON

331. Ms. Mallon admitted that she is incapable of making a scientific determination of whether Mr. Harris is intellectually disabled. Hr'g Tr. 14:86. Some

of the witnesses Ms. Mallon spoke to told her that Mr. Harris displayed signs of being slow. Hr'g Tr. 14:86. Witnesses also told Mr. Harris's trial team that Mr. Harris was not very good with money. Hr'g Tr. 14:88. Based on conflicting testimony from other members of the Harris trial team, the Court finds Ms. Mallon's testimony relating to ineffective assistance of counsel to be not credible.

332. Ms. Mallon found that it was apparent that Mr. Harris was lower functioning. She recalled having to explain things to him on a very basic level. She has represented many people, but with Mr. Harris, she had to make sure that he understood what his attorneys were saying. She had to use very basic language, and sometimes she would need to say things multiple times. Hr'g Tr. 14:93.

333. Ms. Mallon acknowledged Mr. Harris had difficulty understanding things the average person would not have difficulty understanding. Hr'g Tr. 14:92.

334. Mr. Harris did not participate in decisions regarding trial strategy. In fact, his trial team "didn't really give him that option." Hr'g Tr. 14:87.

335. Ms. Mallon acknowledged that Mr. Harris was not in control of his life. Hr'g Tr. 14:101.

C. NICOLE JACKSON

336. Ms. Nicole Jackson was a member of Mr. Harris's defense team. Hr'g Tr. 15:7. Based upon conflicting testimony from the Harris trial team and her own admissions on cross-examination, the Court finds Ms. Jackson's original signed affidavit and testimony on direct examination regarding ineffective

assistance of counsel to be not credible. The court finds Ms. Jackson's cross-examination admissions to be credible.

337. Mr. Ward was an investigator who also worked on Mr. Harris's case before Ms. Jackson joined the team. Hr'g Tr. 15:44. Mr. Ward drafted a number of memos about his investigations into Mr. Harris. Hr'g Tr. 15:45.

338. Ms. Jackson considered Mr. Ward's work product as reliable when she conducted her investigation. Hr'g Tr. 15:45; Applicant's Ex. 189.

339. Mr. Ward's memo said that the team needed to "explore the stressors on James at the time" of the incident. Hr'g Tr. 15:48. Ms. Jackson agreed that drug abuse is not necessarily "an exclusive cause of having a subject break with reality." Hr'g Tr. 15:48.

340. Ms. Jackson also agreed that drug use can be consistent with an intellectual disability. Hr'g Tr. 15:48.

341. Ms. Jackson testified that drug abuse can be comorbid with intellectual disability. Hr'g Tr. 15:48.

342. The existence of drug abuse or substance abuse in a suspect's history does not rule out intellectual disability. Hr'g Tr. 15:49.

343. The presence of substance abuse could be a red flag that an individual has an intellectual disability. Hr'g Tr. 15:49.

344. Ms. Jackson testified that drug abuse or substance abuse could be a red flag that she might consider a basis for additional follow-up into whether the individual has an intellectual disability. Hr'g Tr. 15:49.

345. Mr. Ward reported that Mr. Harris had experienced a "break with reality." Hr'g Tr. 15:49-50.

346. Mr. Harris's break with reality is a red flag that would be considered in determining whether or not the subject has an intellectual disability. Hr'g Tr. 15:49.

347. Based on Mr. Ward's observation of Mr. Harris's video interview, Mr. Ward's memo said that Mr. Harris "appears to have had minimal formal education." Hr'g Tr. 15:50.

348. The fact that the investigator on Mr. Harris's team determined that "James appears to have had minimal formal education" is a red flag suggesting that further investigation into intellectual disability is warranted. Hr'g Tr. 15:50; Applicant's Ex. 189.

349. Mr. Ward, an investigator on Mr. Harris's original team, also wrote in his memo that Mr. Harris "presents as a person of lo intellect." Hr'g Tr. 15:51.

350. The fact that Mr. Harris was considered a person of low intellect by an investigator on his case is a red flag, indicating a need for follow-up on the fact that he may have an intellectual disability. Hr'g Tr. 15:51.

351. Ignoring the investigator's observation that Mr. Harris is a person of low intellect was a mistake in Mr. Harris's case. Hr'g Tr. 15:51.

352. Mr. Ward, an investigator on Mr. Harris's team, also wrote in a case memo that Mr. Harris is "[e]ven somewhat childlike, despite his chronological age." Hr'g Tr. 15:51; Applicant's Ex. 189.

353. The fact that an investigator on Mr. Harris's team observed that Mr. Harris is "somewhat childlike,

despite his chronological age," is a "fairly strong red flag" for intellectual disability. Hr'g Tr. 15:51-52.

354. Ms. Jackson testified that, based on the information she was presented with during her testimony, there should have been follow-up on intellectual disability in Mr. Harris's case. Hr'g Tr. 15:52.

355. Mr. Ward observed that Mr. Harris's "somewhat fanciful expression of faith in what Jay as his lawyer can do for him, in James' view of the incident itself, his view of the possible outcomes," supported his belief that Mr. Harris is "somewhat childlike." Hr'g Tr. 15:52; Applicant's Ex. 189.

356. If an individual has a "fanciful view" of what his lawyer may be able to do, that is a red flag that would warrant following up on the presence of intellectual disability. Hr'g Tr. 15:52.

357. According to Mr. Ward, Mr. Harris appeared "naïve, exhausted, and somewhat detached," which are all red flags of an intellectual disability. Hr'g Tr. 15:52; Applicant's Ex. 189. These signs are consistent with both drug withdrawal and intellectual disability. Hr'g Tr. 15:52-53; Applicant's Ex. 189.

358. The presence of drug withdrawal in a subject does not mean intellectual disability is ruled out. Hr'g Tr. 15:53; Applicant's Ex. 189.

359. Mr. Ward's memo notes that "James really does not seem to appreciate the consequences of talking to the detectives." Hr'g Tr. 15:53; Applicant's Ex. 189.

360. The fact that Mr. Harris did not seem to appreciate the consequences of talking to detectives

and confessing is a serious red flag that should prompt additional investigation into intellectual disability. Hr'g Tr. 15:53; Applicant's Ex. 189.

361. While Mr. Harris's lack of appreciation for the consequences of his actions may have been caused by something other than intellectual disability, nothing should be ruled out in the investigation stage. Hr'g Tr. 15:53.

362. During her investigation as mitigation specialist, Ms. Jackson met with Ms. Carolyn Duplechin, Mr. Harris's younger sister. Ms. Jackson wrote a memo memorializing that meeting. Hr'g Tr. 15:61; Applicant's Ex. 169.

363. Younger sisters can play a very important role in assessing the adaptive functioning of a subject because younger sisters might be called on to be caretakers of a subject who cannot care for himself. Hr'g Tr. 15:62-63.

364. Younger sisters are also likely to know the subject's adaptive functions during the developmental phase. Hr'g Tr. 15:62-63.

365. An interview with a younger sister is fairly important for an intellectual disability investigation. Hr'g Tr. 15:63.

366. Ms. Jackson did not meet with Ms. Duplechin until May 30, 2013. Hr'g Tr. 15:63.

367. During Ms. Jackson's meeting with Ms. Duplechin, Ms. Duplechin discussed the fact that her family was poor growing up. Hr'g Tr. 15:63; Applicant's Ex. 169.

368. During her interview with Ms. Duplechin, Ms. Jackson never asked Ms. Duplechin if her brother was

slow. Hr'g Tr. 15:65.

369. Ms. Duplechin told Ms. Jackson that her brother James is a pleaser and a follower and that he does not lead. Hr'g Tr. 15:66; Applicant's Ex. 169.

370. Ms. Jackson testified that identification of a subject as a follower is an indicator, coupled with other things, that investigation into intellectual disability is warranted. Hr'g Tr. 15:66.

371. Ms. Jackson testified that indication of a subject as a follower, like Mr. Harris, is an important factor to consider when moving forward in an intellectual disability investigation. Hr'g Tr. 15:66.

372. The fact that Ms. Duplechin encouraged Mr. Harris to live with her is additional support for her view that Mr. Harris is a follower. Hr'g Tr. 15:66-67; Applicant's Ex. 169.

373. The fact that people were offering support to an adult, such as Mr. Harris, is a red flag indicating that Mr. Harris might have an intellectual disability. Hr'g Tr. 15:67.

374. The fact that there may be multiple reasons why people offer support to an adult, such as Mr. Harris, does not foreclose intellectual disability. Hr'g Tr. 15:67.

375. Ms. Duplechin's concern about Mr. Harris's drug abuse does not correlate with whether Mr. Harris could live independently. Hr'g Tr. 15:68.

376. There is a serious stigma surrounding mental retardation. Hr'g Tr. 15:68. Because of that stigma, family members—including sisters—can be unreliable reporters. Hr'g Tr. 15:68.

377. Ms. Duplechin did not tell Ms. Jackson anything that is inconsistent with requiring further investigation into intellectual disability on the part of Mr. Harris. Hr'g Tr. 15:69.

378. Ms. Duplechin told Ms. Jackson things that might be coterminous or comorbid with the fact that Mr. Harris might have an intellectual disability. Hr'g Tr. 15:69; Applicant's Ex. 169.

379. Ms. Duplechin told Ms. Jackson things that are red flags indicating that Mr. Harris might have an intellectual disability. Hr'g Tr. 15:69; Applicant's Ex. 169.

380. While she was a mitigation specialist on Mr. Harris's defense team, Ms. Jackson met with Mr. Harris's niece, Tamara Harris. Hr'g Tr. 15:70-71. She memorialized that meeting in a memo. Hr'g Tr. 15:71; Applicant's Ex. 182.

381. A critical piece of mitigation investigation is to determine the incidents of intellectual disability among family members. There is therefore a requirement that an investigation into a capital defendant go back three generations to look for the presence of mental illness or mental disability. Hr'g Tr. 15:72.

382. Ms. Jackson failed to conduct any investigation into whether Ms. Harris has an intellectual disability. Hr'g Tr. 15:72.

383. Ms. Jackson interviewed Ms. Tamara Harris on August 8, 2013. Hr'g Tr. 15:72; Applicant's Ex. 182.

384. Ms. Jackson testified that she did not recall knowing whether Tamara Harris competed as "a Special Olympics athlete." Hr'g Tr. 15:72.

385. Ms. Jackson agreed that the existence of a niece with an intellectual disability is a red flag necessitating a follow-up for intellectual disability investigation. Hr'g Tr. 15:73.

386. When Ms. Jackson interviewed Tamara Harris, she told Ms. Jackson that her home life growing up was "rough." Hr'g Tr. 15:74; Applicant's Ex. 182. Tamara's family received help from neighbors to help them get food and other things they needed. Hr'g Tr. 15:74; Applicant's Ex. 182.

387. Ms. Jackson testified that if someone needs help getting food and other necessities, that is a red flag that would prompt a mitigation specialist to follow up on the possibility of intellectual disability. Hr'g Tr. 15:74.

388. Ms. Jackson failed to ask Ms. Tamara Harris about Mr. Harris's adaptive deficits. Hr'g Tr. 15:75; Applicant's Ex. 182.

389. Ms. Jackson did not disclose to Dr. Kasper, Mr. Harris's original defense team's intellectual disability expert, that Mr. Harris's has a niece with an intellectual disability. Hr'g Tr. 15:75.

390. Ms. Jackson does not know whether anyone on Mr. Harris's team told Dr. Kasper that Mr. Harris has a niece with an intellectual disability. Hr'g Tr. 15:75.

391. When Ms. Jackson was on Mr. Harris's defense team, she visited him in prison several times. Hr'g Tr. 15:76.

392. Ms. Jackson testified that Mr. Harris has had difficulty managing his money while in jail. Hr'g Tr. 15:79-80.

393. Ms. Jackson testified that Mr. Harris's difficulty managing his money is a red flag that supports an investigation into intellectual disability. Hr'g Tr. 15:80.

394. Ms. Jackson testified that the structure of prison life makes it more difficult to determine practical adaptive deficiencies than in the world itself. Hr'g Tr. 15:80. Prison provides structure that addresses some adaptive deficiencies, particularly in the practical domain. Hr'g Tr. 15:80.

395. Ms. Jackson testified that even though Mr. Harris was in prison, where there are limited opportunities to spend money, he still struggled to budget his money. Hr'g Tr. 15:81.

396. Ms. Jackson testified that Mr. Harris's inability to stick to his fiscal needs is a red flag indicating Mr. Harris might have an intellectual disability. Hr'g Tr. 15:81.

397. Ms. Jackson testified that the fact that Mr. Harris wanted to spend his money in an unwise way would not be a reason to rule out further investigation into intellectual disability. Hr'g Tr. 15:81.

398. Based on an August 2013 memo, Mr. Harris threatened to abstain from participating in his life or death trial if he did not receive money for hygiene products. Hr'g Tr. 15:82; Applicant's Ex. 162. Ms. Jackson agreed that this behavior is a red flag for intellectual disability. Hr'g Tr. 15:82.

399. Ms. Jackson agreed that an investigation into Mr. Harris's commissary accounts could have been relevant to a diagnosis of adaptive deficits. Hr'g Tr. 15:82-83.

400. While an investigation into Mr. Harris's commissary spending habits could have been relevant to an adaptive deficit diagnosis, Ms. Jackson does not recall whether she looked into his accounts. Hr'g Tr. 15:83.

401. Ms. Jackson called Marcus Lincoln on June 28, 2013. Hr'g Tr. 15:84. At the time, Mr. Harris had asked her to call Lincoln "several times," to ask Marlin Lincoln to put money on his books. Hr'g Tr. 15:84-85; Applicant's Ex. 171.

402. Ms. Jackson called Marcus Lincoln's phone number on June 28, 2013. Hr'g Tr. 15:84. Marcus told Ms. Jackson that he was at work with his brother, Marlin, and would relay Mr. Harris's message. Hr'g Tr. 15:85; Applicant's Ex. 171.

403. When Ms. Jackson was speaking with Marcus Lincoln in June 2013, Lincoln was upset that the Harris defense team was contacting him so late. Hr'g Tr. 15:85; Applicant's Ex. 171. Marcus Lincoln viewed himself as an important witness for Mr. Harris's defense. Hr'g Tr. 15:86; Applicant's Ex. 171.

404. Marcus Lincoln and Marlin Lincoln were friends with Mr. Harris, and were his former coworkers. Hr'g Tr. 15:86.

405. Coworkers can be particularly relevant to an adaptive deficit assessment. Ms. Jackson contacted Marcus and Marlin Lincoln, but she did not contact any other coworkers. Hr'g Tr. 15:86.

406. According to Marcus Lincoln, Mr. Harris's defense team did not contact Marcus until a few months before trial. Hr'g Tr. 15:87.

407. In Ms. Jackson's understanding, Mr. Harris

did not operate a forklift. She does not recall why he did not do it. Hr'g Tr. 15:87.

408. Ms. Jackson contacted Marcus Lincoln, who she agreed would have been a "very relevant witness to speak with in determining whether or not there was an adaptive deficit in the workplace." However, Ms. Jackson did not speak with Marcus Lincoln about Mr. Harris's adaptive deficits. Hr'g Tr. 15:88; Applicant's Ex. 171.

409. Ms. Jackson did not administer a formal instrument to Marcus Lincoln. Hr'g Tr. 15:88.

410. Ms. Jackson did not administer an informal instrument to Marlin Lincoln. Hr'g Tr. 15:88.

411. Ms. Jackson submitted an affidavit in connection with the Harris proceedings on September 6, 2016. Ms. Jackson signed the affidavit. Hr'g Tr. 15:91.

412. Ms. Jackson's affidavit said that she "never exhibited any behaviors that were indicative of an intellectual disability in [her] presence." Hr'g Tr. 15:92-93; Applicant's Ex. 225. During her January 25, 2019 testimony, Ms. Jackson testified that she does not agree with that sentence as it stands. Hr'g Tr. 15:92-93; Applicant's Ex. 225.

413. Ms. Jackson also testified that, given the chance today, she may modify the sentence to say that "James Harris never exhibited any behaviors that I understood at the time to be indicative of intellectual disability in my presence." Hr'g Tr. 15:93.

414. Ms. Jackson agreed that there are statements in her memoranda that supported the need for an intellectual disability investigations. Hr'g Tr. 15:94;

Applicant's Ex. 225.

415. As part of her work on Mr. Harris's defense team, Ms. Jackson reviewed Dr. Kasper's IQ testing. Hr'g Tr. 15:94. Ms. Jackson admitted that Mr. Harris's IQ score of 75 supports the need for an intellectual disability investigation. Hr'g Tr. 15:94; Applicant's Ex. 225.

416. Ms. Jackson also agreed that Mr. Harris's IQ score of 75 alone would cause her to disagree with the sentence from her affidavit: "Furthermore, there weren't any records obtained by the defense team that supported the need for an intellectual disability investigation." Hr'g Tr. 15:93-94; *cf.* Applicant's Ex. 225.

417. Ms. Jackson admitted that Mr. Harris's beta test IQ score of 83 is low and supports the need for an intellectual disability investigation by a mitigation specialist. Hr'g Tr. 15:94-95.

418. Ms. Jackson admitted that her statement that "there weren't any records obtained by the defense team that supported the need for an intellectual disability investigation" was also incorrect with respect to the Beta test IQ score of 83. Hr'g Tr. 15:95; Applicant's Ex. 225.

419. Ms. Jackson's affidavit said: "During my visits with Mr. Harris, he was always able to properly articulate what he was thinking and how he was feeling." Hr'g Tr. 15:95. But during her January 2019 testimony, Ms. Jackson admitted that whether a subject can articulate appropriately and in sporadic conversations, does not foreclose the need for an intellectual disability analysis. Hr'g Tr. 15:95.

420. Ms. Jackson admitted that Mr. Harris's problems with masturbation raised red flags with respect to intellectual disability. Further, Mr. Harris's inappropriate behavior supported the need for additional investigation. Hr'g Tr. 15:96.

421. Ms. Jackson admitted that the statement in her affidavit that Mr. Harris's family never provided any information and / or concerns that alluded to delayed or lack of cognitive functioning, adaptive deficits, or any factors that correlated with intellectual disability is not accurate. Hr'g Tr. 15:96-97; Applicant's Ex. 225.

422. Ms. Jackson admitted that she no longer agrees with the statement that "Mr. Harris's family never provided any information and/or concern that alluded to delayed or lack of cognitive functioning, deficits, or any factors that correlate with intellectual disability," and would not sign her name to that sworn statement if she were to resubmit her affidavit. Hr'g Tr. 15:97; Applicant's Ex. 225.

423. In fact, Ms. Jackson confirmed that Mr. Harris's family members provided information with factors that correlate with intellectual disability. Hr'g Tr. 15:97.

424. Mr. Harris's family members also provided information and / or concern that alluded to the fact that Mr. Harris is delayed or has a lack of cognitive functioning. Hr'g Tr. 15:97.

425. Ms. Jackson testified that Mr. Harris's family members provided information that somewhat alluded to adaptive deficits. Hr'g Tr. 15:97.

426. Ms. Jackson's affidavit noted that none of their

three experts—Dr. Walter Farrell, Dr. Mary Elizabeth Kasper, and Dr. Raymond Singer—"expressed that it was their expert opinion that James had an intellectual disability." Hr'g Tr. 15:98; Applicant's Ex. 225. However, Ms. Jackson confirmed that Dr. Farrell never said there is no intellectual disability worth investigating here; he was the social history expert. Hr'g Tr. 15:98-99. Further, Ms. Jackson testified that Dr. Kasper was the only expert "truly . . . qualified to" offer an opinion on intellectual disability, although the other experts "would have been able to speak to it." Hr'g Tr. 15:98-99.

427. Ms. Jackson admitted that Beta testing can be a problem. Hr'g Tr. 15:101.

428. Ms. Jackson admitted that the statements in her affidavit about Beta testing include a typo. She agreed that her affidavit would be more accurate if she were to strike out the subjunctive clause starting with "however," because it does not make sense. Hr'g Tr. 15:101-02.

429. Ms. Jackson admitted that Dr. Kasper did not say that Mr. Harris lacked adaptive deficits. Hr'g Tr. 15:103.

430. Ms. Jackson testified that she did not complete targeted adaptive deficit investigation. Hr'g Tr. 15:103.

431. Ms. Jackson also testified that she had not interviewed people who could provide information about Mr. Harris's developmental period. Hr'g Tr. 15:103-04.

432. Ms. Jackson admitted that Dr. Kasper's references to dementia and declining IQ throughout

Mr. Harris's life are red flags indicating that further investigation into intellectual disability is warranted. Hr'g Tr. 15:104.

433. The existence of significant cognitive deficits as an adult is a red flag indicating that investigation is warranted in Mr. Harris's case with respect onset intellectual disability. Hr'g Tr. 15:104.

434. In her affidavit, Ms. Jackson noted that Dr. Kasper "never recommended that the team pose an *Atkins* claim during [Jackson's] time on the Harris case." Hr'g Tr. 15:104.

435. Ms. Jackson confirmed that the team did not specifically look to Dr. Kasper for legal advice. Hr'g Tr. 15:105.

436. Using an instrument when interviewing is the best practice when investigating intellectual disability, however, Ms. Jackson did not use an instrument in Mr. Harris's case. Hr'g Tr. 15:107.

437. Ms. Jackson agreed that if there were an intentional effort to gather intellectual disability evidence, she would use an informal instrument. She also agreed that they did not use an instrument in Mr. Harris's case. Hr'g Tr. 15:107.

438. On direct examination, Ms. Jackson was asked about a statement that Mr. Harris's half-brother made, that Mr. Harris liked "the party life." Hr'g Tr. 15:108. However, Ms. Jackson agreed that the fact that Mr. Harris liked "the party life" is not inconsistent with intellectual disability. Hr'g Tr. 15:108. That is, someone with an intellectual disability can still like the "party life." Hr'g Tr. 15:108.

439. The fact that Mr. Harris lived in a motel by

himself raises red flags for intellectual disability. Hr'g Tr. 15:108-09.

440. Ms. Jackson wrote a memo memorializing a visit that she had with Mr. Harris on June 4, 2013. Hr'g Tr. 15:109; Applicant's Ex. 154. According to the memo, she informed Mr. Harris that she was there to "fill in the gaps of missing information relating to his case." Hr'g Tr. 15:110; Applicant's Ex. 154.

441. During the meeting at June 4, 2013, Ms. Jackson asked Mr. Harris about the people in his life. Hr'g Tr. 15:111; Applicant's Ex. 154.

442. Larry Williams was Mr. Harris's cousin. Mr. Williams had a reported hearing disability in the 1970's and 1980's that rose to the level of social security disability, which Ms. Jackson agreed is a red flag that supports the need for investigation into Mr. Harris's intellectual disability. Hr'g Tr. 15:113.

443. Mr. Williams lived with James Harris during his childhood, and would have therefore been an important witness for an investigation on adaptive deficits in the developmental phase. Hr'g Tr. 15:113.

444. At the meeting Ms. Jackson had with Mr. Harris in June 2013, Harris provided her with the names of some teachers and counselors who he knew. Hr'g Tr. 15:114; Applicant's Ex. 154. Ms. Jackson agreed that those teachers and counselors would have been very important witnesses to speak with about adaptive conceptual deficits. Hr'g Tr. 15:114. However, June 2013 was the first time the team was discussing these witnesses with Mr. Harris. Hr'g Tr. 15:114.

445. During Ms. Jackson's interview with Mr. Harris in June 2013, Mr. Harris said that he had the

opportunity to go to college and electrical school in Dallas, Texas, on a grant scholarship. Hr'g Tr. 15:114.

446. Ms. Jackson agreed that the truth of Mr. Harris's statement that he "had the opportunity to go to college and electrical school" in Dallas, Texas would be very relevant to an intellectual disability investigation. Hr'g Tr. 15:114-15. However, Ms. Jackson testified that she does not know what he was talking about with respect to an "electric school" in Dallas. Hr'g Tr. 15:114. In fact, Ms. Jackson testified that she was "never able to substantiate the scholarship information." Hr'g Tr. 15:115.

447. Ms. Jackson never found any evidence to confirm the scholarship after looking at Mr. Harris's school records and talking to family members. Hr'g Tr. 15:115-16.

448. Ms. Jackson failed to further investigate Mr. Harris's statement during the June 2013 interview that he and Carolyn were "the two smartest ones out of their siblings." Hr'g Tr. 15:116-17. She testified that she did not take this statement at face value. Hr'g Tr. 15:116-17.

449. Ms. Jackson agreed that Mr. Harris's statement that he and Carolyn were the "two smartest out of their siblings" was an invitation to follow up with him about his intellectual abilities at the time, but Ms. Jackson did not follow up on that topic. Hr'g Tr. 15:116-17; Applicant's Ex. 154.

450. Instead of following up about Mr. Harris's cognitive abilities, Ms. Jackson asked Mr. Harris about his high school prom, since he was "popular with the ladies." Hr'g Tr. 15:117. Mr. Harris's relationship with women was a component of the defense team's

mitigation themes at trial. Hr'g Tr. 15:117.

451. During her time on Mr. Harris's defense team, Ms. Jackson contacted Macon Sash & Door over the phone. Hr'g Tr. 15:121; Applicant's Ex. 167. Mr. Harris worked at Macon Sash & Door. Hr'g Tr. 15:121.

452. Jackson asked Macon Sash & Door for James Harris's employment records. Hr'g Tr. 15:121. The Macon Sash & Door employee told Ms. Jackson that she vaguely remembered him and that he was not employed there for long. Hr'g Tr. 15:122; Applicant's Ex. 167.

453. Ms. Jackson agreed that a short period of employment could raise red flags indicating that some follow-up for an intellectual disability investigation. Hr'g Tr. 15:122; Applicant's Ex. 167.

454. The Macon Sash & Door Employee said that she remembered an incident with a man "who she believed was Mr. Harris," where he was stealing money from the coke machine and hiding it in different places. Hr'g Tr. 15:122; Applicant's Ex. 167. She did not remember further details, only that Mr. Harris "left and never came back." Hr'g Tr. 15:123; Applicant's Ex. 167.

455. Ms. Jackson admitted that Mr. Harris's incident of stealing money from a coke machine and then running around and hiding it in different places is "strange behavior"—the sort of strange behavior that would support continuing an investigation into intellectual disability. Hr'g Tr. 15:123; Applicant's Ex. 167.

456. Ms. Jackson testified that, looking back on the case now, "there are things that [she] would have

looked further into" with respect to intellectual disability. Hr'g Tr. 15:130.

A. THIRD PARTY OBSERVERS ENCOURAGED MR. HARRIS'S ORIGINAL TRIAL TEAM TO INVESTIGATE INTELLECTUAL DISABILITY

1. Danalynn Recer

457. Evidence of adaptive deficits means that the client's development is a couple of standard deviations below what would be expected of their development in functioning. Hr'g Tr. 13:239. There are spheres of adaptive functioning that are used to measure adaptive deficits. Hr'g Tr. 13:239. For example, social or academic spheres can show deficits. Hr'g Tr. 13:239. A deficit means someone is not meeting the expectations of their peer group in those spheres of functioning. Hr'g Tr. 13:239. You do not have to have deficits in all of the areas to be intellectually disabled. Hr'g Tr. 13:239-40.

458. No single strength can defeat the diagnosis of intellectual disability because the diagnosis is based on the combination of deficits. Hr'g Tr. 13:240. Everyone who has intellectual disability is going to have strengths in some areas. Hr'g Tr. 13:240-41.

459. Ms. Recer testified: "Counsel are advised that the issue of mental retardation may not easily be determined from the attorneys' interviews with the client. The client will generally attempt to mask such a condition. Special expertise in recognizing actual mental retardation is required." Hr'g Tr. 13:242-43 (quoting the Texas Guidelines); Applicant's Ex. 120 at

971.

460. People with intellectual disability may mask their intellectual disability by mirroring the attorney. Hr'g Tr. 13:243-44. Mirroring may happen in conversations between the lawyer and client where the client will agree with them and pick up some of the words to repeat them back. Hr'g Tr. 13:244-45.

461. Often the intellectual disability diagnosis is missed because the intellectually disabled can "defy our stereotypes, biases, and expectations about people who carry this diagnosis. Most often these clients strike us as no different from many other individuals." Hr'g Tr. 13:247 (quoting Applicant's Ex. 123 at 5). The Court finds all of Ms. Recer's testimony to be credible.

2. Kathryn Kase

462. Ms. Kase learned from the team that Mr. Harris had a number of risk factors for intellectual disability. Hr'g Tr. 14:189. The Court finds all of Ms. Kase's testimony to be credible.

463. Ms. Kase testified, "[H]e had grown up in a very poor household, there was hunger, there was a lot of moving around, there was domestic disputes and domestic violence, that there were a lot of other children in the household . . . he subsisted as a day laborer." Hr'g Tr. 14:189-90.

B. THE STATE'S REBUTTAL EVIDENCE: EVEN DR. RANDALL PRICE AGREES THAT MR. HARRIS EXHIBITS SIGNIFICANT ADAPTIVE DEFICITS IN THE PRACTICAL DOMAIN.

464. Dr. Price is a forensic psychologist and

neuropsychologist and the State's only witness in Mr. Harris's evidentiary hearing. Hr'g Tr. 18:4. He is not a medical doctor and cannot offer a medical diagnosis. Hr'g Tr. 18:78. Instead, Dr. Price is limited to rendering clinical judgments. Hr'g Tr. 18:72-73. The Court does not find Dr. Price's testimony to be credible.

