CASE NO. _____ (CAPITAL CASE)

IN THE SUPREME COURT OF THE UNITED STATES

BRENT BREWER,
Petitioner,

v.

BOBBY LUMPKIN, DIRECTOR,
Respondent.

On Petition for a Writ of Certiorari to
The United States Court of Appeals for the Fifth Circuit

Execution Scheduled for November 9, 2023

APPENDIX

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TABLE OF APPENDIX

APPENDIX A

United States Court of Appeals for the Fifth Circuit

No. 22-70006

BRENT RAY BREWER,

Petitioner—Appellant,

versus

BOBBY LUMPKIN, *Director, Texas Department of Criminal Justice, Correctional Institutions Division*,

Respondent—Appellee.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:15-CV-50

ON PETITION FOR REHEARING

Before JONES, OLDHAM, and WILSON, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the petition for rehearing is DENIED.

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE,
Suite 115
NEW ORLEANS, LA 70130

May 23, 2023

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 22-70006 Brewer v. Lumpkin
USDC No. 2:15-CV-50

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk

By: _____
Monica R. Washington, Deputy Clerk
504-310-7705

Mr. Craig William Cosper
Mr. Peter James Walker
Mr. Philip Alan Wischkaemper

APPENDIX B

e.g., Regents, 140 S. Ct. at 1906–07 (rejecting Government's invocation of "prosecutorial discretion"); *Texas v. United States*, 809 F.3d 134, 163–70 (5th Cir. 2015) (same), *aff'd by equally divided court*, 579 U.S. 547, 136 S.Ct. 2271, 195 L.Ed.2d 638 (2016) (per curiam) (mem.); *Citizens for Resp. & Ethics in Washington v. FEC*, 55 F.4th 918, 929 (D.C. Cir. 2022) (en banc) (Millett, J., dissenting) ("To begin with, affixing a brief invocation of prosecutorial discretion to lengthy substantive analyses in statements of reasons has become commonplace in Commission proceedings. This court errs in allowing those brief invocations to broadly insulate dismissal decisions from judicial review."). Unchecked, such invocations of "prosecutorial discretion" distort the rule of law. We should have seen through the Board's machinations in this case. I respectfully dissent.

Brent Ray BREWER, Petitioner—Appellant,

v.

Bobby LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division, Respondent—Appellee.

No. 22-70006

United States Court of Appeals,
Fifth Circuit.

FILED April 27, 2023

Background: Following affirmance of his capital murder conviction and death sentence, 2011 WL 5881612, state prisoner filed petition for writ of habeas corpus. The United States District Court for the Northern District of Texas, Matthew J. Kacsmaryk, J., 2022 WL 398414, adopted report and recommendation of Lee Ann Reno, United States Magistrate Judge, 2021 WL 6845600, and denied petition. Petitioner filed application for certificate of appealability (COA).

Holdings: The Court of Appeals, Jones, Circuit Judge, held that:

(1) jurists of reason could not disagree with district court's resolution of petitioner's claim that he was denied effective assistance as result of counsel's failure to object to state's expert's future dangerousness testimony;

(2) jurists of reason could not disagree with district court's resolution of petitioner's claim that he was denied effective assistance as result of counsel's failure to rebut state expert's testimony;

(3) jurists of reason could not disagree with district court's resolution of petitioner's claim that he was denied effective assistance as result of counsel's failure to investigate potentially mitigating evidence or prepare effective mitigation defense; and

(4) jurists of reason could not disagree with district court's resolution of petitioner's claim that he was denied effective assistance as result of counsel's failure to adequately investigate and rebut state's evidence of his future dangerousness.

Application denied.

1. Habeas Corpus ⚿818

To obtain certificate of appealability (COA), habeas petitioner must demonstrate that reasonable jurists would find district court's assessment of constitutional claims debatable or wrong. 28 U.S.C.A. § 2253(c)(2).

2. Habeas Corpus ⚿818

Grant or denial of certificate of appealability (COA) turns not on ultimate merits of habeas petitioner's claims, but on whether threshold inquiry into their underlying merit finds claims debatable. 28 U.S.C.A. § 2253(c)(2).

3. Habeas Corpus ⚿450.1

To obtain federal habeas relief, state prisoner must show that state court's ruling was so lacking in justification that there was error well understood and comprehended in existing law beyond any possibility for fairminded disagreement. 28 U.S.C.A. § 2254(d).

4. Habeas Corpus ⚿753

Federal court may review habeas petitioner's claim based solely on state court record. 28 U.S.C.A. § 2254.

5. Criminal Law ⚿1881

To establish that he was denied constitutionally effective assistance of counsel, defendant must demonstrate that (1) counsel's representation fell below objective standard of reasonableness and (2) there is reasonable probability that prejudice resulted. U.S. Const. Amend. 6.

6. Criminal Law ⚿1871

To establish ineffective assistance of counsel, defendant must overcome presumption that, under circumstances, challenged action might be considered sound trial strategy. U.S. Const. Amend. 6.

7. Criminal Law ⚿1883

To show prejudice, defendant alleging ineffective assistance of counsel must show that there is reasonable probability that, but for counsel's unprofessional errors, proceeding's result would have been different; this requires substantial, not just conceivable, likelihood of different result. U.S. Const. Amend. 6.

8. Habeas Corpus ⚿486(1), 773

Federal court's review of state court's adjudication on merits of ineffective assistance of counsel claim is doubly deferential because court takes highly deferential look at counsel's performance under *Strickland* through Antiterrorism and Effective Death Penalty Act's (AEDPA) deferential lens. U.S. Const. Amend. 6; 28 U.S.C.A. § 2254(d).

9. Habeas Corpus ⚿818

Habeas petitioner failed to make substantial showing that jurists of reason could disagree with district court's resolution of his claim that he was denied effective assistance of counsel as result of counsel's failure to object to state's expert's testimony at resentencing hearing that he constituted future threat to society, and thus issuance of certificate of appealability (COA) was not warranted, even though expert's future dangerousness testimony was found inadmissible in another proceeding one year later; expert had been allowed to testify in at least 16 Texas judicial proceedings on special issue of future dangerousness, including petitioner's trial, and counsel reasonably strategized to prevent expert from testifying by attacking his methodology at evidentiary hearing. U.S. Const. Amend. 6; 28 U.S.C.A. § 2253(c)(2).

10. Habeas Corpus ⚿818

Habeas petitioner failed to make substantial showing that jurists of reason could disagree with district court's resolution of his claim that he was denied effective assistance of counsel as result of counsel's failure to rebut state's expert's testimony at sentencing hearing that he constituted future threat to society with alternative expert opinion, and thus issuance of certificate of appealability (COA) was not warranted; state would likely have attacked defense expert's evaluation,

which would reflected poorly on petitioner and distracted from his attack on state's expert, defense effectively rebutted state expert's testimony, and jury heard substantial evidence of petitioner's violent episodes and eyewitness accounts of gruesome murder. U.S. Const. Amend. 6; 28 U.S.C.A. § 2253(c)(2).

11. Criminal Law ⇐1891

Sixth Amendment requires defense counsel to make reasonable investigations into potential mitigating evidence or to make reasonable decision that makes particular investigations unnecessary. U.S. Const. Amend. 6.

12. Habeas Corpus ⇐818

Habeas petitioner failed to make substantial showing that jurists of reason could disagree with district court's resolution of his claim that he was denied effective assistance of counsel as result of counsel's failure to investigate potentially mitigating evidence or prepare effective mitigation defense at his resentencing hearing in death penalty case, and thus issuance of certificate of appealability (COA) was not warranted; district court concluded that unoffered mitigating evidence would have been cumulative of evidence already presented, that expert mental health evaluation would have been unnecessary and even harmful to petitioner's case, and that there was no substantial likelihood that mental health evaluation or additional evidence would have influenced jury's decision. U.S. Const. Amend. 6; 28 U.S.C.A. § 2253(c)(2).

13. Habeas Corpus ⇐818

Habeas petitioner failed to make substantial showing that jurists of reason could disagree with district court's resolution of his claim that he was denied effective assistance of counsel as result of counsel's failure to adequately investigate and rebut state's evidence of his future dangerousness at resentencing hearing in his capital murder case, and thus issuance of certificate of appealability (COA) was not warranted; district court found that counsel reasonably decided to rely upon prosecution witnesses' trial testimony when deciding not to interview them prior to hearing, and that decision to put petitioner on stand to show his remorse, empathy, and non-violence during incarceration, rather than to quibble with minor details of witnesses' testimony, was eminently reasonable. U.S. Const. Amend. 6; 28 U.S.C.A. § 2253(c)(2).

Appeal from the United States District Court for the Northern District of Texas, USDC No. 2:15-CV-50, Matthew Joseph Kacsmaryk, U.S. District Judge

Peter James Walke, Federal Community Defender Office, Eastern District of Pennsylvania, Philadelphia, PA, Philip Alan Wischkaemper, Snuggs & Wischkaemper, Lubbock, TX, for Petitioner—Appellant.

Craig William Cosper, Assistant Attorney General, Office of the Attorney General, Criminal Appeals Division, Austin, TX, for Respondent—Appellee.

Before Jones, Oldham, and Wilson, Circuit Judges.

Edith H. Jones, Circuit Judge:

Brent Ray Brewer was convicted of capital murder and sentenced to death by a Texas court in 1991. The United States Supreme Court ordered Brewer resentenced in 2007. After he was sentenced to death a second time, Brewer exhausted his state remedies and then petitioned for federal habeas relief. The district court denied his petition and did not certify any questions for appellate review. Brewer now seeks a certificate of appealability

("COA") under 28 U.S.C. § 2253(c)(2). For the following reasons, we DENY his application for a COA.

I. Background

On April 26, 1990, then 19-year-old Brent Brewer and his girlfriend, Kristie Nystrom, approached Robert Laminack outside his flooring store in Amarillo, Texas and asked for a ride to the Salvation Army. Laminack invited the young couple to get in his truck; Nystrom took the front seat, and Brewer sat in the back. While en route, Brewer grabbed Laminack and began to stab him in the neck with a butterfly knife. Laminack begged for his life while obeying Brewer's demand to hand over his keys and wallet. He was wounded in the carotid artery and jugular vein. After losing consciousness, he bled to death.

In 1991, Brewer was convicted of capital murder and sentenced to death. A multi-year saga of direct and collateral challenges to his conviction and sentence ended in 2007 when the United States Supreme Court, ruling on the adequacy of jury instructions for the sentencing phase, ordered that Brewer be resentenced. *See Brewer v. Quarterman*, 550 U.S. 286, 127 S. Ct. 1706, 167 L.Ed.2d 622 (2007).

In a 2009 retrial of the sentencing, the state presented many of the same witnesses and evidence as it had at Brewer's first capital murder trial. These included: Robert Laminack's widow and daughter; numerous crime scene photographs; blood spatter testimony and other physical evidence, such as Brewer's bloody fingerprint on the butterfly knife found at the crime scene; testimony that Brewer "smirked and giggled" when describing to a witness how Laminack begged for his life; testimony that Brewer told a former cellmate that Laminack pleaded "please don't kill me, Boy" as Brewer stabbed him; and a photograph of Brewer "shooting the finger" while exiting the courthouse around the time of his arraignment for Laminack's murder. Dr. Richard Coons, a forensic psychiatrist, testified that there was a probability that Brewer would commit criminal acts of violence in the future, as he had opined before at Brewer's 1991 trial.

Unlike in 1991, Kristie Nystrom, Brewer's former girlfriend and accomplice in the murder of Robert Laminack, agreed to testify in order to obtain a favorable parole consideration. Nystrom gave a chilling firsthand account of the killing, which contained details the 1991 jury did not hear, such as that Brewer began to stab Laminack *before* asking for his wallet or truck keys.

The defense presented testimony from Brewer's mother and sister, who described Brewer's childhood and teenage years, and numerous correctional officers, who testified that Brewer had been an exemplary inmate for nearly two decades both on and off death row. The defense also used Dr. John Edens, a forensic psychologist, to attack Dr. Coons's methodology as having no basis in legitimate science. Finally, in order to counter the state's aggravating evidence and show Brewer's remorse, the defense put Brewer on the stand. He described his childhood, his former relationship with Kristie Nystrom, and the murder of Robert Laminack. He said he was sorry for what he had done to Laminack and his family.

A unanimous jury again found beyond a reasonable doubt that there was a probability that Brewer would commit criminal acts of violence that would constitute a continuing threat to society. The jury also found that the mitigating evidence presented by defense counsel was insufficient to merit a life sentence. The trial court resentenced Brewer to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Brewer's sentence. *See Brewer v. State*, 2011 WL 5881612 (Tex. Crim. App. Nov. 23, 2011). Brewer then sought state habeas corpus review. The state trial court held an evidentiary hearing and received testimony from Dr. Coons and Brewer's two 2009 trial counsel: Anthony Odiorne and Edward Keith, Jr. The court entered findings of fact, conclusions of law, and a recommendation that the TCCA deny habeas relief. The TCCA adopted that recommendation in large part and denied relief.[1] *See Ex parte Brewer*, 2014 WL 5388114 (Tex. Crim. App. Sept. 17, 2014).

In March 2020, nearly thirty years after he murdered Robert Laminack, Brewer filed his second amended petition for a writ of habeas corpus in federal district court, asserting fourteen claims for relief.[2] The district court adopted and supplemented the magistrate judge's extensive findings, conclusions, and recommendations, denied all claims for relief, and declined to grant Brewer's request for a COA. Brewer renews his application for a COA in this court.

II. Standard for Certificate of Appealability

[1, 2] Under the Antiterrorism and Effective Death Penalty Act ("AEDPA"), a state court prisoner must obtain a COA before appealing a federal district court's denial of habeas relief. 28 U.S.C. § 2253(c)(1)(A). This is warranted upon a "substantial showing of the denial of a constitutional right." *Id.* § 2253(c)(2). In *Miller-El v. Cockrell*, the Supreme Court clarified: "The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." 537 U.S. 322, 338, 123 S. Ct. 1029, 1040, 154 L.Ed.2d 931 (2003). As held by the Supreme Court, the grant or denial of a COA turns not on the ultimate merits of a petitioner's claims but on whether "a threshold inquiry into [their] underlying merit" finds the claims "debatable." *Id.* at 327, 336, 123 S. Ct. at 1034, 1039; *see also Buck v. Davis*, 580 U.S. 100, 114–16, 137 S. Ct. 759, 773–74, 197 L.Ed.2d 1 (2017). Accordingly, this court has made a "general assessment" of Brewer's claims. *Miller-El*, 537 U.S. at 336, 123 S. Ct. at 1039.

[3, 4] And in doing so, this court nevertheless "must be mindful of the deferential standard of review the district court applied to [the habeas petition] as required by ... AEDPA." *Williams v. Stephens*, 761 F.3d 561, 566 (5th Cir. 2014) (quoting *Miniel v. Cockrell*, 339 F.3d 331, 336 (5th Cir. 2003)) (alteration in original). That standard requires that state-court decisions "be given the benefit of the doubt." *Renico v. Lett*, 559 U.S. 766, 773, 130 S. Ct. 1855, 1862, 176 L.Ed.2d 678 (2010). To prevail, the petitioner must prove that the adjudication by the state court "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States" or "resulted in a decision that was based on an unreasonable determination of the

1. The TCCA did not adopt two paragraphs of legal conclusions pertaining to a disputed autopsy report, which is not at issue in this petition.

2. In 2018, Brewer filed a petition for habeas relief in federal district court and moved to hold his case in abeyance while he returned to state court to exhaust state habeas remedies on new claims. *Brewer v. Davis*, 2018 WL 4585357 (N.D. Tex. Sept. 25, 2018). The district court granted the motion, and the TCCA subsequently dismissed Brewer's new claims under state writ-abuse principles without considering the merits. *Ex parte Brewer*, 2019 WL 5420444 (Tex. Crim. App. Oct. 23, 2019).

facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d). Thus, a "state prisoner must show that the state court's ruling ... was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Harrington v. Richter*, 562 U.S. 86, 103, 131 S. Ct. 770, 786–87, 178 L.Ed.2d 624 (2011). Further, "the federal court may review the claim based solely on the state-court record." *Shinn v. Ramirez*, —— U.S. ——, 142 S. Ct. 1718, 1732, 212 L.Ed.2d 713 (2022). "The petitioner carries the burden of proof" to overcome this standard, known as "AEDPA deference," which is "difficult to meet" by design. *Cullen v. Pinholster*, 563 U.S. 170, 181, 131 S. Ct. 1388, 1398, 179 L.Ed.2d 557 (2011).

III. Discussion

Brewer raises three ineffective assistance of trial counsel claims in this court: *first*, that his 2009 counsel failed to properly challenge the state expert's testimony on future dangerousness; *second*, that counsel neglected to develop and present a mitigation defense; and *third*, that counsel did not adequately investigate and rebut the state's evidence of his prior bad acts.

[5–7] To establish that he was denied constitutionally effective assistance of counsel, Brewer must demonstrate that "(1) counsel's representation fell below an objective standard of reasonableness and ... (2) there is a reasonable probability that prejudice resulted." *Druery v. Thaler*, 647 F.3d 535, 538 (5th Cir. 2011) (citing *Strickland v. Washington*, 466 U.S. 668, 694, 104 S. Ct. 2052, 2068, 80 L.Ed.2d 674 (1984)). "Both of these prongs must be proven, and the failure to prove one of them will defeat the claim, making it unnecessary to examine the other prong." *Williams*, 761 F.3d at 566–67 (citing *Strickland*, 466 U.S. at 687–88, 104 S. Ct. at 2064–65). For the first prong, Brewer "must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065 (internal quotation mark omitted). To show prejudice, Brewer "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Id.* at 694, 104 S. Ct. at 2068. This "requires a 'substantial,' not just 'conceivable,' likelihood of a different result." *Pinholster*, 563 U.S. at 189, 131 S. Ct. at 1403 (quoting *Richter*, 562 U.S. at 112, 131 S. Ct. at 791).

[8] A federal court's review of a state court's adjudication on the merits of an ineffective assistance of counsel claim is "doubly deferential" because we "take a highly deferential look at counsel's performance [under *Strickland*] through the deferential lens of § 2254(d)." *Id.* at 190, 131 S. Ct. at 1403 (internal quotation marks omitted).

A. Expert Testimony on Future Dangerousness

Brewer argues that his 2009 trial counsel were ineffective for failing to timely object to the expert testimony by Dr. Coons that he constituted a future threat to society. Brewer contends that because the TCCA later held Dr. Coons's testimony inadmissible in *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010), it likely would have done the same in this case had a timely objection been made.

The state habeas court found that although counsel failed to preserve an objection to Dr. Coons's testimony for appellate review, counsel reasonably strategized to prevent Dr. Coons from testifying by attacking his methodology at an evidentiary

hearing.[3] The court found further that counsel's performance must be "measured against the law in effect at the time of trial," and *Coble* was decided the year *after* Brewer's 2009 retrial. By 2009, Dr. Coons had testified in at least sixteen Texas judicial proceedings on the special issue of future dangerousness, including Brewer's 1991 trial. *Coble* marked the first time that Dr. Coons's testimony had been deemed inadmissible.[4]

[9] Thus, the district court concluded that Brewer's counsel cannot be faulted for lacking the "clairvoyance" "to follow the same strategy that had proved unsuccessful during Coble's ... retrial." Of course, "[c]lairvoyance is not a required attribute of effective representation." *United States v. Fields*, 565 F.3d 290, 295 (5th Cir. 2009). Reasonable jurists could not debate the district court's conclusion that the state courts did not act unreasonably in holding that trial counsel were not ineffective for failing to make what at that time would have been a futile objection to the introduction of Dr. Coons's testimony.

Brewer also alleges that his counsel were ineffective for failing to rebut Dr. Coons's testimony with an alternative expert opinion on his future dangerousness. Specifically, Brewer argues that counsel should have enlisted Dr. Mark Cunningham, who had previously examined Brewer, or Dr. John Edens, the defense's forensic psychologist, to evaluate Brewer afresh.

[10] The state habeas court found that Brewer's counsel executed a "reasonable and plausible" strategy to counter Dr. Coons's testimony: Trial counsel would "attack Dr. Coons's testimony and methodology on cross-examination," and Dr. Edens would "rebut Dr. Coons's testimony on direct examination." The court articulated several reasons supporting counsel's decision to forego an independent expert evaluation of Brewer. These included: (1) the state would then have been entitled to have its own expert examine Brewer; (2) the state would likely have attacked the defense expert's evaluation, "which would reflect poorly on [Brewer] and distract from the defense's attack on Dr. Coons"; and (3) the jury may have viewed "the defense expert in the same light as Dr. Coons" or "become lost in the science." Ultimately, Brewer's counsel opted to focus the jury's attention on the fact that Brewer had not engaged in any violent criminal activity during his 18 years of incarceration on death row as the "best evidence" that Brewer "was not a future danger."

Finally, the state habeas court held that even if counsel's strategy to challenge Dr. Coons's testimony was unsound, and despite any error in preserving an objection

3. During the voir dire, Brewer's counsel elicited admissions from Dr. Coons that he has a ''different definition of criminal act of violence than other people in this field,'' that he has never performed ''any follow-up ... to determine whether or not [the] predictions were accurate,'' and that he had not interviewed Brewer in this particular case.

4. In fact, Coble's counsel were ultimately unsuccessful, because the TCCA held the admission of Dr. Coons's testimony there was harmless error. As an aside, the district court stated that the TCCA's ''primary reason'' in *Coble* for holding Dr. Coons's testimony inadmissible ''was because Dr. Coons had not evaluated the defendant for 18 years before he testified.'' (citing *Coble*, 330 S.W.3d at 279–80). More completely considered, the TCCA found a number of additional significant deficiencies in Dr. Coons's testimony, such as Dr. Coons's failure to cite any ''books, articles, journals, or even other forensic psychiatrists who practice in this area,'' and the dearth of any ''objective source material in [the] record to substantiate Dr. Coons's methodology.'' *Coble*, 330 S.W.3d at 277.

for appeal, Brewer has not shown that he was likely prejudiced as a result. Specifically, the court concluded that the brutal facts of the capital murder offense, in addition to several violent episodes from Brewer's adolescent and adult years, independently supported the jury's verdict on the future dangerousness special issue. Importantly, the 2009 trial jury heard eyewitness testimony from both Brewer and Nystrom, who provided detailed and consistent accounts of the gruesome murder—evidence not presented at the 1991 trial.

Additionally, the state court found that Dr. Coons's testimony was "not particularly powerful, certain, or strong" because, among other things, Dr. Coons admitted before the jury that he had no "statistical data" or "research to support his opinion" and that he rarely, if ever, followed up "to determine if his predictions were accurate." Moreover, Dr. Edens "effectively rebutted and refuted" the methodological flaws underlying Dr. Coons's conclusions regarding "predictions of future dangerousness." Dr. Edens emphasized that the predictions are not borne out with any statistical significance in the behavior of death row inmates. He also recounted his voluminous scholarship on the subject, as juxtaposed against Dr. Coons's scant *curriculum vitae.* Thus, the court concluded that neither the absence of Dr. Coons's testimony nor an independent expert evaluation submitted on Brewer's behalf would likely have changed the result.

Reviewing these findings and the magistrate judge's recommendation, which it adopted, the district court held that the state court reasonably concluded that counsel's 2009 trial strategy as to Dr. Coons was reasonable under *Strickland.* The district court alternatively found the state court's rejection of prejudice to be reasonable under *Strickland*, especially considering the jury's opportunity to assess Brewer's credibility in light of the eyewitness description of the crime's brutality. No reasonable jurist could find the district court's assessment debatable or wrong. *See Slack v. McDaniel*, 529 U.S. 473, 484, 120 S. Ct. 1595, 1604, 146 L.Ed.2d 542 (2000).

B. Mitigating Evidence

[11] Brewer's second ineffective assistance claim is based upon his counsel's alleged failure to investigate potentially mitigating evidence or prepare an effective mitigation defense. The Supreme Court has interpreted the Sixth Amendment to require defense counsel "to make reasonable investigations [into potential mitigating evidence] or to make a reasonable decision that makes particular investigations unnecessary." *Wiggins v. Smith*, 539 U.S. 510, 521, 123 S. Ct. 2527, 2535, 156 L.Ed.2d 471 (2003) (quoting *Strickland*, 466 U.S. at 691, 104 S. Ct. at 2066). Brewer argues that he likely would not have received the death penalty a second time if the jury had seen additional evidence of his troubled childhood coupled with the results of a mental health evaluation.

Specifically, Brewer asserts that an adequate investigation would have produced additional mitigating evidence of neglect by his mother during his infancy, traumatic incidents of sex play with a male friend and sexual abuse by a babysitter, and the "full extent" of his biological father's "violence and depravity." He alleges further that his counsel should have submitted a mental health evaluation, like that performed on him in 1996 by Dr. Cunningham, to show that Brewer suffered from mental illness. Brewer bolsters this claim with a new declaration from 2009 trial counsel Odiorne, in which Odiorne states "that the defense team did no investigation of Mr. Brewer's mental health."

As an initial matter, neither Dr. Cunningham's 1996 mental health evaluation nor Odiorne's declaration were part of the state habeas record. Because this claim was adjudicated on the merits by the state court, this new evidence is barred from federal court consideration under *Cullen v. Pinholster*. 563 U.S. at 181, 131 S. Ct. at 1398. Further, the declaration is wholly inconsistent with Odiorne's testimony before the state habeas court, and, as such, is "viewed ... with extreme suspicion." *Summers v. Dretke*, 431 F.3d 861, 872 (5th Cir. 2005) (collecting cases).

In rejecting Brewer's claim, the state habeas court found that his 2009 counsel properly investigated and presented strong mitigating evidence. With the assistance of in-house investigator Rob Cowie, counsel investigated and developed a mitigation defense by reviewing the 1991 trial transcript along with trial counsel's notes and by traveling to Mississippi to interview Brewer's mother and sister, both of whom testified.

The court found that the jury heard evidence of Brewer's troubled childhood. Specifically, counsel presented evidence that Brewer's biological father, Albert Brewer, was absent during Brewer's formative years. Brewer's step-father, whom his mother married when Brewer was four years old, "would repeatedly beat him with an extension cord or a belt," so Brewer "would often run away from home for months at a time in order to get away from his step-father." The jury also learned that Brewer "was diagnosed with scoliosis" when he was eleven years old, which required extensive surgery, three weeks in the hospital, and eight weeks in a body brace. Because this condition prevented him from "playing his beloved sports," he began "hanging out with 'stoners' and using drugs when he was about twelve years old." Counsel also presented evidence that Albert, who had rejoined the family when Brewer was fifteen, was "mean, violent, and abusive" to Brewer and his mother. Albert nearly broke Brewer's nose with a piece of wood on one occasion, and Brewer beat Albert with a broom on another "to stop Albert from hurting" Brewer's mother. Following "the broom incident," Brewer moved cities to live with his grandmother and continued his drug and alcohol use. While with his grandmother, Brewer wrote a suicide note and was subsequently committed to a state hospital. The state court also found that Brewer's counsel presented mitigating evidence to show that Brewer had been an exemplary inmate in jail and for eighteen years on death row.

The habeas court concluded that the unoffered mitigating evidence would have been cumulative of the evidence already presented. *United States v. Bernard*, 762 F.3d 467, 476 (5th Cir. 2014) (citing *Strickland*, 466 U.S. at 687, 104 S. Ct. at 2064) ("A plea for 'more of the same' does not, in the circumstances of this case," show that counsel "were not functioning as counsel guaranteed to [petitioner] by the Sixth Amendment."). Thus, Brewer could not show how he was prejudiced by its absence. *See Howard v. Davis*, 959 F.3d 168, 173 (5th Cir. 2020) ("Cumulative testimony generally cannot be the basis" of an ineffective assistance of counsel claim.); *Norman v. Stephens*, 817 F.3d 226, 233 (5th Cir. 2016).

The district court approved the state court's implicit finding that counsel reasonably decided an expert mental health evaluation would have been unnecessary and even harmful to Brewer's case. The same sound strategy undergirding counsel's decision to forgo an expert examination on future dangerousness also supported the decision to refuse a mental health evaluation. Further, "[t]here is no suggestion in

the record that Petitioner suffers from an intellectual disability or that he functions anywhere below the average range of intellectual functioning. Petitioner's mental-health records ... introduced during his 2009 retrial showed no mental-health referrals despite his suicide attempt." With regard to prejudice, the court emphasized that given the "graphic and grisly" testimony by Brewer and Nystrom, along with the state's other evidence, there is not a "substantial likelihood" that a mental health evaluation or additional evidence from Brewer's childhood would have influenced the jury's balancing of the aggravating and mitigating factors. *See Bernard*, 762 F.3d at 476.

[12] Reasonable jurists could not debate the district court's conclusion that, as evidenced in extremely thorough opinions by the state court and magistrate judge, the state court reasonably applied *Strickland* in holding that trial counsel were not ineffective in preparing and presenting a mitigation defense.

C. Prior Bad Acts

Brewer's final ineffective assistance claim is that his trial counsel failed to adequately investigate and rebut the state's evidence of his future dangerousness. Brewer presented a similar claim in his subsequent state habeas application, which the TCCA dismissed as an abuse of the writ without considering the merits. *Ex parte Brewer*, 2019 WL 5420444 (Tex. Crim. Ap. Oct. 23, 2019). Thus, this claim, or portions of it, are barred by the doctrine of procedural default. *See Ramirez*, 142 S. Ct. at 1732 ("[F]ederal courts generally decline to hear any federal claim that was not presented to the state courts consistent with [the State's] own procedural rules." (internal quotation marks omitted, alteration in original)). Nevertheless, the district court "cut straight to the merits to deny his claim," rather than decide whether Brewer could overcome his default. *Murphy v. Davis*, 901 F.3d 578, 589 n.4 (5th Cir. 2018).

The Supreme Court has held that constitutionally deficient assistance can take the form of failing "adequately to investigate the State's aggravating evidence, thereby foregoing critical opportunities to rebut the case in aggravation." *Andrus v. Texas*, —— U.S. ——, 140 S. Ct. 1875, 1881–82, 207 L.Ed.2d 335 (2020); *see also Rompilla v. Beard*, 545 U.S. 374, 385, 125 S. Ct. 2456, 2465, 162 L.Ed.2d 360 (2005). Brewer points to three "prior bad acts" from the state's aggravation case: (1) an assault against his high school girlfriend that dislocated three discs in her spine and temporarily paralyzed her arm; (2) an arrest for possessing a concealed knife in Florida; and (3) the assault against Albert with a broom handle, which left the man bleeding from the nose, mouth, and side of the head, and led to his hospitalization.[5] Had his 2009 counsel interviewed the witnesses supplying this testimony, argues Brewer, counsel would have been able to garner the evidence needed to undermine the state's case for future dangerousness. Brewer then would not have taken the stand.

Brewer supports this claim with six new declarations, including one by defense investigator Cowie, another by trial counsel

5. Brewer also alleges that his counsel failed to investigate a fight he had with a former inmate, in which Brewer threatened to shove a pencil in the man's eye. It does not appear that the state submitted any evidence of this fight at Brewer's 2009 trial. If so, Brewer's counsel cannot be faulted for failing to rebut aggravating evidence never seen by the jury. Regardless, the district court found that an interview with the inmate would not have softened the severity of Brewer's threat.

Odiorne, and his own affidavit. All of these are barred under *Shinn v. Ramirez*. 142 S. Ct. at 1734 ("[U]nder § 2254(e)(2), a federal habeas court may not . . . consider evidence beyond the state-court record based on ineffective assistance of state postconviction counsel."). Further, several should be viewed with "extreme suspicion" for containing statements that are inconsistent with previous testimony. *Spence v. Johnson*, 80 F.3d 989, 1003 (5th Cir. 1996).

The district court found that Brewer's counsel reasonably decided "to rely upon their interviews with him" and "on the sworn testimony of prosecution witnesses when deciding not to interview those witnesses prior to the 2009 trial." The court noted that these witnesses testified at Brewer's 1991 trial and gave the same or very similar testimony at his 2009 trial, so the additional details that could have been gleaned from fresh interviews would have been minor. Taking them one by one, the district court found first that even if a new interview with Brewer's high school girlfriend revealed that the assault was out of character and that he did not intend to hurt her, the testimony of the severe injury he inflicted upon her would remain unchanged. Next, any new evidence gleaned from an interview with the alleged owner of the knife for which Brewer was arrested in Florida would have been cumulative. Similarly, the district court found that additional evidence of Albert's "violence and depravity" would have been cumulative.

The district court then emphasized that the state's case in aggravation was significantly stronger in 2009 than it was in 1991, given Nystrom's eyewitness account of the murder. The district court concluded that the decision to put Brewer on the stand to show the jury his remorse, empathy, and non-violence during incarceration, rather than to quibble with minor details of the prosecution's witnesses' testimony, was an eminently reasonable one.

[13] "There are countless ways to provide effective assistance in any given case," and the district court concluded that Brewer's 2009 trial counsel found and employed one. *Strickland*, 466 U.S. at 689, 104 S. Ct. at 2065. Reasonable jurists could not debate the district court's assessment of this claim.

For the foregoing reasons, Brewer's request for a COA is DENIED.

Joshua AMIN, Plaintiff—Appellant,

v.

UNITED PARCEL SERVICE, INCORPORATED, a Delaware Corporation, Defendant—Appellee.

No. 22-10295

United States Court of Appeals,
Fifth Circuit.

FILED April 27, 2023

Background: Employee, a union member, brought action against employer, alleging that employee's supervisor had caused employee to defecate in his pants at his workstation after denying him a bathroom break, and bringing claims under Texas law for negligent supervision, invasion of privacy, false imprisonment, and intentional infliction of emotional distress (IIED). The District Court, United States District Court for the Northern District of Texas, Brantley David Starr, J., 2020 WL 3404119, granted employer's motion to dismiss the claims for negligent supervision, invasion of privacy, and false imprison-

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BRENT RAY BREWER,	§	
	§	
Petitioner,	§	
	§	
v.	§	2:15-CV-050-Z-BR
	§	
DIRECTOR, TDCJ-CID,	§	
	§	
Respondent.	§	

ORDER

On September 30, 2021, the United States Magistrate Judge entered a Findings, Conclusions, and Recommendation ("FCR") that denied Petitioner Brent Ray Brewer's ("Petitioner") Second Amended Petition for Writ of Habeas Corpus and a Certificate of Appealability. *See* ECF Nos. 103, 131. Petitioner and Respondent Texas Department of Criminal Justice ("TDCJ") Director ("Respondent") objected to the FCR. *See* ECF Nos. 138, 139. After an independent review of the pleadings, files, records, and objections, the Court **OVERRULES** Petitioner's and Respondent's objections. The Court **ADOPTS** the Magistrate Judge's FCR. The Court **DENIES** the Second Amended Petition for Writ of Habeas Corpus, the request for an evidentiary hearing, and a Certificate of Appealability.

BACKGROUND

Petitioner's "future dangerousness" is the root of his petition to this Court. Petitioner was convicted in 1991, retried on punishment in 2009, and resentenced to death later that same year. At every interval, the evidence and testimony affirmed and reaffirmed his callous disregard for human life and "future dangerousness" to society. Three issues are before this Court today: (1) Petitioner's ineffective assistance of trial counsel ("IATC") claims against his 2009 counsel; (2)

Petitioner's *Napue* claim; and (3) the suppression of accomplice Kristie Nystrom's Big Spring State Hospital records ("Nystrom's 1990 Medical Records") at Petitioner's 2009 resentencing trial. After an examination of the issues Petitioner presents, the Court **DENIES** Petitioner's application for habeas relief.

PETITIONER'S OBJECTIONS

Section I of the FCR details this case's procedural history. Neither party objects to Section I. The Court thus relies on the factual accuracy of the Magistrate Judge's procedural chronology.

1. Petitioner's General Objections

Petitioner objects to the state habeas court's failure to hold an evidentiary hearing on his habeas claims. ECF No. 139 at 6–7. The Court finds the Magistrate Judge correctly concluded this objection fails to identify a legitimate basis for federal habeas relief. Infirmities in a state habeas proceeding — including an assertion that due process was denied — does not entitle one to federal habeas relief. *Rockwell v. Davis*, 853 F.3d 758, 761 n.5 (5th Cir. 2017); *Kinsel v. Cain*, 647 F.3d 265, 273 & n.23 (5th Cir. 2011). The state habeas court's failure to hold an evidentiary hearing on Petitioner's claims does not render that court's factual findings or legal conclusions inherently suspect. *Richards v. Quarterman*, 566 F.3d 553, 563 (5th Cir. 2009). The Court **OVERRULES** Petitioner's objections to the Magistrate Judge's deference to the state habeas court's factual findings.

2. Petitioner's IATC Objection Concerning Dr. Coons's Testimony

Petitioner argues IATC as a ground for federal habeas relief. His argument is based on 2009 trial counsel's varied attempts to exclude, cross-examine, and rebut Prosecution opinion testimony by expert Dr. Richard Coons. ECF No. 139 at 8, 10. The state habeas court held an

evidentiary hearing on this same IATC claim. It heard extensive testimony concerning Petitioner's "future dangerousness" from Dr. Coons and Petitioner's 2009 trial counsel. The state habeas court ultimately rejected Petitioner's IATC claims.

The Magistrate Judge reviewed the record from Petitioner's 1991 and 2009 trials. She also reviewed the record from Petitioner's multiple state habeas proceedings. The Magistrate Judge concluded Petitioner's 2009 trial counsel acted in an objectively reasonable manner when they: (1) attempted to exclude Dr. Coons's opinion testimony by attacking his methodology; (2) declined to have a mental-health expert evaluate Petitioner in order to opine on future dangerousness; (3) used Dr. Edens to rebut Dr. Coons's expert-opinion testimony about future violence; (4) focused their cross-examination of Dr. Coons on his future-violence testimony and 1991 prediction that Petitioner would be violent during his incarceration; and (5) failed to predict the Texas Court of Criminal Appeals would reverse decades of case law and — for the first time — rule Dr. Coons's opinions inadmissible as not founded on reliable scientific principles. ECF No. 131 at 107–19.

The Court finds the Magistrate Judge did not err when she applied the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") standard of review to Petitioner's IATC claim.[1] The Magistrate Judge correctly concluded that Petitioner's 2009 trial counsel acted in an objectively reasonable manner when they chose to seek, exclude, discredit, and rebut Dr. Coons's expert testimony about future dangerousness by: (1) arguing Dr. Coons's "highly subjective methodology" was not based on reliable scientific methodology; and (2) presenting evidence Dr. Coons's testimony about Petitioner's predicted future violence was that. ECF No. 131 at 114.

[1] The Court also finds the Magistrate Judge did not err by applying a de novo standard of review to this expanded IATC claim. ECF No. 131 at 114–19. The Magistrate Judge conducted an alternative de novo review of this IATC claim. Petitioner's federal habeas counsel submitted numerous documents to this Court. Petitioner failed to present those documents to the state habeas court during his second state habeas proceeding when that court adjudicated his analogous IATC claim on the merits. The submission of those documents necessitated the Magistrate Judge's review.

The Court independently reviewed Dr. Coons's testimony from Petitioner's 1991 capital-murder trial and 2009 punishment retrial. The Court also reviewed the alternative future-dangerousness evidence that Petitioner posits his 2009 counsel should have presented.

Petitioner's argument is unpersuasive for at least two reasons. First, the primary reason the Texas Court of Criminal Appeals held Dr. Coons's future-dangerousness testimony inadmissible in another trial was because Dr. Coons had not evaluated the defendant for 18 years before he testified. *See Coble v. State*, 330 S.W.3d 253, 279–80 (Tex. Crim. App. 2010) (noting Dr. Coons had not evaluated defendant for 18 years and had lost his notes from that interview when called to testify at defendant's retrial). Second, if Petitioner's 2009 counsel employed Petitioner's federal counsel's strategy, that approach would have waived any complaint Petitioner had with the admission of Dr. Coons's testimony. Had the court admitted Dr. Cunningham's mental-health expert testimony based on an evaluation of Petitioner, then the Prosecution would have been entitled to have its own expert evaluate Petitioner. ECF No. 131 at 114; *Kansas v. Cheever*, 571 U.S. 87, 94 (2013). Petitioner's effort to exclude Dr. Coons's testimony would have failed if Dr. Cunningham testified at Petitioner's 2009 retrial.

Petitioner's 2009 trial counsel sought to avoid a battle of the mental-health experts — with each side expressing divergent opinions on Petitioner's future dangerousness. ECF No. 131 at 114–15. Instead, they sought to focus the jury's attention on verifiable facts relevant to future dangerousness. *Id.* at 114. Petitioner cannot render his 2009 counsel's strategy objectively unreasonable by proposing a different trial strategy now. "There are countless ways to provide effective assistance in any given case." *Strickland v. Washington*, 466 U.S. 668, 689 (1984). The Court independently finds — and agrees with the Magistrate Judge — that the state habeas court

reasonably concluded Petitioner's 2009 trial strategy was objectively reasonable and did not prejudice him. ECF No. 131 at 114.

The Court further finds the state habeas court and Magistrate Judge reasonably concluded that Petitioner's trial counsel's failure to follow the strategy now advocated by Petitioner did not prejudice Petitioner within the meaning of *Strickland*. *Id.* at 119. Dr. Coons's 2009 testimony, Dr. Eden's 2009 testimony, and Dr. Cunningham's report reveal those experts disagreed about how to define "criminal acts of violence" relevant to future dangerousness. Dr. Cunningham and Dr. Edens focused on discrete *acts* of physical violence resulting in either significant physical injury or TDCJ disciplinary actions. By contrast, Dr. Coons's testimony spanned a wider range of possible future criminal misconduct as relevant to future dangerousness. The mental-health experts' differing definitions of "criminal acts of violence" relevant to future dangerousness render their opinions of little practical aid to jurors. A battle of the mental-health experts would have been futile. Petitioner's 2009 trial counsel wisely chose a different approach. His counsel focused the jury's attention on an undisputed fact: other than a single suicide attempt, Petitioner had a largely *non-violent* post-conviction incarceration history. In fact, Petitioner's TDCJ disciplinary record was unremarkable.

Finally, Petitioner's IATC claim fails to adequately consider the new, aggravating evidence presented during Petitioner's 2009 retrial. In Petitioner's 1991 capital-murder trial, the jury viewed crime-scene videos and photographs. In 2009, the jury had additional testimony: accomplice Kristie Nystrom's vivid eyewitness account of Petitioner's attack on Robert Laminack. Petitioner also chose to testify. His testimony only marginally differed from accomplice Nystrom's eyewitness account. Petitioner's testimony indicated he alone held the knife that killed Laminack. Both Petitioner and accomplice Nystrom agreed they attacked Laminack *before* either asked him

for his wallet or truck keys. Both Petitioner and accomplice Nystrom testified that Nystrom walked away from Laminack's truck covered in blood, with Laminack's keys and wallet in their possession. Meanwhile, Laminack laid slumped over his steering wheel as he bled to death. Neither Petitioner nor accomplice Nystrom sought to help Laminack.

Although the 2009 jury could assess Petitioner's non-violence during incarceration, the jury also had a detailed account of Laminack's murder. The 1991 trial did not feature such a detailed account. Petitioner's and accomplice Nystrom's 2009 eyewitness testimony painted the murder in a more sinister light than the Prosecution did at the 1991 sentencing. And, in 2009, the jury had the opportunity to assess Petitioner's demeanor as well as the credibility of his assertions of remorse and empathy.

The Court independently concludes there is no reasonable probability that — but for the failure of Petitioner's 2009 trial counsel to present Dr. Cunningham's future-dangerousness opinion testimony — the outcome of Petitioner's 2009 retrial would differ. The Magistrate Judge correctly concluded that Petitioner's IATC claim concerning his 2009 trial counsel's approach to challenging, cross-examining, and rebutting Dr. Coons's testimony lacks merit.

3. Petitioner's Objections Concerning His *Napue* Claim and Dr. Erdmann

Petitioner argues the Prosecution presented false testimony about Laminack's cause of death. ECF No. 139 at 11. Dr. Erdmann performed Laminack's autopsy and provided testimony related to Laminack's death. Petitioner argues Dr. Erdmann's testimony is false as a matter of law because Dr. Erdmann was convicted of multiple felonies involving autopsies unrelated to Laminack's autopsy. *Id.* at 11–14. But Petitioner cites no legal authority to support his argument. He instead presents an Oklahoma investigation — based largely on speculation — that accuses Dr.

Erdmann of having been a Nazi-sympathizer as a teenager. *Id.* at 11. Character assassination, however, does not replace *factual* allegations or *actual* evidence of falsity.

First, Petitioner failed to present the state habeas court or this Court with evidence that highlights inaccuracies in Laminack's autopsy report — at least with respect to Laminack's cause of death. Petitioner's new experts take exception to the wording of Laminack's autopsy report. Yet those same experts do not suggest Laminack died from anything other than what Dr. Erdmann opined in 1991 — or what Dr. Natarajian opined in 2009. Dr. Erdmann's 1991 trial testimony and Dr. Natarajian's 2009 trial testimony also provide no basis to believe multiple stab wounds did not kill Laminack. The crime-scene video, crime-scene photographs, autopsy photographs, and accomplice Nystrom's 2009 eyewitness testimony leave no reasonable doubt that multiple stab wounds killed Laminack.

An arterial injury caused blood to *soak* the interior of Laminack's truck. The autopsy photos reflect same. *See* ECF No. 126 at 2 n.1, 11 n.24. And the blood-spatter experts who testified at both of Petitioner's trials linked the blood spray to Laminack's stab wounds. *Id.* Importantly, accomplice Nystrom's eyewitness testimony corroborates the blood-spatter experts' opinions. None of Petitioner's new experts suggested another cause of death. Petitioner has not presented the Court with evidence that Laminack died from anything other than what Dr. Erdmann concluded in 1991.

Second, Laminack's cause of death was not the issue before the jury in Petitioner's 2009 punishment retrial. The state habeas court repeatedly noted as much in its factual findings during Petitioner's second habeas corpus proceeding. Laminack's cause of death had been determined beyond a reasonable doubt at his 1991 capital-murder trial. Petitioner's 2009 trial counsel did not challenge the evidence that established Laminack's cause of death. They reasonably deemed such

a challenge to be inconsistent with their trial strategy to have Petitioner accept responsibility for his offense, express remorse and empathy, and to point to the evidence of his non-violence during incarceration.

Petitioner's federal habeas counsel aver that the 2009 trial team should have challenged Laminack's cause of death like they challenged the Prosecution's future-dangerousness evidence. Yet at his 2009 retrial, Petitioner accepted full responsibility for fatally stabbing Laminack. Petitioner explained that although accomplice Nystrom helped him plan the crime and held Laminack's right arm during the assault, Petitioner *alone* stabbed Laminack.

Third, Petitioner asserts he would not have testified in 2009 had his trial counsel done a better job of attacking Dr. Erdmann's credibility. But even if Petitioner's 2009 trial counsel managed to conceal Dr. Erdmann's autopsy report and 1991 trial testimony, those exclusions would do little to counter evidence of Laminack's cause of death. Petitioner identifies no legal basis to exclude any evidence that establishes Laminack's cause of death — including Dr. Natarajian's 2009 testimony, the crime-scene video, crime-scene photographs, the autopsy photographs, blood-spatter expert testimony, and accomplice Nystrom's eyewitness account.

As the Magistrate Judge noted, the state habeas court's conclusion that Dr. Natarajian's 2009 testimony was admissible under state evidentiary rules binds this Court. ECF No. 131 at 137; *see also Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013) (holding a Texas habeas court's interpretation of evidentiary rules was binding in a federal habeas corpus case). Had Petitioner not testified at his 2009 retrial, the jury would have been left

with the evidence described above. That evidence would likely have alone established that multiple stab wounds killed Laminack.

None of the evidence would have been mitigated had Petitioner not testified in 2009. Petitioner's 2009 testimony sought to reduce his moral culpability. Petitioner accepted responsibility for his capital offense, expressed remorse and empathy, and attempted to humanize himself. Only Petitioner could express palpable remorse for his offense. The Magistrate Judge identified the legal standard for a due-process claim of this nature:

> To succeed in this type of due process claim, a defendant must show that the testimony complained of was actually false, the state knew or should have known that it was actually false, and the false testimony was material. *In re Raby*, 925 F.3d 749, 756 (5th Cir. 2019); *Canales v. Stephens*, 765 F.3d 551, 573 (5th Cir. 2014) (a conviction obtained through false evidence known to be such by representatives of the State violates a defendant's constitutional rights); *Kinsel v. Cain*, 647 F.3d 265, 271 (5th Cir. 2011) ("The Supreme Court has held that the Due Process Clause is violated when the government knowingly uses perjured testimony to obtain a conviction."); *Reed v. Quarterman*, 504 F.3d at 473 (same). False testimony is material if there is "any reasonable likelihood" that it could have affected the jury's verdict. *Raby*, 925 F.3d at 756; *Canales*, 765 F.3d at 573; *Goodwin v. Johnson*, 132 F.3d 162, 185 (5th Cir. 1997) (citing *Westley v. Johnson*, 83 F.3d 714 (5th Cir. 1996)).

ECF No. 131 at 52.

The Magistrate Judge correctly concluded Petitioner's due-process claim concerning Laminack's autopsy report and Dr. Erdmann's 1991 testimony fails to satisfy any of these requirements. Petitioner's argument that he would have remained silent in 2009 had his counsel discredited Dr. Erdmann's testimony and excluded the autopsy report is irrelevant to his *Napue* claim. Petitioner's argument also ignores that: (1) the state habeas court concluded Dr. Natarajian's 2009 cause-of-death testimony was admissible under Texas evidentiary rules; and (2) accomplice Nystrom largely blamed Petitioner for Laminack's death. Had Petitioner stayed silent, the jury would likely not have answered any of the Texas capital-sentencing special issues in Petitioner's favor.

Petitioner's related argument that his trial counsel failed to cross-examine Dr. Natarajian about the autopsies Dr. Erdmann conducted unrelated to Laminack's death is equally irrelevant to Petitioner's *Napue* claim. Plus, there is no specific factual allegation or evidence before the Court that shows Dr. Natarajian knew about the details of Dr. Erdmann's crimes. An attorney cannot effectively cross-examine an expert witness about matters unrelated to that expert's opinions if the expert lacks knowledge of those ancillary matters.

Regardless of whether Petitioner stayed silent in 2009, Petitioner failed to identify false or misleading testimony presented by the Prosecution during his 2009 retrial. The evidence does not establish that anything other than stab wounds killed Laminack. Dr. Natarajian and the blood-spatter experts reached the same conclusion as to cause of death. Having independently examined the evidence introduced at Petitioner's 1991 and 2009 trials and state habeas corpus proceedings, the Court independently concludes no other cause can rationally explain Laminack's death.

Given the forensic evidence, blood spatter experts' testimony, and accomplice Nystrom's eyewitness testimony, any alleged error in Dr. Erdmann's autopsy report or 1991 testimony regarding cause of death fails to satisfy the materiality prong of the *Giglio/Napue* analysis. All other alleged errors in Laminack's autopsy report or in Dr. Erdmann's 1991 testimony identified by Petitioner also fail to satisfy this prong. The Magistrate Judge correctly concluded no evidence indicated the Prosecution knowingly presented false or misleading cause-of-death evidence at the 2009 retrial. Thus, the Magistrate Judge correctly concluded Petitioner's *Giglio/Napue* claim lacks merit.

4. Petitioner's IATC Claim Concerning the Prosecution's Prior Bad-Acts Evidence and Future Dangerousness

Petitioner argues his 2009 trial counsel rendered ineffective assistance by: (a) failing to properly investigate and rebut evidence relating to his prior bad acts; (b) advising Petitioner to

testify; (c) failing to present evidence of his good behavior during incarceration; and (d) failing to present evidence showing his biological father was violent and abusive. ECF No. 103 at 64–78. Petitioner's last two claims are unfounded. Petitioner's 2009 trial counsel presented evidence that demonstrated Petitioner's good behavior during his incarceration and his father's violent and abusive nature. Only the first of these two issues remain.

A. *Prior Bad Acts*

Petitioner's own testimony acknowledges as much. ECF No. 131 at 107. Petitioner's 2009 trial counsel had additional evidence on these two evidentiary points, but that evidence did not render their performance objectively unreasonable or prejudice Petitioner within the meaning of *Strickland*. The Magistrate Judge correctly noted Petitioner's 2009 trial counsel presented these points by Petitioner's own trial testimony and the testimony of other witnesses. *Id.* at 130. One cannot base an IATC claim on a failure to present cumulative testimony. *Id.*; *Howard v. Davis*, 959 F.3d 168, 173 (5th Cir. 2020).

Petitioner faults his 2009 trial counsel for failing to interview Aimee Long, Kevin Lewis, Ronald Mosher, and Dr. Coons about Petitioner's bad acts. ECF No. 139 at 14. The Magistrate Judge concluded each of these witnesses provided testimony in 2009 that was substantially similar to their testimony at the punishment phase of Petitioner's 1991 capital-murder trial. ECF No. 131 at 101. Petitioner does not disagree. Instead, he argues that had his 2009 counsel interviewed Long, Lewis, and Mosher, counsel may have elicited minor details from the witnesses that could have cast Petitioner in a better light.

Petitioner's argument ignores that the Prosecution's 2009 case in aggravation was significantly *stronger* than it was in 1991. This was, in large part, due to accomplice Nystrom's decision to testify in 2009. Instead of relying exclusively on blood-spatter and forensic expert

testimony to determine how Laminack's murder occurred, the 2009 jury had accomplice Nystrom's firsthand account of the killing. Additionally, accomplice Nystrom's 2009 eyewitness testimony added new details about the advance planning she and Petitioner engaged in before the murder. Accomplice Nystrom's testimony also detailed that they attacked Laminack without warning *before* asking for his wallet or truck keys. Accomplice Nystrom's 2009 testimony only bolstered the case against Petitioner.

The Magistrate Judge correctly concluded there was no reasonable probability that the minor mitigating details Petitioner's 2009 trial team could have gleaned from interviews would have impacted the jury's answers to the capital-sentencing special issues. For instance, Petitioner argues his former high-school girlfriend could have opined that his assault upon her was "out of character." But Petitioner still assaulted her and caused her serious injury. Her testimony would not change that fact. And the testimony of a former fellow inmate that he had instigated a confrontation with Petitioner would not have altered the fact that Petitioner threatened to shove a pencil in that inmate's eye. As to the knife Petitioner pleaded guilty to illegally possessing in Florida, testimony as to the weapon's true owner would do little to alleviate anything. Such details would have done little to mitigate accomplice Nystrom's eyewitness account of Laminack's murder.

An argument that Petitioner's 2009 counsel should have more thoroughly blamed Petitioner's father for his propensity for violence ignores the possibility that such double-edged evidence could indicate Petitioner is genetically inclined to engage in violence. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (explaining that mitigating evidence is "double-edged" when it might permit an inference that the defendant is not as morally culpable for his behavior but also might suggest that, as the product of his environment, the defendant is likely to continue

to be dangerous in the future); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) ("Although the evidence of Ladd's inadequate supervision as a child might permit an inference that he is not as morally culpable for his behavior, it also might suggest Ladd, as a product of his environment, is likely to continue to be dangerous in the future."). As the Magistrate Judge explained, Petitioner's biological father had little contact with Petitioner during his developmental period.

Petitioner's 2009 counsel could have reasonably concluded that blaming Petitioner's biological father would have conceded the future-dangerousness special issue and required a favorable answer to the mitigation special issue. A failure to present double-edged evidence generally lies within the discretion of trial counsel. *Ayestes v. Davis*, 933 F.3d 384, 392 (5th Cir. 2019). The state habeas court and Magistrate Judge both reasonably concluded Petitioner's 2009 counsel did not need to place blame on Petitioner's father to render effective assistance.

Petitioner argues his 2009 counsel failed to interview his family and various Prosecution witnesses to obtain mitigating evidence. Petitioner, however, fails to identify any new, compelling mitigating evidence available from such interviews unknown to Petitioner himself. *See Burger v. Kemp*, 483 U.S. 776, 795 (1987) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information." (quoting *Strickland*, 466 U.S. at 691)). Absent specific allegations that show Petitioner's counsel unreasonably failed to interview their own client, one cannot fault Petitioner's 2009 counsel with failing to obtain mitigating evidence Petitioner possessed.

Moreover, Defense counsel's alleged failure to interview Prosecution witnesses must be balanced against a basic trial rule: prospective witnesses are not obligated to divulge information to defense counsel. *United States v. Soape*, 169 F.3d 257, 270 n.9 (5th Cir. 1999); *see also United States v. Rice*, 550 F.2d 1364, 1374 (5th Cir. 1977) ("All that a defendant is entitled to is access to a prospective witness. This right, however, exists co-equally with the witnesses' right to refuse to say anything."); *United States v. Dryden*, 423 F.2d 1175, 1177 n.6 (5th Cir. 1970) (a witness may refuse to be interviewed or dictate the circumstances under which he or she will submit to an interview). Petitioner fails to allege specific facts or present evidence that shows it was objectively unreasonable for his 2009 counsel to rely on their interviews with him. Petitioner also fails to allege specific facts or present evidence that shows it was objectively unreasonable for his 2009 counsel to rely on the sworn testimony of Prosecution witnesses when his counsel decided not to interview those witnesses prior to the 2009 retrial.

B. *Trial Testimony*

It was objectively reasonable for Petitioner's 2009 trial counsel to encourage Petitioner to testify at trial. Absent Petitioner's rebuttal testimony, the jury would only have photographic and video evidence of the horrific crime scene and accomplice Nystrom's grisly, eyewitness account of Laminack's murder. Only Petitioner could furnish firsthand testimony as to his remorse, empathy, and non-violence during incarceration. During his second state habeas proceeding, Petitioner's 2009 trial counsel testified that Petitioner's mother was uncooperative in 2009 and his biological father was likely to commit perjury had he been called to testify.

Faced with accomplice Nystrom's eyewitness testimony, Petitioner's 2009 trial counsel chose an objectively reasonable trial strategy. Petitioner himself testified to rebut aspects of the Prosecution's bad-acts evidence and accomplice Nystrom's eyewitness testimony. Petitioner also

testified to express remorse and empathy. That Defense counsel's strategy proved unsuccessful did not render it objectively unreasonable. Again, "[t]here are countless ways to provide effective assistance in any given case." *Strickland*, 466 U.S. at 689. The Magistrate Judge correctly concludes that this IATC claim fails to satisfy either prong of *Strickland*.

5. Petitioner's *Wiggins* Claim

Petitioner argues his 2009 trial counsel failed to adequately investigate his background and present mitigating evidence that showed: (a) a mental-health evaluation performed during Petitioner's 1991 trial revealed Petitioner suffered from these problems during Petitioner's early childhood; (b) Petitioner is traumatized by a babysitter who molested him; (c) accomplice Nystrom was manipulative, controlling, and responsible for Petitioner's actions at the time of Laminack's murder; (d) Petitioner had a family history of substance abuse, mental illness, and violence; (e) Petitioner suffered from inadequate nutrition, maternal neglect, and instability during his early childhood; (f) Petitioner's step-father emotionally abandoned him; (g) Petitioner's biological father had only minor contact with Petitioner before Petitioner turned 15, and then turned violent toward Petitioner; and (h) Petitioner suffers from mental illness, including severe depression. ECF No. 131 at 123.

A. *Petitioner's Mental Health*

Petitioner's 2009 counsel made a reasonable strategic decision not to present mental-health evidence like that offered by Dr. Cunningham. Such evidence would have required Petitioner to undergo a mental-health evaluation, and the trial would have turned into a battle of the mental-health experts. Instead, the 2009 counsel chose a reasonable alternative strategy: (1) confront the jury with Petitioner's non-violence during incarceration by cross-examination of Prosecution experts; (2) present Dr. Edens's expert testimony that questioned the scientific validity and lack of

efficacy of future violence predictions; and (3) argue Petitioner had proven Dr. Coons's predications false. ECF No. 131 at 125. After de novo review, the Court concludes the strategy Petitioner's 2009 counsel adopted was objectively reasonable and did not prejudice Petitioner within the meaning of *Strickland*.

Contrary to the cases cited by Petitioner (*e.g.*, *Wiggins*, *Porter*, and *Williams*), Petitioner does not present evidence that shows he suffered from diminished intellectual capacity or severe mental illness of which the jury was unaware in 2009. Petitioner testified about his suicide attempt and depression. There is no suggestion in the record that Petitioner suffers from an intellectual disability or that he functions anywhere below the average range of intellectual functioning. Petitioner's mental-health records from the TDCJ introduced during his 2009 retrial showed no mental-health referrals despite his suicide attempt.

B. *Petitioner's Childhood Molestation*

The psychological impact of Petitioner's new childhood-molestation allegation does not appear to have affected his ability to function in school or society. During his 2009 testimony, Petitioner did not refer to that incident as significantly impacting him. Instead, Petitioner and his mother blamed Petitioner's diagnosis with a congenital back condition as the event that triggered Petitioner's experimentation with drugs and subsequent academic and behavioral decline.

C. *Nystrom's Responsibility for Laminack's Murder*

Petitioner's 2009 counsel likewise reasonably chose not to blame accomplice Nystrom for Laminack's murder. A 1991 effort to do so failed miserably. By 2009, Petitioner was no longer an impressionable young man barely out of his teens. Nor was Nystrom any longer a twenty-one-year-old exotic dancer. Both had spent the better part of two decades in prison. It was objectively

reasonable for Petitioner's 2009 trial counsel to confront that reality and, instead, focus the jury's attention on Petitioner's demonstrated record of non-violence during incarceration.

The Prosecution would most likely have rebutted an attempt to blame accomplice Nystrom for Laminack's death with arguments that Petitioner was neither remorseful nor sincere in his attempt to accept responsibility for his crime. Attacking accomplice Nystrom would have undermined Petitioner's 2009 trial counsel's primary strategy. In hindsight, one can easily complain that trial counsel failed to pursue every defensive strategy. But *Strickland* review demands the Court disregard hindsight's distorting impact. 466 U.S. at 689; *Wiggins v. Smith*, 539 U.S. 510, 523 (2003). Trial counsel should avoid taking logically inconsistent positions before the jury. Advancing inconsistent positions invites counterarguments that can eviscerate one's best arguments, thereby reducing his credibility.

D. *The Evidence Would Have Been of Little — If Any — Value*

When evaluating the *Strickland* prejudice prong in the context of a capital habeas proceeding, this Court must consider the totality of the available mitigation evidence. The Court considers mitigation evidence adduced at trial as well as in the habeas proceeding and balances it against the evidence in aggravation. *Andrus v. Texas*, 140 S. Ct. 1875, 1886 (2020). After de novo review, the Court concludes the state habeas court and Magistrate Judge correctly found Petitioner's *Wiggins* claim fails to satisfy *Strickland*'s prejudice prong. Presenting a mental-health based defense at Petitioner's 2009 retrial would have required him to submit to a mental-health evaluation by a Prosecution clinician who would likely have expressed an opinion like the one presented by Dr. Coons in 2009. Such a strategic approach would also have deflected the jury's attention from the far more salient fact that Petitioner's non-violence during incarceration.

The new mitigating evidence Petitioner avers his family or Prosecution witnesses could have presented in 2009 had only minor mitigating value. Some of it — particularly the evidence of his biological father's propensity for violence and abusive conduct — had the potential to be double-edged. Double-edged evidence could have hurt Petitioner's chances for a favorable verdict on the future-dangerousness special issue far more than it could have helped him on the mitigation special issue. And it would have done little to offset the impact of accomplice Nystrom's eyewitness account of Laminack's murder. The Magistrate Judge correctly concluded this IATC claim fails to satisfy either prong of *Strickland* and lacks merit.

6. Petitioner's Objections Concerning IATC in Nystrom's Role and Petitioner's Remorse

Petitioner argues his 2009 trial counsel rendered ineffective assistance by failing to: (1) impeach Nystrom and Prosecution witness Skee Callen with a statement Callen made to police suggesting Nystrom stabbed Laminack; and (2) elicit testimony showing Petitioner's remorse for his crime. ECF No. 139 at 27.

A. *IATC: Callen's Statement*

On cross-examination by Defense counsel at Petitioner's 1991 trial, Callen admitted that he gave the police a statement that Nystrom told him she had stabbed the victim. ECF No. 124-12 at 36. Callen, however, insisted that statement was in error. *Id.* Callen also testified that he later corrected the error in his statement. *Id.* at 36–37.

Petitioner's 2009 counsel could have reasonably concluded that eliciting the same testimony from Callen in 2009 would not benefit Petitioner. Petitioner argues his 2009 counsel should have attempted to use Callen's statement to police as a basis to argue Nystrom stabbed Laminack. ECF No. 139 at 28. But the 1991 efforts to blame Nystrom for Laminack's death failed. Petitioner's federal habeas counsel does not demonstrate how the same attempt would have

resulted in a different outcome in the 2009 trial. Plus, Petitioner's 2009 testimony recounts how he killed Laminack. Petitioner never suggested Nystrom stabbed Laminack. Petitioner, in effect, asserts his 2009 counsel should have attempted to prove a "fact" they knew to be false. Petitioner's 2009 counsel were not required to do so. *See United States v. Chronic*, 466 U.S. 648, 656 n.19 (1984) (stating "the Sixth Amendment does not require that counsel do what is impossible or unethical"). The Court agrees with the Magistrate Judge and finds the IATC claim concerning Nystrom's role void of merit. ECF No. 131 at 99–100. The Magistrate Judge correctly concluded Petitioner's IATC claim concerning Nystrom's role lacks merit. ECF No. 131 at 99–100.

B. *IATC: Petitioner's Remorse*

As the Magistrate Judge recounted, Petitioner testified extensively at his 2009 retrial and repeatedly expressed remorse for his crime. ECF No. 131 at 15 n.34. In both 1991 and 2009, Callen testified that Petitioner smirked when he recounted how Laminack pleaded for his life while Petitioner stabbed him. 22/28 R.R. 67–74. Petitioner argues his 2009 trial counsel should have elicited testimony from Callen that Petitioner cried after he murdered Laminack. ECF No. 139 at 28. Callen's ambiguous observation, however, does not confirm whether Petitioner wept out of remorse or from fear of his own impending apprehension. Given Petitioner's own extensive 2009 testimony expressing his remorse, one cannot fault Petitioner's trial counsel for relying on his own testimony. The Magistrate Judge correctly concluded Petitioner's IATC claim regarding his remorse is without merit. ECF No. 131 at 100.

7. Petitioner's Objections Concerning IATC in Nystrom's Role and Petitioner's Remorse

In his seventh claim for federal habeas relief, Petitioner argues the state trial court violated his rights under *Brady v. Maryland*, 373 U.S. 83, 97 (1963), by suppressing Nystrom's 1990 Medical Records. ECF No. 139 at 30. Petitioner avers the suppression denied him due process

because the medical records contained impeachment material. *Id.* at 30. The Magistrate Judge rejected Petitioner's *Brady* claim on the merits, concluding the Prosecution had not "withheld" the records in question within the meaning of *Brady*. ECF No. 131 at 78–79.

The Magistrate Judge based her rejection on the fact that: (1) all parties were aware of the existence of Nystrom's 1990 Medical Records in 2009; and (2) the state trial court conducted an in-camera review before ruling the records would not be disclosed to the Defense and the records would not have benefitted Petitioner in 2009. *Id.* at 73–85. Petitioner does not suggest Nystrom's 1990 Medical Records mention Laminack's murder — which took place after Nystrom left the drug-treatment facility in Big Spring — or anything which might have foreshadowed Nystrom's subsequent involvement in Laminack's murder.

