EXHIBIT A

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-84,064-01

EX PARTE JAMES HARRIS, JR., Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS
IN CAUSE NO. 67063-A IN THE 149TH JUDICIAL DISTRICT COURT
BRAZORIA COUNTY

***Per curiam*.**

O R D E R

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

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.

---

[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

EXHIBIT B

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/10/2023
HARRIS, JAMES JR. **Tr. Ct. No. 67063-A** **WR-84,064-01**

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

Deana Williamson, Clerk

JAMES HARRIS JR.
POLUNSKY UNIT - TDC # 999587
3872 FM 350 S.
LIVINGSTON, TX 77351

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/10/2023
HARRIS, JAMES JR. **Tr. Ct. No. 67063-A** **WR-84,064-01**

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

Deana Williamson, Clerk

MICHELLE WARD
OFFICE OF CAPITAL AND FORENSIC WRITS
STEPHEN F. AUSTIN BUILDING
AUSTIN, TX 78701
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS FILE COPY
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

1/10/2023
HARRIS, JAMES JR. **Tr. Ct. No. 67063-A** **WR-84,064-01**

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

Deana Williamson, Clerk

BENJAMIN WOLFF
OFFICE OF CAPITAL AND FORENSIC WRITS
1700 NORTH CONGRESS AVE SUITE 460
AUSTIN, TX 78701
* DELIVERED VIA E-MAIL *

OFFICIAL NOTICE FROM COURT OF CRIMINAL APPEALS OF TEXAS
P.O. BOX 12308, CAPITOL STATION, AUSTIN, TEXAS 78711

FILE COPY

1/10/2023
HARRIS, JAMES JR. **Tr. Ct. No. 67063-A** **WR-84,064-01**

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

Deana Williamson, Clerk

ASHLEY STEELE
TEXAS OFFICE OF CAPITAL WRITS
1700 N. CONGRESS AVE
SUITE 460
AUSTIN, TX 78701-1436
* DELIVERED VIA E-MAIL *