465. Dr. Price is not, and does not hold himself out to be, a speech pathologist. Hr'g Tr. 18:76-77. He does not have a degree in speech pathology and has never administered various tests related to speech pathology such as the GORT-5 or any other language assessment instruments. Hr'g Tr. 18:77. He admits that he is not qualified to opine whether Dr. Fahey had administered any of her instruments correctly while performing an assessment on Mr. Harris. Hr'g Tr. 18:77. Nor is he qualified to opine whether Dr. Fahey scored her assessments correctly. Hr'g Tr. 18:77.

466. Dr. Price is not, and does not hold himself out to be, a neuropsychologist ora medical doctor. Hr'g Tr. 18:78. He cannot offer any medical diagnosis, prescribe any medication, or offer any opinions to a reasonable degree of medical certainty. Hr'g Tr. 18:78.

467. During the course of his evaluation of Mr. Harris's intellectual disability, Dr. Price did not consult with a medical doctor, speech pathologist, or forensic psychologist. Hr'g Tr. 18:78-79.

468. Dr. Price agreed that a forensic psychologist should be thorough, careful, and transparent in making a clinical judgment. Hr'g Tr. 18:73-74.

469. Dr. Price tried to follow the DSM-5 in conducting his analysis. He agreed that the DSM-5 was the foundational text for his analysis of Mr.

Harris's intellectual disability. Hr'g Tr. 18:74. As Dr. Price acknowledged, the DSM-5 requires, among other things, an assessment of "deficits in intellectual functions such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience, confirmed by both clinical assessment and individualized standardized intelligence testing." Hr'g Tr. 18:75.

470. For purposes of his expert evaluation of Mr. Harris's intellectual disability, Dr. Price considers the DSM-5 to be a reliable and authoritative source within the field of neuropsychology. Hr'g Tr. 18:75-76. In addition to the DSM-5, Dr. Price also considers the Green Book and the Green Book User's Guide to be authoritative and reliable sources. Hr'g Tr. 18:76.

471. Dr. Price agreed that Mr. Harris is "low average functioning" and has significant adaptive deficits in the practical domain. Hr'g Tr. 18:80-81.

472. As set forth in the DSM-5, Dr. Price examined Mr. Harris for symptoms of mild intellectual disability in the conceptual, practical, and social domain. Applicant's Ex. 240.

473. The DSM-5 provides a list of symptoms in the conceptual domain that someone with intellectual disability would display. Hr'g Tr. 18:82-83. Dr. Price brought the copy of this list that he used to evaluate Mr. Harris with him on the witness stand. He underlined "difficulties in learning academic skills involving reading, writing, arithmetic, time or money." He also underlined, "In adults, abstract thinking, executive function, i.e., planning, strategizing, priority setting, and cognitive flexibility, and short-term memory, as well as functional use of academic

skills, e.g. reading, money management, are impaired." Hr'g Tr. 18:83.

474. Dr. Price examined Mr. Harris's school records in conducting his analysis. Dr. Price was aware that Mr. Harris's first grade test records from September 1965, showed a Metropolitan Readiness score for someone in the "poor risk area." Hr'g Tr. 18:83-84. Dr. Price also knew that Mr. Harris's basic pre-primer reading score was "ranked very low" in December of that year. Hr'g Tr. 18:84. Similarly, Mr. Harris's February 1966 basic primer reading score was also "ranked very low." Hr'g Tr. 18:84.

475. Mr. Harris received all of these "very low" scores during Mr. Harris's developmental period. Hr'g Tr. 18:84.

476. Mr. Harris was ranked in the 5th percentile in math concepts on the SRA achievement series in the 5th and 6th grades. Moreover, while in the 6th grade, Mr. Harris ranked in the 7th percentile in reading comprehension on the SRA achievement series. Hr'g Tr. 18:85.

477. Dr. Price agrees that these tests occurred during Mr. Harris's developmental period. Hr'g Tr. 18:85.

478. Dr. Price agrees that reports regarding Mr. Harris's poor academic performance throughout school is corroborated by the teachers and family members he spoke with. Hr'g Tr. 18:85. Carolyn Duplechin, Mr. Harris's sister, told Dr. Patton that Mr. Harris was a "weak student throughout school." Hr'g Tr. 18:86. She also told him that Mr. Harris's siblings had to help him with his school work. Hr'g Tr. 18:86.

479. Dr. Price agreed that Jean Shaw, Mr. Harris's 3rd grade teacher, informed Dr. Patton that Mr. Harris "appeared to struggle in school." Hr'g Tr. 18:86. In fact, Ms. Shaw believed that Mr. Harris should have been retained a grade. Further, Ms. Shaw reported that Mr. Harris's grades remained low in elementary and middle school. Dr. Price also testified that another one of Mr. Harris's elementary school teachers, Annie Stafford, believed that Mr. Harris should have been held back in the 1st grade. And Michael Kalina, Mr. Harris's vocational agricultural teacher, told him that Mr. Harris "needed extra help" in class. Hr'g Tr. 18:86-87.

480. Dr. Price examined a number of standardized tests that Mr. Harris took while in school. Still, Dr. Price agrees that those standardized tests are "certainly not a way to determine intellectual disability." Hr'g Tr. 18:87.

481. Dr. Price also agrees that a group administered screening test that produces an IQ equivalent cannot be used as an instrument for diagnosing intellectual disability. Hr'g Tr. 18:87.

482. Dr. Price also examined Mr. Harris for deficits in the practical domain. Hr'g Tr. 18:87-88.

483. Dr. Price found that Mr. Harris had "significant supports at every stage of his life." Hr'g Tr. 18:88.

484. Dr. Price agreed that Shirley Rutherford informed Dr. Patton that Mr. Harris's mother and sisters "babied" him as a child and as an adult, and that Mr. Harris was dependent on them. Hr'g Tr. 18:88. Nola Amey, a neighbor of the Harris family, also reported that Mr. Harris's family babied him

throughout his life. Hr'g Tr. 18:89. According to Ms. Duplechin, Mr. Harris's sister, Mr. Harris's older siblings remained in their mother's house to help take care of Mr. Harris. Hr'g Tr. 89-90.

485. Several family friends said that Ethel Harris, James's sister was Mr. Harris's rock, especially after his mother died. Ethel Harris "kept James out of trouble," told Mr. Harris "what to do," helped him manage his money, and transported him when he did not have a car. Hr'g Tr. 18:89-90.

486. The women who were romantically involved with Mr. Harris provided similar descriptions of Mr. Harris's dependency. Rose Lewis, Mr. Harris's ex-wife, described Mr. Harris "completely dependent on her" throughout their relationship. She said that he depended on her completely. He relied on her to manage household chores, household finances, the process of renting their home, and even filing for divorce. Hr'g Tr. 18:90.

487. Mr. Harris lived with his girlfriend Shadia Daniels for a short period. Mr. Harris also depended on Ms. Daniels for household chores, money management, and transportation. Hr'g Tr. 18:92.

488. Mr. Harris's estranged wife, Bonnie Clark, lived with Mr. Harris for approximately one year before they separated. Hr'g Tr. 18:90-91. While they lived together, Mr. Harris was completely dependent on Ms. Clark. Hr'g Tr. 18:91. For instance, Mr. Harris depended on Ms. Clark for managing his money, cooking his food, and transportation. Mr. Harris was merely responsible for simple chores such as dishwashing and cleaning. Although Ms. Clark and Mr. Harris never formerly divorced from one another,

immediately after they separated, Mr. Harris moved back in with his sister. Hr'g Tr. 18:91.

489. After his mother's death in 2008, Mr. Harris began living in hotels and staying with friends and other family members. Hr'g Tr. 18:92. According to Tamara Harris, Mr. Harris's niece, Mr. Harris was distraught after his mother's death because his mother always "told him what to do." Hr'g Tr. 18:92

490. Dr. Price agrees that although Mr. Harris was employed, Mr. Harris "has not held jobs that require conceptual skills." He testified, Mr. Harris only had "manual labor jobs." For example, Mr. Harris worked in construction with his uncle after graduating high school. And when Mr. Harris met Ms. Clark, he was a dishwasher. Hr'g Tr. 18:93.

491. The longest continuous employment that Mr. Harris ever had was when he worked in construction. He would work full-time and sometimes off and on doing concrete work on mobile homes. This type of work would include ceiling, painting, street repairing, and cleaning up. From time to time, Mr. Harris would also do small jobs for neighbors and lawn work at a trailer park. Hr'g Tr. 18:93-94.

492. Dr. Price knows Mr. Harris was certified as a forklift driver at some point but admits that he does not know anything about what was required to become forklift certified. He agrees that Mr. Harris did not like doing forklift work and was not "very good at it." Nor was Mr. Harris considered an efficient driver of the forklift. Hr'g Tr. 18:94. One of Mr. Harris's supervisors, Marlin Lincoln, testified that he assigned Mr. Harris "lower level" jobs because he believed Mr. Harris was most comfortable with those jobs. Hr'g Tr.

18:94.

493. In his interview with Mr. Harris, Dr. Price inquired about Mr. Harris's occupational history. Dr. Price concluded that none of the work Mr. Harris performed required "any level of complex intellectual functioning." Mr. Harris mentioned tasks such as stacking hay, unloading cargo ships, moving furniture, and pouring concrete. Hr'g Tr. 18:95.

494. Although Mr. Harris could "always get a job right away," he always had "low level jobs" and never had steady work. Hr'g Tr. 18:95.

495. Dr. Price recognized that it would be appropriate in this case not to use a formal instrument to measure Mr. Harris's adaptive behavior. Hr'g Tr. 18:95-96. Dr. Price agrees that in an *Atkins* case, it is rare to find an appropriate informant who can serve as a reliable declarant for a formal instrument to assess adaptive behavior. Hr'g Tr. 18:96.

496. He also agrees that when an appropriate adaptive behavior rating scale is not feasible, the evaluation of adaptive behavior is best assessed by the integration of multiple sources of information and by using clinical judgment, for several reasons. Hr'g Tr. 18:96-97. First, clinical judgment is based on a high level of expertise and experience. Second, it is based on extensive data. Third, it is based on the knowledge of the individual and his or her environment. Fourth, it is based on the systemic, logical, and transparent analysis. Dr. Price recognizes that Dr. Patton's analysis met these standards. Hr'g Tr. 18:97.

497. Dr. Price understands the Green Brook guidelines for synthesizing information. According to the Green Book, in synthesizing school-related factors,

it is important to determine whether the assessments focus heavily on functional systems of assessment with an emphasis on adaptive behavior. Hr'g Tr. 18:97-99. As Dr. Price recognizes, that guideline further states that "in the evaluation of academic competence, the focus should be on the actual academic content or academic standard assessed." Hr'g Tr. 18:99.

498. Dr. Price agrees it would be wrong for a clinical psychologist to rely upon an individual's academic test results without any knowledge of the content. Hr'g Tr. 18:99. Indeed, Dr. Price recognizes "the less that you know about a test, the less reliable it will be for purposes of your analysis." Hr'g Tr. 18:100-01. Still, in his investigation of Mr. Harris, Dr. Price reviewed wholly unidentified tests. Dr. Price agreed that these tests should be afforded less weight. Hr'g Tr. 18:100-01.

499. Another Green Book guideline instructs reviewers not to "use past criminal behavior or verbal behavior to infer level of adaptive behavior or about having [Intellectual Disability]." In other words, "one should not use past criminal behavior or verbal behavior to infer a level of adaptive behavior about having intellectual disability." Dr. Price agrees that this guideline is considered reliable and authoritative in conducting investigations such as his investigation of Mr. Harris. Hr'g Tr. 18:101-02.

500. Although Dr. Price concluded that Mr. Harris has significant adaptive deficits in the practical domain, he concluded that they are not related to any lack of intellectual functioning. Rather, Dr. Price posited, the adaptive deficits stem from Mr. Harris's

choices and preferences. Hr'g Tr. 18:102-03.

501. Dr. Price reached this conclusion through: his "logic," Mr. Harris's "description," "collateral information" from Mr. Harris's supervisor, and Dr. Price's view that Mr. Harris "had the ability but chose not to do it." Hr'g Tr. 18:105.

502. More specifically, Dr. Price focused on a few of Mr. Harris's statements in making this determination. For example, Mr. Harris told Dr. Price that he had a roof over his head at the motel with no bills to pay but the cell phone. Dr. Price believed Mr. Harris "liked the convenience of that." Mr. Harris explained that he could not hold steady jobs. Dr. Price thought that was because "he liked the flexibility." Mr. Harris described his past employment, which required no conceptual skills, to Dr. Price. Dr. Price found Mr. Harris had those jobs because "he did not like responsibility." Dr. Price concluded that Mr. Harris "performed at the unskilled level but was not upset about it." Hr'g Tr. 18:102-03.

503. Dr. Price did not use any instrument that is generally accepted in the field of neuropsychology to determine whether Mr. Harris's significant adaptive deficits were consequences of Mr. Harris's choices or his inabilities. Hr'g Tr. 18:103-04.

504. In accordance with Judge Denman's order, Dr. Price recorded his clinical interview of Mr. Harris on video. Dr. Price acknowledged that was important for Mr. Harris's case that he preserve and produce this video. But Dr. Price did neither. Hr'g Tr. 18:107. Dr. Price does not know what happened to the video recording and cannot determine whether it was not saved appropriately or accidentally deleted. Dr. Price

further admitted that he made a mistake in losing the video recording. Dr. Price agreed that because of this "mistake," the interview was not "the ultimate in transparency." Hr'g Tr. 18:108-09.

505. As part of Mr. Harris's clinical interview, Dr. Price assessed his attention and concentration. Hr'g Tr. 18:109-10. Dr. Price kept handwritten notes of Mr. Harris's clinical interview. Hr'g Tr. 18:110; Applicant's Ex. 229. Dr. Price testified on direct examination that Mr. Harris's attention and concentration was grossly intact. Hr'g Tr. 18:110. However, according to his own handwritten notes, Dr. Price crossed out the word "grossly," which was the adverb used to describe the noun "intact," and reported that Mr. Harris's attention and concentration was "intact." Hr'g Tr. 18:112; Applicant's Ex. 229. Dr. Price agrees that "grossly intact" and "intact" are medical terms stating degrees of whether or not somebody's attention and concentration is intact, and that there is some significance to the fact that he decided to cross out the word "grossly" before intact. Hr'g Tr. 18:112-13.

506. On direct examination, Dr. Price testified that Mr. Harris's thought process was not "tangential." Hr'g Tr. 18:113. However, according to his handwritten notes, he checked the box for "tangential" and concluded that Mr. Harris was "mildly tangential." Hr'g Tr. 18:113; Applicant's Ex. 229.

507. There is no video of this assessment. Hr'g Tr. 18:113.

508. Dr. Price checked and rescored Dr. Kasper's WAIS-IV test for Mr. Harris. Dr. Price concluded that Mr. Harris had a full scale IQ score of 76—one point higher than Dr. Kasper's score for Mr. Harris. This

one-point increase effectively pushes Mr. Harris's IQ beyond the cutoff for intellectual disability. Hr'g Tr. 18:116.

509. When he rescored Dr. Kasper's test, Dr. Price believes he used the same degree of care and attention he uses in scoring his own IQ tests. Hr'g Tr. 18:116-18.

510. Dr. Price did not adjust Mr. Harris's score to account for the Flynn Effect. Dr. Price recognizes that the Flynn Effect is real. But, unlike Dr. Woods, he holds that adjusting scores for the Flynn Effect is controversial. Hr'g Tr. 18:114.

511. Other than an article written by Hagan, Drogin, and Guilmete, which was published in 2008, Dr. Price cannot provide any citations supporting his contention that the Flynn Effect is controversial. Hr'g Tr. 18:115-16.

512. Dr. Price also retested Mr. Harris. At first, Dr. Price asserted Practice Effect did not affect Mr. Harris's WAIS-IV retest. Hr'g Tr. 18:120. However, Dr. Price later admitted that he cannot say "there was no [Practice] effect absolutely." Nevertheless, Dr. Price did not make any adjustments in his scoring of the WAIS- IV to account for the Practice Effect. Hr'g Tr. 18:121-22.

513. Dr. Price created a chart comparing his WAIS-IV results to Dr. Kasper's WAIS-IV results. Hr'g Tr. 118-19; Applicant's Ex. 228. On that chart, Dr. Price misspelled Dr. Kasper's name. Hr'g Tr. 18:123. Dr. Price also failed to include a column that measures the raw score for each individual test even though it would have been more transparent to do so. Hr'g Tr. 18:125.

514. Both Dr. Kasper and Dr. Price performed the WAIS-IV coding subtest on Mr. Harris. Dr. Kasper gave Mr. Harris a scaled score of 9 on the coding section of the WAIS-IV test while Dr. Price gave Mr. Harris a scaled score of 10. Hr'g Tr. 18:125-26; Applicant's Ex. 228. Both tests ultimately reached the same raw score of 59. But Dr. Price gave Mr. Harris a higher scaled score based on the "age effect." Dr. Price added a point to Mr. Harris's score solely because he was several years older than when he took the test with Dr. Kasper. Hr'g Tr. 18:126-29. Dr. Price did not disclose the effect of the "age effect" in his report, which was the ultimate basis for him giving Mr. Harris a higher score in the coding section. Hr'g Tr. 18:129.

515. Dr. Price performed a WAIS-IV test of Mr. Harris's comprehension level. Hr'g Tr. 18:130. Although he knew Dr. Kasper found Mr. Harris's comprehension was "impaired," Dr. Price decided not to score the results of Mr. Harris's comprehension test in the scoring of his WAIS-IV. Thus, he did not include Mr. Harris's comprehension score in his report. Hr'g Tr. 129-30. Dr. Price cannot provide a single clinically valid reason of why he would administer a test and not score it. Hr'g Tr. 18:132. Dr. Price agreed that the scoring of Mr. Harris's comprehension test would have been "useful" for a determination as to whether Mr. Harris was intellectually disabled. Hr'g Tr. 18:130. Because of his failure to include a score for Mr. Harris's comprehension test, Dr. Price admitted that his investigation was not thorough, careful, or transparent. Hr'g Tr. 18:132.

516. Dr. Price also performed a WAIS-IV digit span

subtest on Mr. Harris. On the digit span subtest, Dr. Price incorrectly calculated the sum of Mr. Harris's item scores. For questions 1 through 7, Dr. Price scored Mr. Harris a score of 2, 2, 2, 2, 1, 0, respectively. Those individual scores total 11 points. By adding those item scores together, there should be 11 total points. However, Dr. Price mistakenly gave Mr. Harris a boost of 1 additional point, bringing the total score to 12. That incorrect raw score caused an increase in Mr. Harris's scaled score. Hr'g Tr. 18:133.

517. Dr. Price performed a WAIS-IV spelling test on Mr. Harris. Hr'g Tr. 18:133-34. When he administered the test, Dr. Price knew that spelling was a relative strength for Mr. Harris. In scoring Mr. Harris's spelling test, Dr. Price admitted that he made a mistake on number 35: instead of deducting points, Dr. Price mistakenly added points for Mr. Harris's incorrect spelling of the word "loquacious." Hr'g Tr. 18:134.

518. In Appendix B of Applicant's Exhibit 228, which compares Dr. Kasper's and Dr. Price's scaled scores for the Arithmetic subtest, instead of correctly calculating a difference of 2 between the two scores, Dr. Price mistakenly indicated there was a five point difference. Hr'g Tr. 18:147; Def's Ex. 228.

519. Dr. Price testified that if one made an apples to apples comparison of Dr. Price's testing of Mr. Harris to Dr. Kasper's testing of Mr. Harris, that is to not take any age norm change into account, Dr. Price would need to decrease his final scaled score even further. In fact, there would be no difference in Dr. Kasper's score and Dr. Price's score on the coding section. Hr'g Tr. 18:148-49.

520. In his scoring of Mr. Harris's IQ test, Dr. Price did not take into account any adjustments for the Practice Effect and the Flynn Effect. Hr'g Tr. 18:149.

Ineffective Assistance of Counsel

V. Mr. Harris' RPDO Defense Team

521. Thomas Jess ("Jay") Wooten is a capital attorney at the Regional Public Defenders Office ("RPDO"). Hr'g Tr. 19:7. Mr. Wooten has been an attorney with the RPDO since February 1, 2012. Hr'g Tr. 19:7. Mr. Wooten served as the lead trial attorney in Mr. Harris's capital murder trial that started on September 3, 2013 and concluded on November 6, 2013. Hr'g Tr. 13:171, 172-73. Jay Wooten served as the first chair defense attorney on Mr. Harris's case through the sentencing trial, which ended on December 11, 2013. Hr'g Tr. 19:7, 187-88.

522. Mr. Harris's trial team initially consisted of Mr. Wooten as first-chair and Mary Conn as second-chair. Ms. Conn worked on Mr. Harris's case from the time she began at RPDO in August 2012 through sentencing. Hr'g Tr. 13:170-71. Kerri Mallon joined the trial team approximately three months prior to Mr. Harris's trial. Hr'g Tr. 14:95.

523. Mr. Harris's trial team at RDPO underwent numerous personnel changes: Robin Buggs was originally assigned to serve as the mitigation specialist on Mr. Harris's case. J.R. Soto, the fact investigator for Mr. Harris's case, also left during trial preparation and was replaced by Rudy O'Brian. By the time Ms. Conn joined RDPO, Carol Camp had replaced Ms. Buggs as mitigation specialist. A few months

before Mr. Harris's trial, Nicole Jackson replaced Carol Camp as the mitigation specialist on Mr. Harris's case. Hr'g Tr. 13:172.

524. Mr. Wooten had no experience working on capital murder cases prior to joining RPDO. Mr. Wooten joined RPDO to gain experience working on death penalty cases so he could "so he could go to the city and make a lot of money." Hr'g Tr. 13:173.

VI. Guidelines Requiring Investigation Into Intellectual Disability

525. Mr. Wooten agreed that the American Bar Association Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases ("ABA Mitigation Guidelines") are binding and authoritative. Hr'g Tr. 19:101-02; Applicant's Ex. 121. He also agreed that as an RPDO attorney, he must follow the ABA Mitigation Guidelines. Hr'g Tr. 19:102. Mr. Wooten agreed that under the ABA Mitigation Guidelines, lead trial counsel bears overall responsibility for the conduct of a capital case. Hr'g Tr. 19:102. Mr. Wooten testified that as lead trial counsel, he "ultimately" had responsibility for the decisions that were made, including the strategic decisions with regards to investigation. Hr'g Tr. 19:102. Mr. Wooten agreed that the ABA Mitigation Guidelines required him to identify a mental health associate who is qualified by training and experience to screen individuals for presence of mental or psychological disorders or impairments. Hr'g Tr. 19:102-03. He also agreed that the ABA Mitigation Guidelines imposed upon him an obligation to conduct a thorough and independent

investigation relating to the issues of both guilt and penalty. Hr'g Tr. 19:103. Mr. Wooten agreed that this included conducting a review of the client's possible mental retardation. Hr'g Tr. 19:103. He also understood that the client may attempt to mask his mental condition. Hr'g Tr. 19:103. He understood that special expertise in recognizing actual mental retardation is required. Hr'g Tr. 19:103-04. Mr. Wooten understood that the ABA Mitigation Guidelines advise him to pursue pretrial hearings to challenge any attempt by the State to seek death if there is credible evidence of mental retardation. Hr'g Tr. 19:104. He understood that under the ABA Mitigation Guidelines, he had a continuing duty to investigate issues extending through the trial. Hr'g Tr. 19:104.

526. Mr. Wooten agreed that the Texas State Bar Supplementary Guidelines and Standards for the Mitigation Function of Defense Team in Texas Capital Cases ("Texas State Guidelines") are binding and authoritative. Hr'g Tr. 19:106. Mr. Wooten agreed that all members of the defense team are agents of defense counsel. Hr'g Tr. 19:107. He also agreed that it is his duty to provide each member of the defense team with the necessary legal knowledge for each individual case. Hr'g Tr. 19:107. This duty includes providing mitigation specialists with knowledge of the law directing their work. Hr'g Tr. 19:107. He agreed that counsel bears ultimate responsibility under the Texas State Guidelines for the performance of the defense team and their decisions affecting the client in the case. Hr'g Tr. 19:107. He also agreed that under the Texas State Guidelines regarding mitigation, it is the duty of counsel to lead the team in conducting an

exhaustive investigation into the life history of the client. Hr'g Tr. 19:107. As lead counsel, Mr. Wooten was responsible for guiding the defense team, conducting ongoing reviews of evidence, assessing potential witnesses, analyzing the most effective manner in which to convey the mitigating information, and deciding how mitigation evidence will be presented. Hr'g Tr. 19:107-08.

527. The ABA Mitigation Guidelines and the Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation/Intellectual Disability, Third Edition ("Practitioner's Guide") outline the protocol for investigating intellectual disability. Applicant's Ex. 119, 121.

528. Defense counsel must investigate the possibility of intellectual disability as potential grounds for an *Atkins* defense. Applicant's Ex. 119, 121, 123.

529. The American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases ("ABA Guidelines") state: "The Constitution forbids the execution of persons with mental retardation, making [the investigation of intellectual disability] a necessary inquiry in every case." Applicant's Ex. 123.

530. The Practitioner's Guide provides that counsel cannot determine by merely looking or speaking with a client whether that person is intellectually disabled: "[I]n no instance should the possibility of mental retardation be ruled out until there has been a thorough investigation of the client's intellectual and adaptive functioning along the lines of what is described in these pages." Applicant's Ex. 123 at 5.

VII. October 2012 "Bring Your Own Case" CLE in Houston, Texas

531. Mr. Wooten and the RPDO trial team attended a capital defense training session in October of 2012. Hr'g Tr. 19:151. The training session was called "Bring Your Own Case CLE" ("BYOC") sponsored by the Texas Criminal Defense Lawyers Association. Hr'g Tr. 19:151. Danalynn Recer and Kathryn Case attended the training. Mr. Wooten agreed that Ms. Recer is a very experienced capital defense lawyer. Hr'g Tr. 19:152-53.

532. Ms. Recer is a capital defense attorney and mitigation specialist. Hr'g Tr. 13:202. Ms. Recer has worked solely on capital cases since 1990. Hr'g Tr. 13:202. She has acted in various roles on capital cases, including direct representation at the trial, post-conviction, and direct appeal stages of capital litigation. Hr'g Tr. 13:204. Ms. Recer has also consulted for counsel on capital cases. Hr'g Tr. 13:204.

533. Ms. Recer has handled about 65 trial-level capital cases as an attorney, about 50 consulting or assisting, and about 45 as a mitigation specialist. Hr'g Tr. 13:205.

534. Ms. Recer is on the faculty of numerous national trainings for capital lawyers, including the National Capital *Voir Dire* College, National Capital Trial College, National Training for Mitigation Specialists, and regional trainings in Texas, Louisiana, Mississippi, Pennsylvania, California, Arizona, Ohio, Florida, Georgia, North Carolina, and South Carolina. Hr'g Tr. 13:206. Ms. Recer also does capital case training at conferences. Hr'g Tr. 13:207.

535. Ms. Recer trains capital attorneys at the

BYOC conference. Hr'g Tr. 13:207- 08. This conference was developed starting in 2005 with a grant from the Department of Justice and the Defender Services of the Administrative Office of the U.S. Courts to find the best way to improve and standardize capital defense nationwide. Hr'g Tr. 13:208.

536. Mr. Wooten testified that at the time he attended this training session, the theory of mitigation for the Harris case was mild cognitive impairment due to vascular dementia or traumatic brain injury. Hr'g Tr. 19:153. Mr. Wooten also thought that he might argue that Mr. Harris's impairment was due to exposure to crop dusting at an early age. Hr'g Tr. 19:153-54.

537. Mr. Wooten testified that at the training, Ms. Recer told him to "keep your eye out for any adaptive deficits." Hr'g Tr. 19:154. He also testified that as lead trial counsel, he failed to instruct his mitigation specialists and investigators to search for adaptive deficits as a result of Ms. Recer's advice, nor did he take any steps to follow up with the specialists and investigators to determine if they were looking out for information concerning Mr. Harris's adaptive deficits. Hr'g Tr. 19:155.

538. Ms. Recer spoke in the morning at the conference in a Mitigation Specialist and Investigator Strategy session. Hr'g Tr. 13:212. In this session, Ms. Recer spoke generally to attendees about what makes capital cases different from other criminal cases, the Eighth Amendment jurisprudence, the "ABA Guidelines", and the capital mitigation investigation. Hr'g Tr. 13:212. Ms. Recer then turned to the social history investigation, the life history investigation,

and the specific requirements of the investigation. Hr'g Tr. 13:213.

539. To be certified to represent capital defendants in Texas, counsel must—among other things—attest to abide by the ABA Guidelines. Hr'g Tr. 13:221. Certified capital counsel would thus have attested to this prior to receiving them at the BYOC conference. Hr'g Tr. 13:221; 14:14. Ms. Recer testified, "In Texas, the [Court of Criminal Appeals] has relied upon both the Texas standards and the ABA standards in assessing the effectiveness of counsel, using it as a measure of prevailing standard of care." Hr'g Tr. 14:14.

540. Dr. James Patton, an expert who focuses on intellectual disability, spoke at the October 2012 BYOC conference as well. Hr'g Tr. 13:213. Ms. Recer testified capital defenders need a significant amount of training from mental health experts about how to build a case, how to spot signs and symptoms, and how to determine what experts are needed. Hr'g Tr. 13:213-14. The BYOC planners bring experts in intellectual disability to these conferences to provide that training. Hr'g Tr. 13:214. Dr. Patton presented on Intellectual Disability and *Atkins* Claims. Hr'g Tr. 13:214.

541. Ms. Recer taught Mr. Harris' RPDO trial team strategies to employ in an intellectual disability investigation in a capital case. Hr'g Tr. 13:217. She explained counsel must do a life history investigation in every case to the same degree of thoroughness because they are not aware of what could be uncovered. Hr'g Tr. 13:217; Applicant's Ex. 120 at 971-72. Ms. Recer explained: Before intellectual disability was an exclusionary category it was still a mitigator .