Petitioner argues he could have used notations in Nystrom's 1990 Medical Records to impugn Nystrom's credibility. ECF No. 139 at 30. But the medical records were created before Laminack's murder. Petitioner's federal habeas pleadings and objections fail to cite legal authority that demonstrates how a fact witness's medical records relating to the witness's drug-dependency treatment months before a criminal offense may be used to impeach testimony about that offense given during a subsequent criminal trial. Unlike Texas Rule of Evidence 412 — which identifies circumstances in which evidence of a witness's prior sexual behavior may be admissible in a sexual-assault case — Petitioner identifies no similar rule authorizing use of the information contained in Nystrom's 1990 Medical Records to impeach her 2009 testimony. And Petitioner fails to identify an aspect of Nystrom's 2009 testimony of circumstances surrounding Laminack's murder that could refute information Nystrom's 1990 Medical Records contain.[2]

[2] This is not a case where a witness' testimony that he or she was injured on a specific date could be impeached by medical records showing the witness suffered the injuries in question before the defendant's alleged assault.

Petitioner also ignores that Nystrom's 1990 Medical Records were nearly 20 years old in 2009. The passage of time greatly reduced any impeachment value those records contained. For example, the Medical Records contained negative comments about Nystrom's character. But those comments were made at a time when Nystrom underwent drug-dependency treatment. ECF No. 139 at 30. Nystrom had been in TDCJ custody for nearly two decades by 2009. She was presumably clean during most of her incarceration. In fact, Nystrom testified she was approaching the date of her eligibility for release on parole. Petitioner does not allege a single fact that shows Nystrom still battled drug dependency in 2009.

Additionally, Petitioner fails to mention facts that demonstrate Nystrom was responsible for creating the diagnostic notations identified in her 1990 Medical Records. Big Spring State Hospital staff made those notations. The hospital staff's notations did not directly correspond to any of Nystrom's 2009 trial testimony about the details of Laminack's murder. Evidence is "material" under *Brady* where there exists a "reasonable probability" that — had the evidence been disclosed — the result at trial would have differed. *Smith v. Cain*, 565 U.S. 73, 75 (2012); *Cone v. Bell*, 556 U.S. 449, 469–70 (2009). After de novo review, the Court independently concludes Petitioner fails to satisfy the materiality prong of *Brady* analysis.

Moreover, as the Magistrate Judge noted, Petitioner does not identify a disclosure exception to state and federal statutes that protect medical records. ECF No. 131 at 80. Insofar as Petitioner asserts a freestanding due-process claim separate from his *Brady* claim, he cites no legal authority recognizing a criminal defendant's due-process right of access to a prosecution fact witness's medical records as impeachment evidence or otherwise. Petitioner also fails to cite legal authority holding that — by taking the stand as a fact witness in a criminal trial — a private citizen waives her right to maintain the privacy of her medical records.

The Court concludes that any error committed by the state trial court's denial of Petitioner's 2009 trial counsel to access Nystrom's 1990 Medical Records was harmless. *Brecht v. Abrahamson*, 507 U.S. 619, 623–24 (1993) (harmless-error test is "whether the error had a substantial and injurious effect or influence in determining the jury's verdict"). Petitioner's *Brady* claim relating to Nystrom's 1990 Big Spring medical records and his due-process claim lack merit.

RESPONDENT'S OBJECTIONS

Respondent objects to the Magistrate Judge's failure to address procedural-default defenses in Respondent's pleadings. *See* ECF No. 138. As the Magistrate Judge explained, however, this Court is not required to address procedural-default questions, especially when confronted with an array of federal habeas claims lacking any arguable merit. ECF No. 131 at 23; *Broadnax v. Davis*, No. 3:15-CV-1758-N, 2019 WL 3302840, at *29 n.41 (N.D. Tex. July 23, 2019); *see also Lambrix v. Singletary*, 520 U. S. 518, 520 (1997) ("We do not mean to suggest that the procedural-bar issue must be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law.").

The FCR would be convoluted if the Magistrate Judge addressed each of Respondent's procedural-default defenses. For example, every assertion of procedural default by Respondent would require judicial inquiry into: (1) the application of state procedural rules; (2) whether the procedural rule in question is regularly and consistently employed by the state courts, *see Harris v. Reed*, 489 U.S. 255, 262–63 (1989); (3) whether a commonly recognized exception to the procedural-default doctrines applies to the procedural default in question; and (4) whether the limited exception to the procedural-default doctrine recognized in *Martinez v. Ryan*, 556 U.S. 1 (2012), and *Trevino v. Thaler*, 569 U.S. 413 (2013), applies to the procedurally defaulted IATC

claim in question. The first two steps require a federal court to delve into the application of state procedural rules. *See Bradshaw*, 546 U.S. at 76 ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."). The third and fourth steps require analysis of the potential merits of procedurally defaulted claims. *See Schlup v. Delo*, 513 U.S. 298, 323 (1995)[3]; *Ayestas v. Davis*, 138 S. Ct. 1080, 1087 (2018).[4]

If the Magistrate Judge addressed Respondent's procedural-default defenses, then the need to address the merits of Petitioner's claims would remain. Therefore, the Court need not analyze the procedurally defaulted claims. A disposition of clearly meritless claims on the merits instead of engaging in a lengthy and convoluted procedural-default analysis serves a legitimate public purpose:

> In the absence of any legal obligation to consider a preliminary nonmerits issue, a court may choose in some circumstances to bypass the preliminary issue and rest its decision on the merits. *See, e.g.*, 28 U.S.C. § 2254(b)(2) (federal habeas court may reject claim on merits without reaching question of exhaustion). Among other things, the court may believe that the merits question is easier, and the court may think that the parties and the public are more likely to be satisfied that justice has been done if the decision is based on the merits instead of what may be viewed as a legal technicality.

Smith v. Texas, 550 U. S. 297, 324 (2007) (Alito, J., dissenting).

The Court finds that Respondent's objection to the Magistrate Judge's failure to apply procedural default analysis is without merit and overruled.

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[3] "Actual innocence" within the context of the punishment phase of a capital habeas case requires a showing by clear and convincing evidence that — but for a constitutional error — no reasonable juror would have found the petitioner eligible for the death penalty.

[4] To be entitled to the exception to procedural-default rules recognized in *Martinez* and *Trevino*, a federal habeas petitioner must show that his claim of ineffective assistance by his trial counsel was "substantial" and that his state habeas counsel rendered ineffective assistance in failing to assert same.

CONCLUSION

For the reasons set forth above, the Court **ORDERS**:

1. The Court **OVERRULES** Petitioner's objections (ECF No. 139) to the Magistrate Judge's FCR;
2. The Court **OVERRULES** Respondent's objections (ECF No. 138) to the Magistrate Judge's FCR;
3. The Court **ADOPTS** the Magistrate Judge's FCR (ECF No. 131);
4. The Court **DENIES** all relief requested in Petitioner's Second Amended Petition for federal habeas corpus relief (ECF No. 103), as supplemented by his reply brief (ECF No. 128);
5. The Court **DENIES** Brewer's request for an evidentiary hearing;
6. The Court **DENIES** a Certificate of Appealability regarding all claims for relief; and
7. The Court **DIRECTS** the United States District Clerk to append a copy of the Magistrate Judge's FCR (ECF No. 131) to this Order.

SO ORDERED.

February 8, 2022.

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

BRENT RAY BREWER,	§	
	§	
Petitioner,	§	
	§	
v.	§	2:15-CV-50-Z-BR
	§	
DIRECTOR, TDCJ-CID	§	
	§	
Respondent.	§	

FINDINGS, CONCLUSIONS, AND RECOMMENDATION TO DENY PETITION FOR A WRIT OF HABEAS CORPUS BY A PERSON IN STATE CUSTODY

Brent Ray Brewer, a Texas prisoner sentenced to death for capital murder, petitions the Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. In June 1991, a Randall County jury convicted Brewer for the April 1990 fatal stabbing of Robert Laminack in the course of a robbery. *See State v. Brewer*, AP-71,307 (Tex. Crim. App. June 22, 1994). This Court subsequently granted federal habeas corpus relief as to Brewer's death sentence only. *Brewer v. Dretke*, 2004 WL 1732312 (N.D. Tex. Aug. 2, 2004). Following a retrial as to punishment in 2009, a different Randall County jury answered the Texas capital sentencing special issues and the state trial court again imposed a sentence of death. *Brewer v. State*, AP-76,378, 2011 WL 5881612 (Tex. Crim. App. Nov. 23, 2011). Brewer has again petitioned for federal habeas corpus relief. It is the recommendation of the undersigned Magistrate Judge that Brewer is entitled to neither federal habeas corpus relief nor a Certificate of Appealability.

I. BACKGROUND

A. The Offense

There is no genuine dispute as to the details of Brewer's capital offense. During his 2009

retrial, Brewer took the stand and described in graphic detail how he and his accomplice Kristie Lynn Nystrom approached Laminack late one evening in April 1990, asked for a ride, and fatally stabbed Laminack while he attempted to drive them a short distance in Amarillo.[1]

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[1] Brewer's account of Laminack's murder appears at pages 76-86 and 147-69 in Volume 25 of 28 in the court reporter's record from his 2009 retrial (henceforth "25/28 R.R.", which is located at ECF no. 125-13). Brewer admitted that he fatally stabbed Laminack after asking Laminack for a ride and that his purpose in doing do was to obtain Laminack's vehicle. (26/28 R.R. 73, 77-79). Brewer described his assault on Laminack as "frantic" and explained that Nystrom sat in the front seat beside Laminack and held his right arm while Brewer sat behind Laminack, grabbed and attempted to pull Laminack into the back seat, and stabbed him multiple times in the neck. (25/28 R.R. 79-83, 152-55). In a significantly revealing disclosure, Brewer admitted that he stabbed Laminack multiple times and the fatal assault was all but over prior to the time he demanded that Laminack hand over his wallet and keys. (25/28 R.R. 80-83, 154-61, 169). Brewer also testified that he was sober at the time he killed Laminack. (25/28 R.R. 68).

Neither Brewer nor Nystrom testified during Brewer's original 1991 capital murder trial. At that trial, prosecutors utilized testimony from a series of investigating law enforcement officers, blood spatter experts, and other forensic experts, who relied upon crime scene photographs, autopsy photographs and reports, and other physical evidence in an attempt to re-create the capital offense. Those witnesses speculated that someone seated in the passenger seat behind Laminack had reached forward, grabbed Laminack, and fatally stabbed him with a butterfly knife found at the crime scene. Testimony of Bill Leonard, Volume 15 of 21 in the court reporter's record from Brewer's 1991 capital murder trial (henceforth "15/21 R.R.", which is located at EF no. 124-10), 69-93 (describing the crime scene when he arrived and found Laminack's lifeless body slumped over the steering wheel inside his pickup truck and a bloody butterfly knife on the street beside the passenger side of the vehicle); testimony of Modeina Holmes, (15/21 R.R. 126-40) (identifying various photographs taken at the crime scene); the testimony of Joe Allen, (15/21 R.R. 141-61) (describing the blood droplets he observed and which appeared in the videotape of the crime scene that prosecutors played for the jury); testimony of Greg Soltis, (15/21 R.R. 161-259 and 16/21 R.R. 261-82, 307-09, and 413-24) (describing blood stains, blood spatter, blood droplets, bloody fingerprints, and other items shown in photographs and the videotape of the crime scene which he observed); testimony of Keith Howland, (16/21 R.R. 310-40) (describing the results of blood testing done on blood stains and swabs taken from various locations inside Laminack's pickup truck. as well as from various items found at the scene); testimony of Michael Vick, (16/21 R.R. 342-60) (describing the results of DNA testing done on various items found at the crime scene as well as various locations within Laminack's pickup truck); testimony of Dr. Ralph Erdmann, (16/21 R.P. 361-91) (describing the results of Laminack's autopsy, *i.e.*, concluding Laminack died from exsanguination after suffering stab wounds to the neck that damaged both the left carotid artery and the right deep jugular vein); testimony of Joseph Brown, (16/21 R.R. 392-412) (describing results of fingerprint analysis of items found at crime scene, including presence of Brewer's fingerprint on a door handle and door frame of the pickup, as well as the knife found at the crime scene); testimony of Bobby Henderson, (17/21 R.R. 486-546) (describing his analysis of blood spatter observed inside Laminack's pickup truck, suggesting that someone or something had been located directly next to Laminack's right side during the fatal assault and also suggesting that the person who attacked Laminack was right handed). In addition, two other witnesses testified they observed both Brewer and Nystrom covered in blood shortly after the fatal assault on Laminack and that Brewer had suffered a serious wound to his hand that required medical attention. Testimony of Michelle Francis, (16/21 R.R. 424-43); testimony of Stephen John Callen, III, (17/21 R.R. 447-86). In addition, Callen also testified that, shortly after Laminack's murder, Brewer admitted to him that he (Brewer) had stabbed a man in the neck four or five times and had obtained about $140 in cash. (17/21 R.R. 457-58).

During Brewer's 2009 retrial, both Nystrom and Brewer testified. Nystrom's account of the events leading up to and including Laminack's murder, which Brewer subsequently, and very accurately, described as "sanitized," appears at 22/28 R.R. 194-212. Nystrom described herself as sitting and looking out the front passenger window of Laminack's pickup truck while Brewer grabbed and stabbed Laminack. (22/28 R.R. 201-10). Nystrom also recalled that Laminack said "don't kill me" while Brewer was stabbing him, and Brewer replied "I don't want to kill you

B. The Indictment

A Randall County grand jury indicted Brewer on May 22, 1990 on a charge of capital murder, *i.e.*, fatally stabbing Laminack with a knife while in the course of attempting to commit and committing the robbery of Laminack.[2]

C. 1991 Capital Murder Trial

1. Guilt-Innocence Phase of Trial

Brewer and Nystrom were separately convicted of capital murder in 1991 in connection with the fatal stabbing of Laminack.[3]

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mister. I just want your money." (22/28 R.R. 206-08).

[2] Numerous copies of Brewer's indictment returned May 22, 1990 in Randall County cause no. 6997-A appear in the record currently before this Court. Examples include pp. 15-16 of 167 in ECF no. 126-5 and pp. 20-21 of 356 in ECF no. 122-23.

[3] The forensic evidence presented during the guilt-innocence phase of Brewer's 1991 capital murder trial is summarized in note 1 *supra*.

In addition, the jury also heard testimony at the guilt-innocence phase of trial from: (1) Ivy Craig regarding Nystrom and Brewer's unsuccessful attempt to solicit a ride from her just minutes before Laminack's murder (which both Nystrom and Brewer testified in 2009 was part of a plan on their part to purloin Craig's vehicle), testimony of Ivy Elaine Craig, (15/21 R.R. 28-50); (2) Laminack's daughter that moments before his murder, Laminack advised her that he was giving a young couple a ride to the Salvation Army and she looked outside and saw two persons inside her father's truck before he drove off for the final time from her place of business, testimony of Anita Piper, (15/21 R.R. 51-69); (3) Laminack's widow regarding the amount of money Laminack was carrying on his person the night in question and Laminack's need to wear the glasses found inside the pickup truck after the murder, testimony of Miriam Gwendolyn Laminack, (15/21 R.R. 112-25); (4) a young woman with whom Brewer and Nystrom were staying at the time of the murder regarding a conversation in which Nystrom described a plan to lure a victim to a motel where Brewer and she could rob the victim, and the bloody appearance and "crazy" demeanor of both Brewer and Nystrom when they arrived back at the young woman's apartment minutes after Laminack's murder, testimony of Michelle Francis, (16/21 R.R. 424-43); and (5) Brewer and Nystrom's highly inculpatory admissions that they had robbed and stabbed a man, testimony of Stephen John Callen, III, (17/21 R.R. 447-86).

Significantly, at Brewer's 2009 retrial Callen repeated the same basic testimony he had given at the 1991 capital murder trial regarding Brewer's admissions to Callen on the night of Laminack's murder that he (Brewer) and Nystrom had robbed and stabbed a man. Compare 1991 testimony of Stephen John Callen, III, (17/21 R.R. 447-86) with the 2009 testimony of Stephen John Callen, III, (22/28 R.R. 67-74). Significantly during his testimony at both trials, Callen testified without contradiction that Brewer recounted to Callen that Laminack had begged "please don't kill me" while Brewer was stabbing him. (17/21 R.R. 461-62; 22/28 R.R. 71). In his own testimony at the 2009 retrial, Brewer expressly admitted that Callen's 2009 trial testimony was fully accurate. (25/28 R.R. 86).

During the 1991 capital murder trial, Callen also testified without contradiction that Brewer smirked as he described his victim begging for his life. (17/21 R.R. 471). Callen also corroborated Francis' testimony at the 1991 trial that both Brewer and Nystrom appeared nervous and emotional (*i.e.*, they were crying) when they returned to

2. Punishment Phase of 1991 Trial

a. The Prosecution's Evidence

At the punishment phase of Brewer's 1991 trial, the jury heard testimony from prosecution witnesses establishing that: (1) while attending middle school in Cedar Hill, Texas, Brewer was twice sent to an alternative school – the first time after he threatened another student with a buck knife and the second time after he fought with a child in physical education class[4]; (2) when he was a high school student in Mississippi, Brewer once picked up and shoved a diminutive former girlfriend against a bank of lockers, injuring her to the extent that she suffered three displaced vertebral discs leaving her arm paralyzed for two months, requiring her to undergo extensive physical therapy, and causing her physical issues that continued to linger years later, including at the time of Brewer's 1991 trial[5]; (3) in a separate incident just months after the shoving episode, Brewer threatened to kill the same former girlfriend[6]; (4) in January 1989, Brewer was arrested for carrying a concealed weapon, specifically a hunting knife, while Brewer was driving a vehicle registered to a couple named Greenman late at night in a high-crime area in Naples, Florida[7]; (5) in July 1989, Brewer beat his biological father Albert Brewer about the head with a broom while

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Francis' apartment shortly after the murder. (17/21 R.R. 472-73). Callen added at the 1991 trial that, when he drove both Nystrom and Brewer to the hospital that same night to get medical treatment for Brewer's wounded hand, neither Nystrom nor Brewer appeared to still be nervous. (17/21 R.R. 472-73).

[4] Testimony of Kathleen Bailey (former assistant superintendent Cedar Hill ISD), (18/21 R.R. 636-56). Bailey also testified about an incident when Brewer was in the ninth grade in which he threw a stapler in math class and made threats.

[5] Testimony of Amy Forrester (Brewer's former girlfriend), (18/21 R.R. 592-608).

[6] Testimony of Cecil Beasley (former principal of Brewer's Mississippi high school), (18/21 R.R. 609-35). Beasley also testified that Brewer had a temper and could get very angry. (18/21 R.R. 633).

[7] Testimony of Ronald Mosher (Naples. Florida, police officer), (18/21 R.R. 657-72). Officer Mosher testified that the Greenmans (John and Amy) used several different drivers and were known to engage in narcotics trafficking. On cross-examination, officer Mosher admitted that Brewer did not resist arrest, and did not threaten anyone and the knife in question was observed near the console in the front seat, not on Brewer's person.

defending his biological mother from an assault by Albert Brewer, resulting in Albert Brewer suffering a broken jaw and facial and head injuries that necessitated surgery and a hospital stay of several weeks[8]; (6) around the time of Brewer's arraignment for Laminack's capital murder, Brewer was photographed shooting the finger while exiting the courthouse[9]; (7) while awaiting trial in the county jail for Laminack's capital murder, Brewer became involved in a confrontation with another inmate and threatened to stab the other inmate in the eye with a pencil[10]; and (8) a mental health expert (Dr. Richard E. Coons) who believed, despite not having evaluated Brewer, that there was a probability Brewer would be violent in the future.[11]

b. The Defense's Evidence

Brewer's trial counsel presented testimony at the punishment phase of trial from: (1) a

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[8] Testimony of Richard Lepicher (the deputy sheriff who responded to a domestic disturbance call at the Brewer home in Monroe County, Mississippi, and discovered Albert Brewer bleeding about the mouth, nose, and side of the head when he arrived at the scene), (18/21 R.R. 578-94). Lepicher also testified that: (1) Brewer's mother, who had remarried Albert Brewer, informed him that Brewer intervened when Albert Brewer began assaulting her; (2) there had been other episodes of violence at the Brewer home that resulted in calls to the police, including incidents in which Albert Brewer had become drunk and violent; and (3) months after the broom incident, he observed that Albert Brewer still had problems with muscle control on his right side. Nonetheless, Lepicher testified that no charges were ever brought against anyone as a result of the broom incident.

A physician who treated Albert Brewer following the broom incident testified without contradiction that: (1) Albert Brewer suffered several injuries in the broom incident, including bruises to the left chest and shoulder, a small laceration to the left scalp, a large laceration to the base of the nose, limitations to his speech ability and weakness to the right side of his face, and slow movement on the right side of its body; (2) Albert Brewer's injuries included a compound depressed skull fracture in the left temporal frontal area that required surgery to repair a laceration to the dural membrane; (3) Albert Brewer was discharged from the hospital on July 27, 1989, while still experiencing weakness in the feet and right side; but (4) by October 1989, he cleared Albert Brewer to return to work. Testimony of Dr. Walter W. Echman, 18/21 694-704.

[9] Testimony of Henry Burgess (the photographer who took the photograph in question), (18/21 R.R. 673-77). Burgess identified State Exhibit no. 202, which was admitted into evidence at the 1991 trial, as the photograph he took of Brewer on the date in question, which Burgess believed to have been sometime around the date of Brewer's arraignment.

[10] Testimony of Kevin Long (the inmate whom Brewer threatened), (18/21 705-20). Long also testified that during his pretrial detention, Brewer informed Long that Laminack begged Brewer not to kill him, saying "please boy, don't kill me."

[11] Testimony of Dr. Richard E. Coons, (18/21 R.R. 721-36).

Texas Justice of the Peace who had sent Brewer to Big Spring Hospital for a mental health evaluation at the request of Brewer's family after Brewer wrote a note threatening suicide[12]; (2) Brewer's biological father, who testified (a) he had no contact with Brewer until Brewer was age fifteen, (b) he showed his younger son more affection than he showed Brewer and Brewer resented it, (c) he was more harsh toward Brewer, (d) on one occasion he was arrested for assaulting Brewer, (e) on the occasion of the broom episode, he was violent toward Brewer's mother and threatened to kill Brewer, and (f) Brewer apologized for beating him with the broom and he forgave Brewer for doing so[13]; (3) a resident of the apartment complex where Brewer and Nystrom stayed after they left Big Spring Hospital, who testified Brewer was not violent and was not on drugs[14]; (4) one of Brewer's roommates at the apartment in Amarillo, who testified that on the night of the murder, Brewer told her that a third person named "James" had stabbed Laminack and that he (Brewer) cut his hand when he attempted to grab the knife[15]; (5) another of Brewer's roommates, who testified that Nystrom "controlled" Brewer[16]; (6) Brewer's mother, who testified (a) she divorced Brewer's biological father Albert Brewer when Brewer was two years old, (b) she later married Brewer's step father Dan Bartlett, who was verbally and physically abusive toward her and Brewer, (c) Bartlett showed favoritism toward Brewer's younger sister, (d) Brewer did well in school until the fifth grade when he had to undergo back surgery, (e) prior to his back surgery, Brewer was good in sports and had many friends but, after his surgery, he struggled in school and

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[12] Testimony of China Long (Howard County, Texas Justice of the Peace), (18/21 R.R. 755-65).

[13] Testimony of Albert Brewer (Brewer's biological father), (18/21 R.R. 768-88).

[14] Testimony of Carol Burks (resident of Raintree Apartments in Amarillo in 1990), (18/21 R.R. 790-804).

[15] Testimony of DeDe Bishop (Brewer's roommate), (18.21 R.R. 805-12).

[16] Testimony of Michelle Francis (Brewer's roommate), (18/21 R.R. 613-18).

was held back, (f) in junior high school, Brewer began smoking pot, (g) Brewer helped to take care of his younger sister, (h) in 1990 while in the hospital in Big Spring, Brewer informed her that he had decided to turn his life around, he wanted to get rids of drugs, and he planned to seek counseling in Abilene once he left the hospital, and (i) Nystrom controlled Brewer[17]; (7) Brewer's younger sister, who testified that Brewer took care of her and that Nystrom controlled Brewer[18]; (8) a clinical psychologist, who testified that (a) mental health professionals have no special powers when it comes to predicting future dangerousness, (b) the general consensus in the mental health profession is that an evaluation of an individual is needed to make a prediction of future dangerousness, and (c) common sense and logic are as good a guide to the future dangerousness issue as an expert opinion.[19]

3. The Verdict

The jury began its deliberations at the punishment phase of Brewer's first trial at 3:24 PM on June 1, 1991. The jury returned its verdict at 6:42 PM the same date, and the trial court imposed a sentence of death in accordance with the jury's answers to the Texas capital sentencing special issues.[20]

D. Initial Direct Appeal

Brewer appealed his 1991 conviction and sentence. The Texas Court of Criminal Appeals ("TCCA") affirmed Petitioner's capital murder conviction and sentence of death. *Brewer v. State*, AP-71,307 (Tex. Crim. App. June 22, 1994).

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[17] Testimony of Karon Brewer (Brewer's mother), (18/21 R.R. 819-37).

[18] Testimony of Billie Ann Bartlett (Brewer's younger half-sister), (18/21 R.R. 848-40).

[19] Testimony of Dr. Randall Price, (18/21 R.R. 841-51).

[20] (19/21 R.R. 900-03).

E. Initial State Habeas Corpus Proceeding

The TCCA subsequently denied Petitioner's initial application for state habeas corpus relief.[21]

Ex parte Brewer, 50 S.W.3d 492 (Tex. Crim. App. 2001).

F. First Federal Habeas Corpus Proceeding

This Court granted federal habeas corpus relief as to Brewer's sentence after concluding the state trial court's punishment phase jury instructions violated his federal constitutional rights. *Brewer v. Dretke*, 2004 WL 1732312 (N.D. Tex. Aug. 2, 2004). The United States Court of Appeals for the Fifth Circuit reversed. *Brewer v. Dretke*, 410 F.3d 773 (5th Cir. 2005), *superseded* 442 F.3d 273 (5th Cir. 2006). The United States Supreme Court granted certiorari and reversed the Fifth Circuit. *Brewer v. Quarterman*, 550 U.S. 286 (2007). The Fifth Circuit then remanded to this Court for entry of judgment. *Brewer v. Quarterman*, 512 F.3d 210 (5th Cir. 2007).

G. 2009 Retrial as to Sentencing

1. The Prosecution's Evidence

At Brewer's August 2009 retrial as to punishment, the prosecution presented many of the same witnesses it had presented at Brewer's first capital murder trial.[22]

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[21] Brewer's initial state habeas corpus application was filed on August 19, 1997 by attorney Richard Keffler. A copy of that application appears among the state court records filed in this case in ECF no. 125-17. Among the many exhibits that attorney Keffler attached to Brewer's first state habeas application were a detailed report by Dr. Mark Cunningham identifying additional mitigating evidence not presented at Brewer's first trial, a report by a forensic pathologist criticizing aspects of Laminack's autopsy report, and various documents addressing the criminal convictions of Dr. Ralph Erdmann (who performed Laminack's autopsy and testified at Brewer's first trial) for misconduct in connection with other autopsies.

[22] For example, Laminack's widow again testified concerning the amount of cash he had on his person on the day of the murder and the fact that he wore his glasses all the time (the same glasses found on the floorboard of the pickup truck after his murder); this time, however, she also testified extensively regarding he relationship with her late-husband and the impact of Laminack's murder on her entire family. Testimony of Miriam Gwendolyn Laminack, (21/28 R.R. 58-81, 246-47).

Laminack's daughter again testified regarding her conversation with Laminack shortly before he left to give

Brewer and Nystrom a ride; this time, she also testified about the events that transpired after Laminack failed to return home that same night. Testimony of Anita Laminack Piper, (21/28 R.R. 119-43).

Ivy Elaine Craig again testified concerning her encounter with Nystrom (whom Craig testified was "angry" and "adamant" and aggressively demanded a ride) on the same evening as Laminack's murder. Testimony of Ivy Elaine Craig, (21/28 R.R. 105-08).

A Randall County Sheriff's Department supervisor identified numerous crime scene photographs and a diagram of the area in Amarillo where the murder occurred that had been admitted into evidence during the first trial. Testimony of Byron Towndrow, (21/28 R.R. 83-103).

A former Amarillo Police Officer, now employed at the FBI's lab in Quantico, Virginia, again identified numerous crime scene photographs, fingerprint cards, and other physical evidence collected from inside Laminack's pickup truck (including a finding that Brewer's bloody fingerprint was found on the butterfly knife found at the crime scene); he also testified about the results of blood stain analysis and blood comparisons done on blood swabbed from various locations within and without Laminack's vehicle, as well as blood found on various items found within and without the vehicle (including findings that both Laminack's and Brewer's blood were found on the butterfly knife); he also presented expert blood spatter testimony regarding the patterns found inside Laminack's vehicle. Testimony of Greg Soltis, (21/28 R.R. 146-245).

One of the two young women with whom Brewer and Nystrom stayed during April 1990 just prior to the murder testified again about (1) a conversation she overheard in which Nystrom described a plan to Brewer in which Nystrom would lure a victim to a motel room where they could rob him, and (2) the nervous demeanor both Nystrom and Brewer exhibits when they returned covered in blood to the apartment the night of Laminack's murder, as well as Brewer's hand injury. Testimony of Michelle Francis Christian, (21/28 R.R. 248-88).

After the trial court heard testimony from two witnesses concerning the unavailability of former prosecution witness Richard Lepicier due to impending orthopedic surgery [testimony of Gil Farren, (22/28 R.R. 15-18), and testimony of Ron Jennings, (22/28 R.R. 2-0-30)], the state trial court permitted the prosecution to read Lepicier's testimony from Brewer's 1991 trial into the record, which focused primarily upon Lepicier's observations on the date in July 1989 when he responded to a domestic disturbance call and found Albert Brewer incapacitated on the kitchen floor after Brewer had beaten him with a broom while defending his mother. Testimony of Richard Lepicier, (22/28 R.R. 40-59).

The same photographer who took a photograph of Brewer shooting the finger while exiting the courthouse around the time of his arraignment for Laminack's capital murder (State Ex. No. 202) again identified that photograph. Testimony of Henry Bargas, (22/28 R.R. 60-64).

Stephen Callen III again testified that (1) Brewer and Nystrom told him they had killed a man for $140, and (2) Brewer smirked and giggled when he described his victim begging for his life. Testimony of Stephen Callen III, (22/28 R.R. 67-74).

Brewer's former high school girlfriend again testified that (1) after she broke up with Brewer he threatened her more than once, (2) on one occasion, their verbal altercations in the school hallway escalated and Brewer picked her up and shoved her back against a locker, causing her to sustain three displaced vertebral discs, pinched nerves in her arm, all of which left her without the use of her arm for several months, and (3) in addition to threatening and assaulting her, Brewer also threatened to kill her new boyfriend. Testimony of Aimee Diane Long, (22/28 R.R. 75-88).

A former Randall County Jail inmate again testified (1) he briefly shared a cell with Brewer, (2) Brewer explained that he had been arrested for a murder, and (3) Brewer said that his victim had begged "please don't kill me, Boy" as Brewer stabbed him. Testimony of Kevin Lewis, (22/28 R.R. 91-125). On cross-examination, Lewis admitted that (1) he had convictions for DWI, delivery of marijuana, and non-payment of child support, (2) he had been friends with Skee Callen in high school but later drifted apart, and (3) he sometimes went into the business run

In addition, the prosecution also presented testimony from Kristie Nystrom that (1) she had refused to testify during Brewer's first trial; (2) she later pleaded guilty to capital murder and received a life sentence; (3) she was now testifying in an effort to obtain favorable parole consideration following her own conviction for capital murder in connection with Laminack's murder; (4) she went to Big Spring Hospital voluntarily in 1990 for drug rehab; (5) she met Brewer there; (6) after she left that hospital, she and Brewer moved to the Raintree Apartment after the person in Amarillo with whom they were staying forced them to leave; (7) she worked at a topless bar to earn money while Brewer did not work; (8) she gave all her money to Brewer; (9) Brewer told her he wanted to roll someone to get money; (10) Brewer told her to ask a woman for a ride, but the woman slammed her door in Nystrom's face and locked it; (11) later they saw a man in an alley whom she identified as Laminack; (12) they approached him and Brewer asked him for a ride; (13) Laminack agreed to give them a ride and told them to get inside his truck; (14) Brewer told her to get into the front seat and she did; (15) Laminack went inside to tell his daughter; (16) Laminack returned a few minutes later and began driving; (17) the truck started to go out of control as Brewer attacked Laminack, whose hands were not on the steering wheel; (18) she sat on

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by the Laminack family, *i.e.*, Amarillo Flooring, to buy tile. (22/28 R.R. 105-25).

After hearing testimony establishing that a witness from the 1991 trial had died [testimony of Ron Jennings, (22/28 R.R. 131-34)], the state trial court admitted her earlier trial testimony into evidence regarding Brewer's assignments to an alternative school on two occasions in middle school after he threatened another student with a knife and fought with a child in physical education class. Testimony of Kathleen Bailey, (22/28 R.R. 136-53).

The former Naples, Florida police officer who arrested Brewer for possession of a concealed weapon again testified that (1) he arrested Brewer who was driving a vehicle owned by the Greenmans when he observed the handle of a hunting knife located between the driver's seat and console of the vehicle and (2) Brewer subsequently pleaded guilty to that charge. Testimony of Ronald Mosher, (22/28 R.R. 230-40).

Finally, Dr. Coons again opined that (1) based upon his interviews with inmates, prison guards, and warden, he believed that many reports on prison violence greatly understated the amount of violence within the prison system and (2) despite Brewer's lack of violent behavior during his nearly two-decade stay on death row, based upon Brewer's suicidal conduct and history of violence, he believed there was a probability that Brewer would commit criminal acts of violence in the future. Testimony of Dr. Richard E. Coons, (23/28 R.R. 196-237). On cross-examination, Dr. Coons admitted that he had not evaluated Brewer and he had done no studies to ascertain whether any of his other predictions of future dangerousness in capital cases had been borne out by subsequent events. (23/28 R.R. 225, 229).

Laminack's thigh to try and reach the brakes; (19) when she hit the brake, the truck stalled and she slid back into her seat; (20) Brewer had Laminack around the neck, Laminack was trying to grab Brewer's hands, and Brewer was cutting Laminack; (21) Laminack said "don't kill me"; (22) Brewer responded "I don't want to kill you mister. I just want your money"; (23) Brewer then told Laminack to hand his wallet to Nystrom and he did so; (24) Brewer then told Laminack to hand over his keys but she had to retrieve them; (25) both she and Brewer exited the passenger side of the pickup; and (26) she later flushed Laminack's wallet down a toilet after removing his money.[23]

The Lubbock County Medical Examiner testified regarding Laminack's injuries based upon his review of Laminack's autopsy report, autopsy photographs, witness statements, and the 1991 testimony of the medical examiner who actually performed Laminack's autopsy.[24]

A Texas Department of Criminal Justice ("TDCJ") correctional officer testified about an incident in June 2007 in which Brewer broke open a razor and attempted to cut his own wrists.[25]

Another TDCJ correctional officer testified regarding the conditions under which inmates are housed on death row and explained that Brewer had only one major disciplinary violation during his years on death row, *i.e.*, a March 2000 violation for possession of marijuana, a charge to which Brewer pleaded guilty and received a 15-day cell restriction.[26]

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[23] Testimony of Kristie Lynn Nystrom, (22/28 R.R. 168-225).

[24] Testimony of Dr. Sridha Natarajian, (23/28 R.R. 19-66). Like Dr. Erdmann, who testified at Brewer's 1991 trial, Dr. Natarajian concluded that Laminack died from massive blood loss resulting from stab wounds to his neck, which damaged both the carotid artery and the internal jugular vein, two vital blood vessels. (23/28 R.R. 32-47). Dr. Natarajian also testified (1) Laminack's wounds, as shown in the autopsy photographs were consistent with the double-edged blade found at the crime scene, and (2) Laminack also suffered defensive type wounds to his left hand. (23/28 R.R. 43-54).

[25] Testimony of Russell Pinckard, (23/28 R.R. 73-86). Pinckard also testified that Brewer gave no explanation for his conduct. On cross-examination, Pinckard testified that during his fifteen years working on death row, Brewer had never given him any problems and the same was true for other guards. (23/28 R.R. 86).

[26] Testimony of Stephen Bryant, (23/28 R.R. 87-125). Bryant explained that: (1) death row inmates are classified into three groups based upon their history of disciplinary violations; (2) death row inmates remain in their

An investigator for the special prosecutor's unit in Huntsville identified a videotape that showed daily activity on Texas' death row, including the procedure for moving death row inmates, and discussed the differences between conditions on death row and in the general prison population.[27]

2. The Defense's Evidence

Brewer's trial counsel presented testimony from forensic psychologist Dr. John Edens that (1) he was the primary author of an academic study that concluded there was little accuracy to mental health professional's predictions of future dangerousness in capital cases; (2) his study focused on inmates who had been removed from death row and placed in the general prison population; (3) as a general rule, past behavior is a good predictor of future behavior; and (4) the highly subjective methodology employed by Dr. Coons had no basis in legitimate science.[28]

A Randall County Jail correctional officer and the Administrator of the Randall County Jail both testified that Brewer had not been written up for any disciplinary violations during his current stay at the jail.[29]

Brewer's mother testified that (1) Brewer was very active in team sports until he was

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cells 22 hours of each day, take their meals in their cells, and recreate and shower individually, not in groups; (3) Brewer was classified as Level 1, *i.e.*, the lowest level of seriousness, when Brewer was transferred back to Randall County to stand trial a second time; and (4) Brewer had very few disciplinary violations during his stay on death row. (23/28 R.R. 101, 115, 125). Bryant also testified that while some death row inmates had once been allowed to work in various jobs within the TDCJ system, that was no longer the case. (23/28 R.R. 102-03). Finally, Bryant testified that despite Brewer's suicide attempt in 2000, which was noted as having resulted from Brewer's frustration over his court case, he could recall no specific incidents involving Brewer, and Brewer's only mental health contacts during his time on death row had been routine 90-day screenings. (23/28 R.R. 89, 106-08).

[27] Testimony of A.P. Merillat, (23/28 R.R. 129-69). Merillat testified that inmates in the general prison population, including those serving life sentences, are not segregated from other inmates and have considerably more freedom than inmates housed on death row. (23/28 R.R. 149-61). Merillat also testified that criminal acts of violence do take place within TDCJ, including on death row. (23/28 R.R. 164). He did not recall ever investigating Brewer for any offense. (23/28 R.R. 166).

[28] Testimony of Dr. John Edens, (23/28 R.R. 11-69).

[29] Testimony of Scott Thomas Castleberry, (24/28 R.R. 74-76); testimony of Captain Debbie Uhruh, (24/28 R.R. 105-07).

diagnosed with scoliosis and had to undergo back surgery to fuse several of his vertebrae and put a rod in his back, which caused a severe change in Brewer's life; (2) Brewer did not know his biological father until he reached age fifteen; (3) Brewer's biological father abused Brewer physically and emotionally; and (4) on one occasion, Brewer defended her from an assault by Brewer's biological father by hitting his father over the head with a broom.[30]

Brewer's younger sister testified that (1) she and Brewer enjoyed a good childhood in Cedar Park, Texas; (2) her parents divorced when she was eleven and Brewer was fourteen or fifteen; and (3) when Brewer was seventeen, she, Brewer, and their mother moved to Mississippi to be with Brewer's biological father, who beat and fought with Brewer.[31]

A former correctional officer on Texas death row who worked there from 1977 through 2002 testified that (1) while assaults took place and weapons were available on death row, there was more opportunity for violence in the general prison population than on death row, and (2) he did not recall ever writing Brewer up for a disciplinary infraction.[32]

A different former Texas death row correctional officer testified that he was once assaulted while working death row when an inmate (not Brewer) threw hot water on him.[33]

Finally, Brewer took the stand and testified that: (1) he was only nineteen years old in April 1990; (2) his biological father Albert Brewer was not in his life until he reached age fifteen; (3) his biological father went to Vietnam and returned a different person; (4) his mother married Don Bartlett, who gave all his attention to Brewer's younger sister Billie Anne while giving Brewer

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[30] Testimony of Karon Brewer, (24/28 R.R. 77-94). On cross-examination, Brewer's mother acknowledged Brewer's marijuana use. (24/28 R.R. 94).

[31] Testimony of Billie Anne Young, (24/28 R.R. 96-102).

[32] Testimony of Jared Wilson, (25/28 R.R. 16-27).

[33] Testimony of Kyle Rains, (25/28 R.R. 28-34).

none; (5) Bartlett beat Brewer with his belt and an extension cord; (6) his mother and Bartlett fought frequently; (7) he played team sports until he was diagnosed with scoliosis, which necessitated spinal surgery that included the fusion of several of his spine and Brewer spending six-to-eight weeks in a body brace after two-to-three weeks in the hospital; (8) after he was no longer able to play sports, he began to hang with "stoners"; (9) he smoked weed and drank alcohol starting around age twelve-to-thirteen; (10) thereafter he experimented with "everything, stopped doing his school work, and ran away three or four times; (11) he met his biological father at age fifteen and they drank alcohol and smoked pot together; (12) when his mother divorced Don Bartlett and got back together with his biological father, they moved to Mississippi; (13) he was responsible for Billie Anne when they lived in Mississippi because both their parents were on the road five days a week working as truck drivers; (14) Albert Brewer was violent, beat both Brewer and his mother, and on one occasion nearly broke Brewer's nose with a piece of firewood; (15) Brewer ran away to Florida in 1989 for two-to-three months, where the Greenmans introduced him to crack cocaine; (16) on one occasion, Brewer struck his biological father with a broom while defending his mother from an assault by Albert; (17) after that incident, Brewer moved to Abilene to live with his grandmother – where he hung out with stoners and did drugs and alcohol; (18) in 1990, he wrote a suicide note that his family found and resulted in Brewer being referred by a judge to a state hospital; (19) he spent about a month at the state hospital in Big Spring, where he met Kristie Nystrom; (20) when he left the hospital in Big Spring, he moved to a room his mother rented for him from Guy Blackwell; (21) when Nystrom left the hospital in Big Spring, he brought her to live with him and Blackwell; (22) he and Blackwell later fought over Nystrom, so he and Nystrom moved to the Raintree Apartments; (23) he and Nystrom decided to steal a car and attempted to steal Ivy Craig's van, but she drove off before they could do so; (24) he asked

Laminack for a ride with the intention of taking Laminack's truck; and (25) he felt remorse for what he had done to both Laminack and his family.[34]

3. The Verdict

The jury returned its verdict on August 14, 2009 unanimously finding (1) beyond a reasonable doubt that Brewer deliberately caused the death of Laminack; (2) beyond a reasonable doubt there is a probability Brewer would commit criminal acts of violence that would constitute a continuing threat to society; and (3) taking into consideration all of the evidence, including the circumstances of the offense and Brewer's background, character, and personal moral culpability, there were insufficient mitigating circumstances to warrant that a sentence of life imprisonment be imposed rather than a death sentence.[35]

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[34] Testimony of Brent Ray Brewer, (25/28 R.R. 37-101).

Brewer's 2009 testimony detailing his fatal assault upon Laminack is described in note 1 *supra*.

Brewer repeatedly asserted that he felt remorse for his murder of Laminack, admitting that he had killed Laminack and expressing sorrow for what he had done: "I took his life for no reason and there's no excuse." (25/28 R.R. 84); "I had no idea I hurt these people." (25/28 R.R. 83); and explaining that he thinks about Laminack on holidays and the anniversary of the murder, understanding that "I can't bring Mr. Laminack back. I can't fix this. I can't do anything to fix this." (25/28 R.R. 98-100). In addition, Brewer testified that: (1) his 2000 suicide attempt resulted from his isolation from other inmates and his belief that he no longer wished to live; (2) since his return to the Randall County Jail, where he has interaction with other inmates, he is now 39 years old and no longer feels that way; and (3) he has tried to behave while in prison. (25/28 R.R. 95-97).

On cross-examination, Brewer: (1) insisted that he had tried to behave since his conviction: "I've already done the worst thing I could ever do. The only way to make a difference at all is to stay out of trouble if I could." (25/28 R.R. 102); (2) admitted that he had done a drawing showing drug paraphernalia (25/28 R.R. 105-06); (3) while awaiting trial in 1991 he wrote a letter to Nystrom in which he wrote "life's most unbearable moments are those we enjoy the most" and in which he offered to take sole responsibility for Laminack's murder (25/28 R.R. 108-11); (4) he admitted that he had threatened someone in 1983 (25/28 R.R. 113-14); (5) he admitted he struck Albert Brewer on the head with a broom while protecting his mother (25/28 R.R. 115-26); (6) he admitted that he was arrested and pleaded guilty to possession of a knife in Florida, but insisted the knife was not his and that the Greenmans for whom he was driving were making purchases of drugs and not selling drugs (25/28 R.R. 127-32); (7) insisted he got counseling while at the hospital in Big Spring (25/28 R.R. 139); (8) admitted that he made up a story about his assault on Laminack on the night of the murder (25/28 R.R. 143).

[35] Volume 2 of the Clerk's Record (henceforth "2 C.R."), pages 602-05 [ECF no. 122-24 & ECF no. 126-5 at 34-37 of 167]; (25/28 R.R. 238-40).

H. Second Direct Appeal

Brewer again appealed his sentence.[36] The Texas Court of Criminal Appeals ("TCCA") again affirmed Brewer's death sentence. *Brewer v. State*, AP-76,378, 2011 WL 5881612 (Tex. Crim. App. Dec. 23, 2011).

I. Second State Habeas Corpus Proceeding

Brewer also sought state habeas corpus review of his second death sentence.[37] The TCCA

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[36] Attorney John Bennett filed Brewer's direct appeal brief on March 23, 2011, arguing that: (1) the state trial court quashed the indictment and therefore lacked jurisdiction over Brewer; (2) the trial court erred in admitting evidence of Nystrom's eligibility for release on parole; (3) the trial court erred in responding to a jury note inquiring about parole eligibility by directing the jury to the jury charge, which instructed the jury to disregard parole; (4) the trial court erred in not granting Brewer's challenge for cause to a venire member who was biased and against whom Brewer was forced to exercise a peremptory challenge; and (5) the trial court erred in admitting the testimony of Dr. Coons as to future dangerousness. ECF no. 122-16.

[37] Attorney Richard Wardroup filed Brewer's second state habeas corpus application on July 20, 2012, asserting eighteen broad categories of claims in a 410-page application, including numerous multifaceted claims. [Brewer's second state habeas corpus application appears at ECF no. 88, pp. 17-428. Brewer attached several hundred pages of exhibits to his second state habeas application, which also appear in ECF nos. 88-89.] For instance, in his first claim, Brewer argued that (1) Dr. Coons' 2009 trial testimony was false and misleading, and (2) his trial counsel was ineffective for failing to challenge the admission of Dr. Coons' testimony, as well as failing to challenge Dr. Coons' credentials. In his second state habeas claim, Brewer argued (1) the prosecution withheld potentially beneficial information regarding the conditions of confinement within the TDCJ from his 2009 trial counsel in violation of the rule announced in *Brady v. Maryland*, (2) prosecution witness A.P. Merillat gave false testimony, (3) his trial counsel rendered ineffective assistance by failing to impeach Merillat's testimony, and (4) his state appellate counsel rendered ineffective assistance by failing to raise a point of error arguing Merillat's testimony was false or misleading. In his third state habeas claim, Brewer argued that (1) his trial counsel rendered ineffective assistance by failing to (a) adequately challenge the admission of Laminack's autopsy report and failing to challenge the admission of Dr. Natarajian's testimony that was based in part on Laminack's autopsy report, as well as Dr Erdmann's 1991 trial testimony, and (b) use Dr. Erdmann's intervening convictions for fraud in several other cases to impeach the findings in Laminack's autopsy report, (2) his state appellate counsel rendered ineffective assistance by failing to raise a point of error challenging the admission of Laminack's autopsy report, and (3) Dr. Natarajian testified falsely concerning the validity of Laminack's autopsy report and the autopsy conducted by Dr. Erdmann. Brewer asserted fifteen other claims for relief, including arguments that his trial counsel rendered ineffective assistance by failing to adequately investigate Brewer's background and present available mitigating evidence.

On August 20-21, 2013, the state trial court heard testimony from Dr. Coons and Brewer's two 2009 trial counsel (attorneys Anthony Odiorne and Edward Ray Keith, Jr.) in connection with Brewer's many claims of ineffective assistance of counsel, as well as his complaints about Dr. Coons' 2009 testimony. The verbatim transcription from that hearing appears at ECF no. 126-9 through 126-10. The voluminous exhibits admitted into evidence during Brewer's 2013 state habeas hearing appear at ECF no. 126-11 through 126-14. In addition, Brewer submitted several post-hearing affidavits, most of which attack Dr. Coons' credibility. Brewer's post-hearing submissions are found at ECF nos. 126-17 to 125-18.

On March 8, 2014, the state trial court filed its findings of fact, conclusions of law, and recommendation that Brewer's second state habeas corpus application be denied. The state trial courts' findings and conclusions are

denied state habeas relief. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114 (Tex. Crim. App. Sept. 17, 2014).

J. Return to this Court

Brewer returned to this Court, which granted his motion for a stay and to hold this case in abeyance while he returned to state court in order to exhaust state habeas corpus remedies on new claims. *Brewer v. Davis*, 2018 WL 4585357 (N.D. Tex. Sept. 25, 2018).

K. Third State Habeas Corpus Proceeding

The TCCA dismissed Brewer's new claims under state writ-abuse principles.[38] *Ex parte Brewer*, WR-46,587-03, 2019 WL 5420444 (Tex. Crim. App. Oct. 23, 2019).

L. The Latest Return to this Court

On March 30, 2020, Brewer filed his second amended petition for federal habeas corpus relief in this cause, asserting fourteen multifarious claims for relief. ECF no. 103.

Respondent filed his response on July 20, 2020. ECF no. 113.

Brewer filed his reply brief on October 9, 2020. ECF no. 128.

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erroneously dated "March 8, 2013." The state habeas trial court's findings and conclusions appear at ECF no. 126-19, at 192-294 of 306.

[38] Attorney Philip Alan Wischkaemper filed Brewer's third state habeas corpus application on November 12, 2018, asserting therein three claims for relief. Brewer's third state habeas corpus application appears at ECF nos. 127-1 and 127-3 through 127-15. More specifically, in his third state habeas application Brewer argued that (1) his 2009 trial counsel rendered ineffective assistance by failing to investigate the incidents presented by the prosecution in aggravation (specifically failing to interview Aimee Long prior to Brewer's retrial to discover Brewer was not a violent person, failing to interview Amy Valley – formerly Grossman – regarding her ownership of the knife that formed the basis for Brewer's conviction for possession of a concealed weapon, failing to interview officer Mosher regarding Brewer's failure to resist arrest, and failing to interview Kevin Long regarding the threat Brewer made while awaiting trial in 1999 to show Long started their argument); (2) the prosecution withheld Kristie Nystrom's Big Spring Hospital medical records from Brewer's defense counsel in violation of *Brady*; and (3) the refusal of Texas courts to give Brewer a retrial as to both his guilt-innocence and his sentence following the vacation of his initial death sentence violated ex post factor principles because, at the time of Brewer's capital offense, Texas law provided for a retrial as to both guilt and sentence whenever a death sentence was vacated. Brewer's third state habeas corpus application was accompanied by voluminous exhibits, including a lengthy report by psychologist Dr. Mark Cunningham (found in ECF nos. 127-9 through 127-12) and Kristie Nystrom's medical records from Big Spring Hospital (found in ECF nos. 127-13 through 127-15).

II. STANDARD OF REVIEW

Because Brewer filed this federal habeas corpus action after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), this Court's review of his claims for federal habeas corpus relief is governed by AEDPA. *Penry v. Johnson*, 532 U.S. 782, 792 (2001). Under the AEDPA standard of review, this Court cannot grant Brewer federal habeas corpus relief in connection with any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000); 28 U.S.C. § 2254(d).

The Supreme Court has concluded the "contrary to" and "unreasonable application" clauses of Title 28 U.S.C. § 2254(d)(1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the "contrary to" clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown*, 544 U.S. at 141; *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) ("A state court's decision is 'contrary to' our clearly established law if it 'applies a rule that contradicts the governing law set forth in our cases' or it 'confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.'"). A state court's failure to cite Supreme Court authority does not, per se, establish the state court's decision is "contrary to" clearly established federal law: "the state court need not even be aware of our precedents, 'so long as neither the reasoning nor the result of the state-court

decisions contradicts them.'" *Mitchell*, 540 U.S. at 16.

Under the "unreasonable application" clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme Court's decisions but unreasonably applies that principle to the facts of the petitioner's case. *Brown*, 544 U.S. at 141; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A federal court making the "unreasonable application" inquiry should ask whether the state court's application of clearly established federal law was "objectively unreasonable." *McDaniel v. Brown*, 558 U.S. 120, 132-33 (2010) ("A federal habeas court can only set aside a state-court decision as 'an unreasonable application of . . . clearly established Federal law,' § 2254(d)(1), if the state court's application of that law is 'objectively unreasonable.'"); *Wiggins*, 539 U.S. at 520-21. The focus of this inquiry is on whether the state court's application of clearly established federal law was objectively unreasonable; an "unreasonable" application is different from a merely "incorrect" one. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) ("The question under the AEDPA is not whether a federal court believes the state court's determination was incorrect but whether that determination was unreasonable - a substantially higher threshold."); *Wiggins*, 539 U.S. at 520; *Price v. Vincent*, 538 U.S. 634, 641 (2003) ("[I]t is the habeas applicant's burden to show that the state court applied that case to the facts of his case in an objectively unreasonable manner"). "Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court 'must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (quoting *Harrington v. Richter,* 562 U.S. 86, 101(2011)).

Legal principles are "clearly established" for purposes of AEDPA review when the

holdings, as opposed to the dicta, of Supreme Court decisions as of the time of the relevant state-court decision establish those principles. *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) ("We look for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.'"); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

AEDPA also significantly restricts the scope of federal habeas review of state court fact findings. Section 2254(d)(2) of Title 28, United States Code, provides federal habeas relief may not be granted on any claim that was adjudicated on the merits in the state courts unless the state court's adjudication of the claim resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Wood v. Allen*, 558 U.S. 290, 301(2010) ("[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance."); *Williams v. Taylor*, 529 U.S. at 410 ("[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law."). Even if reasonable minds reviewing the record might disagree about the factual finding in question (or the implicit credibility determination underlying the factual finding), on habeas review, this does not suffice to supersede the trial court's factual determination. *Wood*, 558 U.S. at 301; *Rice v. Collins*, 546 U.S. 333, 341-42 (2006).

In addition, § 2254(e)(1) provides that a federal habeas petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court's findings were erroneous. *Schriro*, 550 U.S. at 473-74 ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with 'clear and convincing evidence.'"); *Rice*, 546 U.S. 333, 338-39 (2006) ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'"); *Miller-El v. Dretke,* 545 U.S. 231, 240 (2005)

("[W]e presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.'"); 28 U.S.C. §2254(e)(1). It remains unclear at this juncture whether § 2254(e)(1) applies in every case presenting a challenge to a state court's factual findings under § 2254(d)(2). *See Wood*, 558 U.S. at 300-01 (choosing not to resolve the issue of § 2254(e)(1)'s possible application to all challenges to a state court's factual findings); *Rice*, 546 U.S. at 339 (likewise refusing to resolve the Circuit split regarding the application of § 2254(e)(1)).

The deference to which state-court factual findings are entitled under AEDPA does not imply an abandonment or abdication of federal judicial review. *See Miller-El*, 545 U.S. at 240 (the standard is "demanding but not insatiable"); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) ("Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.").

Absent a showing that there is an absence of available state corrective process or that circumstances exist that render such process ineffective to protect the rights of a petitioner, this Court is statutorily precluded from granting federal habeas corpus relief on any claim that has not been fairly presented to the state courts. *Davila v. Davis*, 137 S. Ct. 2058, 2064 (2017) (the exhaustion requirement is designed to avoid the unseemly result of a federal court upsetting a state court conviction without first according the state courts an opportunity to correct a constitutional violation); 28 U.S.C. § 2254(b)(1). Nonetheless, this Court is authorized to deny federal habeas relief on the merits notwithstanding a petitioner's failure to exhaust available state court remedies. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005) (a federal habeas court abuses its discretion if it grants a petitioner a stay when his unexhausted claims are plainly meritless); 28 U.S.C. § 2254(b)(2) ("An application for a writ of habeas corpus may be denied on the merits,

notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State."). In those instances in which the state courts failed to adjudicate a claim on the merits that Brewer presents to this Court (such as claims (1) the state courts summarily dismissed under the Texas writ-abuse statute or other Texas rules of procedural default or (2) which Brewer failed to fairly present to the state courts), this Court's review of the un-adjudicated claim is de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (de novo review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla v. Beard*, 545 U. S. 374, 390 (2005) (de novo review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins*, 539 U.S. at 534 (same).

III. EX POST FACTO CLAIM

A. The Claim

In his thirteenth claim for relief, Brewer argues that the failure of the state trial court to grant him a retrial as to both his guilt-innocence and sentence following this Court's granting of federal habeas corpus relief as to his sentence only violated the constitutional ban on ex post facto laws. (ECF no. 103, at 126-27).

B. State Court Disposition

Brewer presented this claim to the state courts for the first time as part of his third claim for relief in his third state habeas corpus application. (ECF no. 127-1). As explained above, the Texas Court of Criminal Appeals summarily dismissed Brewer's third state habeas corpus application. *Ex parte Brewer*, WR-46,587-03, 2019 WL 5420444 (Tex. Crim. App. Oct. 23, 2019).

C. *De Novo* Review

It is unnecessary for this Court to determine whether Brewer has procedurally defaulted on this claim because the undersigned concludes after de novo review that Brewer's ex post facto claim is legally frivolous.[39] Brewer complains that, following his trial, the Texas Legislature adopted a series of new statutes that ultimately authorized a retrial as to punishment only in capital murder cases where a sentence was invalidated. (ECF no. 103, at 126-17). He contends that he was entitled to a full retrial as to both guilt-innocence and punishment under Texas law as it existed at the time of his 1991 trial and application of the state statutes enacted after his trial (following this Court's ruling that he was entitled to a new punishment hearing) violates ex post facto principles.

Retroactive application of a law violates the United States Constitution's Ex Post Facto Clause only if it either (1) punishes as a crime an act previously committed, which was innocent when committed; (2) makes more burdensome the punishment for a crime after its commission; or

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[39] The Supreme Court has made clear that federal habeas courts may deny writs of habeas corpus by engaging in de novo review when it is unclear whether AEDPA deference applies because a federal habeas petitioner will not be entitled to a writ of habeas corpus if his claim is rejected on de novo review. *Berghuis v. Thompkins*, 560 U.S. 370, 390 (2010). The Supreme Court has declined to address an issue of procedural default and chosen, instead, to resolve a claim on the merits, holding that an application for habeas corpus may be denied on the merits notwithstanding a petitioner's failure to exhaust in state court. *See Bell v. Cone*, 543 U. S. 447, 451 n.3 (2005) (citing section 2254(b)(2)). "An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State." *Rhines v. Weber*, 544 U. S. 269, 277 (2005) (quoting 28 U.S.C. § 2254(b)(2)). Writing for four Justices of the United States Supreme Court, Justice Alito explained the rationale underlying a federal habeas court's decision to eschew analysis of a factually and legally convoluted procedural default question in favor of simply addressing the lack of merit in a particular claim as follows:

> In the absence of any legal obligation to consider a preliminary nonmerits issue, a court may choose in some circumstances to bypass the preliminary issue and rest its decision on the merits. *See*, *e.g.*, 28 U.S.C. § 2254(b)(2) (federal habeas court may reject claim on merits without reaching question of exhaustion). Among other things, the court may believe that the merits question is easier, and the court may think that the parties and the public are more likely to be satisfied that justice has been done if the decision is based on the merits instead of what may be viewed as a legal technicality.

Smith v. Texas, 550 U. S. 297, 324 (2007) (Justice Alito, with Chief Justice Roberts and Justices Scalia and Thomas, dissenting). A Supreme Court majority employed this very approach in *Lambrix v. Singletary*, 520 U. S. 518, 520 (1997), where the Supreme Court held "[w]e do not mean to suggest that the procedural-bar issue must be resolved first; only that it ordinarily should be. Judicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law."

(3) deprives one charged with a crime of any defense available according to the law at the time the act was committed. *Collins v. Youngblood*, 497 U.S. 37, 42 (1990) (upholding against an ex post facto challenge a Texas statute authorizing the reformation of an illegal sentence without the necessity of re-trying the criminal defendant); *Jackson v. Vannoy*, 981 F.3d 408, 417 (2020). Retroactive application of the Texas statutes in question did not violate any of the foregoing ex post facto principles.

Brewer's reliance on the Supreme Court's holding in *Weaver v. Graham*, 450 U.S. 24 (1981), is unpersuasive. In *Weaver*, the Supreme Court addressed retroactive application of a state statute reducing the availability of good conduct time credits for inmates convicted of criminal offenses prior to the effective date of the statute in question. Thus, the Supreme Court was confronted in *Weaver* with retroactive application of a statute that clearly increased or made more burdensome the punishment for crimes committed prior to its enactment. No such constitutional violation occurred in Brewer's case. In fact, in a footnote in *Weaver*, the Supreme Court took pains to distinguish purely procedural changes, such as the one involved in Brewer's case, from the substantive changes in criminal law at issue in Weaver's case. *See Weaver*, 450 U.S. at 29 n.12 (holding no ex post facto violation occurs if the change effected is merely procedural and does not increase the punishment nor change the ingredients of the offense or the ultimate facts necessary to establish guilt).

D. Conclusion

For the reasons explained above, Brewer's ex post facto challenge to his retrial as to punishment only is without arguable merit and does not warrant federal habeas corpus relief under a de novo standard of review.

IV. EIGHTH AMENDMENT UNDUE DELAY CLAIM

A. The Claim

In his fourteenth and final claim for federal habeas relief, Brewer argues that delay of two decades since his offense somehow now makes his execution a violation of the Eighth Amendment. (ECF no. 103, at 127-28).

B. Lack of Exhaustion

Respondent correctly points out that Brewer did not raise this claim on direct appeal or in any of his state habeas corpus applications; thus, the claim is unexhausted. (ECF no. 113, at 160).

C. *De Novo* Review

It is unnecessary for this Court to determine whether Brewer has procedurally defaulted on this unexhausted claim because the undersigned concludes after de novo review that this claim is legally frivolous. As Respondent accurately points out, the Fifth Circuit has repeatedly rejected this same claim. *See, e.g., Ruiz v. Davis*, 850 F.3d 225, 228-29 (5th Cir. 2017) (denying a Certificate of Appealability ("CoA") on a claim premised upon the delay between a capital offense and the defendant's scheduled execution and holding that prisoners who have benefitted from the careful and meticulous process of judicial review of a capital sentence may not later complain that the expensive and laborious process of habeas corpus appeals that exists to protect them violates their constitutional rights); *ShisInday v. Quarterman*, 511 F.3d 514, 526 (5th Cir. 2007) (denying a CoA on claim that delay constitutionally precluded the execution of a petitioner who had spent 25 years on death row); *Reed v. Quarterman*, 504 F.3d 465, 488 (5th Cir. 2007) (recognizing that well-settled circuit authority clearly establishes that inordinate delay in executing a condemned prisoner does not violate the Eighth Amendment); *Felder v. Johnson*, 180 F.3d 206, 215 (5th Cir. 1999) (describing as bordering on the legally frivolous the argument that executing a prisoner who

had spent 20 years on death row violated the Constitution); *White v. Johnson*, 79 F.3d 432, 439-40 (5th Cir. 1996) (holding no constitutional violation resulted from inordinate delay in carrying out the execution of a condemned prisoner because there are compelling justifications for the delay between the imposition of a capital sentence and an execution); *Fearance v. Scott*, 56 F.3d 633, 635-40 (5th Cir. 1995) (rejecting the argument that a prisoner who successfully challenged his initial capital sentence could complain of unconstitutional delay in scheduling his execution). Simply put, the Fifth Circuit has been rejecting this same claim as borderline frivolous for almost as long as Brewer has been on death row.

Furthermore, Respondent correctly points out that Brewer's undue delay argument has been held by the Fifth Circuit to be foreclosed by the non-retroactivity doctrine of *Teague v. Lane*, 489 U.S. 288 (1989), which forecloses adoption of the new principles of federal constitutional criminal procedure in federal habeas corpus proceedings. Under the holding in *Teague*, federal courts are generally barred from applying new constitutional rules of criminal procedure retroactively on collateral review. *Caspari v. Bohlen*, 510 U.S. 383, 389-90 (1994). A "new rule" for *Teague* purposes is one that was not dictated by precedent existing at the time the defendant's conviction became final. *See O'Dell v. Netherland*, 521 U.S. 151, 156 (1997) (holding a "new rule" either "breaks new ground," "imposes a new obligation on the States or the Federal Government," or was not "dictated by precedent existing at the time the defendant's conviction became final"). Under this doctrine, unless reasonable jurists hearing the defendant's claim at the time his conviction became final would have felt compelled by existing precedent to rule in his favor, a federal habeas court is barred from doing so on collateral review. *Id.*

The holding in *Teague* is applied in three steps: first, the court must determine when the petitioner's conviction became final; second, the court must survey the legal landscape as it then

existed and determine whether a state court considering the petitioner's claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule he seeks was required by the Constitution; and third, if the rule advocated by the petitioner is a new rule, the court must determine whether the rule falls within one of the two narrow exceptions to the nonretroactivity principle. *Caspari*, 510 U.S. at 390.

The only two exceptions to the *Teague* nonretroactivity doctrine are reserved for (1) new rules forbidding criminal punishment of certain primary conduct and rules prohibiting a certain category of punishment for a class of defendants because of their status or offense and (2) "watershed" rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding, *i.e.*, a small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. *O'Dell v. Netherland*, 521 U.S. at 157. Brewer's proposed new rule barring the execution of a convicted capital murderer after "inordinate delay" resulting from the petitioner's own legal machinations satisfies neither of these two exceptions. A conviction becomes final for *Teague* purposes when either the United States Supreme Court denies a certiorari petition on the defendant's direct appeal or the time period for filing a certiorari petition expires. *Caspari*, 510 U.S. at 390. Brewer's conviction became final for *Teague* purposes no later than June 6, 2012, *i.e.*, the ninety-first day after the Texas Court of Criminal Appeals denied Brewer's motion for rehearing following that court's affirmation of his second capital sentence. *See Beard v. Banks*, 542 U.S. 406, 411-12 (2004) (recognizing a state criminal conviction ordinarily becomes final for *Teague* purposes when the availability of direct appeal to the state courts has been exhausted and either the time for filing a petition for writ of certiorari has elapsed or a timely filed petition for certiorari has been denied); *Caspari*, 510 U.S. at 390 ("A state conviction and sentence become final for purposes of retroactivity analysis when the availability

of direct appeal to the state courts has been exhausted and the time for filing a petition for a writ of certiorari has elapsed or a timely filed petition has been finally denied.")