. . that many state and federal courts had identified as inherently mitigating. So it is something that you investigate before you know whether or not it meets the standard." Hr'g Tr. 14:20.

542. Ms. Recer stated this investigation must not be aimed at confirming biases of what counsel thinks they will find. Hr'g Tr. 13:217-18. The investigation must be "from the ground up" and based on independent sources, such as school records and property records. Hr'g Tr. 13:217-18. Ms. Recer testified, "[Y]ou're not supposed to be looking for anything. You're supposed to be looking at everything." Hr'g Tr. 14:20-21.

543. Counsel must conduct a multigenerational biopsychosocial history investigation in every case. Hr'g Tr. 13:217. This requires very thoroughly collecting records and talking to witnesses about the client's life history and family, back at least three generations. Hr'g Tr. 13:218. Counsel must get this investigation substantially underway before beginning to develop themes or decide what mental health experts are needed for the specific case. Hr'g Tr. 13:218.

544. Ms. Recer explained that evidence of adaptive deficits and intellectual disability are found through this life and social history investigation. Hr'g Tr. 13:218. If evidence is found, but does not rise to the level of intellectual disability, this evidence is still useful for mitigation purposes. Hr'g Tr. 13:218. Therefore, defense counsel must conduct a life history investigation in every case—not just cases where intellectual disability is suspected. Hr'g Tr. 13:218. Furthermore, this investigation must begin

immediately due to its time-consuming nature. Hr'g Tr. 13:230.

545. Ms. Recer attended two small-group sessions with Mr. Harris's defense team during the BYOC conference in October 2012. Hr'g Tr. 13:211, 2148. She also conducted a strategy session with Mr. Harris's mitigation team. Hr'g Tr. 13:248.

546. Ms. Recer instructed Mr. Harris' trial team about the four stages of the method for conducting a mitigation investigation pursuant to the ABA Guidelines and Texas Bar Guidelines. Hr'g Tr. 13:202, 210, 243.

547. The first stage in this method is to gather preliminary information, including an intake interview with the client, collecting private and school records, and gathering information from the available core family members, including parents, siblings, spouses, and any children. Hr'g Tr. 13:219.

548. After the preliminary information is gathered, counsel must assemble a team to conduct the investigation. Hr'g Tr. 13:219, 226; Applicant's Ex. 119 at 952; Applicant's Ex. 120 at 967. This includes two attorneys, a fact investigator, and a mitigation specialist or life history investigator. Hr'g Tr. 13:219-20; Applicant's Ex. 119 at 952; Applicant's Ex. 120 at 967. Gathering the preliminary information about the client and the family informs the needs of the team, so the preliminary information should be gathered first. Hr'g Tr. 13:220.

549. The various persons on the team have different responsibilities. See Hr'g Tr. 13:226-27; Applicant's Ex. 119 at 952. Counsel must select the appropriate team members to hire, direct the team,

and coordinate the representation. Hr'g Tr. 13:226.

550. Ms. Recer testified that the representation and investigation are the ultimate responsibility of counsel, as the other team members are counsel's agents. Hr'g Tr. 13:226. Likewise, the ABA Guidelines are phrased in a way that they are directed at counsel regarding counsel's duties. Hr'g Tr. 13:226; Applicant's Ex. 119. The mitigation specialist and investigators act at the direction of counsel, and counsel is ultimately responsible. Hr'g Tr. 13:227.

551. The second stage in this method is investigating and pre-trial litigating. Hr'g Tr. 13:224, 232. Here, the team would begin to conduct team meetings on a regular basis and conduct a thorough, methodical investigation. Hr'g Tr. 13:224. Likewise, the team will have a written plan. Hr'g Tr. 13:226; Applicant's Ex. 119 at 952.

552. For the client's life history, the team should conduct a multigenerational biopsychosocial history, collect additional documents, and conduct interviews. Hr'g Tr. 13:224. Based on the initial intake with the client and their immediate family from stage one, the team should have gathered ample information about potentially relevant people, places, and events. Hr'g Tr. 13:224. The team will then develop secondary documents or timelines, people lists, additional records that may exist, and an investigation plan where the team pinpoints people who came in contact with the client and their family. Hr'g Tr. 13:224-25.

553. The team is expected to do multiple face-to-face interviews. Hr'g Tr. 13:225. There is a method to approaching prospective witnesses. Hr'g Tr. 13:225. For example, one would not call in advance or suggest

what the team is looking for in any way. Hr'g Tr. 13:225. This keeps the investigation open ended. Hr'g Tr. 13:225. The goal is to find out what the person remembers without prompting them. Hr'g Tr. 13:225. Often, once the team has interviewed the initial family, the team should turn to other witnesses including classmates, neighbors, people from the client's church, people the client was in jail with, people the client worked with, etc. Hr'g Tr. 13:225. These witnesses are usually found through objective sources, such as records. Hr'g Tr. 13:225.

554. During the interviewing process, the team must work to overcome barriers to disclosure. Hr'g Tr. 13:230. These may include memory, shame, humiliation, people not wanting to talk about their life history, masking, misunderstandings in the family, race, language barriers, distrust, and geography/travel time. Hr'g Tr. 13:230-31. Some of these barriers are overcome by developing a rapport with the witnesses. Hr'g Tr. 13:231.

555. The third stage in this method is to develop the evidence. Hr'g Tr. 13:231. Here, counsel would determine what type of experts the team needs to retain to aid in the development of the evidence and evaluate the client. Hr'g Tr. 13:234-35. These experts may testify. Hr'g Tr. 13:236.

556. The fourth stage in this method is presentation. Hr'g Tr. 13:236. First, counsel would approach the District Attorney or the government to make a presentation of why they should not seek the death penalty. Hr'g Tr. 13:236. Then, if the case proceeds to trial, counsel must make a presentation to the fact finder. Hr'g Tr. 13:236.

557. Although formal presentation to the government as to why it should not seek the death penalty happens at this later stage, counsel should always be having a conversation with the government throughout representation to try to get the death penalty off the table. Hr'g Tr. 13:227; Applicant's Ex. 119 at 1035. If the case proceeds to the formal presentation stage without the government having already agreed to not seek the death penalty, counsel would have a packet of materials to present to the government. Hr'g Tr. 13:227. Usually, this packet includes a written submission that would have an overview of what counsel believes they will be able to present in trial as mitigation. Hr'g Tr. 13:227. The packet would also include an overview of the assessment of the strength of the State's case, which may be based on the outcome of pre-litigation evidentiary motions up to this point. Hr'g Tr. 13:227. Finally, it would include attachments, declarations, records, and possibly a signed settlement offer from the client. Hr'g Tr. 13:228.

558. Some members of the Harris trial team had filled out questionnaires about Mr. Harris before coming to the small-group sessions at the Bring Your Own Case conference. Hr'g Tr. 13:249; Applicant's Ex. 125-26. Ms. Recer testified that she had discussed with the team issues raised in the questionnaires of Jay Wooten and fact investigator Juan Soto. Hr'g Tr. 13:249.

559. Ms. Recer discussed with the Harris trial team their theory of mitigation, traumatic brain injury, brain imaging, vascular dementia, and neuropsychologist evaluation. Hr'g Tr. 13:250. She

asked the team about the results of the neuropsychologist evaluation and IQ testing. Hr'g Tr. 13:251. She discussed the multiple IQ scores that Mr. Harris had and how the lower score was within the standard error of measurement for the first prong of intellectual disability. Hr'g Tr. 13:251. She told the team that this information regarding Mr. Harris's prior IQ scores required them to conduct a more thorough life history investigation about adaptive deficits. Hr'g Tr. 13:251. Ms. Recer told the team that the lower IQ score puts an even greater burden on them to do a thorough adaptive functioning investigation. Hr'g Tr. 13:251-52. The prevailing standards of care required that once a red flag such as this was raised, counsel had to investigate it until counsel exhausted the topic. Hr'g Tr. 13:253; Applicant's Ex. 120 at 972.

560. Ms. Recer informed the Harris trial team Mr. Harris's IQ score of 75 was "within the standard error of measurement for the first prong of intellectual disability" recognized by the U.S. Supreme Court. Hr'g Tr. 13:251.

561. Ms. Recer discussed with the Harris trial team Mr. Harris's historic higher IQ test score. Hr'g Tr. 13:253. She advised the team that they needed to do an investigation of what kind of IQ test was administered, along with the testing conditions, such as whether it was group administered, and have an expert look at the raw data to reevaluate it. Hr'g Tr. 13:253. She suggested that the team have the test rescored and checked for errors. Hr'g Tr. 13:253.

562. Ms. Recer also advised the team that they had to do an investigation for adaptive functioning as part

of the life history investigation they were already required to conduct. Hr'g Tr. 13:254. Ms. Recer told the team that although they liked the client or found the client friendly or personable did not mean that he did not have adaptive deficits. Hr'g Tr. 13:254. She explained, "Oftentimes somebody who is masking is going to give the people around them a good feeling because that's how they are covering up their deficits." Hr'g Tr. 13:254.

563. The team did not dispute that they needed to conduct an investigation, but they seemed concerned about the time it would take to conduct the level of investigation that was needed based on the red flags. Hr'g Tr. 13:255.

564. Ms. Recer encouraged the Harris defense team to find independent sources to investigate—sources outside of the family and ones not invested in whether revealing deficits could stigmatize the family. Hr'g Tr. 13:254. Ms. Recer recalls Mr. Harris's team did not dispute that that was the prevailing standard. However, Ms. Recer recalls some skepticism within the team about whether Ms. Harris could be intellectually disabled given that they liked him, and further, whether or not they would have the time to do such a thorough investigation. Hr'g Tr. 13:255.

565. Ms. Kase also participated in a "brainstorming session" with Mr. Wooten and Ms. Camp. Hr'g Tr. 14:178.

566. Ms. Kase always begins her brainstorming sessions with the topic of intellectual disability. Hr'g Tr. 14:178. She recalls starting her session with the Harris trial team with the topic of intellectual disability. Hr'g Tr. 14:178. She did so "because it's a

bar to [the] imposition of the death penalty . . . it's very important for groups . . . and I told them then, to investigate intellectual disability." Hr'g Tr. 14:178. Ms. Kase testified that she had explained the definition of intellectual disability to Mr. Harris's trial team in terms related to proof: adaptive deficits, onset during the developmental period, in the social, practical or conceptual areas, with an IQ score in the range set by psychologists. Hr'g Tr. 14:178-79.

567. Ms. Kase recalled explaining to the Harris trial team that their "first obligation is to do a searching, thorough and complete investigation into risk factors and adaptive deficits. Because if you front load [IQ] testing . . . you can make a really big error." Hr'g Tr. 14:179. She explained to the team that they needed to begin with the investigation rather than testing. Hr'g Tr. 14:179. An understanding of the client's background, culture, and life history would contribute to the choice of the appropriate IQ test and the choice of the appropriate neuropsychologist to administer the test if testing was needed. Hr'g Tr. 14:179.

568. Ms. Kase also recalled discussing risk factors for intellectual disability with the team and how this related to their case. She testified, "I told them you need to determine if your client had risk factors for intellectual disability because first, it allows you to show onset in the developmental period. But second, it also gives you good information about the client's life." Hr'g Tr. 14:180.

569. She testified that the team needed to look for risk factors in Mr. Harris's mother prior to pregnancy, in the time he was being carried by his mother, and in the postnatal period. Hr'g Tr. 14:180. "[D]uring those

three periods . . . what you need to look at are things such as abuse, poverty, emotional trauma, [and] substance abuse." Hr'g Tr. 14:180. In those three periods, these can be causative factors for impeding brain development. Hr'g Tr. 14:180.

570. Ms. Kase instructed the team to collect all records that existed about the client's life, including all medical records, all educational records, all criminal justice records, the family's records three generations back, and the siblings' records also in case some school records for the client ended up there. Hr'g Tr. 14:181; Applicant's Ex. 119 at 1023-24; Applicant's Ex. 120 at 972. She explained to the team that this collection must "start early in the case and keep going." Hr'g Tr. 14:181.

571. Ms. Kase recalled that Ms. Camp seemed very excited about the prospect of investigating intellectual disability and continued to asked questions about developing this. Hr'g Tr. 14:181-82. Ms. Kase explained to the team that Mr. Wooten was the team leader and "ultimately responsible for insuring [sic] that you do a searching, thorough and complete investigation and that this evidence is used well." Hr'g Tr. 14:182; *see also* Applicant's Ex. 120 at 970. Ms. Kase testified, "[I]n the end, [Camp's] work is subordinate to the team leader." Hr'g Tr. 14:184.

572. Ms. Kase testified that she had asked the team to tell her what evidence they had developed at that point. Hr'g Tr. 14:182. She got the impression that the team was very new to the case and had very little information about Mr. Harris's life and potential adaptive deficits. Hr'g Tr. 14:182-83. She gathered that the team had not developed much mitigation.

Hr'g Tr. 14:183. She recalls emphasizing, "[Y]ou've got to do this investigation into intellectual disability. You have to do it. It's out there. And it's clear to me based on what you're telling me now, you haven't yet done it." Hr'g Tr. 14:183.

573. Ms. Camp testified that Mr. Harris's trial team was encouraged to pursue intellectual disability because even if turned out that he was not intellectually disabled, the team would gather valuable mitigation evidence in the course of the investigation that they could present, either to the prosecution to try to get the death penalty waived, or at trial in front of a jury. Hr'g Tr. 14:145. This was in line with how Ms. Camp was trained to always pursue an investigation into intellectual disability until you're able to rule it out. Hr'g Tr. 14:145; *see also* Applicant's Ex. 120 at 972 ("Counsel at every stage of the case, exercising professional judgment in accordance with these Guidelines, should . . . Thoroughly investigate the basis for each potential claim before reaching a conclusion as to whether it should be asserted."). However, Mr. Wooten laughed at Kathryn Kase and Danalynn Recer behind their backs instead. Hr'g Tr. 14:144.

574. At the October 2012 BYOC training, the Mr. Harris's trial team received a draft continuance motion that they could use to seek additional time to conduct a thorough investigation into intellectual disability. Hr'g Tr. 13:255.

VIII. July 2013 Brainstorming Session

575. In July 2013, Ms. Kase led another brainstorming session with Mr. Harris's trial team.

Hr'g Tr. 14:184. The following members of Mr. Harris's trial team were present: Phillip Wischkaemper, Keri Mallon, Jay Wooten, Carlos Garcia, and Ms. Jackson. Hr'g Tr. 14:184-85.

576. Ms. Kase recalled that Ms. Mallon seemed to be still learning the facts of the case in order to assist with jury selection. Hr'g Tr. 14:185. Ms. Kase opened the meeting by asking the team about the status of their negotiations with the District Attorney, as it made sense to her to put energy toward that if the case could settle. Hr'g Tr. 14:185. The team responded that there was no chance the District Attorney was going to agree to a life-saving plea or waiver of the death penalty. Hr'g Tr. 14:185.

577. Ms. Kase then turned to discussing the team's intellectual disability investigation. Hr'g Tr. 14:185. However, Mr. Wooten told her definitively that Mr. Harris did not have an intellectual disability. Hr'g Tr. 14:185. Ms. Kase asked Mr. Wooten to explain how he reached that conclusion. Hr'g Tr. 14:185. Mr. Wooten's only basis was that Mr. Harris had a beta IQ test conducted on him sometime before and his score was "in the 80's and he wasn't intellectually disabled." Hr'g Tr. 14:185.

578. Ms. Kase inquired about Mr. Harris's IQ score of 180. Hr'g Tr. 14:186. She was interested in knowing whether the score was reliable and valid. Hr'g Tr. 14:186. Specifically, she wanted to know: "[W]hat instrument it was derived from, I want to know if it's a full scale IQ or a partial. I want to know if the instrument was normed, if the norms for the instrument were current. I want to know who administered it. I wanted to know under what

conditions. I wanted to know how old the client was. And I wanted to know about things like margin of error, Flynn Effect." Hr'g Tr. 14:186.

579. Ms. Kase testified that Ms. Jackson, the mitigation specialist, seemed unfamiliar with the case because she was likely a new member. When asked about Mr. Harris's IQ testing, Ms. Jackson was unable to provide any relevant answers. Mr. Wooten was also unable to provide Ms. Kase with any information related to Mr. Harris's beta IQ testing. No one on the team knew the information about this beta test during this meeting. Hr'g Tr. 14:187.

580. Ms. Kase explained to the team that this information did not mean Mr. Harris was not intellectually disabled. Hr'g Tr. 14:187. She continued to discuss the need for an intellectual disability investigation. Hr'g Tr. 14:188. Then, Mr. Wooten told her that Dr. Kasper had evaluated Mr. Harris and administered an IQ test. Hr'g Tr. 14:188. Mr. Wooten called Dr. Kasper during this meeting. Hr'g Tr. 14:188.

581. Ms. Kase heard Dr. Kasper inform the team over this phone call that Mr. Harris scored in the seventies on Dr. Kasper's administered IQ test. Hr'g Tr. 14:188. Mr. Wooten stated his understanding that this IQ test result indicated that Mr. Harris was not intellectually disabled. Hr'g Tr. 14:188. Ms. Kase explained that this IQ test result was not definitive because the test had a margin of error. Hr'g Tr. 14:188. Additionally, Ms. Kase determined that Dr. Kasper had not received any evidence concerning risk factors or adaptive behavior because the team had not developed this evidence. Hr'g Tr. 14:189.

582. Ms. Kase informed the team that they needed

to seek a continuance to give them time to develop evidence of Mr. Harris's adaptive deficits. Mr. Wooten stated there was no chance the District Attorney was going to agree to a continuance. Ms. Kase explained that the team needed to file a continuance motion with the Court and make their record. Hr'g Tr. 14:191.

583. Ms. Kase urged the team to pursue an investigation into Mr. Harris's potential intellectual disability. Hr'g Tr. 14:192-93. She testified that their investigation was "woefully incomplete" with trial quickly approaching. Hr'g Tr. 4:192.

584. Ms. Mallon testified that she did not know what sort of intellectual disability investigation had been undertaken that informed Dr. Kasper's opinion. Nor does she know what sort of testing had been done to determine whether there was a viable intellectual disability claim. Hr'g Tr. 14:73-74. Ms. Mallon does not recall the basis or discussions about the basis for Dr. Kasper's opinion. Nor does she recall if any documents were collected regarding the basis of Dr. Kasper's opinion.

585. Ms. Mallon testified that she does not believe anyone on the trial team or at the July 2013 brainstorming session had any documents revealing the basis of Dr. Kasper's opinion. Hr'g Tr. 14:75. The only information she recalls Dr. Kasper may have relied on was Mr. Harris's IQ score, but Ms. Mallon could not recall where Harris's IQ test scores came from. Hr'g Tr. 14:79.

586. In fact, Mallon was not aware of the extent of the intellectual disability investigation before the July 2013 brainstorming session in Houston. She confirmed that the team did nothing to investigate a potential

intellectual disability after the brainstorming session. Hr'g Tr. 14:96. From the time Ms. Mallon joined Mr. Harris's team, she did not ask any questions about intellectual disability in her mitigation investigation. Hr'g Tr. 14:74.

587. Ms. Mallon testified that Dr. Kasper was a forensic psychologist and the Harris trial team did not consult any adaptive psychologists or neuropsychologists on the case. Hr'g Tr. at 14:76. Ms. Mallon did not know anything about Dr. Kasper's qualifications for reviewing brain scans or if Dr. Kasper had reviewed Mr. Harris's brain scans. Hr'g Tr. 14:76-77.

588. Ms. Mallon acknowledged that if someone appears to be a low-functioning individual that could signal the individual has an intellectual disability. Hr'g Tr. 14:121. Ms. Mallon testified that the trial team did not ask potential witnesses questions to determine whether Harris is intellectual disabled, even though some witnesses indicated that Harris showed signs of being slow. Hr'g Tr. 14:86.

IX. Members of Mr. Harris' Trial Team Identified Red Flags Signaling the Need to Investigate Intellectual Disability

A. *Ms. Ward and Ms. Jackson*

589. In a March 19, 2012 memo, Mr. Ward, an investigator on Mr. Harris' original trial team, wrote that Mr. Harris "presents as a person of low intellect." Hr'g Tr. 15:51.

590. Ms. Jackson, the last mitigation specialist on Mr. Harris' trial team, testified that the fact that Mr.

Harris was considered a "person of low intellect" by an investigator on the case was a red flag, indicating a need for follow-up relating to potential intellectual disability. Hr'g Tr. 15:51.

591. Ms. Jackson testified that ignoring Mr. Ward's observation that Mr. Harris is a "person of low intellect" was a mistake. Hr'g Tr. 15:51.

592. According to Mr. Ward's memo Mr. Harris appeared "naïve, exhausted, and somewhat detached," which are all red flags of an intellectual disability. Hr'g Tr. 15:52; Applicant's Ex. 189. These signs are consistent with both drug withdrawal and intellectual disability. Hr'g Tr. 15:52-53; Applicant's Exhibit 189.

593. Ms. Jackson testified that the presence of drug withdrawal in a subject does not rule out potential intellectual disability. Hr'g Tr. 15:53; Applicant's Ex. 189.

594. Mr. Ward's memo notes that "James really does not seem to appreciate the consequences of talking to the detectives." Hr'g Tr. 15:53; Applicant's Ex. 189.

595. Ms. Jackson testified that the fact that Mr. Harris did not seem to appreciate the consequences of talking to detectives and confessing is a serious red flag that should prompt additional investigation into intellectual disability. Hr'g Tr. 15:53; Applicant's Ex. 189.

596. Ms. Jackson agreed that while Mr. Harris's lack of appreciation for the consequences of his actions may have been caused by something other than intellectual disability, nothing should be ruled out in the investigation stage. Hr'g Tr. 15:53.

597. Ms. Jackson did not specifically follow-up on Mr. Ward's memo. Hr'g Tr. 15:53-54.

598. Ms. Jackson admitted that Mr. Ward's memorandum of Mr. Harris's case is an important document to a mitigation specialist, but Ms. Jackson does not recall following-up on it. Hr'g Tr. 15:54; Applicant's Ex. 189.

599. Ms. Jackson failed to conduct any investigation into whether Ms. Harris has an intellectual disability. Hr'g Tr. 15:72.

600. As part of her work on Mr. Harris's defense team, Ms. Jackson reviewed Dr. Kasper's IQ testing. Hr'g Tr. 15:94. Ms. Jackson admitted that Mr. Harris's IQ score of 75 supports the need for an intellectual disability investigation. Hr'g Tr. 15:94; Applicant's Ex. 225.

601. Ms. Jackson also agreed that Mr. Harris's IQ score of 75 alone would cause her to disagree with the sentence from her affidavit: "Furthermore, there weren't any records obtained by the defense team that supported the need for an intellectual disability investigation." Hr'g Tr. 15:93-94; *cf.* Applicant's Ex. 225.

602. Ms. Jackson admitted that Mr. Harris's beta test IQ score of 83 is low and supports the need for an intellectual disability investigation by a mitigation specialist. Hr'g Tr. 15:94-95.

603. Ms. Jackson admitted that her statement that "there weren't any records obtained by the defense team that supported the need for an intellectual disability investigation" was also incorrect with respect to the Beta test IQ score of 83. Hr'g Tr. 15:95;

Applicant's Ex. 225.

604. Ms. Jackson admitted that the statement in her affidavit that Mr. Harris's family never provided any information and or concern that alluded to delayed or lack of cognitive functioning, adaptive deficits, or any factors that correlated with intellectual disability is not accurate. Hr'g Tr. 15:96-97; Applicant's Ex. 225.

605. Ms. Jackson admitted that she no longer agrees with the statement that "Mr. Harris's family never provided any information and/or concern that alluded to delayed or lack of cognitive functioning, deficits, or any factors that correlate with intellectual disability," and would not sign her name to that sworn statement if she were to resubmit her affidavit. Hr'g Tr. 15:97; Applicant's Ex. 225.

606. In fact, Ms. Jackson confirmed that Mr. Harris's family members provided information with factors that correlate with intellectual disability. Hr'g Tr. 15:97.

607. Ms. Jackson admitted that Dr. Kasper did not say that Mr. Harris lacked adaptive deficits. Hr'g Tr. 15:103.

608. Ms. Jackson testified that she did not complete a targeted adaptive deficit investigation. Hr'g Tr. 15:103.

609. Ms. Jackson testified that, looking back on the case now, "there are things she would have looked further into" with respect to intellectual disability. Hr'g Tr. 15:130.

Ms. Camp

610. Ms. Camp, one of the mitigation specialists on Mr. Harris' trial team, had serious concerns about Mr.

Harris's intellectual functioning and wanted to investigate it. Hr'g Tr. 13:179. The Court finds Ms. Camp's testimony to be credible.

611. Ms. Camp raised the possibility of intellectual disabilities issue as a possible mitigating factor with Mr. Wooten. Hr'g Tr. 13:179.

612. When Ms. Camp suggested they should explore intellectual disability as part of the mitigation plan for Mr. Harris, Mr. Wooten told them that they should not do that. Hr'g Tr. 13:188.

613. Because Mr. Wooten told Carol Camp not to investigate intellectual disability, she was prevented from doing so. Hr'g Tr. 13:191-92.

614. Through the pre-trial and trial phases of Mr. Harris's case, three different mitigation specialists worked on his case. Hr'g Tr. 13:181-82.

615. The role of the mitigation specialist is to investigate anything that might mitigate against the death penalty, including intellectual disability. Hr'g Tr. 13:182.

616. Mr. Wooten did not understand that Mr. Harris had an intellectual disability and dismissed Carol Camp and Mary Conn when they suggested that they explore that possibility as a part of their mitigation investigation. Hr'g Tr. 13:188.

617. Ms. Camp has worked on capital cases since 2001 in various capacities. Hr'g Tr. 14:128. She has worked on mitigation investigations, worked as a mitigation specialist, and worked as an attorney. Hr'g Tr. 14:128. She worked full time as a mitigation specialist at the RPDO from December 2011 to March 2013. Hr'g Tr. 14:128. She was assigned to Mr.

Harris's case as a mitigation specialist in June 2012. Hr'g Tr. 14:129.

618. The mitigation specialist's primary duty is to put together a biopsychosocial history of the client. Hr'g Tr. 14:129. To do this, the mitigation specialist needs to obtain records and put together a family history of the client to better understand issues and challenges he may have faced in his life. Hr'g Tr. 14:129. The ABA Guidelines require the investigation go three generations back, starting with the client, then back to the parents and grandparents. Hr'g Tr. 14:129-30; Applicant's Ex. 119 at 1025 n.216. Additionally, as the mitigation specialist on Mr. Harris's trial team, Ms. Camp was responsible for establishing a relationship with the client, maintaining regular client contact with him, making sure his needs were taken care of, meeting his family members, developing a relationship with his family members, and finding as many people as possible who knew the client, such as family members, teachers, coaches, significant others, and supervisors. Hr'g Tr. 14:129.

619. Prior to Ms. Camp joining Mr. Harris's trial team as the mitigation specialist, two others had been mitigation specialists on the team. Hr'g Tr. 14:138. Robin Buggs was the mitigation specialist immediately before Ms. Camp joined the team. Hr'g Tr. 14:138. Joe Ward worked as a mitigation specialist on Mr. Harris's case before Ms. Buggs. Hr'g Tr. 14:138, 152. However, even with two prior mitigation specialists on the case before Ms. Camp joined, the team head conducted only a few interviews and collected few documents. Hr'g Tr. 14:138. Ms. Camp

felt there was "still a great deal of work that needed to be done." Hr'g Tr. 14:138.

620. At the time Ms. Camp joined the team, many witnesses had not yet been contacted or interviewed, and the team still needed to collect numerous records. Hr'g Tr. 14:138-39. Ms. Camp wanted to talk to more witnesses and do more comprehensive interviews for adaptive deficits. Hr'g Tr. 14:139. She wanted to do so using a checklist from a manual she received in a training hosted by the Administrative Office of the Federal Courts that had a very detailed list for how to interview family members, former spouses, significant others, and other people who were close to the client about adaptive deficits. Hr'g Tr. 14:139, 141. She also wanted to obtain more records from others in the family to look for a family history of intellectual disability. Hr'g Tr. 14:139.

621. Furthermore, Ms. Camp wanted to bring in a specialist or expert, such as Dr. James Patton, to identify adaptive deficits in Mr. Harris and also interview the family members to assess for adaptive deficits. Hr'g Tr. 14:140. Ms. Camp also wanted to interview family members again because mitigation requires follow-up interviews and time to establish rapport with the witnesses. Hr'g Tr. 14:140.

622. For the interviews Ms. Camp did conduct, she documented them in interview memoranda. Hr'g Tr. 14:141. She documented details, such as Mr. Harris giving his paychecks to his wife to manage the money. Hr'g Tr. 14:141. Ms. Camp did this because she was trained as a mitigation specialist to describe how the behavior manifests itself and give examples. Hr'g Tr. 14:141-42. These examples are to aid a judge or a

jury's understanding of the diagnosis in a way that clinical terms may not describe as simply. Hr'g Tr. 14:141-42.

623. To determine what issues to investigate in Mr. Harris's history, Ms. Camp used information she gained in interviews with Mr. Harris and other witnesses as well as school and prison records she received. Hr'g Tr. 14:130-31. In Mr. Harris's case, Ms. Camp began investigating intellectual disability, patterns of illness and disease in the family, a history of mental illness, history of substance abuse and addiction, and cancer. Hr'g Tr. 14:130

624. During Ms. Camp's time working as a mitigation specialist for Mr. Harris's trial team, she was familiar with the original and revised ABA Guidelines as well as the supplementary material. Hr'g Tr. 14:132. However, Ms. Camp was prevented from working in accordance with these guidelines on Mr. Harris's team because the team did not work together cohesively. Hr'g Tr. 14:132-33. Additionally, when Ms. Camp started on the case, she went with the team to visit Mr. Harris in jail. Hr'g Tr. 14:133. Mr. Wooten stated that Mr. Harris was not "mentally retarded," and Mr. Wooten based this on his own conversations and observations of Mr. Harris. Hr'g Tr. 14:133. Ms. Camp responded to this by explaining to Mr. Wooten "you can never tell whether somebody is mentally retarded by looking at them or just by talking do them. [Y]ou have to do an investigation and you have to have them assessed to determine whether that's the case or not." Hr'g Tr. 14:134.

625. Ms. Camp's interviews led her to believe Mr. Harris was intellectually disabled. Hr'g Tr. 14:134.

Specifically, she found that he had difficulty in school. Hr'g Tr. 14:134. His former wives and his sister advised her that he had not lived on his own and that he depended on others a great deal to help him function on a daily basis. Hr'g Tr. 14:134. His second ex-wife had described to Ms. Camp how he would bring home his paychecks and give it to her to manage all of the household finances. Hr'g Tr. 14:134. He also held various unskilled jobs. Hr'g Tr. 14:135. "[T]he combination of his lifestyle, his work experience, and his intellectual issues in school . . . all added up to suggest that we needed to do a comprehensive intellectual disability investigation," Ms. Camp testified. Hr'g Tr. 14:135.

626. Ms. Camp spoke to Mr. Wooten, Phillip Wischkaemper (then-Deputy Director at the RPDO), and fellow mitigation specialist Rob Cowie about her "desire to do an intellectual disability investigation for Mr. Harris." Hr'g Tr. 14:135-37. Even after speaking with Mr. Cowie, Ms. Camp felt she was still not able to do the investigation into intellectual disability the way that it should have been done. Hr'g Tr. 14:136. She did try to find out what she could about Mr. Harris's limitations through interviews. Hr'g Tr. 14:136. She also tried to find other areas of investigation that could be potentially highly mitigating, but it was her view that these areas were not as mitigating as intellectual disability would have been. Hr'g Tr. 14:136.

627. Mr. Wischkaemper encouraged Ms. Camp to continue trying to educate Mr. Wooten about the investigation and talk to him about allowing her to investigate intellectual disability. Hr'g Tr. 14:135-37.

Ms. Camp attempted this, but Mr. Wooten made clear to her that he did not believe Mr. Harris was intellectually disabled because of the way Mr. Harris talked, so he would not pursue that or let the team investigate it. Hr'g Tr. 14:137-38, 142.

628. Ms. Camp has, in other capital cases, created a mitigation packet. A mitigation packet is a collection of things presented for mitigation. Hr'g Tr. 14:157-58. Information about intellectual disability is included in those packets. Hr'g Tr. 14:158.

629. Mitigation packets cannot be prepared too early before the team has gathered the information about the client, but they cannot be prepared too late as this would not allow time for negotiations to resolve the case. Hr'g Tr. 14:158. In Mr. Harris's case, Ms. Camp did not work on a mitigation packet because she was not authorized to do so. Hr'g Tr. 14:159. No one on the defense team worked on a mitigation packet. Hr'g Tr. 14:159.

X. Mr. Harris's Trial Team Failed to Investigate Intellectual Functioning

630. Mr. Wooten agreed that "there was never any investigation specific to intellectual disability" in Mr. Harris's case prior to his trial. Hr'g Tr. 19:52.

631. An April 3, 2012 "Investigation Plan Memorandum" written by RPDO staff members J.R. Soto, Joseph Ward, and Robin Buggs to the Harris defense team set forth numerous investigative projects in preparation for Mr. Harris's murder trial—none of which related to intellectual disability. Hr'g Tr. 19:130-133.

632. Mr. Wooten testified that as lead trial counsel, he took no steps to confirm whether the mitigation specialists on his team were qualified to serve as mental health associates. Hr'g Tr. 19:62-63.

633. Mr. Wooten admitted that he only instructed Dr. Kasper to provide expert opinions on two issues: (1) organic developmental brain dysfunction, and (2) traumatic or organic brain injury or insult. Hr'g Tr. 19:68-69; State's Ex. 100. Mr. Wooten admitted that both of these issues are not the same as intellectual disability. Hr'g Tr. 19:68-69. Mr. Wooten instructed Dr. Kasper specifically not to perform additional psychiatric or psychological testing "without [the trial team's] approval." Hr'g Tr. 19:70; State's Ex. 100, ¶ 3.

634. Mr. Wooten admitted that the absence of damage to Mr. Harris's frontal lobe on the MRI scan would not rule out intellectual disability. Hr'g Tr. 19:189. In other words, one can have an MRI scan that does not show any evidence of frontal lobe damage and still be intellectually disabled. Hr'g Tr. 19:189-90.

635. Mr. Wooten testified that when Dr. Kasper was retained as an expert, Mr. Wooten never told her that he wanted her to investigate whether Mr. Harris had intellectual disability. Hr'g Tr. 19:65; 19:27-28, 65.

636. Mr. Wooten testified that he was aware that Mr. Harris had a full scale IQ test result of 75. He understood that a full scale IQ result on a WAIS score of 75 would put Mr. Harris within the possibility of an intellectual disability defense. Hr'g Tr. 19:111.

637. Page 52 of the Practitioner's Guide to Defending Capital Clients Who Have Mental Retardation/Intellectual Disability, Third Edition

("Practitioner's Guide") states, "It is not unusual for a client who is properly diagnosed with mental retardation to have obtained, at some point in the past, an IQ score higher than 75." Applicant's Ex. 123. "Such scores are referred to as outliers, and should never cause a team to abandon a potential mental retardation diagnosis." Applicant's Ex. 123. Mr. Wooten admitted that Mr. Harris's IQ score of 83 was, in part, one of the causes for his team to abandon a potential mental retardation diagnosis. Hr'g Tr. 19:169. Mr. Wooten also admitted that he does not have any knowledge with respect to the administration of Mr. Harris's former IQ test. Hr'g Tr. 169-70. Mr. Wooten testified that he knew nothing about the previous test and could have followed up to learn more about its administration. Hr'g Tr. 19:170. Mr. Wooten testified that since his team failed to obtain the test results from Mr. Harris's previous IQ test, he did not furnish Dr. Kasper with that information. Hr'g Tr. 19:171.

638. Mr. Wooten admitted that Dr. Kasper told him that Mr. Harris had a full scale IQ test of 75. Hr'g Tr. 19:224-25. He understood that to be in the zone to support an intellectual disability defense as described in *Atkins v. Virginia*, 536 U.S. 304 (2002). Hr'g Tr. 19:225.

639. Mr. Wooten testified that Dr. Kasper did not conduct any investigation into adaptive deficits. Hr'g Tr. 19:227.

XI. Mr. Harris's Trial Team Failed to Investigate Adaptive Functioning

640. Mr. Wooten testified that the investigation

into Mr. Harris's intellectual disability defense "never got jump-started." Hr'g Tr. 19:64.

641. On page 2 of Applicant's Exhibit 150, Ms. Camp instructed as part of her "to- do list" that a genogram be created. Applicant's Ex. 150. Mr. Wooten admitted that by the time Ms. Camp created this list, she had been serving as the mitigation specialist on Mr. Harris's case for at least nine months. Hr'g Tr. 19:176. Mr. Wooten testified that he was surprised to learn that a genogram had still not been created six months before trial. Hr'g Tr. 19:176. Mr. Wooten admitted that he does not know one way or another whether a genogram was ever created for Mr. Harris. Hr'g Tr. 19:177.

642. Mr. Wooten testified that a genogram is one of the first things that a mitigation team should do. He also testified that it was important for a claim of intellectual disability. Hr'g Tr. 19:173.

643. Mr. Wooten testified that he considered the Practitioner's Guide reliable and authoritative in his field of work. Hr'g Tr. 19:157. Mr. Wooten agreed with the statement that "[t]he most important thing for practitioners to know about mental retardation/intellectual disability, is that we don't know it when we see it." Hr'g Tr. 19:158; Applicant's Ex. 123. He also agreed with the statement, "In other words you can't tell by looking whether or not someone has mental retardation." Hr'g Tr. 19:158; Applicant's Ex. 123. Mr. Wooten acknowledged that "investigation [into intellectual disability] is required not just sometimes but in all cases." Hr'g Tr. 19:158.

644. Mr. Wooten testified that he was not familiar with what the Practitioner's Guide prescribes as the

appropriate investigation into adaptive functioning. Hr'g Tr. 19:159.

645. On page 15 of the Practitioner's Guide, the first full paragraph on page 15 states: "Assessment of adaptive behavior should include 'a systemic review of the individual's family history, medical history, school records, employment records (if an adult), other relevant records and information, as well as clinical interviews with a person or persons who know the individual well.'" Applicant's Ex. 123 at 15. It cites to the AAIDD Green Book, which Mr. Wooten agreed is a reliable and authoritative source in the field. Hr'g Tr. 19:159-60; Applicant's Ex. 123. Mr. Wooten testified that neither he nor his trial team conducted any clinical interviews with people who have knowledge to determine whether Mr. Harris had adaptive deficits. Hr'g Tr. 19:161.

646. Page 19 of the Practitioner's Guide states, "In addition, it is very likely that no one – and, particularly, no one in the justice system – has previously considered the possibility that your capital client has mental retardation. The suggestion will undoubtedly be met with skepticism, even by members of the defense team." Mr. Wooten testified that he himself was skeptical of Mr. Harris's intellectual disability. Hr'g Tr. 19:164; Applicant's Ex. 123.

647. Moreover, the Practitioner's Guide also states that, "First, since people with mental retardation are often capable of more than conventional stereotypes of the condition suggests, it's possible that the questioned behavior is in fact indicative of an area of strength for the client that is not inconsistent with his

diagnosis of mental retardation." Hr'g Tr. 19:163-64; Applicant's Ex. 123. It states further that, "it is even more frequently the case that assertions about a client's accomplishments turn out to be exaggerated." Hr'g Tr. 19:163-64; Applicant's Ex. 123.

648. Page 26 of the Practitioner's Guide states, "Accordingly, to avoid overlooking mental retardation in our clients, it is imperative to proceed with extreme care. It is inappropriate to rely upon impressions derived from our interviews with clients, their letters to us, or what others think of them to rule out mental retardation." "Furthermore, we absolutely must not rely on a client's assertions about his or her own skills and abilities. These must always be probed." Hr'g Tr. 19:165; Applicant's Ex. 123.

649. Pages 27-31 of the Practitioner's Guide lists a number of "red flags for mental retardation" that arise from a client's life history. Applicant's Ex. 123. Subsection (a) is the "possibility that a client's family members . . . have mental retardation, learning disabilities, or any neurological or other brain-based disability." Applicant's Ex. 123. Mr. Wooten agreed that the incidence of intellectual disability in a niece would be relevant to an investigation into the intellectual disability of the client. Hr'g Tr. 19:166. Mr. Wooten admitted that he did not know that Mr. Harris's niece, Ms. Tamara Harris, was found to be intellectually disabled. Hr'g Tr. 19:166- 67.

650. Mr. Wooten understands that formal and informal instruments exist and that they are used to investigate adaptive deficits with witnesses. Hr'g Tr. 19:55.

651. Mr. Wooten admitted that he has never seen

informal adaptive functioning instruments created by Dr. James Patton. Hr'g Tr. 19:55.

652. Mr. Wooten admitted that he has never read the Practitioner's Guide. He also admitted that he had never had a copy of the Practitioner's Guide. Hr'g Tr. 19:55.

653. About two or three months before Mr. Harris's trial, Mr. Wooten decided as lead trial counsel for Mr. Harris that there was no need for further investigation into Mr. Harris's claim for intellectual disability. Hr'g Tr. 19:56.

654. Mr. Wooten testified that that he believed Mr. Harris was coherent, rational, and focused. Hr'g Tr. 19:79.

655. Mr. Wooten noted in a memorandum that he believed Mr. Harris had an "unearned affinity" for Mr. Wooten and that he viewed that unearned affinity as exploitable. Hr'g Tr. 19:80.

656. Mr. Wooten testified that he did not compare any of his working memos in his team meetings to any of the ten domains of adaptive functioning. Hr'g Tr. 19:229. Mr. Wooten agreed that there is a methodical way that you can record the evidence both for and against adaptive deficits. Hr'g Tr. 19:231. He admitted that he did not undertake any methodical approach to investigate Mr. Harris's adaptive deficits. Hr'g Tr. 19:231.

657. Marlin Lincoln met with Harris's trial counsel a couple of times before testifying at trial. Marlin Lincoln never met with Mr. Wooten before testifying at trial. Hr'g Tr. 15:170-71.

658. Mr. Lincoln has never met with Mr. Wooten for

any trial preparation or at any time before Mr. Harris's trial. Hr'g Tr. 15:171.

659. Had the Harris trial team asked Mr. Lincoln about Mr. Harris's shortcomings and struggles at work or in living an independent life, he would have been willing and able to testify about them in court. Hr'g Tr. 15:172.

660. Ms. Duplechin testified in Mr. Harris's 2013 trial. Hr'g Tr. 15:142-43. She met with members of his defense team prior to testifying. Hr'g Tr. 15:142-43. The discussion did not involve how Mr. Harris functioned in everyday life. Hr'g Tr. 15:143. She did not discuss with the 2013 trial team Mr. Harris's inability to manage money. Hr'g Tr. 15:140, 143. She did not discuss with the 2013 trial team Mr. Harris's abilities regarding chores around the house. Hr'g Tr. 15:143. The 2013 trial team did not ask about the type of tasks with which Mr. Harris struggled. Hr'g Tr. 15:143.

661. Mr. Wooten admitted that in his sworn affidavit submitted to this Court, he stated that when he previously interviewed Carolyn Duplechin prior to Mr. Harris's trial, he did not ask Ms. Duplechin any questions designed to elicit information on Mr. Harris's adaptive deficits. Hr'g Tr. 19:58-59. Mr. Wooten testified that he never asked any witness in the Harris case questions designed to elicit information about Mr. Harris's adaptive deficits. Hr'g Tr. 19:61-62.

JUROR MISCONDUCT

I. Juror Henry Was the Victim of a Crime

and Friends with the Victim of a Crime

662. Deborah Henry was a juror in Mr. Harris's capital murder trial. Hr'g Tr. 13:33-34. Based on conflicting testimony and her admissions on cross-examination, the Court finds that Ms. Henry's testimony on direct examination regarding juror misconduct and juror bias to be not credible.

663. On September 3, 2013, Juror Henry completed the mandatory juror questionnaire for Mr. Harris's capital murder trial. Applicant's Ex. 79. She signed the juror questionnaire and affirmed that her responses were true and correct. *Id.*

664. Question 45 of the juror questionnaire asked: "Have you, any member of your family, or a friend, ever been a victim of a crime?" Juror Henry checked the box for "No." Applicant's Ex. 79.

665. Question 135 of the juror questionnaire asked: "Have you or your spouse ever been a victim of any crime? Juror Henry checked the box for "No." Applicant's Ex. 79.

666. Juror Henry also testified that she knew Cathy Harrell, who worked on same floor with her at ThromboVision, and considered her a friend. Hr'g Tr. 13:132. Ms. Henry was aware that Ms. Harrell's husband had been murdered. Hr'g Tr. 13:130-32.

667. Ms. Harrell had complained to Ms. Henry that she often had to return to court to deal with appeals relating to the man who had murdered her husband. Ms. Henry felt that Joann Heisey from the Office of Capital and Forensic Writs was doing the same thing to her when Ms. Heisey approached her about potentially signing an affidavit relating to the Harris

trial. Ms. Henry recalled how she felt sorry for Ms. Harrell having to go back and forth to court, and she did not want the same thing to occur in the Harris case. Ms. Henry related Ms. Harrell's experience with the court system to the prospect of appeals in the Harris case. Hr'g Tr. 13:133-34.

668. Ms. Henry first met Alan Jernigan while working at ThromboVision. Hr'g Tr. 13:34.

669. Ms. Henry left ThromboVision in 2008, but she remained in contact with Alan Jernigan. Hr'g Tr. 13:34.

670. Ms. Henry considered Mr. Jernigan a friend. Hr'g Tr. 13:35.

671. After Ms. Henry's husband died, she received his life insurance proceeds. Hr'g Tr. 13:35.

672. In 2008, Mr. Jernigan contacted Ms. Henry and asked her for seed money for a purported business in the Philippines. Initially, Mr. Jernigan asked Ms. Henry for approximately $8,000. Because Ms. Henry had the proceeds from her husband's life insurance, she was willing to help a friend. Hr'g Tr. 13:35-36.

673. Ms. Henry eventually came to realize that Mr. Jernigan was committing a scam on her. Hr'g Tr. 13:36.

674. Ms. Henry also learned that she was not the only person whom Mr. Jernigan was scamming. Hr'g Tr. 13:36.

675. Ms. Henry kept correspondence that she had with Mr. Jernigan. Hr'g Tr. 13:36.

676. On May 8, 2009, Mr. Jernigan sent Ms. Henry an email related to the scam he was committing on her.

Mr. Jernigan claimed that there was exciting news related to his business in the Philippines. The exciting news was that the wire transfer was ready and waiting for Ms. Henry at all the Manila ministries and agencies. Mr. Jernigan also stated that there was disappointing news. The disappointing news was that Mr. Jernigan's agent had put a stop order on the wire transfer and he needed more money. These are just a few examples of the many lies that Mr. Jernigan told Ms. Henry related to the scam he committed on her. Hr'g Tr. 13:38-39; Applicant's Ex. 129.

677. Mr. Jernigan's scam on Ms. Henry consisted of telling her lies about a business in the Philippines. He specifically guaranteed that regardless of what happened with the business, Ms. Henry would get her money back. Based on that guarantee, Mr. Jernigan continued to ask Ms. Henry for money, and she continued to give it to him. Hr'g Tr. 13:39-40.

678. On one occasion, Ms. Henry gave Mr. Jernigan $39,000. Hr'g Tr. 13:41.

679. Ms. Henry kept an excel spreadsheet tracking the money that she gave to Jernigan. She also notarized an agreement made between the two of them. Hr'g Tr. 13:42-43.

680. Throughout the time period that Mr. Jernigan was scamming Ms. Henry, she remained friendly with him. Ms. Henry considered Mr. Jernigan a friend, and she totally trusted him. Even late in the process, she remained friendly with Jernigan, and she believed they were friends and that friends do not betray friends. Hr'g Tr. 13:43.

681. As late as October 2009, Ms. Henry was continuing to lend Mr. Jernigan money, and she had

no hard feelings toward him. Shortly after October 2009, Mr. Jernigan vanished. He never gave Ms. Henry her money back, and he did not keep his promises to her. Although Ms. Henry continued to email Mr. Jernigan, he never would not respond. Hr'g Tr. 13:45-47.

682. Mr. Jernigan's disappearance hurt Ms. Henry. It took Ms. Henry a long time to get over the hurt that Mr. Jernigan caused her. It took so long that Ms. Henry described herself as being "scarred for life." Ms. Henry stopped trusting people because of Mr. Jernigan's betrayal. Thinking about what Mr. Jernigan did to her causes Ms. Henry to become very sad. Hr'g Tr. 13:48.

683. Thinking back on what Mr. Jernigan did, Ms. Henry felt that he "played" her. Hr'g Tr. 13:49.

684. After Ms. Henry realized that Mr. Jernigan had scammed her, she approached District Attorney Jeri Yenne at church. Ms. Henry knew that Ms. Yenne was the District Attorney. Ms. Henry asked if there was anything that could be done about what Mr. Jernigan had done to her. Hr'g Tr. 13:52.

685. In seeking advice from Ms. Yenne, one of Ms. Henry's goals was to see if there was any way she could recover some of her money. Another goal was to make sure that Jernigan could not scam others again. Hr'g Tr. 13:54.

II. Texas State Securities Board Investigation

686. Ms. Henry was contacted by the Texas Securities Board after LeAnn Latham—Ms. Henry's

friend, co-worker, and fellow victim of Mr. Jernigan—began working with the Board. Ms. Latham had told Ms. Henry that Ms. Henry's name had come up in Ms. Latham's conversations with the Texas Securities Board. Hr'g Tr. 13:58.

687. Ms. Henry received a subpoena to act as a potential witness in a civil fraud case brought against Mr. Jernigan by another victim named John Fiducia. Ms. Henry reported to the courthouse, but she ultimately was not called to the witness stand. Hr'g Tr. 13:59-60.

688. After Ms. Henry was contacted by the State Securities Board, she provided them with information, including filling out a questionnaire. Hr'g Tr. 13:63.

689. Greta Cantwell is an enforcement attorney with the Texas State Securities Board ("Securities Board"). Hr'g Tr. 12:76. Ms. Cantwell has been with the Securities Board since December of 2007. Hr'g Tr. 12:77. As an enforcement attorney, Ms. Cantwell investigates conduct that is potentially in violation of the Texas State Securities Act including fraud. Hr'g Tr. 12:76-78.

690. Matthew Leslie is Assistant Director in the Enforcement Division of the Securities Board. Hr'g Tr. 12:126. Mr. Leslie has worked at the Securities Board since August 2011. Hr'g Tr. 12:126. As an enforcement attorney, Mr. Leslie "investigate[s] cases to try and detect and present violations of the Texas Securities Act." Hr'g Tr. 12:127.

691. All investigations carried out by Ms. Cantwell and other enforcement attorneys carry a potential for administrative, civil, or criminal penalties. Hr'g Tr. 77. In making the determination of whether to pursue

an administrative, civil, or criminal penalty, the enforcement attorney considers the facts and circumstances of each case. Hr'g Tr. 12:78. Generally, a case involving fraud would likely be treated as a criminal case. Hr'g Tr. 12:78. Similarly, if the suspected violator has committed fraud and has no assets "to go after," then the case is usually treated as criminal. Hr'g Tr. 12:78. The Texas State Securities Board places a "significant emphasis on criminal prosecutions." Hr'g Tr. 12:79.

692. Ms. Cantwell worked on the investigation of Alan Jernigan, who ultimately pled guilty to securities fraud in 2014. Hr'g Tr. 12:79. In 2014, Mr. Jernigan was indicted by a grand jury on charges of securities fraud, money laundering, and aggravated theft. Hr'g Tr. 12:82-84; Applicant's Ex. 111. As a result of Mr. Jernigan's criminal conduct, he defrauded five investors out of $463,000. Hr'g Tr. 12:84.

693. Mr. Leslie joined Ms. Cantwell in her investigation of Mr. Jernigan in September 2013. Hr'g Tr. 12:127.

694. On May of 2013, as part of her investigation of Mr. Jernigan, Ms. Cantwell learned that Deborah Henry, who served as a juror in Mr. Harris's capital murder case later that year, was a victim of Mr. Jernigan's criminal conduct. Ms. Cantwell testified that Ms. Henry was the biggest investor who was defrauded out of the most amount of money—around $254,000. Hr'g Tr. 12:85.

695. On May 29, 2013, as part of Mr. Jernigan's criminal investigation, Ms. Cantwell issued a letter to Bank of America enclosing a subpoena, requesting documents related to Ms. Henry's account. Hr'g Tr.

12:87-88; *see also* Applicant's Ex. 100. In Ms. Cantwell's letter, she wrote in bold typeface, "The Texas State Securities Board finds that the subpoenaed records relate to an ongoing criminal investigation by the agency and the disclosure could significantly impede or jeopardize the investigation. It is required that your office refrain from disclosing to the account holder(s) any information regarding the service of this subpoena, the nature of the request, or whether records have been furnished in response to this subpoena. This non-disclosure requirement is made pursuant to Section 59.010 of the Texas Finance Code." Hr'g Tr. 12:88-89; Applicant's Ex. 100. As of May 29, 2013, Ms. Cantwell testified that Mr. Jernigan's investigation was "potentially criminal." Hr'g Tr. 12:89.

696. Ms. Henry testified at the evidentiary hearing she "know[s] now that [Jernigan] was actually committing a scam" against her. Hr'g Tr. 13: 36.

697. As part of her investigation, Ms. Cantwell received Ms. Henry's contact information from LeAnn Latham, who was another one of Mr. Jernigan's victims. Hr'g Tr. 12:85, 89.

698. On May 30, 2013, Ms. Cantwell contacted Ms. Henry by email where she introduced herself as an enforcement attorney and attached a complaint form requesting information related to Ms. Henry's investments with Mr. Jernigan. Hr'g Tr. 12:90-91; Applicant's Ex. 101; Applicant's Ex. 82. Ms. Cantwell testified that Ms. Henry had "responded quickly," and had completed a form complaint and returned it to Ms. Cantwell in short order. Hr'g Tr. 12:86, 90. In fact, Ms. Henry called Ms. Cantwell after receiving her initial

email. Hr'g Tr. 12:94. As part of that conversation, Ms. Henry explained to Ms. Cantwell that she had invested her husband's life insurance money with Mr. Jernigan and that she agreed to complete the attached complaint form as well as send Ms. Cantwell any documents that she had requested. Ms. Cantwell testified that the information Ms. Henry had provided to her was ultimately used in her criminal case against Mr. Jernigan. Hr'g Tr. 12:86- 87.

699. During a May 30, 2013 phone conversation with Ms. Cantwell, Juror Henry agreed to cooperate with the investigation of Jernigan. *See* Applicant's Ex. 82.

700. Ms. Cantwell informed Ms. Henry by email that the Securities Board received Ms. Henry's name from Ms. Latham. Applicant's Ex. 81. In that same email, Ms. Cantwell attached a complaint form. Ms. Henry filled out the complaint form and sent it back to Ms. Cantwell right away. Hr'g Tr. 13:63-65.

701. Among the information that Ms. Henry provided to Cantwell and the Texas Securities Board was all of the documentation of the money that she lent to Mr. Jernigan. The documentation was substantial enough that Ms. Henry had to spread it out over five separate emails on May 31, 2013. The documentation included banking information and correspondence between Ms. Henry and Mr. Jernigan. The documentation also included an attorney package that Ms. Henry had prepared with a lawyer she consulted about the possibility of getting her money back from Mr. Jernigan. Hr'g Tr. 13:66-68; Applicant's Ex. 105

702. As part of a typical investigation, anytime an

enforcement attorney from the Texas State Securities Board contacts a victim regarding a potential violation, they must provide them with enough information about the agency and the case as well as the potential for "administrative, civil, or criminal penalties." Hr'g Tr. 12:96-97. Ms. Cantwell cannot recall specifically whether she gave Ms. Henry this standard disclosure. Hr'g Tr. 12:97.

703. On May 31, 2013, Ms. Henry provided Ms. Cantwell with documents related to her investments with Mr. Jernigan as well as her completed complaint form. Hr'g Tr. 12:98; Applicant's Ex. 103. All within the same morning, Ms. Henry had sent Ms. Cantwell six separate emails containing information related to her investments with Mr. Jernigan, and she had even called Ms. Cantwell to confirm whether she had received the documents. Hr'g Tr. 12:101-02.

704. In addition to her email correspondence with the Texas Securities Board, Ms. Henry also communicated to the Board by telephone. Hr'g Tr. 13:76.

705. Ms. Henry confirmed that Cantwell and the Texas Securities Board received her emails, either by calling or by following up in an email. Hr'g Tr. 13:77.

706. Ms. Henry discussed setting up an interview with the Texas Securities Board, and they decided to wait until after the Harris trial concluded, because she was occupied with serving on the jury. Hr'g Tr. 13:78.

707. Ms. Henry filled out the complaint that the Texas Securities Board provided, and sent them all the documentation that she retained relating to Mr. Jernigan's scam. She held nothing back. Hr'g Tr. 13:70-71.

708. In her completed complaint form, and in response to question 14 asking her to "summarize the improper or illegal activity you believe has occurred," Ms. Henry wrote: "As time has passed and [Mr. Jernigan] skipped town and has made no attempt to contact me about the money he guaranteed (my money) and finding out the same thing happened to others co-worker: Leann Latham and Albert Rodrigues—leads me to believe fraud was involved." Applicant's Ex. 106 (emphasis added). Ms. Cantwell testified at trial that she understood Ms. Henry to believe that she had been defrauded by Mr. Jernigan. Hr'g Tr. 12:106.

709. In response to question 19, which asks "What would you consider to be a reasonable resolution of your complaint," Ms. Henry wrote, "First: Get my money back - at least some of it [and] Second: [Mr. Jernigan] be held responsible." *See* Applicant's Ex. 106 at 3; *see also* Applicant's Ex. 83

710. On June 6, 2013, months before Mr. Harris's sentencing trial, Ms. Cantwell called Ms. Henry regarding the Jernigan investigation. Hr'g Tr. 12:108. As part of that conversation, Ms. Cantwell offered Ms. Henry the opportunity to meet in person at the Brazoria County District Attorney's Office, which is located near Lake Jackson where Ms. Henry resides. Hr'g Tr. 12:109-10; *see also* Applicant's Ex. 107. In that same conversation, Ms. Henry had mentioned to Ms. Cantwell that she knew District Attorney Jerri Yenne and that the two of them had attended the same church. See Hr'g Tr. 12:110.

711. On December 19, 2013, days after Mr. Harris's sentencing trial, Ms. Cantwell, Ms. Henry, and Mr.

Leslie met in the Brazoria County Courthouse. Hr'g Tr. 12:111-12; 12:132; Hr'g Tr. 13:80-81; Applicant's Ex. 115. At this meeting, Ms. Cantwell learned that Ms. Henry had served as a juror in Mr. Harris's capital murder trial. Hr'g Tr. 12:112.

712. Mr. Jernigan was ultimately convicted of fraud. Ms. Henry was aware of Jernigan's conviction. Hr'g Tr. 13:83

713. Mr. Jernigan harmed Ms. Henry by betraying her and hurting her emotionally when he took money from her under false pretenses. Hr'g Tr. 13:83.