Teague remains applicable after the passage of AEDPA. *See Horn v. Banks*, 536 U.S. 266, 268-72 (2002) (applying *Teague* in an AEDPA context); *Robertson v. Cockrell*, 325 F.3d 243, 255 (5th Cir. 2003) (recognizing the continued vitality of the *Teague* nonretroactivity doctrine under AEDPA). As of the date Brewer's conviction and sentence became final for *Teague* purposes no federal court had ever held a condemned prisoner's execution violated the Eighth Amendment because of delay in executing the capital sentence arising from the prisoner's own legal challenges to his sentence. Thus, under *Teague*, Brewer's final claim does not warrant federal habeas corpus relief under even a de novo standard of review. *See White*, 79 F.3d at 437-39 (holding *Teague* foreclosed claim that prolonged incarceration before execution is cruel and unusual punishment).

D. Conclusion

For the reasons explained above, Brewer's complaint of prolonged incarceration before his execution is foreclosed by *Teague*, without arguable legal merit, and insufficient to warrant federal habeas corpus relief under a de novo standard of review.

V. CONSTITUTIONAL CHALLENGES TO CAPITAL SENTENCING SCHEME

A. The Claims

In his multifarious tenth claim for federal habeas corpus relief, Brewer argues the Texas capital sentencing statute is unconstitutional because: (1) evidence of the defendant's extraneous offenses may be admitted in Texas at the punishment phase of a capital trial even without proof the defendant has been convicted of those offenses, in violation of the Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002); (2) the Texas capital sentencing scheme's future dangerousness special issue lacks definitions of key terms, such as "probability," "criminal acts of

violence," and "continuing threat to society"; and (3) the Texas twelve/ten rule violates the Supreme Court's holding in *Caldwell v. Mississippi*, 472 U.S. 320 (1985), because it fails to inform the jury of the effect of, and misleads the jury, a single holdout juror on the jury's punishment phase verdict. (ECF no. 103, at 120-24).[40]

B. Lack of Exhaustion

Respondent correctly points out that Brewer failed to fairly present the state appellate court with any of these three constitutional challenges to the Texas capital sentencing scheme in either his direct appeal or his multiple state habeas corpus applications. Instead, Brewer argued in his second state habeas corpus application that his state appellate counsel rendered ineffective assistance by failing to raise points of error suggesting that: (1) the Texas capital sentencing scheme unconstitutionally fails to require that aggravating circumstances be alleged in the indictment [Claim 13 in Second State Habeas Application, at 373-81, which is located at ECF 88]; (2) the Texas twelve/ten rule violates the rule announced in *Caldwell v. Mississippi* [Claim 8 in Second State Habeas Application, at 316-45]; and (3) the Texas capital sentencing statute failed to impose a burden of proof on the prosecution to disprove the existence of mitigating evidence sufficient to warrant a life sentence [Claim 14 in Second State Habeas Application, at 381-89]. At no point in his direct appeal or his multiple state habeas corpus proceedings, did Brewer complain about either the admission of evidence of unadjudicated extraneous offenses or the absence of definitions of key terms in the future dangerousness special issue. Thus, Brewer wholly failed to exhaust state remedies with regard to two of his three constitutional challenges to the Texas capital

[40] Brewer's companion complaint of ineffective assistance by his state appellate counsel (failing to raise points of error on direct appeal challenging the constitutionality of the Texas capital sentencing statute and capital sentence special issues) will be addressed below in connection with Brewer's multifarious ineffective assistance claims.

sentencing statute and raised his third challenge (*i.e.*, his *Caldwell v. Mississippi* challenge to the Texas twelve/ten rule) only in the context of a claim of ineffective assistance by his state appellate counsel.

C. *De Novo* Review

It is unnecessary for this Court to determine whether Brewer has procedurally defaulted on his unexhausted challenges to the Texas capital sentencing statute because the undersigned concludes after de novo review that all of these claims lack arguable legal merit.

1. Lack of Definitions in Future Dangerousness Special Issue

It is well-settled that the Texas capital sentencing scheme's future dangerousness special issue does not constitutionally require definitions of its key terms, such as "probability," "criminal acts of violence," and "continuing threat to society." *See, e.g.*, *Sprouse v. Stephens*, 748 F.3d 609, 622-23 (5th Cir. 2014) (denying Certificate of Appealability ("CoA") on complaints about the lack of definitions of "probability," "criminal acts of violence," and "continuing threat to society" in a Texas capital sentencing jury charge); *Paredes v. Quarterman*, 574 F.3d 281, 294 (5th Cir. 2009) (holding the terms "probability," "criminal acts of violence," and "continuing threat to society" "have a plain meaning of sufficient content that the discretion left to the jury is no more than that inherent in the jury system itself"); *Turner v. Quarterman*, 481 F.3d 292, 299-300 (5th Cir. 2007) (rejecting claims that the terms "probability," "criminal acts of violence," and "continuing threat to society" were so vague as to preclude a capital sentencing jury's consideration of mitigating evidence); *Leal v. Dretke*, 428 F.3d 543, 552-53 (5th Cir. 2005) (listing numerous Fifth Circuit opinions rejecting complaints about the failure of Texas courts to define the terms "probability," "criminal acts of violence," and "continuing threat to society"). Thus, all of the key terms in his punishment phase jury charge about which Brewer complains have a common understanding in

the sense that they ultimately mean what the jury says by their final verdict they mean and do not require further definition. *James v. Collins*, 987 F.2d 1116, 1120 (5th Cir. 1993); *Milton v. Procunier*, 744 F.2d 1091, 1096 (5th Cir. 1984). Brewer's constitutional complaints about the trial court's failure to define the terms "probability," "criminal acts of violence," and "continuing threat to society" have repeatedly been rejected by the Fifth Circuit and are legally frivolous.

2. Evidence of Unadjudicated Extraneous Offenses

Likewise, the Fifth Circuit has repeatedly rejected the argument that Texas prosecutors must prove that a criminal defendant was previously convicted of a criminal offense (or prove the defendant committed that offense beyond a reasonable doubt) before presenting evidence at the punishment phase of a capital murder trial showing the defendant engaged in criminal misconduct. *See, e.g., Brown v. Dretke*, 419 F.3d 365, 376-77 (5th Cir. 2005) ("there is no constitutional prohibition on the introduction at a trial's punishment phase of evidence showing that the defendant has engaged in extraneous, unadjudicated criminal conduct"); *Hughes v. Dretke*, 412 F.3d 582, 592-93 (5th Cir. 2005) (holding *Teague* foreclosed claim that jury should not have been permitted to consider evidence of an unadjudicated capital murder at the sentencing phase of trial absent proof beyond a reasonable doubt); *Harris v. Cockrell*, 313 F.3d 238, 246 (5th Cir. 2002) (admission of evidence of an extraneous offense for which the defendant had been acquitted did not violate constitutional due process principles); *Jackson v. Johnson*, 194 F.3d 641, 656 (5th Cir. 1999) (Fifth Circuit authority allows the admission of unadjudicated offenses in death penalty cases without violating due process, equal protection, or the Eighth Amendment); *Vega v. Johnson*, 149 F.3d 354, 359 (5th Cir. 1998) ("Extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt."); *Harris v. Johnson*, 81 F.3d 535, 541 (5th Cir. 1996) (use of evidence of unadjudicated extraneous offenses at the sentencing phase of a

Texas capital murder trial does not implicate constitutional concerns).

Insofar as Brewer agues this well-settled line of Fifth Circuit case law was somehow undermined by the Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), Brewer misperceives the nature of the Supreme Court's holding in that case, as well as several other pertinent Supreme Court decisions. More specifically, in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), the Supreme Court struck down on due process grounds a state scheme that permitted a trial judge to make a factual finding based on a preponderance of the evidence regarding the defendant's motive or intent underlying a criminal offense and, based on such a finding, increase the maximum end of the applicable sentencing range for the offense by a factor of one hundred percent. *Apprendi*, 530 U.S. at 497. The Supreme Court's opinion in *Apprendi* emphasized it was merely extending to the state courts the same principles discussed in Justice Stevens' and Justice Scalia's concurring opinions in *Jones v. United States*, 526 U.S. 227, 252-53 311 (1999): other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury and proved beyond a reasonable doubt. *Apprendi*, 530 U.S. at 490. Put more simply, the Supreme Court held in *Apprendi* (1) it was unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal is exposed, and (2) all such findings must be established beyond a reasonable doubt. *Id.*

Two years later, in *Ring v. Arizona*, 536 U.S. 584 (2002), the Supreme Court applied the holding and its reasoning in *Apprendi* to strike down a death sentence in a case in which the jury had declined to find the defendant guilty of pre-meditated murder during the guilt-innocence phase of a capital trial (instead finding the defendant guilty only of felony murder) but a trial judge subsequently concluded the defendant should be sentenced to death based upon *factual*

determinations that (1) the offense was committed in expectation of receiving something of pecuniary value (*i.e.*, the fatal shooting of an armored van guard during a robbery), and (2) the foregoing aggravating factor out-weighed the lone mitigating factor favoring a life sentence (*i.e.*, the defendant's minimal criminal record). *Ring*, 536 U.S. at 609. The Supreme Court emphasized, as it had in *Apprendi*, the dispositive question "is not one of form, but of effect": "If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt." *Id.* at 602. "A defendant may not be exposed to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone." *Id.* (quoting *Apprendi*, 530 U.S. at 483). Because Ring would not have been subject to the death penalty but for the trial judge's factual determination as to the existence of an aggravating factor, the Supreme Court declared Ring's death sentence violated the right to trial by jury protected by the Sixth Amendment. *Id.* at 609.

The essential elements of the offense of capital murder, as defined by Texas law, are set forth in Sections 19.02(b) and 19.03 of the Texas Penal Code. Capital murder, as so defined by Texas law, is punishable by a sentence of either life imprisonment or death. Applicable Texas law does not include any of the sentencing factors included in the Texas capital sentencing special issues set forth in Article 37.071 of the Texas Code of Criminal Procedure as "essential elements" of the offense of capital murder: "In Texas, the statutory maximum for a capital offense is death. The mitigation issue does not increase the statutory minimum. To the contrary, the mitigation issue is designed to allow for the imposition of a life sentence, which is *less* than the statutory maximum." *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003). Thus, the nature of Brewer's capital sentencing proceeding was vastly different from the sentencing proceedings the

Supreme Court addressed in *Ring*.

In *Blakely v. Washington*, 542 U.S. 296 (2004), the Supreme Court struck down as a violation of the Sixth Amendment's right to jury trial a judge-imposed sentence of imprisonment that exceeded by more than three years the state statutory maximum of 53 months. *Blakely*, 542 U.S. at 303-04. In so ruling, the Supreme Court relied upon its prior holding in *Apprendi,* 530 U.S. at 490 ("Other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt."). In *Blakely*, the Supreme Court also relied upon its prior opinion in *Ring*, for the principle "the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant.*" *Blakely*, 542 U.S. at 303 (emphasis added). None of the foregoing legal principles were violated when Brewer's *jury* rendered its verdict during his retrial as to punishment.

Petitioner's capital sentencing *jury* made a key factual determination at the punishment phase of petitioner's trial *beyond a reasonable doubt*; more specifically, finding a probability Brewer would commit criminal acts of violence that would constitute a continuing threat to society. Brewer's *jury* also determined, after taking into consideration all the evidence, including the circumstances of the offense, his character and background, and his personal moral culpability, there was insufficient mitigating circumstance to warrant a life sentence. Thus, the capital sentence imposed upon Brewer pursuant to Texas law was based on jury findings, unlike the judicially-imposed sentences struck down in *Apprendi*, *Ring*, and *Blakely*.

Moreover, the Arizona capital sentencing scheme the Supreme Court addressed in *Ring* relied upon a trial judge's factual findings of "aggravating" factors and directed the trial judge to weigh those aggravating factors against any mitigating factors found to apply to the defendant.

Thus, the Arizona trial judge's factual findings in *Ring* were part of the constitutionally-mandated eligibility determination, *i.e.*, the narrowing function. In contrast, the Texas capital sentencing scheme under which Brewer was tried, convicted, and twice sentenced performed the constitutionally-required narrowing function at the guilt-innocence phase of petitioner's trial and further narrowed the category of those eligible for the death penalty by requiring a jury finding, beyond a reasonable doubt, of future dangerousness. *See Sonnier v. Quarterman*, 476 F.3d 349, 365-67 (5th Cir. 2007) (recognizing the Texas capital sentencing scheme, like the one upheld by the Supreme Court in *Kansas v. Marsh*, 548 U.S. 163 (2006), performs the constitutionally-required narrowing function through its statutory definition of capital murder and further narrows the category of those eligible for the death penalty by requiring an additional fact finding, beyond a reasonable doubt, that there is a probability the defendant will commit criminal acts of violence that would constitute a continuing threat to society).

Unlike Arizona's weighing scheme, the Texas capital sentencing scheme performs the constitutionally-mandated narrowing function, *i.e.*, the process of making the "eligibility decision," at the guilt-innocence phase of a capital trial by virtue of the manner with which Texas defines the offense of capital murder in Section 19.03 of the Texas Penal Code. *See Johnson v. Texas*, 509 U.S. 350, 362 (1993) (holding its previous opinions upholding the Texas capital sentencing scheme found no constitutional deficiency in the means used to narrow the group of offenders subject to capital punishment because the statute itself adopted different classifications of murder for that purpose); *Lowenfield v. Phelps*, 484 U.S. 231, 243-47 (1988) (comparing the Louisiana and Texas capital murder schemes and noting they each narrow those eligible for the death penalty through narrow statutory definitions of capital murder); *Jurek v. Texas*, 428 U.S. 262, 268-75 (1976) (*plurality opinion* recognizing the Texas capital sentencing scheme narrows

the category of murders for which a death sentence may be imposed and this serves the same purpose as the requirements of other statutory schemes that require proof of aggravating circumstances to justify the imposition of the death penalty).

The Texas capital sentencing scheme under which Brewer was convicted and sentenced involved a significantly different approach to capital sentencing than the Arizona scheme involved in *Ring*. By virtue of (1) its guilt-innocence phase determination *beyond a reasonable doubt* that the Brewer committed *capital* murder, as defined by applicable Texas law, and (2) its factual finding of future dangerousness, also made *beyond a reasonable doubt*, Brewer's jury found *beyond a reasonable doubt* the petitioner was *eligible* to receive the death penalty. *Sonnier v. Quarterman*, 476 F.3d at 365-67. In contrast, Ring's jury made no analogous factual findings. Instead, Ring's Arizona jury found beyond a reasonable doubt only that Ring was guilty of "felony murder," a wholly separate offense from the offense of capital murder as defined under Texas law.

Brewer's first capital sentencing special issue, *i.e.*, the future dangerousness issue, included a "beyond a reasonable doubt" burden of proof squarely placed on the prosecution. Brewer's *jury* made that determination. Thus, no violation of the principles set forth in *Apprendi*, *Ring*, or *Blakely* occurred during his trial. Insofar as Brewer argues his jury's factual finding on the future dangerousness special issue was an essential part of the procedural process under Texas law for determining whether he was *eligible* to receive the death penalty, that argument is foreclosed by the Supreme Court's *express* recognition the Texas capital sentencing scheme accomplishes the eligibility determination, *i.e.* the constitutionally mandated "narrowing function," at the guilt-innocence phase of trial. *Johnson v. Texas*, 509 U.S. at 362; *Jurek v. Texas*, 428 U.S. at 270-71. For the foregoing reasons, Brewer's citations to the Supreme Court's holding in *Ring* are non sequitur. Nothing in *Ring* or any other Supreme Court holding issued to date casts any doubt on

the continuing vitality of the long line of Fifth Circuit opinions holding that the use of evidence of unadjudicated extraneous offenses at the sentencing phase of a Texas capital murder trial does not implicate constitutional concerns. *See Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir. 1998) ("we hold that the admission of unadjudicated offenses at the sentencing phase of a capital trial does not violate the eighth and fourteenth amendments." (quoting *Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987)). This claim is legally frivolous.

3. *Caldwell* Challenge to Texas' Twelve/Ten Rule

Brewer argues that his jury was never instructed as to the consequences in the event it was unable to reach either a unanimous verdict in favor of the prosecution or to gain ten votes in favor of the defense on any of the capital sentencing special issues. He contends this effectively misled his jury as to the consequences of a hung jury or even a single holdout juror and violated his constitutional rights. Brewer is in error. The Supreme Court has implicitly rejected his argument. *See Jones v. United States* 527 U.S. 373, 382 (1999) (holding the Eighth Amendment does not require a capital sentencing jury be instructed as to the effect of a "breakdown in the deliberative process," because (1) the refusal to give such an instruction does not affirmatively mislead the jury regarding the effect of its verdict, and (2) such an instruction might well undermine the strong governmental interest in having the jury express the conscience of the community on the ultimate question of life or death).

Likewise, the Fifth Circuit has repeatedly rejected the argument that the Texas twelve/ten rule (which requires unanimity for pro-prosecution verdicts but only ten votes to warrant a pro-defense verdict on the Texas capital sentencing special issues) violates the Supreme Court's holding in *Caldwell v. Mississippi* by misleading the jury as to the impact of a hung jury. *See, e.g., Druery v. Thaler*, 647 F.3d 535, 543-44 (5th Cir. 2011) (holding no violation of *Caldwell* resulted

from state trial court's refusal to instruct jury regarding the impact of a hung jury); *Hughes v. Dretke*, 412 F.3d 582, 593-94 (5th Cir. 2005) (holding the same arguments underlying Brewer's tenth claim herein were so legally insubstantial as to be unworthy of a certificate of appealability); *Alexander v. Johnson*, 211 F.3d 895, 897-98 (5th Cir. 2000) (holding *Teague* precluded applying such a rule in a federal habeas context); *Davis v. Scott*, 51 F.3d 457, 466-67 (5th Cir. 1995) (holding the same); *Jacobs v. Scott*, 31 F.3d 1319, 1328-29 (5th Cir. 1994) (rejecting application of the Supreme Court's holding in *Mills v. Maryland* to a Texas capital sentencing proceeding).

More significantly, Brewer's reliance upon the Supreme Court's holding in *Caldwell v. Mississippi,* 472 U.S. 320 (1985), is misplaced. In *Caldwell*, the Supreme Court addressed an instance in which a capital murder prosecutor's jury argument suggested, in an erroneous and misleading manner, that the jury was *not* the final arbiter of the defendant's fate.[41] To establish a *Caldwell* violation, "a defendant necessarily must show that the remarks to the jury improperly described the role assigned to the jury by local law." *Dugger v. Adams*, 489 U.S. 401, 407 (1989). The Fifth Circuit has repeatedly rejected efforts identical to Brewer's to shoehorn the Supreme Court's holding in *Caldwell*, into the wholly dissimilar context of a Texas capital trial. *See, e.g., Blue v. Thaler*, 665 F.3d 647, 669-70 (5th Cir. 2011) (rejecting Eighth Amendment challenge to Texas twelve/ten rule and holding that proposed new rule advocated by petitioner would be foreclosed by *Teague*); *Turner v. Quarterman*, 481 F.3d 292, 300 (5th Cir. 2007) (recognizing Fifth Circuit precedent foreclosed arguments the Eighth Amendment and Due Process Clause of

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[41] In *Caldwell*, the Supreme Court held the following statement by the prosecution during its closing argument undermined reliable exercise of jury discretion:

> Now, [the defense] would have you believe that you're going to kill this man and they know--they know that your decision is not the final decision. My God, how unfair can they be? Your job is reviewable. They know it.

Caldwell v. Mississippi, 472 U.S. at 325 & 329, 105 S.Ct. at 2637 & 2639.

the Fourteenth Amendment mandated jury instructions regarding the effect of a capital sentencing jury's failure to reach a unanimous verdict); *Alexander v. Johnson*, 211 F.3d at 897 n.5 (holding the same); *see also Barrientes v. Johnson*, 221 F.3d 741, 776-78 (5th Cir. 2000) (holding state court voir dire instructions informing the jury that the court would impose sentence, not the jury, but specifically explaining how the jury's answers to the capital sentencing special issues would require the court to impose either a sentence of life or death did not result in a *Caldwell* violation).

D. Conclusion

For the reasons explained above, Brewer's constitutional challenges to the Texas capital sentencing statute are all foreclosed by well-settled Fifth Circuit precedent, without arguable legal merit, and insufficient to warrant federal habeas corpus relief under a de novo standard of review.

VI. DENIAL OF DEFENSE'S CHALLENGES FOR CAUSE

A. The Claim

In his eleventh claim for federal habeas corpus relief, Brewer complains that the state trial court denied his trial counsel's challenges for cause to thirteen members of the jury venire whom Brewer deemed to be unqualified and this necessitated his counsels' use of thirteen peremptory strikes to remove the objectionable individuals from Brewer's jury (ECF no. 103, at 124).

B. State Court Disposition

Brewer raised this same complaint for the first time as his seventeenth claim in his second state habeas corpus application (Second State Habeas Application, at 395-405). The state habeas trial court: (1) found that Brewer had failed to allege a denial of his right to an impartial jury; (2) found Brewer could have raised this claim on direct appeal but failed to do so; (3) concluded that Brewer forfeited his complaint about the trial court's rulings on his challenges for cause by failing to raise those complaints during his direct appeal; and (4) concluded, alternatively, that Brewer

failed to establish his right to an impartial jury was violated (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, which is located at ECF no. 126-19, at 70-71 & 98). The Texas Court of Criminal Appeals adopted that finding and conclusion when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

C. *De Novo* Review

It is unnecessary for this Court to determine whether Brewer procedurally defaulted on his complaints about the state trial court's rulings on his challenges for cause because the undersigned concludes after de novo review that Brewer's claim lacks any arguable legal merit. Respondent correctly points out that insofar as Brewer complains about the state trial court's failure to grant defense challenges for cause made against venire members against whom Brewer later exercised peremptory challenges, Brewer's complaints are *non sequitur*. *See Ross v. Oklahoma*, 487 U.S. 81, 88 (1988) ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."). If a criminal defendant exercises a peremptory challenge to exclude an allegedly biased venire member from service on the jury, no constitutional violation occurs. *See United States v. Martinez-Salazar*, 528 U.S. 304, 307 (2000) ("[I]f the defendant elects to cure such error by exercising a peremptory challenge, and is subsequently convicted by a jury on which no biased juror sat, he has not been deprived of any rule-based or constitutional right.").

In support of his eleventh claim for federal habeas relief, Brewer alleges only that his trial counsel employed peremptory challenges to remove thirteen identified members of the jury venire. Brewer does not identify any of these purportedly objectionable jurors who actually served on his petit jury. As a matter of law, therefore, his Sixth Amendment claim lacks any arguable merit. A

defendant's Sixth Amendment right to trial before an impartial jury is not violated or impaired simply because the defendant chooses to use a peremptory challenge to remove a juror who should have been removed for cause. *United States v. Snarr*, 704 F.3d 368, 386 (5th Cir. 2013) (quoting *Martinez-Salazar*, 528 U.S. at 317).

D. Conclusion

For the reasons explained above, Brewer's eleventh claim for federal habeas relief is foreclosed by well-settled Supreme Court precedent, without arguable legal merit, and insufficient to warrant federal habeas corpus relief under a de novo standard of review.

VII. BIASED JUROR CLAIM

A. The Claim

In his twelfth claim for federal habeas corpus relief, Brewer identifies one juror whom he alleges possessed disqualifying bias and whom the state trial court chose not to dismiss when Brewer raised a challenge for cause. (ECF no. 103, at 125).[42]

B. State Court Disposition

During individual voir dire of the jury venire, venire member R___ M____ testified under oath in response to questions by the prosecution that: (1) her views on the propriety of the death penalty had changed subsequent to her answering the juror questionnaire in that she had read the Bible and concluded that death could be an appropriate punishment in a case of murder (19/28 R.R. 86-89); (2) she could put aside the fatal stabbing of her brother and decide the case upon the evidence presented at trial (19/28 R.R. 91-92); (3) she understood that the terms "intentional" and

[42] Actually, Brewer identified two jurors in his twelfth claim – jurors R____ M_____ and R_____. However, juror R_____ was an alternate juror. Brewer does not allege any facts showing that juror R_____ ever participated in any of the deliberations or cast a vote to render a verdict during Brewer's 2009 retrial. Thus, any error in connection with the state trial court's failure to grant Brewer's challenge for cause to juror R___ was harmless as a matter of law. *See Brecht v. Abrahamson*, 507 U.S. 619, 623-24 (1993) (the test for harmless error in federal court is "whether the error had a substantial and injurious effect or influence in determining the jury's verdict").

"deliberate" meant different things and that, as used in the Texas capital sentencing special issues, the burden of proving that a murder was deliberate is upon the prosecution (19/28 R.R. 98-103); and (4) she understood that mitigating circumstance meant anything that she, as a juror, believed justified a life sentence (19/28 R.R. 106-08). Her voir dire examination by the prosecution concluded with the following exchanges:

> Q: * * * You indicated earlier that you had read the Bible and that it shows that the proper punishment for a murder is death, and you also agree, though, that the Bible says that not every death should be punishable or not every murder should be punishable by death. Were you aware of that?
> A: Yes.
> Q. And, likewise our law says the same thing. We talked about the difference between capital murder and ordinary murder, and some killings can be punished by death, under our law, and some cannot. Would you agree with that?
> A. Yes, I do.
> Q. And even some capital murders, depending on what the facts show, are appropriately punished with life. Would you agree with that?
> A. Yes, I do.
> Q. Hang on. Do you think that's fair or reasonable?
> A. Yes, I do.
> Q. [Name redacted] I have about asked you everything I needed to. Before I pass you over to Mr. – I believe – Odiorne, do you have any questions you would like to ask me?
> A. No, sir.
> Q. This is one of the few opportunities you won't get a bill for asking a question.
> A. I just have a comment. To me, these three questions are like, that's the first step. That's the second. The third one is taking all of it together.
> Q. Absolutely.
> A. And it's fair.
> Q. Right. And in the first two questions, it's the State's burden to prove the answers to those questions beyond a reasonable doubt, and on the third question. Nobody has a burden of proof at all. You just take what you got, and you decide, based upon that, if you think there is enough mitigating circumstances to justify a life sentence. And you are okay with that?
> A. I like that, yes.

(19/28 R.R. 110-11).

On voir dire examination by Brewer's counsel, the same venire member testified in part as follows:

Q. You had mentioned that you had some causes and concerns about the death penalty before you came here today and that you had consulted the Bible and read through that. Tell me a little bit about that. What did you find when you read through there?
A. I found the answers to everything, like I usually do. I found that if a man picks up something and deliberately – with the intention to kill, he is a murderer. He needs to be sentenced to death.

I also found that it is our responsibility and our duty to look at all aspects of this case, all sides, listen carefully and give our – our answer as to what we think.
Q. Okay. And where did you find that in there?
A. It was in Numbers 35:16 through 26, I think it was.
Q. And after having read that, that kind of set your mind at ease, and you feel like your questions have been answered?
A. Total peace with the death penalty.
Q. Okay. I'm guessing you had unease with it before. Why did you feel that way?
A. Because I had never researched it as far. I never had to. I'm a little embarrassed to tell you that I'm a grown woman and never really had to give it much thought, but there is different scriptures that can be taken different ways, and one of them was an eye for an eye and a tooth for a tooth, and that confused me, but I didn't read it – the whole – I didn't take in the whole, scriptures before and after it.
Q. Okay. Tell me a little bit about that now. How do you feel about that, eye for an eye, tooth for a tooth?
A. Well, that's talking about if someone does something wrong to you to turn the other cheek and pray for that person. It also says in an injury – if it's an injury, not murder, not a death, then you are to take an eye for an eye and a tooth for a tooth in that situation.
Q. What about for a murder or a death?
A. For a murder or death, there is situations there, too. If it's an accidental, then they are still to be punished but not with capital punishment.
Q. Okay. What about if it's not accidental?
A. Intentional with malice, they are to be put to death.
Q. Okay. And is that a belief that you firmly hold?
A. Yes, it is.
Q. There is not anything I'm going to say that's going to change your mind about that, is there?
A. The only thing that – when you go to Step 3, you have to take everything into consideration and be fair. That's.
Q. Okay. When you said be fair, what does that mean to you?
A. It means – be fair means to be honest with your feelings and judge – I mean, look at every – every aspect of the situation, all sides of it, and that's fair, weigh it all out because it's a big decision.
Q. Okay.
A. It's huge.

(19/28 R.R. 115-17).

In response to further questions by Brewer's counsel, the same venire member testified that: (1) in the case of an intentional murder with no provocation by the victim and no insanity on the part of the perpetrator, her opinion as to the propriety of the death penalty would depend upon the background of the defendant, which must be considered in answering the third special issue (19/28 R.R. 119-20); (2) she believed there was a difference between intentional and deliberate action in that deliberately means it was done purposely, knowingly while intentional means knowing it would result in death (19/28 R.R. 123-24); (3) intentionally committing capital murder means a person deliberately commits capital murder (19/28 R.R. 124); (4) in answering the future dangerousness special issue, in the case of an intentional and deliberate murder, she would look at whether the defendant was remorseful and would look to the defendant's past behavior as an indicator of his future behavior (19/28 R.R. 124-26); (5) even in the case of an intentional and deliberate murder, she could not be certain the defendant would always commit criminal acts of violence that would constitute a continuing threat to society (19/28 R.R. 125-26); (6) even in the case of an intentional and deliberate murder, where the evidence established the defendant would commit criminal acts of violence that constituted a continuing threat to society, there could be sufficient mitigating circumstances that would justify a life sentence (19/28 R.R. 127-28, 135); and (7) in the months since she answered the juror questionnaire her views on capital punishment had changed and she no longer believed the best justification for the death penalty was "an eye for an eye" (19/28 R.R. 139); (8) she now believed the best arguments in favor of and opposition to the death penalty were in the three Texas capital sentencing special issues (19/28 R.R. 139-40).

At the conclusion of R___ M___'s voir dire examination, Brewer's counsel lodged a challenge for cause, arguing that R___ M__ was substantially impaired in her ability to follow the law because she had testified that she believed murder with malice should result in a death sentence

and "[w]hether she can follow the law is irrelevant since she has made this statement" (19/28 R.R. 151-52). Brewer's counsel argued the venire member R___ M___ would automatically vote to impose the death penalty in every case and was subject to a challenge for cause under the Supreme Court's holding in *Morgan v. Illinois*, 504 U.S. 719 (1992). *Id.* The state trial court denied Brewer's challenge for cause. (19/28 R.R. 152).

Brewer raised a complaint about juror R____ M_____'s service on his jury for the first time as his eighteenth claim in his second state habeas application, arguing juror R_____ M_____ was biased in favor of the death penalty because she indicated she would vote to impose the death penalty in any case of deliberate murder (Second State Habeas Application, at 405-09). The state habeas trial court: (1) found Brewer could have raised this complaint on direct appeal but failed to do so; (2) found Brewer had failed to establish that his right to a fair and impartial jury was violated; (3) concluded Brewer forfeited this complaint by failing to raise it on direct appeal; and (4) concluded, alternatively, that Brewer failed to establish his right to an impartial jury was violated (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 70-71 & 98). The Texas Court of Criminal Appeals adopted those findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

C. *De Novo* Review

It is unnecessary for this Court to determine whether Brewer procedurally defaulted on his complaint about juror R___ M___'s alleged bias because the undersigned concludes after de novo review that Brewer's claim lacks any arguable legal merit. Contrary to Brewer's assertion, venire member R___ M___ never indicated that she would automatically vote to impose the death penalty in every case in which the defendant was convicted of capital murder. On the contrary, a fair

reading of R___ M___'s voir dire examination by Brewer's counsel summarized above emphasizes her view was just the opposite – that consideration of a wide variety of factors was necessary to answer the Texas capital sentencing special issues and that there could be no automatic response to the mitigation special issue, regardless of how the jury voted on the deliberateness and future dangerousness special issues. (19/28 R.R. 119-20, 124-28, 135). The Supreme Court has long held that a potential juror's personal viewpoints on a wide variety of subjects, including the propriety of the death penalty, do not justify exclusion of that potential juror as biased unless he or she is unable to set aside their viewpoint and render a verdict based on the law and evidence: "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). At no point during her voir dire examination did any party ask R___ M___ whether, regardless of her personal or religious views on capital punishment, she could set aside her views and decide Brewer's case based solely on the applicable law and the evidence presented in court. As a result, Brewer's challenge for cause to R___ M___ was constitutionally insufficient to establish disqualifying bias. *Id.*

In *Adams v. Texas*, 448 U.S. 38 (1980), the Supreme Court emphasized the limitations its previous holding in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), imposed on the ability of the State to exclude members of a jury venire from service on a capital sentencing jury:

> a juror may not be challenged for cause based on his views about capital punishment unless those views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. The State may insist, however, that jurors will consider and decide the facts impartially and conscientiously apply the law as charged by the court.

Adams v. Texas, 448 U.S. at 45. The Supreme Court emphasized in *Adams* that the State could, consistent with *Witherspoon*, exclude prospective jurors whose views on capital punishment are

such as to make them unable to follow the law or obey their oaths; but excluding jurors on broader grounds based on their opinions concerning the death penalty is impermissible. *Id.* at 44-48.

In *Wainwright v. Witt*, 469 U.S. 412 (1985), the Supreme Court further clarified its holdings in *Witherspoon* and *Adams*, holding the proper inquiry when faced with a venire member who expresses personal, conscientious, or religious views on capital punishment is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." *Wainwright v. Witt*, 469 U.S. at 424. The Supreme Court also emphasized that considerable deference is to be given the trial court's first-hand evaluation of the potential juror's demeanor and that no particular magical incantation or word choice need necessarily be followed in interrogating the potential juror in this regard. *Id.* at 430-35.

More recently, the Supreme Court has identified the following "principles of relevance" from its *Witherspoon-Witt* line of opinions:

> First, a criminal defendant has the right to an impartial jury drawn from a venire that has not been tilted in favor of capital punishment by selective prosecutorial challenges for cause. Second, the State has a strong interest in having jurors who are able to apply capital punishment within the framework state law prescribes. Third, to balance these interests, a juror who is substantially impaired in his or her ability to impose the death penalty under the state-law framework can be excused for cause; but if the juror is not substantially impaired, removal for cause is impermissible. Fourth, in determining whether the removal of a potential juror would vindicate the State's interest without violating the defendant's right, the trial court makes a judgment based in part on the demeanor of the juror, a judgment owed deference by reviewing courts.

Uttecht v. Brown, 551 U.S. 1, 9 (2007) (citations omitted). In *Uttecht*, the Supreme Court admonished reviewing courts to defer to the trial court's resolution of questions of bias arising from a potential juror's conflicting voir dire answers because the trial court had the opportunity to observe the demeanor of the potential juror. *Id.* at 20 ("where, as here there is a lengthy questioning of a prospective juror and the trial court has supervised a diligent and thoughtful *voir dire*, the trial

court has broad discretion."). "Courts reviewing claims of *Witherspoon-Witt* error, however, especially federal courts considering habeas petitions, owe deference to the trial court, which is in a superior position to determine the demeanor and qualifications of a potential juror." *Id.* at 22. Moreover, judicial determinations of whether a potential juror possesses disqualifying bias is a question of fact to which a federal habeas court is required to give deference. *Skilling v. United States,* 561 U.S. 358, 396 (2010); *Wainwright. Witt*, 469 U.S. at 423-24; *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984).

Brewer's reliance upon the Supreme Court's holding in *Morgan v. Illinois* is misplaced. *Morgan* held merely that it was constitutional error for a state trial court to deny a defendant the opportunity to conduct voir dire into whether a potential juror would automatically vote to impose the death penalty in every case of capital murder. *Morgan*, 504 U.S. at 729-34. *Morgan* did not establish a new standard for evaluating the propriety of a challenge for cause to a venire member in a capital case. Instead, the Supreme Court took great pains in *Morgan* to reaffirm its prior holdings that: (1) the proper standard for determining when a juror may be excused for cause is "whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and oath," *Morgan*, 504 U.S. at 728; (2) a juror who in no case would vote for capital punishment regardless of his or her instructions is not an impartial juror and must be removed for cause, *id. (*citing *Witt* and *Adams*); and (3) a juror who would automatically vote for the death penalty in every capital murder case will fail in good faith to consider the aggravating and mitigating circumstances as the instructions require and must also be excused for cause, *Id.* at 728-29 (citing *Ross v. Oklahoma*, 487 U.S. 81, 85 (1988)).

Brewer alleges no facts showing he was denied the opportunity to voir dire venire member R___ M___ with regard to any aspect of her views on the propriety of capital punishment, much

less on whether she would automatically vote to impose the death penalty in every case of capital murder. On the contrary, this Court's independent de novo review of R___ M___'s voir dire examination reveals that Brewer's trial counsel examined her extensively on this very topic and was repeatedly informed by R___ M___ that she considered each of the Texas capital sentencing special issues to be independent of one another and worthy of very careful and deliberate consideration based upon the available evidence (19/28 R.R. 124-28, 135, 139-40). Thus, no *Morgan* error took place with regard to venire member R___ M___. Furthermore, R___ M__ made crystal clear during her voir dire examination that there would be absolutely nothing "automatic" about any of her answers to the capital sentencing special issues.

No rational person reviewing the voir dire examination of R___ M___ would conclude this potential juror was unable, despite her personal or religious views, to render a verdict based upon the evidence and applicable law. Nor does an objectively reasonable construction of R___ M___'s voir dire examination support a conclusion that she was predisposed to vote in favor of the death penalty automatically in every case in which the defendant was convicted of capital murder. On the contrary, R___ M___ repeatedly referred Brewer's counsel back to the Texas capital sentencing special issues when he attempted to interrogate her on the moral justifications for and against capital punishment. (19/28 R.R. 124-28, 135, 139-40). R___ M___ also repeatedly emphasized throughout her voir dire testimony the need to consider all circumstances when answering the Texas capital sentencing special issues, particularly the mitigation special issue. (19/28 R.R. 110-11, 119-20, 124-28, 135, 139-40). Under such circumstances, Brewer has failed to carry his burden of establishing that the state trial judge's implicit factual determination of no disqualifying bias was erroneous. *See Canfield v. Lumpkin*, 998 F.3d 242, 248 (5th Cir. 2021) (a federal habeas court may reject a state court's factual finding of no disqualifying bias only with

clear and convincing evidence) (citing *Patton v. Yount*, 467 U.S. 1025, 1036 (1984)); *Thomas v. Lumpkin*, 995 F.3d 432, 444-45 (5th Cir. 2021) (an implicit state court finding of no disqualifying bias is entitled to a presumption of reasonableness). R___ M___'s voir dire examination reveals a lack of clear and convincing evidence showing she was biased.

D. Conclusion

For the reasons explained above, Brewer's twelfth claim for federal habeas relief is foreclosed by well-settled Supreme Court precedent, without arguable legal merit, and insufficient to warrant federal habeas corpus relief under a de novo standard of review.

VIII. *GIGLIO/NAPUE* CLAIM AS TO CONDITIONS OF CONFINEMENT

A. The Claim

In a portion of his eighth claim for federal habeas relief, Brewer argues that he was denied due process of law when the prosecution employed false or misleading testimony from witnesses A.P. Merillat and Stephen Bryant regarding the conditions under which Brewer would be housed if given a life sentence and the details of the remuneration Merillat received in exchange for his trial testimony. (ECF no. 103, 114-19).[43]

B. State Court Disposition

As explained in Section I.G.1. above, at Brewer's retrial, the prosecution presented testimony from a TDCJ official and a Walker County, Texas criminal investigator regarding (1) the differences generally between the conditions of confinement on TDCJ's death row and those facing inmates in the general prison population, and (2) the opportunities for inmates to engage in

[43] Brewer's companion complaints of ineffective assistance by both his trial counsel (failing to rebut alleged errors in the testimony of Merillat and Bryant) and his state appellate counsel (failing to raise points of error on direct appeal challenging the alleged factual errors in Merillat's and Bryant's testimony) will be addressed below in connection with Brewer's multifarious ineffective assistance claims.

violent conduct in both the general prison population and while on death row.[44] To summarize, investigator A.P. Merillat (1) narrated a video played for the jury showing the conditions on TDCJ's death row, and (2) offered testimony contrasting those conditions with what Merillat termed the much less restrictive conditions found in TDCJ's general prison population. Meanwhile, Captain Stephen Bryant testified generally that, even though Brewer did have a suicide attempt while on death row, Brewer had never undergone an intensive mental health evaluation, Brewer had very few disciplinary violations while on death row, and Brewer's only major disciplinary violation while on death row was for possession of marijuana. Thus, the apparent thrust of both of these witnesses' testimony was to blunt the defense's argument that Brewer's non-violent prison record while on death row suggested Brewer would not pose a risk of future violent behavior if he were to receive a life sentence.

Brewer complained about alleged factual errors in the trial testimony of prosecution witnesses Merillat and Bryant in claim 2A in his second state habeas corpus application, arguing both witnesses gave false or misleading testimony regarding the details of the TDCJ's inmate classification system and how it might apply to Brewer if he were to receive a life sentence (Second State Habeas Application, at 120-45). The state trial court reviewed conflicting affidavits from prosecution witness A.P. Merillat [found in ECF no. 126-16, at 166-75] and defense expert Frank AuBuchon [found in ECF no. 126-13, at 29-37]. Significantly, AuBuchon's affidavit included an admission that "neither side asked specific questions as to how the defendant would be managed by the TDCJ if he were to receive a life sentence."[45] The state habeas trial court: (1) found neither Merillat nor Bryant were asked about the details of classification of inmates convicted of capital

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[44] *See* notes 26-27, *supra*, and accompanying text.

[45] Affidavit of Frank AuBuchon dated July 16, 2012, at p. 7 [ECF no. 126-13, at p. 35].

murder or other conditions of confinement; (2) found there was nothing false about Merillat's trial testimony regarding his rate of compensation for his testimony at Brewer's trial; (3) found Merillat's post-trial affidavit to be credible; (4) concluded Brewer had failed to show there was anything false or misleading about Merillat's trial testimony; and (5) concluded Brewer's state habeas claim 2A had no merit (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 27-34 & 77-78). The Texas Court of Criminal Appeals adopted these findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

C. Clearly Established Federal Law

A state denies a criminal defendant due process when it knowingly uses perjured testimony at trial or allows untrue testimony to go uncorrected. *Giglio v. United States*, 405 U.S. 150, 153-54 (1972); *Napue v. Illinois*, 360 U.S. 264. 269-70 (1959). To succeed in showing a due process violation from the use of allegedly perjured testimony, a defendant has the burden of establishing that (1) the witness in question actually gave false testimony, (2) the falsity was material in that there was a reasonable likelihood that it affected the judgment of the jury, and (3) the prosecution used the testimony in question *knowing* that it was false. *Giglio*, 405 U.S. at 153-54. Thus, the deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with the rudimentary demands of justice and violates due process. *See Giglio*, 405 U.S. 153 (citing *Mooney v. Hologan*, 294 U.S. 103 (1935)); *Napue*, 360 U.S. at 269 (applying *Mooney* to testimony that bore upon a witness's credibility).

D. AEDPA Analysis

To succeed in this type of due process claim, a defendant must show that the testimony complained of was actually false, the state knew or should have known that it was actually false,

and the false testimony was material. *In re Raby*, 925 F.3d 749, 756 (5th Cir. 2019); *Canales v. Stephens*, 765 F.3d 551, 573 (5th Cir. 2014) (a conviction obtained through false evidence known to be such by representatives of the State violates a defendant's constitutional rights); *Kinsel v. Cain*, 647 F.3d 265, 271 (5th Cir. 2011) ("The Supreme Court has held that the Due Process Clause is violated when the government knowingly uses perjured testimony to obtain a conviction."); *Reed v. Quarterman*, 504 F.3d at 473 (same). False testimony is material if there is "any reasonable likelihood" that it could have affected the jury's verdict. *Raby*, 925 F.3d at 756; *Canales*, 765 F.3d at 573; *Goodwin v. Johnson*, 132 F.3d 162, 185 (5th Cir. 1997) (citing *Westley v. Johnson*, 83 F.3d 714 (5th Cir. 1996)).

Brewer's *Giglio/Napue* claim fails for at least three separate, and equally compelling, reasons: (1) the state habeas court found as a matter of fact there was nothing false or misleading in the trial testimony of Merillat or Bryant; (2) after independently reviewing the entire record from Brewer's original trial, retrial, multiple direct appeals, and multiple state habeas corpus proceedings, this Court concludes after de novo review the alleged errors in Merillat's trial testimony and Bryant's trial testimony do not meet the materiality standard required for a due process violation; and (3) and most compelling of all, Brewer alleges no facts and presented the state habeas court with no evidence showing the prosecution *knowingly* presented false or misleading testimony from either Merillat or Bryant at Brewer's retrial as to punishment.

1. State Court's Factual Finding of No False or Misleading Testimony

The state habeas court's factual finding that Merillat's and Bryant's trial testimony was neither false nor misleading is a factual determination entitled to deference by this federal habeas court pursuant to 28 U.S.C. § 2254(e)(1). *See Schriro*, 550 U.S. at 473-74 ("AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants

rebut this presumption with 'clear and convincing evidence.'"); *Rice v. Collins*, 546 U.S. at 338-39 ("State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by 'clear and convincing evidence.'"); *Miller-El v. Dretke,* 545 U.S. at 240 ("[W]e presume the Texas court's factual findings to be sound unless Miller-El rebuts the 'presumption of correctness by clear and convincing evidence.'").

As Respondent accurately describes (ECF no. 113, at 140-45), the debate between Merillat and AuBuchon in their conflicting affidavits before the state habeas court was more one of style than of substance. In his affidavit, AuBuchon repeatedly criticizes Merillat for failing to volunteer additional information about the intricacies of the TDCJ's inmate classification system. Meanwhile, Merillat replies that he could only answer the questions he was asked by the parties' counsel and that he was simply not asked to address many of the subjects AuBuchon argued should have been explained to the jury. AuBuchon does not really disagree, admitting in his affidavit that neither Merillat nor Bryant were asked by either party to address the details of the TDCJ's inmate classification system or to explain precisely how Brewer would be classified if he were to be given a life sentence instead of a death sentence.

This is not the first, nor will it likely be the last, debate between Merillat and AuBuchon or between other experts addressing what the Fifth Circuit has accurately described as the TDCJ's "labyrinthine" and "voluminous and convoluted" prisoner classification system.[46] *See Ruiz v.*

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[46] One possible source for the arguments directed toward Merillat in Brewer's state and federal habeas pleadings in this case may be found in the Fifth Circuit's opinion in *Ruiz v. Davis* 819 F. App'x 238, 240 (5th Cir. July 7, 2020). In *Ruiz*, the Fifth Circuit explained that during the 2008 capital murder trial of a Texas death row inmate, Merillat had testified erroneously that Ruiz would receive a moderately restrictive classification if sentenced to life without parole but after ten years could be promoted to a less restrictive classification depending on his behavior. This was undisputedly incorrect. TDCJ had changed its classification policy effective September 1, 2005 to disallow this exact reclassification, *i.e.*, to provide that effective that date, inmates convicted of capital murder who received sentences of life without parole would be ineligible for reclassification above the G-3 level. Ruiz sought federal habeas, arguing Merillat had committed the same error during his testimony at the trial of Texas death row inmate Adrian Estrada. On state direct appeal the state confessed error, which both parties admitted was unintentional, and

recommended that Estrada receive a new sentencing hearing. The Texas Court of Criminal Appeals directed that Estrada receive a new trial as to punishment. *Estrada v. State*, 313 S.W.3d 274, 287 (Tex. Crim. App. 2010).

In contrast, Ruiz failed to raise his complaint about Merillat's erroneous testimony either on direct appeal or in his initial state habeas corpus proceeding. When Ruiz did raise his complaint in a subsequent state habeas application, the Texas Court of Criminal Appeals dismissed the claim under state writ-abuse principles. The federal district court held Ruiz had procedurally defaulted on his complaint about Merillat's erroneous testimony. The Fifth Circuit denied Ruiz a Certificate of Appealability on Ruiz's *Giglio/Napus* claim, holding Ruiz could not overcome his procedural default because there was no allegation or evidence showing the prosecution knowingly used false or perjured testimony to secure Ruiz's death sentence. 819 F. App'x at 242-43 & n.4. As Respondent correctly points out, Brewer's capital offense took place long before the 2005 change in TDCJ classification policy, which does not apply to Brewer. Thus, the type of factual error in Merillat's testimony that occurred during the Estrada and Ruiz trials was simply not possible during Brewer's 2009 retrial.

The narrow nature of the holding in *Estrada* has not precluded federal habeas petitioners from mounting a wide range of assaults upon Merillat's credibility, including a number of arguments wholly unrelated to the factual accuracy of his testimony regarding the TDCJ's classification system. As is true of Brewer's attacks upon Merillat's credibility in this case, some of those challenges have been unusual. For example, Texas death row inmate Clinton Lee Young argued in an amended federal habeas pleading that both a *Brady* violation and a *Giglio/Napue* violation had occurred when (1) the prosecution failed to furnish the defense with a copy of Merillat's 2006 *Texas Bar Journal* article prior to Merillat's rebuttal testimony at the punishment phase of Young's March 2003 capital murder, and (2) Merillat testified erroneously regarding the details of the TDCJ's classification system and the level of violence found within the TDCJ generally. The federal district court stayed that federal habeas proceeding to permit Young to return to state court and exhaust those new claims. During Young's subsequent state habeas evidentiary hearing, Young himself interrupted his state habeas counsel's interrogation of Merillat to announce that he wished to withdraw all claims attacking Merillat. *Young v. Stephens*, 2014 WL 509376, *17-*22 (W.D. Tex. Feb. 20, 2014). After the state habeas trial court held a hearing in which Young testified under oath that his waiver of the claims involving Merillat was voluntary, intelligent, and knowing, Young was permitted to withdraw those claims. *Id.* Upon his return to federal court, however, Young reasserted both his *Brady* and *Giglio/Napue* claims. The district court concluded Young's claims were waived and, alternatively, lacked arguable merit. *Id.*, at *35-*39. The Fifth Circuit denied Young a Certificate of Appealability. *Young v. Stevens*, 795 F.3d 484 (5th Cir. 2015).

At the October 2009 punishment phase of the capital murder trial of Paul Devoe, Merillat testified that (1) many violent crimes take place inside the TDCJ, and (2) inmates have access to drugs, alcohol, and materials they can fashion into weapons. Devoe brought *Brady* and *Giglio/Napue* claims premised upon assertions that Merillat's trial testimony: (1) overstated the frequency of violence within the TDCJ system; (2) misstated that two inmates who drank alcohol inside a cell and then got involved in a fatal altercation were "cellmates"; and (3) misrepresented the amount of compensation Merillat received for testifying. As Merillat did in this case, he furnished the state habeas court with a detailed affidavit refuting each of the allegations of false testimony made against him. Devoe presented the state habeas court with no controverting affidavit or testimony. The state habeas court concluded Merillat's affidavit was credible, his trial testimony was neither false nor perjurious, and the state had not knowingly presented false or misleading testimony. The federal district court concluded: (1) the state habeas court's factual finding that Merillat had not furnished false or misleading testimony was fully supported by the record before that court; (2) none of the alleged inaccuracies in Merillat's trial testimony were material to the outcome of the punishment phase of Devoe's capital trial; (3) Devoe had failed to establish the prosecution knowingly used any false or misleading testimony from Merillat to secure Devoe's death sentence; and (4) Devoe's *Brady* claim was likewise without arguable merit. *Devoe v. Davis*, 2016 WL 5408169, *15-*19 (W.D. Tex. Sept. 27, 2016). The Fifth Circuit denied Devoe a Certificate of Appealability. *Devoe v. Davis*, 717 F. App'x 419 (5th Cir. Jan. 9, 2018).

In *Chanthakoummane v. Director*, 2018 WL 1288443 (E.D. Tex. 2018), a Texas death row inmate argued his state appellate counsel had rendered ineffective assistance by failing to challenge the admissibility of Merillat's expert testimony regarding TDCJ's classification system and the potential for TDCJ inmates to engage in acts of violence while incarcerated. The state habeas court held that, notwithstanding Merillat's erroneous testimony in *Estrada* and another capital murder trial about the details of the TDCJ's classification system, Merillat's credentials

Davis, 819 F. App'x 238, 244 (5th Cir. July 7, 2020) ("The Texas prison classification system is complex." (citing *Garcia v. Stephens*, 357 F.3d 222, 226-29 (5th Cir. 2014)). The fact Brewer's state habeas counsel found one or more experts willing to express an opinion about the minutiae of the TDCJ's inmate classification system divergent from those *unexpressed* by Merillat or Bryant does not establish that Merillat's or Bryant's expert opinions about the general operations of TDCJ's prisoner classification system were false or misleading. *See Clark v. Johnson*, 202 F.3d 760, 766-67 (5th Cir. 2000) (holding that a disagreement between experts regarding the conclusions to be drawn from the physical evidence was insufficient to overcome the presumption of correctness afforded a state habeas court's factual finding that an expert trial witness had not testified falsely at trial or otherwise misled the jury). Merillat's and Bryant's expert opinions regarding the *general* nature in which the TDCJ's prisoner classification system operates are not refuted by AuBuchon's assertions as to the *detailed* machinations of that same system as it might possibly apply to Brewer. Simply put, as AuBuchon admits in his affidavit before the state habeas court, neither Merillat nor Bryant were asked by either party to address the specifics of how Brewer would be treated by the TDCJ's prisoner classification system had Brewer received a life sentence.

The reason for this is readily apparent from even a cursory review of the record from Brewer's retrial: neither Merillat nor Bryant were called to testify about the possible application of the TDCJ's prisoner classification system upon Brewer in the event Brewer received a life sentence. Instead, they were called, and cross-examined, to address a variety of other issues.

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to testify as an expert on those subjects were not seriously in question. *Chanthakoummane*, 2018 WL 1288443, at *29-*31 (citing *Fuller v. Johnson*, 114 F.3d 491, 498 (5th Cir. 1997) (approving the testimony of another member of Merillat's special prosecution unit as an expert witness)). The district court noted that Merillat's expert testimony had been noted and approved by the Texas Court of Criminal Appeals in numerous criminal trials reviewed by that state appellate court, including cases affirming capital sentences. *Id.*, at *29-*31. The federal district court concluded there was nothing constitutionally deficient nor prejudicial about the failure of that petitioner's state appellate counsel to challenge the admissibility of Merillat's testimony. *Id.* The Fifth Circuit denied a Certificate of Appealability. *Chanthakoummane v. Stephens*, 816 F.3d 62 (5th Cir. 2016).

More specifically, Merillat was called by the prosecution to authenticate a videotape showing the highly restrictive conditions that applied to TDCJ's death row at the Polunsky unit and to testify that those conditions are significantly stricter than those that apply to inmates in the general prison population. The purpose of Merillat's direct testimony was an attempt by the prosecution to counter what it correctly expected Brewer's trial counsel would argue, *i.e.*, that Brewer's lack of a violent record while housed on death row indicated he would not pose a risk of future violent behavior if he received a life sentence. On cross-examination, Brewer's lawyers used Merillat's expertise on prison violence to attempt to establish that there were opportunities for inmates to engage in violence throughout the TDCJ system, including on death row. An article Merillat wrote for the *Texas Bar Journal* discussing the opportunities for violence within the TDCJ, which was published in 2006, appears among the materials before the state habeas court.[47] This article fully supports the state habeas court's conclusion that Brewer's attorneys had an objectively reasonable basis for choosing not to impeach or otherwise attack Merillat's credibility: on cross-examination, they planned to use Merillat's expertise to help build their case supporting a negative answer to the future dangerousness special issue.

For the same reason, attempting to impeach Merillat based upon the level of compensation he received for testifying at Brewer's trial would have been counter-productive for Brewer's trial counsel. Moreover, Brewer's efforts to do so during his second state habeas corpus proceeding failed miserably. Merillat testified accurately at Brewer's trial that he charged a flat rate of $495 a day for each day he was required to be out of the office in order to testify at trials as a prosecution expert, in part to compensate him for his lost vacation days (23.28 R.R. 132-33). During his second

[47] A copy of Merillat's article "The Question of Future Dangerousness of Capital Defendants," which appeared in the September 2006 edition of the *Texas Bar Journal*, appears in ECF no. 126-13, at 94-97, and was before the state habeas court when it issued its findings and conclusions in Brewer's second state habeas corpus proceeding.

state habeas proceeding, Brewer did not challenge the flat rate figure Merillat quoted in his trial testimony as factually inaccurate. Instead, Brewer attacked Merillat's credibility by arguing that Merillat's level of compensation made the $495 figure wholly excessive if that figure were intended *solely* to compensate Merillat for his lost vacation days. At no point during Brewer's trial, however, did Merillat testify that compensating him for his lost vacation days was the *only* factor that went into calculating his $495 flat rate fee. If the flat rate Merillat *accurately* quoted during his trial testimony included no consideration whatsoever for his out-of-pocket travel expenses (*i.e.*, his mileage, food, and lodging expenses), then Merillat would be a rare expert witness indeed. Experts for whom federal habeas petitioners seek funding in this Court pursuant to 18 U.S.C. § 3599(g)(2) routinely include requests for such travel expenses when seeking expert funding.

In their testimony during Brewer's second state habeas corpus proceeding, Brewer's trial counsel testified their trial strategy was intended to do certain things, including: (1) establishing that, despite the opportunities for violence on death row, Brewer had a practically exemplary (and particularly non-violent) disciplinary record over nearly two decades of incarceration; (2) showing Dr. Coons had erroneously predicted during Brewer's first trial that Brewer would engage in violent actions and would even join a prison gang; and (3) avoiding having the jury get bogged down in an attempt to understand the complex TDCJ prison classification system and, instead, focusing the jury on something far more tangible and comprehensible, *i.e.*, Brewer's established record of non-violent behavior during his extended incarceration.[48] Thus, AuBuchon's criticisms

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[48] The testimony of Brewer's former trial counsel, attorney Anthony Odiorne, in Volume 2 of 4 of the Statement of Facts from the evidentiary hearing held August 20, 2013 in Brewer's Second State Habeas Corpus Proceeding, *i.e.*, WR-46,587-02, (henceforth "Second State Habeas Hearing", which appears at ECF no. 126-9), at 48-247. The testimony of Brewer's other 2009 trial counsel, attorney Edward Ray Keith, Jr. appears in volume 2 of 4 from Brewer's Second State Habeas Hearing, at 249-86; and in Volume 3 of 4 from Brewer's Second State Habeas Hearing (which is located at ECF no. 126-10), at 7-172.

Attorney Odiorne testified, in pertinent part, that: (1) the defense chose to have Brewer testify to show his

of the way Merillat and Bryant were questioned by Brewer's trial counsel ignore the reasonable trial strategy Brewer's trial counsel adopted. The things AuBuchon argues should have been addressed by Brewer's trial counsel in their questioning of Merillat and Bryant would have undermined the reasonable trial strategy adopted by Brewer's trial counsel.

Bryant was called by the prosecution to establish that: (1) Brewer's records indicated he had a suicide attempt in June 2007 that was attributed to his frustration with his court case; (2) Brewer received a major disciplinary violation in March 2000 for possession of marijuana, a charge to which he pleaded guilty and for which he received a 15-day cell restriction; and (3) despite his suicide attempt, Brewer's only mental health contacts during his stay on death row had been routine 90-day evaluations. (23/28 R.R. 90-113). On cross-examination, Brewer's trial counsel elicited testimony from Bryant that (1) Brewer had very few disciplinary violations while on death row, and (2) Brewer's classification records showed that when he was transferred back to County custody for retrial as to punishment, Brewer was classified as a Level 1 death row

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remorse for his offense and his good conduct in prison ever since, in part, because Brewer was the only available witness who could establish his remorse (Second State Habeas Hearing, Volume 2 of 4, at 70-71, 80-81); (2) there were no records of Brewer ever having been investigated or prosecuted by Merillat's special investigations unit in Walker County or any other agency with jurisdiction to conduct such an investigation (*Id.*, at 71, 79); (3) the defense chose not to have Brewer evaluated by a mental health expert because doing so would open Brewer up to being evaluated by a prosecution mental health expert in the event the defense chose to call its evaluating expert (*Id.*, at 98); (4) the defense strategy was to show there were opportunities for violence within the TDCJ but that Brewer had a non-violent record over an extended time period (*Id.*, at 84); (5) the defense presented evidence showing that Dr. Coons' 1991 predictions that Brewer would behave violently if incarcerated had proven to be erroneous (*Id.*, at 185-86).

Attorney Keith testified in part that: (1) the defense's strategy at trial was to show Brewer's conduct while in prison had been remorseful and non-violent (*Id.* at 278, 285); (2) the defense chose not to present its own mental health expert to make a prediction about Brewer's propensity for future violence because that would have turned the issue of future dangerousness into a battle of the experts and the defense wanted to the jury to focus on the reality that Brewer's record of non-violence was clearly established by the evidence – in short, they did not want the jury "to get lost in the science" (Second State Habeas Hearing, Volume 3 of 4, at 24-26, 33, 49, 51, 100); (3) instead, the defense chose to attack Dr. Coons' methodology and to argue that expert predictions of future dangerousness were inherently unreliable (*Id.*, at 27-31, 40, 46, 100, 116-17, 142-43); (4) the defense was well aware of Merillat's position that TDCJ was a violent place and made a strategic decision not to present an expert who would testify that violence could be easily controlled within the prison system (*Id.*, at 54-56); (5) the defense chose not to have Brewer evaluated by Dr. Edens because doing so could open the door to an evaluation by a prosecution mental health expert (*Id.*, at 99); and (6) the defense wanted to focus the jury's attention on Brewer's expressions of remorse and his non-violent conduct over 18 years on death row (*Id.*, at 124, 135-36).

inmate, which meant he had received no violations for 90 days prior to that date. (23/28 R.R. 113-25).

AuBuchon's critique of Captain Bryant's trial testimony is even more trivial than his criticisms of Merillat's testimony. For instance, in paragraph 8 of his affidavit, AuBuchon admits that Bryant did not make any misstatements when Bryant testified that Brewer would have to wait ten years before possibly upgrading from G-3 to G-2 level, but AuBuchon criticizes Bryant for failing to add that Brewer would never be eligible for a further upgrade to level G-1. The short answer to this criticism is that neither party asked Bryant to explain whether Brewer would ever be eligible for an upgrade to level G-1.[49]

In paragraph 9 of his affidavit, AuBuchon points out Bryant testified that TDCJ death row inmates had once been eligible to participate in a work program, but were no longer eligible to do so since TDCJ transferred its death row in 1999 from the Ellis I unit to the Polunsky Unit. AuBuchon criticizes Bryant, who admitted he had worked death row only at the Polunsky unit, for failing to explain that inmate participation in the then-defunct work program at the Ellis I unit had been voluntary. AuBuchon never explains why Bryant, who admitted he had not worked death row at the Ellis I unit, would have had personal knowledge of that aspect of a then-defunct TDCJ program.

In paragraph 10 of his affidavit, AuBuchon complains that when Bryant discussed

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[49] AuBuchon's criticism of Merillat's and Bryant's testimony at trial for their failure to volunteer information not specifically requested by the attorneys questioning them is more than problematic. For generations, in preparation for depositions, hearings, and trials alike, experienced lawyers have advised their witnesses prior to testifying to listen carefully to each question asked and to answer that question and *only* that question. As best this Court can tell from its review of their testimony at Brewer's retrial, both of these witnesses followed that sage bit of legal wisdom. Moreover, it is this Court's experience that witnesses who volunteer information not germane to the question asked are often confronted with a meritorious objection from opposing counsel that the witness's answer was "non-responsive" and an equally meritorious motion asking the court to strike that unresponsive portion of the witness's answer and to direct the jury to disregard same.

Brewer's suicide attempt, Bryant failed to mention that suicide attempts are not *per se* considered violations of TDCJ disciplinary rules. The short answer to this critique is that Bryant never suggested they were. It is clear from this Court's independent review of Bryant's trial testimony that neither party asked him if they were. In sum, AuBuchon's criticisms of Captain Bryant's trial testimony do not establish there was anything false, *i.e.*, factually inaccurate, or misleading about Bryant's trial testimony.

Finally, this Court again concludes, just as was the case with Merillat, it would have been objectively unreasonable for Brewer's trial counsel to attack Bryant's credibility by cross-examining Bryant in the manner suggested by AuBuchon when the defense planned to use Bryant to help establish that Brewer (1) had a non-violent disciplinary record over the 18 years Brewer had spent on death row, and (2) was classified as a level 1 inmate (*i.e.*, the least problematic classification) at the time Brewer left death row to return to County custody for his retrial. Choosing *not* to attack the credibility of an opposing party's expert or fact witness upon whom you intend to rely to establish your own case is an objectively reasonable legal strategy.

After independently reviewing the entirety of Merillat's and Bryant's trial testimony, this Court agrees with one portion of AuBuchon's state habeas affidavit – neither Merillat nor Bryant were asked to address the specifics of how the TDCJ's inmate classification would impact Brewer in the event Brewer received a life sentence. This Court also finds the only things Merillat definitively opined in that regard were that (1) upon receiving a life sentence, Brewer would enter the TDCJ's classification system as a G-3 inmate, and (2) thereafter, Brewer's housing and work assignments would depend primarily upon his classification rating, not on the fact he had been convicted of capital murder. (23/28 R.R. 157-61). In his affidavit, AuBuchon does not appear to disagree with either of these two assertions; nevertheless, he does attempt to muddy the water quite

a bit by suggesting a number of variables unmentioned by Bryant or Merillat that could potentially impact Brewer's classification status in later years. As explained above, the vast majority of Merillat's trial testimony was spent (1) narrating and authenticating a videotape recording showing the conditions under which death row inmates are housed at the TDCJ's Polunsky Unit, and (2) explaining that, in contrast to the highly restrictive conditions of confinement on death row, inmates in the general TDCJ inmate population endure much less restrictive conditions (23/28 R.R. 144-56). Again, AuBuchon does not controvert those two points.

The undersigned concludes, after an exhaustive review of the record from both of Brewer's trials, as well as his direct appeals, and his multiple state habeas corpus proceedings, the state habeas court's factual finding that there was nothing false or misleading about the trial testimony of Merillat or Bryant at Brewer's 2009 retrial is unassailable.

2. Lack of Materiality

For the same reasons, the alleged errors or purportedly misleading aspects of Merillat's and Bryant's trial testimony identified by Brewer and his own expert AuBuchon were not material to the outcome of Brewer's 2009 retrial on punishment. To reiterate, Merillat and Bryant were both called by the prosecution to establish very specific facts, unrelated to the details of the TDCJ's classification system or its possible impact upon Brewer if he received a life sentence. Brewer's defense counsel reasonably chose not to attack Merillat's or Bryant's credibility because they wanted to use those same two witnesses on cross-examination to establish facts that would benefit their attempt to gain a favorable jury verdict on the future dangerousness special issue. By and large, Brewer's defense team accomplished their goals: on cross-examination: Merillat admitted that there were opportunities for violence by TDCJ inmates, including on death row, and he could not recall anyone in his unit ever investigating Brewer for allegedly committing an act of violence

(23/28 R.R. 164-66); Bryant acknowledged on cross-examination that Brewer had very few disciplinary reports over his 18 years on death row and, at the time Brewer was sent back to state court for retrial, Brewer was classified as a level 1 inmate, the least troublesome of all death row inmates (23/28 R.R. 115-25).