714. After Mr. Jernigan scammed Ms. Henry, she consulted a private attorney about the possibility of recovering some of her money from Jernigan. Ms. Henry learned that there was little that could be done because Mr. Jernigan declared bankruptcy before she had begun lending him money. Hr'g Tr. 13:68-69.

715. When Ms. Henry learned that Mr. Jernigan declared bankruptcy before she began lending him money, she felt even more betrayed and hurt. That is when she fully realized that she had been scammed. She was not able to contact Mr. Jernigan after she learned this information because—in Ms. Henry's words—he had "dropped off the face of the earth." Hr'g Tr. 13:69.

716. Brazoria County prosecutor David Bosserman informed Ms. Henry that she was a victim of Mr. Jernigan's criminal actions. Hr'g Tr. 13:84.

717. After Mr. Jernigan's conviction, Ms. Henry was aware that he was required to write her a letter of apology and that he was required to set up a way to pay his victims' money back. She was also aware that

he would be on probation. Hr'g Tr. 13:86.

III. Jury Selection in Mr. Harris's Capital Murder Trial

718. Ms. Mallon was responsible for questioning jurors during jury selection. Hr'g Tr. 14:80.

719. Ms. Mallon was the only member of the trial team with previous experience picking a capital jury. Hr'g Tr. 14:62-63.

720. During jury selection, Ms. Mallon expected that potential jurors were providing accurate information in their jury questionnaires. Hr'g Tr. 14:81.

721. Ms. Mallon felt that the question relating to whether someone had previously been a victim of a crime was "very important." She would expect that a victim of a crime would have a bias against Mr. Harris. Hr'g Tr. 14:81-82.

722. Ms. Mallon stated that on a scale of 1-10, she would rate the question about whether a potential juror had previously been a victim of a crime as a "10." She further stated that she would "give it a 15" if she could. Hr'g Tr. 14:82.

723. Had she known that Deborah Henry had been the victim of a crime during voir dire, Ms. Mallon would have "[a]bsolutely" followed up with Ms. Henry. Furthermore, Ms. Mallon would have "[a]bsolutely" moved to strike Ms. Henry for cause. Hr'g Tr. 14:82.

724. If Ms. Mallon had known of Ms. Henry's status as a crime victim and had the Court not granted Mallon's for-cause challenge to Ms. Henry, then Ms.

Mallon would have used one of the trial team's peremptory challenges on Ms. Henry because she did "[did] not want a crime victim on [the] jury." Hr'g Tr. 14:82-83.

725. Ms. Yenne negotiated the juror questionnaire with the defense in Harris trial. Hr'g Tr. 12:165. She and the defense agreed on the questionnaire. Hr'g Tr. 12:165. She considered it to be a thorough effort. Hr'g Tr. 12:166.

726. The Court instructed the jurors to be honest and candid in answering the juror questionnaire. The Court repeatedly instructed each juror to be honest and candid on individual voir dire. The questionnaire also instructed jurors to answer honestly and candidly. Hr'g Tr. 12:166; Applicant's Ex. 79

727. The Court demanded honesty on the general voir dire and individual voir dire. The questionnaire explained why honesty was important. Hr'g Tr. 166-67.

728. Ms. Yenne instructed the jurors that the Defense is entitled to a fair trial and in order to do that the Court needs to impanel fair and impartial jurors who can honestly follow the law and the evidence given them by the Court. Hr'g Tr. 167.

729. Question 45 of the juror questionnaire asked whether the potential juror, their family or a friend, had ever been a victim of a crime. Hr'g Tr. 168. In 2009, before Ms. Henry answered the juror questionnaire, she had been taken advantage of and injured by Mr. Jernigan. Hr'g Tr. 169-70.

730. If Ms. Yenne knew Ms. Henry had been injured by Mr. Jernigan, she would have told Ms.

Henry that she should have answered Question 45 differently. Hr'g Tr. 170.

731. Question 135 of the juror questionnaire asked whether you or your spouse has been the victim of a crime. Hr'g Tr. 171.

732. Ms. Henry answered Question 135 of the juror questionnaire inaccurately. Hr'g Tr. 171.

733. If Ms. Yenne had known during juror selection in Mr. Harris's case that Ms. Henry was a victim of a crime she would have addressed it during voir dire. Hr'g Tr. 12:173-74.

734. During the voir dire, Ms. Yenne agreed to excuse people or ask the Court to exclude people who knew her. Hr'g Tr. 12:174. Ms. Yenne agreed to excuse Stephen Starr because she knew him through her work as a District Attorney. Hr'g Tr. 12:175. Ms. Yenne agreed to excuse Dennis Troyer because he was a victim of property theft. Hr'g Tr. 12:176-77.

735. Ms. Yenne agreed that question 45 is a key component of the juror questionnaire. Hr'g Tr. 12:178.

736. Another potential juror on Mr. Harris's capital murder trial, Ms. Barbara Lewis, provided false information in response to Question 45 on the juror questionnaire. Hr'g Tr. 12:178-79. Ms. Lewis's ex-husband had pulled an empty gun on her in 2005. Hr'g Tr. 12:179-80. Ms. Lewis did not disclose this gun incident on her juror questionnaire in the Harris case. The parties agreed to strike Ms. Lewis entirely due to her failure to disclose this crime. Hr'g Tr. 12:180-82.

737. Ms. Lewis explained that she did not think the crime her husband committed against her was relevant and therefore did not disclose this

information in her juror questionnaire. Hr'g Tr. 181:12-18.

738. The only reason the parties in the Harris case discovered Ms. Lewis's false response to Question 45 on the juror questionnaire was because records at the District Attorney's office revealed she had been the victim of a violent crime. Hr'g Tr. 12:182.

739. The parties agreed to excuse Ms. Lewis as a juror because she had intentionally falsified the record in response to Question 45 on the juror questionnaire. Hr'g Tr. 178:24-179:1

IV. Juror Henry's Interactions with District Attorney Jerri Yenne

740. Ms. Yenne knew Deborah Henry before she was called as a venire person. Hr'g Tr. 12:151. Ms. Yenne and Deborah Henry regularly attended the same church service for years before Mr. Harris's trial. Hr'g Tr. 12:151. Ms. Yenne would often greet Ms. Henry at the 8:30 a.m. church service, which only 20 to 30 people attended. Hr'g Tr. 12:152-53.

741. Although Ms. Yenne cannot recall the conversation, Ms. Henry says she and Ms. Yenne spoke at church in 2010 about Alan Jernigan and Ms. Yenne recommended that she speak to criminal authorities about the matter. Hr'g Tr. 12:153-54. Ms. Yenne does not dispute Ms. Henry's account of the conversation. Hr'g Tr. 12:154-55.

742. Ms. Yenne's office secured the first three felony indictments from a Grand Jury against Alan Jernigan. Hr'g Tr. 12:155-56.

743. Ms. Yenne believed it was important she

distance herself from the Grand Jury Investigation because of Ms. Henry's service on the capital jury for Mr. Harris. Hr'g Tr. 12:156.

744. The indictments against Mr. Jernigan were returned on June 5, 2014. Applicant's Ex. 78.

745. Ms. Yenne informed OCFW of Mr. Jernigan's indictment on July 24, 2015. Applicant's Ex. 78.

746. The criminal indictments identified Juror Henry as a victim of Mr. Jernigan's financial fraud. Applicant's Ex. 78.

747. Ms. Yenne forwarded the Jernigan indictments to OCFW because Deborah Henry, a juror on Mr. Harris's capital murder trial, was one of Alan Jernigan's victims. Hr'g Tr. 12:159.

748. Mr. Jernigan was indicted for Aggregated Theft. Hr'g Tr. 12:159-60.

749. One of Alan Jernigan's victims was Deborah Henry. Hr'g Tr. 12:160. Half of the money Mr. Jernigan obtained from his fraud was from Deborah Henry. Hr'g Tr. 12:160.

750. Mr. Jernigan lied to investors and told them he would use their money to purchase medical devices in the Philippines and Malaysia. Hr'g Tr. 12:161-62. In furtherance of his fraud, Mr. Jernigan gave investors false documents. Hr'g Tr. 12:162.

751. Mr. Jernigan ultimately pled guilty to a crime. Hr'g Tr. 12:163.

752. The jury sentenced Mr. Harris to death on December 11 and Ms. Yenne met with Ms. Henry in-person eight days later. Hr'g Tr. 12:184-851.

753. At the meeting with Ms. Yenne, Deborah

Henry told Ms. Yenne that she had met with the State Securities Board about Alan Jernigan. Ms. Yenne understood Mr. Jernigan's case was serious and could be potentially criminal. Hr'g Tr. 12:187- 88.

754. Ms. Yenne knew that Ms. Henry had spoken with her sister during jury deliberations. Hr'g Tr. 12:186. It is important for jurors to obey the Court's instructions with regard to outside influence. Hr'g Tr. 12:189.

755. Ms. Yenne agrees that Ms. Henry should not have called her sister about this case. Hr'g Tr. 12:189:-90.

V. Ms. Henry's Conversation with Her Sister Prior to Sentencing Mr. Harris

756. Before closing arguments of the Harris trial, the trial was starting to take its toll on Henry, and she needed emotional support, so she called her oldest sister. Hr'g Tr. 13:103; Applicant's Ex. 143.

757. The purpose of Ms. Henry's phone call to her sister was that the trial had gotten to her. She was crying because she thought to herself "who am I to judge someone or say 'life in prison or death penalty.'" Ms. Henry had a problem with that. Ms. Henry told her sister that she was really depressed and that the trial was very upsetting to her. Ms. Henry's sister reminded her that she was called to do a job. Her sister told her that "God . . . gave us government to keep order in society" and that she was called by the government to do her job as a juror. Her sister advised her to "look at it that way, just black and white. Keep your emotions low." Hr'g Tr. 13:105; 13:109

758. Ms. Henry called her sister because she was depressed, and she always calls her sister when things upset her. She told her that she was on a jury and was feeling really low. Ms. Henry needed someone to talk to and was having a "low moment." She was on her hands and knees crying because she needed someone to talk to. Hr'g Tr. 13:105; 13:109.

759. The conversation with Ms. Henry's sister provided her the physical emotional support that she needed to hear in order to move forward with voting for the death sentence. Hr'g Tr. 13:106.

760. Ms. Henry related to the man who testified about Mr. Harris defrauding him out of $40,000 because she saw him as a fellow person who had trusted someone and got scammed. Ms. Henry had viewed herself as a fool because she had thought she was a pretty good judge of people. Ms. Henry admired that the witness had the guts to admit that he had been scammed after willingly lending money to someone. Hr'g Tr. 13:109.

761. Ms. Henry related to the witness because he had undergone a similar experience as her, similar to how someone who has children can relate to another individual with children. Hr'g Tr. 13:110-11.

762. When the state originally approached Ms. Henry about signing an affidavit for the *Harris* habeas appeal, Ms. Henry made changes to the draft affidavit. The original draft did not state why Ms. Henry called her sister or what they spoke about. Ms. Henry made sure that Ms. Bosserman added the part about God putting government in place to keep order in society. It was very important to Ms. Henry that it be included because it helped her "put things into perspective."

Hr'g Tr. 13:111-12.

763. During the trial, Ms. Henry heard from several witness who talked about how Mr. Harris had stolen from people who had helped him. That reminded her of how she had been scammed by someone she thought was her friend. Hr'g Tr. 13:119.

764. The context in which Mr. Henry related to the witness at trial was that he was "another person who trusted people," the same way she had trusted Mr. Jernigan in her incident. Hr'g Tr. 13:120.

765. Mr. Jernigan's betrayal and scamming of Ms. Henry was "especially hard" on her because she considered Jernigan a friend. Hr'g Tr. 13:121.

> Ms. Henry acknowledged that every aspect of Paragraph 6 of Applicant's Exhibit 144 was true: During the trial [Henry] heard from several witnesses who talked about how Mr. Harris had stolen from people who had helped him. It reminded [Henry] of how [she] had been scammed by someone [she] thought was [her] friend. [Henry] especially related to the elderly man who got scammed out of $40,000 by Mr. Harris. Back in 2008, [Henry] was scammed by a man that [she] worked with. At the time, [she] thought he was [her] friend, which made it especially hard. [Henry] had given him a lot of money for a program he said he was starting to provide medical supplies to people in the Philippines, and he had assured [Henry] that [she] would be repaid. But after about a year, he

> disappeared, and [Henry] stopped hearing from him. It was then that [Henry] realized [she] had been scammed. [Henry] did not know what to do. [Henry] went to the same church as District Attorney Jeri Yenne, and someone else at [her] church suggested that [Henry] talk to her about it. [Henry] approached Ms. Yenne one morning in 2009 after church and told her about what had happened to [her]. The case ended up being investigated by the State Securities Board in Austin. He was charged with fraud, and the case [was] still pending [at the time Henry was presented with the affidavit].

Hr'g Tr. 13:121-23; Applicant's Ex. 144.

766. Ms. Henry also acknowledged that the first two sentences of Paragraph 7 of Applicant's Exhibit 144 was true:

> [Henry] started to lean towards voting for a death sentence after [she] heard from the prisons expert who talked about how Mr. Harris would be in general population if he was given a life sentence. It was difficult for [Henry], though, because [Henry] felt uncomfortable about making a judgment to sentence someone to death.

Hr'g Tr. 13:124-25.

767. The only aspect of the final paragraph of Applicant's Exhibit 144 that Ms. Henry would change is the final two sentences. Ms. Henry would alter the

language of the third sentence to the language used in her signed affidavit:

768. Ms. Henry would alter the final sentence to read: "That made [Henry] feel much better." Hr'g Tr. 13:125-26.

VI. Post-Conviction Investigation of Juror Henry

769. Joanne Heisey is a licensed attorney and works as a research and writing specialist in the Capital Habeas Unit at the Federal Community Defender for the Eastern District of Pennsylvania. Hr'g Tr. 13:6. The Court finds Ms. Heisey's testimony to be credible.

770. Ms. Heisey worked for the Texas Office of Capital and Forensic Writs from the fall of 2013 until September 2017. During her time working for the Office of Capital and Forensic Writs, James Harris was one of the Office's clients, and Ms. Heisey worked on his case. Hr'g Tr. 13:7

771. Ms. Heisey's work on Mr. Harris's case included reviewing the trial record and files of counsel, conducting an investigation of the case from scratch, identifying and interviewing witnesses, obtaining social history and court records, and drafting and filing Mr. Harris's habeas petition. Hr'g Tr. 13:7-8.

772. On February 13, 2016, Heisey interviewed juror Deborah Henry at Henry's home. Hr'g Tr. 13:9.

773. Ms. Henry talked to Ms. Heisey about the evidence of Mr. Harris's trial. Ms. Henry also talked about having struggled with her deliberations and her decision to impose the death sentence. Ms. Henry said

that as she was struggling with that decision that she had called her sister and that "her sister had counselled her about her decision and that that had made her decision easier." Hr'g Tr. 13:12.

774. Ms. Henry also told Ms. Heisey that Ms. Henry had been a victim of a fraud by a man named Mr. Jernigan. She told Ms. Heisey that Mr. Jernigan had "defrauded her out of a very large sum of money." Ms. Henry talked about how that had been an impactful experience in her life and had also impacted how she viewed the evidence in Mr. Harris's case. Hr'g Tr. 13:12.

775. Ms. Henry told Ms. Heisey that Mr. Jernigan had been someone that she knew through work and that he had approached Ms. Henry about donating money for medical supplies for folks in the Philippines. Ms. Henry explained that she had given Mr. Jernigan quite a lot of money and that at some point she stopped hearing from him, and she realized that she had been scammed. Ms. Henry said that it was a lot of money and that it hurt having felt betrayed by this person that she considered a friend. Hr'g Tr. 13:13.

776. Ms. Henry told Ms. Heisey that when she heard evidence in Mr. Harris's trial of Mr. Harris having scammed another older gentlemen out of some money, she "related to that experience." Hr'g Tr. 13:13.

777. When Ms. Henry told Ms. Heisey about having been scammed by Mr. Jernigan, Ms. Hesiey had already been aware of this incident because the District Attorney's Office had disclosed to the Office of Capital and Forensic Writs that Ms. Henry had been a victim of fraud by Mr. Jernigan. Hr'g Tr. 13:13.

778. Ms. Heisey viewed the circumstances

regarding Mr. Jernigan's fraud on Ms. Henry as problematic because Ms. Henry's juror questionnaire and voir dire stated that neither Ms. Henry nor anyone close to her had been a victim of a crime. Hr'g Tr. 13:14.

779. When talking about the evidence at trial of Mr. Harris having defrauded someone, Ms. Henry told Ms. Heisey that what Mr. Harris had done "goes hand-in-hand with what was done to her." Hr'g Tr. 13:14.

780. This information also struck Ms. Heisey as problematic because Ms. Henry was stating that her prior victimization—which she did not disclose during voir dire—had impacted the way she had viewed the evidence in Mr. Harris's case. Hr'g Tr. 13:14.

781. Ms. Henry also told Ms. Heisey that Ms. Henry was struggling with imposing a death sentence in James' case and so she called her sister on the phone. Ms. Henry told Ms. Heisey that her sister gave her some counsel. . Ms. Henry's sister told Ms. Henry that God had put her in this place to decide and that that helped her to make her decision. Hr'g Tr. 13:15.

782. Ms. Henry told Ms. Heisey that she was struggling with her decision to impose the death penalty and that it was the phone call with her sister that allowed her to feel comfortable with her decision. Hr'g Tr. 13:30.

783. Ms. Henry also told Ms. Heisey that Ms. Henry had known Jeri Yenne prior to serving as a juror in the case, and that they had gone to the same church. Ms. Henry told Ms. Heisey that after she realized that she had been scammed by Mr. Jernigan, someone else had advised her that she should talk to Ms. Yenne about it. One day after church she had gone and told

Ms. Yenne about what hadhappened to her, but Ms. Yenne told Ms. Henry that she could not help her. Hr'g Tr. 13:16.

784. Ms. Heisey had told Ms. Henry that her office often likes to get statements from jurors or other witnesses that they speak to. Ms. Henry stated that she would be open to doing that, as long as it was accurate and in her words. Ms. Heisey drafted a declaration based on her conversation with Ms. Henry and took it to Ms. Henry's home on February 15, 2016. Hr'g Tr. 13:17-18.

785. Ms. Henry read the declaration and stated that everything in it was true and that it was in her words, but that it did not encompass everything that Ms. Henry had told Ms. Heisey in their conversation—including that she felt like Mr. Harris did not display remorse and that the defense attorneys had done a good job. Hr'g Tr. 13:17. Ms. Henry had looked for Mr. Harris to demonstrate remorse throughout the trial and did not find "an ounce of remorse or embarrassment." Applicant's Ex. 118.

786. Ms. Heisey told Ms. Henry that the declaration was just a draft and that they could add to it whatever Ms. Henry wanted to be included, and that they could amend it however Ms. Henry would like. Hr'g Tr. 13:17.

787. Ms. Henry told Ms. Heisey that regardless of how it could be amended, she would not be willing to sign a declaration because she did not want to do anything that could help Mr. Harris in his appeals. Hr'g Tr. 13:18.

788. Ms. Henry told Ms. Heisey that "she did not want to do anything that might be helpful to Mr.

Harris in his appeal" because Ms. Henry has a friend whose husband was murdered and that her friend "goes through hell" whenever the defendant in that case comes up for appeal or parole. Hr'g Tr. 13:20-21.

789. It is the standard practice of the Office of Capital and Forensic Writs to take notes of conversations with witnesses and draft declarations based on those notes. The Office of Capital and Forensic Writs always works with witnesses to edit the draft, to make changes, corrections, or additions as the witnesses want in order to make sure the declaration is accurate and reflects the witnesses' words. Ms. Heisey followed this practice when she interviewed and presented a draft declaration to Ms. Henry. Hr'g Tr. 13:31-32.

790. Ms. Heisey would not have opposed Ms. Henry drafting her own declaration, and there was no information that Ms. Henry told Ms. Heisey during their conversation that Ms. Heisey would have been unwilling to include in a finalized declaration. Hr'g Tr. 13:32.

VII. Findings of Fact Relating to Witness Credibility

791. The Court finds each of the Applicant James Harris Jr.'s proffered expert witnesses—Dr. Woods, Dr. Patton, and Dr. Fahey—to be credible.

792. The Court finds the State's expert witness, Dr. Price, to be not credible.

793. This Court took judicial notice of the records and filings in trial, appeal, and post-convictions proceedings. This Court has considered all exhibits

filed with Mr. Harris's Initial Application, the State's Answer, supplemental briefing, as well as all exhibits, testimony and arguments submitted by the parties at the January-February 2019 evidentiary hearing. This Court has accepted all exhibits presented in the pleadings and at the evidentiary hearing as substantive evidence, as well as all testimonial evidence received at the live evidentiary hearing. Unless otherwise noted herein, the Court finds the above evidence to be credible.

794. The Court further finds that the live expert testimony presented at the hearing would have been admissible at Mr. Harris's trial and would have met sufficient reliability standards under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

CONCLUSIONS OF LAW

I. Issue No. 1: Intellectual Disability

1. The U.S. Supreme Court held that imposing the death penalty on intellectually disabled individuals violates the Eighth Amendment, reasoning that the purposes served by the death penalty cannot justify its use on intellectually disabled individuals. *Atkins v. Virginia*, 536 U.S. 304 (2002). The Court left it up to the individual states to enact rules and procedures for determining which defendants may not be executed because they are intellectually disabled, with the caveat that those rules or procedures must "generally conform" to the scientifically accepted and recognized clinical definitions. *Id.*

2. The Texas Court of Criminal Appeals now relies on the "current medical diagnostic standards" set

forth in the American Psychiatric Association's DSM-5. *Thomas v. State*, No. AP-77,047, 2018 WL 6332526, at *4 (Tex. Crim. App. Dec. 5, 2018). As defined in the DSM-5, intellectual disability requires three basic elements: (1) low intelligence, often measured by an intelligent quotient (IQ) two standard deviations below the mean, (2) concurrent impaired adaptive functioning, and (3) onset during the developmental period.

3. Under the DSM-5, higher IQ scores no longer bar a diagnosis for intellectual disability, and it specifically recognizes that "an individual with an IQ score over 70 can be intellectually disabled." *In re Johnson*, 935 F.3d 284, 292-93 (5th Cir. 2019). In fact, "any authority for making an IQ of 70 a ceiling for intellectual disability was rejected in 2014 when the Supreme Court held that there could not be a mandatory IQ number cutoff for consideration of intellectual disability." *Id.* (citing *Hall v. Florida*, 572 U.S. 701, 721-22 (2014)).

4. *Prong 1*: Mr. Harris scored a 75 on a WAIS-IV exam administered in 2013. FOF ¶ 93. Dr. Woods, a medical doctor specializing in neuropsychiatry who testified as an expert in neuropsychiatry during the evidentiary hearing, testified that Mr. Harris's scores could be as low as 70 or as high as 80. FOF ¶ 95. For example, as discussed above, the Flynn Effect slightly decreases Mr. Harris's score of 75 to a 73.8. XX at 17:108-11. Dr. Kasper therefore concluded that Mr. Harris's IQ score falls within a range of 69.18 and 78.18, to a 95% degree of confidence. FOF ¶ 95.

5. *Prong 2:* Multiple experts—Dr. James Patton, Dr. George Woods, and Dr. Kathleen Fahey—have studied

Mr. Harris and individually concluded that Mr. Harris exhibits significant adaptive deficits, and that those deficits began in the developmental period. FOF ¶ 139, 205, 247. These conclusions were based on Mr. Harris's significant adaptive deficits throughout his life, his demonstrably low reading comprehension, and his performance on Dr. Woods's functional academic testing. FOF ¶¶ 139, 205, 241, 247.

6. *Prong 3*: Mr. Harris's deficits were evident during the developmental period. FOF ¶¶ 160, 205. Their conclusions are supported by Dr. Fahey's conclusion that she is "confident that Mr. Harris's deficits took hold during the developmental period," noting that he made gains until the 4th grade level across all language domains but did not go beyond that level. FOF ¶ 252 Dr. Fahey found that his language development plateaued at that level. FOF ¶ 252.

7. Dr. Woods conducted a neuropsychiatric evaluation of Mr. Harris at the Polunsky Unit on February 16, 2016. FOF ¶ 47. Additionally, he reviewed Dr. Kasper's sworn declaration as well as a summary of her neuropsychological test results of Mr. Harris; Dr. Patton's affidavit; Mr. Harris's primary and secondary school records; Mr. Harris's Windham School District records; and the trial testimony of Dr. Kasper. FOF ¶ 33. Before his trial testimony, he also reviewed Dr. Fahey's expert report and Dr. Price's affidavit. FOF ¶ 34. Based on the battery of tests he applied to James Harris and the inventory of information he reviewed, Dr. Woods diagnosed James Harris with mild intellectual development disorder, a mild intellectual disability. FOF ¶ 83.

8. Because Mr. Harris is intellectually disabled, he is ineligible for the death penalty under Atkins. Accordingly, his sentence must be reversed.

II. Issue No. 2: Ineffective Assistance of Counsel

9. To establish ineffective assistance of counsel, a petitioner must show that (1) "counsel's representation fell below an objective standard of reasonableness," and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland v. Washington*, 466 U.S. 668, 687-88; 694 (1984). The reasonableness of counsel's is based on "prevailing professional norms." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003). In a capital case, defense counsel must investigate the possibility of intellectual disability as potential grounds for an *Atkins* defense. *See* Applicant's Ex. 121, 123. Prior to trial, two experts in capital defense mitigation investigations reviewed the facts of Mr. Harris's case and informed the defense team that they were obligated to conduct an investigation into intellectual disability. FOF ¶¶ 572, 559. As lead trial counsel, Mr. Wooten was responsible for leading Mr. Harris's defense team and ensuring that the team conducted an adequate investigation into intellectual disability, pursuant to the relevant guidelines for capital defense counsel.

10. Mr. Harris's trial team's failure to investigate intellectual disability was objectively unreasonable and did not comply with prevailing professional norms for capital defense counsel. *See Strickland* 466 U.S.

688. *Wiggins* 539 U.S. at 521. Over a year before Mr. Harris's capital murder trial, members of Mr. Harris's trial team identified numerous red flags signaling potential intellectual disability—for example, Mr. Harris's IQ score of 75 and the fact that he "presents as a person of low intellect" —in their preliminary interviews and review of Mr. Harris's background files. FOF ¶¶ 324, 328, 590-591, 600-601, 625. Mr. Wooten would not authorize the team to investigate these red flags signaling potential intellectual disability, which was objectively unreasonable. FOF ¶ 627.

11. There is a reasonable probability that, had Mr. Harris's trial team investigated his intellectual disability, the result of Mr. Harris's capital murder trial would have been different. Jurors were charged with answering the mitigation special issue to determine whether to impose the death penalty. TEX. CODE CRIM. PROC. art. 37.071 § 2(e)(1). Mr. Harris's trial team did not present any mitigation evidence of Mr. Harris's intellectual disability to the jury.

12. Defendants with intellectual disabilities can "create an unwarranted impression of lack of remorse for their crimes." *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Mr. Harris's trial counsel did not provide any mitigating evidence of intellectual disability that could have corrected this "unwarranted impression." At least one juror stated that she specifically looked for Mr. Harris to show remorse and did not see an "ounce of remorse." FOF ¶¶ 786-87.

13. Mr. Harris's trial team's failure to investigate his intellectual and adaptive functioning violated Mr. Harris's Sixth Amendment rights to effective

assistance of counsel.

III. Issue No. 8: Conclusions of Law

14. Juror Deborah Ann Henry's bias violated Mr. Harris's fundamental right to a trial by a fair and impartial jury and to due process under state and federal Constitutions. *See McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 554 (1984) (*voir dire* serves to protect a defendant's constitutional rights "by exposing possible biases, both known and unknown, on the part of potential jurors."). Evidence of a juror's actual bias toward a criminal defendant requires reversal. *See id.* at 556 (holding that a party may "obtain a new trial . . . [upon proof] that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for challenge for cause."); *see also Von January v. State*, 576 S.W.2d 43, 45 (Tex. Crim. App. 1978) (holding "[w]hen a partial, biased, or prejudiced juror is selected without fault or lack of diligence on the part of defense counsel, who has acted in good faith upon the answers given to him on voir dire not knowing them to be inaccurate, good ground exists for a new trial."). Alternatively, evidence of an implied bias, which does not require a showing of intentional concealment, also requires a new trial. *See, e.g., Hunley v. Godinez*, 975 F.2d 316, 319-20 (7th Cir. 1992).

15. To establish actual bias, a defendant must prove that (1) the juror failed to answer a material question honestly during *voir dire*; (2) a correct response would have provided a valid basis for a challenge for cause; and (3) proof of the juror's failure

to disclose bias must come from a source other than jury deliberation. *United States v. Bishop*, 264 F.3d 535, 554 (5th Cir. 2001) (citing and applying *McDonough*, 464 U.S. 548); *Golden Eagle Archery, Inc. v. Jackson*, 24 S.W.3d 362, 371 (Tex. 2000) ("failure to disclose bias is a form of juror misconduct that justifies a new trial under the appropriate circumstances").

16. During *voir dire*, Juror Henry provided false information regarding two material facts: (1) she was a recent victim of a financial fraud crime; and (2) she was friends with a woman whose husband was violently murdered. *See* FOF ¶¶ 663-685, 729, 732. Had Juror Henry provided accurate information on the jury questionnaire and during *voir dire*, Mr. Harris's defense counsel would have had a basis for moving to strike her from the jury and would have done so. *See* FOF ¶ 723.