Contrary to Brewer's arguments, the prosecution's evidence of Brewer's propensity for future violence involved very little input from either Merillat or Bryant. As explained at length and in detail in Section I.G.1. above, the prosecution presented testimony showing: (1) during his middle school years, Brewer was twice disciplined and sent to an alternative school, once for threatening another student with a knife and another time for fighting with another student; (2) in high school, Brewer angrily picked up and pushed his much smaller former girlfriend against a bank of lockers, resulting in her sustaining significant injuries to her back and spine (including three displaced vertebral discs) that required her to endure months of physical therapy; (3) in his late teens, Brewer broke up a fight between his biological parents by beating his father so badly Albert Brewer sustained a fractured skull and injuries to the lining of his brain that required surgical intervention – injuries for which he was forced to remain in the hospital for several weeks; (4) while working as the driver for a couple making a late night trip to purchase illegal narcotics, Brewer was arrested and pleaded guilty to illegal possession of a hunting knife; (5) the night of his capital offense, while smirking and giggling, Brewer told his friend Skee Callen that Laminack had begged for his life while Brewer fatally assaulted him; (6) after his arrest, Brewer repeated a similar description of his fatal assault on Laminack to a fellow jail inmate; (7) while being transported from the courthouse back to jail after a pretrial hearing prior to his original capital murder trial, Brewer shot the finger at a photo journalist (which photo was admitted into evidence at both trials as State Exhibit 202); and (8) while awaiting trial before his original trial, Brewer

threatened to assault another jail inmate.

At his 2009 retrial, by far the most compelling evidence regarding Brewer's propensity for future violence came from Brewer himself and his accomplice Nystrom. Both of these individuals testified at great length regarding the details of their fatal assault upon Laminack. They disagreed on many details. Nystrom described herself as initially playing a passive role in the assault, sitting and staring out the passenger window while Brewer assaulted Laminack - until it was time to secure Laminack's car keys. Brewer's account of the fatal assault (which clearly fit the physical evidence more logically than Nystrom's self-serving account) had Nystrom sitting directly adjacent to Laminack and holding Laminack's right arm while Brewer grabbed Laminack from behind and repeatedly stabbed and cut Laminack's neck.

Still, there were things on which they agreed. Neither Brewer nor Nystrom denied they were responsible for the lurid crime scene captured in numerous crime scene photographs admitted into evidence. Both Nystrom and Brewer admitted they fled the crime scene on foot despite the fact they had possession of Laminack's truck keys. Both testified their purpose in going out that evening was to secure a means of transportation, *i.e.*, to find a vehicle and take it – most likely by force. More significantly, the preeminent detail these two confessed killers agreed upon was that neither of them ever asked Laminack for his wallet or his keys until *after* Brewer had repeatedly stabbed Laminack in the neck. The ruthlessness with which Nystrom and Brewer dispatched and then abandoned Laminack to bleed to death was self-evident from the lurid nature of the crime scene.

Thus, there was compelling evidence of Brewer's propensity for future violence without any consideration whatsoever of the testimony of either Merillat or Bryant. The evidence clearly established that Brewer engaged in a pattern of escalating violence culminating in Laminack's

brutal murder. Nothing in Merillat's or Bryant's trial testimony on direct examination significantly added to or significantly detracted from that unassailable fact. In fact, when viewed objectively, on cross-examination both of these witnesses furnished testimony that was more helpful to Brewer on the future dangerousness special issue than to the prosecution.

As AuBuchon accurately points out in his affidavit, neither party asked Merillat or Bryant to delve into the intricacies of how the TDCJ classification system might apply to Brewer were he to receive a sentence of life imprisonment. The prosecution presented compelling evidence of Brewer's propensity for future violence separate and apart from the testimony of Merillat and Bryant. The most substantial of which was Brewer's own account of his and Nystrom's capital offense. Under these circumstances, the failure of Bryant and Merillat to volunteer their views on the intricacies of the TDCJ's classification system or to speculate on its possible impact on Brewer were he to receive a life sentence does not create a "reasonable likelihood" that the outcome of Brewer's 2009 retrial as to punishment would have been different had they done so.

3. No Showing the Prosecution "Knowingly" Used False or Misleading Testimony

Finally, as Respondent accurately points out, there was no evidence presented to the state habeas court showing that anything in Merillat's or Bryant's trial testimony or any other evidence then available should have alerted the prosecution that anything either of these two witnesses testified to at trial was either factually inaccurate or misleading. As explained above, Merillat and Bryant were called to testify as to specific matters of opinion and fact largely unrelated to the minutiae of the TDCJ's inmate classification system as it might apply to Brewer if he were to receive a sentence of life imprisonment. Also as explained above, the state habeas court reasonably concluded there was nothing factually inaccurate or misleading about their trial testimony.

Instead, Brewer contends that because both Merillat and Bryant are associated with the

prosecution and "members of the prosecution team," their knowledge of the alleged falsity of their own testimony should be attributable to the prosecution. (ECF no. 103, at 118). Not surprisingly, Brewer cites no legal authority in support of his attempt to make every prosecution expert witness a de facto member of the prosecution for purposes of *Brady* and *Giglio/Napue* analysis.[50] On the contrary, it appears well-settled that defense counsel are ordinarily permitted to rely upon the accuracy and efficacy of the objectively reasonable opinions and other information conveyed to them by their own experts. *See Murphy v. Davis*, 901 F.3d 578, 592-93 (5th Cir. 2018) (absent a red flag, it is unreasonable to expect counsel to second-guess their own expert's testimony or objectively reasonable evaluations and opinions); *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) (holding the same). The same principle should apply to experts retained by the prosecution.

Brewer argues that careful examination of the TDCJ's classification rules should have alerted the prosecution to potentially ambiguous or misleading aspects of Merillat's or Bryant's testimony. As explained above, however, the prosecution did not call Bryant or Merillat to wax eloquent on the possible ramifications of various hypothetical applications of the TDCJ classification system on Brewer's classification status (in the event he received a life sentence). Nor was there anything inherently suspect in either of Merillat's or Bryant's trial testimony that should have alerted the prosecution to a possible false or misleading aspect to their actual trial testimony. Under such circumstances, the undersigned concludes after de novo review that Brewer has wholly failed to establish that the prosecution *knowingly* used any false or misleading testimony at Brewer's 2009 retrial to secure Brewer's death sentence.

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[50] Brewer's citation to the Supreme court's opinion in *Pennsylvania v. Ritchie*, 480 U.S. 39, 60-61 (1987), is wholly inapposite to his legal argument. The portion of the Supreme Court opinion to which Brewer cites addresses the propriety of an order directing a state prosecutor to tender to a court for *in camera* inspection records of a child protective services agency relating to accusations of child abuse. There is no dispute that states have a significant interest in maintaining the confidentiality of their records relating to accusations of child abuse. Thus, the subject addressed by the Supreme Court in *Ritchie* simply has no application to Brewer's *Giglio/Napue* claim in this case.

E. Conclusions

The state habeas court's denial on the merits of Brewer's *Giglio/Napue* claim addressing the testimony of Merillat and Bryant during Brewer's second state habeas corpus proceeding was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's trial and second state habeas corpus proceedings. This Court therefore denies relief on this claim.

IX. *GIGLIO/NAPUE* CLAIM AS TO LAMINACK'S AUTOPSY RESULTS

A. The Claim

In a portion of his second claim for federal habeas relief *i.e.*, federal claim 2A, Brewer argues his due process rights were violated when the state trial court admitted: (1) a transcript of the 1991 trial testimony of the medical examiner who conducted Laminack's autopsy, *i.e.*, Dr. Erdmann; (2) Dr. Erdmann's autopsy report on Laminack; and (3) the trial testimony of a different medical examiner, *i.e.*, Dr. Natarajian, whose testimony was based in part on Dr. Erdmann's autopsy report and 1991 trial testimony (ECF no. 103, 38-51). Basically, Brewer argues that, subsequent to his 1991 capital murder trial, it became public knowledge that Dr. Erdmann had engaged in criminal misconduct in several other cases, including falsifying autopsy reports and creating autopsy reports without actually conducting autopsies. Brewer does not, however, allege any specific facts or present any evidence showing that Dr. Erdmann falsified any identified aspect of Laminack's autopsy report or, in fact, failed to conduct Laminack's autopsy. Nor does Brewer identify any specific factual error in either Dr. Erdmann's autopsy report, Dr. Erdmann's 1991 trial testimony, or Dr. Natarajian's 2009 trial testimony regarding the cause of Laminack's death.

B. Lack of Exhaustion

As Respondent correctly points out, Brewer did not complain on direct appeal about either the admission of Dr. Erdmann's autopsy report or the admission of Dr. Natarajian's testimony at Brewer's 2009 retrial. Nor did Brewer bring a straight-forward *Giglio/Napue* claim in his second or third state habeas corpus proceedings. Instead, in claim 3A in his second state habeas corpus application, Brewer argued that his trial counsel rendered ineffective assistance by failing to: (1) challenge the admissibility of Dr. Erdmann's autopsy report; (2) challenge the admissibility of Dr. Erdmann's prior testimony; (3) utilize Dr. Erdmann's multiple criminal convictions to impeach the veracity of his autopsy report and 1991 trial testimony; and (4) present expert testimony impeaching Dr. Erdmann's autopsy report and 1991 trial testimony (Second State Habeas Application, at 171-215).

In its findings and conclusions in Brewer's second state habeas corpus proceeding, the state habeas trial court: (1) found the main reason Laminack's autopsy report was admitted into evidence at Brewer's 2009 retrial was to establish Laminack's cause of death, which was a guilt-innocence issue; (2) found Brewer's trial counsel objected when the prosecution re-tendered Laminack's autopsy report and Dr. Edrmann's 1991 trial testimony, both of which had been admitted into evidence in 1991, and the state trial court ruled both the report and prior testimony admissible; (3) found Brewer's trial counsel chose as a matter of trial strategy not to contest the cause of Laminack's death because it was a guilt-innocence issue and the defense's reasonable strategy in 2009 was to have Brewer take responsibility for his actions by admitting his role in Laminack's murder; (4) found Brewer's 2009 trial counsel were not ineffective for failing to challenge Dr. Erdmann's reputation for veracity and competence or for failing to challenge the cause of Laminack's death; (5) found Laminack's autopsy report was not subject to a hearsay

objection; (6) found Brewer's trial counsel did adequately challenge the admission of Laminack's autopsy report and Dr. Erdmann's prior testimony and did object to Dr. Natarajian's testimony because it was based in part on Dr. Erdmann's work; (7) found there was nothing ineffective in the failure of Brewer's 2009 trial counsel to call an expert medical examiner to impeach Dr. Erdmann's findings or Dr. Natarajian's testimony; (8) concluded that admission of an expert's opinion based upon his review of an autopsy report prepared by a non-testifying expert does not violate Confrontation Clause principles; and (9) concluded Brewer's 2009 trial counsel did not render ineffective assistance in connection with the admission of Dr. Edrmann's autopsy report on Laminack, the admission of Dr. Erdmann's prior testimony, or the admission of Dr. Natarajian's testimony. (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 41-45 & 81-82).

The Texas Court of Criminal Appeals adopted all of the foregoing findings and conclusions but expressly rejected conclusions by the state habeas trial court addressing (1) the application of hearsay principles to autopsy reports, and (2) the propriety of a criminal defendant raising claims on direct appeal or in state habeas arising from the guilt-innocence phase of his trial following a retrial as to punishment only. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

C. *De Novo* Review

The federal constitutional principles governing this *Giglio/Napue* claim are the same ones discussed in Sections VIII.C. and VIII.D above. It is unnecessary for this Court to determine whether Brewer has procedurally defaulted on this unexhausted *Giglio/Napue* claim because, as explained below, the undersigned concludes after de novo review that this claim lacks any arguable merit.

Succinctly, Brewer has failed to allege any specific facts, much less furnish any evidence,

showing either that: (1) there was anything factually inaccurate or misleading about either Laminack's autopsy report, Dr. Erdmann's 1991 trial testimony relating the cause of Laminack's demise (*i.e.*, multiple stab wounds to the neck and associated massive blood loss), or Dr. Natarajian's 2009 trial testimony regarding the cause of Laminack's death (which reached the same conclusions as Dr. Erdmann's autopsy report and 1991 trial testimony); (2) any alleged error in any of the foregoing materials satisfies the materiality requirement of this *Giglio/Napue* analysis; or (3) the prosecution *knowingly* used any identified false or misleading testimony in 2009 to secure Brewer's death sentence.

1. Nothing Factually Inaccurate or Misleading

Despite the strong arguments directed toward Dr. Erdmann in Brewer's pleadings, after de novo review, this Court finds there is no fact-specific allegation or any evidence currently before this Court establishing either that: (1) Dr. Erdmann failed to actually conduct Laminack's autopsy in the manner set forth in Laminack's autopsy report; (2) Dr. Erdmann falsified any aspect of Laminack's autopsy report; (3) there is any material misstatement of fact or opinion contained in Laminack's autopsy report; (4) Dr. Erdmann's conclusions regarding Laminack's cause of death given during his testimony at Brewer's 1991 trial were in any manner factually inaccurate or misleading; (5) there was anything factually inaccurate or misleading about Dr. Natarajian's 2009 trial testimony regarding the cause of Laminack's death; or (6) the prosecution was aware of (or reasonably on notice of any facts showing) anything false or misleading was contained in either Laminack's autopsy report, Dr. Erdmann's 1991 testimony regarding cause of death, or Dr. Natarajian's 2009 testimony regarding cause of death. Simply put, Brewer has failed to allege any facts, much less provide any evidence, showing Laminack died from any cause other than multiple stab wounds to the neck resulting in massive blood loss.

At best, the affidavits and other records Brewer furnished to the state habeas court and this Court establish merely that (1) Dr. Erdmann committed multiple criminal acts of misconduct in connection with *other autopsies* unrelated to Laminack's and was successfully prosecuted for those criminal offenses, and (2) Brewer's new medical experts take issue with some of the word choices employed by Dr. Erdmann in Laminack's autopsy report but offer absolutely no specific allegations suggesting the cause of Laminack's death was anything other than multiple stab wounds to the neck resulting in massive blood loss, *i.e.*, the same cause identified by both Dr. Erdmann and Dr. Natarajian. The crime scene and autopsy photographs admitted into evidence at both of Brewer's capital trials fully support the conclusion reached by Dr. Natarajian, *i.e.*, that Laminack suffered multiple stab wounds to the neck and died as a result of the associated massive blood loss. Brewer has failed to carry his burden of alleging and proving there was any false or misleading evidence regarding the cause of Laminack's death admitted during his 2009 retrial.

2. No Materiality

As explained in Section I.A. above, once Brewer completed his testimony at his 2009 retrial, the cause of Laminack's death was simply no longer in any doubt. Brewer admitted in graphic detail how he and Nystrom attacked Laminack and Brewer delivered multiple blows to Laminack's head and neck with the butterfly knife police found at the crime scene. Following the admission of Brewer's 2009 testimony, the testimony of Dr. Natarajian, the 1991 testimony of Dr. Erdmann, and Laminack's autopsy report all became immaterial to any issue before the jury. Furthermore, the crime scene photographs and video, as well as the autopsy photographs admitted into evidence and the forensic expert testimony regarding blood spatter admitted into evidence, fully supported Brewer's account of the crime, as opposed to Nystrom's self-serving account. Finally, neither Nystrom nor Brewer testified that Nystrom delivered any blows to Laminack using

the butterfly knife. Under these circumstances, the undersigned concludes after de novo review that Brewer's conclusory complaints about alleged errors in Dr. Natarajian's 2009 testimony, Dr. Erdmann's 1991 testimony, and Laminack's autopsy report fail to satisfy the materiality prong of *Giglio/Napue* analysis. There is simply no reasonable likelihood that, but for the admission of Dr. Natarajian's 2009 testimony, the transcript of Dr. Erdmann's 1991 testimony, and Laminack's autopsy report, the outcome of Brewer's 2009 trial would have been any different.

3. No Knowing Use of Perjured or Misleading Testimony

Brewer alleges no specific facts nor presents any evidence showing the prosecution knowingly used false, perjured, or misleading evidence to secure Brewer's 2009 death sentence. The fact Dr. Erdmann may have committed acts of fraud in connection with other autopsies does not establish that he did so in Laminack's case. Furthermore, the crime scene photographs, the crime scene video, the autopsy photographs, and, most tellingly, Brewer's own 2009 trial testimony fully support the conclusion that Laminack died as a result of massive blood loss caused by multiple stab wounds to the neck. Brewer has neither alleged any specific facts nor presented any evidence suggesting the prosecution was on notice in 2009 that there was anything factually inaccurate or misleading in either (1) Laminack's autopsy report, (2) Dr. Erdmann's 1991 trial testimony regarding the cause of Laminack's death, or (3) Dr. Natarajian's 2009 testimony regarding the cause of Laminack's death. If the prosecution had possessed any doubts as to the cause of Laminack's death, they were most assuredly resolved by Brewer's trial testimony.

D. Conclusions

After de novo review, the undersigned concludes Brewer's federal claim 2A lacks any arguable merit. This claim does not warrant federal habeas relief.

X. *BRADY* CLAIM AS TO NYSTROM'S HOSPITAL RECORDS

A. The Claim

In his seventh claim for federal habeas relief, Brewer argues that his rights under the Supreme Court's holding in *Brady v. Maryland*, 373 U.S. 83, 97 (1963), were violated by virtue of the state trial court's refusal to turn over to Brewer's trial counsel copies of Kristie Nystrom's medical records from the Big Spring Hospital, *i.e.*, the facility where she and Brewer both lived briefly several months prior to their murder of Laminack (ECF no. 103, 110-13).

B. State Court Disposition

The records custodian for the Big Spring Hospital, where Brewer and Nystrom met prior to Laminack's murder, appeared pursuant to a subpoena at the punishment phase of Brewer's 1991 capital murder trial. Grace Martinez was called to testify by the defense and identified documents she had brought with her as including Brewer's and Nystrom's Big Spring medical records. (18/21 R.R. 745). The state trial court ordered the records turned over to Brewer's defense counsel but, when the prosecution requested *in camera* review of the records, the state trial judge granted that request. (18/21 R.R. 746). The trial court then ruled Nystrom's records were not relevant. (*Id.*). Martinez did, however, turn over Brewer's Big Spring medical records to his defense counsel, which stated they were not offering those records for admission. (18/21 R.R. 748, 751).

Prior to Nystrom being called to testify at Brewer's 2009 retrial, the following exchanges took place:

> MR. KEITH: It's our understanding Ms. Nystrom is coming next. And there are records of hers – you may have to help me – there are records of her from the Big Spring Hospital, Your Honor. It is our understanding that they are here. In fact, Mr. Odiorne in looking at the exhibits, picked them up. Realized what they were, put them back down, because it's our understanding that they are under seal. And so she is now testifying, and we would like to be able to look at those records before cross of her.
> THE COURT: Yeah, I can't imagine not.

MR. FARREN: Well, Your Honor, the – the Defense made the same request at the first trial. The Prosecution's response – well, I think the Defense and Prosecution both recognized that those were covered by the Privacy Act and she had not released those records.
THE COURT: Okay.
MR. FARREN: The clerk that came here from Big Spring wanted the Court to order her to release these records, otherwise she was not going to do so, because she believed she needed protection. Judge – Judge Gleason listened to arguments of both Prosecution and Defense and agreed to review her records in chambers and determine whether there was sufficient relevancy to override the Privacy Act protection. He did so on the record stating he did not believe there was sufficient relevancy to do so.

They then went into the records of Mr. Brewer who, of course, would not oppose his counsel having those records. He then ordered the clerk a second time – Judge Gleason ordered the clerk a second time to release Mr. Brewer's records. And it was at that point that Mr. Daffern said he didn't want to introduce them to the jury. He just wanted them introduced into the record for appellate purposes because he believed there were plenary issues in those record [sic].

And so what the record reflects up to this point is, an attempt by the Defense to introduce – to get to Ms. Nystrom's records, which was denied on the grounds that the judge saw no relevancy after reviewing them in camera. He then released Mr. Brewer's records to the Defense to use as they saw fit. And that's where – that's where it was in the first trial.
THE COURT: Do you-all have Mr. Brewer's records?
MR. KEITH: Yes.
MR. ODIORNE: Yes, Your Honor.
THE COURT: You have those records that Judge Gleason reviewed and that were – and that the custodian of records brought up here – from Big Spring brought up here in 1991?
MR. KEITH: I think we have – we don't have the exact ones, but I think we have those records, Judge.
THE COURT: Okay.
MR. ODIORNE: We have ones from Big Springs [sic], but not necessarily those particular ones.
THE COURT: This is a corollary. Are there any records here that you know of that you don't have of Mr. Brewer?
MR. KEITH: Not that I am aware of, Judge.
THE COURT: Okay. You would like the records of Ms. Nystrom?
MR. ODIORNE: Your Honor, that's correct. And in the first trial, Ms. Nystrom did not testify. So therefore there would be much less of a need of relevance on that if she is not testifying.
MR. KEITH: She exercised her 5th, Your Honor.
MR. FARREN: That's correct, Your Honor. She was called in the courtroom the first trial. Her attorney, Mr. Seldon Hale, was present. She claimed the 5th amendment on two or three questions. Was then asked, is it your intention to claim the 5th amendment on each question? She said, yes. And then they wrapped that

up, so she did not testify.
THE COURT: Okay. Let me have – somebody hand me Ms. Nystrom's records. I'm going to review them.
MR. FARREN: Yes, sir.
THE COURT: In view of the fact that she didn't testify, Judge Gleason never really had to reach that question.
MR. FARREN: True, Your Honor. He simply announced that he didn't see relevancy having reviewed them, and that's all I know.
THE COURT: I'm going to keep that in mind. I'm going to look at them. We're going to get started, and I'll make a decision before you begin your cross.
MR. KEITH: Yes, sir.
MR. ODIORNE: Thank you, Your Honor.
THE COURT: Is that okay?
MR. FARREN: That's fine with us, Your Honor.

(22/28 R.R. 160-63).

Prosecution witness Nystrom's testimony on direct at Brewer's 2009 retrial is summarized in detail in Section I.G.1. above. (22/28 R.R. 168-225). After a brief recess, the trial resumed outside the presence of the jury with the following exchanges taking place:

THE COURT: Everybody be seated. I reviewed some of these records. I don't see anything in these records that – that's helpful or relevant to you-all.
MR. FARREN: And, your Honor, out of an abundance of caution, may I inquire of Ms. Nystrom out of the presence of the jury if she wants to – if she wants to release them. I just want her to be aware she doesn't have to.
THE COURT: That's probably appropriate. Let me ask her.
MR. FARREN: Yes, sir.
THE COURT: Ms. Nystrom, in the envelope are your records from the Big Spring State Hospital in 1990. You understand?
THE WITNESS: Yes, sir.
THE COURT: There are medical notes and they're about a half-inch thick. You were there about a month. The – the Defense has requested that they be allowed to review them. Do you wish to give your permission to the Defense team to review these records?
THE WITNESS: No.
THE COURT: Okay. Then having reviewed them in camera and finding no relevance to them – or very little that's even remotely helpful and without her permission, I'm going to leave them sealed.
We'll take a break. Ten till 3:00. Now y'all can have her. Have her back at ten till 3:00, please.
(Recess)
(Open court, defendant present, no jury)
THE COURT: Okay.

> MR. KEITH: Your Honor, at this point the Defense would request a longer recess than the 15 minutes we've had. Your Honor, I base that request upon the fact that we have prepared and relied in this case upon the Court's previous order concerning the parole issue. And at this point, I'm asking the Court for more time to make a decision on what I'm going to do in terms of cross-examining this witness, and I need longer than 15 minutes.
> THE COURT: How long do you need?
> MR. KEITH: Your honor – my request, Judge is that we adjourn at this point. Alternatively, Judge, any – you know, as long as the Court will give me, Your Honor.
> THE COURT: And by adjourn, do you mean leave for the night?
> MR. KEITH: That is my – that is –
> THE COURT: I got you. Okay.
> MR. FARREN: If it is of any assistance to the Court, Your Honor, if the Court entertains that request, we have a witness we flew here from Florida. We would like to go ahead and put that witness on this afternoon if – if the Court decides to do that. We have four witnesses tomorrow, two will be fairly brief, two fairly long. If you delay the cross until tomorrow, I certainly think we would still finish easily tomorrow, before the close of day around 5:00. But I would like to get this witness from Florida on to make sure we can get him back to Naples on time.
> THE COURT: Can that witness be done fairly quickly?
> MR. FARREN: Oh, Mosher? Oh, he's a half hour, maybe, Your Honor.
> THE COURT: Okay, let's do that.
> Would you step down, Ms. Nystrom. And you can take her back to the RCSO Jail, and we'll need her in the morning. Thank you.
> Will that give you enough time?
> MR. KEITH: Yes. Thank you, Your Honor.

(22/28 R.R. 225-28).

The following day, August 12, 2009, the prosecution continued presenting its witnesses. The prosecution rested at the commencement of proceedings the day after that, *i.e.*, on August 13, 2009. (24/28 R.R. 8). Brewer's trial counsel presented the defense's witnesses but rested without asking that Nystrom be brought to the courthouse for cross-examination.

Brewer did not complain about his request for access to Nystrom's hospital records being denied on direct appeal. He did not include any such complaint in his second state habeas corpus application. In fact, Brewer did not raise any claim relating to Nystrom's medical records until he included a claim that the state trial court had improperly denied his request for access to Nystrom's

records, along with a related *Brady* claim, in his second claim for relief in his third state habeas corpus proceeding (Third State Habeas Application, ECF 127-1 at 44-48). The Texas Court of Criminal Appeals summarily dismissed Brewer's third state habeas corpus application, citing state writ-abuse principles. (ECF 127-2); *Ex parte Brewer*, WR-46,587-03, 2019 WL 5420444, *1.

C. Clearly Established Federal Law

"'[T]he suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.'" *Banks v. Dretke*, 540 U.S. 668, 691 (2004) (quoting *Brady*, 373 U.S. at 87). The Supreme Court has consistently held the prosecution's duty to disclose evidence material to either guilt or punishment applies even when there has been no request by the accused. *Banks*, 540 U.S. at 690; *Strickler v. Greene*, 527 U.S. 263, 280 (1999); *United States v. Agurs*, 427 U.S. 97, 107 (1976). This duty also applies to impeachment evidence. *Strickler*, 527 U.S. at 280; *United States v. Bagley*, 473 U.S. 667, 676 & 685, (1985). The rule in *Brady* encompasses evidence known only to police investigators and not personally known by the prosecutor. *Strickler*, 527 U.S. at 280-81; *Kyles v. Whitley*, 514 U.S. 419, 438 (1995). "'[T]he individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in this case, including the police.'" *Strickler*, 527 U.S. at 281 (quoting *Kyles*, 514 U.S. at 437).

Under clearly established Supreme Court precedent, there are three elements to a *Brady* claim: (1) the evidence must be favorable to the accused, either because it is exculpatory or because it is impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be "material," *i.e.*, prejudice must have ensued from its non-disclosure. *Banks*, 540 U.S. at 691; *Strickler*, 527 U.S. at 281-82. Evidence is "material" under

Brady where there exists a "reasonable probability" that had the evidence been disclosed, the result at trial would have been different. *Smith v. Cain*, 565 U.S. 73, 75 (2012); *Cone v. Bell*, 556 U.S. 449, 469-70 (2009); *Banks*, 540 U.S. at 698-99. A reasonable probability does not mean that the defendant would more likely than not have received a different verdict with the evidence, only that the likelihood of a different result is great enough to undermine confidence in the outcome of the trial. *Smith*, 565 U.S. at 75; *Kyles*, 514 U.S. at 434.

The Supreme Court has emphasized four aspects of the *Brady* materiality inquiry. First, a showing of materiality does *not* require demonstration by a preponderance that disclosure of the suppressed evidence would have resulted in the defendant's acquittal. *See Bagley*, 473 U.S. at 682 (expressly adopting the "prejudice" prong of the *Strickland* analysis of ineffective assistance claims as the appropriate standard for determining "materiality" under *Brady*). Second, the materiality standard is *not* a sufficiency of the evidence test. *Kyles*, 514 U.S. at 434-35. Third, once materiality is established, harmless error analysis has no application. *Id.* at 435-36. Finally, materiality must be assessed collectively, not item by item. *Id.* at 436-37.

D. *De Novo* Review

It is unnecessary for this Court to determine whether Brewer procedurally defaulted on his *Brady* claim relating to Nystrom's medical records because, as explained below, the undersigned concludes after de novo review this claim lacks arguable merit.[51]

1. No Prosecutorial Suppression of Evidence

As explained at length in Section X.B. above, this is not a case in which the prosecution withheld information beneficial to the defense from the defendant's trial counsel. Brewer's 2009

[51] Copies of Nystrom's Big Spring Hospital medical records appear as an exhibit to Brewer's third state habeas corpus application, specifically in ECF nos. 127-13, 127-14, and 127-15.

trial counsel were well aware of the existence of Nystrom's medical records from the Big Spring Hospital. It was the state trial court's evidentiary ruling that the records in question could not be released to Brewer's counsel without Nystrom's consent (and Nystrom's refusal to grant such consent) that resulted in the denial of access, not any active or even negligent concealment or withholding on the part of the prosecution.

Brewer's naked assertion, bereft of any citation to applicable state law, that the state trial court erroneously applied state evidentiary rules and state substantive law in denying his trial counsel's request for access to Nystrom's medical records does not furnish a basis for federal habeas corpus relief. A federal court may grant habeas relief based on an erroneous state court evidentiary ruling only if the ruling violates a specific federal constitutional right or is so egregious it renders the petitioner's trial fundamentally unfair. *Payne v. Tennessee*, 501 U.S. 808, 825 (1991); *Darden v. Wainwright*, 477 U.S. 168, 179-83 (1986); *Wood v. Quarterman*, 503 F.3d 408, 414 (5th Cir. 2007); *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005). Thus, the question before this Court is not whether the state trial court properly applied state evidentiary rules but, rather, whether Brewer's federal constitutional rights were violated by the state trial court's rulings on evidentiary matters. *See Bigby v. Dretke*, 402 F.3d 551, 563 (5th Cir. 2005) (holding federal habeas review of a state court's evidentiary ruling focuses exclusively on whether the ruling violated the federal Constitution).

> Due process is implicated only for rulings "of such a magnitude" or "so egregious" that they "render the trial fundamentally unfair." It offers no authority to federal habeas courts to review the mine run of evidentiary rulings of state trial courts. Relief will be warranted only when the challenged evidence "played a crucial, critical, and highly significant role in the trial."
>
> The due process inquiry must consider the significance of the challenged evidence "in the context of the entire trial." We have held that the Due Process Clause does not afford relief where the challenged evidence was not the principal focus at trial and the errors were not "'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" This is a high hurdle, even without

AEDPA's added level of deference.

Gonzales v. Thaler, 643 F.3d 425, 430-31 (5th Cir. 2011) (footnotes omitted).

Brewer cites no legal authority establishing that the state trial court's application of federal and state privacy statutes[52] and state evidentiary rules to Nystrom's medical records rendered Brewer's 2009 trial fundamentally unfair. For the reasons discussed below, denial of access to Nystrom's 18-year-old medical records to Brewer's trial counsel did not render Brewer's 2009 trial fundamentally unfair.

As explained in Section I.G.1. above, the thrust of Nystrom's 2009 testimony was a recitation of how she and Brewer approached Laminack and then murdered him. Nystrom attempted to put a spin on her account that suggested her role in the capital offense was much less significant than Brewer's. As explained in Section I.G.2. above, however, Brewer, gave a detailed account of the murder that was far more consistent with the physical evidence than Nystrom's and that argued Nystrom was an active and aggressive participation in Laminack's murder, including Brewer's testimony that Nystrom sat directly adjacent to Laminack and held his right arm while Brewer grabbed him from behind and stabbed him in the neck. The jury saw all of the forensic evidence, as well as the demeanor of the two eyewitnesses to the offense firsthand. The jury was more than capable of evaluating their relative credibility. The key fact is that Brewer candidly admitted his role in Laminack's murder.

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[52] For instance, Brewer makes no effort to discuss the applicability, if any, of the Health Insurance Portability and Accountability Act ("HIPAA") (29 U.S.C. §§ 1181 *et seq.* and 42 U.S.C. § 1320d-1 - § 1320d-9), or the Texas Medical Records Privacy Act ("TMRPA") (TEX. HEALTH & SAFETY CODE § 181.001 - § 181.207), to Nystrom's Big Spring Hospital medical records.

2. Nystrom's Medical Records were Not Beneficial to the Defense

The prosecution called Nystrom in 2009 to establish the circumstances of Laminack's murder. At that point in Brewer's retrial, it was far from clear whether he would testify. While Nystrom's testimony and Brewer's testimony differed in numerous details (such as which one of them obtained Laminack's truck keys from the ignition), they agreed on the most salient facts. They both testified that on the night in question: (1) they plotted to find a vehicle and were prepared to use force, if necessary, to secure a vehicle; (2) they made an attempt to get a woman to give them a ride, but the woman drove away before they could get inside her vehicle; (3) Laminack agreed to give them a ride to the Salvation Army; (4) after Laminack drove them only a short distance, Brewer grabbed and assaulted Laminack with a knife—the same knife left at the crime scene; and (5) they left the scene with Laminack's wallet, which contained about $140 in cash.

Both Brewer and Nystrom left the Big Spring Hospital several months before the murder of Laminack. There is absolutely nothing in Nystrom's Big Spring Hospital medical records that addresses the facts or circumstances of her and Brewer's capital offense. Nothing in those medical records suggests that she or Brewer were planning to commit such a horrific offense when they were residents of that medical facility seeking to obtain medical treatment for their respective substance abuse problems. Both Nystrom and Brewer candidly admitted during their 2009 testimony that they met while staying at the Big Spring Hospital and they were both seeking treatment for substance abuse problems while they were at that facility.

Nystrom's Big Spring Hospital records show that: (1) she was a patient at that facility from January 26 to February 20, 1990; (2) she received a variety of medications and was tested for a variety of ailments, both physiological and psychiatric in nature; (3) she had a family, marital, and social history consistent with the histories of individuals who develop substance abuse issues; (4)

her medical history was relatively unremarkable; (5) she entered the facility seeking treatment for alcohol and substance abuse problems; (6) shortly after her admission, she was described in her records as experiencing "labile mood swings," "acting out," and "exhibiting unstable behavior"; (8) she was diagnosed with borderline personality disorder; and (8) less than a month later, however, after receiving considerable medical treatment, she was discharged with a staff conclusion that she no longer required hospitalization and staff notes indicating she had articulated plans for continuing to avoid alcohol and narcotics abuse.

Brewer argues that access to Nystrom's Big Spring Hospital medical records would have allowed him to "impeach" her based upon the diagnosis of borderline personality disorder and findings that, at an early point in her stay at that medical facility, Nystrom "acted out," exhibited "labile mood swings," and demonstrated "unstable behavior." Brewer fails to explain how presenting the jury with evidence showing the Big Spring Hospital staff made such observations of Nystrom in January and February of 1990, near the beginning of her stay at that facility, would have proven helpful to the jury in evaluating Nystrom's credibility in 2009, after she had spent almost two decades in the custody of the TDCJ.

Insofar as Brewer now argues that he wanted to "impeach" Nystrom using her Big Spring Hospital medical records, the short answer is that Nystrom offered virtually no testimony in 2009 about her stay at that facility that could have been impeached through the use of the records in question. She and Brewer both admitted they met while they were patients at that facility. They both admitted they went to that facility to seek treatment for their substance abuse problems. Nothing in Nystrom's medical records in question refuted or even addressed her 2009 testimony regarding the circumstances of her and Brewer's murder of Laminack.

3. No Materiality

For reasons similar to those discussed at length in Section IX.C.2. above, there is no likelihood that, but for the state trial court's denial of access to defense counsel of Nystrom's medical records, the outcome of Brewer's 2009 retrial would have been any different. Brewer's own testimony established without any doubt that he fatally stabbed Laminack while Nystrom held Laminack's right arm. The physical evidence fully supported Brewer's account of that offense. Both Nystrom and Brewer described their plan to secure a vehicle on the night in question by employing force if necessary. The minor details over which Nystrom and Brewer disagreed in their respective accounts of the murder were irrelevant and immaterial to the outcome of Brewer's 2009 trial. It simply did not matter which one of them removed Laminack's keys from the ignition of his truck after Laminack was bleeding so profusely he was unable to do so. At no point in their trial testimony did either Nystrom or Brewer assert that Nystrom stabbed or cut Laminack's neck. It was undisputed that Laminack's cause of death was multiple stab wounds to the neck. In sum, Brewer's trial testimony rendered Nystrom's testimony immaterial to the issues before the jury at Brewer's 2009 retrial.

Brewer's 2009 trial counsel chose not to challenge the prosecution's theory of how Laminack's murder took place. In fact, Brewer himself furnished testimony at the 2009 retrial that was far more supportive of the prosecution's theory of the murder based on the forensic evidence than did Nystrom's testimony. Thus, even if Brewer's 2009 trial counsel had figured out a way to impeach Nystrom's testimony, there is no likelihood that such impeachment would have had any impact whatsoever on the outcome of Brewer's retrial.

In 1991, Brewer's trial counsel attempted to cast blame for Laminack's murder on Nystrom and to paint Brewer as the victim of Nystrom's malignant leadership. That effort failed.

In 2009, Brewer's defense team was confronted with a 39-year-old defendant whom they reasonably believed it would be difficult to convince a jury to imagine as an impressionable teenager. Brewer's 2009 trial counsel reasonably chose, instead, to have Brewer take the stand and (1) candidly admit his guilt, (2) express his sincere remorse and contrition for what he had done, (3) express empathy for the harm he had done to Laminack and his family, and (4) emphasize Brewer's subsequent and lengthy history of non-violent behavior while in the custody of the TDCJ and state jails. Under such circumstances, there is no likelihood that attacking Nystrom's credibility through the use of her 1990 medical records would have resulted in a different outcome for Brewer's 2009 trial. Such an attack would have been, at best, irrelevant to the arguments Brewer's trial counsel were attempting to make in 2009. Such an attack on Nystrom could also have undermined those very arguments by offering the prosecution the opportunity to counter with its own argument that Brewer's attacks on Nystrom's credibility reflected Brewer's lack of sincere remorse and contrition for his offense. In fact, Brewer's 2009 counsel ultimately chose not to cross-examine Nystrom at all. Brewer does not allege any specific facts showing what, if any, helpful information his trial counsel could have obtained from Nystrom on cross-examination.

In sum, this Court concludes after de novo review that there is no likelihood using her 1990 medical records to attack Nystrom's credibility would have resulted in a different outcome at Brewer's 2009 retrial. Doing so would not have realistically aided Brewer's trial counsel in obtaining favorable answers to either the deliberateness, future dangerousness, or mitigation special issues. Brewer's own testimony rendered Nystrom's testimony largely irrelevant and immaterial to the special issues properly before the jury.

E. Conclusion

After de novo review, this Court concludes Brewer's federal claim 7 lacks any arguable

merit. This claim does not warrant federal habeas relief.

XI. *BRADY* CLAIM AS TO DR. ERDMANN'S PROSECUTION

A. The Claim

In his Section A of his second federal claim, Brewer complains, in part, that the prosecution withheld from the defense information relating to the criminal prosecution of Dr. Erdmann. (ECF no. 103, 38-51). Brewer did not fairly present the state court with a *Brady* claim addressing evidence of Dr. Erdmann's wrongdoing on direct appeal or in any of his state habeas corpus proceedings. Out of an abundance of caution, this Court construes Brewer's arguments in support of this portion of his second federal claim as an attempt to bring an unexhausted *Brady* claim.

B. *De Novo* Review

Insofar as Brewer's second claim for federal habeas relief can be construed as asserting a claim premised on *Brady*, that claim lacks arguable merit. By 2009, the criminal prosecution of Dr. Erdmann for his falsification of autopsy records was a matter of public knowledge, as is shown by the numerous attachments and exhibits accompanying Brewer's second state habeas corpus application.[53] The state is under no responsibility to direct the defense toward potentially beneficial information or evidence that is either known to the defendant or that could be discovered through the exercise of due diligence. *United States v. Vasquez-Hernandez*, 924 F.3d 164, 171 (5th Cir. 2019); *United States v. Sipe*, 388 F.3d 471, 478 (5th Cir. 2004); *Rector v. Johnson*, 120 F.3d 551, 558-59 (5th Cir. 1997). Nor is the state obligated to furnish evidence that is available from other sources. *Rector*, 120 F.3d at 559. Brewer had failed to allege any specific facts showing the

[53] More specifically, exhibits 18, 19, 20, and 24 to Brewer's second state habeas corpus application consist of (1) a New York Times article dated in 1992; (2) a Dallas Morning News article published in November 1992; (3) an opinion issued by this Court in March 1993 in a case styled *Farmer v. Sherrod*; and (4) an April 1992 affidavit of Pat Kelly. All discuss Dr. Erdmann's misconduct. Those documents appear in ECF no. 126-13 at 116-20, 122-27, 129-36, and 150-51, respectively, of 417.

prosecution suppressed or withheld any relevant or potentially beneficial information regarding Dr. Erdmann's prosecution from Brewer's 2009 trial counsel.

Furthermore, for the reasons discussed at length in Section IX.C. above, the failure of the prosecution to furnish Brewer's 2009 trial counsel with information regarding Dr. Erdmann's misconduct and criminal prosecution did not violate the rule in *Brady* because any such materials were not material to the outcome of Brewer's retrial. As explained above, there was no legitimate debate in 2009 as to the cause of Laminack's death. Brewer presented the state trial court and the state habeas court (and has presented this Court) with no evidence showing that Dr. Erdmann's 1991 trial testimony or Dr. Natarajian's 2009 trial testimony regarding the cause of Laminack's death was in any way factually inaccurate. In 2009, Brewer stood convicted of capital murder. Brewer's own 2009 trial testimony (identifying himself as the only person who stabbed Laminack in the neck) rendered any argument as to the cause of Laminack's death immaterial to the issues properly before the jury at that trial, which was a purely punishment phase proceeding.

C. Conclusion

Insofar as Section A of Brewer's second claim for federal habeas relief can be construed as asserting a *Brady* claim, after de novo review, this Court concludes that claim is without arguable merit and does not warrant federal habeas relief.

XII. INEFFECTIVE ASSISTANCE BY TRIAL COUNSEL

A. Overview of the Claims

In his first, second, fourth, fifth, sixth, and eighth federal claims, Brewer asserts a wide variety of complaints about the performance of his 2009 trial counsel. In his ninth claim, Brewer attempts to cumulate the prejudicial impact of those complaints into an independent ground for federal habeas relief. Basically, Brewer complains that his 2009 trial counsel rendered ineffective

assistance by failing to: (1) adequately challenge the admission of Dr. Coons' opinion testimony as to future dangerousness and failing to rebut same (ECF no. 103, 11-37 [claim 1]); (2) adequately challenge the admission of Dr. Erdmann's 1991 trial testimony and failing to rebut same (ECF no. 103, 51-59 [claim 2B]); (3) adequately investigate Brewer's history of adolescent violence and present evidence rebutting same, as well as evidence showing Brewer had never been investigated for violent misconduct while incarcerated (ECF no. 103, 64-78 [claim 4]); (4) adequately investigate Brewer's background and present all available mitigating evidence [ECF no. 103, 79-108 [claim 5]); (5) investigate, impeach prosecution witness Skee Callen, and present evidence showing Nystrom had a larger role in Laminack's murder (ECF no. 103, 108-10 [claim 6]); and (6) rebut false testimony by prosecution witnesses Merillat and Bryant regarding conditions of confinement within the TDCJ (ECF no. 103, 114-19 [claim 8]).

B. Clearly Established Federal Law

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of *trial* counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668, 687 (1984):

> A convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence 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 reliable.

To satisfy the first prong of *Strickland*, a convicted defendant must show that counsel's representation "fell below an objective standard of reasonableness." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). In so doing, a convicted defendant has the burden of proof and must overcome a strong presumption that the conduct of his

trial counsel "falls within [a] wide range of reasonable professional assistance." *Strickland*, 466 U.S. at 689. "No particular set of detailed rules for counsel's conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant." *Bobby v. Van Hook*, 558 U.S. 4, 7 (2009) (quoting *Strickland*, 466 U.S. at 688-89). Under the well-settled *Strickland* standard, the Supreme Court recognizes a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Wiggins*, 539 U.S. at 523; *Bell v. Cone*, 535 U.S. 685, 698 (2002); *Strickland*, 466 U.S. at 690.

To satisfy the "prejudice" prong, a convicted defendant must establish a reasonable probability that, but for the objectively unreasonable misconduct of his counsel, the result of the proceeding would have been different. *Wiggins*, 539 U.S. at 534; *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Strickland*, 466 U.S. at 694.

In instances where the state courts failed to adjudicate either prong of the *Strickland* test (such as those complaints the state courts summarily dismissed under the Texas writ-abuse statute or which the petitioner failed to fairly present to the state courts), this Court's review of the un-adjudicated prong is de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009); *Rompilla v. Beard*, 545 U. S. 374, 390 (2005).

Under the AEDPA's deferential standard of review, claims of ineffective assistance adjudicated on the merits by a state court are entitled to a doubly deferential form of federal habeas review. The AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, "erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court." *Burt v. Titlow,* 571 U.S. 12, 19 (2013). Under § 2254(d)(1), "'a state

prisoner must show that the state court's ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.'" *White v. Wheeler,* 136 S. Ct. 456, 460 (2015) (quoting *White v. Woodall,* 572 U.S. 415, 419-20 (2014)); *Harrington v. Richter,* 562 U. S. 86, 103 (2011).

> The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel's performance fell below *Strickland's* standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), "an *unreasonable* application of federal law is different from an *incorrect* application of federal law." A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.
>
> A state court's determination that a claim lacks merit precludes federal habeas relief so long as "fairminded jurists could disagree" on the correctness of the state court's decision. And as this Court has explained, "[E]valuating whether a rule application was unreasonable requires considering the rule's specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. "[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court."

Harrington, 562 U. S. at 101 (citations omitted).

C. Complaints Regarding Merillat's and Bryant's Testimony

1. The Claim Restated

In his eighth claim for federal habeas relief, Brewer argues that his trial counsel rendered ineffective assistance by failing to rebut the allegedly false testimony of Merillat and Bryant concerning conditions of confinement within the TDCJ. (ECF no. 103, 114-19). More specifically, Brewer argues: "To the extent evidence rebutting the State's false and misleading testimony was available to trial counsel, counsel was ineffective for failing to investigate and present this evidence." *Id.*, at 118.

2. State Court Disposition

In claim 2C in his second state habeas corpus application, Brewer argued that his trial counsel rendered ineffective assistance by failing to impeach and rebut the trial testimony of Merillat and Bryant regarding TDCJ conditions. (Second State Habeas Application, at 147-66).

The state habeas court heard testimony from Brewer's 2009 trial counsel that: (1) there was no record in the special prosecutor's office where Merillat worked or in any other state agency indicating Brewer had ever been investigated or charged with a violent offense during his years of incarceration (Second State Habeas Hearing, Vol. 2 of 4, at 70-71, 79); (2) the defense strategy was to show that there were opportunities for inmates to engage in violence within TDCJ but Brewer had a clean disciplinary record and was remorseful (*Id.*, Vol. 2 of 4, at 84, 278, 285; Vol. 3 of 4, at 33, 124, 135-36); (3) the defense chose to have Brewer testify and to use his good behavior in prison and his expressed remorse as bases for seeking a negative answer to the future dangerousness special issue (*Id.*, Vol. 2 of 4, at 70-71, 80-81, 84, 278, 285; Vol. 3 of 4, at 33, 124, 135-36); (4) the defense team expected and planned to use to the defense's advantage Merillat's opinion that prisons are violent places and also to use Merillat and Bryant's testimony to show Brewer's non-violent record during his incarceration (*Id.*, Vol. 2 of 4, 70-71, 79, 84; Vol. 3 of 4, at 54); and (5) for that reason, the defense did not hire a prison conditions expert to opine that Brewer's violent propensity could be controlled in prison (*Id.*, Vol. 3 of 4, at 54-56). In addition, attorneys Odiorne and Keith furnished the state habeas court with affidavits that were consistent with their testimony during the state habeas hearing.[54]

The state habeas trial court: (1) found there was nothing false or misleading in the

[54] The affidavits of Brewer's 2009 trial counsel, attorneys Anthony Odiorne and Edward Ray Keith, Jr., were attached as exhibits A and B to the State's answer to Brewer's second state habeas corpus application and appear among the state court records in this case at ECF no. 126-16, at 151-54 and 155-58 of 356, respectively.

testimony of Merillat or Bryant; (2) found as a matter of reasonable trial strategy Brewer's trial counsel decided not to challenge Merillat because part of the defensive theory was to show that Brewer had an exemplary prison record over 18 years; (3) found Merillat's testimony helped establish that Brewer had the opportunity to commit violent acts but chose not to do so; (4) found Brewer's trial counsel were not deficient for failing to object to Merillat's testimony about the TDCJ inmate classification system because Merillat's trial testimony was factually accurate and supported by Merillat's credible post-trial affidavit[55]; (5) found Brewer's trial counsel were not deficient in failing to present a defense expert on the TDCJ inmate classification system because they determined as a matter of reasonable trial strategy to focus the jury's attention on the fact Brewer had a non-violent record over 18 years of incarceration; (6) found Brewer's trial counsel reasonably chose not to challenge the admissibility of Merillat's or Bryant's testimony; (7) found Brewer's trial counsel reasonably chose not to attempt to impeach or object to Merillat's and Bryant's testimony regarding conditions of confinement within TDCJ; (8) found Brewer had failed to establish prejudice based upon his complaints as to how his trial counsel approached the testimony of Merillat and Bryant; and (9) concluded Brewer's ineffective assistance complaint failed to satisfy either prong of *Strickland.* (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 30-39 & 79). The Texas Court of Criminal Appeals adopted the foregoing findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. AEDPA Review

The state habeas court's findings and conclusions underlying its rejection on the merits of

[55] Merillat's affidavit was attached as exhibit D to the State's answer to Brewer's second state habeas corpus application and appears among the state court records in this case at ECF no. 126-16, at 166-75 of 356.

this ineffective assistance claim are unassailable. Both the affidavits and evidentiary hearing testimony of Brewer's 2009 trial counsel fully supported the state habeas court's factual findings and legal conclusions.

a. No Deficient Performance

Brewer's 2009 trial counsel reasonably believed that they could take advantage of Merillat's well-established reputation as an expert on prison violence to help them convince the jury that Brewer would not pose a risk of future violence if incarcerated. In fact, they did elicit testimony from Merillat on cross-examination that was helpful to the defense on the issue of future dangerousness. The same was true for Captain Bryant. During 18 years of incarceration, Brewer had an almost spotless disciplinary record, save for a suicide attempt and a confession to having smoked marijuana on a single occasion. Brewer's trial counsel believed they could use that fact to gain a favorable verdict on the future dangerousness special issue and that attacking Merillat or Bryant's credibility would be counterproductive. The state habeas court reasonably concluded Brewer's 2009 trial strategy was itself objectively reasonable. Furthermore, after de novo review that included careful review of the entire record from both of Brewer's trials, both of his direct appeals, all three of his state habeas corpus proceedings, and all the new materials accompanying Brewer's federal habeas corpus petition, this Court agrees.

The fact the strategy in question ultimately proved unsuccessful does not make it unreasonable. *See Strickland*, 466 U.S. at 698-99 (recognizing that a reasonable trial strategy need not be a successful one). *Strickland* forbids a reviewing court from second-guessing a trial counsel's objectively reasonable trial strategy. *Thomas v. Lumpkin*, 995 F.3d 432, 447 (5th Cir. 2021) (*Strickland* forbids second-guessing trial strategy as to how to conduct voir dire); *Wardrip v. Lumpkin*, 976 F.3d 467, 477 (5th Cir. 2020) (holding *Strickland* and the AEDPA required

deference to a state court's decision that trial counsel acted reasonably in making an informed choice not to present certain mitigating evidence of the defendant's good behavior while in prison following a prior murder conviction (citing *Harrington*, 562 U.S. at 105)). In light of the lack of success experienced by Brewer's trial counsel in 1991 in their attempt to convince a jury that Brewer did not pose a risk of future dangerousness by casting blame for Laminack's murder on Nystrom, Brewer's 2009 trial counsel reasonably chose an alternative strategy. They instead emphasized Brewer's good conduct during nearly two decades of incarceration. This was a reasonable approach given the evidence in the record showing Brewer had an escalating history of violence during his adolescence and the horrific facts of Laminack's murder. In sum, Brewer's 2009 trial counsel reasonably chose to emphasize Brewer's good conduct in prison in an attempt to convince the jury he was no longer the angry teenager who had brutally murdered Laminack and then shot the finger at a newspaper photographer.

b. No Prejudice

The state habeas court also reasonably concluded this ineffective assistance complaint failed to satisfy the prejudice prong of *Strickland*. As explained in Section VIII.D. above, on cross-examination both Merillat and Bryant testified in a manner that was very clearly favorable to the defense's strategy. Under such circumstances, attacking their credibility through attempts to impeach them or by offering alternative experts to criticize their testimony on the technical aspects of TDCJ classification policy would likely have proven counterproductive. Furthermore, this Court concludes after de novo review of the entire record now before it that there is no reasonable probability that, but for the failure of Brewer's 2009 trial counsel to aggressively attack the credibility of Merillat and Bryant or challenge their testimony with experts on prison conditions, the outcome of Brewer's 2009 retrial would have been any different. The state habeas court's

similar conclusion was supported by the record before that court, especially the testimony of Brewer's 2009 trial counsel, who gave an objectively reasonable rationale for their strategy.

4. Conclusions

The state habeas court's rejection on the merits of Brewer's ineffective assistance complaints about the performance of his 2009 trial counsel vis-a-vis the trial testimony of Merillat and Bryant was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials and second state habeas corpus proceeding. After de novo review, this Court likewise concludes these ineffective assistance complaints fail to satisfy either prong of *Strickland*. Brewer's eighth claim for federal habeas relief is without merit and does not warrant federal habeas relief.

D. Complaints Regarding Nystrom's and Callen's Testimony

1. The Claim Restated

In his sixth claim for federal habeas corpus relief Brewer complains about the performance of his 2009 trial counsel vis-a-vis the 2009 trial testimony of prosecution witnesses Kristie Nystrom and Skee Callen. More specifically, Brewer faults his 2009 trial counsel for failing to: (1) present evidence showing that Kristie Nystrom played a larger role in Laminack's murder than she testified; (2) impeach Callen's and Nystrom's testimony by showing Callen had once claimed Nystrom confessed that she stabbed Laminack; (3) impeach Callen by showing that he received inducements (including favorable legal treatment from prosecutors and help from police getting a job) for testifying against Brewer; and (4) elicit testimony from Callen that Brewer was weeping when Callen saw him after Laminack's murder. (ECF no. 103, 108-10).

2. State Court Disposition

On cross-examination by defense counsel at Brewer's 1991 trial, Callen admitted that he had given police a statement in which he stated that Nystrom told him that she had stabbed the victim. (17/21 R.R. 479, which is located at ECF no. 124-12). But he insisted that statement was in error. *Id.* He also testified that he later corrected the error in his statement. (17/21 R.R. 480). Callen also denied having received any benefit in exchange for his testimony against Brewer. (17/21 R.R. 481-82). At Brewer's 2009 trial, Callen testified on direct that Nystrom told him "they" had killed a man for $140; defense counsel did not cross-examine Callen. (22/28 R.R. 70-71, 74). As explained in Section I.G. above, both Nystrom and Brewer testified at Brewer's 2009 retrial. Neither testified that Nystrom stabbed Laminack.

In his sixth claim in his second state habeas corpus application, Brewer presented the same complaints about his 2009 trial counsel's handling of the testimony and cross-examination of prosecution witnesses Nystrom and Callen (Second State Habeas Application, at 302-07).

Brewer's 2009 trial counsel, attorneys Anthony Odiorne and Edward Ray Keith, Jr., each responded to Brewer's complaints in affidavits that were attached to the State's Answer to Brewer's Second State Habeas Application. Attorney Odiorne stated in his affidavit that (1) part of the defense strategy was to have Brewer himself testify "so he could tell the jury personally about his responsibility for the crime and his remorse for his actions," and (2) impeaching Skee Callen regarding his statement about Nystrom's involvement in the murder would not be consistent with the defense strategy. (ECF no. 126-16, at p. 152 of 356). Attorney Keith stated in his affidavit that: (1) "the basic defensive theory included Mr. Brewer's acceptance of responsibility for the murder"; (2) Keith made the decision not to challenge the prosecution's blood spatter expert because Brewer was going to take the stand and admit he stabbed Laminack; (3) in view of that

strategy, Keith made the decision not to attack the prosecution's blood spatter analysis or to suggest alternative theories for how the blood ended up where it was found; and (4) he believed it would damage the defense's credibility with the jury to do otherwise. (ECF no. 126-16, at p. 157 of 356).

The state habeas trial court: (1) found, as a matter of trial strategy, Brewer's 2009 counsel reasonably concluded it was unnecessary to impeach Callen and Nystrom with Callen's earlier statement indicating Nystrom had said that she stabbed Laminack; (2) found Callen's statement in question did not affirmatively establish that Nystrom had stabbed Laminack; (3) found it was reasonable for Brewer's 2009 trial counsel to believe that impeaching Callen would be inconsistent with their trial strategy of having Brewer take the stand and admit his guilt; (4) found as a matter of trial strategy, Brewer's 2009 counsel reasonably concluded it was unnecessary to elicit testimony from Callen regarding Brewer's crying because Brewer was going to testify himself that he was remorseful for his actions; (5) found Brewer's 2009 counsel reasonably believed this was a better strategy and would have a greater impact on the jury; (6) found the foregoing strategic decisions were all reasonable; (7) found Brewer had failed to establish any prejudice arising from his 2009 trial counsel's strategic decisions on these subjects because Brewer testified and expressed remorse for his actions; and (8) concluded Brewer's complaints about his 2009 trial counsels' actions vis-a-vis Nystrom and Callen failed to satisfy either prong of *Strickland* (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 56-58 & 86). The Texas Court of Criminal Appeals adopted the foregoing findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. AEDPA Review

The state habeas court's findings and conclusions underlying its rejection on the merits of

this ineffective assistance claim are unassailable. The affidavits of Brewer's 2009 trial counsel fully supported the state habeas court's factual findings and legal conclusions, as do the records from Brewer's 1991 and 2009 trials.

a. No Deficient Performance

Brewer's 2009 trial counsel reasonably believed that the best strategy available to them was to have Brewer take the stand, admit his guilt, express his sincere remorse and contrition for his crime, demonstrate empathy for the family of his victim, and explain that he had a non-violent record ever since. That is precisely what Brewer did when he testified in 2009.

This was a reasonable trial strategy for a number of reasons. First, in 1991 the jury had convicted Brewer of capital murder and answered all of the punishment phase special issues in a manner favorable to the prosecution without hearing any testimony from Brewer or Nystrom. This necessarily meant that, after viewing the lurid crime scene evidence and listening to expert testimony at the guilt-innocence phase of Brewer's 1991 trial, the jury concluded beyond a reasonable doubt that Brewer intentionally murdered Laminack in the course of committing or attempting to commit a robbery. At the conclusion of the punishment phase of Brewer's 1991 trial, the jury concluded beyond a reasonable doubt that both (1) Brewer committed Laminack's murder deliberately, and (2) there was a probability Brewer would commit criminal acts of violence that would constitute a continuing threat to society. In 2009, Brewer's trial counsel confronted the reality that they would once again face the same horrific crime scene photographs and videos and the same expert forensic testimony interpreting the crime scene that had been presented during the guilt-innocence phase of Brewer's 1991 trial. Likewise, Brewer's 2009 trial counsel confronted the prospect they would face the same evidence presented during the punishment phase of Brewer's 1991 trial showing Brewer had engaged in an escalating pattern of violence during his

adolescence. That evidence included testimony showing Brewer had (1) once shoved his diminutive ex-girlfriend against a locker so forcefully that he caused damage to three of her vertebral discs, and (2) once broke up a fight between his parents by beating his biological father with a broom so hard the older man sustained a depressed skull fracture and injuries to the lining of his brain that required emergency surgery and a hospital stay of several weeks.

Second, in addition to the foregoing evidence, in 2009 the defense confronted the prospect that Nystrom would testify and identify Brewer as the person who fatally stabbed Laminack. Third, by 2009, Brewer was 39 years old and no longer resembled an impressionable teenager. Finally, unlike 1991, when Dr. Coons had been free to speculate that Brewer would pose a risk of future violence if convicted, the defense now had documented proof that, over a period of nearly two decades, Brewer had been a non-violent inmate inside the TDCJ, save for a single suicide attempt.

Under these circumstances, it was eminently reasonable for Brewer's 2009 trial counsel to choose a strategy that emphasized Brewer's non-violent history as an inmate and attempted to convince the jury that Brewer was no longer the angry teenager who had murdered Laminack and, following his arrest, shot the finger at a photographer.

The state habeas court reasonably concluded that Brewer's 2009 trial counsel (1) adopted an objectively reasonable trial strategy, and (2) reasonably concluded that attacking Callen's credibility or suggesting that Nystrom had stabbed Laminack would prove counterproductive. After conducting a de novo review of the entire record in this federal habeas proceeding, this Court agrees and concludes that Brewer's 2009 trial counsel reasonably determined that having Brewer himself testify and describe the circumstances of Laminack's murder was a more effective way to counter the self-serving aspects of Nystrom's testimony than having Callen suggest that Nystrom once said she had stabbed Laminack.

b. No Prejudice

The state habeas court also reasonably concluded that this ineffective assistance claim failed to satisfy the prejudice prong of *Strickland.* Attacking Callen's credibility and implying that Nystrom had stabbed Laminack (when in fact she had not) proved to be an unsuccessful strategy in 1991. During Brewer's 2009 trial, there was no testimony from either of the eyewitnesses to Laminack's murder suggesting that Nystrom had stabbed Laminack. On the contrary, Brewer testified Nystrom sat directly adjacent to Laminack and held Laminack's right arm while Brewer grabbed Laminack from behind and stabbed him in the neck. Brewer's testimony in that regard was fully supported by the forensic evidence. Brewer testified without contradiction that he sustained a severe cut to his own hand while fighting for control of the knife with Laminack. In contrast, there was no testimony in 2009 suggesting that Nystrom sustained any physical injuries during the fatal assault.

After de novo review of the entire record, this Court concludes there is no reasonable probability that, but for failure of Brewer's trial counsel to cross-examine and impeach Callen using his prior statement to police suggesting Nystrom confessed to stabbing Laminack, the outcome of Brewer's 2009 retrial would have been any different. The same is true for Brewer's complaint that his 2009 trial counsel did not cross-examine Nystrom on her alleged statement to Callen. Brewer's 1991 trial counsel attempted to impeach Callen in the manner Brewer now urges. It proved unhelpful. Doing so again in 2009 would only have undermined the strategy of Brewer's 2009 trial counsel.

4. Conclusions

The state habeas court's rejection on the merits of Brewer's ineffective assistance complaints about the performance of his 2009 trial counsel vis-a-vis the trial testimony of Nystrom

and Callen was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials and second state habeas corpus proceeding. After de novo review, this Court likewise concludes these ineffective assistance complaints fail to satisfy either prong of *Strickland*. Brewer's sixth claim for federal habeas relief is without merit and does not warrant federal habeas relief.

E. Complaints Regarding Brewer's Prior Bad Acts & History of Good Behavior

1. The Claim Restated

In his fourth claim for federal habeas relief, Brewer argues that his 2009 trial counsel rendered ineffective assistance by: (1) failing to properly investigate (in part, by not interviewing prosecution witnesses who testified at the punishment phase of his 1991 trial) and rebut prosecution evidence relating to Brewer's prior bad acts, *i.e.*, his history of violence; (2) failing to present evidence showing Brewer had a history of good behavior while incarcerated and was not a gang member; (3) failing to present evidence showing his biological father was violent and abusive; and (4) advising Brewer to testify. (ECF no. 103, 64-78).

2. State Court Disposition

Brewer presented a similar complaint of ineffective assistance by his 2009 trial counsel as his first claim in his third state habeas corpus application (Third State Habeas Application, 17-44 [ECF no. 127-1, 24-51 of 585]). The Texas Court of Criminal Appeals summarily dismissed Brewer's third state habeas application, citing state writ-abuse principles. *Ex parte Brewer*, WR-46,587-03, 2019 WL 5420444, *1. It is unnecessary to determine whether Brewer has procedurally defaulted on this ineffective assistance claim because this Court concludes after de novo review

that this claim is without arguable merit.

3. *De Novo* Review

Because the state courts did not address the merits of this ineffective assistance claim, this Court's review is necessarily de novo. *See Porter*, 558 U.S. at 39 (de novo review of the allegedly deficient performance of petitioner's trial counsel was necessary because the state courts had failed to address this prong of *Strickland* analysis); *Rompilla*, 545 U. S. at 390 (de novo review of the prejudice prong of *Strickland* was required where the state courts rested their rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins*, 539 U.S. at 534 (same).

a. No Deficient Performance

Insofar as Brewer complains that his 2009 defense team failed to interview prosecution witnesses who had testified at the punishment phase of his 1991 trial, Brewer fails to allege any specific facts showing it was objectively unreasonable for his 2009 trial counsel to believe these witnesses would present the same or very similar testimony in 2009 to what they had testified in 1991. By and large, that is exactly what they did.[56] Brewer does not allege any facts or present any

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[56] There is a striking consistency between the trial testimony of the prosecution witnesses who testified in 1991 and the same witnesses when they appeared and testified at Brewer's 2009 retrial. In addition, in several instances, the state trial court permitted the prosecution in 2009 to read into the record the testimony of witnesses from 1991 when those witnesses were not available. This is what happened with the 1991 trial testimony of both Richard Lepicher (22/28 R.R. 40-59 [ECF no. 125-10]) and Kathleen Bailey (22/28 R.R. 136-53 [ECF no. 125-10]). This Court's independent review of the records from both of Brewer's trials reveals no significant differences in the relevant testimony of the prosecution witnesses who testified in both proceedings.

For example, Amy Forrester (1991) and Aimee Diane Long (2009) (the same person despite dissimilar spelling) testified at both of Brewer's trials that Brewer responded to her breaking up with him while they were in high school by threatening her on multiple occasions, threatening her new boyfriend, and on one occasion pushing her against a bank of lockers hard enough to cause damage to her spine, including three displaced vertebral discs, a pinched nerve, and loss of the full use of her right arm for several months. (*Compare* 18/21 R.R. 592-608 [ECF no. 124-13] with 22/28 R.R. 75-88 [ECF no. 125-10]).

Ronald Mosher testified in 1991 that: (1) he arrested Brewer in January 1989 for carrying a concealed weapon, *i.e.*, a seven-inch hunting knife; (2) Brewer did not threaten anyone with the knife and did not resist arrest; and (3) at the time of Brewer's arrest he was driving for the Greenmans, a couple known to frequent areas where

evidence showing that, but for the failure of his trial counsel or defense team to interview these witnesses prior to their 2009 trial testimony, their 2009 testimony would have been significantly different.

While Brewer argues that his former high school girlfriend (whom he shoved into a bank of lockers, injuring her spine) was willing to testify Brewer's actions in assaulting her were inconsistent with her understanding of Brewer's character, this concession hardly diminishes the impact of her testimony at both trials regarding the physical ailments she sustained as a result of Brewer's violent act toward her. The same holds for her highly speculative assertion that Brewer did not intend to hurt her. Those assertions must be judged in light of the fact that this same witness apparently has never recanted her trial testimony that Brewer threatened her on multiple occasions and, at least once, threatened to kill both her and her new boyfriend. Furthermore, Brewer admitted on cross-examination that he had shoved Aimee. (25/28 R.R. 114). As explained above, the objectively reasonable strategy adopted by Brewer's 2009 trial counsel was to focus the jury's attention not on Brewer's behavior as an angry adolescent but, instead, on Brewer's good behavior while in prison and his sincere remorse for his offense. Brewer's 2009 trial counsel could reasonably have believed that engaging in a game of semantics with Brewer's former high school girlfriend would not further their trial strategy.

A more fundamental problem with Brewer's complaints about his 2009 trial counsel's failure to interview prosecution witnesses as to Brewer's prior bad acts is that Brewer himself

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narcotics trafficking took place. (18/21 R.R. 657-72 [ECF no. 124-13]). In 2009, Mosher testified to the same facts as he had in 1991, explained he observed the knife handle between the driver's seat and the console, and added that Brewer pleaded guilty to possession of a concealed weapon following the arrest in question. (22/28 R.R. 230-40 [ECF no. 125-10]).

Freelance photographer Henry Bargas testified briefly at both Brewer's 1991 trial (18/21 R.R. 673-77 [ECF no. 124-13]) and 2009 trial (22/28 R.R. 60-64 [ECF no. 125-10]) to identify State Exhibit no. 202, *i.e.*, the photograph showing Brewer shooting the finger at Bargas, that was admitted into evidence at both trials.

testified extensively in 2009 in rebuttal to many of the incidents described by these prosecution witnesses. For example, Brewer testified that: (1) the knife he was arrested for carrying in Florida did not belong to him; (2) his guilty plea to that charge resulted from his desire to avoid prosecution for a more serious offense; and (3) he was driving the Greenmans to buy drugs when he was arrested for carrying a concealed weapon (25/28 R.R. 56-58, 127-32). Given the fact Brewer also testified that the Greenmans (the couple in Florida for whom Brewer was driving when arrested for carrying a concealed weapon) introduced him to crack while he was but a teenager (25/28 R.R. 58), Brewer's 2009 trial counsel could reasonably have believed it was better to have Brewer himself explain the circumstances of his Florida arrest than to call the former Mrs. Greenman (now Ms. Valles) to testify the knife in question belonged to her. The possibility the prosecution might impeach Ms. Valles on cross-examination had to occur to Brewer's 2009 trial counsel.

Nor would Ms. Valles' testimony have changed the fact Brewer entered a guilty plea to the concealed weapon charge. Brewer identifies no legal authority suggesting that ownership of the knife in question was an element under Florida law of the concealed weapon charge to which he pleaded guilty. Brewer's 2009 trial counsel could reasonably have believed calling Ms. Valles to contest the irrelevant issue of the knife's ownership would detract from their strategy of focusing the jury on Brewer's good conduct in prison and remorse for his capital offense.

The testimony of prosecution witness Richard Lepicher at both of Brewer's trials established: (1) Brewer's biological father, Albert, had a history of violence and alcohol abuse; (2) Albert had been responsible for starting the 1986 altercation with Brewer's mother that culminated in Brewer assaulting Albert with a broom in an effort to protect his mother from Albert's assault; and (3) no criminal charges were ever brought against Brewer as a result of the broom incident. (18/21 R.R. 678-94 & 22/28 R.R. 40-59). In his 2009 trial testimony Brewer himself: (1) furnished

additional background to the incident in question, emphasizing that he acted to protect his mother from Albert; (2) testified Albert was an abusive alcoholic who likely suffered from some form of post-traumatic stress disorder after serving multiple tours in Vietnam; and (3) testified that, prior to the fight between his parents, Albert had once struck Brewer in the face with a piece of wood, causing Brewer to suffer severe facial injuries. (25/28 R.R. 39-40, 59-62, 115, 118-26). Given the extent of Albert's head injuries, Brewer's 2009 trial counsel reasonably have could have believed that it would be more impactful for the jury to hear additional details about the 1986 fight between Brewer and Albert from Brewer himself rather than from Brewer's mother and sister or from Lepicher, even assuming that Lepicher was available to testify in 2009. In fact, Lepicher did not testify at the 2009 trial; his testimony from 1991 was read to the jury in 2009.

In both their affidavits and testimony before the state habeas court in Brewer's second state habeas proceeding, his 2009 trial counsel made clear it was their trial strategy to have Brewer testify and explain to the jury his acceptance of responsibility for his crime. (Second State Habeas Hearing, Volume 2 of 4, at 70; Volume 3 of 4, at 124, 135-36). Brewer's lead 2009 trial counsel also testified he believed Brewer himself was the only available witness who could testify with authority as to Brewer's remorse for what he had done. (Second State Habeas Hearing, Volume 2 of 4, at 80-81). In the course of his trial testimony, Brewer extensively discussed his upbringing, furnished a fairly detailed chronology of his life, and made attempts to ameliorate the most damaging aspects of the prosecution's bad acts evidence. Brewer explained that: (1) both his biological and adoptive fathers were violent and abusive; (2) he suffered a serious injury as a child, which led the discovery that he had a spinal problem; (3) he and his sister experienced a very unstable childhood; (4) the knife he was arrested for carrying in Florida did not belong to him; and (5) he was defending his mother from his violent biological father when he struck Albert with a

broom. (25/28 R.R. 39-64, 113-15, 118-32).

Brewer also faults his 2009 trial counsel for failing to have Brewer's mother and sister testify that Brewer had witnessed violence between his biological mother and biological father prior to the incident in which Brewer broke up a fight between his biological parents by beating Albert with a broom. Brewer himself testified, however, that Albert was violent and beat his mother on many occasions. (25/28 R.R. 40, 62). Brewer also testified extensively regarding the circumstances of the incident in which he beat Albert with a broom. (25/28 R.R. 60-62, 127-32). This Court finds it was objectively reasonable for Brewer's 2009 trial counsel to use Brewer's own testimony to rebut most of the prosecution's bad acts evidence.

Brewer also faults his 2009 trial counsel for failing to interview and challenge prosecution witness Kevin Lewis regarding the circumstances under which Brewer threatened Lewis while they were both jail inmates prior to Brewer's 1991 trial. Brewer argues that Lewis could have testified that he started the hostile verbal exchange that escalated into Brewer threatening to shove a pencil in Lewis's eye. Given the fact Brewer did not deny making the threat, his 2009 trial counsel could reasonably have believed that eliciting testimony about who started the verbal altercation would be of only minimal rebuttal value and, once again, could take the jury's focus off Brewer's otherwise non-violent prison record and sincere remorse for his capital offense.

In sum, it was objectively reasonable for Brewer's 2009 trial counsel to choose the strategy of having Brewer himself take the stand and rebut the more problematic aspects of the prosecution's testimony about Brewer's history of violence as an adolescent and teenager, *i.e.*, the so-called "bad acts" evidence. Brewer's 2009 trial counsel were well aware that Brewer had remained mute at his 1991 trial, been convicted of capital murder, and received a sentence of death. All this happened despite (1) the absence of any eyewitness testimony identifying Brewer as

Laminack's assailant, and (2) the fact Brewer was only 20 years old in 1991, young enough his 1991 trial counsel could reasonably argue Brewer was an impressionable young man manipulated by a seductive, domineering, slightly older woman. In 2009, Brewer's trial counsel had neither of those two strategic advantages. Thus, the strategic decision by Brewer's 2009 trial counsel to advise the 39-year-old Brewer to take the stand, admit his guilt, express his sincere remorse for his capital offense, demonstrate his empathy for the family of his victim, and emphasize his good behavior over nearly two decades in prison was objectively reasonable.

As explained above, choosing the strategy now advocated by Brewer's federal habeas counsel (*i.e.*, having Brewer remain mute once again before the jury and calling other witnesses to attempt to confront the prosecution's bad acts evidence) would likely have been less effective in terms of countering the prosecution's "bad acts" evidence. It would also would have deprived the jury of the opportunity to see firsthand as Brewer (1) expressed his sincere remorse and contrition for his capital offense, and (2) demonstrated empathy for his victim and his victim's family.

Insofar as Brewer complains that his 2009 trial counsel failed to present evidence showing Brewer's good behavior while incarcerated, that complaint is based upon a faulty factual premise. Brewer himself testified that he had been on his best behavior since his 1991 conviction. (25/28 R.R. 100-02). As explained in Section XII.C. above, prosecution witnesses Merillat and Bryant testified on cross-examination that (1) there was no record of Merillat's special prosecution unit ever having investigated Brewer during Brewer's TDCJ incarceration, and (2) Brewer's TDCJ disciplinary record was relatively clean, containing only a charge of having once smoked marijuana. (23/28 R.R. 111, 115, 125, 166). While prosecution witness Bryant did mention Brewer's 2007 suicide attempt, he did so in the context of discussing Brewer's *medical* records, not Brewer's disciplinary records. (23/28 R.R. 105-10). No witness testified Brewer was charged

with a disciplinary infraction in connection with his suicide attempt. Brewer himself explained to the jury that he took pills and cut his wrists because he was feeling depressed due to his isolation from other inmates but, since his return to the County jail to await his retrial, he had contact with other people and no longer wanted to die. (25/28 R.R. 95-97).

b. No Prejudice

Likewise, because Brewer himself testified extensively in 2009 regarding his life history and the circumstances surrounding the prosecution's bad acts evidence, Brewer can show no prejudice arising from his trial counsels' failure to have other witnesses attempt to address the same bad acts. In sum, Brewer was not prejudiced within the meaning of *Strickland* by his 2009 trial counsels' failure to present cumulative testimony to rebut the prosecution's bad acts evidence. A failure to present cumulative testimony cannot be the basis of a claim of ineffective assistance. *Howard v. Davis*, 959 F.3d 168, 173 (5th Cir. 2020) (citing *Richards v. Quarterman*, 566 F.3d 553, 568 (5th Cir. 2009)); *Norman v. Stephens*, 817 F.3d 226, 233 (5th Cir. 2016) (defendant was not prejudiced by failure of counsel to present cumulative evidence).

4. Conclusions

After de novo review, this Court concludes all of the ineffective assistance complaints contained in Brewer's fourth claim for federal habeas relief fail to satisfy both prongs of *Strickland*. Brewer's fourth claim for federal habeas relief is without arguable merit.

F. Complaints Regarding Dr. Coons' Testimony

1. The Claim Restated

In his first federal habeas claim, Brewer argues that his 2009 trial counsel failed to adequately: (1) challenge the admission of Dr. Coons' opinion testimony on the issue of future dangerousness; (2) impeach Dr. Coons; and (3) rebut Dr. Coons' opinion. (ECF no. 103, 11-37).

Among the arguments Brewer asserts in this claim are complaints that his trial counsel did not: (1) present expert testimony during the *Daubert* hearing challenging the scientific validity of Dr. Coons' method for determining future dangerousness; (2) present opinion testimony from a qualified mental health expert who evaluated Brewer in order to rebut Dr. Coons' opinion on Brewer's future dangerousness; and (3) attack Dr. Coons' credentials and experience.

2. State Court Disposition

Prior to Dr. Coons testifying at Brewer's 2009 retrial, Brewer's trial counsel filed a motion in limine regarding Dr. Coons' testimony. They also requested a *Daubert* hearing, during which they questioned Dr. Coons and argued Dr. Coons' opinions were not based on valid theory and were unverifiable and scientifically unreliable. (23/28 R.R. 172-96). At the conclusion of that hearing, the state trial court overruled Brewer's objections and ruled Dr. Coons was qualified to testify and express his opinion. (23/28 R.R. 196). During Dr. Coons' ensuing testimony, Brewer's counsel made multiple objections to him offering his opinion as to Brewer's future dangerousness. (23/28 R.R. 199, 205-08, 211-12, 214-16, 221). On cross-examination, Brewer's trial counsel elicited testimony that Dr. Coons had never examined Brewer and had never done any studies to determine the reliability or accuracy of his prior predictions of future dangerousness in criminal defendants. (23/28 R.R. 223-37). After Dr. Coons left the stand, Brewer's trial counsel made another objection to the admission of Dr. Coons' testimony, raising several grounds, including constitutional claims, all of which the trial court overruled. (23/28 R.R. 239-40).

In his fifth point of error on direct appeal, Brewer argued the state trial court erred in admitting Dr. Coons' opinion testimony. (Second Appellant's Brief, AP-76,378, at 81-90, which is located at ECF no. 122-16). The Texas Court of Criminal Appeals held the trial court's adverse ruling on Brewer's motions in limine, Brewer's request for a *Daubert* hearing, and Brewer's post-

testimony objection were insufficient to preserve for state appellate review Brewer's complaint about the admission of Dr. Coons' testimony. *Brewer v. State*, AP-76,378, 2011 WL 5881612, *6-*8.

In claims 1A and 1B in his second state habeas corpus application, Brewer argued his 2009 trial counsel rendered ineffective assistance by failing to adequately challenge the admission of Dr. Coons' opinion testimony and failing to adequately impeach, rebut, and counter Dr. Coons' opinion. (Second State Habeas Application, at 15-111). In a related claim, 1C, Brewer alleged that Dr. Coons testified falsely regarding work he had done for the State Bar. (*Id.*, at 111-20).

In his affidavit submitted to the state habeas court, Brewer's 2009 lead trial counsel stated that: (1) he had reviewed Dr. Coons' CV and believed he was unqualified to render his opinion testimony; (2) he cross-examined Dr. Coons outside the jury's presence and attempted to have his testimony excluded by the trial court; and (3) he made what he believed were timely objections during Dr. Coons' testimony. (ECF no. 126-16, at p. 151 of 356). Attorney Keith stated in his affidavit that: (1) the defense strategy was to attempt to exclude Dr. Coons' testimony based on his methodology; (2) failing that, the defense planned to show and argue that Dr. Coons' assertions were demonstrably wrong; (3) they challenged his methods and made manifest to the jury that Dr. Coons had been wrong in the past about Brewer; (4) they did this in part through the testimony of their own expert, Dr. Edens. (ECF no. 126-16, at p. 157 of 356).

During his extensive testimony at the evidentiary hearing in Brewer's second state habeas proceeding, attorney Odiorne testified that (1) he knew Dr. Coons' reputation and obtained copies of Dr. Coons' testimony in prior death penalty cases (Second State Habeas Hearing, Vol. 2 of 4, at 51-57); (2) his research revealed no problems with Dr. Coons' CV and he believed Dr. Coons would be qualified by the court as an expert (*Id.*, at 58-59); (3) the state trial court ruled Dr. Coons

was qualified to testify as an expert before Odiorne had the opportunity to delve into the bases for Dr. Coons' opinions (*Id.*, at 59, 66); (4) he did not believe calling Dr. Edens to testify at the *Daubert* hearing would have changed the trial judge's ruling admitting Dr. Coons' testimony (*Id.*, at 61, 92); (5) the defense made the decision not to have Brewer evaluated by a mental health expert because it could open the door to Brewer being interviewed and evaluated by a prosecution mental health expert (*Id.*, at 98); (6) he did not cross-examine Dr. Coons regarding his methodology because he did not believe it would have affected Dr. Coons' opinion (*Id.*, at 103-06, 175); (7) instead, he chose to have Dr. Edens attack Dr. Coons' methodology (*Id.*, at 176, 209); (8) the defense brought out on cross-examination that Dr. Coons had erroneously predicted in 1991 that Brewer would be violent in prison (*Id.*, at 186); (9) the defense's primary method of countering Dr. Coons' testimony was presenting Dr. Edens' testimony suggesting that Dr. Coons' methodology was flawed, *i.e.*, unreliable and unscientific (*Id.*, at 94, 176, 209); (10) he objected numerous times to Dr. Coons' testimony (*Id.*, at 213-22); and (11) he did not believe that additional objections would have prevented Dr. Coons from testifying (*Id.*, at 232).

Brewer's co-counsel, attorney Keith, testified that: (1) he researched Dr. Coons through the Texas Defender Service and felt there was no basis for Dr. Coons' response to the prosecution's hypothetical regarding Brewer's propensity for future violence (Second State Habeas Hearing, Vol. 2 of 4, at 254-66); (2) he was unaware that Dr. Coons had ever fabricated anything like Dr. Erdmann (*Id.*, at 263); (3) at the time of Brewer's 2009 retrial, he was not familiar with the events at the 2008 retrial of Billy Wayne Coble (*Id.*, at 269); (4) the defense did not plan to use Dr. Edens to attempt to keep Dr. Coons from testifying but, rather, to use Dr. Edens to rebut Dr. Coons' methodology, in part, because having Dr. Edens testify at the *Daubert* hearing would have tipped off Dr. Coons prior to his trial testimony as to exactly how the defense planned to attack his opinion

on Brewer's future dangerousness (*Id.*, Vol. 2 of 4, at 277; Vol. 3 of 4, at 24, 27, 142-43, 147-48); (5) the defense's focus was on attacking Dr. Coons' methodology and showing Brewer had displayed non-violent behavior in prison and was remorseful (*Id.*, Vol. 2 of 4, at 277-78, 285; Vol. 3 of 4, at 33, 124, 135-36); (6) the defense did not ask Dr. Edens to evaluate Brewer and did not use experts on future dangerousness, like Dr. Cunningham or Dr. Sorenson, to rebut Dr. Coons' opinion because doing so would turn the future dangerousness question into a battle of experts, *i.e.*, the defense's expert would be doing the same thing as Dr. Coons (*Id.*, Vol. 3 of 4, at 26-31, 33, 46, 49, 51, 99); (7) instead, the defense wanted to focus the jury's attention on Brewer's good behavior inside prison (*Id.*, at 33, 124, 135-36); and (8) Dr. Cunningham testified for the defense at the 2008 Coble retrial and the jury still returned a death sentence (*Id.*, at 132).

Dr. Coons testified during Brewer's state habeas hearing that: (1) he believed a diagnosis could be made without an evaluation if enough information were available (Second State Habeas Hearing, Vol. 3 of 4, at 209, 211-12); (2) he has sought to evaluate the accuracy of his predictions of future dangerousness in only a few cases and cannot verify same (*Id.*, at 218-21, 226, 228, 230, 232); (3) the consensus is that there is a lot of violence in jails and much of it is unreported (*Id.*, at 228-29); (4) he believed Dr. Cunningham and other prison violence psychologists look at an extremely narrow range of conduct they consider to be "violent" and disregard a lot of unreported violence that does not result in disciplinary charges (*Id.*, at 229-30, 233, 240); (5) he has consulted with a number of state agencies and licensing boards over the years, most often to address professionals or applicants who have a history of substance abuse, and believed he had undersold his credentials when he testified at Brewer's 2009 trial (*Id.*, at 256-59, 263); and (6) he has consulted in about 150 potential capital cases and has rejected about 100 of those as not warranting capital punishment (*Id.*, at 247).

The state habeas trial court: (1) found Brewer's 2009 trial counsel adopted a reasonable trial strategy of not having Brewer evaluated by a defense mental health expert because of concerns that: (a) doing so might open the door to Brewer being evaluated by a prosecution expert; (b) the result of such an evaluation might be unhelpful to the defense; (c) having a defense expert testify on his own opinion of Brewer's future dangerousness would detract from their attack upon Dr. Coons' opinion as unscientific; (d) there was a possibility the jury would view the defense's future dangerousness expert in the same vein as Dr. Coons and the jury would "get lost in the science"; and (e) the defense wanted to focus the jury's attention on Brewer's non-violent behavior while in prison; (2) found the defense reasonably chose Dr. Edens, a psychologist rather than a psychiatrist, to challenge Dr. Coons' methodology; (3) found the defense reasonably chose to attack Dr. Coons' methodology rather than attempting to have a defense expert address risk factors and make a different assessment of Brewer's propensity for future violence; (4) found the defense's primary strategy at the hearing addressing the admissibility of Dr. Coons' testimony (*i.e.*, the "*Daubert* hearing") was to assert that Dr. Coons' methodology was unsound; (5) found the defense strategy was to cross-examine Dr. Coons and rebut Dr. Coons' opinion with Dr. Edens' testimony, which was reasonable; (6) found Brewer's trial counsel reasonably chose not to have Dr. Edens testify at the 702 hearing on Dr. Coons' opinion because doing so could have tipped off Dr. Coons as to the method the defense planned to use to rebut his opinion; (7) found the defense reasonably investigated Dr. Coons' methodology and CV prior to trial; (8) found Brewer's trial counsel effectively challenged Dr. Coons' opinion on future dangerousness by eliciting testimony on cross-examination admitting Dr. Coons had followed up on his past predictions of future violence in only a few isolated cases and Dr. Coons had no statistics establishing the accuracy of his methodology; (9) found the defense reasonably attacked Dr. Coons' opinion by emphasizing those

admissions during closing argument; (10) found it was reasonable for Brewer's trial counsel not to cross-examine Dr. Coons about the *Barefoot* case because the Supreme Court's opinion in that case allowed the admission of opinions such as Dr. Coons' on future dangerousness; (11) found the defense also rebutted Dr. Coons' opinion by showing Brewer had not engaged in any violence while in prison; (12) found the defense acted reasonably in relying on Brewer's own testimony, and that of prosecution witnesses Merillat and Bryant, to establish Brewer's non-violent prison record; (13) found Brewer failed to establish prejudice with regard to his trial counsels' rebuttal and cross-examination of Dr. Coons; (14) found there was ample other evidence of Brewer's future dangerousness beyond Dr. Coons' opinion; (15) found Dr. Coons' opinion regarding future dangerousness was not particularly powerful, certain, or strong and was effectively rebutted by Dr. Edens; (16) found Dr. Coons testified credibly and accurately regarding his experience and credentials; (17) concluded Brewer's complaints about his 2009 trial counsels' failure to impeach Dr. Coons for allegedly misrepresenting his credentials failed to satisfy either prong of *Strickland*; (18) concluded Brewer's complaints about his trial counsel's handling of Dr. Coons' testimony failed to satisfy both prongs of *Strickland* (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 6-26 & 71-76). The Texas Court of Criminal Appeals adopted the foregoing findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. AEDPA Review

The state habeas court's findings and conclusions underlying its rejection on the merits of this ineffective assistance claim are unassailable. The affidavits and state habeas testimony of Brewer's 2009 trial counsel fully supported the state habeas court's factual findings and legal conclusions, as do the records from Brewer's 1991 and 2009 trials. Brewer's 2009 trial counsel

gave detailed explanations during their state habeas hearing testimony for the objectively reasonable trial strategy they adopted regarding Dr. Coons' opinion testimony.

Brewer's 2009 trial counsel reasonably believed that the best strategy for countering the opinion testimony of Dr. Coons was to: (1) employ Dr. Edens' expert testimony and cross-examination of Dr. Coons to show (a) there was no scientific or statistical support for Dr. Coons' highly subjective methodology for predicting future dangerousness, and (b) in 1991, Dr. Coons had erroneously predicted Brewer would be violent if incarcerated, respectively; (2) show prosecution witnesses Merillat and Bryant corroborated Brewer's own testimony showing Brewer's non-violent record while incarcerated; and (3) not present their own expert prediction on the future dangerousness issue because doing so would undermine their attack on Dr. Coons' methodology and opinion, potentially require Brewer to submit to an evaluation by a prosecution expert, and distract from the concrete evidence showing Brewer's non-violent record during nearly two decades of incarceration. This Court concludes after de novo review that the state habeas court's findings and conclusions on these subjects were objectively reasonable.

Having Brewer evaluated by a defense mental health expert who testified about Brewer's propensity for future violence would likely have required Brewer to submit to an evaluation by a prosecution expert (possibly even Dr. Coons). It is well-established that when a criminal defendant seeks to introduce mental health evidence through a psychological expert, the prosecution is entitled to have its own expert examine and evaluate the defendant. *Kansas v. Cheever*, 571 U.S. 87, 94 (2013). It was reasonable for Brewer's 2009 trial counsel to wish to avoid that possibility. Such an evaluation could have proven problematic for a number of reasons. As noted by the state habeas court, the defense's mental health expert could have concluded Brewer did pose a risk of future dangerousness, despite his non-violent prison record. Alternatively, a prosecution mental

health expert might have concluded Brewer displayed antisocial or borderline personality disorder, a diagnosis that could foreseeably have damaged the defense on the future dangerousness, as well as the mitigation, special issue. Given Brewer's history of escalating adolescent violence leading to Laminack's murder, a diagnosis of antisocial personality disorder was a possibility.

Likewise, it was reasonable for the state habeas court to conclude that the strategic approach chosen by Brewer's 2009 trial counsel to attempt to exclude Dr. Coons' opinion was objectively reasonable. Brewer's trial counsel filed motions and requested a hearing to address the admissibility of Dr. Coons' opinion on future dangerousness, but recognized the practical reality that his testimony was likely to be admitted. It had been admitted at Brewer's original trial in 1991. By the time of Brewer's 2009 retrial, Dr. Coons had testified in many Texas capital murder trials and related proceedings.[57] In some of the cases, Dr. Coons had evaluated the defendant personally. In others, as was true in Brewer's case, he had not done so. In almost all of those cases, the admissibility of his opinion on future dangerousness was challenged at trial and on appeal or in a subsequent state or federal habeas corpus proceeding.

The undeniable fact confronting Brewer's 2009 trial counsel was that at the time of Brewer's retrial no Texas court, trial or appellate, had ever ruled inadmissible Dr. Coons' opinions on future dangerousness. The first such ruling came a year *after* Brewer's retrial in the case of

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[57] In another death penalty habeas case currently pending before this Court, the parties filed trial transcripts from over a dozen state or federal trials or hearings in which Dr. Coons testified on the topic of a defendant's future dangerousness. *See Holberg v. Lumpkin*, cause no. 2:15-CV-285-Z, at ECF nos. 220, 221, 271, 272, 311. These transcripts show Dr. Coons' opinions on future dangerousness were admitted in judicial proceedings in the following cases: (1) George E. Clark (Travis County Oct. 31, 1978); (2) Thomas Barefoot (W.D. Tex. July 28, 1982); (3) James C.L. Davis (Travis County Oct. 10-11, 1984); (4) Billy W. Coble (McLennan County Oct. 20, 1989); (5) James E. Bigby (Tarrant County May 7, 1991); (6) Brent R. Brewer (Randall County May 31, 1991); (7) Jeff Emery (Brazos County Nov. 25, 1991); (8) John A. Alba (Collin County May 5, 1992); (9) Ronald C. Chambers [*for the defense*] (Dallas County June 23-34, 1992); (10) Steven B. Alvarado (El Paso County Oct. 5, 1993); (11) Robert J. Anderson (Potter County Nov. 15, 1993); (12) Michael N. Blair (Midland County Sept. 29, 1994); (13) John D. Battaglia (Dallas County April 2002); (14) Guy L. Allen (Travis County Mar. 18, 2004); (15) Billy W. Coble (McLennan County Aug, 28, 2008); (16) Paul G. DeVoe (Travis County Oct. 7, 2009). Pursuant to Rule 201, FED. R. EVID., this Court takes judicial notice of the contents of the foregoing trial and hearing transcripts contained in its public records.

Coble v. State, 330 S.W.3d 253, 270-87 (Tex. Crim. App. 2010). Brewer's 2009 trial counsel cannot reasonably be faulted for failing to anticipate the very narrow holding of the TCCA in *Coble*, a case in which Dr. Coons testified after evaluating the defendant prior to an initial trial but in which he did not conduct a second evaluation prior to Coble's retrial. Clairvoyance is not a required attribute of effective assistance. *United States v. Fields*, 565 F.3d 290, 295 (5th Cir. 2009); *Sharp v. Johnson*, 107 F.3d 282, 289 n.28 (5th Cir. 1997).

The state habeas court reasonably concluded that Brewer's 2009 trial counsel acted in an objectively reasonable manner in filing a motion in limine, requesting a hearing on the admissibility of Dr. Coons' opinion, attempting to challenge the efficacy of that opinion, and making numerous objections to the admission of Dr. Coons' testimony. That Brewer's 2009 trial counsel failed to predict the exact procedure they needed to follow to preserve error regarding the admission of Dr. Coons' testimony, *i.e.*, the procedure employed in the *Coble* case during a 2008 retrial, does not mean their efforts attempting to do so were objectively unreasonable. Even in Coble's 2008 retrial, Dr. Coons' opinions were admitted. There was no logical reason for Brewer's 2009 trial counsel to believe the procedural path chosen by Coble's trial counsel in 2008 would ultimately prove *partially* successful on direct appeal (the TCCA held the trial court error in admitting Dr. Coons' opinion at Coble's retrial was harmless). In sum, Brewer's 2009 trial counsel cannot reasonably be faulted for failing to follow the same strategy that had proved unsuccessful during Coble's 2008 retrial.

The state habeas court also reasonably concluded that Brewer's trial counsel did mount an effective effort to rebut or counter Dr. Coons' opinion on future dangerousness. Dr. Edens challenged Dr. Coons' methodology for determining future dangerousness. On cross-examination, Dr. Coons admitted he could identify no standardized or scientific bases for his subjective

decision-making on the subject. Dr. Coons also admitted he had done virtually no follow-up research to verify the accuracy of his previous predictions on future dangerousness. The fact Brewer had a non-violent record over nearly two decades inside TDCJ was not seriously in dispute. Likewise, Brewer's 2009 trial counsel used both prosecution witnesses and defense witnesses to support their contention that TDCJ is a dangerous place, including death row.

The state habeas court also reasonably concluded there was a wealth of other evidence, besides Dr. Coons' less than convincing opinion, supporting the jury's 2009 verdict on the future dangerousness special issue. As explained above, the crime scene photos and video were quite stark and graphic. Brewer's and Nystrom's 2009 accounts of Laminack's violent murder were equally disturbing - they both made clear their surprise attack on Laminack commenced *before* either of them asked their victim to turn over his wallet or keys. Despite the apparent success of Brewer's trial counsels' efforts to rebut Dr. Coons' opinion, the jury returned a verdict on future dangerousness favorable to the prosecution. This Court concludes after de novo review, as did the state habeas court, there is no reasonable probability that, but for the failure of Brewer's trial counsel to pursue a very different strategy for addressing Dr. Coons' testimony, the outcome of Brewer's 2009 trial would have been any different. Under these circumstances, the state habeas court reasonably concluded that Brewer's complaints about his 2009 trial counsels' trial strategy and actual behavior toward Dr. Coons fail to satisfy either prong of *Strickland.*

Furthermore, this Court concludes after de novo review it was objectively reasonable for Brewer's 2009 trial counsel to choose to employ Dr. Edens' testimony to rebut Dr. Coons' methodology but not to attempt to exclude Dr. Coons' opinions. As of 2009, no Texas court identified by Brewer or located by this Court through independent research had ruled Dr. Coons' opinions on future dangerousness inadmissible. Having Dr. Edens attack Dr. Coons' methodology

during the Daubert hearing would have informed Dr. Coons as to the precise manner the defense planned to use to attack his opinion in Brewer's case. It was reasonable for Brewer's trial counsel to choose to keep that card close to their vests.

It was likewise objectively reasonable for Brewer's 2009 trial counsel *not* to attempt to attack Dr. Coons' credibility based on assertions that he had distorted his credentials. When questioned by Brewer's state habeas counsel at the evidentiary hearing in Brewer's second state habeas proceeding, Dr. Coons gave detailed accounts of his work for a variety of state agencies and licensing boards, most of which had taken place a considerable time before he testified at Brewer's 2009 retrial. (Second State Habeas Hearing, Vol. 3 of 4, at 256-63). Other than presenting the state habeas court with copies of correspondence from various state boards and agencies reporting that those entities could not locate copies of contracts or records indicating payments having been made to Dr. Coons, Brewer's state habeas counsel presented no evidence suggesting there was anything illegitimate about Dr. Coons' CV or inaccurate about his testimony at Brewer's retrial concerning his credentials or experience. The short answer to these complaints is Dr. Coons never testified in 2009 that he had ever entered into any formal written contracts with the agencies or boards in question. Instead, at Brewer's state habeas hearing, Dr. Coons testified without contradiction that he had worked for the boards and agencies in question on an ad hoc basis, a case at a time. *Id.* Brewer's 2009 trial counsel reviewed Dr. Coons' CV and found nothing therein that they believed furnished a basis for attacking Dr. Coons' credibility. (*Id.*, Vol. 2 of 4, at 53-58, 263). The state habeas court reasonably found Dr. Coons testified accurately and credibly in 2009 regarding his experience and credentials (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 26). Brewer presented the state habeas court, and presents this Court, with no clear and convincing evidence showing otherwise.

4. Conclusions

The state habeas court's rejection on the merits of Brewer's ineffective assistance complaints about the performance of his 2009 trial counsel vis-a-vis the trial testimony of Dr. Coons was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials and second state habeas corpus proceeding. Likewise, after de novo review, this Court concludes all of these ineffective assistance complaints fail to satisfy either prong of *Strickland*. Brewer's first claim for federal habeas relief is without merit and does not warrant federal habeas relief.

G. Complaints Regarding Admission of Autopsy Report & Related Testimony

1. The Claim Restated

In his federal habeas claim 2B, Brewer argues that his 2009 trial counsel failed to adequately challenge the admission of Laminack's autopsy report, the 1991 testimony of Dr. Erdmann, and the 2009 testimony of Dr. Natarajian regarding Laminack's cause of death (ECF no. 103, 51-59). More specifically, Brewer complains his 2009 trial counsel failed to: (1) use Dr. Erdmann's criminal convictions to impeach Dr. Erdmann's 1991 trial testimony; (2) present expert testimony attacking Dr. Erdmann's autopsy findings; (3) present testimony concerning Dr. Erdmann's criminal malfeasance; (4) move for the recusal of District Attorney Farren; and (5) adequately investigate before advising Brewer to testify.

2. State Court Disposition

Brewer presented an expanded version of these same complaints as claim 3A in his second state habeas corpus application. (Second State Habeas Application, at 184-215).

In their affidavits addressing Brewer's second state habeas application, both attorneys Odiorne and Keith stated that: (1) they made a decision not to challenge the prosecution's evidence regarding cause of death because, while they objected to the prosecution's presentation of the evidence from the 1991 trial, they believed it was a guilt-innocence phase issue; (2) the defense's strategy was to have Brewer testify, admit his guilt, and express remorse for his offense; and (3) any benefit that might be gained from attacking the evidence establishing cause of death would likely be outweighed by the potential damage to the credibility of the defense. (ECF no. 126-16, at 152 & 156 of 356). In their testimony at the evidentiary hearing held in Brewer's second state habeas proceeding, they echoed and elaborated on the same strategic reasoning. (Second State Habeas Hearing, Volume 2 of 4, at 70, 80-81, 84, 278; Volume 3 of 4, at 124, 135-36).

The state habeas trial court: (1) found as a matter of reasonable trial strategy, Brewer's 2009 trial counsel decided not to challenge the evidence of Laminack's cause of death because doing so was inconsistent with the trial strategy to have Brewer accept responsibility for his actions and admit his guilt; (2) found, in light of the defense's reasonable trial strategy, Brewer's trial counsel were not ineffective for failing to attack Dr. Erdmann's credibility; (3) concluded that, because Dr. Erdmann was cross-examined at the time of his 1991 testimony, there was no viable Confrontation Clause challenge to admission of his 1991 testimony in 2009; (4) found Laminack's autopsy report was not subject to a hearsay objection; (5) found Brewer's 2009 trial counsel did object to the admission of the autopsy report and 1991 trial testimony; (6) found Brewer's 2009 trial counsel were not ineffective for failing to present expert testimony challenging the accuracy of Dr. Erdmann's autopsy report and 1991 trial testimony; (7) found Brewer had failed to show he was prejudiced by his counsels' conduct vis-a-vis evidence of cause of death; and (8) concluded Brewer's state claim 3A failed to satisfy either prong of *Strickland* (Findings of Fact and

Conclusions of Law in Second State Habeas Corpus Proceeding, at 41-45 & 82). The Texas Court of Criminal Appeals adopted these findings and conclusions when it denied Brewer's second state habeas application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. AEDPA Review

The state habeas court's findings and conclusions underlying its rejection on the merits of this ineffective assistance claim are unassailable. The affidavits and state habeas testimony of Brewer's 2009 trial counsel fully supported the state habeas court's factual findings and legal conclusions, as do the records from Brewer's 1991 and 2009 trials.

For the same reasons discussed in Section XII.E. above, the state habeas court reasonably concluded Brewer's 2009 trial counsel adopted an objectively reasonable trial strategy when they advised Brewer to accept responsibility for his offense, take the stand, admit his guilt, express his remorse, and point to his good behavior in prison. The state habeas court also reasonably concluded Brewer was not prejudiced thereby. Attacking Dr. Erdmann's credibility, the accuracy of Laminack's autopsy report, or Dr. Natarajian's 2009 testimony could have greatly undermined the credibility of the defense at Brewer's 2009 retrial. Given that Brewer's and Nystrom's 2009 testimony rendered moot any issue regarding the cause of Laminack's death, Brewer's trial counsel reasonably concluded that attacking the autopsy report, Dr. Erdmann's 1991 testimony, or Dr. Natarajian's 2009 testimony was potentially harmful and unlikely to furnish any tangible benefit.

As explained in Section IX. above, Brewer has failed to allege any specific facts or to present any evidence to either the state habeas court or this Court establishing that Laminack's cause of death was anything other than what Dr. Erdmann and Dr. Natarajian testified, *i.e.*, multiple stab wounds to the neck causing a fatal blood loss.

Brewer complains that his 2009 trial counsel failed to adequately investigate the case and

erroneously advised him to testify in 2009. Had Brewer again chosen to stand mute at his 2009 retrial, however, the jury would have heard all of the same evidence the jury heard in 1991, as well as Nystrom's self-serving account of Laminack's murder. In addition, as explained in Section XII.E. above, absent Brewer's own testimony in 2009, a considerable amount of mitigating evidence that had been presented in 1991 would not have been before the jury in 2009. As attorney Keith explained during his testimony at the state habeas hearing, in 2009 Brewer's mother was no longer an effective witness and Brewer's biological father appeared intent on committing perjury. (Second State Habeas Hearing, Volume 3 of 4, at 142, 156-57). Brewer's testimony was needed in 2009 to furnish a comprehensive overview of Brewer's background and to present considerable mitigating evidence not otherwise available. Under such circumstances, this Court concludes there is no reasonable probability the outcome of Brewer's 2009 trial would have been any different had Brewer not testified.

Brewer complains that his trial counsel failed to move to recuse District Attorney Farren. Brewer does not, however, allege any specific facts or present any evidence showing the identity of the prosecuting attorneys had any impact on the outcome of Brewer's 2009 retrial. This Court concludes after de novo review that Brewer was not prejudiced within the meaning of *Strickland* by his 2009 trial counsels' failure to move to recuse District Attorney Farren.

After de novo review, and for many of the same reasons discussed in Sections IX. and XII.E. above, this Court agrees with the state habeas court that Brewer's complaints regarding his trial counsel's handling of the autopsy report, Dr. Erdmann's 1991 trial testimony, and Dr. Natarajian's 2009 testimony all fail to satisfy both prongs of *Strickland*.

4. Conclusions

The state habeas court's rejection on the merits of Brewer's ineffective assistance

complaints about the performance of his 2009 trial counsel vis-a-vis Laminack's autopsy report, Dr. Erdmann's 1991 trial testimony, and Dr. Natarajian's 2009 trial testimony was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials and second state habeas corpus proceeding. Likewise, after de novo review, this Court concludes these ineffective assistance complaints fail to satisfy either prong of *Strickland*. Brewer's claim 2B for federal habeas relief is without merit and does not warrant habeas relief.

H. Failure to Investigate Brewer's Background & Present Mitigating Evidence

1. The Claim Restated

In his fifth federal habeas claim, Brewer argues that his 2009 trial counsel failed to adequately investigate Brewer's background and present mitigating evidence showing that: (1) Brewer had a family history of substance abuse, mental illness, and violence; (2) Brewer's early childhood was characterized by inadequate nutrition, severe maternal neglect, and instability; (3) Brewer was emotionally abandoned by his step-father; (4) Brewer was traumatized when he was ten-to-twelve years old when a female babysitter molested him; (5) Brewer's biological father Albert had only minor contact with Brewer prior to Brewer reaching age fifteen, but thereafter was abusive and violent toward Brewer; (6) Brewer suffers from mental illness, including severe depression (which had led to multiple instances of suicidal ideation and at least one attempt), and at the time of his capital offense, Brewer was in the midst of an abandonment crisis, decompensating, and suffering major depression, severe anxiety, and dysthymia; (7) a mental health evaluation of Brewer performed after Brewer's 1991 trial revealed that Brewer suffered from all of the foregoing problems during his childhood; and (8) Nystrom was manipulative,

controlling, and responsible for Brewer's actions at the time of their capital offense. (ECF no. 103, 79-108).

2. State Court Disposition

Brewer presented an expanded version of this same claim as his fourth claim in his second state habeas corpus application. (Second State Habeas Application, at 225-92).

In their affidavits filed in the state habeas court, Brewer's 2009 trial counsel stated: (1) they reviewed the record from Brewer's first trial and the notes and records of Brewer's prior counsel (trial and state habeas), as well as retaining the services of both a mitigation specialist and an investigator; (2) they made a conscious decision not to call Albert Brewer to testify because they believed he would commit perjury; (3) attorney Keith traveled to Mississippi and met with Brewer's sister Billie Ann on two occasions prior to trial; and (4) Keith also attempted to meet with Brewer's mother, and, when she did not make herself available, he started the process of obtaining a subpoena to ensure her appearance at trial. (ECF no. 126-16, at 152 & 156-57 of 356).

At the evidentiary hearing in Brewer's second state habeas proceeding, attorney Odiorne testified without contradiction that: (1) the only available evidence of Brewer's remorse came from Brewer himself (Second State Habeas Hearing, Volume 2 of 4, at 70, 80-81); (2) the defense's strategy was to show there were opportunities for violence in prison but Brewer had a record of consistently behaving non-violently (*Id.*, at 70, 84); (3) the defense team made the decision not to have Brewer evaluated by a testifying mental health expert because doing so would open Brewer up to evaluation by a prosecution expert (*Id.*, at 98); (4) evidence focusing the jury on Brewer's suicide attempt and underlying depression could have been spun by the prosecution as indicating Brewer was fascinated by death and support a prosecution argument that Brewer's depression reflected his remorse over getting caught rather than for his offense (*Id.*, at 198-202); and (5) the

defense did move for a continuance for the purpose of obtaining more time to develop its mitigation case (*Id.*, at 187).

Attorney Keith testified at the same hearing, also without contradiction, that: (1) the defense's strategy was to show Brewer's behavior in prison was good and that Brewer was remorseful for his offense (*Id.*, at 278, 285); (2) the defense chose not to have a mental health expert like Dr. Edens, Dr. Cunningham, or Dr. Sorenson make a negative prediction about Brewer's future dangerousness because they feared the jury would view such a prediction in the same vein as Dr. Coons' affirmative prediction and "get lost in the science" (Second State Habeas Hearing, Volume 3 of 4, at 26-31, 51, 99-100, 114-17); (3) the defense did not repeat the same trial strategy as Brewer's 1991 trial counsel (*Id.*, at 33); (4) instead, the defense's strategy was to show that Dr. Coons had been wrong in 1991 when he predicted Brewer would behave violently in prison and emphasize Brewer's remorse and record of good behavior in prison (*Id.*, at 33, 124, 135-36, 142-43); (5) instead of attempting to explain in detail to the jury precisely why Dr. Coons' methodology was flawed, they used Dr. Edens to testify that Dr. Coons' methodology was unscientific (*Id.*, at 46); (6) the defense team did not want the jury focusing on risk factors necessary for an accurate prediction of future violence – they wanted the jury to focus on the concrete fact that Brewer had behaved nonviolently throughout his TDCJ incarceration (*Id.*, at 49); (7) the defense wanted to stay away from Albert's Brewer's 1991 trial testimony because they believed it was perjured and they feared Albert would perjure himself if called to testify in 2009 (*Id.*, at 80, 142); (8) the defense wanted to show that Brewer had a good relationship with his sister and had earned a GED while in Big Spring (*Id.*, at 80); (9) the defense did not wish to emphasize Brewer's suicide attempt because doing so could be spun by the prosecution as showing Brewer was intent on taking human life (*Id.*, at 127-28, 130); (10) Dr. Cunningham testified at the Coble

retrial to counter Dr. Coons, but the jury returned a verdict on the capital sentencing special issues authorizing Coble's death penalty (*Id.*, at 132); (11) he did not believe Brewer's jury would be impressed by the admission of scientific articles addressing risk assessments for prison inmates (*Id.*, at 137-38); (12) Brewer's mother's demeanor in 2009 was such that defense counsel were leery of asking her too many questions (*Id.*, at 156-57); and (13) he did not believe Dr. Coons would change his affirmative prediction of future dangerousness if the hypothetical question asked by the prosecution were changed (*Id.*, at 158).

The state habeas court found Brewer's 2009 trial counsel: (1) used an investigator and a mitigation specialist to attempt to secure mitigating evidence, as well as undertaking review of Brewer's 1991 trial transcript, traveling to Mississippi to interview Brewer's family, and reviewing the notes of Brewer's original trial counsel; (2) made a reasonable decision not to call Albert Brewer to testify based on their mitigation investigation, which revealed Albert Brewer would commit perjury if called to testify; (3) presented an extensive case in mitigation, including Brewer's own testimony regarding his life history; (4) presented substantial testimony showing Brewer had been an exemplary inmate; (5) presented evidence showing Brewer had the opportunity to commit acts of violence while incarcerated but had not done so; (6) called Dr. Edens to refute Dr. Coons' opinion regarding future dangerousness and challenge Dr. Coons' methodology; (7) most of the unoffered mitigating evidence identified by Brewer in his second state habeas application was not substantially different from the mitigating evidence Brewer's 2009 trial counsel actually presented; (8) the investigation of Brewer's background and trial strategy for presenting mitigating evidence employed by Brewer's 2009 trial counsel were objectively reasonable; and (9) Brewer failed to show prejudice in connection with his 2009 trial counsels' presentation of mitigating evidence. (Findings of Fact and Conclusions of Law in Second

State Habeas Corpus Proceeding, at 48-54). The state habeas court also concluded Brewer's complaints about his 2009 trial counsels' investigation and presentation of mitigating evidence failed to satisfy either prong of *Strickland* (*Id.*, at 85). The Texas Court of Criminal Appeals adopted those findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. Clearly Established Federal Law

Complaints about a trial counsel's failure to investigate the defendant's background and to present available mitigating evidence are quite common. In the context of penalty phase mitigation in capital cases, the Supreme Court has held that it is unreasonable not to investigate further when counsel has information available to him that suggests additional mitigating evidence - such as mental illness or a history of childhood abuse - may be available. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 39-40 (2009) (trial counsel failed to interview any witnesses or to request any of the defendant's school, medical, or military records and ignored information in a report on the defendant's competency evaluation suggesting possible mitigating evidence - including evidence of mental illness - could be gleaned from investigation into the defendant's family background and military service); *Wiggins v. Smith*, 539, U.S. 510, 524-26 (2003) (counsel failed to investigate the defendant's background beyond review of summary records from competency evaluation, presentence report, and records from the state foster care system, failed to compile a social history of the defendant, and presented no mitigating evidence concerning the defendant's background); *Williams v. Taylor*, 529 U.S. 362, 395-96 (2000) (counsel failed to conduct even a cursory investigation into the defendant's background that would have shown the defendant's parents had been imprisoned for the criminal neglect of the defendant and his siblings, the defendant had been severely beaten by his father, and had been returned to his parents' custody after they were released

from prison). Such claims are commonly referred to as *Wiggins* claims.

With regard to the prejudice prong of *Strickland*, the Supreme Court held the petitioners in *Wiggins*, *Porter*, and *Williams* were prejudiced by the failure of their trial counsel to fully investigate, develop and present available mitigating evidence. More specifically, the Supreme Court found in *Wiggins* that his trial counsel failed to discover, develop, and present available mitigating evidence showing:

> Wiggins experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic, absentee mother. He suffered physical torment, sexual molestation, and repeated rape during his subsequent years in foster care. The time Wiggins spent homeless, along with his diminished mental capacities, further augment his mitigation case. Petitioner thus has the kind of troubled history we have declared relevant to assessing a defendant's moral culpability.

Wiggins, 539 U.S. at 253.

In *Porter*, the new mitigating evidence undiscovered and undeveloped by trial counsel included lay and expert testimony showing: (1) Porter routinely witnessed his father beat his mother, one time so severely that she had to go to the hospital and lost a child; (2) Porter's father was violent every weekend and Porter was his father's favorite target, particularly when Porter tried to protect his mother; (3) on one occasion, Porter's father shot at him for coming home late but missed and beat Porter instead; (4) Porter attended classes for slow learners until he left school at age 12 or 13; (5) to escape his horrible family life, Porter enlisted in the Army at age 17 and fought in the Korean War; (6) Porter suffered a gunshot wound to the leg, yet fought heroically through two battles; (7) after the war, Porter suffered dreadful nightmares and would attempt to climb his bedroom walls at night with knives; (8) Porter developed a serious drinking problem and began drinking so heavily that he would get into fights and not remember them at all; (9) Porter suffered from brain damage that could manifest in impulsive, violent behavior; (10) at the time of the capital offense, Porter was substantially impaired in his ability to conform his conduct to the

law and suffered from an extreme mental or emotional disturbance; and (11) Porter had substantial difficulties with reading, writing, and memory. *Porter*, 558 U.S. at 449-51.

Prejudice was established in *Williams* through testimony showing trial counsel failed to discover and develop available mitigating evidence showing: (1) Williams experienced a nightmarish childhood; (2) Williams' parents had been imprisoned for criminal neglect of Williams and his siblings; (3) Williams had been severely beaten by his father, committed to the custody of the social services bureau for two years during his parents' incarceration, and then returned to his parents after they were released from prison; (4) Williams was borderline mentally retarded and did not advance beyond the sixth grade in school; (5) Williams received commendations for helping to crack a prison drug ring and for returning a guard's missing wallet; (6) Williams was among the inmates least likely to act in a violent, dangerous or provocative way; (7) Williams seemed to thrive in a more regimented and structured environment; and (8) Williams earned a carpentry degree while in prison. *Williams,* 529 U.S. at 395-96.

4. AEDPA Analysis

Establishing deficient performance under *Strickland* requires more, however, than a mere showing that a criminal defendant's trial counsel could have done more investigation or presented additional mitigating evidence. *See Thomas v. Lumpkin*, 995 F.3d 432, 454 (5th Cir. 2021) ("Our concern is not whether counsel at trial could have done more. This is often, almost always, the case."). Rather the evaluation of trial counsel's performance turns on the objective reasonableness of the scope of said counsel's investigation, which in turn depends to a great extent upon the information furnished to trial counsel by the defendant himself, information furnished by those family members and other individuals who knew the defendant and whom the defendant's defense team interviewed, and the information contained in the defendant's school, medical, employment,

and institutional records obtained by the defense team prior to trial. *See Burger v. Kemp*, 483 U.S. 776, 795 (1987) ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions. Counsel's actions are usually based, quite properly, on informed strategic choices made by the defendant and on information supplied by the defendant. In particular, what investigation decisions are reasonable depends critically on such information.") (quoting *Strickland*, 466 U.S. at 691)). Moreover, the fact that a particular strategic approach to presenting mitigating evidence ultimately proved unsuccessful does not render it unreasonable. *Thomas*, 995 F.3d at 455 (citing *Strickland*, 466 U.S. at 689).

As explained in Sections I.G.2. and XII.E. above, Brewer's 2009 trial counsel used Brewer's own testimony to present a nearly comprehensive account of Brewer's background. The state habeas court reasonably found that almost all of the "new" mitigating evidence identified by Brewer in his voluminous second state habeas application and its exhibits actually had been presented in one form or another during Brewer's 2009 retrial. Brewer's trial counsel cannot reasonably be faulted for failing to present cumulative mitigating evidence. *Howard*, 959 F.3d at 173; *Norman*, 817 F.3d at 233.

Brewer's 2009 testimony gave a detailed account of his troubled childhood, including the difficulties he experienced growing up in an unstable family environment, unloved by his violent, abusive stepfather and largely ignored by his neglectful mother. Brewer also testified, as had Albert Brewer in 1991, that Brewer had virtually no contact with his biological father until Brewer reached age fifteen. Brewer also testified that his biological father was violent and abusive toward him and his mother, even to the point that Brewer had to violently intercede on one occasion to protect his mother from an assault by his biological father. Brewer's 2009 trial counsel could reasonably have believed that additional testimony emphasizing those aspects of Brewer's

background that showed him to be the product of a violent, abusive, homelife could prove problematic. Failure to present evidence that is double-edged in nature generally lies within the discretion of trial counsel. *See Ayestes v. Davis*, 933 F.3d 384, 392 (5th Cir. 2019) ("this Court has repeatedly denied claims of ineffective assistance of counsel for failure to present 'double edged' evidence where counsel has made an informed decision not to present it." (quoting *Hopkins v. Cockrell* 325 F.3d 579, 586 (5th Cir. 2003)), *cert. denied*, 140 S. Ct. 1107 (2020); *Smith v. Davis*, 927 F.3d 313, 337 (5th Cir. 2019) (defense counsel acted reasonably in choosing not to present mental health evidence because doing so could have opened the door to evidence showing the defendant displayed antisocial personality disorder and had confessed to feigning mental illness while incarcerated), *cert. denied*, 140 S. Ct. 1299 (2020).

Likewise, the state habeas court reasonably concluded Brewer's 2009 trial counsel acted reasonably when they chose not to have Brewer evaluated by a *testifying* mental health expert. As explained in Section XII.F.3. above, doing so would have opened Brewer up to evaluation by a prosecution mental health expert. *Cheever*, 571 U.S. at 94. It could also have opened a potential Pandora's box of possibly harmful consequences. *Smith*, 927 F.3d at 337. In addition, Brewer's 2009 trial counsel could reasonably have concluded that pursuing the same strategic approach that had proven unsuccessful at the 2008 retrial in Coble (*i.e.*, using a defense expert to unsuccessfully attack the admissibility of Dr. Coons' opinion in a pretrial hearing and then calling a mental health expert (Dr. Cunningham) to render an opposing opinion on future dangerousness) was less efficacious than having Dr. Edens challenge Dr. Coons' methodology *after* Dr. Coons had testified.

In 2008, the defense strategy at Coble's retrial had failed to exclude Dr. Coons' opinion and ultimately resulted in the return of a second death sentence for Coble. Brewer's 2009 trial counsel cannot reasonably be faulted for choosing an alternative, objectively reasonable, trial

strategy, *i.e.*, one which used the defense expert to attack Dr. Coons' methodology and eschewed using a defense expert to present a differing opinion as to future dangerousness. As explained in Section XII.F. above, as of 2009, Dr. Coons' opinion as to future dangerousness had never been ruled inadmissible by any Texas trial or appellate court. It was therefore reasonable for Brewer's trial counsel to expect Dr. Coons' opinion would be admitted at Brewer's retrial, just as it had been in 1991.

Brewer's 2009 trial counsel had a very compelling argument as to future dangerousness and strong evidence supporting same at their disposal: testimony from multiple jail and prison officials establishing Brewer's nearly two decades of good behavior in TDCJ and jail custody. Attempting to focus the jury on that concrete fact, rather than offering a controverting expert opinion on future dangerousness, was eminently reasonable.

The state habeas court reasonably concluded there was no reasonable probability that, but for the failure of Brewer's 2009 trial counsel to present the legitimately new mitigating evidence Brewer identified in his second state habeas application (*e.g.*, Brewer's evidence that he was fondled by a teenage babysitter when Brewer was ten or twelve years old), the outcome of Brewer's retrial would have been any different. The thrust of the defense's evidence and argument at Brewer's retrial was focusing the jury's attention on Brewer's excellent behavior *as an adult* in TDCJ custody. Brewer's 2009 trial counsel could reasonably have believed testimony detailing Brewer's childhood molestation would detract from the thrust of their defensive strategy.

Furthermore, there was evidence in the trial record that tended to show Brewer had not suffered any long-lasting negative effects from his fondling incident. Brewer's educational records showed he had an IQ of 115. (22/28 R.R. 154). Prosecution witness Bryant testified, without contradiction, that Brewer's TDCJ medical records showed, despite Brewer's 2007 suicide

attempt, there was no indication Brewer had ever been evaluated or treated for any mental health problems during his incarceration – all of his contacts with TDCJ mental health professionals had been limited to routine mental health screenings. (23/28 R.R. 105-10).

After de novo review of the entire record from Brewer's trial, direct appeals, state habeas corpus proceedings, and Brewer's pleadings in his federal habeas corpus proceeding, this Court concludes there is no reasonable probability that, but for the failure of Brewer's 2009 trial counsel to present any of Brewer's legitimately new mitigating evidence, the outcome of his retrial would have been any different. As explained in Section I.G. above, Brewer's and Nystrom's 2009 testimony was graphic and grisly, as were the crime scene photographs and videos. As explained in Section XII.F.3. above, Brewer's and Nystrom's testimony established they assaulted Laminack without warning *before* either of them asked him to turn over his wallet or keys. They agreed they later walked away from the crime scene with Laminack's keys in their possession, even though their goal and plan on the evening in question had been to obtain the use of a vehicle. There was testimony from multiple witnesses describing Brewer as having smirked or giggled when describing Laminack begging for his life. There was also a photograph showing Brewer shooting the finger at a photographer while being escorted from the courthouse prior to his initial trial. In addition, Brewer's 2009 jury had the firsthand opportunity to evaluate the credibility of Brewer's expressions of remorse and contrition for his offense.

Despite the considerable efforts of Brewer's 2009 trial counsel to refute Dr. Coons' opinion on future dangerousness, and despite Brewer's repeated insistence during his testimony that he was remorseful and sincerely contrite, the jury answered all of the capital sentencing special issues favorably to the prosecution. Under such circumstances, this Court concludes there is no reasonable probability that a different outcome would have resulted had Brewer's 2009 trial

counsel presented all of the testimony and other new evidence Brewer has identified in his current federal pleadings. The state habeas court reasonably concluded Brewer's new mitigating evidence added very little of substance to the case in mitigation actually presented at his 2009 retrial. Most certainly, the "new" mitigating evidence identified by Brewer pales in comparison to the compelling yet unpresented mitigating evidence in *Porter*, *Williams*, and *Wiggins*.

5. Conclusions

The state habeas court's rejection on the merits of Brewer's *Wiggins* claim was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials and second state habeas corpus proceeding. Likewise, after de novo review, this Court concludes these ineffective assistance claim fails to satisfy either prong of *Strickland*. Brewer's fifth claim for federal habeas relief is without merit and does not warrant habeas relief.

XIII. INEFFECTIVE ASSISTANCE BY APPELLATE COUNSEL

A. Overview of the Claims

In his third, eighth, and tenth claims for federal habeas relief, Brewer complains that his state appellate counsel rendered ineffective assistance by failing to raise points of error on direct appeal complaining of: (1) the state trial court's allegedly erroneous admission in 2009 of the trial transcript and exhibits from Brewer's 1991 trial; (2) the allegedly false testimony of prosecution witnesses A.P. Merillat and Stephen Bryant; and (3) the unconstitutionality of various provisions within the Texas capital sentencing statute. (ECF no. 103, at 59-63, 114-19, 120-24).

B. Clearly Established Federal Law

The same two-pronged standard for evaluating ineffective assistance claims against trial

counsel announced in *Strickland* applies to complaints about the performance of counsel on appeal. *See Smith v. Robbins*, 528 U. S. 259, 285 (2000) (holding a petitioner arguing ineffective assistance by his appellate counsel must establish both his appellate counsel's performance was objectively unreasonable and there is a reasonable probability that, but for appellate counsel's objectively unreasonable conduct, the petitioner would have prevailed on appeal). Thus, the standard for evaluating the performance of counsel on appeal requires inquiry into whether appellate counsel's performance was deficient, *i.e.*, whether appellate counsel's conduct was objectively unreasonable under then-current legal standards, and whether appellate counsel's allegedly deficient performance "prejudiced" the petitioner, *i.e.*, whether there is a reasonable probability that, but for appellate counsel's deficient performance, the outcome of the petitioner's appeal would have been different. *Smith v. Robbins*, 528 U. S. at 285. Appellate counsel who files a merits brief need not and should not raise every nonfrivolous claim but, rather, may select from among them in order to maximize the likelihood of success on appeal. *Smith v. Robbins*, 528 U. S. at 288; *Jones v. Barnes*, 463 U. S. 745, 751 (1983). The process of winnowing out weaker arguments on appeal and focusing on those more likely to prevail is the hallmark of effective appellate advocacy. *Smith v. Murray*, 477 U. S. 527, 536 (1986); *Jones v. Barnes*, 463 U. S. at 751-52.

Where, as in Brewer's case, appellate counsel presented, briefed, and argued, albeit unsuccessfully, one or more nonfrivolous grounds for relief on appeal and did not seek to withdraw from representation without filing an adequate *Anders* brief, the defendant must satisfy *both* prongs of the *Strickland* test in connection with his claims of ineffective assistance by his appellate counsel. *See Roe v. Flores-Ortega*, 528 U. S. 470, 477, 482 (2000) (holding the dual prongs of *Strickland* apply to complaints of ineffective appellate counsel and recognizing, in cases involving "attorney error," the defendant must show prejudice); *Smith v. Robbins*, 528 U.S. at 287-89

(holding petitioner who argued his appellate counsel rendered ineffective assistance by failing to file a merits brief must satisfy both prongs of *Strickland*).

C. Failure to Challenge Admission of 1991 Trial Testimony & Exhibits

1. The Claim Restated

In his third claim for federal habeas relief, Brewer argues that his state appellate counsel should have raised a point of error on direct appeal complaining about the state trial court's wholesale admission in 2009 of the testimony and exhibits from Brewer's 1991 capital murder trial and arguing that action violated Brewer's Confrontation Clause rights. (ECF no. 103, 59-63).

2. State Court Disposition

In claims 9A and 9B in his second state habeas corpus application, Brewer complained that his state appellate counsel rendered ineffective assistance by failing to raise points of error complaining about the trial court's (1) denial of Brewer's motion to preclude the prosecution's expected use in 2009 of the 1991 trial transcript, and (2) overruling of Brewer's objections to the admission of the 1991 trial transcript and exhibits. (Second State Habeas Application, 345-55).

The state habeas trial court found: (1) the facts and circumstances of Brewer's capital offense were relevant to the jury's assessment of punishment; (2) the exhibits and trial transcript from the original trial were relevant to the jury's assessment of punishment and did not violate the Confrontation Clause; (3) the retendered evidence from the initial trial had been reviewed by the state appellate court and withstood scrutiny; (4) the retendered evidence had been subject to objections and cross-examination at the guilt-innocence phase of the original trial; (5) Brewer's state appellate counsel did not render ineffective assistance by failing to challenge the trial court's (a) denial of Brewer's motion to preclude the expected use of the 1991 trial transcripts and exhibits, or (b) overruling of Brewer's objections to the prosecution's exhibits from the prior trial; and (6)

the state trial court took judicial notice of Brewer's capital murder conviction and so informed the jury in 2009. (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 66-67). The state habeas trial court also concluded: (1) in 2009, the state trial court did not have jurisdiction to address the admissibility of the prior trial's exhibits and transcript; (2) Brewer failed to establish a lack of relevancy regarding evidence describing the facts and circumstances of his capital offense; (3) Brewer failed to establish admission of the transcript and exhibits violated the Confrontation Clause; and (4) Brewer's ninth grounds for state habeas relief failed to establish either prong of *Strickland*. (*Id.*, at 95-96). The state habeas court also concluded the admission of Dr. Natarajian's opinion testimony did not violate Confrontation Clause principles. (*Id.*, at 82). The Texas Court of Criminal Appeals adopted those findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. AEDPA Review

The state habeas court concluded that, as a matter of state evidentiary principles, the exhibits and trial transcripts from Brewer's 1991 trial were relevant to the jury's assessment of punishment. (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 66). The Texas Court of Criminal Appeals' conclusion on this matter of state evidentiary law is binding on this federal habeas court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus."); *Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013) (holding a Texas habeas court's interpretation of evidentiary rules was binding in a federal habeas case); *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009) (a state court's interpretation of state law binds a federal court

sitting in habeas corpus). Thus, there was no arguable legal basis for excluding evidence relating to the facts and circumstances of Laminack's murder from the jury at Brewer's 2009 retrial.

At the time Brewer's state appellate counsel was preparing Brewer's second direct appeal brief, it was clear under both clearly established federal and state law that violations of the Confrontation Clause were subject to harmless error analysis. *See Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (constitutionally improper denial of a defendant's opportunity to impeach a witness for bias, like other Confrontation Clause errors, is subject to *Chapman* harmless-error analysis); *Smith v. State*, 297 S.W.3d 260, 277 (Tex. Crim. App. 2009) (finding erroneous admission at the punishment phase of a capital murder trial of the defendant's TDCJ disciplinary records violated the Confrontation Clause but concluding the error was harmless); *Clay v. State*, 240 S.W.3d 895, 902 n.9 (Tex. Crim. App. 2007) (a violation of the Confrontation Clause is subject to harmless error analysis) (citing *Van Arsdall*, 475 U.S. at 684)). As the Supreme Court explained in *Van Arsdall*, the Constitution entitles a criminal defendant to a fair trial not a perfect one. 475 U.S. at 681.

Brewer's Confrontation Clause argument, underlying his third claim for federal habeas relief, ignores the fact that in 2009 the prosecution did far more than merely admit the trial testimony of prosecution witnesses from the 1991 trial. As explained in Section I.G.1. above, the prosecution presented live testimony in 2009 from a variety of witnesses *subject to cross-examination* covering much of the same evidence presented during the guilt-innocence and punishment phases of Brewer's 1991 trial. For example, a Randall County sheriff's deputy authenticated crime scene photographs and a diagram of the crime scene. (21/28 R.R. 83-103). The young woman whom Nystrom and Brewer attempted to rob of her vehicle testified about her encounter with them shortly before Laminack's murder. (21/28 R.R. 105-18). Laminack's wife

and daughter testified again about their interactions with Laminack on the night of his murder. (21/28 R.R. 58-81, 119-43, 247). The same prosecution blood spatter expert who testified at Brewer's 1991 trial repeated his testimony regarding his interpretation of the patterns he observed inside Laminack's vehicle. (21/28 R.R. 146-245). One of Brewer's roommates at the time of the murder again testified about what she observed Nystrom and Brewer do and say on the evening of the murder. (21/28 R.R. 248-88). The same photographer who authenticated his photo of Brewer shooting the finger while being escorted from court prior to the 1991 trial did so again. (22/28 R.R. 60-64). Brewer's acquaintance Stephen "Skee" Callen again testified that Nystrom told him they had killed a man for $140 and Brewer smirked and giggled when he described Laminack begging for his life. (22/28 R.R. 67-74). A former Randall County jail inmate again testified that Brewer also recounted to him how Laminack had begged for his life as Brewer stabbed him. (22/28 R.R. 91-125). Brewer's former high school girlfriend again testified that Brewer threatened her on multiple occasions after she broke up with him and he shoved her against a bank of lockers, causing her to suffer a significant back injury. (22/28 R.R. 75-88). A Florida law enforcement officer again testified regarding his arrest of Brewer for carrying a concealed weapon. (22/28 R.R. 230-40).