17. Juror Henry's material misrepresentations of information that evinced her actual (or alternatively, implied) bias violated Mr. Harris's Sixth Amendment right to an impartial jury and his Fifth Amendment right to due process. Mr. Harris's death sentence should be vacated and a new trial ordered.

IV. Issue No. 10: Conclusions of Law

18. Juror Henry based her decision to sentence Mr. Harris to death on an extraneous influence in violation of Mr. Harris's right to a fair trial. The Due Process Clause and the Eighth Amendment require that imposition of the death penalty be based solely on the evidence presented and the reasoned judgment of each individual juror—not a juror's family member. The Constitution does not permit imposition of the

death penalty based on an outside influence. Due process requires that the accused receive a fair trial by an impartial jury free from outside influences. *Sheppard v. Maxwell*, 384 U.S. 333, 362 (1966). "A juror must . . . use the law, the evidence, and the trial court's mandates as his ultimate guides in arriving at decisions as to guilt or innocence and as to punishment." *Granados v. State*, 85 S.W.3d 217, 235 (Tex. Crim. App. 2002).

19. Juror Henry admitted she had called her sister during Mr. Harris's trial because the trial had taken a toll on her and she needed emotional support. FOF ¶ 756. She recalled telling her sister that she questioned her ability to sentence another person (*i.e.*, Mr. Harris) to death. FOF ¶ 757. Her role in deciding whether to vote for the death penalty in Mr. Harris's case conflicted with Juror Henry's biblical upbringing, which taught her not to judge others. FOF ¶ 768. Juror Henry's sister told her "not to be anxious but to remember that God put government in place to keep order in society and that [Juror Henry's] serving on the jury is [Juror Henry's] way of helping fulfilling the law." FOF ¶ 768. Juror Henry testified that the conversation with her sister gave her the emotional support necessary to vote for Mr. Harris to be sentenced to death. FOF ¶ 759.

20. Juror Henry's misconduct in discussing Mr. Harris's case with her sister directly and prejudicially affected Mr. Harris's sentence, and violated his federal and state rights. Therefore, Mr. Harris's death sentence must be vacated a new trial ordered.

DATED: October 7, 2019

Respectfully submitted,

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Appendix E

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

No. WR-84,064-01

EX PARTE JAMES HARRIS, JR.,

Applicant

Filed: June 2, 2022

SUGGESTION FOR THE COURT TO RECONSIDER ITS DENIAL OF APPLICANT JAMES HARRIS'S APPLICATION FOR WRIT OF HABEAS CORPUS

Mr. James Harris, Jr., through his counsel, respectfully suggests that this Court reconsider on its own initiative the May 18, 2022 Order denying Mr. Harris relief on his Application for Writ of Habeas Corpus (the "Order"). The Court made two serious errors, which, when corrected, require this Court to grant Mr. Harris habeas relief.

First, the Court ran afoul of the Supreme Court's precedent by failing to consider a critical update to the American Psychological Association's DSM-5 (the "DSM-5") in determining that Mr. Harris failed to establish that he had an intellectual disability. *Moore v. Texas*, 137 S. Ct. 1039 (2017), requires courts to defer to the current medical diagnostic methods of

diagnosing the condition—here, the March 2022 version of the DSM-5, which was updated ***after*** the habeas court issued its Findings of Fact and Conclusions of Law ("FFCL" or "Findings") on February 22, 2021, but ***before*** this Court issued its Order on May 18, 2022. Mr. Harris respectfully suggests that the Court reconsider that Order, address these errors, and grant Mr. Harris habeas relief or at least remand to the habeas court to consider whether Mr. Harris is intellectually disabled under the current methods in the first instance.

Second, the Court applied the incorrect standard in reviewing the habeas court's factual finding that Mr. Harris's trial counsel were ineffective. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984) (explaining that an applicant establishes an ineffective assistance of counsel claim where he shows "that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense"). Rather than deferring to that factual finding, as the law requires, the Court reached deep into the underlying *trial* record to identify additional facts that could justify its own finding. But the Court's preferred facts do not undermine or contradict the habeas court's conclusion. This Court therefore should have deferred to the habeas court and granted Mr. Harris habeas relief based on his ineffective assistance of counsel claim.[1]

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[1] In suggesting that the Court reconsider the May 18 Order for these reasons, Mr. Harris does not waive any other arguments on any of his claims for habeas relief.

BACKGROUND

Mr. James Harris, Jr., is confined under a death sentence pursuant to the judgment of the 149th District Court, Brazoria County, Texas, cause number 67063- A, which was entered on December 11, 2013. 4 CR at 186; 75 RR at 17.[2]

On January 20, 2012, the trial court appointed Thomas J. "Jay" Wooten to represent Mr. Harris. 2 RR 5-6. Soon after, Mr. Wooten joined the Regional Public Defender's Office of Capital Cases (RPDO) and RPDO assumed representation of Mr. Harris. Phillip Wischkaemper originally served as co-counsel to Mr. Wooten at RPDO. Another RPDO attorney, Mary Conn, replaced Mr. Wischkaemper as Mr. Wooten's co-counsel in August 2012.

Mr. Harris's trial team retained several experts, including two neuropsychologists, Dr. Mary Elizabeth Kasper and Dr. Raymond Singer. Mr. Harris's trial counsel requested that Dr. Kasper examine Mr. Harris for "organic developmental brain dysfunctions" and "traumatic or organic developmental brain injury or insult." WRR Applicant Ex. 192. She concluded that he had a "mild cognitive impairment," which means a brain impairment that "is not significant enough to be called a diagnosis of dementia," because there is not "significant" memory impairment. 72 RR at 35:3-36:1. Dr. Singer, who examined Mr. Harris in November and December of 2013, accepted Dr. Kasper's findings. 73 RR at 14:13-14, 26:10-23. He concluded that Mr.

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[2] All references to "CR" are to the Clerk's Record, "RR" are to the Reporter's Record, and "WRR" are to the Evidentiary Hearing Record.

Harris suffered from a "major neurocognitive disorder" as a result of "brain injury from exposure to numerous toxic substances, particularly from childhood." *Id.* at 14:15-22.

In July 2013, Mr. Harris's counsel team met to discuss Mr. Harris's case. According to lead trial counsel Mr. Wooten, at some point in the discussion, the team called Dr. Kasper and asked whether she believed Mr. Harris was intellectually disabled, a claim that the trial team had not even begun investigating. 19 WRR at 193:6-10, 195:1-8. Mr. Wooten asserts that Dr. Kasper denied the possibility that Mr. Harris had an intellectually disability and "everyone accepted it." *Id.* at 195:25- 196:9. Contrary to Mr. Wooten's statements, Dr. Kasper herself denies that she was ever asked or gave an opinion about whether Mr. Harris was intellectually disabled. Mr. Harris's Initial Application for Writ Ex. 2 ¶ 7.

A few months after this July 2013 meeting, on September 3, 2013, jury selection began in Mr. Harris's case. 20 RR. On November 11, 2013, Mr. Harris entered a plea of guilty to the offense of capital murder, and the penalty phase of his trial began. 57 RR at 37, 53. Mr. Harris was sentenced to death on December 11, 2013. 75 RR at 16-17. Mr. Harris's conviction and sentence were affirmed by the Court of Criminal Appeals on March 9, 2016. *Harris v. State*, No. AP-77,029 (Tex. Crim. App. Mar. 9, 2016) (not designated for publication).

Mr. Harris subsequently sought habeas relief. Mr. Harris timely filed his Initial Application on March 15, 2016. Mr. Harris raised constitutional claims for relief including, inter alia, that he is ineligible for the death

penalty because of his intellectual disability and ineffective assistance of trial counsel for failing to investigate intellectual disability. The State filed its Answer on September 9, 2016 and entered a general denial of Mr. Harris's allegations.

The habeas court entered an Order Designating Issues on October 6, 2016, designating, among other issues, Mr. Harris's allegations that he is intellectually disabled and that trial counsel performed ineffectively for failing to investigate intellectual disability.[3]

Following that Order, the Supreme Court of the United States held, in *Moore v. Texas*, that the Eighth Amendment of the United States Constitution requires courts to evaluate intellectual disability claims under the current medical diagnostic standards. 137 S. Ct. 1039 (2017), *reaffirmed by Moore v. Texas*, 139 S. Ct. 666 (2019).

The habeas court held a two-week evidentiary hearing on the designated issues beginning on January 22, 2019. Neither Dr. Kasper nor Dr. Singer testified. Other experts, however, testified to Mr. Harris's intellectual disability claim, evaluating that claim under the 2013 version of the DSM-5, the most-up-to-date medical standard at the time.

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[3] The Order also designated Mr. Harris's allegations that Juror Deborah Henry engaged in misconduct by failing to disclose that she was the victim of a crime, and that the State engaged in misconduct for failing to disclose that Juror Henry was the victim of a crime. The remaining factual issues, including the allegation that Mr. Harris's trial counsel performed ineffectively for failing to investigate mitigating evidence, were designated for resolution through the submission of affidavits.

On February 22, 2021, the habeas court entered its 193-page Findings. The habeas court found that Mr. Harris's trial counsel's "failure to cause a thorough mitigation investigation, which at the very least [would] have shown [Mr. Harris] had red flags indicating some adaptive deficits, was objectively unreasonable and did not comply with prevailing professional norms for capital defense counsel." FFCL at 117 ¶ 8. The habeas court further found that there was a "reasonable probability that had [Mr. Harris's] trial team properly investigated whether [Mr. Harris] suffered from an intellectual disability, the result of [Mr. Harris's] capital murder trial would have been different." *Id.* at 117-118 ¶ 9; 120 ¶ 14. Thus, the habeas court concluded that Mr. Harris proved his ineffective assistance of counsel claim. *Id.* at 191. But on Mr. Harris's intellectual disability claim, it found that Mr. Harris had not established, by a preponderance of the evidence, that he was intellectually disabled under the criteria set forth in the DSM-5, because he had not established that his adaptive deficits were directly related to his intellectual functioning deficits, or that these deficits had onset before he reached the age of 18. *Id.* at 98 ¶ 3; 102 ¶ 12; 104 ¶ 17; 191. The habeas court ultimately recommended that the Court of Criminal Appeals grant Mr. Harris's application for writ of habeas corpus on his ineffective assistance of counsel claim and remand for a new trial. *Id.* at 192.

This Court's May 18, 2022 Order rejected that recommendation. It concluded that Mr. Harris's trial team did not fail to investigate whether Mr. Harris had suffered from an intellectual disability because Dr. Kasper, when asked once whether she thought Mr.

Harris had an intellectual disability, replied in the negative and because Dr. Singer's conclusion that Mr. Harris suffered brain damage due to exposure from toxic substances "corroborated" Dr. Kasper's opinion that Mr. Harris suffered from cognitive impairment. Order at 4-5. On Mr. Harris's intellectual disability claim, this Court, citing to *Moore* but not citing to any of the habeas court's findings or evidence in the record, concluded that Mr. Harris had not established that he was intellectually disabled. *Id.* at 2-3.

Mr. Harris now respectfully suggests that this Court reconsider and correct the errors in the May 18, 2022 Order.

ARGUMENT

I. The Court Should Follow Supreme Court Precedent and Evaluate Mr. Harris's Intellectual Disability Claim Under the Current Medical Standards.

In evaluating Mr. Harris's evidence of intellectual disability, this Court must defer to the prevailing medical standards for diagnosing the condition. *See Moore v. Texas*, 137 S. Ct. 1039 (2017); *accord Moore v. Texas*, 139 S. Ct. 666 (2019). At the time of Mr. Harris's evidentiary hearing—and during the majority of the time this Court spent drafting its findings and conclusions—the most up-to-date medical text regarding intellectual disability was the 2013 version of the DSM-5. Thus, the evidence presented and presentations made during Mr. Harris's evidentiary hearing focused on whether Mr. Harris was intellectually disabled according to the criteria set forth in that manual, including whether Mr. Harris's intellectual functioning deficits were

"related to" his adaptive functioning. *See Thomas v. State*, 2018 WL 6332526, at *4 (Tex. Crim. App. Dec. 5, 2018) ("[I]n determining whether [an applicant] [i]s intellectually disabled . . . [the Court of Appeals] adopted the framework set forth in the DSM-5 because, as noted by the Supreme Court, 'the DSM-5 embodies "current medical diagnostic standards" for determining intellectual disability.'") (quoting *Ex parte Moore*, 548 S.W.3d 552, 559 (Tex. Crim. App. 2018), *cert. granted, judgment rev'd sub nom. Moore v. Texas*, 139 S. Ct. 666 (2019)).

In March 2022, however, a new version of the DSM-5 was released: the DSM- 5-Text Revision (also referred to as the "DSM-5-TR") (the "Neurodevelopmental Disorder" section of which is attached hereto as Appendix A), which "embodies 'current medical diagnostic standards' for determining intellectual disability." *Id. Moore v. Texas* therefore requires the Court to determine whether Mr. Harris proved, by a preponderance of the evidence, that he is intellectually disabled pursuant to the DSM-5-TR.

This update matters because, although in large part the evaluation of intellectual disability is the same as it was under the DSM-5, the DSM-5-TR wipes out the requirement that intellectual functioning deficits be "related to" adaptive functioning deficits. *See* App. A at 3. The DSM-5-TR also makes clear that the deficits need not have arisen strictly before the age of 18, but rather during the "developmental period," *see id.*, which, as Dr. Patton explained, extends to the age of 22, *see* 16 WRR at 129:15-130:24; FFCL at 100 ¶ 6. Thus, under "current medical diagnostic standards," Mr. Harris is intellectually disabled if he

has (1) significant intellectual functioning deficits, (2) significant adaptive functioning deficits, and (3) those deficits arose during the "developmental period." *See* App. A at 3.

No court has considered Mr. Harris's intellectual disability claim using these criteria. The May 18 Order did not set forth any independent findings related to Mr. Harris's intellectual disability, implicitly agreeing with the habeas court's conclusions on that claim. Order at 2-3. But the habeas court did not rely on the DSM-5-TR. Nor could it, as it was released after the habeas court issued its Findings.[4] Instead, relying on now outdated medical standards, the habeas court concluded that Mr. Harris had not established, by a preponderance of the evidence, that he was intellectually disabled. FFCL at 97. In reaching this conclusion, the habeas court leaned heavily on its findings that Mr. Harris's adaptive functioning deficits were not related to his intellectual functioning deficits. *Id.* at 42 ¶ 141; 48 ¶ 165; 55 ¶ 214;

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[4] The habeas court explicitly relied on the 2013 version of the DSM-5, correctly citing the (now abandoned) requirement that "deficits in adaptive functioning must be *directly related* to the intellectual requirement in Criterion A." *See* FFCL at 42 ¶ 141 (emphasis added). An updated version of another manual for diagnosing intellectual disability—the AAIDD manual on Intellectual Disability—was released during the period after the habeas hearing and before the habeas court issued its Findings. AAIDD, INTELLECTUAL DISABILITY: DEFINITION, DIAGNOSIS, CLASSIFICATION, AND SYSTEMS OF SUPPORTS (12th ed. 2021) ("AAIDD Manual"). That manual also dispenses with the "related to" requirement. *See id.* at 1. But in reaching its findings, the habeas court did not consider that manual either. *See* Mr. Harris's Limited Objections to the Trial Court's Findings of Fact and Conclusions of Law at 6-8.

57 ¶¶ 221, 226; 58 ¶¶ 227, 230-31; 59 ¶ 234; 99-100 ¶ 6. The habeas court also determined that Mr. Harris had not established that the deficits manifested by the time he reached the age of 18. *Id.* at 106 ¶ 20; 110 ¶ 29. It set the bar at 18, not because that was the age set by the current medical standards, but because in dicta, the *Moore* Court repeatedly used the word "minor." *Id.* at 100 ¶ 6; 106 ¶ 20.[5]

Evaluating Mr. Harris's intellectual disability claim under the DSM-5-TR's criteria, *i.e.* without imposing the "relatedness requirement," or an 18-year-old ceiling for when the deficits must onset, would lead to a different conclusion. For example, ***even the State's own expert, Dr. Price, opined that Mr. Harris had significant deficits*** in the practical domain of adaptive functioning. 18 WRR at 38- 40, 69-71, 80-81. And there is significant evidence in the record that Mr. Harris exhibited deficits before he reached the age of 23, including his struggles with reading and math skills, inability to handle paperwork, heavy dependence on his family, and difficulty in managing money. *See generally* 16 WRR at 145-152.

Moore requires this Court to evaluate Mr. Harris's intellectual disability claim under the current medical standards set forth in the DSM-5-TR, consistent with this Court's decision in *Ex Parte Segundo*. *See Ex Parte Segundo*, 2022 WL 1663956, at *2 (Tex. Crim.

[5] The version of the DSM-5 in effect at the time of the habeas court's evidentiary hearing did not require that the deficits arise before the age of 18. *See* 16 WRR at 129:15-21. Rather, like the current version, it required that they arise during the developmental period. *Id.*

App. May 25, 2022) (Newell, J. concurring) ("Applicant is entitled to relief under [*Moore*] and the Court correctly grants it. We've already seen what happens when we ignore the Supreme Court on this issue."). Because the Supreme Court has made the application of current medical standards clear, unless or until the Supreme Court reverses its jurisprudence, this Court is bound to follow it. In doing so, it should conclude that Mr. Harris has established, by a preponderance of the evidence, that he has an intellectual disability under the current medical standards. Otherwise, because the prevailing medical standards were updated after the habeas court entered its Findings, but before this Court's May 18 Order, this Court should remand the issue for the habeas court to make new findings of fact and conclusions of law under the prevailing standards. *See id.* at *1 (granting habeas relief after remanding to habeas court to resolve intellectual disability issue under current clinical diagnostic standards following the Supreme Court's decision in *Moore*).

II. The Court Should Apply the Correct Standard of Review and Affirm the Habeas Court's Finding that Mr. Harris's Trial Counsel Were Ineffective for Failing to Investigate an Intellectual Disability Claim.

In concluding that Mr. Harris's counsel represented him effectively, the Court should have deferred to the habeas court's findings. This Court "afford[s] almost *total deference* to the trial judge's findings of fact." *Hall v. State*, 160 S.W.3d 24, 36 (Tex. Crim. App. 2004) (emphasis added). As this Court has

explained "[g]iving 'almost total deference to a trial judge's determination of the historical facts supported by the record' in the habeas context is essentially the same as *Jackson v. Virginia's* requirement that the evidence be viewed 'in the light most favorable to the prosecution' when the findings are adverse to the defendant." *Id.* at 39 (quoting *Jackson v. Virginia*, 443 U.S. 307, 319 (1979)); *see also Ex Parte Brown*, 2007 WL 4200636, at *3 (Tex. App. Nov. 29, 2007) ("Generally, we review a trial court's decision to grant or deny relief on a writ of habeas corpus for abuse of discretion.").

This Court may "exercise [its] authority to enter contrary findings and conclusions" only where "the record reveals circumstances that contradict or undermine the trial judge's findings and conclusions." *Ex parte Storey*, 584 S.W.3d 437, 439 (Tex. Crim. App. 2019).

The Court did not give "almost total deference" to the habeas court's 193- page factual findings. Specifically, it did not identify any evidence that contradicted or undermined the habeas court's conclusion that Mr. Harris's trial counsel failed to properly investigate an intellectual disability claim. Rather, the Court relied on the testimony of two medical experts—Dr. Kasper and Dr. Singer—who did not actually evaluate Mr. Harris for an intellectual disability.[6] First, the Court cited the testimony of Dr. Kasper, who evaluated Mr. Harris for developmental brain dysfunctions and traumatic or organic brain

[6] *See* 73 RR at 85:13-16; 19 WRR at 68-69. In fact, Dr. Singer never even performed an IQ Test on Mr. Harris. 73 RR at 85:3-5.

injury—***not an intellectual disability***. *See* Order at 5; WRR Def. Ex. 192. Even though she did not conduct such an evaluation, when asked during a teleconference shortly before trial whether she believed Mr. Harris was intellectually disabled, Dr. Kasper responded in the negative. *See* Order at 5; FFCL at 119-20 ¶ 14. Second, as this Court sees it, Dr. Singer, who evaluated Mr. Harris for neurotoxicity, reached conclusions that corroborated Dr. Kasper's initial conclusion that Mr. Harris suffered from a neurocognitive disorder. Order at 5. Critically, neither expert ever evaluated Mr. Harris for an intellectual disability or rendered a medical opinion regarding whether Mr. Harris had an intellectual disability.

That evidence does not "contradict or undermine" the habeas court's finding that Mr. Harris's trial counsel were ineffective for failing to investigate whether Mr. Harris was intellectually disabled and present that defense at his death penalty trial. Indeed, the habeas court grappled with the defense team's call to Dr. Kasper and her response that Mr. Harris was not intellectually disabled as well. FFCL at 120. But the habeas court did not find that Dr. Kasper's opinion justified the team's quick abandonment of an intellectual disability claim, concluding that "it would be improper to absolve the RPDO for failure of the trial team to conduct a thorough mitigation investigation ***solely because of the opinion given by Dr. Kasper***, which was given only two months before Applicant's trial began." *Id.* (emphasis added).

The habeas court considered and rejected the argument that Dr. Kasper's opinion alone could justify dropping the intellectual disability claim. Thus, Dr.

Singer's expert conclusion—which the habeas court did not consider—must somehow contradict or undermine the habeas court's finding. It does not.

As an initial matter, up until this point, Dr. Singer's role hasn't been at issue in the habeas proceedings: the State did not offer him as an expert and his evaluation did not come up at all during the evidentiary hearing on Mr. Harris's ineffective assistance of counsel claim. His name is not mentioned in the habeas court's Findings. And the State did not discuss Dr. Singer in the State's Proposed Findings of Fact Determined by Evidentiary Hearing, the State's Brief on Issues Determined by Evidentiary Hearing, or the State's Response to Applicant's Objections. The Court therefore had to turn to the trial record to find this evidence.

It turns out that there was good reason that, prior to the May 18, 2022 Order, no one had relied on Dr. Singer's testimony to justify the RPDO's failure to conduct a thorough mitigation investigation. The record shows that Dr. Singer did not perform any of the analyses required to diagnose someone with an *intellectual disability*, including an IQ test or an investigation of collateral sources to evaluate adaptive functioning. *See* 73 RR at 13:20-14:9; App. A at 3-5. Instead, Dr. Singer was testifying about whether toxic substances caused Mr. Harris to suffer from a *neurocognitive disorder*. Therefore, throughout Dr. Singer's testimony, the State objected that Dr. Singer was not qualified to opine on Mr. Harris's IQ score, 73 RR at 60:12-61:22, and that he was not qualified to perform the testing necessary to determine whether

someone is intellectually disabled, *id.* at 79:22-80:7.[7] The trial court agreed, holding that Dr. Singer could not opine on intellectual disability or Mr. Harris's IQ score, noting his "demeanor and his hesitation" answering trial counsel's question about that score. *Id.* at 86:23-87:4. And the trial court emphasized that Dr. Singer "didn't know how [IQ] tests were administered." *Id.* at 87:6-7.

The concerns with Dr. Singer's testimony do not stop there. Dr. Singer did not evaluate Mr. Harris until 14 days before he testified. *Id.* at 97:21-98:3. He did not complete his expert report until four days before he testified, supplementing it the night before. *Id.* at 103:14-24. And it is also troubling that while Dr. Singer had testified as an expert before, prior courts had excluded his expert testimony five times. *Id.* at 27:20-28:8, 124-129.

In sum, the record is crystal clear that Dr. Singer was not qualified to—and did not attempt to—opine on whether Mr. Harris's obvious mental deficiencies were attributable to an intellectual disability rather than a neurocognitive disorder.[8] And although his opinion may have corroborated Dr. Kasper's that Mr. Harris suffered from neurocognitive issues, Dr. Singer did not evaluate Mr. Harris or write his report until

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[7] In response to these objections, Mr. Harris's trial counsel made clear that "we're [in] no way raising that constitutional limitation on the death penalty." 73 RR at 79:20-21.

[8] In fact, an individual can be diagnosed with both an intellectual disability and a neurocognitive disorder. *See* DSM-5-TR at 5. So Dr. Kasper's diagnosis and Dr. Singer's "corroboration" of that diagnosis do not bear on whether Mr. Harris could also be intellectually disabled.

the eve of trial—long after Mr. Harris's trial counsel had decided not to pursue an intellectual disability claim. It is impossible for trial counsel to have relied on Dr. Singer's opinion in making that decision. Therefore, whether Dr. Singer's opinion corroborated Dr. Kasper's initial diagnosis has no bearing on whether trial counsel should have investigated Mr. Harris's intellectual disability. In accordance with its precedent, the Court should defer to the habeas court's finding that Mr. Harris's trial counsel were ineffective and grant habeas relief on that claim.

PRAYER FOR RELIEF

For the foregoing reasons, Mr. Harris respectfully suggests this Court to reconsider its May 18, 2022 Order denying relief to Mr. Harris on his claims of intellectual disability and ineffective assistance of counsel or otherwise remand to the habeas court to evaluate whether Mr. Harris has proven that he is intellectually disabled under current medical standards.

Respectfully submitted,
OFFICE OF CAPITAL AND FORENSIC WRITS

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Appendix F

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

Filed: March 15, 2016

DECLARATION OF MARY ELIZABETH KASPER, Ph.D

I, Mary Elizabeth Kasper, state and declare as follows:

Introduction

1. I am a clinical psychologist, licensed to practice in Texas and Florida. I am board certified in neuropsychology and clinical psychology. I received my Ph.D. from the University of North Texas in clinical neuropsychology and psychology. I completed a predoctoral internship at Tulane University Medical School in clinical psychology and neuropsychology in the Department of Psychiatry and Neurology. Additionally, I completed a postdoctoral fellowship in neuropsychology and behavioral medicine at Braintree Hospital in Massachusetts. Each year, I complete twenty or more hours of additional training to keep my licenses in Florida and Texas current.

2. Two of my articles have been published in

peer-reviewed journals. I am also a fellow of the Academy of Clinical Psychology and a member of the American Psychological Association and the American Association on Intellectual and Developmental Disabilities.

3. After completing my postdoctoral training, I joined a multidisciplinary medical practice primarily focused on the evaluation and treatment of medical and dementia patients. In 1999 I started my own private psychology practice in Florida. I have conducted evaluations for State of Florida agencies involving Disability Determination, Vocational Rehabilitation, and the Florida Brain and Spinal Injury Program. I have taught undergraduate and graduate courses in psychology and have been a practicum supervisor at the University of North Texas; Argosy University in Sarasota, Florida; and Argosy University in Tampa. In my private practice, my practicum trainings were focused on teaching doctoral students how to conduct psychological and neurospsychological assessments. I also worked for several years as a neuropsychologist as part of a multidisciplinary treatment team at the Memory Clinic at Sarasota Memorial Hospital.

4. I began conducting criminal forensic evaluations in 2005. Since then, I have provided psychological analysis in about 7,000 or more cases. I have testified as an expert witness in state courts over thirty times. Mr. Harris's case was my first time testifying in Texas. I have been involved in at least sixteen death penalty cases.

5. A complete copy of my CV is attached to this Affidavit as Attachment A.

Experience at James Harris Jr.'s Trial

6. I was retained by trial counsel to conduct a neuropsychological evaluation of their client, Mr. Harris. I conducted that evaluation on August 30 and 31, 2012, in the Brazoria County Jail, where Mr. Harris was being held at the time.

7. Trial counsel asked me to provide my expert opinion as to the following issues: (a) organic developmental brain dysfunctions, and (b) traumatic or organic brain injury or insult. Trial counsel did not ask me to consider the possibility that Mr. Harris was intellectually disabled, before or after I conducted my evaluation.

8. Trial counsel provided me with a number of records to review. These included records of Mr. Harris's criminal convictions, TDCJ records for Mr. Harris, a record of his divorce, four pages of high school education records, five employer records, Mr. Harris's medical records, several news articles, and birth and death certificates for Mr. Harris's family members.

9. The TDCJ records that trial counsel provided me with reflected an IQ score of 83 in 2000, when Mr. Harris was forty-one years old. Trial counsel did not inform me that the IQ score administered by TDCJ was a Beta IQ test, a group test which is invalid for the purpose of diagnosing intellectual disability. My impression was that trial counsel was not considering the possibility that Mr. Harris was intellectually disabled, and that intellectual disability had already been ruled out by trial counsel on the basis of this IQ score, as well as by other information, such as his academic history. Typically, for Intellectual Disabiltiy

to be considered, I am presented with volumes of school records or affadavits of school performance, collateral sources from childhood, results of prior full-scale intelligence tests or other sources indicative of functioning during the developmental period.

10. My formal evaluation process included an interview of Mr. Harris, the expanded Halstead-Reitan neuropsychological battery of tests, the Wechsler Adult Intelligence Scale (WAIS-IV), the Wide Range Achievement Test-4, the Test of Memory Malingering, the Victoria Symptom Validity Measure, and the Validity Indicator Profile. The neuropsychological measures are designed to assess and quantify brain function. This battery of tests assesses: general intellectual functioning; achievement skills (such as reading and math); executive skills (like organization, planning, inhibition, and flexibility); attention; learning and memory; language; visual-spatial skills; and motor coordination.

11. In September 2012, I provided trial counsel with a report on the results of my assessment. Thereafter, trial counsel indicated that they would call me to provide expert neuropsychological testimony regarding Mr. Harris during the punishment phase of his trial.

12. I diagnosed Mr. Harris with Mild Cognitive Impairment, which is a precursor to the diagnosis of vascular dementia. Mr. Harris's IQ score on the WAIS-IV was 75.

13. I testified on December 6, 2013. During my testimony, I discussed the testing that I had conducted of Mr. Harris, as well as the results of my assessment.