Dr. Natarajian testified *subject to cross-examination* about his conclusions regarding Laminack's cause of death. (23/28 R.R. 19-66). While Dr. Natarajian testified that he had reviewed Dr. Erdmann's 1991 testimony and Laminack's autopsy report, he also testified that he had reviewed the autopsy photographs and crime scene photographs in formulating his own opinion. More importantly, at no point did Dr. Natarajian recite from or read into the record any portion of Laminack's autopsy report or Dr. Erdmann's 1991 trial testimony. The state habeas court concluded Dr. Natarajian's opinion testimony as to Laminack's cause of death was admissible under Texas evidentiary rules and did not violate the Confrontation Clause. (Findings of Fact and

Conclusions of Law in Second State Habeas Corpus Proceeding, at 82). Moreover, as explained in Sections IX. and XII.G. above, at Brewer's 2009 retrial there was no genuine dispute as to the cause of Laminack's death. There still is none. Nystrom and Brewer both testified without contradiction that Laminack bled profusely after Brewer stabbed him in the neck and Laminack was totally incapacitated by time they left the crime scene. It did not require a medical degree, or the assistance of an expert opinion, to help the jurors to review the crime scene photographs, recall the testimony of Brewer and Nystrom, and conclude Laminack's cause of death was massive blood loss. Likewise, as explained in Section XII.G. above, contesting the cause of Laminack's death was not a matter Brewer's 2009 trial counsel wished to pursue; doing so conflicted with their reasonable trial strategy of having Brewer admit his guilt, accept responsibility for his offense, express remorse, and point to his good behavior in prison.

Prosecution witnesses A.P. Merillat, Stephen Bryant, and Dr. Richard E. Coons all testified in 2009 *subject to cross-examination* in the manner discussed at length in Sections I.G.1., VIII., XII.C., and XII.F. above. Finally, Kristie Nystrom testified in 2009 *subject to cross-examination* about Brewer's fatal stabbing of Laminack. (22/28 R.R. 168-225).

The only testimony from Brewer's 1991 capital murder trial that was read into the record in the presence of the jury in 2009 consisted of the testimony of (1) a Mississippi law enforcement officer concerning the incident in which Brewer beat his biological father while breaking up a fight between his parents (22/28 R.R. 40-59), and (2) a Cedar Hill ISD administrator concerning Brewer's educational and disciplinary records from middle school (22/28 R.R. 136-53). When he testified, Brewer did not controvert or contradict any of the evidence the prosecution presented through the 1991 testimony of either of those two witnesses.

Brewer's state appellate counsel could reasonably have reviewed the record from Brewer's

2009 trial and concluded that any error committed by the state trial court in its wholesale admission of the trial transcript and exhibits from Brewer's 1991 trial was harmless under the applicable *Chapman* standard:

> Whether such an error is harmless in a particular case depends on a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.

Van Arsdall, 475 U.S. at 684.

The admission of the 1991 trial transcript and exhibits resulted in largely cumulative evidence being before Brewer's 2009 jury. All of the crime scene photographic and video evidence introduced during the 1991 trial were again authenticated in the jury's presence during the 2009 trial. All of the relevant prosecution witnesses from Brewer's 1991 trial testified again, subject to cross-examination, at his 2009 trial. The admission of the 1991 trial testimony of prosecution witness Richard Lepicher (the Mississippi law enforcement officer who arrived at the Brewer residence the night Brewer beat his father Albert with a broom) was wholly consistent with Brewer's own 2009 testimony about both that incident and Albert's alcoholism and propensity for violence. (25/28 R.R. 60-62, 115, 188-26). Likewise, when he testified in 2009, Brewer admitted that he had twice been disciplined in middle school and one of those incidents involved him pointing a buck knife at a fellow student. (25/28 R.R. 50, 113-14). This corroborated the 1991 testimony of a then-unavailable Cedar Hill ISD administrator read into the record in 2009. Under such circumstances, Brewer's state appellate counsel could reasonably have believed that a point of error on direct appeal raising a Confrontation Clause challenge to the state trial court's admission of the transcript and exhibits from Brewer's 1991 trial would have been rejected on harmless error grounds.

Because the prosecution made a showing that the two witnesses whose 1991 testimony was read before the jury in 2009 were both unavailable and had been subject to cross-examination when they testified in 1991, no Confrontation Clause error arose from the admission of their prior testimony. *See Melendez-Diaz v. Massachusetts*, 557 U.S. 305, 309 (2009) (the Confrontation Clause requires that a witness against a criminal defendant appear at trial or, if the witness is unavailable, the defendant had a prior opportunity for cross-examination); *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004) (Confrontation Clause requires that testimonial statements of a witness who does not appear at trial are inadmissible absent a showing the witness is unavailable to testify and the defendant had a prior opportunity for cross-examination). Likewise, Brewer's complaint about the admission of the 1991 testimony of Dr. Erdmann, which was not read or quoted to the jury in 2009, did not violate Confrontation Clause principles. The parties appear to have agreed during Brewer's second state habeas proceeding that Dr. Erdmann was unavailable in 2009 and the trial transcript clearly reveals he had been subject to cross-examination by Brewer's 1991 trial counsel. (16/21 R.R. 387-88).

Brewer's state appellate counsel could reasonably have believed that the points of error actually included in Brewer's second direct appeal brief challenging (1) the state trial court's admission of Nystrom's testimony regarding her parole eligibility, (2) the trial court's response to the jury's notes regarding parole, and (3) the trial court's admission of Dr. Coons' opinion testimony were plainly stronger than Brewer's proposed Confrontation Clause claim. *See Davila v. Davis*, 137 S. Ct. at 2067 (declining to raise a claim on appeal is not deficient performance unless that claim was plainly stronger than those actually presented to the appellate court); *Smith v. Robbins*, 528 U.S. at 288 (to prove ineffective assistance on appeal for failure to raise a claim in a merits brief, a petitioner must show that a particular omitted nonfrivolous issue was clearly

stronger than issues that appellate counsel did present); *Medellin v. Dretke*, 371 F.43d 270, 279 (5th Cir. 2004) (failure of appellate counsel to raise a meritless *Batson* claim on direct appeal was not ineffective assistance).

After de novo review, this Court independently concludes there is no reasonable probability that, but for the failure of Brewer's second state appellate counsel to present a Confrontation Clause challenge to the 2009 state trial court's admission of the 1991 trial testimony and exhibits, the outcome of Brewer's second direct appeal would have been any different. In all reasonable likelihood, the state appellate court would have concluded any error in the summary admission of the trial record from 1991 was harmless at best. The prosecution presented all but a handful of witnesses in 2009 whose testimony were included in the 1991 trial records. In Brewer's first direct appeal, the state appellate court found no evidentiary error in the admission of any of the exhibits from Brewer's 1991 trial that were later re-admitted during Brewer's 2009 retrial. The vast majority of those exhibits merely gave context to the criminal charge against Brewer for which he had already been convicted. Nothing in this Court's previous judgment granting Brewer federal habeas relief as to his sentence in anyway reversed, vacated, or otherwise abrogated his conviction for capital murder.

Brewer's reliance in his reply brief on the Supreme Court's holding in *Bullcoming v. New Mexico*, 564 U.S. 647 (2011), is unpersuasive. Brewer argues *Bullcoming* addressed the issue of whether admission of Laminack's autopsy report in 2009 violated the Confrontation Clause in the absence of live testimony from Dr. Erdmann. As the Fifth Circuit and at least one Supreme Court Justice have noted, however, *Bullcoming* did not clearly establish a rule that the *only* person who can authenticate a forensic report is the scientist who prepared the report. *See Grim v. Fisher*, 816 F.3d 296, 307-10 (5th Cir. 2016) (discussing the limited nature of the holding in *Bullcoming*);

Williams v, Illinois, 567 U.S. 50, 92-98 (2012) (Breyer, concurring) (noting the ambiguity that exists after *Bullcoming* regarding who can authenticate a forensic report). Moreover, Brewer's state appellate counsel cannot reasonably be faulted for failing to present a Confrontation Clause point of error premised upon the Supreme Court's holding in *Bullcoming*. The Supreme Court handed down its opinion in *Bullcoming* on June 23, 2011. Brewer's second state appellate brief was filed three months earlier, on March 23, 2011. Clairvoyance is not a required attribute of effective assistance. *Fields*, 565 F.3d at 295; *Sharp*, 107 F.3d at 289 n.28.

4. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits during the course of Brewer's second state habeas corpus proceeding of Brewer's ineffective assistance complaint about his state appellate counsel's failure to assert a Confrontation Clause challenge to the admission of Brewer's 1991 trial testimony and exhibits during his 2009 retrial was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials, second direct appeal, and second state habeas corpus proceeding. Likewise, after de novo review, this Court concludes this ineffective assistance claim fails to satisfy either prong of *Strickland*. Brewer's third claim for federal habeas relief is without merit and does not warrant habeas relief.

D. Failure to Challenge Alleged Factual Errors in Merillat's & Bryant's Testimony

1. The Claim Restated

In the final portion of his eighth claim for federal habeas relief, Brewer argues that his state appellate counsel rendered ineffective assistance by failing to raise a point of error on direct appeal

challenging the allegedly false testimony of A.P. Merillat and Stephen Bryant at Brewer's 2009 retrial. (ECF no. 103, at 114-19).

2. State Court Disposition

Brewer presented a similar ineffective assistance complaint as claim 2D in his second state habeas application. (Second State Habeas Application, at 166-70). The state habeas trial court found: (1) no objections were raised at trial to allegedly false testimony by Merillat; (2) therefore, nothing was preserved for state appellate review; (3) the ineffective assistance arguments against Brewer's trial counsel urged by Brewer in conjunction with this claim were better raised in a state habeas proceeding than on direct appeal; and (4) this complaint failed to satisfy either prong of *Strickland*. (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, 39-40). The state habeas court also concluded this ineffective assistance complaint failed to satisfy either prong of *Strickland*. (*Id.*, 80-81). The Texas Court of Criminal Appeals adopted these findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. AEDPA Review

For the reasons discussed at length in Sections VIII. and XII.C. above, the state habeas court reasonably concluded there was nothing factually inaccurate or misleading in Merillat's or Bryant's 2009 testimony regarding the conditions of confinement within TDCJ. Brewer's 2009 trial counsel did not attack the credibility of these two prosecution witnesses because they planned to use their expert testimony on cross-examination to assist the defense in building its case for a negative jury verdict on the future dangerousness special issue. This is precisely what happened. Both Merillat and Bryant gave testimony on cross-examination that benefitted the defense's theory that opportunities exist on death row for inmates to commit acts of violence but Brewer's

disciplinary record over 18 years on death row showed he had been non-violent.

It is undisputed there were no timely defense objections at trial identifying any alleged factual error or misleading aspects in Merillat's or Bryant's 2009 trial testimony. Nor has Brewer alleged any specific facts or presented any evidence showing the prosecution knowingly used any false or misleading testimony by either Merillat or Bryant to obtain Brewer's second death sentence. As explained in Section VIII. above, because Brewer's 2009 trial counsel chose a very different strategy from the one employed in 1991, none of the allegedly inaccurate or misleading testimony by Merillat or Bryant identified by Brewer was material to the outcome of Brewer's 2009 retrial. Failure to raise a meritless claim does not constitute ineffective assistance on appeal. *Medellin*, 371 F.43d at 279 (failure of appellate counsel to raise a meritless *Batson* claim on direct appeal was not ineffective assistance). Thus, the state habeas court reasonably concluded this complaint of ineffective assistance by Brewer's state appellate counsel failed to overcome the presumption of reasonableness afforded counsel and failed to satisfy either prong of *Strickland*.

4. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits during the course of Brewer's second state habeas corpus proceeding of Brewer's ineffective assistance complaint about his state appellate counsel's failure to assert a point of error complaining about allegedly factually inaccurate or misleading testimony by prosecution witnesses Merillat and Bryant regarding conditions within TDCJ was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials, second direct appeal, and second state habeas corpus proceeding. Likewise, after de novo review, this Court concludes this

ineffective assistance claim fails to satisfy either prong of *Strickland*. The final portion of Brewer's eighth claim for federal habeas relief is without merit and does not warrant habeas relief.

E. Failure to Challenge Constitutionality of Texas Capital Sentencing Statute

1. The Claim Restated

In the final portion of his tenth claim for federal habeas relief, Brewer argues his state appellate counsel rendered ineffective assistance by failing to raise points of error on direct appeal challenging the constitutionality of various aspects of the Texas capital sentencing statute. (ECF no. 103, 120-24).

2. State Court Disposition

In his eighth and eleventh through sixteenth claims in his second state habeas application, Brewer argued that his state appellate counsel rendered ineffective assistance by failing to assert a wide variety of constitutional challenges to the Texas capital sentencing statute, *i.e.*, Art. 37.0711 of the Texas Code of Criminal Procedure. (Second State Habeas Application, at 316-45, 360-95).

The state habeas court: (1) found the issues raised by these complaints were all purely legal in nature; (2) concluded all of Brewer's constitutional challenges were without merit because the Texas Court of Criminal Appeals had routinely and regularly rejected those same legal arguments; and (3) concluded his state appellate counsel had not rendered ineffective assistance in failing to raise those same meritless claims on direct appeal. (Findings of Fact and Conclusions of Law in Second State Habeas Corpus Proceeding, at 63-65 & 89-95). The Texas Court of Criminal Appeals adopted these findings and conclusions when it denied Brewer's second state habeas corpus application. *Ex parte Brewer*, WR-46,587-02, 2014 WL 5388114, *1.

3. AEDPA Review

For the reasons explained in detail in Section V. above, all of Brewer's constitutional

challenges to the Texas capital sentencing statute are legally frivolous. Furthermore, as accurately noted by the state habeas court in its conclusions rejecting Brewer's complaints of ineffective appellate counsel, by the time Brewer's state appellate counsel prepared Brewer's second direct appeal brief, the Texas Court of Criminal Appeals had rejected each of Brewer's constitutional challenges to the Texas capital sentencing statute on multiple occasions. *See, e.g., Russeau v. State*, 171 S.W.3d 871, 886-87 (Tex. Crim. App. 2005) (rejecting arguments attacking the Texas ten/twelve rule, suggesting *Ring* requires inclusion of aggravating circumstances in an indictment, attacking the absence of a burden of proof on the mitigation special issue, attacking the statute's failure to inform the jury of the consequences of a lone holdout juror, attacking failure of state appellate courts to do sufficiency of evidence review on mitigation special issue, and alleging the failure of the statute to provide for uniform statewide application); *Lucero v. State*, 246 S.W.3d 86, 96 (Tex. Crim. App. 2008) (rejecting challenge to statutory definition of mitigating evidence); *Williams v. State*, 301 S.W.3d 675, 694 (Tex. Crim. App. 2009) (rejecting challenges to mitigation special issue as open-ended, mitigation special issue's lack of burden of proof, alleged absence of "meaningful appellate review," statutory definition of mitigating evidence, and twelve/ten rule).

The state habeas court reasonably concluded the failure of Brewer's state appellate counsel to raise Brewer's challenges to the constitutionality of the Texas capital sentencing statute was neither deficient performance nor prejudicial within the meaning of *Strickland*. *See Broadnax v. Lumpkin*, 987 F.3d 400, 415 (5th Cir. 2021) (failure of appellate counsel to raise a meritless claim was not ineffective assistance); *Nelson v. Davis*, 952 F.3d 651, 678 (5th Cir. 2020) (failure to raise a meritless argument cannot be the basis for an ineffective assistance claim because there is no possibility the defendant was prejudiced thereby).

4. Conclusions

The Texas Court of Criminal Appeals' rejection on the merits during Brewer's second state habeas proceeding of Brewer's complaints that his state appellate counsel failed to assert a variety of constitutional challenges to the Texas capital sentencing statute was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Brewer's 1991 and 2009 trials, second direct appeal, and second state habeas corpus proceeding. Likewise, after de novo review, this Court concludes this ineffective assistance claim fails to satisfy either prong of *Strickland*. The final portion of Brewer's tenth claim for federal habeas relief is without merit and does not warrant habeas relief.

XIV. CUMULATIVE ERROR

1. The Claim

In his ninth claim for federal habeas relief, Brewer argues the cumulative impact of his 2009 trial counsels' ineffective assistance, his state appellate counsel's ineffective assistance, and errors committed by the state trial court violated his constitutional rights. (ECF no. 103, at 119).

2. Lack of Exhaustion

Brewer did not fairly present his cumulative error claim to the state courts, either on direct appeal or in his second or third state habeas corpus applications.

3. *De Novo* Review

It is well-settled in this Circuit that the cumulative error doctrine requires a showing that constitutional error occurred during the defendant's state court trial. *See Young v. Stephens*, 795 F.3d 484, 494 (5th Cir. 2015) (noting petitioner's failure to demonstrate any constitutional error

committed during his trial, as required to satisfy the cumulative error doctrine (citing *Turner v. Quarterman*, 481 F.3d 292, 301 (5th Cir. 2007))); *Coble v. Quarterman*, 496 F.3d 430, 440 (5th Cir. 2007) (federal habeas relief is only available for cumulative errors that are of a constitutional dimension); *Miller v. Johnson*, 200 F.3d 274, 286 n.6 (5th Cir. 2000) (absent constitutional error, there is nothing to cumulate); *Jackson v. Johnson*, 194 F.3d 641, 659 n.59 (5th Cir. 1999) (cumulative error doctrine provides relief only when the constitutional errors committed in the state court trial so fatally infected the trial that they violated the trial's fundamental fairness (citing *Spence v. Johnson*, 80 F.3d 989, 1000 (5th Cir. 1996)); *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992) (federal habeas corpus relief may only be granted for cumulative errors in the conduct of a state trial where: (1) the individual errors involved matters of constitutional dimension other than violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process" (quoting *Cupp v. Naighten*, 414 U.S. 141, 147 (1973)).

For the reasons discussed at length in Sections XII. and XIII. above, all of Brewer's complaints about the performance of his trial and state appellate counsel fail to satisfy either prong of *Strickland*. For the reasons discussed at length in Sections III. through XI. above, all of Brewer's *Brady*, *Giglio/Napue*, and other substantive constitutional claims lack arguable merit - some border on the frivolous. Thus, under the cumulative error doctrine recognized in this Circuit, there is nothing for this Court to cumulate.

4. Conclusion

Brewer's conclusory cumulative error claim is without arguable merit. His ninth claim for federal habeas relief does not warrant federal habeas relief.

XV. REQUEST FOR EVIDENTIARY HEARING

Brewer requests that this Court afford him an evidentiary hearing. (ECF no. 103, 128). Insofar as Brewer's claims in this federal habeas corpus proceeding were disposed of on the merits during the course of his direct appeal or state habeas corpus proceedings, he is not entitled to a federal evidentiary hearing to develop new evidence attacking the state appellate or state habeas court's resolution of his claims. Under AEDPA, the proper place for development of the facts supporting a federal habeas claim is the state court. *See Harrington*, 562 U. S. at 103 ("Section 2254(d) thus complements the exhaustion requirement and the doctrine of procedural bar to ensure that state proceedings are the central process, not just a preliminary step for a later federal habeas proceeding."); *Hernandez v. Johnson*, 108 F.3d 554, 558 n.4 (5th Cir. 1997) (holding AEDPA clearly places the burden on a federal habeas petitioner to raise and litigate as fully as possible his federal claims in state court). Where a petitioner's claims have been rejected on the merits, further factual development in federal court is effectively precluded by virtue of the Supreme Court's holding in *Cullen v. Pinholster*, 563 U. S. 170, 181-82 (2011):

> We now hold that review under § 2254(d)(1) is limited to the record that was before the state court that adjudicated the claim on the merits. Section 2254(d)(1) refers, in the past tense, to a state-court adjudication that "resulted in" a decision that was contrary to, or "involved" an unreasonable application of, established law. This backward-looking language requires an examination of the state-court decision at the time it was made. It follows that the record under review is limited to the record in existence at that same time *i.e.,* the record before the state court.

Thus, Brewer is not entitled to a federal evidentiary hearing on any of his claims that were rejected on the merits by the state courts, either on direct appeal or during his state habeas corpus proceedings. *See Halprin v. Davis*, 911 F.3d 247, 255 (5th Cir. 2018) ("If a claim has been adjudicated on the merits by a state court, a federal habeas petitioner must overcome the limitation of § 2254(d)(1) on the record that was before that state court." (quoting *Cullen*, 563 U.S. at 185)), *cert. denied*, 140 S. Ct. 167 (2019).

With regard to the new factual allegations, new evidence, and new legal arguments Brewer presents to this Court (or which Brewer presented to the state courts only in his third state habeas application that was summarily dismissed by the Texas Court of Criminal Appeals) for which this Court has undertaken de novo review, he is likewise not entitled to an evidentiary hearing. In the course of conducting de novo review of his claims that were not disposed of on the merits by the TCCA, except for those assertions that are refuted by the state courts records now before this Court, this Court has assumed the factual accuracy of (1) all the specific facts alleged by Brewer in support of his claims for relief, and (2) the documents he has presented in support of his claims that were unadjudicated on the merits in the state court. Even when the truth of all of Brewer's new factual allegations supporting his unadjudicated claims is assumed, his claims do not warrant federal habeas relief. *See Schriro v. Landrigan*, 550 U. S. 465, 474 (2007) ("In deciding whether to grant an evidentiary hearing, a federal court must consider whether such a hearing could enable an applicant to prove the petition's factual allegations, which, if true, would entitle the applicant to federal habeas relief."). Thus, Brewer is not entitled to an evidentiary hearing in this Court with regard to any of his claims which the TCCA did not reject on the merits.

XVI. CERTIFICATE OF APPEALABILITY

Under AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under § 2254, the petitioner must obtain a Certificate of Appealability ("CoA"). *Miller-El v. Johnson*, 537 U.S. 322, 335-36 (2003); 28 U.S.C. § 2253(c)(2). Likewise, under AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the

issues on which CoA has been granted). In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted. *Crutcher*, 301 F.3d at 658 n.10; 28 U.S.C. § 2253(c)(3).

A CoA will not be granted unless a petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El v. Johnson*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard*, 542 U.S. at 282; *Miller-El*, 537 U.S. at 336. This Court is required to issue or deny a CoA when it enters a final Order, such as this one, adverse to a federal habeas petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts*.

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. "[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). In a case in which the petitioner wishes to challenge on appeal this Court's dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* whether this Court was correct in its procedural ruling. *See Slack*, 529 U.S. at 484 (holding when a district court denies a

habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the petitioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right and (2) the district court's procedural ruling was correct). This Court did not dispose of any of Brewer's federal habeas corpus claims on procedural grounds. This Court addressed the merits of all of Brewer's claims.

In death penalty cases, any doubt as to whether a CoA should issue must be resolved in the petitioner's favor. *Thompson v. Davis*, 916 F.3d 444, 453 (5th Cir. 2019); *Halprin*, 911 F.3d at 255. Nonetheless, a CoA is not automatically granted in every death penalty habeas case. *See Miller-El*, 537 U.S. at 337 ("It follows that issuance of a COA must not be *pro forma* or a matter of course."). The deferential standard of review applied to claims of ineffective assistance adjudicated on the merits in the state courts has particular bite in evaluating the appealability of ineffective assistance claims—the Supreme Court requires that federal courts "use a 'doubly deferential' standard of review that gives both the state court and the defense attorney the benefit of the doubt." *Burt,* 571 U.S. at 15.

Reasonable minds could not disagree with this Court's conclusions that: (1) all of Brewer's complaints of ineffective assistance by his 2009 trial counsel and state appellate counsel fail to satisfy both prongs of *Strickland*; (2) the TCCA reasonably rejected Brewer's *Brady* and *Giglio/Napue* claims; (3) the TCCA reasonably rejected Brewer's constitutional challenges to the state trial court's admission of Dr. Natarajian's 2009 testimony, as well as Brewer's constitutional challenges to the admission of the trial transcript and exhibits from his 1991 trial; (4) Brewer's challenges to the constitutionality of the Texas capital sentencing statute and capital sentencing special issues are legally frivolous; (5) all of Brewer's *Brady* claims fail to satisfy the materiality prong of *Brady* analysis; (6) all of Brewer's *Giglio/Napue* claims fail to satisfy the materiality

prong of *Giglio/Napue* analysis; (7) the TCCA reasonably rejected on the merits all of Brewer's complaints about the state trial court's rulings on Brewer's challenges for cause, including Brewer's claim that venire member R___ M___ possessed disqualifying bias; and (8) Brewer is not entitled to an evidentiary hearing in this Court.

XVII. RECOMMENDATION

For the foregoing reasons it is the recommendation of the undersigned Magistrate Judge that: (1) all relief requested in Brewer's second amended federal habeas corpus petition (ECF no. 103), as supplemented by his reply brief (ECF no. 128), be **DENIED**; (2) Brewer's request for an evidentiary hearing be **DENIED;** and (3) Brewer be **DENIED** a Certificate of Appealability with regard to all of his claims for relief.

XVIII. INSTRUCTIONS FOR SERVICE

The United States District Clerk is directed to send a copy of these Findings, Conclusions and Recommendation to each party by the most efficient means available.

IT IS SO RECOMMENDED.

ENTERED September 30, 2021.

Lee Ann Reno

LEE ANN RENO
UNITED STATES MAGISTRATE JUDGE

* NOTICE OF RIGHT TO OBJECT *

Any party may object to these proposed findings, conclusions and recommendation. In the event parties wish to object, they are hereby NOTIFIED that the deadline for filing objections is fourteen (14) days from the date of filing as indicated by the "entered" date directly above the signature line. Service is complete upon mailing, Fed. R. Civ. P. 5(b)(2)(C), or transmission by electronic means, Fed. R. Civ. P. 5(b)(2)(E). Any objections must be filed on or before the fourteenth (14th) day after this recommendation is filed as indicated by the "entered" date. *See* 28 U.S.C. § 636(b); Fed. R. Civ. P. 72(b)(2); *see also* Fed. R. Civ. P. 6(d).

Any such objections shall be made in a written pleading entitled "Objections to the

Findings, Conclusions and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge and accepted by the district court. *See Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (en banc), *superseded by statute on other grounds*, 28 U.S.C. § 636(b)(1), *as recognized in ACS Recovery Servs., Inc. v. Griffin*, 676 F.3d 512, 521 n.5 (5th Cir. 2012); *Rodriguez v. Bowen,* 857 F.2d 275, 276–77 (5th Cir. 1988).

APPENDIX E

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-46,587-02

EX PARTE BRENT RAY BREWER

ON APPLICATION FOR WRIT OF HABEAS CORPUS
CAUSE NO. 6997-A IN THE 47TH DISTRICT COURT
RANDALL COUNTY

Per curiam. Johnson, J., would grant.

ORDER

This is a post conviction application for writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure article 11.071.

In 1991, applicant was convicted of capital murder and sentenced to death. TEX. PENAL CODE ANN. § 19.03(a)(2); Article 37.071.[1] We affirmed the conviction and sentence

[1] Unless otherwise indicated, all references to Articles are to the Texas Code of Criminal Procedure.

on direct appeal, but the sentence was later vacated in federal habeas proceedings. *Brewer v. State,* No. 71,307 (Tex. Crim. App. June 22, 1994) (not designated for publication); *see Brewer v. Dretke,* 2004 U.S. Dist. LEXIS 14761 (N. Dist. Aug. 2, 2004) (not designated for publication); *Brewer v. Quarterman,* 550 U.S. 286 (2007); *Brewer v. Quarterman,* 512 F.3d 210 (5th Cir. 2007). At a new punishment hearing in 2009, applicant was again sentenced to death. Art. 37.0711, §3(g). We affirmed the sentence on direct appeal. *Brewer v. State,* No. AP-76,378 (Tex. Crim. App. Nov. 23, 2011) (not designated for publication).

Applicant then filed an application for writ of habeas corpus challenging his sentence. The trial court held a live evidentiary hearing. As to all of the allegations, the trial judge entered findings of fact and conclusions of law and recommended that relief be denied.

This Court has reviewed the record with respect to the allegations made by applicant. We agree with the trial judge's recommendation and adopt the trial judge's findings and conclusions, except for paragraphs 1 and 2 on page 81. Based upon the trial court's findings and conclusions and our own review of the record, relief is denied.

IT IS SO ORDERED THIS THE 17TH DAY OF SEPTEMBER, 2014.

Do Not Publish

APPENDIX F

NO. W-6997-A-2

EX PARTE	§	IN THE 47th DISTRICT COURT
	§	IN AND FOR
BRENT RAY BREWER,	§	RANDALL COUNTY, TEXAS
APPLICANT		

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The Court, having considered the Application for Writ of Habeas Corpus and attached exhibits, the State's Answer and attached exhibits, the August 20-21, 2013 evidentiary hearing and attached exhibits, and the official court documents and records in Cause Number W-6997-A-2, makes the following findings of fact and conclusions of law:

PRELIMINARY FINDINGS OF FACTS

1. The Court finds that the applicant was convicted of capital murder and sentenced to death during a jury trial held on May 28, 1991 through June 1, 1991.

2. The death sentence was later vacated and a re-sentencing trial was ordered.

3. After individual voir dire and jury selection, the re-sentencing trial was held on August 10, 2009 through August 14, 2009.

4. Anthony C. Odiorne and Edward Ray Keith, Jr. represented the applicant at the re-sentencing trial.

5. Judge Hal Miner presided over the re-sentencing trial.

6. Judge Quay Parker presided over some of the individual voir dire examinations at the re-sentencing trial.

7. At the re-sentencing trial, the jury answered the special issues in a manner that mandated a sentence of death.

8. Judge Miner sentenced the applicant to death on August 14, 2009.

9. On March 12, 2010, Judge Miner passed away. Shortly thereafter, Judge Dan L. Schaap became the judge of the 47th District Court.

10. On November 23, 2011, the Texas Court of Criminal Appeals affirmed the judgment and sentence in Cause No. 6997-A for the reasons expressed in its unpublished opinion.

11. John Bennett represented the applicant as appellate counsel on direct appeal.

12. On July 20, 2012, the applicant filed his Application for Writ of Habeas Corpus in Cause No. W-6997-A-2.

13. At the time the writ application was filed, Richard L. Wardroup represented the applicant as writ counsel in Cause No. W-6997-A-2.

14. On January 9, 2013, Judge Dick Alcala replaced Judge Dan L. Schaap as presiding judge in Cause No. W-6997-A-2.

15. On January 15, 2013, the State filed its writ answer.

16. On February 22, 2013, Judge Alcala signed an Order Designating Issues. In the order, Judge Alcala found that the following controverted, previously unresolved factual issues needed to be resolved by affidavits and evidentiary hearings: 1) claims of ineffective assistance of trial counsel, 2) claims of ineffective assistance of appellate counsel, and 3) claims that harm occurred as a result of the opinion testimony of Dr. Richard Coons on the issue of future dangerousness.

17. On March 6, 2013, the State filed a Motion to Narrow and Clarify the Scope of the Order Designating Issues.

18. On March 14, 2013, Richard L. Wardroup was permitted to withdraw as writ counsel in Cause No. W-6997-A-2 and was replaced by Hilary Sheard. Ms. Sheard had been assisting Mr. Wardroup with this case since November of 2011.

19. On May 6, 2013, the applicant filed a Response to State's Motion to Narrow and Clarify the Scope of the Order Designating Issues.

20. On May 9, 2013, the State filed a Reply to Applicant's Response to State's Motion to Narrow and Clarify the Scope of the Order Designating Issues.

21. On May 14, 2013, Judge Alcala signed a Revised Order Designating Issues. In the Revised Order Designating Issues, Judge Alcala found that the "...only unresolved issue upon which an evidentiary hearing would be appropriate concerns the assistance of trial counsel, specifically, and solely, the question whether trial counsel's performance regarding prosecution witness Dr. Richard Coons was deficient and violated professional standards and, if so, whether the deficient performance prejudiced the outcome of the sentencing trial."

22. On August 20-21, 2013, an evidentiary hearing was held in Randall County, Texas to address the sole issue of whether trial counsel's performance regarding prosecution witness Dr. Coons was deficient and violated professional standards and, if so, whether the deficient performance prejudiced the outcome of the sentencing trial.

23. On November 18, 2013, the applicant filed post-hearing affidavits from the following individuals: Dr. Douglas Mossman, Dr. John Edens, Gaby Loredo, and John Bennett.

24. On November 22, 2013, the State filed a motion to strike the supplementary affidavit of John Bennett.

25. The Court ordered the State and defense to file Proposed Findings of Fact and Conclusions of Law on December 20, 2013.

FINDINGS OF FACT REGARDING BREWER'S CLAIMS FOR RELIEF

CLAIM ONE (A)

1. In Claim One (A), the applicant contends that trial counsel was ineffective for failing to effectively challenge Dr. Richard Coons. (Writ Application at pages 15-90); (State's Writ Answer at pages 16-31).

2. The Court finds that the opinion in ***Coble v. State***, 330 S.W.3d 253, 270-287 (Tex.Crim.App. 2010) had not even been issued when this case was re-tried in 2009.

3. The Court finds, pursuant to the November 23, 2011 unpublished opinion of the Court of Criminal Appeals, trial counsel Odiorne failed to lodge a timely and specific objection regarding the admission of Dr. Coons' testimony about future dangerousness at the re-sentencing trial. Thus, this issue was not preserved for appellate review.

4. The Court finds, as a matter of trial strategy, trial counsel Odiorne and Keith reasonably concluded that it was unnecessary to have Dr. Edens or any other expert witness evaluate the applicant in order to make a prediction regarding the applicant's future dangerousness for the following reasons: 1) the possibility that the defense might open door for the State to conduct an independent evaluation (RR.II—Evidentiary Hearing-98); (RR.III—Evidentiary Hearing-164); 2) the possibility that the defense would not have an expert witness to testify at the re-sentencing trial about future dangerousness if the evaluation resulted in a negative prediction (RR.III-Evidentiary Hearing-134-135); 3) the possibility that the State would attack the defense expert about his/her future dangerousness evaluation which would reflect poorly on the applicant and distract from the defense's attack on Dr. Coons (RR.III-Evidentiary Hearing-30-31); 4) the possibility that the jury would view the defense expert in the same light as Dr. Coons (RR.III-Evidentiary Hearing-99-100); and 5) the possibility that the jury would

"become lost in the science" (RR.III-Evidentiary Hearing-26). According to trial counsel Keith, the best evidence to establish that the applicant was not a future danger was the fact that the applicant had not engaged in any violent criminal activity while incarcerated in prison for approximately eighteen years. (RR.III-Evidentiary Hearing-30-31). Accordingly, the Court finds that trial counsels' decision not to have the applicant evaluated for future dangerousness was reasonable and plausible in light of all the circumstances.

5. The Court finds, as a matter of trial strategy, trial counsel Keith's decision to hire a psychologist (i.e., Dr. Edens) and not a psychiatrist to rebut Dr. Coons' testimony regarding future dangerousness at the re-sentencing trial was reasonable and plausible in light of all the circumstances. According to trial counsel Keith, he chose an expert who would attack Dr. Coons' methodology underlying his prediction that the applicant would commit criminal acts of violence in the future. (RR.III-Evidentiary Hearing-30-31). Trial counsel Keith did not want an expert who would discuss risk factors of future dangerousness or who would try to evaluate the applicant for future dangerousness because he believed the best evidence to establish that the applicant was not a future danger was the fact that the applicant had not engaged in any violent criminal activity while incarcerated in prison for approximately eighteen years. (RR.III-Evidentiary Hearing 26-29; 30-32;

49-50). In this regard, the following excerpt from Dr. Edens' affidavit clearly shows the trial strategy behind trial counsel Keith hiring him as an expert in this case: "However, my recollection of the events surrounding the 2009 re-sentencing hearing, as well as Mr. Keith's own testimony during the August 2013 evidentiary hearing, indicate that he had limited interest in pursuing any of the lines of inquiry I have summarized in this affidavit, having decided that Mr. Brewer's low risk for future violence would be self-evident to jurors based on his lack of institutional aggression during his years on death row. As such, it was clear to me that trial counsel's primary view of my role in the case was simply for me to summarize research findings on the poor predictive validity of prosecution expert witnesses such as Dr. Coons and *not* to address in any depth other issues, such as a general overview of how to conduct a scientifically informed risk assessment, a specific analysis of Mr. Brewer's level of violence risk, or an extensive review of the specific flaws in Dr. Coons' methodology." (Dr. Edens' affidavit designated as Exhibit H-20 at page 4). Based on the above evidence, the Court finds trial counsel Keith was not ineffective for hiring Dr. Edens, and not a psychiatrist, as an expert in this case.

6. The Court finds from the record that trial counsel Odiorne's trial strategy in regards to the 702 hearing was to prevent Dr. Coons from

testifying at the re-sentencing trial by attacking his methodology. (RR.II—Evidentiary Hearing-64; 69; 255; 277). If Dr. Coons was allowed to testify at the re-sentencing trial, then the trial strategy was for trial counsel Odiorne to attack Dr. Coons' testimony and methodology on cross-examination and for Dr. Edens to rebut Dr. Coons' testimony on direct examination. (RR.II-Evidentiary Hearing-176); (RR.III-Evidentiary Hearing-17); (Keith's affidavit attached as Exhibit to State's Answer). This strategy was reasonable and plausible in light of all the circumstances.

7. The Court finds, as a matter of trial strategy, trial counsels' decision not to have Dr. Edens testify at Dr. Coons' 702 hearing was reasonable for the following reasons: 1) Dr. Coons would have a preview of Dr. Edens' testimony (RR.III-Evidentiary Hearing-135) and 2) Dr. Coons would be able to refine his testimony to minimize Dr. Edens' criticism of his testimony (RR.II-Evidentiary Hearing-227); (RR.III-Evidentiary Hearing-147). Moreover, trial counsel Keith believed it was unnecessary for Dr. Edens to testify at the 702 hearing because the defense had already exposed Dr. Coons' lack of methodology at such hearing. (RR.III-Evidentiary Hearing-121; 149). This trial strategy was reasonable and plausible in light of all the circumstances.

8. The Court finds from the record that trial counsel Keith adequately prepared for the direct examination of Dr. Edens prior to and during the re-sentencing trial. (RR.III-Evidentiary Hearing-70; 72).

9. The Court finds, as a matter of trial strategy, trial counsel Keith's decision not to have Dr. Edens or any other an expert witness specifically discuss the applicant's future dangerousness (or all the risk factors indicating a likelihood for future dangerousness) in front of the jury at the re-sentencing trial was reasonable and plausible in light of all the circumstances. (RR.III—Evidentiary Hearing-26-29; 30-32; 49-50; 100); (Dr. Edens' affidavit designated as Exhibit H-20 at page 4). As trial counsel Keith explained at the evidentiary hearing, "...I did not want attacks on my own expert who might be doing a future dangerousness assessment, after taking on Dr. Coons and attempting to discredit him and then have that reflect negatively on my own client who, in the end, I think, was—his record is the best evidence of his lack of future dangerousness, and I did not want a firestorm over my own expert to not only blunt my attack on Dr. Coons but then to reflect poorly on my client." (RR.III-Evidentiary Hearing-30-31). Accordingly, the Court finds trial counsel Keith was not ineffective for failing to have an expert specifically discuss the applicant's future dangerousness or all the risk factors for future dangerousness at the re-sentencing trial.

10. The Court finds, as a matter of trial strategy, trial counsel Keith's failure to have Dr. Edens or any other expert witness testify about actuarial methods for risk assessment was reasonable and plausible in light of all the circumstances. Instead of focusing on different methods for determining future dangerousness, trial counsel Keith wanted the jury to focus on the fact that the applicant was a low risk for future violence because he had not committed any criminal acts of violence while incarcerated in prison for approximately eighteen years. Accordingly, the Court finds trial counsel Keith was not ineffective for failing to raise actuarial methods for risk assessment at the re-sentencing trial.

11. The Court finds from the record that trial counsel adequately investigated and researched Dr. Coons' methodology and CV prior to the re-sentencing hearing. (RR.II—Evidentiary Hearing-53; 58-59; 62; 67; 254; 258; 260; 263; 266).

12. The Court finds from the record that trial counsel Odiorne effectively challenged Dr. Coons' testimony predicting future dangerousness at the re-sentencing trial. In this regard, the record shows the following: 1) During Dr. Coons' cross-examination, Dr. Coons testified that he has evaluated a lot of people in the past and has predicted that about fifty of these people would constitute a future danger to society. (RR.XXIII-229). Trial counsel asked

Dr. Coons if he had "followed up" with any of these fifty people to ascertain whether his future dangerousness predictions were correct. (RR.XXIII-229). Dr. Coons replied that he has only "followed up" with two or three of these individuals. (RR.XXIII-229); 2) Dr. Coons was questioned during cross-examination about whether he has any statistics to support the accuracy of his future dangerousness predictions. (RR.XXIII-232). Dr. Coons responded, "No." (RR.XXIII-232); 3) At the end of cross-examination, trial counsel asked Dr. Coons if he had made any predictions about the applicant at the 1991 trial. (RR.XXIII-233). Dr. Coons responded that he had predicted that the applicant "...would commit criminal acts of violence in the future." (RR.XXIII-233); 4) During closing argument, trial counsel argued that, "Dr. Coons doesn't even have a concern about whether he is accurate or not. Did you ever go back and try to find out if you're right? Not really. If you're coming into court 50 times or however many it is he claims to have testified where people's lives are on the line and he doesn't even care to know if his supposed method is correct, that's beyond the pale." (RR.XXV-212); 5) During closing argument, trial counsel further argued that "...the interesting thing about Dr. Coons is, he told you all kinds of stuff, but he never told you, oh, by the way I was here in '91, and I made the same prediction then [that the applicant would be a future danger], and I've been wrong for the last 18 years." (emphasis added by this writer); (RR.XXV-212); and 6) Trial counsel

utilized Dr. Edens at the re-sentencing trial to challenge and refute Dr. Coons' testimony regarding predictions of future dangerousness. (RR.XXIV-11-73). In light of trial counsel Odiorne's cross-examination of Dr. Coons and closing argument, the Court finds that trial counsel Odiorne effectively challenged Dr. Coons' predictions of future dangerousness at the re-sentencing trial.

13. The Court finds from the record that trial counsel Odiorne effectively challenged Dr. Coons' experience and credentials at the re-sentencing trial. In this regard, the record shows that trial counsel Odiorne challenged Dr. Coons about the following issues relating to his experience and credentials at the re-sentencing trial: 1) if Dr. Coons had testified about future dangerousness in approximately 150 capital murder cases; 2) if Dr. Coons had been asked to make determinations in any of these cases about predictions of future dangerousness; 3) how many times Dr. Coons had testified about predictions of future dangerousness for the defense and/or for the prosecution; 4) if Dr. Coons' predictions constituted a scientific opinion; 5) what publications Dr. Coons had written; 6) if Dr. Coons is a member of the American Psychiatrist Association and/or the American Academy of Psychiatry and Law; 7) how many people Dr. Coons had evaluated and then predicted would be a future danger to society; and 8) if Dr. Coons had any statistics to support the accuracy of his predictions of future dangerousness. (RR.XXIII-223-233).

Based on trial counsel Odiorne's cross-examination, the Court finds trial counsel Odiorne effectively challenged Dr. Coons' experience and credentials at the re-sentencing trial.

14. The Court finds trial counsel Odiorne was not ineffective for failing to examine Dr. Coons concerning the ***Barefoot*** case. Since the ***Barefoot*** case allows for experts such as Dr. Coons to testify about future dangerousness and since trial counsel are required to follow binding precedent from the United States Supreme Court regarding federal constitutional issues, trial counsel Odiorne's actions were reasonable and plausible in light of all the circumstances.

15. The Court finds from the record that trial counsel Odiorne was not ineffective for failing to examine Dr. Coons concerning his false prediction at the 1991 trial that the applicant would become involved with a prison gang. In this regard, the record shows the following: Dr. Coons specifically stated at the 1991 trial that the applicant "probably would" become involved with a prison gang. (RR.XVIII-736). Dr. Coons went on to state that the applicant "...would either have to defend himself against a gang or be a member of a gang." (RR.XVIII-736). Moreover, trial counsel presented evidence at the re-sentencing trial that the applicant had not engaged in any criminal acts of violence while incarcerated for approximately eighteen years. (RR.II-

Evidentiary Hearing-224-225); (RR.III-Evidentiary Hearing-109-111). In light of the fact that Dr. Coons merely stated that the applicant "probably would" become involved with a prison gang at the 1991 trial and in light of the applicant's disciplinary record, trial counsel Odiorne's failure to examine Dr. Coons about his gang prediction was reasonable and plausible in light of all the circumstances.

16. The Court finds that trial counsel were not ineffective for calling prison guards from death row to establish that inmates have the opportunity to commit criminal acts of violence while on death row. (RR.II-Evidentiary Hearing-82-84); (RR.III-Evidentiary Hearing-56). The Court further finds that trial counsel were not ineffective for also relying on a State's witness (Merillat) to show that death row is a violent place. (RR.II-Evidentiary Hearing-285); (RR.III-Evidentiary Hearing-54).

17. The Court finds that trial counsel sufficiently established that the applicant did not have a record for being criminally violent while in prison. In this regard, the Court finds that trial counsel were not ineffective for mainly relying on the applicant's own testimony to establish his good disciplinary record. (RR.II-Evidentiary Hearing-224-225; 285).

18. The Court finds that trial counsel Odiorne did refute the suggestion that unreported violence in prison is rife and goes unchecked during the direct

examination of Dr. Edens. In this regard, the following is an excerpt from Dr. Edens' testimony:

Q: One of the things that in criticizing your study, Dr. Coons attacked the underlying data, and you've told this jury kind of what the underlying data was. And his reference was that it was garbage in, garbage out because of the data. He—he said that essentially there is unreported violence in the prison system and therefore the data is unreliable. Do you recall that?

A: I do. I believe he quoted a statement in our article.

Q: Is—is this—are there scientific studies about this concept of unreported prison violence?

A: Yes, there are. I mean, there have been studies looking at what inmates tell you in confidence in relation to their aggressive behavior in institutions and prisons in particular, and also what they tell you about their rates of victimization in prisons and other types of settings. So there is a literature out there that goes beyond just what the prison official disciplinary records say is the rate of violent behavior. So there are studies that have actually looked at that. It's not something that you just have to speculate about.

(RR.XXIV-33-34).

The record shows that Dr. Edens also testified that these studies show that the difference in the rates of inmates who admit in a confidential setting that they are a victim of violence and inmates who officially report incidents of violence are not very different. (RR.XXIV-53-54). Based on Dr. Edens' testimony, the Court finds that trial counsel Odiorne did refute the suggestion that unreported violence in prison is rife and goes unchecked.

19. The Court finds from the record that the applicant has failed to establish prejudice stemming from Claim One (A). In determining whether the result of the re-sentencing trial would have been different if trial counsel had successfully prevented Dr. Coons from testifying at the re-sentencing trial and/or had more aggressively challenged Dr. Coons' testimony at the re-sentencing trial, it is helpful to review the five factors relied upon in the ***Coble*** case (the five factors are: 1) was there ample other evidence (i.e., aside from Dr. Coons' testimony) supporting a finding that there was a probability that the applicant would commit future acts of violence; 2) was there other psychiatric evidence of the applicant's character for violence that was admitted without objection; 3) was Dr. Coons' opinion particularly powerful, certain, or strong; 4) was Dr. Coons' testimony effectively rebutted and

refuted by another expert witness' testimony; and 5) was Dr. Coons' testimony mentioned during closing argument and did the argument emphasize Dr. Coons' opinions).

20. The Court finds from the record that there was ample other evidence (aside from Dr. Coons' testimony) supporting a finding that there was a probability that the applicant would commit future acts of violence. In this regard, the record shows that the applicant was convicted in 1991 for the premeditated capital murder of Mr. Robert Laminack. (CR.I-7); (RR.XXV-39; 73-86). On the date of the murder, the applicant had planned to "roll" somebody in order to take that person's money and/or car. (RR.XXII-194); (RR.XXV-73-74). Before approaching Mr. Laminack, the applicant and Kristie Nystrom (the applicant's co-defendant) had already unsuccessfully approached another person to "roll". (RR.XXI-110-116); (RR.XXII-195-197; 204); (RR.XXV-146-149). Mr. Laminack was the second target to "roll" on the night of the offense. (RR.XXII-204). The record shows that the applicant asked Mr. Laminack for a ride to the Salvation Army because his girlfriend was cold and they needed a place to stay. (RR.XXII-198-199); (RR.XXV-77-79). During the drive to the Salvation Army, the applicant murdered Mr. Laminack by repeatedly stabbing him in the neck with a knife as Mr. Laminack begged for his life. (RR.XXII-202; 206-209); (RR.XXIII-20;

28-33); (RR.XXV-79; 82). A few hours after the murder, the applicant "smirked and giggled" when his co-defendant (Kristie Nystrom) told another person that Mr. Laminack begged "please don't kill me." (RR.XXII-72). Then in 1990, while the applicant was in the Randall County jail awaiting his original trial, he told an inmate that Mr. Laminack begged "...please don't kill me, boy. Please don't kill me" as the applicant was stabbing him. (RR.XXII-92-93; 95). Aside from the specific facts of the capital murder offense in the instant case, the record also contains other acts of violence establishing that there was a probability that the applicant would commit future acts of violence that would constitute a continuing threat to society. In 1989, the applicant beat his father by hitting him with a broom and kicking him with his feet. (RR.XXII-41-42). As a result of the beating, the applicant's father was hospitalized for a considerable period of time, suffered from the loss of muscle control in his right hand and leg, had to have his jaw wired together, and had trouble speaking. (RR.XXII-56-57); (RR.XXV-122; 125). During this same time period, the applicant repeatedly threatened to kill his ex-girlfriend and assaulted his ex-girlfriend by picking her up and shoving her into some lockers. (RR.XXII-75-81); (RR.XXV-39). As a result of the assault, the applicant's ex-girlfriend suffered three dislocated discs in her back and lost the use of her right arm for several months. (RR.XXII-82). The record further reflects the following: 1) the applicant threatened a student with

a knife in the 7th grade (RR.XXII-139-140); 2) the applicant threw a stapler and threatened a teacher in the 9th grade (RR.XXII-143); (RR.XXV-50); 3) the applicant pled guilty to possessing a knife (RR.XXII-236-237; 240); (RR.XXV-57-58; 129-130); 4) the applicant hung out with known drug users who threatened police officers in approximately 1989 to 1990 (RR.XXII-233-237); (RR.XXV-57; 126-127); and 5) the applicant was found in possession of marijuana while on death row (RR.XXIII-110-112); (RR.XXV-99-100). (RR.XXIII-76-79; 106-107); (RR.XXV-95). The Court finds that all of this ample evidence supported the jury's finding at the re-sentencing trial that there was a probability that the applicant would commit future acts of violence.

21. The Court finds from the record that there was no other psychiatric evidence of the applicant's character for violence that was admitted without objection at the re-sentencing trial. However, the Court finds that this one factor is not determinable and should be considered with all of the other ***Coble*** factors when determining whether the trial counsels' failure to effectively challenge Dr. Coons' qualifications was so prejudicial that it deprived the applicant of a fair trial.

22. The Court finds from the record that Dr. Coons' opinion was not particularly powerful, certain, or strong. In this regard, the record shows the

following: 1) Dr. Coons testified that he had never written any publications dealing with predictions of future dangerousness and had no statistical data regarding the accuracy of his predictions of future dangerousness. (RR.XXIII-228; 232); 2) Dr. Coons stated that he had evaluated many people concerning future dangerousness and had predicted that about fifty of these people would constitute a future danger. (RR.XXIII-229); 3) Out of the fifty people, Dr. Coons testified that he had only done a follow-up on two of these evaluations to determine if his predictions were accurate. (RR.XXIII-229-230; 232); 4) Dr. Coons testified that, in his opinion, an inmate had a greater opportunity to commit violence in the general population than on death row. (RR.XXIII-231); 5) Dr. Coons again admitted that he had no research to support his opinion. (RR.XXIII-231-232). Based on Dr. Coons' testimony at the re-sentencing trial, the Court finds that his opinion was not particularly powerful, certain, or strong.

23. The Court finds from the record that Dr. Coons' testimony was effectively rebutted and refuted by Dr. Edens. In this regard, the record shows the following: 1) Dr. Edens testified that he was in the courtroom listening to Dr. Coons' testimony in this case and is of the opinion that Dr. Coons' methodology is not supported by science. (RR.XXIV-21; 36; 68-69); 2) Dr. Edens testified that Dr. Coons' methodology had "...not been borne out as an

accurate means of identifying the individuals who are going to be violent in prison in the future." (RR.XXIV-36); 3) Dr. Edens testified that research existed which shows that the "...rate of subsequent murders by people in prison for murder are relatively low and in many studies actually lower than other general population inmates." (RR.XXIV-32); 4) Dr. Edens testified that "...convicted murderers in a lot of studies actually are less prone to getting written up for disciplinary infractions than are people in for other types of crimes." (RR.XXIV-34); 5) Dr. Edens testified that he was the lead author of an article titled "Predictions of Future Dangerousness in Capital Murder Trials, Is It Time to Reinvent the Wheel?" and that the findings from the article revealed that only about five percent of the 155 capital murder defendants who made up the study for the article committed a subsequent serious assault after being on death row for an average of ten years. (RR.XXIV-21-22; 28); 6) Dr. Edens testified that numerous scientific studies pertaining to the issue of unreported violence in prison showed that there is not a big difference in the rates of inmates who admit in a confidential setting that they are a victim of violence and inmates who officially report incidents of violence. (RR.XXIV-33-34; 53-54); 7) Dr. Edens' testimony was supported by scientific articles and scientific data; 8) Dr. Edens was very familiar with the literature and studies of other researchers in his field and used such studies to support his testimony. (RR.XXIV-18; 32-33; 53-54); and

9) Dr. Edens used his own research and literature to support his testimony. (RR.XXIV-21-22; 28). Based on Dr. Edens' testimony, the Court finds that that Dr. Coons' testimony was effectively rebutted and refuted by Dr. Edens.

24. The Court finds from the record that Dr. Coons' testimony was mentioned by both the State and defense during closing arguments at the re-sentencing trial. (RR.XXV-199; 212; 207-216; 220). In this regard, the record shows the following occurred during closing arguments: 1) the State argued that in Dr. Coons' opinion the applicant was a threat and would commit acts of violence in the future. (RR.XXV-199); 2) the State acknowledged that Dr. Edens believed that Dr. Coons' methods for predicting future dangerousness were unscientific, unreliable, and not subject to peer review. (RR.XXV-199); 3) the defense argued that Dr. Coons did not care whether his prediction was accurate and did not care whether his method for determining the predictability of future dangerousness was correct. (RR.XXV-212); 4) the defense argued that Dr. Coons' prediction that the applicant would be a future danger was proven wrong since the applicant had not committed a serious violent criminal act while in prison for the past eighteen years. (RR.XXV-207; 212; 215-216); and 5) the State argued on rebuttal that Dr. Coons had been a distinguished psychiatrist for the past thirty-eight years and that it was up to the jurors to judge Dr. Coons'

testimony. (RR.XXV-220). Although both the State and defense mentioned Dr. Coons' testimony during closing arguments, the Court finds that trial counsel did an effective job of rebutting the State's closing argument concerning Dr. Coons and future dangerousness.

25. The Court finds, after considering the five factors set forth in the ***Coble*** case, any error in admitting Dr. Coons' expert testimony at the re-sentencing trial and/or in allegedly failing to effectively challenge Dr. Coons' qualifications and testimony at the re-sentencing trial did not deprive the applicant of a fair sentencing trial.

CLAIM ONE (B)

1. In Claim One (B), the applicant contends trial counsel's failure to effectively challenge Dr. Coons resulted in the admission of testimony that violated the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Writ Application at pages 90-111); (State's Writ Answer at pages 31-34).

2. The Court finds that if the applicant is solely raising constitutional issues (and not ineffectiveness claims) in Claim One (B), then such constitutional issues are forfeited since they were not raised on direct appeal.

3. The Court finds that nothing prevented the applicant from raising the issues (if solely constitutional issues) in Claim One (B) on direct appeal.

4. The Court finds that the admissibility of Dr. Coons' testimony is not a cognizable issue for habeas corpus review.

5. The Court finds that trial counsel Odiorne effectively challenged Dr. Coons at the re-sentencing trial.

6. The Court finds that the admission of Dr. Coons' testimony did not violate the heightened reliability requirement of the Eighth Amendment to the United States Constitution.

7. The Court finds that the applicant has failed to meet his burden of showing that the admission of Dr. Coons' testimony was harmful (if Claim One (B) is solely a constitutional claim).

8. The Court finds that the admission of Dr. Coons' testimony did not violate the Sixth or Fourteenth Amendments to the United States Constitution.

9. The Court further finds that the applicant has failed to meet the standards enunciated in ***Strickland v. Washington*** (if Claim One (B) is an ineffectiveness claim).

CLAIM ONE (C)

1. In Claim One (C), the applicant contends that Dr. Coons' alleged false and misleading testimony violated his right to due process of law and his Eighth Amendment right to be free of cruel and unusual punishment. (Writ Application at pages 111-120); (State's Writ Answer at pages 34-36).

2. The Court finds from the record that Dr. Coons' testimony at the re-sentencing trial regarding his experience and credentials was credible and accurate. (RR.II—Evidentiary Hearing-58; 260; 263); (RR.III—Evidentiary Hearing-255-265); (Dr. Coons' affidavit attached as Exhibit C to State's Writ Answer).

3. The Court finds that Dr. Coons' affidavit pertaining to his experience and credentials was credible and accurate. (Dr. Coons' affidavit attached as Exhibit C to State's Writ Answer).

4. In the alternative, the Court finds that the alleged false testimony concerning Dr. Coons' experience and credentials was not material and did not violate the applicant's due process rights.

5. The Court further finds that no due process or Eighth Amendment rights were violated as alleged in Claim One (C).

CLAIM TWO (A)

1. In Claim Two (A), the applicant contends that he was denied his right to due process of law when the State called witnesses (Mr. A.P. Merillat and Mr. Stephen Bryant) who allegedly presented false and misleading testimony about the conditions of confinement in the Texas Department of Criminal Justice. (Writ Application at pages 131-145); (State's Writ Answer at pages 36-45).

2. The Court finds that nothing prevented the applicant from raising Claim Two (A) on direct appeal.

3. The Court finds that nothing prevented the applicant from objecting to the allegations contained in Claim Two (A) at the re-sentencing trial.

4. The Court finds that the admissibility of the testimony of Merillat and Bryant is not a cognizable issue for habeas corpus review.

5. The Court finds that the applicant failed to establish a due process violation because the testimony of Merillat and Bryant at the re-sentencing trial was not false and/or misleading.

6. The Court finds that the following statements made by Merillat at the re-sentencing trial were not false or misleading and did not violate the applicant's due process rights: 1) "They will go anywhere there's a bed available for that particular classification." and 2) "They are restricted in the

kind of work they can do, but not where they're housed or how they co-mingle with other inmates." (Merillat's affidavit attached as Exhibit D to State's Writ Answer); (RR.XXIII-161-162).

7. The Court finds from the record that Merillat and/or Bryant were never specifically asked about the following conditions of confinement at the re-sentencing trial: 1) if given a life sentence in a capital murder case, an inmate would remain at a G3 level for a minimum of ten years (Applicant's Writ Application at page 132); 2) an inmate convicted of capital murder can never rise to the level of a "G1" (Applicant's Writ Application at page 132-133); 3) an inmate convicted of capital murder will not be allowed to work on a job without armed supervision (Applicant's Writ Application at page 133); and 4) an inmate's participation in the Death Row Work Capable program and participation in "social summary interviews" is entirely voluntary (Applicant's Writ Application at page 134). Since Merillat and Bryant were never specifically asked about the above conditions of confinement, the Court finds they were not trying to mislead the jury about the conditions of confinement in the Texas Department of Criminal Justice. (Merillat's affidavit attached as Exhibit D to State's Writ Answer).

8. The Court finds that Merillat did not give false testimony about the remuneration he received from Randall County. (Merillat's affidavit attached as Exhibit D to State's Writ Answer).

9. The Court finds that the applicant failed to establish any due process violation because Merillat's remuneration testimony was not false.

10. The Court finds that none of the error alleged in Claim Two (A) affected the applicant's sentence.

CLAIM TWO (B)

1. In Claim Two (B), the applicant contends that he was denied his right to due process of law when the State failed to provide to the defense favorable information about the conditions of confinement in the Texas Department of Criminal Justice in violation of ***Brady v. Maryland***. More specifically, the applicant contends that the State should have provided the defense with a copy of the Texas Department of Criminal Justice's policies. (Writ Application at pages 145-147); (State's Writ Answer at pages 45-46).

2. The Court finds that the State did not commit a ***Brady*** violation or deny the applicant his right to due process of law by failing to provide the defense with a copy of the Texas Department of Criminal Justice's policies. The applicant could have obtained the TDCJ Unit Classification Procedure

Manual through the exercise of reasonable diligence by requesting such information from the Texas Department of Criminal Justice. (Tracy Dingman's letter attached as Exhibit E to State's Writ Answer).

3. The Court finds that the State did not commit a ***Brady*** violation or deny the applicant his right to due process of law because the testimony of Merillat and Bryant was not false or erroneous.

CLAIM TWO (C)

1. In Claim Two (C), the applicant contends that he was denied effective assistance of trial counsel because counsel failed to: 1) impeach the State's evidence concerning conditions of confinement in the Texas Department of Criminal Justice, 2) rebut the State's testimony, and 3) make appropriate objections to preserve issues on appeal. (Writ Application at pages 147-166); (State's Writ Answer at pages 46-57).

2. The Court finds that the testimony of Merillat and Bryant concerning the conditions of confinement in the Texas Department of Criminal Justice was not false/misleading and did not "cry out" for correction by trial counsel.

3. The Court finds that, as a matter of trial strategy, trial counsel Odiorne and Keith reasonably decided not to challenge Merillat during the re-sentencing trial because part of the defensive theory was to show that the

applicant had been an exemplary inmate for over eighteen years and had not committed any criminal acts of violence during this period of incarceration. Trial counsel believed that Merillat's testimony helped establish that the applicant had the opportunity to commit criminal acts of violence while on death row and chose not to engage in such behavior. This trial strategy was reasonable and plausible in light of all the circumstances. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

4. The Court finds that trial counsel Odiorne was not ineffective for failing to object to and/or clarify the following italicized statement made by Merillat at the re-sentencing trial: An inmate convicted of capital murder and sentenced to life "*will go anywhere there's a bed available for that particular classification.* They're not sent to a special unit. They're not put in a special cell block. Just depends on the openings at the time, the population of the prison." (emphasis added by this writer); (RR.XXIII-161); (Merillat's affidavit attached as Exhibit D to State's Writ Answer). According to Merillat, offenders convicted of capital murder and sentenced to life in prison "...are assigned a 'default' classification of G3 upon entry into the prison system. This classification does not call for or mandate placement of the inmate into a 'special unit.' The limitations or restrictions as far as custody of a G3 offender

as applies to a convicted capital murder with a life sentence are outlined in the Texas Department of Criminal Justice Classification Plan, referred to below. There is no mention of a 'special unit' for convicted capital murderers with less than death sentences. However, the prison is prevented from housing those inmates in trusty camps or in 'minimum' security locations." (Merillat's affidavit attached as Exhibit D to State's Writ Answer at pages 2-3). Merillat stated in his affidavit that Frank Aubuchon believes that his italicized statement was incorrect because the applicant could not be assigned to a less restrictive custody than G-3 for a minimum of 10 years. (Merillat's affidavit attached as Exhibit D to State's Writ Answer at page 4). Although Merillat agreed with Aubuchon's assertion, he explained that "...this restriction on custody does not alter my testimony concerning *where* a G3 offender would be housed, according to his classification, nor does it render my statements false or misleading. An incoming offender designated G3 (like Applicant here), regardless of the requirement that he serve 10 years flat before becoming eligible for less restrictive custody will *still* be assigned to *any* unit that has a bed available for *that particular classification*...I also point out that I was never asked by either party about this '10-year rule.' Had I been, my answer would have been consistent with Mr. Aubuchon's affidavit, so neither one of us can be accused of having fabricated testimony or misled any person." (Merillat's affidavit attached as Exhibit D to State's Writ Answer at

pages 4-5). The Court finds Merillat's affidavit to be credible. Based on Merillat's affidavit, the Court finds that Merillat's above italicized statement was truthful and accurate. The Court further finds that trial counsel Odiorne was not ineffective for failing to object to and/or clarify a truthful and accurate statement at the re-sentencing trial.

5. The Court finds that trial counsel Odiorne was not ineffective for failing to object to and/or clarify the following italicized statement made by Merillat at the re-sentencing trial: Odiorne's question was "Do persons who are convicted of capital murder and sentenced to life in prison start out in any kind of restrictive setting?" and Merillat's answer was "No, sir. *They are restricted in the kind of work they can do, but not where they're housed or how they co-mingle with other inmates.*" (emphasis added by this writer); (RR.XXIII-162); (Merillat's affidavit attached as Exhibit D to State's Writ Answer). According to Merillat, G3 offenders "...are housed in units capable of housing general population inmates, including G3 offenders. There are conditions, such as overcrowding or other compelling need, which may require that G3 offenders be housed with G2 offenders...But, this co-mingling of G2 and G3 offenders cannot be accomplished except upon the approval of 'the housing scheme by the Chairperson of the SCC [State Classification Committee].' This exception to an otherwise blanket prohibition is codified in

the Unit Classification Procedures Manual...Moreover, the Recreation Program for offenders, administered and implemented through TDCJ Administrative Directive 03.40 ('Out-of-Cell Time' for General Population Offenders) provides a uniform set of standards which define the conditions and administrative requirements relating to out-of-cell recreational time for offenders, necessarily allowing for a certain degree of interaction between G3, G2 and G1 offenders. Thus, my testimony was accurate and true, particularly when I observed in general terms that G3 offenders 'start out' under these conditions and, according to existing regulations, are permitted limited contact with offenders with a less restrictive custody status...." (Merillat's affidavit attached as Exhibit D to State's Writ Answer at pages 6-7). The Court finds Merillat's affidavit to be credible. Based on Merillat's affidavit, the Court finds that Merillat's above italicized statement was truthful and accurate. The Court further finds that trial counsel Odiorne was not ineffective for failing to object to and/or clarify a truthful and accurate statement at the re-sentencing trial.

6. The Court finds that, as a matter of trial strategy, trial counsel Odiorne and Keith were not ineffective for failing to hire and utilize an expert knowledgeable in the classification and procedures of the Texas Department of Criminal Justice at the re-sentencing trial. Trial counsel choose to focus

the jury's attention on their defensive theory (i.e., that the applicant had been an exemplary inmate for over eighteen years and had not committed any criminal acts of violence during this period of incarceration) and relied on defense witnesses Jared Wilson and Kyle Rains to establish that the applicant had opportunities to commit criminal acts of violence while on death row and chose not to engage in such behavior. The Court finds that this trial strategy was reasonable and plausible in light of all the circumstances. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

7. The Court finds from the record that it was reasonable for trial counsel to call Jared Wilson and Kyle Rains as defense witnesses in order to show that the applicant had the opportunity to commit criminal acts of violence while on death row and chose not to engage in such behavior. (RR.XXV-19-21; 30-32).