Most notably, I opined during my testimony that Mr. Harris, based on testing that showed he had significant short-term memory deficits and his history of concussions, was at high risk for developing dementia. I also made clear that the results of my assessment did not warrant a diagnosis of dementia at that time, but that his brain was not functioning within normal limits.

Referral Question by the OCFW

14. The Office of Capital and Forensic Writs ("OCFW"), current counsel for Mr. Harris, contacted me to discuss my work on his case. In the course of the OCFW's investigation, Mr. Harris's counsel came to suspect that Mr. Harris was intellectually disabled. The OCFW requested that I review the report of my analysis and findings regarding Mr. Harris, my files from Mr. Harris's case, and new materials provided by the OCFW to determine whether it was possible that Mr. Harris was intellectually disabled. The OCFW provided more complete school records for Mr. Harris than those provided by trial counsel, the TDCJ Classification Plan explaining Mr. Harris's IQ scores from his tests in prison, statements from people who knew Mr. Harris throughout his life, his teachers, his family members, and the expert affidavit of Dr. James Patton. A complete list of the new materials I reviewed is attached hereto as Attachment B. These new materials provided a wealth of information that I did not have access to at trial.

15. If I had been given pretrial access to the same materials that OCFW has provided me with, I would have been able to provide testimony that Mr. Harris was within the range of intellectual disability. I could

have testified to the information set forth below if trial counsel had provided me with sufficient information about Mr. Harris's background.

Intellectual Disability Definitions

16. Intellectual disability is a developmental disorder that is characterized by onset during the developmental period that includes both intellectual and adaptive functioning deficits in conceptual, social, and practical domains. There are three prongs that a person must meet to be diagnosed as intellectually disabled. AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS (5th ed. 2013) ("DSM-5").[1]

17. The first prong is the demonstration of deficits in the individual's intellectual functions, such as reasoning, problem solving, planning, abstract thinking, judgment, academic learning, and learning from experience. Intellectual functioning is typically measured through performance on an intelligence test, which results in a full-scale IQ score, and which attempts to locate an individual's intellectual functioning in relation to the average for the general population. Intellectual functioning is best represented by IQ scores when they are obtained from appropriate, standardized and individually administered instruments. IQ tests are generally constructed so that the mean is set at a score of 100, with a standard deviation of 15. The standard deviation is an index of statistical variability. The

[1] At the time of Mr. Harris's trial, the fifth edition of the *Diagnostic and Statistical Manual of Mental Disorders* was in use.

intellectual functioning of someone with intellectual disability falls "approximately two standard deviations below the population mean, including a margin for measurement error (generally ±5 points)." DSM-5; AM. ASS'N INTELLECTUAL & DEV. DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT (11th ed. 2010) ("AAIDD").

18. A factor that may affect an IQ test score is the "Flynn Effect." The Flynn Effect is a scientifically accepted phenomenon that describes how IQ scores have been increasing over time in areas for which IQ data is available. AAIDD. IQ tests are normed, meaning the average is matched to an IQ of 100 for the population at the time the test is created. As a result, an out-of- date IQ test no longer reflects how a person's IQ score compares to the average IQ score of the population because the average begins to increase immediately after the test is normed. This increase in the population's average IQ score has been measured to be 0.33 IQ points increase per year.

> [B]est practices require recognition of a potential Flynn Effect when older editions of an intelligence test (with corresponding older norms) are used in the assessment or interpretation of an IQ score. . . . In cases where a test with aging norms is used, a correction for the age of the norms is warranted.

ROBERT L. SCHALOCK ET AL., USER'S GUIDE TO MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORT, 10TH EDITION (2006).

19. An additional factor that clinicians must take

into account is the standard error of measurement. As described by the AAIDD:

> An IQ score is subject to variability as a function of a number of potential sources of error, including variations in test performance, examiner's behavior, cooperation of the test taker, and other personal and environmental factors. Thus, variation in scores may or may not represent the individual's actual or true level of intellectual functioning.

AAIDD. The standard error of measurement is approximately 3 to 5 points. On tests with a mean IQ score of 100, taking into account the standard error of measurement, the upper IQ level for the intellectual functioning criterion for intellectual disability is 75. Understanding and addressing the test's standard error of measurement is "a critical consideration that must be part of any decision concerning a diagnosis of ID [Intellectual Disability] that is based, in part, on significant limitations in intellectual functioning." The best practice under both the *DSM-5* and the *AAIDD* is to report an IQ score with an associated confidence interval. AAIDD. This is especially critical when a numerical score IQ score is at issue (such as when diagnosing intellectual disability), versus when the IQ score is used as one portion of an array of measures of cognitive functioning in a context an overall battery of neuropsychological tests.

20. The significant limitations in intellectual functioning criterion in both the *AAIDD* and the *DSM-5* do not intend for a fixed cutoff point to be established for making the diagnosis of intellectual disability. The

phrase "*approximately* two standard deviations" in both the *AAIDD* and the *DSM-5* addresses statistical error and uncertainty inherent in any assessment of human behavior. Both the *AAIDD* and the *DSM-5* require clinical judgment regarding how to interpret possible measurement error. An IQ score should be reported with a confidence interval rather than a single score. Clinicians are required to determine what the standard error of measurement is for the particular test used and to interpret the obtained score with reference to the standard error of measurement and other factors, such as the Flynn Effect. DSM-5; AAIDD.

21. The second prong to the intellectual disability diagnosis requires a showing of deficits in adaptive functioning that result in failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, adaptive deficits limit functioning in one or more activities of daily life, such as communication, social participation, and independent living. DSM-5.

22. Adaptive behavior is the collection of conceptual, social, and practical skills that have been learned and are performed by people in their everyday lives. The assessment of adaptive functioning is based on an individual's typical performance during daily routines and changing circumstances, not the individual's maximum performance. When assessing a person's adaptive functioning, clinicians must keep in mind that an individual's strengths coexist with their limitations. A person with intellectual disability may have capabilities and strengths that are

independent of their disability. The individual's strengths and limitations in adaptive skills should be documented within the context of ordinary community environments typical of the person's age peers and tied to the person's individualized needs for support. Additionally, with personalized supports over a sustained period, the life functioning of the person with intellectual disability generally will improve. AAIDD.

23. Deficits in the conceptual domain may not be apparent in preschool age children. When children enter school, they may have difficulties in learning academic skills involved in reading, writing, arithmetic, time, or money, with support needed in one or more areas to meet age-related expectations. In adults, deficits in the conceptual domain may be apparent in the ability to think abstractly, executive functioning (such as planning, strategizing, priority setting, and cognitive flexibility), short-term memory, and functioning use of academic skills (e.g., reading, money management). DSM-5.

24. In the social domain, deficits appear as immature social interactions compared with typically developing peers. An individual with deficits in this domain may have difficulty in accurately perceiving social cues, difficultly regulating emotion and behavior in an age-appropriate fashion, and limited understanding of risk in social situations. An individual may be at increased risk of being manipulated by others or perceived as gullible. DSM-5.

25. Within the practical domain, an individual may function age-appropriately in personal care and

in recreational skills. Individuals need some supports with complex daily living tasks in comparison to their peers. Those supports in adulthood may involve grocery shopping, transportation, home- and child-care organizing, nutritious food preparation, and banking and money management. Employment is often in jobs that do not emphasize conceptual skills, and individuals require support to learn to perform a skilled vocation competently. Individuals also generally need support to make health care and legal decisions or to raise a family. DSM-5.

26. Finally, the third prong requires that the onset of the intellectual and adaptive deficits occurs during the developmental period of the individual's life. Under the *AAIDD* and earlier definitions of intellectual disability, the age of onset criterion was defined as before age eighteen. However, under the *DSM-5*, this criterion has been expanded to include the developmental period. Although the *DSM-5* does not define "developmental period," it does state that "Criterion C [(onset during the developmental)] refers to recognition that intellectual and adaptive deficits are present during childhood or adolescence." DSM-5. In the field of neuropsychology, the developmental period is best conceptualized as the time during which the brain continues to develop, which is commonly accepted to be somewhat beyond the age of eighteen. Brain development, especially in the frontal regions, is known to continue up into the early twenties.

Mr. Harris's Deficits in Intellectual Functioning

27. In my evaluation of Mr. Harris, I administered the fourth-edition Wechler Adult Intelligence Scale IQ test (WAIS-IV). Mr. Harris received a full-scale IQ

score of 75, which is in the fifth percentile for a man in his age group. The standard error of measurement for the instrument I administered was 4.5 points at the 95th percentile confidence interval, according to the manual of the test publisher. The 95th percentile confidence interval is the interval that contains two standard deviations and means that the individual's true score can be determined to fall in that range 95 times out of 100. The 95th percentile confidence interval is the commonly accepted confidence interval to use in interpreting intelligence scores.

28. The WAIS-IV IQ test was normed before 2008, as the test was published in 2008. I administered the test to Mr. Harris in 2012, at least four years after the test was normed (as the test was published in 2008, it could not have been normed afterwards, therefore, with an abundance of caution, I am adopting a 2008 norming year for use in the Flynn Effect calculation). It is appropriate in this case to adjust for the Flynn Effect, which brings Mr. Harris's full-scale IQ score to 73.68, or a decrease of 0.33 IQ for each year between when the test was normed and when Mr. Harris was given the test. Thus, to a 95% degree of confidence, Mr. Harris's true IQ score falls between 69.18 and 78.18. This score range indicates that there is a substantial likelihood that Mr. Harris's true intellectual functioning falls approximately two standard deviations below average, or within the range of intellectual disability. The neuropsychological testing that I completed on Mr. Harris showed test results more consistent with the low end of the IQ scores. Standard well-normed validity measures administered indicated that Mr. Harris expended appropriate effort on testing and

revealed no evidence of malingering or exaggeration of cognitive dysfunction.

Mr. Harris Presents Deficits in Adaptive Functioning

29. Mr. Harris's post-conviction counsel, the OCFW, have provided me with the affidavit of Dr. James Patton, Adjunct Associate Professor of Special Education at the University of Texas at Austin and, in my professional judgment, an expert qualified to make determinations concerning the adaptive functioning prong of an intellectual disability diagnosis. Dr. Patton assessed Mr. Harris's adaptive functioning and found, to a reasonable degree of scientific certainty, that Mr. Harris presented deficits in adaptive functioning that resulted in the failure to meet developmental and sociocultural standards for personal independence and social responsibility. Without ongoing support, Mr. Harris's adaptive deficits limited him in one or more activities of daily life. Aff. of Dr. James R. Patton. I have discussed Dr. Patton's findings with him, and they are consistent with my own; therefore, I am satisfied that Mr. Harris meets the second criterion for an intellectual disability diagnosis. An investigation of adaptive deficits is a substantial task requiring multiple steps and collateral interviews, and I was not asked to evaluate adaptive deficits when I completed a neuropsychological evaluation of Mr. Harris.

Onset of Mr. Harris's Adaptive and Intellectual Deficits

30. Dr. Patton found that the onset of Mr. Harris's adaptive deficits occurred during his developmental period.

31. With regard to the onset of Mr. Harris's intellectual functioning deficits, the OCFW has provided me with new evidence that was not available to me pretrial. This new material establishes that the onset of Mr. Harris's intellectual deficits was during his developmental period.

32. Mr. Harris was not administered a standardized, individually administered IQ test before 2012, to the best of my knowledge. In the new materials I reviewed, Mr. Harris's school records were more complete, encompassing four additional pages that were not included in the copy provided to me by trial counsel. The trial counsel copy of Mr. Harris's school records includes Mr. Harris's high school grades and one page of elementary school achievement testing. The OCFW copy of Mr. Harris's school records includes Mr. Harris's elementary school grades and additional testing administered to Mr. Harris in high school. In the OCFW copy there is a group IQ test, the California Test of Mental Maturity, administered to Mr. Harris in February 1975, when he was fifteen years old. On this group test, Mr. Harris's total IQ score is 77. However, group IQ tests are invalid for diagnosing intellectual disability because, in comparison to individually administered, standardized, well-normed accepted IQ tests, there can be many reasons for score variations aside from variation in test-taker ability.

33. In the absence of a valid IQ test, it is appropriate to use clinical judgment to make a determination as to the onset of intellectual functioning deficits. To make this determination, I considered statements from Mr. Harris's older half-

brother, his younger sister, two childhood friends, his ex-wife, his long-term neighbor, and four teachers ranging from elementary school to high school level.

34. James's third grade teacher said that Mr. Harris struggled academically and required extra support in first grade. She reviewed his school records and interpreted that Mr. Harris's first grade teacher's notations indicated that she was concerned about Mr. Harris's ability to learn in first grade. The notations were not about his behavior, which she remembered to be very respectful. Mr. Harris's grades were low in elementary school. The teacher indicated that there were no separate special education classes when Mr. Harris was in school; instead, slower students like Mr. Harris were identified for extra help and attention. She provided Mr. Harris with additional one-on-one support on subjects in which he had trouble. She noted his improvements to be greater in a subject like Spelling, which involved memorization tests, as opposed to comprehension, reasoning, and judgment. Decl. of Jean Shaw.

35. A fifth grade teacher who taught at Mr. Harris's elementary school at the same time he attended the school reviewed Mr. Harris's school records and said that Mr. Harris was a very slow, academically weak student who needed extra support and help. Based on his grades, which she described as terrible, she thought that Mr. Harris had not been prepared to be promoted to multiple grades, including second grade. He struggled throughout elementary school. At the school, teachers experienced pressures to promote students who were not academically or intellectually prepared for the next grade level, and would experience

negative repercussions for failing students. She felt that this was likely the reason that Mr. Harris was promoted to second grade instead of being held back in first grade. She said that Mr. Harris demonstrated obvious intellectual deficits; however, at the time he was in elementary school, she confirmed that there was not a special education program to identify him. Mr. Harris's one strength was Spelling, which was not surprising to her because it involves memorization, not comprehension. Additionally, she said that the standardized tests that the teachers proctored every year, such as SRA tests, were unreliable because the teachers frequently assisted students by suggesting answers to the questions so that poor student performance would not reflect negatively on the teachers themselves. Decl. of Annie Stafford.

36. James's high school remedial math teacher revealed that Mr. Harris was in remedial math classes throughout high school. Whereas students typically took Algebra I upon entering high school, Mr. Harris was placed into Related Math and Consumer's Math, which taught basic skills such as how to add, subtract, multiply, divide, make change, and balance a checkbook. At times, Mr. Harris was failing this class, indicating that he was unable to grasp these basic math concepts. She reported that remedial classes were the appropriate classes for Mr. Harris, and higher grades, which he did not have, would have indicated that the class was too easy for him. Students were placed into remedial classes based on their test scores and teacher recommendations, which were of particular importance in identifying struggling students. She doubted whether Mr. Harris could have gotten into college based on his poor academic

performance. Decl. of Linda Wittig.

37. Mr. Harris's vocational agriculture teacher also recalled that he struggled in class and needed extra help to complete his work. He took four years of vocational classes, which were mixed academically between students with high aptitudes and special-needs students. He confirmed that separate special education classes were not offered, although tutoring was given to special-needs students who were in remedial classes. His grading was based on effort and not skill or completion of work, because he did not assign homework. The teacher confirmed that Algebra I was the normal entry-level math class for high school students, and that Mr. Harris was placed into remedial math classes. He recalled that placement into remedial classes was not permanent, and a student could be moved into mainstream classes, though Mr. Harris never was. To be placed into remedial classes, Mr. Harris had to have been identified by teachers and by testing as a slow student with limited intelligence. Decl. of Michael Kalina.

38. Mr. Harris's younger sister, Carolyn, remembered that he did not do well in school. She could not recall ever seeing her brother read a book or a magazine. When doing homework at home, Mr. Harris and his many siblings did their homework together, and Mr. Harris's sisters—including Carolyn who was two grades behind Mr. Harris—helped him do his homework because he had a short attention span and had a difficult time doing it himself. However, Mr. Harris was discouraged from asking his mother for help, who would hit her children if they could not answer homework questions correctly or appeared

"dumb." Mr. Harris used humor to deflect from appearing stupid in situations when he did not know something or did not understand what was going on. His sister could not remember if special education classes were an option, though she said that their mother would not have allowed Mr. Harris to be identified in any way as "dumb," even if it resulted in him struggling in school. Additionally, it is unlikely that Mr. Harris's school would have reached out to his mother, because, upset with a teacher to one of Mr. Harris's older sisters, she had gone to the school, sought out the teacher, and assaulted the teacher by striking the teacher and knocking the teacher into a ditch. Throughout school, Mr. Harris relied on his sisters to do his homework at home and his friends to help him at school. Decl. of Carolyn Duplechin.

39. Mr. Harris's sister also revealed that he did not grow up in an enriched environment. The family was extremely poor when Mr. Harris was growing up. The house he spent his childhood in did not have running water or indoor plumbing. Often, the children were malnourished because there was not enough money for food. Mr. Harris's mother was a heavy drinker and gave alcohol to Mr. Harris and his siblings when they were young children. Decl. of Carolyn Duplechin.

40. Mr. Harris's older half-brother confirmed that their mother drank regularly and gave alcohol to the children. Although he was significantly older than Mr. Harris, he could not remember Mr. Harris reading as a child. Decl. of Mack Griggs Jr.

41. A longtime neighbor of the Harris family witnessed Mr. Harris's mother drink heavily and consistently, including during her many pregnancies.

Mr. Harris's mother also put beer into Mr. Harris's bottle to put him to sleep. The neighbor did not think that Mr. Harris had done well in school.

42. One of Mr. Harris's high school friends said that honors classes were offered in their school, but that Mr. Harris was not in any of them. He did not remember Mr. Harris talking about schoolwork. It was difficult to fail classes in their high school, particularly because they were both on the high school football team, which would not allow them to play if their teachers gave them failing grades. Most students who attended their high school graduated because the school provided vocational classes for slower students. He also recalled that Mr. Harris had not gotten a job after high school by filling out an application; instead, he got a job working with his uncle. Decl. of Roland Waddy.

43. Another one of Mr. Harris's childhood friends thought that Mr. Harris had struggled academically. It was easy to cheat on schoolwork at the schools they attended together. He confirmed that there were not separate special education classes in the time he was at school with Mr. Harris. Decl. of Kenneth Murray.

44. Finally, Mr. Harris's ex-wife, whom he met when he was twenty-two years old, remembered that Mr. Harris got confused when attempting to read a lease. She had to read the lease and show him where to sign. He also could not understand the bills they received in the mail and gave them to her to interpret. Mr. Harris was also unable to do the math required to balance a checkbook. Decl. of Rose Lewis.

45. Additionally, the OCFW provided me with the school records of Mr. Harris's older sisters Ethel

Harris, Clorie Harris, and Doris Harris. Their academic performance was similarly quite poor.

46. Moreover, based on the information that Mr. Harris's mother drank heavily during her pregnancy and that Mr. Harris's siblings also performed poorly in school, it is possible that one contributing cause to Mr. Harris and his siblings intellectual problems was Fetal Alcohol Spectrum Disorder ("FASD"). One feature of FASD is a low IQ score. Additionally, because Mr. Harris and his siblings were raised in the same household with environmental factors such as early exposure to alcohol, malnutrition, and poverty, these also may have contributed to deficits in intellectual functioning.

47. Based on the new materials I have reviewed, which were not provided to me by trial counsel, there is substantial and compelling evidence that the onset of Mr. Harris's intellectual and adaptive functioning deficits occurred during the developmental period of his life.

Conclusion

48. If trial counsel had asked me to evaluate whether or not Mr. Harris was intellectually disabled or had provided me with the same information that the OCFW has, I could have testified that Mr. Harris is within the range of intellectual disability. Based on the limited information I was provided by trial counsel, their referral question, and their conversations with me, I believed that intellectual disability already had been ruled out by trial counsel. I believe my testimony could have persuaded at least one juror that Mr. Harris met the criteria for the diagnosis of intellectual disability and, therefore, that there

existed a reasonable doubt as to Mr. Harris's eligibility for the death penalty.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on the 12th day of March, 2016, in Sarasota County, Florida.

Dr. Mary Elizabeth Kasper

Appendix G

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

Filed: April 15, 2019

DECLARATION OF ROSE LEWIS

I, Rose Lewis, state and declare as follows:

1. My name is Rose Lewis. I live at 102 Avenue B in Van Vleck, Texas. My birthdate is 04/06/1952. I am James Harris Jr.'s ex-wife.

2. I met James at my brother's club in Pledger, Texas, in 1981. We were friends at first but eventually started dating.

3. When I first met James, he was still living with his mother in Boling. I thought it was unusual for a man in his twenties to still live with his mother, but at the time I thought James was just trying to help his mother raise his nieces and nephews.

4. Because we were young and I thought I was in love, we got married in April 1982. It was a small ceremony at the Matagorda County courthouse. The ceremony was short, and the only witnesses were two of my co-workers. Nobody was present from James's side.

5. James and I started living together when we got married. We rented a home together. I looked and found a place for us to rent. When we were given the rental paperwork, I read it and signed it, and then I showed James where to sign. He got confused with documents like that, so I handled those sorts of things. Once James and I were living together, it became apparent that James needed someone to take care of him because he could not take care of himself. For example, I paid the bills because when James would try to pay them, he could not understand what they said and he would give them to me to interpret.

6. I also did most of the housework, such as cooking and cleaning. At the time, I was working nights, so I would be at home in the mornings, and James worked during the day. I would cook before I left to go to work so that James had dinner to eat in the evening because he did not know how to make dinner for himself. When something in the house broke, I handled it and called the landlord because I could explain the problem. James did not know how to do any handy work around the house. I set up a joint banking account for us to use, but James could not balance a checkbook. He found it overwhelming and it was easier for him to use cash.

I used to go to the bank with James to cash his paychecks for him, and he would give me all of the money to handle. I do not think he would have been able to create his own checking account. Though he owned a car, he did not have a car loan. I believe he paid for his car in cash.

7. James and I lived in Bay City. He worked as a laborer at the Phillips plant in Old Ocean. I worked as a custodian for the Bay City school district.

8. James and I spent most weekends in Boling visiting his mother and sisters. He did not really have other hobbies. James was very close with his family. I was also close with James's mother and his sisters Ethel, Doris, and Carolyn. However, I only met his sister Wanda one time. Wanda was raised by her father's grandparents, and she was not close like the rest of the family was. I really liked James's family and sometimes I spent time with them without James. His sister Doris and I remained friends until her death in 2010.

9. James was especially close with his sister Ethel. She was the backbone of the family and took care of James like he was one of her children rather than her younger brother. She was like a mother figure and paid for food or clothes if her mother or siblings needed them. When she died in 2008, James was devastated. He could not even stay for her funeral and left soon after he arrived.

10. James's family was very poor. My sister-in-law, Corean Abbott, grew up in Boling near the brick

house where the Harris family lived. Corean's mother used to lend money to James's mother, who was constantly struggling to pay the note on her house. This happened when James and I were married, and it may have continued after we were divorced.

11. I never knew James to use hard drugs when we were together. At that time, James mostly drank beer and occasionally smoked marijuana.

12. We divorced in 1985, but not because of any big disagreement—we just fell out of love and decided to go our separate ways. I took care of all the paperwork and paid for the divorce. Just like with the household bills, I do not think James could have handled the paperwork. I also do not think he understood the divorce paperwork that he was served because he did not show up to court when he was supposed to. We did not own any property together, though, so he did not need to be present.

13. I was shocked when I learned of James's crime. I never knew James to be violent or even to have any physical altercations with anyone while we were together. I only knew him to be gentle and kind to me and to others.

14. Before James's trial, I met with a woman from his defense team named Carol Camp for about an hour. She asked if she could come back to talk to me again, but I did not hear from her or anyone from James's defense team after that.

15. Had I been called as a witness at trial, I would have testified to the above information.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct to the best of my knowledge and that this declaration was executed on the 23rd of February, 2016, in Matagorda County, Texas.

Rose Lewis
Rose Lewis

Appendix H

VERNON'S TEXAS STATUTES AND CODES ANNOTATED

Tex. Code Crim. Proc. Ann. art. 11.071

Effective: September 1, 2015

Code of Criminal Procedure

PROCEDURE IN DEATH PENALTY CASE

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 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

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[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.

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;

(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

(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.

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.

(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:

(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;

(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:

(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 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.

Appendix I

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

January 20, 2012

ADMONISHMENT HEARING
Volume 2 of 87 Volumes

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* * *

[pp.5-6]

THE COURT: […] Do you understand that?
THE DEFENDANT: Yes, ma'am.
THE COURT: If you've been charged with a felony, you have the right to have an examining trial. Do you understand?
THE DEFENDANT: Yes, ma'am.
THE COURT: If you've been charged with a misdemeanor punishable by jail time, you have ten days to prepare for a final hearing or you may waive it. Do you understand?
THE DEFENDANT: Yes, ma'am.

THE COURT: You are not required to make a statement, and any statement made by you may be used against you. Do you understand that?
THE DEFENDANT: Yes, ma'am.
THE COURT: Ms. Huerta visited with you at jail the other day, and you filled out the appropriate paperwork for a court appointed attorney. Is that correct?
THE DEFENDANT: Yes, ma'am.
THE COURT: And since that time, Mr. Jay Wooten has been appointed to represent you. Is that correct?
THE DEFENDANT: Yes, ma'am.
THE COURT: And you visited with him this morning?
THE DEFENDANT: Yes, ma'am.
THE COURT: All right. And a reasonable time and opportunity to consult your attorney has been allowed to you. Is that correct?
THE DEFENDANT: Yes, ma'am.
THE COURT: And you have the right, if you're a foreign national, to contact your national consulate. Do you understand that?
THE DEFENDANT: Yes, ma'am.
THE COURT: All right. Your bond in the --you've been charged with murder, a Felony One offense, and the bond in that is set at $750,000.

You've also been charged with aggravated assault with a deadly weapon, and the bond in that matter has been set at $250,000. Do you understand that?
THE DEFENDANT: Yes, ma'am.
THE COURT: All right. Anything else from the State?

MS. YENNE: Judge, we would simply like to tender and offer as State's Exhibit 1, the previous set of warnings for the aggravated assault charge with a deadly weapon, the one that's carrying the 250,000-dollar bond, the warnings that were given to Mr. Harris January 14th, […]

Appendix J

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

December 6, 2013

PUNISHMENT PHASE
Volume 72 of 87 Volumes

MARY KASPER,
having been previously duly sworn, testified as follows:

DIRECT EXAMINATION
BY MR. WOOTEN:

* * *

[pp.35-36]

Q. And in your opinion were those tests valid?
A. Yes.
Q. Okay. Based on those test results, did you come to any conclusions?
A. I did.
Q. And what are they?

A. I thought that he had some problems that showed impairment in his spatial ability, visual spatial memory, his ability to transfer information between his two hemispheres. I felt that he had mild deficits in sustained attention and acquisition over time of information. And I thought that what it suggested was possible microvascular issues in his brain.

Q. Okay. And what does that mean for his brain?

A. It means that if I saw him in a different context, we would -- we would give him a diagnosis of mild cognitive impairment, which is a precursor diagnosis to vascular dementia.

Q. Okay. Well, what do those two terms mean?

A. Mild cognitive impairment means that there is some mild impairment in your brain, which is not significant enough to be called a diagnosis of dementia. To have a diagnosis of dementia you must have memory impairment. And although I did find some areas of memory impairment, I did not think that they were significant enough to warrant a full-blown diagnosis of dementia. And so without the additional problem of memory impairment, the diagnosis would be mild cognitive impairment.

Q. Okay. You said that's a precursor to dementia. What is dementia?

A. Dementia is a diagnosis where an individual has memory impairment plus impairment in a couple of other cognitive areas such as attention, self-regulation, ability to express yourself, motor functioning. It's just -- you'd have -- the first condition is you have to have memory impairment for it to be a diagnosis of dementia, and then you have other areas of cognitive impairment.

Q. Okay. So physically what is different from Mr. Harris' brain than, I guess, the brain -- well, than a normal standard brain?

A. I believe that he's got some chronic microvascular problems.

Q. Okay. Could you explain that a little more?

A. The inside part of your brain -- the outside part is called the cortex and the inside part is the part that has connections to the cortex. An individual who oftentimes has some chronic microvascular changes has problems with attention, impaired planning, impaired judgment, emotional dis-control, problems with attention, impairments in social situations, sometimes difficulty finding the right words. These are the kind of problems that you see when an individual has some microvascular changes. And I did think he had some of those […]

Appendix K

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

December 9, 2013

PUNISHMENT PHASE
Volume 73 of 87 Volumes

RAYMOND SINGER,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. WOOTEN:

* * *

[pp.13-14]

Q. Okay. Does this field of expertise rely upon accepted scientific principles in the scientific community?
A. Yes.
Q. Has it been recognized as legitimate science by the scientific community?
A. As far as I know it has. We have our journals. We have meetings.

Q. Okay.
A. We get referrals from doctors and other professionals.
Q. Okay. And what about neuropsychology? Is it based on accepted principles in the scientific community?
A. Yes.
Q. It has been recognized as a legitimate field of science?
A. Yes. As far as I know it is recognized.
Q. Okay. Now can you tell me a little bit about -- well, let me just ask you this. You were retained to work on the James Harris case?
A. Yes.
Q. Okay. What, in fact, have you done -- what work have you done on the James Harris case?
A. I've reviewed records in the case. I reviewed the neuropsychological findings of Dr. Kasper. I conducted my own evaluation of Mr. Harris. I've seen him on two occasions prior to today. I studied the research literature on pesticides and other toxic substances to which Mr. Harris had been exposed. I reviewed the latest thinking on the effects of toxic substances on developing nervous systems of children and adolescents. I reviewed records including Mr. Harris' educational records and other cognitive testing that he underwent. I reviewed information regarding the types of pesticides that had been applied to agricultural fields at the time Mr. Harris was working in those fields as a child. And I probably did other things, too.
Q. Okay. Now when you reviewed Dr. Kasper's work in the case, did you form opinions as to her work?
A. Yes.