8. The Court finds from the record that trial counsel Odiorne and Keith were not ineffective for failing to insist on a hearing to establish whether Merillat would give lay or expert opinion testimony at the re-sentencing trial. Trial counsel requested a Rule 702/Rule 705 hearing prior to and during Merillat's testimony and objected that Merillat was not qualified as an expert in classification during the re-sentencing trial. (RR.XXIII-160-161). Trial

counsels' actions were reasonable and plausible in light of all the circumstances.

9. The Court finds trial counsel were not ineffective for allowing the State to elicit testimony from Merillat about the classification system. (RR.XXIII-160-161). It is reasonable to conclude from a reading of the record that Judge Miner was sustaining the prosecutor's argument that the classification evidence had already come in through another witness and was not sustaining the defense objection that Merillat was unqualified to testify about classification issues. (RR.XXIII-160-161). Accordingly, trial counsels' actions were reasonably and plausible in light of all the circumstances.

10. The Court finds, as a matter of trial strategy, trial counsel were not ineffective for failing to argue that Merillat's opinion testimony and testimony of prison violence violated the Eighth Amendment of the United States Constitution. The defense's trial strategy was to show that the applicant had opportunities to commit criminal acts of violence while on death row and chose not to engage in such behavior for over eighteen years of confinement. It was reasonable for trial counsel to conclude that Merillat's testimony actually helped support this trial strategy. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to

State's Writ Answer). Accordingly, the actions of trial counsel were reasonable and plausible in light of all the circumstances.

11. The Court finds that trial counsel were not ineffective for failing to argue that Merillat's testimony was unconstitutional because it rendered mitigating evidence irrelevant. No evidence exists that must be viewed by a juror as being *per se* mitigating. The Court further finds the jury charge properly contained the following language regarding Special Issue #3: "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?". (Exhibit F at page 9 of the State's Writ Answer). Accordingly, the actions of trial counsel were reasonable and plausible in light of all the circumstances.

12. The Court finds that trial counsel were not ineffective for failing to: 1) demonstrate that the applicant had never been investigated by the Special Prosecution Unit (Applicant's Writ Application at pages 152-153); 2) introduce evidence about the decreasing likelihood of violence in an older inmate and for failing to rebut the suggestion that age is irrelevant to the probability of future dangerousness (Applicant's Writ Application at pages

153-154); 3) object that the testimony of Mr. Bryant and Mr. Merillat was premature because the defense had not presented any evidence of their defensive theory prior to these witnesses' testifying at the re-sentencing trial (Applicant's Writ Application at pages 161-162); 4) object that Mr. Merillat's testimony was cumulative of Mr. Bryant's testimony (Applicant's Writ Application at page 162); and 5) object that the testimony of Mr. Merillat and Mr. Bryant regarding an inmate's escape from death row was irrelevant to this case (Applicant's Writ Application at pages 162-163). Trial counsels' main objective in this case was to focus the jury's attention on the fact that the applicant had opportunities to commit criminal acts of violence while on death row and chose not to engage in such behavior for over eighteen years of confinement. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer). In light of this objective, trial counsels' inactions did not constitute ineffective assistance of counsel.

13. The Court finds that trial counsel did not fail to impeach any improper evidence presented by the State concerning conditions of confinement in the Texas Department of Criminal Justice.

14. The Court finds that trial counsel did not fail to make appropriate objections to the State's evidence about conditions of confinement in the Texas Department of Criminal Justice.

15. The Court further finds that the applicant has failed to establish any prejudice stemming from appellate counsels' reasonable professional judgments in Claim Two (C). In light of the strong evidence presented at re-sentencing trial showing that the applicant was not a future danger because he had been an exemplary inmate for over eighteen years and in light of the strong mitigating evidence presented at the re-sentencing trial, trial counsels' actions did not deprive the applicant of a fair trial.

CLAIM TWO (D)

1. In Claim Two (D), the applicant contends that appellate counsel was ineffective for failing to raise the issue of the State's use of witnesses who presented false and misleading testimony about the conditions of confinement in the Texas Department of Criminal Justice on direct appeal. (Writ Application at pages166-170); (State's Writ Answer at pages 57-59).

2. The Court finds that appellate counsel Bennett was not ineffective for failing to raise the allegations contained in Claim Two (D) on direct appeal. Since no objections to the allegations contained in Claim Two (D) were made

at the re-sentencing trial, the Court finds that Claim Two (D) was not preserved for appellate review. (Bennett's affidavit attached as Exhibit G to State's Writ Answer). Trial counsel Bennett was not ineffective for failing to raise unpreserved error on direct appeal.

3. The Court finds that the applicant has failed to establish any prejudice stemming from appellate counsels' reasonable professional judgments in Claim Two (D). (Bennett's affidavit attached as Exhibit G to State's Writ Answer).

4. In the alternative, the Court finds that the arguments raised in Claim Two (D) did not affirmatively demonstrate the alleged ineffectiveness and Claim Two (D) was better raised/developed on habeas corpus review.

5. The Court further finds that the following statement made by appellate counsel Bennett in his affidavit should be disregarded: "In my opinion Mr. Brewer poses no continued danger to others or to society and his sentence should be commuted to life imprisonment." (Bennett's affidavit attached as Exhibit G to State's Writ Answer). The Court finds this statement is multifarious and has no merit. The Court extends the above finding to all the other ineffective assistance of appellate counsel claims alleged in the writ application—Claim Three (B), Claim Seven, Claim Eight, Claim Nine (A)

and (B), Claim Eleven, Claim Twelve, Claim Thirteen, Claim Fourteen, Claim Fifteen, and Claim Sixteen.

CLAIM THREE (A)

1. In Claim Three (A), the applicant contends that trial counsel were ineffective for failing to adequately challenge the State's use of the autopsy report and prior testimony of Dr. Ralph Erdman in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Writ Application at pages 184-215); (State's Writ Answer at pages 59-68). More specifically, the applicant contends in Claim Three (A) that trial counsel were ineffective for the following reasons: 1) trial counsel failed to challenge the admissibility of Dr. Erdmann's work even though trial counsel had ample opportunity to raise Erdmann's lack of qualification, competence, and honest in his professional conduct (Writ Application at pages 184-197); 2) trial counsel failed to adequately challenge the admissibility of Dr. Erdmann's previous testimony on the basis of the confrontation clause and hearsay grounds (Writ Application at pages 197-205); 3) trial counsel failed to utilize Dr. Erdmann's many convictions for crimes of moral turpitude in order to impeach the findings in his report/prior testimony or to demonstrate Dr. Erdmann's untruthful character (Writ Application at pages 205-209); and 4) trial counsel failed to present expert testimony on the applicant's behalf in

order to impeach Dr. Erdmann's findings and theories and Dr. Natarjan's resulting testimony. (Writ Application at pages 209-215); (State's Writ Answer at pages 59-68).

2. The Court finds that the main reason Dr. Erdmann's autopsy report and testimony was presented in the instant case was to inform the jury about Robert Laminack's cause of death. Cause of death is a guilt/innocence issue, not a punishment issue.

3. The Court finds that the jury in the original trial had already determined cause of death at the guilt/innocence stage of trial and the appellate courts had affirmed the conviction.

4. The Court finds that trial counsel Odiorne and Keith objected when the State sought to re-tender evidence (including Erdmann's autopsy and testimony) from the original trial at the re-sentencing trial. However, Judge Miner allowed the State to re-tender all such evidence at the re-sentencing trial. (RR.XXI-20-38).

5. The Court finds, as a matter of trial strategy, trial counsel Odiorne and Keith reasonably decided not to challenge the victim's cause of death because it was primarily a guilt/innocence issue and part of the defensive theory was for the applicant to take responsibility for his actions by admitting that he

murdered Laminack at the re-sentencing trial. This trial strategy was reasonable and plausible in light of all the circumstances. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

6. The Court finds that trial counsel were not ineffective for failing to inform the jury about Erdmann's numerous convictions/criminal acts, Erdmann's loss of his medical license, and Erdmann's dishonesty and incompetence since the defense decided not to challenge cause of death at the re-sentencing trial. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer) (Merillat's affidavit attached as Exhibit B to State's Writ Answer).

7. The Court finds from the 1991 trial transcript that Dr. Erdmann was cross-examined at the original trial and so the applicant cannot establish any confrontation violations in this case. (RR.XVI-387-388).

8. The Court finds that the autopsy report was not subject to hearsay challenges.

9. The Court finds that trial counsel did adequately challenge the admissibility of Dr. Erdmann's work (autopsy report and testimony) at the re-sentencing trial. In this regard, the record shows the following: 1) trial counsel Odiorne and Keith objected when the State sought to re-tender

evidence (including Erdmann's autopsy and testimony) from the original trial at the re-sentencing trial; 2) trial counsel Keith objected to Dr. Natarajan offering his opinion at the re-sentencing trial because it was based on Dr. Erdmann's work and violated the confrontation clause (RR.XXIII-30-32) and 3) trial counsel Keith again objected that Dr. Natarajan's testimony violated the confrontation clause and moved to strike Dr. Natarajan's testimony from the record after Dr. Natarajan testified at the re-sentencing trial. The trial judge overruled the objection. (RR.XXIII-67-69). Accordingly, trial counsels' actions in challenging the admissibility of Dr. Erdmann's work were reasonable and plausible in light of all of the circumstances.

10. The Court finds that trial counsel were not ineffective for failing to present the expert testimony of a pathologist to impeach Dr. Erdmann's findings/theories and Dr. Natarajan's resulting testimony. Since the conviction in this case was affirmed, the appellate courts obviously found no error with Dr. Erdmann's testimony/findings from the 1991 trial.

11. The Court finds that trial counsel were not ineffective for failing to present an expert witness at the re-sentencing trial to challenge Kristie Nystrom's culpability. The trial strategy in the instant case was to have the applicant take responsibility for killing Laminack, to have the applicant show remorse for his actions, and to present evidence showing that the applicant

had been an exemplary inmate in prison for over eighteen years. Based on this trial strategy, it was reasonable for trial counsel Odiorne and Keith not to challenge Nystrom's culpability. This trial strategy was reasonable and plausible in light of all the circumstances. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

12. The Court further finds that the applicant has failed to establish any prejudice stemming from trial counsels' reasonable professional judgments in Claim Three (A) since Dr. Erdmann's autopsy report/prior testimony related to cause of death (which was not an issue in this cause since the applicant admitted to murdering Laminack at the re-sentencing trial).

CLAIM THREE (B)

1. In Claim Three (B), the applicant contends that appellate counsel was ineffective for failing to raise Judge Miner's alleged error in admitting evidence of Dr. Erdmann's autopsy of Laminack. (Writ Application at pages 215-219); (State's Writ Answer at pages 68-70).

2. The Court finds that appellate counsel Bennett did not render ineffective assistance of counsel for failing to raise Judge Miner's alleged error in admitting evidence regarding Dr. Erdmann's autopsy on direct appeal.

Since Dr. Erdmann's autopsy was relevant to the guilt/innocence issue of cause of death and since the cause of death issue had already been reviewed by the appellate courts and withstood scrutiny, appellate counsel Bennett was not ineffective for failing to raise the allegations contained in Claim Three (B) on direct appeal. Appellate counsel Bennett's actions were objectively reasonable and plausible in light of all the circumstances.

3. The Court finds that the applicant has failed to establish prejudice stemming from appellate counsel Bennett's failure to raise the above issue on direct appeal. Since the evidence of Dr. Erdmann's autopsy involved a guilt/ innocence issue and since the applicant admitted to killing Laminack at the re-sentencing trial, no prejudice can be shown.

4. The Court further finds that Bennett's supplementary affidavit designated as Exhibit H-22 is not credible.

CLAIM THREE (C)

1. In Claim Three (C), the applicant contends that he was denied his right to due process of law and to the Eighth Amendment's prohibition against cruel and unusual punishment when the State called Dr. Natarajan to testify about the validity of Dr. Erdmann's autopsy of Laminack. (Writ Application at pages 219, 225); (State's Writ Answer at pages 70-74).

2. The Court finds that nothing prevented the applicant from raising Claim Three (C) on direct appeal.

3. The Court finds that the admissibility of Dr. Natarajan's testimony is not a cognizable issue for habeas corpus review.

4. The Court finds from the record that Dr. Natarajan's testimony concerning the validity of Dr. Erdmann's autopsy of Laminack was not false or misleading. (RR.XXIII-33-64)

5. The Court finds that the applicant failed to establish a due process violation because Dr. Natarajan testimony was not false.

6. The Court finds that Dr. Natarajan's conclusions about cause of death were based upon a review of the following evidence: 1) photographs taken during the autopsy (RR.XXIII-29); 2) photographs taken by law enforcement authorities (RR.XXIII-29-30); 3) information gathered by law enforcement authorities in connection with the investigation of Mr. Laminack's death (RR.XXIII-30; 59-60); 4) police reports (RR.XXIII-31; 59); 5) witness statements(RR.XXIII-58-60); 6) Dr. Erdmann's testimony from the 1991 trial (RR.XXIII-58; 64); and 7) Dr. Erdmann's autopsy report (RR.XXIII-29-32).

7. The Court finds that the applicant has cited no evidence in Claim Three (C) to show that Dr. Erdmann's autopsy failed to follow a standard protocol.

8. The Court finds that the applicant has failed to establish an Eighth Amendment violation.

9. The Court further finds that any error alleged in Claim Three (C) did not affect the applicant's sentence since the applicant admitted to killing Laminack at the re-sentencing trial.

CLAIM FOUR

1. In Claim Four, the applicant contends that trial counsel were ineffective for failing to investigate and present mitigating evidence to support a sentence of less than death at the re-sentencing trial. (Writ Application at pages 225-292); (State's Writ Answer at pages 75-81).

2. The Court finds that trial counsel Odiorne and Keith used an in-house investigator and mitigator prior to the re-sentencing trial in order to discover and/or develop mitigation evidence and a trial strategy. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

3. The Court finds that trial counsel Odiorne and Keith reviewed a copy of the transcript from the original 1991 trial in order to develop mitigation evidence and a trial strategy for the re-sentencing trial. The transcript helped in the investigation of the applicant's mitigating evidence and in the

investigation of the State's aggravating evidence. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

4. The Court finds that trial counsel Odiorne and Keith reviewed the notes from the applicant's counsel (including habeas counsel) at the original 1991 trial in order to develop mitigation evidence and a trial strategy for the re-sentencing trial. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

5. The Court finds that trial counsel Keith traveled to Mississippi prior to the re-sentencing trial in order to meet with the applicant's family members about mitigation evidence. (Keith's affidavit attached as Exhibit B to State's Writ Answer).

6. The Court finds trial counsel Keith made a reasonable decision not to call Albert Brewer (the applicant's father) as a witness during the re-sentencing trial because trial counsel Keith had learned from the mitigation investigation that Albert Brewer would commit perjury if called as a defense witness. (Keith's affidavit attached as Exhibit B to State's Writ Answer).

7. The Court finds that trial counsel Keith made a reasonable decision to alert Judge Miner about Albert Brewer's intention to lie on the witness stand

after learning that the State intended to call Albert Brewer as a witness. (Keith's affidavit attached as Exhibit B to State's Writ Answer).

8. The Court finds from the record that trial counsel presented the following mitigating evidence at the re-sentencing trial which delved into the applicant's background and troubled childhood: 1) the applicant testified that he was born on May 26, 1970 (RR.XXV-39); 2) the applicant testified that Albert Brewer (his father) went to Vietnam and was not the same person when he returned home from the war (RR.XXV-40); 3) the applicant testified that Karon Brewer (his mother) and Albert Brewer divorced because Albert abused Karon Brewer (RR.XXV-40); 4) the applicant testified that Albert Brewer was not present in his life while he was growing up (RR.XXV-39); 5) the applicant testified that his mother remarried in approximately 1974 and that his step-father (Don Bartlett) was never at home (RR.XXV-40-41); 6) the applicant testified that his relationship with his step-father was not good and that his step-father would repeatedly beat him with an extension cord or a belt (RR.XXV-41-42); 7) the applicant testified that he would often run away from home for months at a time in order to get away from his step-father (RR.XXV-54); 8) the applicant testified that his mother and step-father would fight at least once a week (RR.XXV-44); 9) the applicant testified that he was diagnosed with scoliosis in 1981 (RR.XXV-135); 10) Karon Brewer and the

applicant testified that the applicant had to have surgery for his scoliosis (RR.XXIV-83-84); (RR.XXV-135); 11) the applicant testified that the scoliosis surgery involved taking a bone from the applicant's hip and fusing it in his neck and then putting a rod in the applicant's spine (RR.XXV-46; 135); 12) the applicant testified that he spent about three weeks in a hospital bed after the surgery and then about eight weeks in a body brace (RR.XXV-46); 13) Karon Brewer and the applicant testified that the scoliosis prevented the applicant from playing his beloved sports (RR.XXIV-83); 14) the applicant testified that he began hanging out with "stoners" and using drugs when he was about twelve years old because he was no longer able to play sports (RR.XXV-47-48); 15) the applicant testified that Karon Brewer and Don Bartlett ended their marriage in approximately 1985 (RR.XXV-52); 16) the applicant testified that Albert Brewer came back into his life in approximately 1985 when he was about fifteen years old (RR.XXV-40; 51-52); 17) the applicant testified that Karon Brewer and Albert Brewer remarried in 1987 (RR.XXV-54); 18) Karon Brewer and the applicant testified that Albert Brewer was mean, violent, and abusive (RR.XXIV-52; 85); (RR.XXV-52; 59; 62); 19) Billie Anne Young (the applicant's sister) testified that she witnessed Albert Brewer beating the applicant (RR.XXIV-96-102); 20) the applicant testified that law enforcement officers were often called out to his residence because Albert was beating on the applicant or on Karon Brewer

(RR.XXV-62); 21) the applicant testified Albert Brewer hit him in the face with a piece of wood during one abusive incident and nearly broke his nose (RR.XXV-62); 22) the applicant testified that the reason he beat Albert Brewer with a broom so severely on one occasion was to stop Albert from hurting Karon Brewer (RR.XXV-60-62; 123-124); 23) the applicant testified that after the broom incident he moved to Abilene, Texas to live with his grandmother and began using drugs and alcohol again (RR.XXV-62-64); 24) the applicant testified that in 1990 he wrote a suicide note which was found by his grandmother and his grandmother then took legal action to have the applicant committed to a state hospital in Big Springs, Texas (RR.XXV-64-65); 25) the applicant testified that the suicide note stated, "I'm sorry for this, but I've got to go" (RR.XXV-65); and 26) the applicant testified that he has a history of abusing drugs and alcohol (RR.XXV-47-48; 64; 68).

9. The Court finds from the record that trial counsel presented the following mitigating evidence at the re-sentencing trial in order to show that the applicant had been an exemplary inmate: 1) Scott Castleberry (a deputy with the Randall County Sheriff's office) testified that he never wrote the applicant up for a violation while in the Randall County jail and never saw the applicant commit a violent act (RR.XXVI-75-76) and 2) Captain Debbie Unruh (the jail administer for Randall County Sheriff's office) testified that

there were no disciplinary violations committed by the applicant while in the Randall County jail (RR.XXVI-105-106).

10. The Court finds from the record that trial counsel presented the following mitigating evidence at the re-sentencing trial in order to show that an inmate has the opportunity to commit criminal acts of violence while on death row and to support trial counsels' trial strategy that the applicant is not a future danger because he had the opportunity to commit criminal acts of violence while on death row (for approximately eighteen years) and chose not to engage in such behavior: 1) Jared Wilson (a former correctional officer on death row at the Polunsky Unit) testified that he personally observed inmates commit violent acts while on death row and that the level of violence is about the same in the general population as on death row. (RR.XXV-19; 21) and 2) Kyle Rains (a former correctional officer on death row at the Polunsky Unit) testified that he personally observed inmates commit violent acts while on death row and was personally assaulted by an inmate while working on death row. (RR.XXV-29-32).

11. The Court finds that trial counsel Keith called psychologist John Edens as a witness at the re-sentencing trial to refute Dr. Richard Coons' testimony pertaining to future dangerousness and to impeach the methodology

underlying Dr. Coons' predictions of future dangerousness. (RR.XXVI-11-53).

12. The Court finds that most of the unoffered mitigating evidence that the applicant complains about in Claim Four was not substantially different in strength and subject matter from the mitigating evidence actually presented at the re-sentencing trial.

13. The Court finds that trial counsel Odiorne and Keith properly investigated and presented strong mitigating evidence at the re-sentencing trial which called for a sentence of less than death.

14. The Court finds the trial strategy of trial counsel Odiorne and Keith pertaining to the investigation of mitigating evidence and the presentation of mitigating evidence was reasonable and plausible in light of all the circumstances.

15. The Court further finds that the applicant has failed to establish any prejudice in Claim Four in light of the thorough investigation of mitigating and aggravating evidence prior to the re-sentencing trial and in light of the presentation of strong mitigating evidence at the re-sentencing trial.

CLAIM FIVE

1. In Claim Five, the applicant contends that trial counsel were ineffective for failing to adequately challenge the testimony of Greg Soltis (a crime scene investigator) in violation of the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution. (Writ Applications at pages 292-302) (State's Writ Answer at pages 81-85).

2. The Court finds, as a matter of trial strategy, trial counsel Odiorne and Keith reasonably concluded that it was unnecessary to challenge Soltis at the re-sentencing trial because part of the defensive theory was for the applicant to take responsibility for his actions by admitting that he murdered Mr. Laminack at the re-sentencing trial. This trial strategy was reasonable and plausible in light of all the circumstances. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

3. The Court finds, as a matter of trial strategy, trial counsel Odiorne and Keith reasonably concluded that it was appropriate to release Mr. Lawrence Renner (a forensic consultant) as a witness prior to trial because part of the defensive theory was for the applicant to take responsibility for his actions by admitting that he murdered Laminack at the re-sentencing trial. This trial strategy was reasonable and plausible in light of all the circumstances.

(Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

4. The Court finds that Soltis had appropriate training in blood spatter evaluation in April of 1990. (Soltis' affidavit attached as Exhibit I to State's Writ Answer).

5. The Court finds that Soltis was qualified to testify at the re-sentencing trial.

6. The Court finds that the applicant has failed to establish that the allegations in Claim Five resulted in a violation of the Sixth, Eighth, or Fourteenth Amendments to the United States Constitution.

7. The Court further finds that the applicant has failed to establish any prejudice stemming from trial counsels' reasonable professional judgments in Claim Five since the applicant testified that he stabbed and killed Laminack at the re-sentencing trial.

CLAIM SIX

1. In Claim Six, the applicant contends that trial counsel rendered ineffective assistance of counsel by failing to impeach Stephen "Skee" Callen and Kristie Nystrom with prior statements indicating that Nystrom had stabbed Laminack in violation of the Sixth, Eighth, and Fourteenth

Amendments to the United States Constitution. (Writ Application at pages 302-307); (State's Writ Answer at pages 85-89).

2. The Court finds, as a matter of trial strategy, trial counsel Odiorne and Keith reasonably concluded that it was unnecessary to impeach Stephen "Skee" Callen and Kristie Nystrom with Callen's statements indicating that Nystrom had stabbed Laminack. The impeachment statements raised in Claim Six did not affirmatively show that Nystrom had stabbed Laminack. Also, it was reasonable for trial counsel Odiorne and Keith to conclude that impeaching Callen with these prior statements was inconsistent with the defensive theory (i.e., the applicant would take the stand and admit to killing Laminack at the re-sentencing trial). (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer). Based on the trial strategy and defensive theory, the Court finds that the actions of trial counsel pertaining to Claim Six were reasonable and plausible in light of all the circumstances.

3. The Court finds, as a matter of trial strategy, trial counsel Odiorne and Keith reasonably concluded that it was unnecessary to elicit testimony from Callen that the applicant had been crying after the murder offense in order to show that the applicant was remorseful for his actions. It was reasonable for trial counsel Odiorne and Keith to conclude that the better trial strategy (and

the strategy that had a greater impact on the jury) was to have the applicant personally express his remorse for murdering Laminack at the re-sentencing trial. This trial strategy was reasonable and plausible in light of all the circumstances. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer); (Keith's affidavit attached as Exhibit B to State's Writ Answer).

4. The Court finds that the applicant has failed to establish any violation of the Sixth, Eighth, or Fourteenth Amendments to the United States Constitution.

5. The Court further finds that the applicant has failed to establish any prejudice stemming from trial counsels' reasonable professional judgments in Claim Six since the applicant testified that he killed Laminack and personally expressed remorse for his actions at the re-sentencing trial.

CLAIM SEVEN

1. In Claim Seven, the applicant contends that the trial judge erred by failing to provide the jury with a legally correct supplemental instruction on the law. The applicant alleges that the trial judge should have informed the jury that attempted suicide is not a criminal offense in Texas in response to the jury note inquiring whether suicide or attempted suicide is considered a criminal act of violence. The applicant also contends that the trial judge

should have read the written response to the jury note in open court in compliance with the requirements of Article 36.27 of the Texas Code of Criminal Procedure. Furthermore, the applicant raises allegations in Claim Seven pertaining to ineffective assistance of trial counsel and appellate counsel. (Writ Application at pages 307-316); (State's Writ Answer at pages 89-99).

2. The Court finds from the record that the jurors sent Judge Miner a note during deliberations at the re-sentencing trial which read: "Is suicide or attempting suicide considered a criminal act of violence?" (RR.XXV-235); (State's Writ Answer at Exhibit J).

3. The Court finds from the record that Judge Miner announced orally to both parties that he would respond to the jury note by stating, "Please read the charge again and be guided thereby or something." (RR.XXV-236).

4. The Court finds from the record that the State and trial counsel Odiorne and Keith failed to object to Judge Miner's oral response to the jury note. (RR.XXV-236).

5. The Court finds from the record that Judge Miner sent a note back to the jurors with the following response written on the note: "I cannot answer

that question. Please read the charge and be guided only by that." (State's Writ Answer at Exhibit J).

6. The Court finds from the record that the written response was not read in open court and that neither side objected to the Judge Miner's failure to read the written response to the jury note in open court.

7. The Court finds that the applicant did not waive the reading of Judge Miner's response to the jury note in open court.

8. The Court finds that Judge Miner's response to the jury note (i.e., "I cannot answer that question. Please read the charge and be guided only by that.") was proper and did not constitute an additional jury instruction.

9. The Court finds that Judge Miner should have read the written response to the jury note in open court in order to comply with Article 36.27 of the Texas Code of Criminal Procedure.

10. The Court finds that Judge Miner's failure to comply with Article 36.27 of the Texas Code of Criminal Procedure was harmless because Judge Miner's written response did not constitute an additional instruction and because trial counsel Odiorne and Keith were provided an opportunity to object to the trial judge's response to the jury note before it was submitted to the jury.

11. The Court finds that nothing prevented trial counsel Odiorne and Keith from lodging the following objections at the re-sentencing trial: 1) the trial judge erred by failing to provide the jury with a legally correct supplemental instruction on the law and 2) the trial judge erred by failing to have the written response to the jury note read in open court in compliance with the requirements of Article 36.27 of the Texas Code of Criminal Procedure.

12. The Court finds that nothing prevented trial counsel Odiorne and Keith from raising the allegations contained in Claim Seven (excluding the allegations of ineffective assistance of counsel) on direct appeal.

13. The Court finds from the record that trial counsel Odiorne and Keith were not ineffective for failing to request an instruction stating that attempted suicide is not a crime in Texas. Trial counsel testified during the evidentiary hearing that they were unable to find any law supporting such an instruction and believed that it was unlikely that Judge Miner would provide a supplemental jury instruction that failed to conform with model jury charges. (RR.II—Evidentiary Hearing-117); (RR.III—Evidentiary Hearing-123). The Court finds that trial counsels' actions were reasonable and plausible in light of all the circumstances.

14. The Court finds that trial counsel Odiorne and Keith did not render ineffective assistance of counsel for failing to object to Judge Miner's proper response to the jury note.

15. The Court finds that trial counsel Odiorne and Keith did not render ineffective assistance of counsel for failing to object to Judge Miner's noncompliance with Article 36.27 of the Texas Code of Criminal Procedure. Trial counsel were not ineffective for failing to preserve an error that does not constitute reversible error.

16. The Court finds that the applicant has failed to establish prejudice stemming from trial counsels' failure to object to Judge Miner's proper response to the jury note or from trial counsels' failure to object to Judge Miner's noncompliance with Article 36.27 of the Texas Code of Criminal Procedure.

17. The Court finds that appellate counsel Bennett did not render ineffective assistance of counsel for failing to raise the following issues on direct appeal: 1) Judge Miner's alleged failure to provide the jury with a legally correct supplemental instruction pertaining to attempted suicide and 2) trial counsels' failure to object to the trial judge's response to the jury note. Judge Miner's response to the jury note was proper and his non-compliance with Article 36.27 of the Texas Code of Criminal Procedure was harmless.

18. The Court further finds that the applicant has failed to establish prejudice stemming from Bennett's failure to raise the above issues on direct appeal.

CLAIMS EIGHT, ELEVEN, TWELVE, THIRTEEN,

FOURTEEN, FIFTEEN AND SIXTEEN

1. In Claim Eight, the applicant contends that appellate counsel was ineffective for failing to raise the issue of whether Article 37.011(3)(d)(2) and Article 37.0711(3)(f)(2) of the Texas Code of Criminal Procedure are unconstitutional because these statutes confuse and mislead a jury. (Writ Application at pages 316-345); (State's Writ Answer at pages 99-101). In Claim Eleven, the applicant contends that appellate counsel was ineffective for failing to raise the issue of the trial judge's alleged error in overruling the applicant's motion for the court to find Article 37.0711(3)(f)(3) of the Texas Code of Criminal Procedure unconstitutional because the statute's definition of "mitigating evidence" limits the Eighth Amendment concept of mitigation to factors that render a capital defendant less morally blameworthy for the commission of the capital murder. (Writ Application at pages 360-367); (State's Writ Answer at pages 117-119). In Claim Twelve, the applicant contends that appellate counsel was ineffective for failing to raise the issue of the trial judge's alleged error in overruling the applicant's motion to hold the

statutory definition of mitigating evidence unconstitutional (as applied to impose a "nexus" limitation). (Writ Application at pages 367-373); (State's Writ Answer at pages 119-121). In Claim Thirteen, the applicant contends that appellate counsel was ineffective for failing to raise the issue that the Texas death penalty is unconstitutional because it does not require that the indictment include an allegation of the aggravating circumstance which makes the murder a capital murder in violation of ***Ring v. Arizona***. (Writ Application at pages 373-381); (State's Writ Answer at pages 121-123) In Claim Fourteen, the applicant contends that appellate counsel was ineffective for failing to raise the issue of the trial judge's alleged error in overruling the applicant's motion requesting the trial court to find that Article 37.0711(3)(f)(3) of the Texas Code of Criminal Procedure is unconstitutional. More specifically, the applicant contends that this statute is unconstitutional because it fails to place the burden of proof regarding the mitigation special issue upon the State and, instead, implicitly places that burden of proof upon the defendant. (Writ Application at pages 381-390); (State's Writ Answer at pages 123-124). In Claim Fifteen, the applicant contends that appellate counsel was ineffective for failing to raise the issue of the trial judge's alleged error in overruling the applicant's motion to hold Articles 37.0711(3)(e) and (f) unconstitutional. More specifically, the applicant contends that these statutes are unconstitutional because they fail to require that mitigating circumstances

be considered. (Writ Application at pages 390-392); (State's Writ Answer at pages 125-126). In Claim Sixteen, the applicant contends that appellate counsel was ineffective for failing to raise the issue of the trial judge's alleged error in overruling the applicant's motion to declare the Texas death penalty statute unconstitutional. More specifically, the applicant argues that the death penalty statute is unconstitutional because of the inability of lay people to predict future danger. (Writ Application at pages 392-395); (State's Writ Answer at pages 126-127).

2. The Court finds that Claims Eight, Eleven Twelve, Thirteen, Fourteen, Fifteen and Sixteen involve purely legal issues which require no factual resolution.

3. Accordingly, the Court finds that no findings of facts are necessary in Claims Eight, Eleven, Twelve, Thirteen, Fourteen, Fifteen and Sixteen.

CLAIM NINE (A) and (B)

1. In Claim Nine (A) and (B), the applicant contends that appellate counsel was ineffective for failing to raise the following issues on direct appeal: 1) the trial judge's denial of the applicant's motion to preclude the State's expected use of trial transcripts at trial and 2) the trial judge's overruling of the applicant's objections to the State's exhibits offered at the

start of trial. (Writ Application at pages 345-355); (State's Writ Answer at pages 101-108).

2. The Court finds from the record that Judge Miner took judicial notice of the fact that the applicant had previously been convicted of capital murder by a Randall County jury and so informed the jury at the re-sentencing trial. (RR.XXI-37).

3. The Court finds from the record that Judge Miner admitted Exhibit 1-200 from the original trial into evidence at the beginning of the re-sentencing trial. (RR.XXI-37-38).

4. The Court finds that the facts and circumstances of the capital murder offense were relevant to the jury's assessment of punishment.

5. The Court finds that the exhibits and trial transcripts from the original trial were relevant to the jury's assessment of punishment.

6. The Court finds that the re-tendering of evidence from the original trial did not violate Rule 804 of the Texas Rules of Evidence and did not violate the confrontation clause.

7. The Court finds from the record that the re-tendered evidence from the guilt/innocence stage of the 1991 trial was already reviewed by the appellate courts and withstood scrutiny. (RR.XXI-20-36).

8. The Court finds from the record that re-tendered evidence (including any testimony and exhibits) was already subject to objections and/or cross-examination at the guilt/innocence stage of the 1991 trial. (RR.XXI-20-36).

9. The Court finds that appellate counsel Bennett did not render ineffective assistance of counsel for failing to raise the following issues on direct appeal: 1) Judge Miner's denial of the applicant's motion to preclude the State's expected use of trial transcripts at trial and 2) Judge Miner's overruling of the applicant's objections to the State's exhibits (from the original trial) offered at the start of the re-sentencing trial.

10. The Court further finds the applicant has failed to establish prejudice stemming from Bennett's failure to raise the above issues on direct appeal.

CLAIM TEN

1. In Claim Ten, the applicant contends that trial counsel was ineffective for failing to question prospective juror Carla Jo Dugger about her ability to follow the law and not automatically answer the first special issue "yes" because she found that the applicant intentionally killed the victim. (Writ Application at pages 355-360); (State's Writ Answer at pages 108-117).

2. The Court finds from the record that trial counsel Odiorne questioned prospective juror Carla Jo Dugger during voir dire examination about the special issues. (RR.VI-74-124).

3. The Court finds from the record that trial counsel Odiorne failed to ask prospective juror Dugger if she could follow the law in answering the special issues regardless of her personal views. (RR.VI-74-124).

4. The Court finds from the record that trial counsel Odiorne challenged prospective juror Dugger for cause because she was biased towards the death penalty. (RR.VI-121).

5. The Court finds from the record that Judge Quay Parker denied trial counsel Odiorne's challenge for cause to prospective juror Dugger at voir dire examination. (RR.VI-123).

6. The Court finds that Judge Quay Parker's denial of the challenge for cause was proper because trial counsel Odiorne failed to ask prospective juror Dugger if she could follow the law in answering the special issues regardless of her personal views.

7. The Court finds from the record that trial counsel Odiorne exercised a peremptory strike and prospective juror Dugger did not sit as a juror in this case. (RR.VI-124-125).

8. The Court finds from the record that the defense requested that Judge Miner give the applicant additional peremptory strikes after all of the defense's peremptory strikes were exhausted. (RR.XVI-189); (RR.XVII-5-7).

9. The Court finds from the record that Judge Miner denied the defense's written request for additional peremptory strikes. (CR.II-469-486); (RR.XVII-5-7).

10. The Court finds from the record that Judge Miner never allotted the applicant any additional peremptory strikes to be used on prospective jurors, but did grant one peremptory strike to be used on an alternate juror. (RR.XIX-154).

11. The Court finds that trial counsel Odiorne did not render ineffective assistance of counsel for failing to properly challenge prospective juror Dugger for cause. Trial counsel Odiorne reasonably believed that he had properly challenged prospective juror Dugger for cause throughout his vior dire examination by showing prospective juror Dugger was bias against the law. (Odiorne's affidavit attached as Exhibit A to State's Writ Answer).

12. The Court finds that the applicant failed to establish prejudice stemming from trial counsels' failure to properly challenge prospective juror Dugger for cause. The record shows that prospective juror Dugger was never

given an opportunity to say whether or not her inclination or opinion would prevent or substantially impair her ability to follow the law regardless of the evidence. Thus, the Court finds that it is impossible to know whether prospective juror Dugger was actually challengeable for cause and/or whether trial counsel Odiorne's actions in failing to establish a proper challenge for cause to prospective juror Dugger denied the applicant the right to a fair trial.

CLAIMS SEVENTEEN AND EIGHTEEN

1. In Claim Seventeen, the applicant contends that the trial judge violated his right to a fair and impartial jury by failing to excuse unqualified prospective jurors from the panel. More specifically, the applicant contends that the trial judge's failure to excuse unqualified prospective jurors from the panel violated certain federal and Supreme Court cases. (Writ Application at pages 395-405); (State's Writ Answer at pages 127-129). In Claim Eighteen, the applicant contends that the trial judge violated his right to a fair and impartial jury by allowing two automatic death penalty jurors to remain on the jury. More specifically, the applicant contends that the trial judge's actions violated the Texas constitution, the Texas laws and rules of court, and the ***Morgan v. Illinois*** case. (Writ Application at pages 405-409); (State's Writ Answer at pages 130-132).

2. In Claims Seventeen and Eighteen, the Court finds that nothing prevented the applicant from raising these claims on direct appeal.

3. In Claims Seventeen and Eighteen, the Court finds that the applicant failed to establish that Judge Miner violated his right to a fair and impartial jury.

CONCLUSIONS OF LAW

CLAIM ONE (A)

1. The two prong test enunciated in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial. Simply because another attorney might have pursued a different strategy will not support a finding of ineffective assistance of counsel. ***Ingham v. State***, 679 S.W.2d 503, 509 (Tex.Crim.App. 1984); ***Blott v. State***, 588 S.W.2d 588, 592 (Tex.Crim.App. 1979).

2. Trial counsels' performance is measured against the law in effect at the time of trial. ***Vaughn v. State***, 931 S.W.2d 564, 567 (Tex.Crim.App. 1996). The opinion in ***Coble v. State***, 330 S.W.3d 253, 270-287 (Tex.Crim.App. 2010) had not even been issued when this case was re-tried in 2009.

3. In ***Barefoot v. Estelle***, 463 U.S. 880, 103 S.Ct. 3383, 77 L.Ed.2d 1090 (1983), the United States Supreme Court rejected the argument that the use of psychiatric testimony at the punishment stage of trial regarding predictions of future dangerousness is unconstitutional because a psychiatrist is not competent to predict future dangerousness. ***Barefoot v. Estelle***, supra. Since the ***Barefoot*** case allows for experts such as Dr. Coons to testify about future dangerousness and since trial counsel are required to follow binding precedent from the United States Supreme Court regarding federal constitutional issues, it was reasonable trial strategy not to examine Dr. Coons about the ***Barefoot*** case. ***Ex parte Ramey***, 382 S.W.3d 396 (Tex.Crim.App. 2012).

4. In determining whether the result of the re-sentencing trial would have been different if trial counsel had successfully prevented Dr. Coons from testifying at the re-sentencing trial and/or had more effectively challenged Dr. Coons' testimony at the re-sentencing trial, it is helpful to review the five factors relied upon in the ***Coble*** case. These five factors in the ***Coble*** case are as follows: 1) was there ample other evidence (i.e., aside from Dr. Coons' testimony) supporting a finding that there was a probability that the applicant would commit future acts of violence; 2) was there other psychiatric evidence of the applicant's character for violence that was admitted without objection; 3) was Dr. Coons' opinion particularly powerful, certain, or strong; 4) was Dr.

Coons' testimony effectively rebutted and refuted by another expert witness' testimony; and 5) was Dr. Coons' testimony mentioned during closing argument and did the argument emphasize Dr. Coons' opinions. ***Coble v. State***, supra, at 286-287. The applicant has failed to establish that the result of the re-sentencing trial would have been different if trial counsel had successfully prevented Dr. Coons from testifying at the re-sentencing trial and/or had more effectively challenged Dr. Coons' testimony at the re-sentencing trial.

5. In Claim One (A), the applicant has failed to satisfy the ***Strickland*** test. ***Strickland v. Washington***, supra. Most of trial counsels' decisions and actions in Claim One (A) were based on reasonable and plausible trial strategy in light of all the circumstances. Although trial counsel Odiorne failed to preserve error in regards to the admission of Dr. Coons' testimony, his actions did not prejudice the outcome of the re-sentencing trial. Thus, the applicant has failed to establish that he was denied his right to effective assistance of counsel in Claim One (A).

CLAIM ONE (B)

1. A writ of habeas corpus is not a substitute for direct appeal and an applicant forfeits any claims that he could have raised on direct appeal. ***Ex parte Nelson***, 137 S.W.3d 666, 667-668 (Tex.Crim.App. 2004); ***Ex parte***

Townsend, 137 S.W.3d 79, 81 (Tex.Crim.App. 2004); ***Ex parte Gardner***, 959 S.W.2d 189, 199-200 (Tex.Crim.App. 1996). Even constitutional claims may be forfeited if the applicant had the opportunity and failed to raise the claim on appeal. ***Ex parte Townsend***, supra, at 81. Since the applicant could have raised the issues in Claim One (B) on direct appeal (if Claim One (B) is solely a constitutional claim), Claim One (B) is forfeited and should not be considered on habeas review.

2. The Court of Criminal Appeals has held that claims regarding the admissibility of evidence under the Texas Rules of Evidence are not appropriate for habeas review. ***Ex parte Ramey***, supra, at 397-398. Since the erroneous admission of Dr. Coon's testimony involves Rule 702 of the Texas Rules of Evidence, Claim One (B) is not cognizable on collateral review.

3. In ***Ex parte Ramey***, supra, at 397, the Court of Criminal Appeals stated that "...we rejected that same contention [that the admission of Dr. Coons' testimony violated the heightened reliability requirement of the Eighth Amendment] in *Coble*, where we said that the United States Supreme Court had rejected such a claim in *Barefoot v. Estelle*, and that 'we are required to follow binding precedent from that court on federal constitutional issues.'" Since the Court of Criminal Appeals still follows the holding in ***Barefoot v.***

Estelle, Dr. Coons' testimony did not violate the heightened reliability requirement of the Eighth Amendment to the United States Constitution.

4. The applicant has failed to establish that the admission of Dr. Coons' testimony was harmful (if Claim One (B) solely involves a constitutional claim). ***Ex parte Chavez***, 371 S.W.3d 200 (Tex.Crim.App. 2012); ***Ex parte Long***, 910 S.W.2d 485, 486-487 (Tex.Crim.App. 1995); ***Ex parte Tovar***, 901 S.W.2d 484, 486 (Tex.Crim.App. 1995).

5. In Claim One (B), the applicant has failed to establish that trial counsel's actions violated his rights under the Sixth and Fourteenth Amendments to the United States Constitution.

6. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

7. In Claim One (B), the applicant has failed to satisfy both prongs of the ***Strickland*** test (if Claim One (B) solely involves an ineffectiveness claim). ***Strickland v. Washington***, supra.

CLAIM ONE (C)

1. In order to establish a due process violation based on the use of false or misleading testimony, the applicant must show that the witnesses' testimony

was actually false. ***Boyle v. Johnson***, 93 F.3d 180, 186 (5th Cir. 1996). Since Dr. Coons never falsely testified about his experience or credentials, the applicant cannot establish a due process violation.

2. The standard for materiality of false testimony is whether there is a reasonable likelihood that the false testimony affected the applicant's sentence. ***Ex parte Chavez***, supra, at 206-207. Since there is not a reasonable likelihood that Dr. Coons' alleged false testimony about his experience and credentials affected the applicant's sentence, no due process right has been violated as alleged in Claim One (C).

3. In Claim One (C), the applicant has failed to establish a due process violation or an Eighth Amendment violation for cruel and usual punishment.

CLAIM TWO (A)

1. A writ of habeas corpus is not a substitute for direct appeal and an applicant forfeits any claims that he could have raised on direct appeal. ***Ex parte Nelson***, supra, at 667-668; ***Ex parte Townsend***, supra, at 81; ***Ex parte Gardner***, supra, at 199-200. Even constitutional claims may be forfeited if the applicant had the opportunity and failed to raise the claim on appeal. ***Ex parte Townsend***, supra, at 81. Since the applicant could have raised Claim

Two (A) on direct appeal, this claim is forfeited and should not be considered on habeas review.

2. A complaint on appeal must comport with a timely and specific objection made at trial. ***Rezac v. State***, 782 S.W.2d 869, 870-871 (Tex.Crim.App. 1990). Even constitutional error may be waived by the failure to object. ***Parker v. State***, 649 S.W.2d 46, 55 (Tex.Crim.App. 1983. Since the applicant failed to object to the allegations contained in Claim Two (A) at the re-sentencing trial, he waived any error or complaint asserted in Claim Two (A) and is procedurally barred from now complaining on such grounds. ***Vasquez v. State***, 919 S.W.2d 433, 435 (Tex.Crim.App. 1996).

3. The Court of Criminal Appeals has held that claims regarding the admissibility of evidence under the Texas Rules of Evidence are not appropriate for habeas review. ***Ex parte Ramey***, supra, at 397-398. Since the admissibility of testimony and the admissibility/authenticity of exhibits involve Rule 701/702 and Rule 901 of the Texas Rules of Evidence, Claim Two (A) is not cognizable on collateral review.

4. The applicant has failed to show that the testimony of Merillat and/or Bryant was false or misleading.

5.In order to establish a due process violation based on the use of false or misleading testimony, the applicant must show that: 1) the witness's testimony was actually false; 2) the testimony was material; and 3) the prosecution had knowledge that the witness's testimony was false. ***Boyle v. Johnson***, supra, at 186. Since the testimony of Merillat and Bryant was not false or misleading, the applicant cannot meet this burden of proof.

6. The standard for materiality of false testimony is whether there is a reasonable likelihood that the false testimony affected the applicant's conviction or sentence. ***Ex parte Chavez***, supra, at 206-207. The applicant has failed to establish that there is a reasonable likelihood that the allegations contained in Claim Two (A) affected the applicant's sentence.

CLAIM TWO (B)

1. The State does not have a duty to disclose evidence that the defense could have obtained on its own through the exercise of due or reasonable diligence. ***Parr v. Quarterman***, 472 F.3d 245, 254 (5th Cir. 2006). If the evidence was equally accessible to the defense, it is not subject to ***Brady***. ***Taylor v. State***, 93 S.W.3d 487, 499 (Tex.App.—Texarkana 2002, pet. ref'd). Since the applicant could have obtained the TDCJ Unit Classification Procedure Manual by simply requesting such information from the Texas Department of Criminal Justice, no due process or ***Brady*** violation occurred.

2. The applicant has failed to establish that the State violated its obligations under ***Brady v. Maryland.***

3. The applicant has failed to establish any due process violation in Claim Two (B).

CLAIM TWO (C)

1.The applicant has failed to show that the testimony of Merillat and/or Bryant was false and needed correction by trial counsel.

2.The applicant has failed to show Merillat's testimony of prison violence violated his Eighth Amendment rights

3.There is no evidence that must be viewed by a juror as being *per se* mitigating. ***Saldano v. State***, 232 S.W.3d 77, 97 (Tex.Crim.App. 2007); ***Cantu v. State***, 939 S.W.2d 627, 648 (Tex.Crim.App. 1996).

4.The two prong test enunciated in ***Strickland v. Washington***, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

5. In Claim Two (C), the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

CLAIM TWO (D)

1. The Texas, ineffectiveness of appellate counsel is judged under the same standard governing trial counsel (the two prong test set forth in ***Strickland v. Washington***, supra). ***Evitts v. Lucey***, 469 U.S. 387, 392, 105 S.Ct. 830, 83 L.Ed.2d 821 (1984); ***Smith v. Robbins***, 528 U.S. 259, 285-289, 120 S.Ct. 746, 145 L.Ed.2d 756 (2000); ***Ex parte Lozada-Mendoza***, 45 S.W.3d 107, 109 (Tex.Crim.App. 2001). In the appellate context, the applicant must first show that his counsel was objectively unreasonable in failing to raise nonfrivolous issues on appeal. ***Smith v. Robbins***, 528 U.S. at 285. If the applicant succeeds in such a showing, he must then demonstrate prejudice. *Id.* The applicant must show a reasonable probability that, but for his appellate counsel's unreasonably failure to raise a particular nonfrivolous issue on appeal, he would have prevailed on appeal.

2. In Claim Two (D), the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

3. In the alternative, the allegations of ineffectiveness of counsel must be firmly founded in the record and the record must affirmatively demonstrate the alleged ineffectiveness in order to defeat the presumption of reasonable professional assistance. ***Thompson v. State***, 9 S.W.3d 808, 814 (Tex.Crim.App. 1999). Since the record is undeveloped in regards to trial

counsels' reasons for failing to object to the alleged false testimony at trial, the applicant cannot rebut the presumption that appellate counsel's actions were reasonably professional and motivated by sound strategy. ***Thompson v. State***, supra, 813-814.

CLAIM THREE (A)

1.When an appellate court remands a case solely for a new trial on punishment, the trial court no longer has jurisdiction over the guilt/innocence portion of the trial and its jurisdiction on remand is limited to punishment issues. ***Lopez v. State***, 18 S.W. 3d 637, 639 (Tex.Crim.App. 2000). A defendant may not assert any error that occurred during the guilt/innocence phase of trial when he is appealing from re-trial of only the punishment phase. ***Easton v. State***, 920 S.W.2d 747, 750 (Tex.App.—Houston [1st Dist.] 1996, pet. ref'd). Since Dr. Erdmann's testimony/autopsy report and the issue of cause of death (which is a guilt/ innocence issue and not a punishment issue) have already been reviewed during the 1991 trial and withstood scrutiny and since Dr. Erdmann was cross-examined at the 1991 trial, the trial court has no jurisdiction over any error relating to trial counsels' failure to challenge Dr. Erdmann's testimony or autopsy report based on the confrontation clause or hearsay at the re-sentencing trial.

2.The contents of an autopsy report are not subject to hearsay challenges because an autopsy report is a report of a public office. ***Butler v. State***, 872 S.W.

2d 227, 237-238 (Tex.Crim.App. 1994); Rule 803(8)9B) of the Texas Rules of Evidence.

3.A testifying expert's opinion that was based in part on his review of an autopsy report prepared by a non-testifying expert does not violate the confrontation clause. ***Wood v. State***, 299 S.W.3d 200, 213 (Tex.App.—Austin 2009, pet. ref'd). Accordingly, Dr. Natarajan's opinions at the re-sentencing trial based in part on his review of Dr. Erdmann's autopsy report did not violate the confrontation clause.

4. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

5. In Claim Three (A), the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

CLAIM THREE (B)

1. The Texas ineffectiveness of appellate counsel is judged under the same standard governing trial counsel (the two prong test set forth in ***Strickland v. Washington***, supra). ***Evitts v. Lucey***, 469 U.S. at 392; ***Smith v. Robbins***, 528 U.S. at 285-289; ***Ex parte Lozada-Mendoza***, supra, at 109.

2. In Claim Three (B), the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

CLAIM THREE (C)

1. A writ of habeas corpus is not a substitute for direct appeal and an applicant forfeits any claims that he could have raised on direct appeal. ***Ex parte Nelson***, supra, at 667-668; ***Ex parte Townsend***, supra, at 81; ***Ex parte Gardner***, supra, at 199-200. Even constitutional claims may be forfeited if the applicant had the opportunity and failed to raise the claim on appeal. ***Ex parte Townsend***, supra, at 81. Since the applicant could have raised Claim Three (C) on direct appeal, this claim is forfeited and should not be considered on habeas review.

2. The Court of Criminal Appeals has held that claims regarding the admissibility of evidence under the Texas Rules of Evidence are not appropriate for habeas review. ***Ex parte Ramey***, supra, at 397-398. Since the alleged erroneous admission of Dr. Natarajan's testimony at the re-sentencing trial involves Rule 702 of the Texas Rules of Evidence, Claim Three (C) is not cognizable on collateral review.

3. A testifying expert's opinion that was based in part on his review of an autopsy report prepared by a non-testifying expert does not violate the

confrontation clause. ***Wood v. State***, supra, at 213. Accordingly, Dr. Natarajan's opinions at the re-sentencing trial based in part on his review of Dr. Erdmann's autopsy report did not violate the confrontation clause.

4.In order to establish a due process violation based on the use of false or misleading testimony, the applicant must show that: 1) the witness's testimony was actually false; 2) the testimony was material; and 3) the prosecution had knowledge that the witness's testimony was false. ***Boyle v. Johnson***, supra, at 186. Since Dr. Natarajan's testimony was not false, the applicant cannot meet this burden of proof.

5.The applicant must allege and prove facts which, if true, would entitle him to relief. ***Ex parte McPherson***, 32 S.W.3d 860, 861 (Tex.Crim.App. 2000); ***Ex parte Maldonado***, 688 S.W.2d 114, 116 (Tex.Crim.App. 1985). Since the applicant has not cited any evidence to show that Dr. Erdmann's autopsy failed to follow a standard protocol, the applicant is not entitled to relief.

6.The applicant has failed to establish an Eighth Amendment violation.

7. The standard for materiality of false testimony is whether there is a reasonable likelihood that the false testimony affected the applicant's conviction or sentence. ***Ex parte Chavez***, supra, at 206-207. Since the applicant took the witness stand and admitted to killing Laminack, there is no

reasonable likelihood that Dr. Natarajan's alleged false testimony affected the applicant's sentence.

CLAIM FOUR

1. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

2. The failure to present mitigating evidence, if based on informed and reasonable judgment, is well within the range of practical choices not to be second-guessed, and thus cannot constitute deficient performance. ***Turner v. Johnson***, 106 F.3d 1178, 1188 (5th Cir. 1997).

3. In Claim Four, the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

CLAIM FIVE

1. In Claim Five, the applicant has failed to establish any Sixth, Eighth, or Fourteenth Amendment violations.

2. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

3. In Claim Five, the applicant has failed to establish either deficient performance or prejudice under ***Strickland v. Washington***, supra.

CLAIM SIX

1. In Claim Six, the applicant has failed to establish any Sixth, Eighth, or Fourteenth Amendment violations.

2. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

3. In Claim Six, the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

CLAIM SEVEN

1. A complaint on appeal must comport with a timely and specific objection made at trial. ***Rezac v. State***, supra, at 870-871. Even constitutional error may be waived by the failure to object. ***Parker v. State***, supra, at 55. Since the applicant failed to object when the trial judge orally stated that he was going to respond to the jury note by informing the jury to re-read the charge and to be guided by such charge and since the applicant failed to object when the trial judge did not read the jury note in open court as required by Article 36.27 of the Texas Code of Criminal Procedure, the allegations in

Claim Seven (excluding ineffective assistance of counsel allegations) were not preserved for review and are waived. ***Ransom v. State***, 789 S.W.2d 572, 588-589 (Tex.Crim.App. 1989) (failure to object to the trial judge's noncompliance with Article 36.27 waives error); ***Rodriguez v. State***, 500 S.W. 2d 517 (Tex.Crim.App. 1973) (failure to object to the trial judge's response to the jury note waives error).

2. A writ of habeas corpus is not a substitute for direct appeal and an applicant forfeits any claims that he could have raised on direct appeal. ***Ex parte Nelson***, supra, at 667-668; ***Ex parte Townsend***, supra, at 81; ***Ex parte Gardner***, supra, at 199-200. Even constitutional claims may be forfeited if the applicant had the opportunity and failed to raise the claim on appeal. ***Ex parte Townsend***, supra, at 81. Moreover, "record claims" will not be reviewed for the first time in a writ application. ***Ex parte Gardner***, supra, at 199. Since the applicant could have raised the allegations stated above on direct appeal, the allegations in Claim Seven (excluding ineffective assistance of counsel allegations) are forfeited and should not be considered on habeas review.

3. The referral of the jury back to the original charge does not constitute an additional instruction. ***Earnhart v. State***, 582 S.W.2d 444, 450 (Tex.Crim.App. 1979). An additional or supplemental jury instruction only occurs when the trial judge substantively responds to the jury note. ***Daniell v.***

State, 848 S.W.2d 145, 147 (Tex.Crim.App. 1993). Since Judge Miner did not provide the jury with an additional instruction, Judge Miner's response to the jury note was proper.

4. Article 36.27 of the Texas Code of Criminal Procedure specifically states that, "The written instruction or answer to the communication shall be read in open court unless expressly waived by the defendant." Judge Miner failed to comply with Article 36.27 of the Texas Code of Criminal Procedure.

5. Since the response to the jury note did not constitute an additional instruction, Judge Miner's non-compliance with Article 36.27 of the Texas Code of Criminal Procedure was harmless. *See* ***McGowan v. State***, 664 S.W. 2d 355, 358 (Tex.Crim.App. 1984); ***Nacol v. State***, 590 S.W.2d 481, 486 (Tex.Crim.App. 1979).

6. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

7. In the ineffectiveness of trial counsel allegations contained in Claim Seven, the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

8. In the ineffectiveness of appellate counsel allegations contained in Claim Seven, the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra.

CLAIMS EIGHT, ELEVEN, TWELVE, THIRTEEN, FOURTEEN, FIFTEEN, AND SIXTEEN—Ineffective Assistance of Appellate Counsel Claims Based on Challenges to Constitutionality of Texas' Statutory Capital Punishment Scheme

1. Ineffectiveness of appellate counsel is judged under the same standard governing trial counsel (the two prong test set forth in ***Strickland v. Washington***, supra). ***Evitts v. Lucey***, surpa, 469 U.S. at 392; ***Smith v. Robbins***, supra, 528 U.S. at 285-289; ***Ex parte Lozada-Mendoza***, supra, at 109.

2. In Claim Eight, appellate counsel Bennett was not ineffective for failing to raise the issue on direct appeal of whether Article 37.011(3)(d)(2) and Article 37.0711(3)(f)(2) of the Texas Code of Criminal Procedure was unconstitutional because these statutes allegedly confuse and mislead a jury. The Court of Criminal Appeals has consistently rejected the arguments contained in Claim Eight pertaining to the "10-12 Rule" and has repeatedly held that the "10-12 Rule" is constitutional. *See* e.g., ***Russeau v. State***, 171 S.W.3d 871, 886 (Tex.Crim.App. 2005); ***Threadgill v. State***, 146 S.W.3d 654, 673 (Tex.Crim.App. 2004); ***Johnson v. State***, 68 S.W.3d 644, 656 (Tex.Crim.App. 2002); ***Prystash v. State***, 3 S.W.3d 522, 536 (Tex.Crim.App.

1999). There is no constitutional violation in failing to instruct jurors on the effect of their answers. *Id.* Thus, in Claim Eight, the applicant failed to establish ineffective assistance of appellate counsel under the standards enunciated in ***Strickland v. Washington***, supra.

3. In Claim Eleven, appellate counsel Bennett was not ineffective for failing to raise the issue on direct appeal of the trial judge's alleged error in overruling the applicant's motion for the court to find Article 37.0711(3)(f)(3) of the Texas Code of Criminal Procedure unconstitutional. The Court of Criminal Appeals has already addressed and rejected the argument that Article 37.0711(3)(f)(3) of the Texas Code of Criminal Procedure is unconstitutional because the statute's definition of "mitigating evidence" limits the Eighth Amendment's concept of mitigation to factors that render a capital defendant less morally blameworthy for the commission of the capital murder. ***Lucero v. State***, 246 S.W.3d 86, 96 (Tex.Crim.App. 2008); ***Roberts v. State***, 220 S.W.3d 521, 534 (Tex.Crim.App. 2007); ***Moore v. State***, 999 S.W.2d 385, 408 (Tex.Crim.App. 1999); ***Cantu v. State***, supra, at 648-649. There is no evidence that must be viewed by a juror as being *per se* mitigating. ***Saldano v. State***, supra, at 97; ***Cantu v. State***, supra, at 648. Moreover, the following mitigating evidence presented at the re-sentencing trial falls within the scope of the special issues: 1) the applicant was an exemplary inmate while incarcerated, 2)

the applicant was remorseful for his actions, and 3) the applicant completed his G.E.D. ***Morris v. State***, 940 S.W.2d 610, 615 (Tex.Crim.App. 1996); ***Robison v. State***, 888 S.W.2d 473, 488 (Tex.Crim.App. 1994); ***Burks v. State***, 876 S.W. 2d 877, 910 (Tex.Crim.App. 1994); ***Elliott v. State***, 858 S.W.2d 478, 487 (Tex.Crim.App. 1993). Thus, in Claim Eleven, the applicant failed to establish ineffective assistance of appellate counsel under the standards enunciated in ***Strickland v. Washington***, supra.

4. In Claim Twelve, appellate counsel Bennett was not ineffective for failing to raise the issue on direct appeal of the trial judge's alleged error in overruling the applicant's motion to hold the statutory definition of mitigating evidence unconstitutional. A connection between a mitigating circumstance and the offense is not required in order for a jury to properly consider mitigating evidence. ***Coble v. State***, supra, at 296. Since no nexus is required, the lack of a nexus between the mitigation evidence and the offense has no bearing on whether a juror could reasonably find that the applicant deserves a life sentence instead of a death sentence. ***Coble v. State***, supra, at 296. In addition, the definition of mitigating evidence is not unconstitutionally narrow because it fails to accommodate the jury's consideration of any mitigating evidence that does not directly reduce a capital defendant's moral blameworthiness. ***Lucero v. State***, supra, at 96; ***Roberts v. State***, supra, at 534; ***Perry v. State***, 158 S.W.3d

438, 449 (Tex.Crim.App. 2004). There is no evidence that must be viewed by a juror as being *per se* mitigating. ***Saldano v. State***, supra, at 97; ***Cantu v. State***, supra, at 648-649. Furthermore, the United States Supreme Court "... never suggested that a jury can, should, or must be instructed not to consider any nexus between the crime and the mitigating evidence." ***Coble v. State***, supra, at 296. Since the jury was not reasonably likely to infer a nexus requirement from the statutory words, such an instruction was unnecessary in this case. *Id.* Thus, in Claim Twelve, the applicant failed to establish ineffective assistance of appellate counsel under the standards enunciated in ***Strickland v. Washington***, supra.

5. In Claim Thirteen, appellate counsel Bennett was not ineffective for failing to raise the issue on direct appeal that the Texas death penalty is unconstitutional because it does not require that the indictment include an allegation of the aggravating circumstance which makes the murder a capital murder in violation of ***Ring v. Arizona***, 536 U.S. 584, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002). The Court of Criminal Appeals has already rejected this argument and held that ***Ring*** does not require the State to allege the special issues in the indictment. ***Russeau v. State***, 171 S.W.3d 871, 885-886 (Tex.Crim.App. 2005); ***Rayford v. State***, 125 S.W.3d 521, 533-534 (Tex.Crim.App. 2003). Moreover, ***Apprendi v. New Jersey***, 530 U.S. 466, 490,

120 S.Ct. 2348, 147 L.Ed.2d 435 (2000) and ***Ring v. Arizona***, supra, are not applicable to this case. ***Apprendi*** and ***Ring*** both focus on facts which will increase punishment over the statutory maximum. The statutory maximum punishment in a capital murder case is death. Section 19.03(b) of the Texas Penal Code. Since the inclusion of the special issues in the indictment would not allow the State to seek a more severe punishment than death, ***Apprendi*** and ***Ring*** are not germane to this case. ***Russeau v. State***, supra, at 885-886; ***Rayford v. State***, supra, at 533-534; ***Resendiz v. State***, 112 S.W.3d 541, 550 (Tex.Crim.App. 2003). Thus, in Claim Thirteen, the applicant failed to establish ineffective assistance of appellate counsel under the standards enunciated in ***Strickland v. Washington***, supra.

6. In Claim Fourteen, appellate counsel Bennett was not ineffective for failing to raise the issue on direct appeal of the trial judge's alleged error in overruling the applicant's motion requesting the trial court to find that Article 37.0711(3)(f)(3) of the Texas Code of Criminal Procedure is unconstitutional. The statute is not unconstitutional because it fails to place the burden of proof regarding the mitigation special issue upon the State and, instead, implicitly places that burden of proof upon the defendant. The Court of Criminal Appeals has previously reviewed and rejected this claim and similar claims. ***Williams v. State***, 301 S.W.3d 675, 694 (Tex.Crim.App. 2009); ***Fuller v. State***, 253 S.W.3d

220 (Tex.Crim.App. 2008); ***Blue v. State***, 125 S.W.3d 491, 500-501 (Tex.Crim.App. 2003); ***Raby v. State***, 970 S.W.2d 1, 8-9 (Tex.Crim.App. 1998). In cases where mitigating evidence is presented, all that is constitutionally required is a vehicle by which the jury may give effect to the applicant's mitigating evidence. ***Raby v. State***, supra, at 8; ***Barnes v. State***, 876 S.W.2d 316, 330-331 (Tex.Crim.App. 1994). The absence of an explicit assignment of burden of proof on the mitigation special issue does not render the Texas death sentence statute unconstitutional. ***Cantu v. State***, supra, at 641. Thus, in Claim Fourteen, the applicant failed to establish ineffective assistance of appellate counsel under the standards enunciated in ***Strickland v. Washington***, supra.

7. In Claim Fifteen, appellate counsel Bennett was not ineffective for failing to raise the issue on direct appeal of the trial judge's alleged error in overruling the applicant's motion to hold Articles 37.0711(3)(e) and (f) unconstitutional. The statutes are not unconstitutional because they fail to require that mitigating circumstances be considered. There is no evidence that must be viewed by a juror as being *per se* mitigating. ***Saldano v. State***, supra, at 97; ***Cantu v. State***, supra, at 648. Since the consideration and weighing of mitigating evidence is an open-ended, subjective determination engaged in by each individual juror, the death penalty statute is not unconstitutional. *Id.* at

649; ***Shannon v. State***, 942 S.W.2d 591, 597 (Tex.Crim.App. 1996). Thus, in Claim Fifteen, the applicant failed to establish ineffective assistance of appellate counsel under the standards enunciated in ***Strickland v. Washington***, supra.

8.In Claim Sixteen, appellate counsel Bennett was not ineffective for failing to raise the issue on direct appeal of the trial judge's alleged error in overruling the applicant's motion to declare the Texas death penalty statute unconstitutional. The statute is not unconstitutional because of the inability of lay people to predict future danger. *See*, e.g., ***McBride v. State***, 862 S.W.2d 600, 611 (Tex.Crim.App. 1993); ***Joiner v. State***, 825 S.W.2d 701, 709 (Tex.Crim.App. 1992). Thus, in Claim Sixteen, the applicant failed to establish ineffective assistance of appellate counsel under the standards enunciated in ***Strickland v. Washington***, supra.