Q. Okay. And did you accept her findings?
A. Yes.
Q. Did you form an opinion as to Mr. Harris', for lack of a word, mental health from a neurotoxicological and a neuropsychological basis?
A. Yes.
Q. And what, if any, are those opinions?
A. I think he suffers from brain injury from exposure to numerous toxic substances, particularly from childhood, resulting in major neurocognitive disorder.
Q. Okay. Now what substances are we talking about?
A. Organophosphate pesticides, organochlorine pesticides, hydrogen sulfide, lead, mixture of solvents, mercury, carbon […]

* * *

[pp.60-61]

A. Bottom.
Q. Okay. And I know it's not politically correct anymore, but is mental retardation still --
MS. YENNE: Your Honor, I'm going to object. Qualifications regarding this testimony.
THE COURT: Let him finish his question.
Q. Is mental retardation still a valid term in neuropsychology?
A. It's valid. It's not really used very much anymore.
Q. Okay.
A. But it's a valid term, yes.
Q. How close is 75 to that mark?

MS. YENNE: Your Honor, I'm going to object to qualifications regarding this witness to answer that question.
THE COURT: I'll sustain it at this time.
Q. Can you tell us -- when you said it's the bottom 5th percentile, can you explain how you know that?
A. Well, I know that from Dr. Kasper's results.
Q. Okay. And are those results compared to something?
A. They are compared -- yes, they are compared to national norms.
Q. Okay. And do you agree with her assessment of the IQ?
MS. YENNE: Your Honor, I'm going to object to qualifications. May we approach, Your Honor?
THE COURT: You may.

(The following discussion was held at the bench.)

THE COURT: We're at a bench conference. The jury cannot hear.
MS. YENNE: Judge, there is no information -- we're going to object. This doctor is not a psychiatrist. He's not a licensed medical doctor. There is nothing to suggest that testing was performed, and this is bolstering regarding testing of someone. He was not present during the testing.
MR. WOOTEN: Judge, he's an expert. He's allowed to rely on other expert testimony. And the IQ on a board-certified neuropsychologist is so obviously -- he's obviously qualified to talk about IQ.
THE COURT: Well, you didn't qualify him to do that, to talk about IQ. Now, you know, if we can take a break and I'll let you --

MR. WOOTEN: I would have to, Judge. I'm sorry. I thought that was obvious.
THE COURT: Okay. I will let you do that. Go ahead and proceed on, but I'll let you do that later before you take him off the stand.
MR. WOOTEN: Okay.
(Bench discussion concluded.)
THE COURT: You may continue.
MR. WOOTEN: Thank you, Judge.

* * *

(The following discussion was held at the bench.)

* * *

[p.79]

MR. WOOTEN: You had told me to approach about the IQ at the end of his testimony, and then that's --
MS. YENNE: Do you intend to ask him, please? I'm just trying to save the jury time. What do you intend to ask him?
MR. WOOTEN: Dr. Kasper in her report, who he reviewed, said he was an 83 on a prior IQ. He's declined to a 75, number one. And I want to be -- I think he will say that he thinks that decline is due to toxicologic exposure -- if I'm saying that right.

And number two, I had wanted to ask him how -- and by the way, let me be real clear. We are not raising a constitutional -- in any way a constitutional argument as to mental retardation. That would have had to be before the onset of age 21. We know that.

We're not trying to do that. I know it has that buzzword in it. I wanted earlier to ask him the question of whether -- you know, how far a 75 is from retardation now. Not before and not at the time of the crime. Just now. Because I think it gives a context to that number, 75. But we're no way raising that constitutional limitation on the death penalty.

MS. YENNE: Judge, we do need a hearing outside the presence of the jury because mental retardation requires a specific battery of testing. This man is not demonstrated to be qualified to give that testing, and we're going to object.

* * *

[pp.85-87]

VOIR DIRE CROSS-EXAMINATION

BY MS. YENNE:

Q. Dr. Singer, you yourself have done no testing -- IQ testing of the Defendant. Is that correct?

A. Yes.

Q. Okay. You're relying on Dr. Kasper's results, correct?

A. Yes.

Q. You didn't speak to the person in TDC who would have done the IQ testing in the past, and you yourself say that they are not identical. Is that a fair assessment?

A. Yes.

Q. Fair enough. And certainly haven't done any mental retardation testing regarding this Defendant. Is that a fair statement?

A. Yes.

MS. YENNE: I'll pass the witness.

THE COURT: Mr. Wooten.
MR. WOOTEN: Nothing further, Judge.
THE COURT: All right. Dr. Singer, you may step down. Be back here at 1:00 o'clock.

All right. We're continuing on the record. The record will reflect counsel for the State, counsel for the defense, the Defendant are present. The jury is not present, and Dr. Singer is not present.

Mr. Wooten, I'll hear you on the two issues you wish to offer him on.
MR. WOOTEN: Judge, I -- I believe that he's -- well, to the extent that he's willing to say that there is a decline -- I'm not sure he is. I think he's qualified to say that. I don't know that he believes that; but I don't think that's what this hearing is about, unfortunately.

But as far as the 75 is an IQ score and 5 points below it becomes mental retardation, as long as we're not presenting that in a constitutional bar, I believe he should -- he's qualified to say that. And I would like to ask him that in this case.
THE COURT: Ms. Yenne.
MS. YENNE: Judge, I don't believe he's qualified to say it. First of all, the one thing that he has said is that they are not identical tests. He can't say it between the TDC test and the current state. And his level of hesitancy on the witness stand concerning mental retardation is troubling. It is clear that he's attempting to be as honest as he can be with this. And this is not a field that he is currently familiar with. And to inject that in a Capital Murder case is highly inappropriate.
THE COURT: All right. I'm going to deny your request. I think -- I gave you some latitude with him testifying, but his testimony on the 75 is he said "I

think" it's. So that's not the kind of definitive testimony you would expect from an expert who can say, yes, that is. And he -- I did notice his demeanor and his hesitation in answering that question, so I don't think that rises to the level. I think it's more speculative and I will not allow you to go into those two areas. By his own admission the first was more problematic because he didn't know how those tests were administered. So I will not let you go into those two items with him.

But you have not passed the witness. You know, so it's still your witness when you come back.

MR. WOOTEN: Yes, sir. Thank you.

THE COURT: Y'all be here by 5 after.

MR. WOOTEN: Thank you, Your Honor.

THE COURT: Thank you.

(A lunch recess was taken.)

THE COURT: Okay. We're ready.

(Jury in.)

THE COURT: We're on the record. You may be seated.

The record will reflect that counsel for the State, counsel for the defense, the Defendant, and members of the jury are present and seated in the courtroom.

You may inquire when you are ready.

MR. WOOTEN: Thank you, Judge.

Appendix L

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

January 24, 2019

EVIDENTIARY HEARING
Volume 14 of 31 Volumes

KERI MALLON,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. MICHAEL WILLIAMS:

* * *

[pp.71-72]

Q. What, if anything, was discussed about intellectual disability or mental functioning at this particular brainstorming session?
A. I remember discussing it. I remember we had an IQ test that at the time didn't meet the standard. I think at the time it was still the hard 72 in order to have intellectual disability. I remember discussing it.

I remember Kathryn Kase saying -- our expert at the time was Dr. Kasper. And I remember Kathryn saying let's, you know -- let's call her. Let's see what she has to say.

So we got Dr. Kasper on the phone. We asked her flat out if we had an intellectual disability case and she said no, we didn't.

Q. What did you ask her?

A. If we had an intellectual disability -- I can't remember the exact verbiage but asked her if we had a viable intellectual disability case and she said no.

Q. How long was this phone call?

A. I couldn't say. It was maybe 15, 20 minutes maybe.

Q. And how long into the call did you ask Dr. Kasper whether there was a viable intellectual disability case?

A. I don't know. It wasn't at the beginning. We had talked to her for awhile before the ultimate question came out, I believe.

Q. What was discussed at the beginning?

A. What she had learned about Mr. Harris.

Q. What about what she had learned about Mr. Harris?

A. Pardon me?

Q. What about what she had learned about Mr. Harris?

A. I don't know if I can tell you details. But she talked to us for awhile about Mr. Harris, what she had learned. She explained some of his behavior, but I can't recall the details about it.

Q. What did she give as her basis for saying that there was no viable intellectual disability claim?

A. I don't remember.

Q. What did she say about IQ testing?
A. I remember we discussed it. It was over the 72. I don't remember -- I don't remember what it was. I think we had two IQ tests and one was in the 80's and I think one was in the high 70's. But I don't remember.

I don't remember exactly. I don't remember the exact conversation either. What I do remember is her saying that we don't have a viable ID case. Because that was what was most devastating to us.
Q. Who asked whether there was a viable ID case?
A. I don't remember if it was Kathryn. I don't remember the exact language used. I don't remember if it was Kathryn Kase or Jay Wooten. We all participated. She was on speakerphone so we all participated in the conversation.

Appendix M

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

January 25, 2019

EVIDENTIARY HEARING
Volume 15 of 31 Volumes

NICOLE JACKSON,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. BOSSERMAN:

* * *

[pp.14-16]

A. Yeah, that he did not. But I don't remember the specific story. I'm sorry. I don't.
Q. Okay. That he did not operate -- did they say that he wasn't capable of operating it?
A. Those words weren't used.
Q. Okay.
A. It was just he didn't do it.

Q. He didn't. Okay.

Do you remember what his main job was?

A. No.

Q. Okay. There were some discussions with Dr. Kasper regarding the Defendant's mental -- regarding his intelligence?

A. Uh-huh.

Q. Okay. Could you state the circumstances under which there was a discussion regarding his intelligence? I mean or, well, let me rephrase it.

Do you remember a specific circumstance in which Dr. Kasper was asked questions regarding the Defendant's intellectual disability?

A. Yes.

Q. Okay. Could you state what those circumstances are?

A. The discussion that I was present for was we had a trial prep meeting.

Q. Uh-huh?

A. Dr. Kasper, she wasn't there in person. We called her on the phone.

Q. Uh-huh?

A. So we called her there and we discussed two different IQ scores, one of 83, the other of 75. The 83, I believe, was in the records that we collected.

Q. Uh-huh?

A. The 75 was her own testing, I believe.

Q. Uh-huh?

A. And do you want me to go into further detail?

Q. What did she tell you -- what was -- was Dr. Kasper specifically asked whether the Defendant was intellectually disabled?

A. Yes. She did not believe that we had an ID claim --

Q. Okay.
A. -- on our hands. What she stated, she associated the numbers with dementia, early stages of dementia.
Q. Okay.
A. And also associated his declining -- I don't want to say declining intellectual but --
Q. Mental state?
A. Yeah, declining mental state on drug use.
Q. On drug use? Okay.
A. And risky behaviors throughout his life.
Q. Okay. Was there anything in your investigation or any of the investigation of other -- of the other members of RPDO that you're aware of that show the Defendant was intellectually disabled?
A. Repeat that one more time.
Q. Okay. Yeah, maybe I didn't phrase that properly.

Was there anything in your investigation or the investigation of anyone else at RPDO that suggested that the Defendant was intellectually disabled?
A. Not in my investigation. I believe there was some discussion that Carol Camp had stated something about intellectual disability, that she wanted to pursue it.
MR. MICHAEL WILLIAMS: Your Honor, allow the witness to finish her answer. He's been talking over her.
THE COURT: Yes.
MR. BOSSERMAN: I'm sorry. I got to watch myself, Judge.
A. I believe Carol Camp did want to pursue that. There were memos and records, but I cannot recall what was in those.

Q. I understand. I understand.
MR. BOSSERMAN: May I approach the bench, Your Honor?
THE COURT: You may.
MR. BOSSERMAN: Judge, we're going to go into a memo with RPDO.
THE COURT: Ms. Steele, do you want to come up on this?

* * *

CROSS-EXAMINATION
BY MR. MICHAEL WILLIAMS:

* * *

[p.73]

Q. […] you had or hadn't?
A. Not specifically, no.
Q. So Ms. Tamara Harris gave you a full interview. True?
A. Yeah.
Q. That is, she sat down with you and she was fairly open in the conversation?
A. Yes.
Q. By this point it was August 8th, 2013?
A. Yes.
Q. That was your first time speaking with Tamara Harris. Correct?
A. I believe so. Yes.
Q. You'd agree with me as a mitigation specialist that the existence of a niece who is also intellectually disabled would be a red flag prompting further follow-

up for an intellectual disability investigation. Correct?

A. Yes, I do agree with that.

Q. What do you remember about your conversation with Ms. Harris?

A. I don't remember in detail my conversation with her.

Q. If you turn to the first page you'll see there was some talk about asking to see Uncle Man. And that was James. Correct?

A. Uh-huh. I see it there.

Q. She talked about the relatives that she lived with.

Appendix N

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

January 30, 2019

EVIDENTIARY HEARING
Volume 16 of 31 Volumes

DR. JAMES PATTON,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MS. ERICA WILLIAMS:

* * *

[pp.129-131]

A. Practical domain are kind of like it sounds. It's really pretty much a lot of the everyday kind of things that we all do. I mean not that we don't read and do other things, but the practical would be -- I think that the overall term is kind of this -- I kind of -- I like the idea that the DSM uses the term kind of self-management of one's everyday life. It would include

things like self-care. Just basic kind of hygiene and, you know, basics skills. It also includes things like home living, all the things that would be associated with typical home living. It would also include something called community use. So that would involve kind of being able to use various services that are available around in one's community. It does also include health and safety. And then the other major one under this particular category is work.

Q. So you've mentioned the developmental period as being the third criterion for intellectual disability under the DSM-5. Is that correct?

A. Yes.

Q. Does the DSM-5 set an age cap for the developmental period?

A. It does not.

Q. What age limit have you applied for the development period in this case?

A. I have used -- in this particular case I have applied a developmental period that will go up into the 20s, with 22 kind of being the target age.

Q. What authority are you relying on to support the age limit of 22?

A. Yeah. There is three -- I think there is three sources that support doing this. Number one, for the -- and I will say for the first time in professional definitions of recent times, DSM did not -- as stated, did not give an upper age limit. So one option is DSM has left that open by not stating an age range.

The second one is I think that if one looks at the neuroscience research of recent years -- I'm not a neuroscientist, but I am aware of the fact that there is a lot of information out there suggesting that the developing brain goes -- is still developing into the mid

20s. So I think if we're looking at developmental period being associated with the development of cognitive functioning, et cetera, that makes sense.

And then the third area that, you know, comes back to kind of giving you a -- kind of putting it in perspective is that the Social Security Administration has issued a definition of intellectual disability that includes a criterion, the adaptive -- on adaptive functioning. And in their definition they basically state -- they have actually upped the age range to 22.

Q. Now you mentioned that you had done an affidavit in this case. What age did you use for the developmental period in that affidavit?

A. In the affidavit I was operating under an 18 -- more of an 18 developmental period. At the time that's the one that I was working with.

Q. So now why are you using a 22 age limit?

A. I think that -- well, for the reasons I've pretty much kind of stated is I think that -- that -- and the DSM-5 has given this to us, is that I think the developmental age -- I'm sorry -- the developmental period is more extensive than 18. 18 was pretty arbitrary. Historically, that age of 18 has been associated with -- has been mostly associated with kind of when someone ends school. That's kind of what that was. And I think that 22 is a more appropriate age range.

Q. Now, Doctor, how do you go about assessing adaptive functioning in adults?

A. Okay. The way you assess adaptive functioning is -- there's a couple ways that you go about doing it. One is you will certainly look at records that might exist on an individual. You also will -- I think what's critical is to interview individuals that know about the

person for whom we're trying to obtain information. There is also some documents -- in some cases there would be documents that would have been already, you know, developed -- declarations, affidavits, things of that nature -- that one would rely on. And then the […]

* * *

[p.146]

A. […] save and plan for the future, money-wise; did not really -- was not able to balance the checkbook or keep a checkbook; was not able to pay bills; and also he -- and so in the early stages, he needed some help with cashing his checks and things. So that's -- those are some of the key focal areas.

Q. Did Mr. Harris require any supports for any conceptual -- any life skills in the conceptual domain during the developmental period?

A. Yes.

Q. What supports?

A. Well, the supports -- first of all, there is teachers that provided supports. I had a chance to interview two teachers that supported that idea that there was extra help given. There was family members that indicated to me that there was support at home for doing homework. Homework being one of those things that, you know, most of us get or most kids are assigned; and he needed help with that at home. There were other siblings that provided that.

Later on in the developmental period he needed support -- his first wife provided a fair amount of support to him related to -- again, more of the money management kind of areas.

Q. And did you -- did the deficits that you identified in Mr. Harris in the conceptual domain during the developmental period, do those align with the DSM-5?

* * *

[pp.150-152]

Q. […] to whether Mr. Harris had significant adaptive deficits in the practical domain during the developmental period?

A. Yeah, I -- I feel that he did. And this came from a number of different sources. Primarily what it was is that I think in my interviews, in my assessment of this and talking with family members and also documents that were provided to me for during the latter stages of the developmental period, it was clear that he could not cook. Now when I say that, I'm talking about cooking in a little bit more advanced way. I mean simple cooking is possible, and I'll come back to that.

That's an actually important piece here because from what I learned in my assessment is that other individuals in his family, all other individuals, including other males that were around, did learn to cook. And so in not learning, you know, there is a comparative piece there on that.

You know, things like -- you know, simple things about, you know, fixing things around the home, not doing laundry, not cleaning, those were things that were not demonstrated by Mr. Harris during the developmental period.

Q. And just to be clear, on the slides that you prepared, did you list all of the adaptive deficits that you found with Mr. Harris?
A. No. These were, I think, some of the ones that I think stood out the most.
Q. So can you talk about Mr. Harris' deficits in applied skills during the developmental period?
A. Yeah. And I know that -- I'll start with Bullet 2 because -- just because I've been talking about that. I think there is a lot of evidence that money management is an issue. You know, money management comes up. You know, some of those skills are not necessarily independent of each other in the sense that some of them cut over. Because money is related to math; but, you know, we look at math a little bit under conceptual. But here's where the money is actually in an applied way where you really have to deal with things.

Bullet No. 1 is like with his first wife. They were looking for an apartment and she pretty much had to identify a place to live, and then she handled all of the rental paperwork. So kind of an example of, again, someone providing support to him for a necessary daily -- I say daily -- something that you have to do as an adult.
Q. Did you have any indication with respect to the rental paperwork whether his wife was handling it because he couldn't handle it or because he just didn't want to handle it?
A. Yeah. From the information I was -- that I had about that, it was that he could not.
Q. What supports did Mr. Harris receive in the practical domain during the developmental period?

A. Well, growing up certainly there were people in his home that did things -- you know, that provided support for him in these major areas. He was in a family where there were sisters that helped out to a great extent. An older sister, in particular, early on, and then other sisters that helped out. And then his mom certainly was a key person. I mean, moms are key for all of us -- or for many of us. But in this case, you know, he continued to live with his mom into his 20s, early 20s.

And then another example is in the work area. And this is work in the developmental period. So this would be -- there is another work history that we'll get to. But in the developmental period, other people helped him -- in one case his uncle helped him get a job, one of his first jobs.

Q. Let's turn to the practical domain in the adulthood.

A. Okay.

Q. Did you observe Mr. Harris having any significant adaptive deficits in the practical domain when he was an adult?

A. Yeah. The problems in cooking more than just very simple kind of meals -- and what I mean by -- let me define simple meal. I'm kind of talking about, you know, if I have a can of tuna and open it up and put it on some bread, that's kind of preparing a meal; but it's a pretty straightforward, simplistic kind of meal.

Something that would involve maybe following recipes and following multi step-by-step kind of directions would be more difficult to do. So that was one thing.

Appendix O

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

January 31, 2019

EVIDENTIARY HEARING
Volume 17 of 31 Volumes

DR. GEORGE WOODS,
having been first duly sworn, testified as follows:
DIRECT EXAMINATION
BY MR. MICHAEL WILLIAMS:

* * *

[pp.54-56]

A. […] were. I really felt this function, this really pointed to the practical domain. Because taking care of your medical health is an important aspect of the practical domain. And I really saw there would be difficulty. I really -- I'd like to put that primarily under medical in the practical domain.
Q. So medical in the practical domain?

A. Yes. I don't think that relates as much to intellectual functioning.

Q. Could you please turn to Paragraph 57 of your report, Dr. Woods?

A. Sure.

Can you wait just a moment? Okay. I've got it.

Q. What did you report in Paragraph 57, Dr. Woods?

A. Your Honor, Mr. Harris has difficulty really judging major social relationships. We know that he's been married twice. He's been in a relationship. We also know that for most of his life he lived with his mother or his sister, really due to his inability to live independently.

When he lived relatively independently he lived in motels. And he describes living in motels because they were a package that required him not having to do certain money management, et cetera.

We see that with both his first and second wives they paid the bills, they bought the cars, they contracted for the apartments. And it's not just in these relationships. We also see declarations where other family -- other friends of his bought cars for him. And they tested the cars, they brought the cars to him. He didn't even test the car out. He just took the car.

So we see a certain level of dependence that is characteristic both of someone with intellectual functioning but is also, in my opinion -- we talked about independence on the one hand. Now I think we're talking about a real type of dependence.

Q. Where should I put that on this inventory, Doctor?

A. Intellectual functioning. And I would use the word dependence.

Q. Anyplace else?
A. Let me look for a moment.

I think -- I really do think that practical is the most relevant place. Really less conceptual.
Q. What do you mean when you say he had difficulty judging the major social relationships?
A. He had difficulty understanding his role in those relationships. He -- and difficulty is probably not the best word. He really was effectively unable to provide reciprocation in those relationships. Other than he was acquiescent. He was cooperative. He got along. But when you think of being married and being able to pay the bills and being able to take care of the car and being able to do these various and sundry things, he was not really able to do those things. And we see that consistently over multiple relationships.
Q. Could you please turn your attention to Paragraphs 59 and 60 of your report?

Please explain to the Court what you were recounting in Paragraphs 59 and 60 of your report, Dr. Woods.
A. Yes. Let me first say, Mr. Williams, that when you see above 59 and 60 you see the letter F and Cognition?
Q. Yes.
A. This area from 59 on is really the neuropsychiatric components of the mental status examination. And this is really the area where you start to look even more carefully at brain functioning. And so when we talk about memory, there are multiple types of memory. There are probably 10 to 15 different types of memory. And we -- from a layperson's point of view, you often think of short-term memory and long-term memory. But there are

multiple kinds of memory. And we really want to look at as many of those as possible. And Dr. Kasper certainly did that.

You don't really find that in the IQ testing. You really see screening tests of memory rather than comprehensive tests of memory.

In the examination that I did we looked at […]

* * *

[pp.141-142]

A. […] you've got that intellectual piece. How do they do? How do they do in everyday life? And you've got these three different areas that you want to look at.

Q. How many of those areas must there be an adaptive deficit. in to support a diagnosis of intellectual disability?

A. One.

Q. How many domains does Mr. Harris have deficits in?

A. It's my professional opinion that he has deficits in -- significant deficits, not just deficits but significant deficits in two of the areas.

Q. Why do you give that qualifier, significant deficits, Doctor?

A. Because if you are doing a standardized test, for example, they would require that the deficits be two standard deviations below in order to qualify. A lot of people might not be able to do things. But are they not able to do things to a significant degree? And that's really what we're looking for.

So it's not just that you can't do something. It's that, you know, you can't do it effectively and you can't really, I guess, to a significant degree.

Q. What significant deficits did you observe in James' practical domain?

A. Wow. Well, I certainly think the first ones really have to do with getting help at school. You know, he was in a school system that did not have special education. The teachers describe, both in a review of his records and the teacher that was his 3rd grade teacher as well as his neighbor, described him needing help. You know, really needing help in order to do better in school. Even in classes like agriculture, he was recalled as someone that needed, you know, needed more help than the other students.

In his math class, for example, there were two types of math. There was relatable math -- and I think I've already mentioned this -- related math and consumer math. And these were simpler, more straightforward math classes that were really designed to teach basic skills. And what you see is that even though these are the classes that Mr. Harris took, everyday skills in how to do math abilities, when he got out into the community he wasn't even able to take those academic skills and translate them into everyday math ability.

He didn't pay his own -- he didn't pay his bills. His wife described paying -- he would give her money, but she described paying the bills. He lost a car because he didn't pay the note. He would overrun his ATM. It took him a long time to get an ATM. He didn't have a checking account. And so you see these specific kinds of practical skills that really cause problems.

What I saw were that he couldn't remember the medications, although he and I talked because we both share […]

Appendix P

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

February 7, 2019

EVIDENTIARY HEARING
Volume 19 of 31 Volumes

THOMAS WOOTEN,
having been first duly sworn, testified as follows:
CROSS-EXAMINATION
BY MR. MICHAEL WILLIAMS:

* * *

[p.193]

Q. […] that took place at the Hilton Airport. Correct?
A. I don't know what hotel it was at, but it was right by the airport.
Q. This meeting took place on or around July, 2013?
A. That would be my guess.

Q. At that point in July, 2013, when you called Dr. Kasper you had gone for many months without any investigation into intellectual disability issues, as we have just seen from your case reports. Correct?
A. Yes.
Q. Many months without any investigation into adaptive deficits. Correct?
A. I don't know that I would agree with that.
Q. There were no investigations into adaptive deficits that were listed in your monthly case reports we reviewed. Correct?
A. People still -- yes, that's correct.
Q. You were just assuming, I take it, that there were people conducting an investigation into adaptive deficits?
A. No. I think any time you go through, you start building your direct examination as to what happened with people and you start talking to them about how they acted, I think you still are asking people and trying to find evidence of vascular dementia, evidence of BTE, […]

* * *

[pp.195-196]

Q. When you called up Dr. Kasper, there was discussion about this test score of 83. Correct?
A. No, I don't know that we -- I don't -- I don't think we talked to Dr. Kasper about the 83 in the phone call. She already knew that. We -- basically, Kathryn Case just point-blank asked her, Doctor, you know, why are we not going forward on MR -- well, she probably said ID -- on ID? That's how it was put to her.

Q. Did Kathryn Case first ask you as lead trial counsel why you weren't going forward with ID?
A. Yeah.
Q. As lead trial counsel you bore ultimate responsibility for what defenses would be asserted on behalf of James at trial. Right?
A. Again, yes.
Q. You wouldn't delegate that responsibility to a retained expert. Correct?
A. I would rely on the expert. So, no, it's not ultimately their responsibility; but yeah, I would rely on the experts in discharging that responsibility.
Q. How long was this call with Mary Kasper?
A. Well, the entire call was probably about 25 to 30 minutes. However, the part I'm talking about was probably about 10, 15 minutes.
Q. Did anybody push back on what you're saying Mary Kasper said about the possibility that James had intellectual disability?
A. No. Everyone accepted it. It would have been a much longer call. Keep in mind, I wasn't running the show there. There were a lot of people there who were telling me: Here's things you need to do on this case. They were -- they were the ones making the decisions on how we were going to go forward at that time. And all of them, based on what she said, moved on from ID.
Q. When you say you weren't the one that was running the show, you were James' lead trial counsel. Correct?
A. Running the show as far as the meeting goes. Yes, I -- I ultimately have authority, but I don't -- if I'm at a meeting where the public -- the public defender is at and he's running the meeting, I don't tell him to be

quiet because I'm James' lead counsel. He's still running the show.

Q. When Dr. Kasper purportedly said that James does not have an intellectual disability, did anybody in the room raise any of the issues that we just reviewed in the Practitioner's Guide?

A. No, they did not.

Q. Did anybody in the room raise any issues with the fact that the 83 test score was through a Beta screening test?

Appendix Q

IN THE 149TH DISTRICT COURT OF BRAZORIA COUNTY, TEXAS

No. 67063-A

EX PARTE JAMES HARRIS, JR.,

Applicant

August 29, 2012

Defendant's Exhibit 192

August 29, 2012

Mary Elizabeth Kasper Ph.D
2650 Baha Vista, Suite 209
Sarasota, FL 34239

RE: *State v. James Harris Jr., Cause No. 67063*
149th District Court, Brazoria County, Texas

Dear Dr. Kasper,

Thank you for agreeing to conduct a psychiatric evaluation of our client, James Harris Jr. This is a capital offense and the State is seeking the death penalty. As our appointed neuropsychologist, we ask you to provide your expert opinion as to the following issues: a) organic developmental brain dysfunctions, and b) traumatic or organic brain injury or insult.

To establish a basis for that opinion, we would ask you to:

1. Review the provided records regarding our client and his life;
2. Discuss with myself and other members of the defense the specific standardized tests that we mutually agree are appropriate for the purpose of evaluation of the issues identified above;
3. Not perform any additional psychological or psychiatric testing without prior consultation and approval of the defense team;
4. Meet in person or by phone as needed with counsel and other members of the defense team;
5. Advise the team as to any additional mental health experts that may be helpful and what requests we should make of these experts. You will need to provide evidence, by testimony or affidavit, to establish the threshold showing of necessity for the funding of these additional experts;
6. Review and evaluate reports of mental health consultants who have examined our client on behalf of the prosecution. I will ask that you determine whether any examination was performed properly and in accordance with accepted scientific standards, including the *ABA Criminal Justice Mental Health Standards*; and
7. You are specifically instructed that, as a member of the defense team, you are not to communicate with the prosecution, and, if

contacted by them, you are to immediately contact me.

If there are additional records you believe you need to review, please contact us with regard to those records. Please consider any communications that you have with either members of the defense team or Mr. Boulds covered by the attorney-client privilege.

Please contact us with any questions that you might have.

Sincerely,

Thomas Jay Wooten
Assistant Public Defender