CLAIM NINE (A) and (B)

1. When an appellate court remands a case solely for a new trial on punishment, the trial court no longer has jurisdiction over the guilt/innocence portion of the trial and its jurisdiction on remand is limited to punishment issues. ***Lopez v. State***, supra, at 639. A defendant may not assert any error that occurred during the guilt/innocence phase of trial when he is appealing from re-trial of only the punishment phase. ***Easton v. State***, supra, at 750. Since the testimony and exhibits from the guilt/innocence stage of the 1991 trial were

already reviewed by the appellate courts and withstood scrutiny, the trial court no longer has jurisdiction at the re-sentencing trial over matters pertaining to the admissibility of this evidence.

2. The applicant failed to establish that the facts/circumstances of the capital murder offense and the exhibits and trial transcripts from the 1991 were not relevant to the jury's assessment of punishment.

3. The applicant failed to establish that the re-tendering of evidence from the original trial violated the confrontation clause.

4. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

5. In Claim Nine (A) and (B), the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra. Since the trial transcripts/exhibits from the original trial were relevant to sentencing under Article 37.0711(3)(a)(1) of the Texas Code of Criminal Procedure and since all of the re-tendered evidence was already reviewed by the appellate courts and withstood scrutiny, appellate counsel Bennett was not ineffective for failing to raise the issues alleged in Claim Nine (A) and (B) on direct appeal.

CLAIM TEN

1. A prospective juror cannot be excused for cause based on a bias against the law unless the law was explained to the prospective juror and the prospective juror was asked if he/she could follow that law regardless of personal views. ***Davis v. State***, 329 S.W.3d 798, 807 (Tex.Crim.App. 2010); ***Sells v. State***, 121 S.W.3d 748, 759 (Tex.Crim.App. 2003); ***Feldman v. State***, 71 S.W.3d 738, 744 (Tex.Crim.App. 2002).

2. The two prong test enunciated in ***Strickland v. Washington***, supra, is the proper standard to determine ineffective assistance of counsel claims at the punishment stage of a capital murder trial.

3. In Claim Ten, the applicant has not established either deficient performance or prejudice under ***Strickland v. Washington***, supra. Since trial counsel Odiorne believed that he had properly challenged prospective juror Dugger for cause throughout his vior dire examination by showing that prospective juror Dugger was bias against the law and since it is impossible to know whether prospective juror Dugger was actually challengeable for cause, no ineffective assistance of counsel has been established.

CLAIMS SEVENTEEN AND EIGHTEEN

1. A writ of habeas corpus is not a substitute for direct appeal and an applicant forfeits any claims that he could have raised on direct appeal. ***Ex parte Nelson***, supra, at 667-668; ***Ex parte Townsend***, supra, at 81; ***Ex parte Gardner***, supra, at 199-200. Even constitutional claims may be forfeited if the applicant had the opportunity and failed to raise the claim on appeal. ***Ex parte Townsend***, supra, at 81. Since the applicant could have raised Claims Seventeen and Eighteen on direct appeal, these claims are forfeited and should not be considered on habeas review.

2. Alternatively, in Claims Seventeen and Eighteen, the applicant has failed to establish that Judge Miner violated his right to a fair and impartial jury.

3. Overall, the applicant has failed to demonstrate that his sentence was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

ORDER

THE CLERK IS HEREBY ODERED to prepare a transcript of all papers in Cause No. W-6997-A-2 and transmit same to the Court of Criminal Appeals as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in Cause No. W-6997-A-2, including his Application for Writ of Habeas Corpus;

2. all of the State's pleadings filed in Cause No. W-6997-A-2, including the State's Answer to Application for Writ of Habeas Corpus;

3. the transcript of the evidentiary hearing held on August 20-21, 2013 and exhibits;

4. this court's Findings of Fact and Conclusions of Law and Order;

5. any Proposed Findings of Facts and Conclusions of Law submitted by either the applicant or the State;

6. orders entered by the convicting court; and

7. the indictment, judgment, sentence, docket sheet, and appellate record in State of Texas v. Brent Ray Brewer, cause Number 6997-A, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER ORDERED to send 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 to (1) the applicant's counsel: Ms. Hilary Sheard, 7301 Burnet Road #102-328, Austin, Texas 78757 and (2) Assistant Criminal District Attorney: Kristy Wright, Randall County Justice Center, 2309 Russell Long Blvd, Suite 120, Canyon, Texas 79015.

SIGNED AND ENTERED this 8th day of March, 2013.

Dick Alcala, Senior District Judge

Sitting by Assignment

APPENDIX G

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. AP-76,378

BRENT RAY BREWER, Appellant

v.

THE STATE OF TEXAS

ON DIRECT APPEAL
FROM CAUSE NO. 6997-A IN THE 47TH DISTRICT COURT
RANDALL COUNTY

KELLER, P.J., delivered the opinion of the Court in which MEYERS, PRICE, KEASLER, COCHRAN and ALCALA, JJ., joined. WOMACK, JOHNSON, and HERVEY, JJ., concurred.

In June of 1991, appellant was convicted of capital murder and sentenced to death.[1] We affirmed his conviction and sentence on direct appeal,[2] but his sentence was later vacated by a federal

[1] TEX. PENAL CODE §19.03(a); TEX. CODE CRIM. PROC. art. 37.071. Unless otherwise indicated, all future references to articles refer to the Code of Criminal Procedure.

[2] *Brewer v. State*, No. 71,307 (Tex. Crim. App. June 22, 1994) (not designated for publication).

district court.[3] A new punishment hearing was held in 2009, and appellant was again sentenced to death. Direct appeal to this Court is automatic.[4] Appellant raises five issues. Finding no reversible error, we affirm.

I. BACKGROUND

On April 26, 1990, appellant and Kristie Nystrom asked Robert Laminack for a ride to the Salvation Army, and he agreed to take them. During the drive, appellant began stabbing Laminack while demanding his wallet. Laminack turned over his wallet, which contained $140, and appellant and Nystrom fled from the scene. Laminack died from his injuries.

II. ANALYSIS

A. Jurisdiction

In his first issue, appellant claims that the trial court lacked jurisdiction because the trial judge granted his motion to quash the indictment. At oral argument, appellant's counsel conceded this issue. He explained that, at a hearing held after the brief was filed,[5] it became clear that the trial court had orally denied the motion and that the written order purporting to grant the motion was a clerical error. Issue one is overruled.

B. Parole Eligibility

In issues two and three, appellant complains about matters related to parole eligibility. We shall first detail the events relating to parole eligibility that transpired at trial.

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[3] *See Brewer v. Dretke*, 2004 U.S. Dist. LEXIS 14761 (N.D. Tex. Aug. 2, 2004); *Brewer v. Quarterman*, 550 U.S. 286 (2007); *Brewer v. Quarterman*, 512 F.3d 210 (5th Cir. Tex. 2007).

[4] TEX. CODE CRIM. PROC. art. 37.0711, §3(j).

[5] We had abated the appeal and remanded this case to the trial court to inquire in the matter.

1. *Background*

Appellant filed a motion to preclude the State from placing any information about the applicable parole law before the jury. He contended that such information was irrelevant and violated his rights under the due process and cruel and unusual punishment provisions of the United States Constitution. He claimed that a parole instruction could be submitted only if requested by the defense, and he claimed that even an instruction that told the jury not to consider parole would be impermissible.[6] The trial court granted this motion.

In a hearing outside the presence of the jury, defense counsel requested that Nystrom be admonished not to talk about her own eligibility for parole. The prosecutor responded, "Your Honor, the Court's ruling was in reference to Mr. Brewer's parole, not Ms. Nystrom's parole." Defense counsel objected that appellant would be prejudiced by any mention by Nystrom of eligibility for parole on her life sentence for the same capital murder because the jury would then know that appellant was also eligible for parole. The prosecutor responded that evidence regarding Nystrom's parole eligibility was relevant to show why she was testifying at appellant's new punishment hearing when she did not testify at his original trial. The prosecutor also argued that it was "total speculation" whether the jury would equate Nystrom's parole eligibility with appellant's. The trial

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[6] With respect to the latter two claims, appellant's motion stated:

> Any parole instruction requested by the State should be denied as statutorily improper as the Texas Code of Criminal Procedure allows only a defendant to request such an instruction. During Brewer's original sentencing trial, the judge correctly overruled a request by the State for the following instruction: "During your deliberations you will not consider or discuss any possible action of the Board of Pardons and Paroles or the Governor, nor how long a defendant would be required to serve on a sentence of life imprisonment."

judge asked if appellant's objection was based on Rule 403,[7] and defense replied, "Well, I maintain it's objectionable under the entire motion that we filed, but I think that's certainly a component of it." The trial judge then overruled the objection.

The State called Nystrom as a witness. The prosecutor questioned Nystrom about the fact that she had not testified at appellant's earlier trial. Nystrom affirmed that, at the time of appellant's first trial, she had been charged with capital murder but had not been tried yet. At that first trial, she had invoked her Fifth Amendment right not to testify. The prosecutor questioned Nystrom about parole in the following colloquy:

> Q. What is the one thing we said that we would do if you agreed to testify?
>
> A. That you would write a letter stating that I had cooperated to the parole board.
>
> Q. Okay. And you have—you've been up for parole twice. Is that correct?
>
> A. Yes, sir.
>
> Q. And our agreement with you is, that if you testify, we will tell the parole board that you cooperated and testified, and that's all we are going to do.
>
> A. That's it.
>
> Q. We're not going to go testify for you at the parole board or encourage them to give you parole or anything else. Only that you did agree and you did cooperate and you did testify truthfully to our knowledge?
>
> A. Yes, sir.
>
> Q. Is the fact that we're willing to write such a letter to the parole board—is that the only reason you are willing to testify now?
>
> A. No, sir.

During argument, the prosecutor briefly referred to Nystrom's parole eligibility in

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[7] TEX. R. EVID. 403.

commenting on her credibility:

> [PROSECUTOR]: There's been a little bit of new evidence in this case that nobody ever heard before, Kristie Nystrom. And I think it helps a lot. I think it helps us know for sure there was a plan. The other jury apparently believed there was, but now we have even more evidence from Kristie Nystrom. Now, I realize she may have a motive to lie to you. I realize that. She's been up for parole twice. She's hoping—
>
> [DEFENSE COUNSEL]: I'm going to object at this point and renew my previous objection.
>
> THE COURT: Overruled.
>
> [PROSECUTOR]: She's been up for parole twice and she is hoping the parole board will hear this time that she did cooperate for the first time and testified. I understand that. But you saw her testimony. I—I truly believe part of it is she finally wants to try to do what is right by the Laminack family.

During deliberations, the jury sent out two notes (at the same time) inquiring about parole. In the first note, the jury asked, "Is a life sentence 'without chance of parole?'" In the second note, the jury asked, "Does a life sentence constitute life without parole? Is there a possibility of parole in the future?" After the trial judge asked for input from the parties, defense counsel moved for a mistrial on the basis that the jury was improperly considering parole. The trial judge denied the motion for mistrial and instructed the jury, "As to the questions you asked, please reread the charge, and that is all I can tell you."

2. *Evidence*

In issue two, appellant contends that the trial court abused its discretion in admitting evidence that Nystrom was eligible for parole.[8] In his ground and supporting argument, appellant never

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[8] The exact wording of his issue is:

> When the offense was committed, at sentencing a capital jury could not properly

(continued...)

explains exactly why the evidence in question is inadmissible. He argues that parole eligibility is irrelevant to the special issues, but he does not explain why the evidence that the State had agreed to tell the parole board of Nystrom's cooperation was irrelevant. Appellant also cites *Sneed*[9] regarding misstatements of parole law, though he never explains how the *Sneed* case relates to the issues at hand. And appellant devotes a large section of his argument to a harm analysis. But before error can be harmful, it must be error. Arguably, appellant has failed to adequately brief this issue.[10]

Nevertheless, we address the merits of appellant's complaint as best we understand it and determine that the trial court did not abuse its discretion in admitting the evidence. The evidence in question was relevant to the jury's evaluation of Nystrom's credibility as a witness. The fact that the State would write a letter to the parole board saying that she had cooperated had some tendency to show possible bias or interest on her part. In *Coleman v. State*, we said that "*any and every fact* going or tending to show mental bias, interests, prejudice, or any other motive, or mental state, or status of the witness which, fairly considered and construed, might even *remotely tend* to affect his credibility should be admitted."[11] That statement is no longer unqualifiedly true, as it has been modified by the rules of evidence, but we see no rule of evidence that would exclude the evidence

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(...continued)

> consider parole eligibility. And here a life sentence would mean *immediate* parole eligibility. Was the admission of testimony of an accomplice's current parole eligibility under a capital life sentence, over objection, and in violation of a pretrial order, an abuse of discretion, and did more than a slight effect result since the jury notes reflected deliberation regarding appellant's parole eligibility?

[9] *Sneed v. State*, 670 S.W.2d 262 (Tex. Crim. App. 1984).

[10] *See* TEX. R. APP. P. 38.1(h).

[11] 545 S.W.2d 831, 834 (Tex. Crim. App. 1977) (brackets and changed capitalization omitted, emphasis in *Coleman*).

at issue here. If the evidence is seen as an attack on the credibility of the witness, the rules allow the credibility of the witness to "be attacked by any party, including the party calling the witness."[12] Had appellant, rather than the State, offered this evidence in an effort to show Nystrom's motive for testifying, it clearly would have been admissible.[13] Furthermore, it is not uncommon for the State to bring out on direct examination evidence that shows its own witnesses's motive to cooperate.[14]

Even if we construe appellant's complaint to embrace a Rule 403 claim, we conclude that a violation of that rule has not been shown. Rule 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, or needless presentation of cumulative evidence.[15]

The use of the word "may" in the rule was intended to confer substantial discretion on the trial

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[12] TEX. R. EVID. 607.

[13] *Billodeau v. State*, 277 S.W.3d 34, 42-43 (Tex. Crim. App. 2009) ("The possible animus, motive, or ill will of a prosecution witness who testifies against the defendant is never a collateral or irrelevant inquiry, and the defendant is entitled, subject to reasonable restrictions, to show any relevant fact that might tend to establish ill feeling, bias, motive, interest, or animus on the part of any witness testifying against him.") (allegation that child witness was biased because defendant took away his remote-control cars); *see Smith v. State*, 779 S.W.2d 417, 430-31 (Tex. Crim. App. 1989) (alleged violation of discovery order in failing to timely disclose prosecutor's agreement to write a letter to parole board was not a basis for reversal because defendant was able to use this beneficial information in cross-examination of the witness); *contra, Woods v. State*, 152 S.W.3d 105, 111 (Tex. Crim. App. 2004) (defendant's offer of proof failed to establish a nexus between witness's testimony and witness's prison sentence because witness was ineligible for good time and had no idea about other potential favorable treatment).

[14] *See, e.g., De La Paz v. State*, 279 S.W.3d 336, 345 (Tex. Crim. App. 2009).

[15] TEX. R. EVID. 403.

court.[16] Moreover, showing prejudice is not enough to exclude evidence under the rule; the prejudice must be "unfair"[17] and it must *substantially* outweigh the probative value of the evidence.[18] Under the Rule 403 balancing inquiry, the following factors may be considered: (1) how compellingly the evidence serves to make a fact of consequence more or less probable, (2) the potential for the evidence to impress the jury in an irrational but nevertheless indelible way, (3) the time the proponent needs to develop the evidence, and (4) how much the proponent actually needs the evidence to prove a fact of consequence.[19]

With respect to the first factor, the evidence may not have been especially probative, but it was relevant to an assessment of the witness's credibility. Regarding the third factor, the State needed very little time to present the evidence. As for the fourth factor, there was another obvious explanation for why Nystrom would testify at appellant's second trial but not his first: Nystrom's own case had not been tried yet at the time of appellant's first trial. Nevertheless, without the information about the State's promise to tell the parole board of her cooperation, a factfinder's view of Nystrom's credibility would have been incomplete.

The most important question here is the second factor: Did the evidence have the potential to impress the jury in an irrational but indelible way? We conclude that it did not. Even assuming the jury understood from the evidence that appellant could be immediately eligible for parole, the

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[16] *Powell v. State*, 189 S.W.3d 285, 288 (Tex. Crim. App. 2006).

[17] *Martinez v. State*, 327 S.W.3d 727, 737 (Tex. Crim. App. 2010).

[18] *See id.* ("Rule 403 favors the admission of relevant evidence, and carries a presumption that relevant evidence will be more probative than prejudicial.").

[19] *Powell*, 189 S.W.3d at 287; *Montgomery v. State*, 810 S.W.2d 372, 389-90 (Tex. Crim. App. 1991).

future-dangerousness issue calls upon the jury to assess whether the defendant would be dangerous "whether in or out of prison."[20] Because a jury is already supposed to consider a defendant's dangerousness outside of prison, the information that the defendant may be out of prison soon, if given a life sentence, does not really change the calculus. Moreover, because appellant was in fact eligible for parole at the time he was sentenced at the punishment retrial,[21] we are not faced with a situation in which the jurors might have mistakenly believed that the defendant would be eligible for parole sooner than he was.[22]

And, in considering whether evidence had the potential to impress the jury in an irrational way, we must consider whether that potential irrational impact could have been prevented or minimized by a limiting instruction.[23] A limiting instruction to consider the evidence solely in connection with Nystrom's credibility and not to consider the question of parole with respect to appellant's sentence would have been sufficient to prevent the jury from considering the possibility of parole.[24] Issue two is overruled.

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[20] *Estrada v. State*, 313 S.W.3d 274, 282-83 (Tex. Crim. App. 2010). *See also Williams v. State*, 273 S.W.3d 200, 234-35 (Tex. Crim. App. 2008).

[21] Under the law in effect at the time the offense was committed, a capital-murder defendant sentenced to life in prison would be eligible for parole after fifteen years. TEX. CODE CRIM. PROC. art. 42.18, § 8(b). By the time of his punishment retrial, appellant had already served that much time.

[22] *Cf. Sneed, supra*; *Simmons v. South Carolina*, 512 U.S. 154 (1994).

[23] *Henderson v. State*, 962 S.W.2d 544, 567-68 (Tex. Crim. App. 1997); *Lane v. State*, 933 S.W.2d 504, 520 (Tex. Crim. App. 1996); *Montgomery*, 810 S.W.2d at 393.

[24] *Hawkins v. State*, 135 S.W.3d 72, 84-85 (Tex. Crim. App. 2004); *Colburn v. State*, 966 S.W.2d 511, 520 (Tex. Crim. App. 1998); *Brown v. State*, 769 S.W.2d 565, 567 (Tex. Crim. App. 1989). *See also* TEX. CODE CRIM. PROC. art 37.07, § 4 (containing instructions that "[e]ligibility for parole does not guarantee that parole will be granted" and the jury is "not to consider the manner in

(continued...)

3. Jury Instruction

In issue three, appellant contends, in the alternative, that the trial court erred in failing to give the jury an instruction that it could not consider parole after the jury sent out a note inquiring whether a life sentence in this case would be with or without parole.[25] Although appellant concedes that he did not request such an instruction, he contends that he was entitled to an egregious-harm review under *Almanza*.[26]

In his motion, appellant opposed any type of jury instruction about parole—even an instruction to not consider the possibility of parole. He is therefore estopped from now claiming that he should have obtained such an instruction.[27] It could perhaps be argued that circumstances had materially changed since he filed his motion: evidence was introduced about Nystrom's parole eligibility and the jury sent out notes inquiring about parole. But the trial judge cannot have been expected to read defense counsel's mind and decide that appellant had changed his position. To the

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(...continued)
which the parole law may be applied to this particular defendant").

[25] The exact wording of his issue is:

> In the alternative to Issue Two, when the jury sent out notes showing that it was considering parole, the trial court referred the jury to the charge, which contained no mention of parole. The appellant, though, made no request for an instruction precluding the jury from deliberating on the subject of parole. Was the appellant egregiously harmed by the omission?

[26] *Almanza v. State*, 686 S.W.2d 157, 171 (Tex. Crim. App. 1985) (op. on reh'g).

[27] *Druery v. State*, 225 S.W.3d 491, 505-06 (Tex. Crim. App. 2007) (defense counsel said defendant was not requesting submission of lesser-included offense of murder); *Ripkowski v. State*, 61 S.W.3d 378, 389-90 (Tex. Crim. App. 2001) (defense request that mitigation issue not be submitted); *Prystash v. State*, 3 S.W.3d 522, 531-32 (Tex. Crim. App. 1999) (defendant opposed submission of anti-parties special issue).

contrary, given defense counsel's request for a mistrial and his complete failure to request any sort of curative or limiting instruction, the trial judge had ample reason to believe that appellant's position remained the same and that, if the trial judge were to include the type of instruction appellant now says should have been included, appellant would likely complain of such action on appeal. Having once told the trial judge that he opposed even an instruction to disregard parole, it was incumbent upon appellant to inform the trial judge if the circumstances at trial had caused appellant to change his mind on the matter.

Moreover, appellant points to no applicable statute that would entitle him to any instruction about parole, even an instruction to completely disregard parole. Applicant would have been entitled to a limiting instruction in the jury charge regarding the evidence of Nystrom's parole if the evidence had been admitted for a limited purpose, but he did not ask for a limiting instruction at the time the evidence was admitted. "A failure to request a limiting instruction at the time evidence is presented renders the evidence admissible for all purposes and relieves the judge of any obligation to include a limiting instruction in the jury charge."[28] Indeed, we have said, "Trial judges should be wary of giving a limiting instruction under Rule 105(a) without a request because a party might well intentionally forego a limiting instruction as part of its deliberate strategy 'to minimize the jury's recollection of the unfavorable evidence.'"[29] Issue three is overruled.

C. Challenge for Cause

In issue four, appellant contends that the trial judge erred in denying his challenge for cause to prospective juror Dugger. Appellant claims that Dugger was challengeable for cause because she

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[28] *Williams*, 273 S.W.3d at 230.

[29] *Oursbourn v. State*, 259 S.W.3d 159, 179 n.80 (Tex. Crim. App. 2008).

stated that a finding of intentional, deliberate murder will *always* entail a finding of probability of future criminal acts of violence.[30]

Appellant points to the following passage in voir dire:

> [DEFENSE COUNSEL]: Ms. Dugger, if we go back again to this hypothetical defendant here, if you found that he committed this act intentionally, it wasn't an accident or mistake, there was no legal justification, and he did it deliberately, in your mind would that indicate to you that he was always going to be a future danger?
>
> [PROSPECTIVE JUROR DUGGER]: Yes.

Although there had been a substantial amount of questioning by the prosecutor and defense counsel before this point, this passage was the last question asked in Dugger's voir dire. Appellant had previously questioned Dugger repeatedly about her response on the mitigation issue to a hypothetical in which the jury had already found that the defendant intentionally and deliberately committed the murder *and* that the defendant constituted a future danger,[31] but the question set out above was the first time that Dugger had been asked about whether her response to the deliberateness issue would impact her perception of the future-dangerousness issue.

Notably, appellant did not inform Dugger that the law required that she keep an open mind on the future-dangerousness issue even after answering the deliberateness issue "yes." He did not ask her whether she could follow that law and set aside any tendency to automatically believe that

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[30] Appellant exercised a peremptory challenge against Dugger, exhausted his peremptory challenges, requested (and was denied) more peremptory challenges, and identified at least one objectionable juror who sat on the jury. Appellant has therefore satisfied the traditional predicate for showing harm from the erroneous denial of a defense challenge for cause. *Freeman v. State*, 340 S.W.3d 717, 731 (Tex. Crim. App. 2011).

[31] The juror had indicated that she would find no mitigation under those circumstances, regardless of any other evidence she heard, but subsequent questioning by the State rehabilitated her on that point.

a defendant who kills deliberately would also be a future danger.

We review a trial court's decision to deny a challenge for cause with great deference and will reverse only when a clear abuse of discretion has been shown.[32] "To establish that the challenge for cause is proper, the proponent of the challenge must show that the venireperson understood the requirements of the law and could not overcome his prejudice well enough to follow the law. So before a venireperson may be excused for cause on this basis, the law must be explained to him, and he must be asked whether he can follow that law, regardless of his personal views."[33] Appellant failed to explain the law to Dugger or to ask whether Dugger could follow the law despite her personal views.[34] Issue four is overruled.

D. Expert Testimony

In issue five, appellant contends that the trial court erred in admitting testimony from Dr. Richard Coons regarding appellant's future dangerousness. Appellant relies heavily on our opinion

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[32] *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010).

[33] *Gonzales v. State*, 2011 Tex. Crim. App. LEXIS 1323, 11 (September 28). *See also Davis*, 329 S.W.3d at 807.

[34] *See Threadgill v. State*, 146 S.W.3d 654, 667 (Tex. Crim. App. 2004) (prospective juror's statement during voir dire that "with a child killer or something I would vote the death penalty in a minute" did not render him challengeable for cause because "neither party questioned [him] further about his statement, explained to him what the law requires, or asked whether he could follow the law despite his personal views"); *Sells v. State*, 121 S.W.3d 748, 759 (Tex. Crim. App. 2003) (rejecting claim that prospective juror "was biased against the law that 'society' comprises persons inside prison" because the defendant "failed to meet his burden of showing that the law was explained to the venireperson, or that the venireperson was asked whether he could follow that law regardless of his personal views"); *Murphy v. State*, 112 S.W.3d 592, 600 (Tex. Crim. App. 2003) (prospective jurors were not challengeable based on faulty understanding of the term "probability" because "the law was not carefully or adequately explained" to them).

in *Coble v. State*.[35] However, appellant failed to preserve error.

To preserve error regarding the admission of evidence, a party must object in a timely fashion and state the specific ground for objection, if the ground is not apparent from the context.[36] The ground for objection, unless apparent from the context, must be stated with "sufficient specificity to make the trial court aware of the complaint."[37] Appellant claims that he preserved error in two ways: (1) by filing and obtaining an adverse ruling on a motion *in limine*, and (2) by having a *Daubert*[38] hearing outside the presence of the jury. We are not persuaded.

An adverse ruling on a motion in limine does not preserve error.[39] Appellant contends that his motion—although titled a motion *in limine*—requested that expert predictions on future dangerousness be excluded. Appellant seems to be suggesting that his motion was mislabeled and was actually a motion to exclude evidence. If such were the case, the motion could preserve error if the trial judge understood that the motion was in fact a motion to exclude evidence.[40] The only evidence appellant points to for the proposition that the trial judge understood his motion to be something other than *in limine* is the motion's language calling for the exclusion of evidence and a

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[35] 330 S.W.3d 253, 270-80 (Tex. Crim. App. 2010).

[36] TEX. R. EVID. 103(a)(1). *See also* TEX. R. APP. P. 33.1(a)(1).

[37] R. 33.1(a)(1)(A).

[38] *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993).

[39] *Griggs v. State*, 213 S.W.3d 923, 926 n.1 (Tex. Crim. App. 2007) ("A motion in limine, whether granted or denied, preserves nothing for appellate review."); *Geuder v. State*, 115 S.W.3d 11, 14-15 (Tex. Crim. App. 2003).

[40] *See Geuder*, 115 S.W.3d at 14 n.10 (discussing *Draughon v. State*, 831 S.W.2d 331, 333 n.1 (Tex. Crim. App. 1992)).

written order denying the motion and showing the defendant's exception thereto. However, the judge's reaction to appellant's request for a *Daubert* hearing suggests the trial judge may not have understood the motion to be something other than *in limine*:

> [DEFENSE COUNSEL]: Your Honor, I assume they're offering him as an expert in the case.
>
> [PROSECUTOR]: Indeed we are.
>
> [DEFENSE COUNSEL]: In this case we'd ask for a 702, 705 hearing.
>
> THE COURT: Okay. Did you wait this long to delay this thing? Tell me yes or no.
>
> [DEFENSE COUNSEL]: No, Your Honor, I did not.
>
> THE COURT: Okay.

Under the circumstances, we find the record to be insufficient to show that the trial judge understood the motion to be a motion to exclude evidence rather than a motion *in limine*.[41]

But even assuming the trial court understood it as such, the motion failed to preserve error. In *Nenno*, we explained that a reliability inquiry outside the area of hard science involves a three-pronged inquiry: "(1) whether the field of expertise is a legitimate one, (2) whether the subject matter of the expert's testimony is within the scope of that field, and (3) whether the expert's testimony properly relies upon and/or utilizes the principles involved in the field."[42] Appellant's motion did not refer to Dr. Coons but generally castigated psychiatric and psychological expert testimony on future dangerousness as not meeting the applicable standards of reliability and relevance under Rule

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[41] *See Draughon*, 831 S.W.2d at 333 & n.1 (appellant's motion to prevent the state from questioning "prospective jurors concerning their attitudes toward the death penalty" was clearly not "a request that the admissibility of evidence or disposition of other matter by the court be determined outside the jury's presence").

[42] *Nenno v. State*, 970 S.W.2d 549, 561 (Tex. Crim. App. 1998).

702 and as unfairly prejudicial under Rule 403. With respect to the reliability claim under Rule 702, the motion was in essence an attack under the second prong of *Nenno*—whether future-dangerousness predictions are properly within the scope of the fields of psychiatry and psychology. Although we have held Dr. Coons's methodology to be unreliable under Rule 702, we did so solely on the basis of the third prong of *Nenno*—whether Dr. Coons's testimony properly applied the principles in his field. [43] There are other psychiatrists and psychologists that use methodologies for assessing future dangerousness that differ radically from the methodology employed by Dr. Coons.[44] The motion's attack under the second prong of *Nenno* did not place the trial court on notice of appellant's current complaint relating to the third prong of *Nenno*. Indeed, it seems difficult to envision how an attack under the third prong could be made as a general matter, without reference to a specific expert witness's anticipated testimony. The broad-based attack on all psychiatric and psychological testimony on future dangerousness in the motion *in limine* simply did not preserve a contention that Dr. Coons's methodology in particular was unreliable,[45] and appellant does not now, in his brief, attempt to argue that all psychiatric and psychological assessments of future dangerousness are inadmissible.

We also find the existence of a *Daubert* hearing to be insufficient to preserve error. A

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[43] *See Coble*, 330 S.W.3d 253, 274, 279 (Only third prong of inquiry, whether Dr. Coons's methodology properly relied upon the accepted principles of forensic psychiatry, was at issue, and Court concluded "the prosecution did not satisfy its burden of showing the scientific reliability of Dr. Coon's methodology for predicting future dangerousness.")

[44] *See Davis v. State*, 313 S.W.3d 317, 353-54 (Tex. Crim. App. 2010).

[45] *See Roberts v. State*, 220 S.W.3d 521, 532 (Tex. Crim. App. 2007) (global objection to victim-impact testimony did not place trial court on notice that a particular item of victim-impact testimony would be objectionable due to its unforeseeability).

hearing was held outside the presence of the jury in which Dr. Coons was extensively questioned on his qualifications and the reliability of his testimony. At the end of the hearing, the trial judge stated: "I'm going to hold that Dr. Coons is qualified and that the field—the psychiatric field of future dangerousness is a valid scientific theory and that—that the technique he used to apply it was valid, and that it was applied validly here in this Brewer case." But appellant never lodged any objection to the reliability of Dr. Coons's testimony during the hearing, or, as far as we can tell, at any other point before or during Dr. Coon's testimony. We addressed a similar issue in *Davis*, where we explained that the defendant must still lodge an objection at the *Daubert* hearing to preserve error:

> The trial court expressly found both experts to be qualified, their methodologies to be accepted by the relevant scientific community, and their testimony to be relevant and reliable in helping a jury understand the issue of future dangerousness. Appellant did not, during this hearing, lodge an objection to the testimony of these witnesses. Defense counsel did not suggest to the trial court that the witnesses were unqualified or the methodologies unreliable, nor did he present any evidence to that effect. Appellant has failed to show us that he has preserved error.[46]

Similarly, in *Neal*, we explained:

> Appellant filed a motion requesting voir dire of expert witnesses. The trial court granted the motion and allowed Dr. Coons to testify after conducting a hearing on his qualifications. Appellant did not object to the admission of Dr. Coons's testimony based on inadequate qualification. To preserve a complaint for appellate review, a specific and timely objection, motion, or request must be made to the trial court. The complaint is timely only if the party makes the complaint "as soon as the grounds for it become apparent." To be adequately specific, the complaint must "let the trial judge know what he wants and why he is entitled to it." In this case, although appellant did request a hearing on expert qualification in the first place, he did not object once the trial court had qualified Dr. Coons. Thus, he forfeited the right to challenge that ruling on appeal.[47]

The failure to articulate an objection after the *Daubert* hearing could mean that appellant was

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[46] *Davis*, 313 S.W.3d at 352-53.

[47] *Neal v. State*, 256 S.W.3d 264, 279 (Tex. Crim. App. 2008).

satisfied that the State met the applicable predicate for admissibility. But even if one assumed appellant still had an objection, one would be left with the question of what precisely the objection was. Was appellant objecting to Dr. Coons's qualifications, to the legitimacy of future-dangerousness predictions within the field of psychiatry, to Dr. Coons's particular methodology, to whether the evidence satisfied the "fit" requirement,[48] or to some combination of these?

Appellant did lodge an objection *after* Dr. Coons's testimony was complete. At that time, he objected on the basis of Rules 702 and 705 and various constitutional provisions. But that objection, insofar as it encompassed the complaint he now urges, was not timely. An objection is timely only if it is made as soon as the ground for objection becomes apparent.[49] The ground for appellant's objection became apparent, at the latest, at the close of the *Daubert* hearing. Appellant's belated objection did not preserve error. And even if the objection had been timely, it was not specific: Appellant never stated what aspect of Rule 702 he was relying upon, e.g. expert qualifications, whether the subject matter was a legitimate part of the field, whether the expert properly applied the principles of the field, or whether the testimony satisfied the "fit" requirement. Issue five is overruled.

The judgment of the trial court is affirmed.

Delivered: November 23, 2011
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[48] *See Tillman v. State*, 2011 Tex. Crim. App. LEXIS 1343, 40-41 (October 5) (discussing the "fit" requirement); *Morales v. State*, 32 S.W.3d 862, 865 (Tex. Crim. App. 2000) (same).

[49] *Pena v. State*, 2011 Tex. Crim. App. LEXIS 1319, 19 (September 28); *Griggs*, 213 S.W.3d at 927.

APPENDIX H

questions, Your Honor.

THE COURT: You may step down, Mr. Merillat. Thank you.

And may -- may this witness be excused then?

MR. ODIORNE: No -- no objection, Your Honor.

THE COURT: You may go, sir. Thank you for coming.

THE WITNESS: I appreciate it.

THE COURT: All right. Call your next witness.

MR. FARREN: The State calls Richard Coons. Dr. Richard Coons, Your Honor.

THE COURT: Okay. Dr. Coons, if you'll come up here and be sworn, please, sir.

THE WITNESS: Yes, sir.

(Witness sworn)

THE WITNESS: Yes, I do.

THE COURT: Sit right there in that chair, and if you'd pull it around to where everybody could see you, it'd sure help.

MR. FARREN: There's a microphone to your right, Dr. Coons. I know you're getting some materials out. Once you've done that, if you can kind of situate

the -- that looks good.

RICHARD COONS,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. FARREN:

Q. Would you state your name for the Jury, please, sir.

A. Yes. Richard E. Coons, C-O-O-N-S.

Q. And feel free to turn the chair if you need to to where you can see everybody and they can see you. I don't know --

THE COURT: Dr. Coons.

THE WITNESS: Yes, sir.

THE COURT: This lady right here is Ms. Morgan and I want you to be able to look her in the eye. Okay. Thank you.

THE WITNESS: Hi, Ms. Morgan.

Q. (BY MR. FARREN) How are you employed, sir?

A. I practice psychiatry.

Q. How long have you practiced in the field of psychiatry?

A. 37 years.

Q. And have you decided yet if you're going to try to make that a career after 37 years?

A. I'm working on it.

MR. ODIORNE: Your Honor, may we approach?

THE COURT: Yes, sir.

(At the bench, on the record)

MR. ODIORNE: Your Honor, I assume they're offering him as an expert in this case.

MR. FARREN: Indeed we are.

MR. ODIORNE: In this case we'd ask for a 702, 705 hearing.

THE COURT: Okay. Did you wait this long to delay this thing? Tell me yes or no.

MR. ODIORNE: No, Your Honor, I did not.

THE COURT: Okay.

(Bench conference concluded)

THE COURT: All right. Ladies and Gentlemen, I need about ten minutes here.

(Jury not present)

THE COURT: Everybody be seated, Mr. Farren.

MR. FARREN: Thank you, Your Honor.

DIRECT EXAMINATION

BY MR. FARREN:

Q. Dr. Coons, the Defense has requested a -- in layman's terms a Kelly/Daubert hearing. Have you -- are you familiar with that term? Have you testified in that

kind of hearing?

A. Yes.

Q. All right. What I would like to do to expedite matters is, first of all, have you -- give the Court -- the Judge a summary of your qualifications as an expert in the field. I don't think it would be necessary even to -- to enumerate to the Judge everything that we will in a few moments to the jury if the Judge rules that you'll be allowed to testify, but enough so that the record will reflect that he knows you are an expert in the field prior to offering testimony under a Kelly/Daubert theory. Then I will ask you questions in three general categories. One, is psychiatry a valid scientific theory? Two, is there a valid method of applying that scientific theory in various ways? And, three, was that valid method used in applying that science in this particular case? In other words, in the conclusions you reached in the case.

Do you follow where we're going?

A. I do.

Q. All right, sir. Would you give the Judge a summary of your scientific -- of your qualifications as an expert in the field of psychiatry?

A. Yes. I graduated from Hampden-Sydney College in Virginia with a bachelor's of science degree, premed

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major in 1961. And I attended the University of Texas Law School from 1961 to '64. Graduated and was licensed to practice law in Texas in '64. I went straight away to medical school at the University of Texas Medical Branch in Galveston, and graduated with a doctorate of medicine degree in '68. Then I did a rotating internship at the University of Cincinnati, Cincinnati General Hospital in '68 and '69. Then I served as -- well, then I went back to Galveston and did a three-year-general psychiatry residency in the department of psychiatry and neurology. Then I served as a major in the United States Medical Corps from '72 to '74. In '74, I moved to Austin, and I've been in private psychiatric practice since that time.

I've treated several thousand private patients, and I've done probably 95 percent of the criminal forensic psychiatry in Travis County where I live in Austin and many more areas. I've elevated -- I've done somewhere in the neighborhood of eight to ten thousand evaluations of people who were charged with crimes. I've consulted in probably -- maybe 150 capital cases, and I've testified in many cases. I've consulted both for defense and prosecution, primarily the issues of future danger. Then -- and my -- my -- I've never been not allowed to testify as an expert in cases of

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this such.

Q. Thank you. Doctor, would you -- is the --

THE COURT: Holdup here.

MR. FARREN: I'm sorry, Your Honor.

THE COURT: You would score 100 if you hadn't gone to law school. Go ahead.

MR. FARREN: I would suggest, however, he did attend the University of Austin -- I mean, Texas in Austin, Your Honor.

THE COURT: Yeah. That puts it down to a C.

Q. (BY MR. FARREN) Doctor, is the field of psychiatry a valid scientific field?

A. Well, a huge amount of science is involved in it. And there's, of course, some art to it as well.

Q. Would you explain to the Court briefly in summary why and how you as an expert in the field believe it is a valid scientific endeavor and that science is involved in the practice of psychiatry?

A. Well, I mean, we hospitalize people, treat people with medications. We have a scientific literature, several -- numerous journals have come out. We have a national organization, the American Psychiatric Association. I also belong to the American Academy of Psychiatry and Law, which has two periodicals

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and two national meetings a year. And there's considerable data that's involved, research data involved in the practical psychiatry, as well as forensic psychiatry, which I do a lot of.

Q. And -- and I would assume, Doctor, that in the field of psychiatry and forensic psychiatry as well, the efforts that are made by psychiatrists are made relying on the research and experimentation and study done by hundreds, maybe thousands of other people who've worked in the field over the years, and that in shorthand terms, you folks today who are practicing psychiatry stand on the shoulders of many others who have over the centuries learned about the working of the human mind and the -- the effects of various aspects of life upon our mind and our emotions and the way we interact with one another?

A. That's all true except for the centuries. Many centuries.

Q. All right, sir. In addition -- and so you believe that is it a valid scientific field -- or it's a field that employs valid science?

A. Yes. It's a medical speciality.

Q. Okay. And is there a -- one or more valid methods of applying this valid science to, for instance, looking at an individual and reaching conclusions about

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their behavior and why and how they behave the way they do and how they might behave in the future?

A. Yes. We -- as a psychiatrist, we're required to do many of these things by virtue of, say, commitment proceedings where we determine whether someone is a danger to themselves or others, about whether someone should be hospitalized, about where they should be placed if they're hospitalized, under what level of security and why. We do it in jails -- classification issues in jails and when we have histories of people with their issues of violence, how they are -- what security issues apply to them. And so any way, that's an assessment of danger or risk, et cetera, of the things that we do a lot.

Q. And in addition to being a scientific field of science and a valid field of science, and in addition to having one or more methods of applying that science in various ways, was a -- was one or more valid methods used in your preparation to provide an expert opinion in this case --

A. Yes.

Q. -- about the behavior of the Defendant, Brent Ray Brewer and your feelings about probabilities of what might happen in the future?

A. Yes. You know much is written and much is

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read about the issues of danger and so forth. My methodology involves the concept that the past is the best predictor of the future. And with that in mind, I look at the individual's history of violence. I look at their attitude about violence. Is it okay for them to use and do they feel okay about using it. I look at the incident offense, since that's where they've really graduated to. Then I look at the person's personality, their usual form of behavior. Are they law-abiding or not, that sort of thing. Then I look at the issue of conscience. Conscience is that part of our personality which causes us to feel bad if we do something wrong. Do they have a conscience to help them control their behavior. And then I look at the society that they will be in and try to -- and assess whether or not if I could give an opinion about an individual.

Q. And do you -- do you believe as an expert in the field that that can be done without actually examining the individual in question if you have sufficient information from other sources?

A. Yes. If you have enough data.

MR. FARREN: Your Honor, we submit that he is an expert in the field, and we submit that this satisfies the requirements of the United States Supreme Court in their decision. I believe it was actually

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Daubert where they made their decision, Kelly was the Texas case.

MR. ODIORNE: Your Honor, may I have an opportunity to voir dire -- cross-examine this witness?

THE COURT: You may. Go ahead.

MR. ODIORNE: Thank you.

CROSS-EXAMINATION

BY MR. ODIORNE:

Q. Dr. Coons, you've talked about this field. What is the name of this field? What do you call it?

A. Forensic psychiatry.

Q. Does forensic psychiatry -- is the main thrust of that to determine whether or not somebody is going to commit criminal acts of violence in the future?

A. No, that's just part of it.

Q. That's just part of it? Can you tell me what classes you took that trained you in making those predictions?

A. Well, in terms of my residency training, my medical school training, residency training, we are -- you have practical experience and your lectures and so forth on issues of how to assess someone's risk and so on. And --

Q. Risk --

A. -- periodic --

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Q. Risk assessment and stuff, that's kind of general for everything you talked about, civil commitments as being part of that. Correct?

A. I wasn't quite through with my answer.

MR. FARREN: Yeah. We would ask that he be allowed to finish his answer, Your Honor, before the next question.

MR. ODIORNE: Your Honor, this is cross-examination. I just ask that the witness answer my question.

MR. FARREN: He still gets to answer his question before he starts his next one, Your Honor.

THE COURT: Let him finish. Let him finish, Mr. Odiorne, and then make your objection.

MR. ODIORNE: Okay.

A. So remind me of the question again so I can get right back on track.

Q. (BY MR. ODIORNE) With -- such as critical assessments as to whether or not somebody is a civil commitment, would be a danger to themselves or others. Would that be falling under that risk prediction you're talking about?

A. Yes. That's part of it.

Q. Okay. And that would be something at the immediate time whether or not they're a danger to

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themselves or others. Correct?

A. Well, and -- and -- and prospective if they don't put a time limit on it.

Q. Okay. So you're telling us that you are able to look at somebody for a civil commitment and say they're not a danger to themselves or others now, but they're going to be in ten, twenty, or thirty years?

A. No, no, no. Within a reasonable period of time.

Q. Okay. What is a reasonable period of time?

A. Well, it depends on the case.

Q. How would you define the word clinical?

A. Well, basically that's a diagnosis and treatment.

Q. Would you consider your method to be clinical?

A. Forensic.

Q. Forensic psychiatry?

A. If you're talking about what we're talking about here today, it's forensic.

Q. Okay. So you're talking future risk predictions is forensic not clinical?

A. No. I mean, the -- the issues of -- of predicting someone's future dangerousness, it can be in a clinical sense, or if we're talking about what we're doing today, it's a forensic evaluation.

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Q. Clinical studies, is that based primarily on the actual observation of the person?
A. **Clinical studies?**
Q. Is that based on observation of people?
A. **Either observation or understanding or a history of the person, for example.**
Q. You said earlier that you looked at a number of things in making these decisions, correct, such as the history of violence?
A. **Yes, sir.**
Q. Okay. Attitude of violence, et cetera. In this particular case, what steps did you take in formulating your opinion?
A. **Both.**
Q. And I take it that you reached an opinion in this case that you're looking to offer to this Court?
A. **Yes.**
Q. When you are formulating your opinion, how did you define probability?
A. **More likely than not.**
Q. How did you define criminal acts of violence?
A. **It's a little bit differently than the -- than it's generally written about. I would include things like, threats of bodily harm, threats of sexual assault, threats of physical injury, threats of death. I would**

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include those which is not -- generally not the case with -- with folks who write about predictions of dangerousness. And they most often refer to serious -- serious institutional violence. And I would consider a threat to kill somebody would be a criminal act and kind of presupposes violence.
Q. Okay. So you have a different definition than other people who work in this field?
A. **I'm sorry?**
Q. You have a different definition of criminal act of violence than other people in this field?
A. **Well, basically what theirs is, is they -- they are dealing with -- with -- well, yes, I guess I do. Theirs is restricted to -- to serious institutional violence, and they're talking about injury or murder.**
Q. Are you familiar with the term potential rate of error?
A. **The what?**
Q. Potential rate of error.
A. **Oh, potential rate of error. I'm not a statistician. I mean, I certainly--**
MR. FARREN: Your Honor, at this time, I'm going to object. This is basically a cross-examination of -- of the doctor, I guess exploring his qualifications or his understandings of specific

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topics in the field. I don't see how this resolves whether or not it's a valid scientific theory and whether or not there's a valid method of applying it and whether that was used in this particular case.
THE COURT: Maybe, maybe not, but I'm going to let him go a little farther with this. I will overrule that objection. But not for long if you can wrap it up, please.
Q. (BY MR. ODIORNE) Dr. Coons, are you aware of any research that's examined the error rates of judgments of risk assessments in determining criminal acts of violence?
A. **Oh, I mean, there's a fair amount in the literature. I mean, those are -- I mean, I find great fault with those.**
Q. Okay. Do you know what the literature states as being those error rates?
A. **Oh, I don't know the error rates.**
Q. Okay.
A. **I mean, their data is poor, so error rates could be -- I mean, they're almost meaningless.**
Q. Okay. Let's talk a little bit about your cases. You said you've testified in a number of cases. Correct?
A. **A number of cases?**

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Q. Regarding the potential risk of future danger?
A. **Yes.**
Q. How many times have you testified for the prosecution in those cases?
A. **I don't know how many times I've testified, but --**
MR. FARREN: Again, Your Honor, this has nothing to do with whether it's a valid scientific theory and whether it passes Daubert/Kelly.
THE COURT: Sustained.
MR. ODIORNE: Your Honor, may I just continue on -- I have a couple of other questions I would like to ask then.
THE COURT: Well, I sustained the objection to that one. Go ahead.
Q. (BY MR. ODIORNE) Dr. Coons, have you ever done any follow-up on your cases to determine whether or not your predictions were accurate?
A. **Not formally. I mean, I have anecdotal information.**
Q. Would you agree with me that in a valid science that determination of whether or not the predictions were accurate is important?
A. **Sure.**
Q. And in making those predictions determining

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that accuracy, you would need to follow up on those predictions. Correct?

A. Well, if you can. The literature doesn't do that.

Q. Well, you have an opportunity to follow up on your own and determine whether or not your predictions were accurate. Do you not?

A. Well, I mean, no, not really. It would be the same problem that the people who do this have. Which is, they've got bum data. They don't -- they don't -- the only thing -- data they consider is data from reported acts of violence that are serious acts of violence and so much -- a huge amount of violence in the penitentiary goes unreported, and so neither I nor they have that data.

Q. So what you're telling us here, is there is absolutely no way to determine whether or not these predictions have any validity at all?

A. No, no. I mean, I am well aware of violence from people who have been convicted of capital murder.

Q. Okay. Well, you just testified to us previously that you don't know how accurate your predictions have been?

MR. FARREN: Well, objection, Your Honor. That states facts not in evidence. He's stated he does

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have experience with it. He has anecdotal experiences with where he's been accurate.

MR. ODIORNE: Your Honor, anecdotal experience is not the same thing as statistical relevant information.

MR. FARREN: That's not what he asked him. He asked him if he knew whether or not if some of his predictions were accurate.

MR. ODIORNE: Your Honor --

THE COURT: What he testified to was he didn't know how accurate the predictions of the people that do those follow-up exams -- follow-up studies you were talking about, and he didn't trust their data.

MR. ODIORNE: Okay. Let me ask the question again, Your Honor.

THE COURT: Okay.

Q. (BY MR. ODIORNE) Dr. Coons, can you tell us how accurate your predictions have been?

A. Can't be certain. I have an opinion that's quite strong, but there is way more violence than any of the literature that I've seen demonstrates.

Q. Do you have any basis for that opinion?

A. Sure.

Q. What is your basis for that opinion?

A. I've spoken to probably several thousand

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people who've been in the Texas Department of Corrections who've been in prison, and I've asked many of them about violence at prison. And I don't recall anybody ever telling me, no, there's no violence. I've asked them about if they've had violence perpetrated on them, and they say yes. Did you report it? No. Why? Well, nobody likes -- nobody will put up with a rat in prison. I mean, I already had enough problem with being beaten up the first time without getting killed. So all that unreported data is not available to the folks who write all of these little articles.

Q. Were these incidents that you personally observed or is this all just based on hearsay?

A. Oh, you know, when a guy -- when a kid tells me that he's been in the pen and he sitting there crying about being raped --

MR. ODIORNE: Your Honor, this is nonresponsive.

THE COURT: Overruled. I would like to hear it.

A. -- sitting there crying when I'm evaluating him about being raped, the people that -- that have -- have sustained significant injuries in the penitentiary that I've seen, I've -- I've evaluated a number of other exonerees who were in for a long time and were beaten

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up, bones broken, witnessed all kinds of violence and so forth that was never reported. I mean, I've -- I've seen a lot it.

Q. (BY MR. ODIORNE) Okay. Again, you have not witnessed any of this violence personally, have you?

A. I've seen it in the county jails. And -- I don't think I've ever -- I've been to the penitentiary several times, but I don't think I ever saw anything while I was there.

Q. Why do you consider your prediction in future dangerousness to be within the field of psychiatry?

A. Why do I consider it? It's -- forensic psychiatry is a subspecialty within psychiatry.

Q. Okay. And is assessing risk of probability of future acts of violence a subspeciality of forensic psychiatry?

A. Well, it borrows from psychiatry, but it's also -- it would be -- it's performing forensic evaluations.

Q. Okay. Is that one of the things that will get you board certified in forensic psychiatry?

A. I don't know.

Q. You testified earlier you're a member of the American Psychiatry Association. Correct?

A. Psychiatric.

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Q. Psychiatric. I'm sorry. Is that correct? You are a member --

A. Yes.

Q. -- of the American Psychiatric Association? Are you aware of the American Psychiatric Association's position regarding testimony in future dangerousness.

A. Yes. Some years ago they gave an amicus curiae brief in a case regarding that. And it was their opinion that it shouldn't be occurring. I mean, that's -- I mean, that's their opinion.

Q. Okay. How many members are there in the American Psychiatric Association?

A. Don't have any idea.

Q. Is that the largest association of psychiatrists in this country?

A. Yes. Sure it is.

Q. In this particular case, did you interview Mr. Brewer?

A. No.

Q. How many interviews have you conducted of people where you have made predictions of whether or not there is a risk of probability of future danger?

A. You talking about capital cases?

Q. Yes, on capital cases. How many of those have you actually interviewed the person?

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MR. FARREN: Again, Your Honor, this is testing his qualifications as an expert. It is not testing the field for forensic psychology.

THE COURT: Sustained. It goes to the weight, not to the admissibility.

Q. (BY MR. ODIORNE) I take it then you disagree with the American Psychiatric Association on that?

A. Well --

MR. FARREN: This is repetitious, Your Honor. He's already indicated that he disagrees with them.

THE COURT: Sustained.

MR. ODIORNE: I pass the witness, Your Honor.

MR. FARREN: Just one question if I might, Your Honor.

REDIRECT EXAMINATION

BY MR. FARREN:

Q. There are -- there are other psychiatric associations. Is that correct?

A. Yes.

Q. Do you belong to any of those?

A. American Academy of Psychiatry and the law.

Q. And do they have an opinion as a group about this field of forensic psychiatry and making some

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assessment about the future -- or possibility of future violence?

A. I know that they have presentations at their annual meeting and so forth and in their publications, but I don't know that they've ever come out with a -- you know, specific association opinion.

Q. But there are presentations and -- and activity exploring this -- this aspect of forensic psychiatry?

A. Yes. There are many people that are members who do exactly this sort of work.

MR. FARREN: That's all I have, Your Honor.

THE COURT: Okay. I'm going to -- do you have anything more?

MR. ODIORNE: Yes, Your Honor, I do have more questions.

THE COURT: Okay.

RECROSS-EXAMINATION

BY MR. ODIORNE:

Q. What organization was this you were just talking about?

A. AAPL, American Academy of Psychiatry of the Law.

Q. And how many members belong to that

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organization?

A. Don't know.

THE COURT: Okay. We'll be in recess until 3:25. Take a break.

MR. FARREN: Before you leave, Your Honor, there's a --

THE COURT: She needs a break. She's about to fold on me.

MR. FARREN: Okay.

THE COURT: Do we need to do something on the record there?

MR. FARREN: It's just a judgment that they are not objecting to. We just forgot to tender it earlier.

THE COURT: Let's do it when we get back. I want her to have a break. I thought he was through.

Doc, you can step down until 3:25. Thank you.

(Recess)

(Open court, defendant present, no jury)

MR. FARREN: Your Honor, Dr. Coons is in the facility. He will be out in just a moment.

THE COURT: Good.

MR. FARREN: Okay. While he's doing that --

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THE COURT: What have you got there?
MR. FARREN: This is a judgment from Collin County Florida on the possession of a weapon that Deputy Mosher testified about, Your Honor. We will offer it into evidence. They had agreed to do it, but we just never did offer it.
MR. ODIORNE: Your Honor, I've had an opportunity to review that. We have no objection.
THE COURT: Let's call it something.
MR. FARREN: State's Exhibit 222. I apologize.
THE COURT: Got you. State's 222 will be admitted.
MR. FARREN: Thank you, Your Honor.
THE COURT: Do you have anything further of Dr. Coons?
MR. ODIORNE: Your Honor, I need about two more minutes with him.
THE COURT: All right, Doctor. Will you come back and take that stand again.
THE WITNESS: Yes, sir.
THE COURT: Okay. Go ahead.
MR. ODIORNE: All right. Thank you, Your Honor.

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RECROSS-EXAMINATION (Continued)
BY MR. ODIORNE:
Q. Are there specific standards that govern how to make these predictions of future dangerousness?
A. Specific standards?
Q. Yes.
A. Well, I'm not sure exactly what you mean.
Q. Okay. Are there -- are there standards that have been generally accepted by the scientific community as being the standards or protocol to follow in making these predictions?
A. No. I mean, it's done in a variety of ways. Some people use instruments to -- to determine the personality of the individual and so forth. But the areas that I have discussed are -- are routinely used.
Q. And the method that you use has that been generally accepted by the scientific community?
A. I couldn't tell you.
MR. ODIORNE: I'll pass the witness, Your Honor.
MR. FARREN: I have no other questions, Your Honor.
THE COURT: Okay. Wait just a second. Let me make an announcement here. Yes, sir?
MR. ODIORNE: I'm sorry. Did you have

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something you were going to say?
THE COURT: Yes. I'm going to hold that Dr. Coons is qualified and that the field -- the psychiatric field of future dangerousness is a valid scientific theory and that -- that the technique he used to apply it was valid, and that it was applied validly here in this Brewer case.
And let's get the jury back in.
(Open Court, defendant and jury present)
THE COURT: Thank you-all. Everybody be seated. Go ahead, Mr. Farren.
MR. FARREN: Thank you, Your Honor.
DIRECT EXAMINATION (CONTINUED)
BY MR. FARREN:
Q. Dr. -- Dr. Coons, I'm not sure exactly where we left off, so I apologize if I'm replowing some of this. Would you share with the Jury a summary of your training, experience, and education in the field of psychiatry and forensic psychiatry, please, sir.
A. Yes. Do you want my experience and training and so forth and the application of it?
Q. Everything that would help the Jury evaluate your expertise in this field, sir.
A. Okay. I graduated from Hampden-Sydney College of Virginia in 1961, premed major, bachelor of science

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degree. Then I went to the University of Texas Law School from '61 to '64. I graduated with a law degree and was licensed to practice law in Texas in 1964. Then I went to medical school at the University of Texas Medical Branch in Galveston from 1964 to '68, and graduated with a doctor of medicine degree and was licensed to practice medicine in Texas in '68. Then I did a rotating internship at the University of Cincinnati, Cincinnati General Hospital rotating in that -- '68 to '69. And that's where you rotate through OBGYN, internal medicine, surgery, emergency medicine and so on.
Then I returned to Galveston and I did a three-year general psychiatry residency in the department of psychiatry and neurology, 1969 through '72. And I was chief resident in the department of psychiatry and neurology in '71 and '72, which involves clinical research and teaching duties, administrative duties. Then I served as a -- as a psychiatrist in -- as a major in the United States Medical Corps from 1972 to '74. And then I ran the drug and alcohol program for the post at Fort Sam Houston in San Antonio and was the psychiatric consultant for -- for the Brooke Army Medical Center. Then I moved to Austin in 1974. And I've been in private psychiatric practice since that

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time. I've treated several thousand private patients. I'm board certified in general psychiatry by the American Board of Psychiatry and Neurology as of February 1975. License is on file -- medical license is on file with the district clerk of Travis County where I practice.

I've treated several thousand private patients, and I've also done a great majority of -- well, 90, 95 percent of the criminal forensic psychiatry in -- in the -- Travis County where I practice. I've evaluated probably 8- to 10,000 people for -- who were charged with crimes for competency to stand trial and many of them for insanity at the time of the offense. And I also do some consulting in civil litigation regarding head injuries and so on and so on. Testamentary capacity and so on.

I've also evaluated a number of people for capital murder cases regarding issues of future dangerousness, and testified in a number of case.

I've been consulted probably in the neighborhood of 150 times in those cases. And many of the times I've told one side or the other, you know, I can't go along with what your theory is. I'll tell the prosecutor, I would advise you to not go for death penalty in this case if --

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MR. ODIORNE: Objection, Your Honor. I'm going to object to this as the proper --

THE COURT: I'm sorry. I couldn't understand you.

MR. ODIORNE: Okay. I'm sorry. This is self-bolstering testimony, Your Honor.

MR. FARREN: Which would be true of most resumes, Your Honor.

THE COURT: Overruled.

A. So anyway, I've testified in a number of cases. I've testified mostly as a prosecution witness, but on a number of occasions as a defense witness in capital cases.

Oh, and a few other little things. I'm a consultant to the State Board of Law Examiners regarding fitness of bar applicants to practice law. I've consulted with -- been a witness for the State Bar Association. I have -- I have dealt with the State Board of Medical Examiners, Dental Examiners, Nurse Examiners, Veterinary Examiners about the fitness of people that practice in those areas. And I'm on -- was on the board of -- the committee -- State Bar Committee that wrote the insanity defense for Texas. I was on psychiatric society -- Texas Psychiatric Society representative to the committee that wrote the mental

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health commitment laws for Texas. They have been amended a little bit since then. And a lot of other stuff.

Q. (BY MR. FARREN) The -- the various examiner groups you mentioned, nurse examiners, veterinary examiners and so forth, did -- did any of that work involve evaluating an individual who wants to practice or work in that area and in trying to make some sort of prediction about how they would behave in that -- if they were allowed to practice in that field?

A. Yes. It can involve drug or alcohol abuse, mental illness that they haven't taken care of. I mean, basically those things.

Q. Okay. You indicated that you've testified many multiple times in various trials in the State of Texas, sometimes for the prosecution, sometimes for the defense. Do you recall that?

A. Yes.

Q. And do you believe as an expert in the field that if you have sufficient data that you can make some -- that you as an expert can make, depending on the case, some prediction about the probability of -- of future dangerous criminal activity on the part of a defendant charged and convicted of capital murder?

A. Yes, if you have enough data.

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Q. If you have enough data.

And, in fact, Dr. Coons, I want to direct your attention back to a trial that occurred in Randall County sometime after April 26th of 1990. The trial of Brent Ray Brewer. Did you testify in that original trial, Doctor.

A. Yes.

Q. And in that trial, did you share an opinion with the jury about the probability of future danger?

A. Yes.

Q. Okay. And in reaching your conclusions back then, did you have access to and were you provided with background information and data about the Defendant, Brent Ray Brewer?

A. Yes.

Q. And have you had an opportunity to review all of that information and all the data that you were given back then, have you had a chance to review that again in preparation for testimony today?

A. Yes.

Q. And have you received additional data and additional information that's come to light after the trial -- I don't remember the exact date -- sometime after April of 1990?

A. Yes.

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Q. Dr. Coons, not every psychiatrist necessarily agrees with an effort to predict future activity or future dangerousness on the part of some individual. Is that correct?

A. Yes.

Q. In fact -- and I don't recall the names of the particular associations or clubs for lack of a better word within the psychiatry community, but is there more than one such association to which psychiatrists might belong?

A. Yes.

Q. What are the names of a couple of those associations or --

A. Well, there's the American Academy of Psychiatry and the Law, American Psychiatrist Association. There are others. Southern Medical Association.

Q. I think it's been suggested that the -- one of the psychiatric associations has taken a position in opposition to the idea of making a prediction or about future dangerousness. Is that correct?

A. At some point in the past, the American Psychiatric Association discouraged that endeavor. They filed an amicus curiae brief in the case involving that issue.

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Q. Was that a death penalty case?

A. Yes. Well, it was either a death penalty case or some -- well, it was a legal issue. They filed an amicus curie brief, which means friend of the court, giving their thoughts about it. And this was -- it certainly wasn't any, you know -- every member votes on what this is. It's some -- I'm sure some committee that gave an opinion.

Q. So some -- some representatives of that association filed this legal brief --

A. Yes.

Q. -- arguing against the idea and used the name of that association?

A. Yes.

Q. Okay. And some of the other associations you mentioned they have not taken such a position. Is that correct?

A. That's correct.

Q. Okay. Would you also agree with me that there are various psychiatrists, perhaps psychologists in the field that have personally taken the position that psychiatrists or psychologists either shouldn't or can't make these kinds of predictions as to probability of future dangerousness?

A. Yes.

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Q. Are you aware that -- I believe the man's name is John Edens or Edens is in the courtroom today?

A. I've heard that he is.

Q. Okay. And that he is going to have an opportunity to hear your testimony and is likely to be called by the Defense after you testify at some point and will probably take issue with some of your positions.

A. Okay.

Q. And you won't -- you will be going back to Austin this afternoon so you won't have an opportunity to hear him testify. Is that correct?

A. God willing.

Q. Are you familiar with a publication that he helped create titled, Predictions of Future Dangerousness in Capital Murder Trials, Is It Time to Disinvent the Wheel? Appeared in Law and Human Behavior, Volume 21, Number 1 -- 29, Number 1, February, 2005.

Are you familiar with this publication or this particular article?

A. I'm familiar with the article. I don't know the publication.

Q. Okay. Would you -- would you share with the Jury a summary -- and first of all, a summary of the

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position taken by Mr. Edens in this paper?

A. I suspect it's Dr. Edens, but --

Q. I suspect you're right.

A. Well, in general he's taking the position, as I see it, that -- that such a prediction can't be made within a particular validity. And the problem with the position that he takes is that the data that he and others who have written on the subject doesn't include -- it includes only reported violence. And in the penitentiary a huge amount of violence occurs that is never reported.

MR. ODIORNE: I'm going to object, Your Honor, as being speculative. There's no foundation for making this opinion.

MR. FARREN: Well, he's an expert in the field, Your Honor.

THE COURT: I'll overrule the objection.

A. And so since they don't know of the data, they can't utilize the data. And they also consider -- in other words, there -- if there's a report, there's a report written up, then the -- the folks who are doing the statistical work on it, they have that data. But they don't have any data about -- or they don't include any data about things that aren't reported. And so that considerably limits their ability to reach conclusions

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that they appear to reach.

Further, they consider the -- the violence that they consider as they refer to as -- as serious institutional violence, and -- which would appear to leave out such things as threats of violence which are criminal acts, threats of --

MR. ODIORNE: Objection, Your Honor. This witness is not qualified. It's a legal conclusion, not a fact issue as far as --

THE COURT: I'm sorry. I can't hear you.

MR. ODIORNE: Your Honor, this witness just made a legal conclusion that's invading the province of the jury in saying that threats of violence are criminal acts of violence.

THE COURT: Hold on. Are you saying that threats of future violence is a legal conclusion? Is that your position?

MR. ODIORNE: Your Honor, my position is, is that there's not a definition as to what constitutes criminal acts of violence, and, therefore, it would be improper for him to state categorically that that is a criminal act of violence. It's up to each individual jury member to make that decision.

MR. FARREN: If I might respond, Your Honor. The Doctor holds a law degree from the

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University of Texas. I think he's aware of what's a criminal act under the Texas laws and the Texas Penal Code. Therefore, he would know what is a criminal act of violence.

MR. ODIORNE: Your Honor, I'm not aware that Dr. Coons is still a practicing attorney.

THE COURT: I'll overrule the objection and let it go to the weight.

Q. (BY MR. FARREN) You may go ahead with your answer, Doctor. I think you were talking about threats being a criminal act of violence in your opinion.

A. **Yes. And where someone says, if you don't give me your commissary then I'm going to stick you with a shank or I'm going to beat you up or I'll have somebody else beat you up, or -- and the threats of, if you tell -- if you report what happened here, whether it's a sexual assault, a physical assault, a threat, or whatever, then -- then you will be in even bigger trouble. These are -- these are -- these are threats and they're certainly violent threats. And those are not reported, hugely not reported, because people -- the individuals -- the prisoners --**

MR. ODIORNE: Your Honor, again, I'm going to object to this. It is purely strictly opinion. There's no foundation for it to make such statements.

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MR. FARREN: The foundation --

THE COURT: Overruled. Go ahead. You can answer.

A. **Yes. I forgot where I was.**

Q. (BY MR. FARREN) Well, you were explaining that in your opinion when you make threats, like, concerning commissary items, I assume, to make the person give them up and let them know if they report it.

A. **The prison system -- the prison life involves in your face kinds of activities. It involves threats and it involves the punishment of somebody ratting on someone else. They're not going to put up with it, and people know that. So if you get injured, you better tell them you fell out of your bunk instead of turning somebody in, because it would be a lot worse for you.**

Q. And have you come into contact with one or more individuals in the prison system in the State of Texas and learned of this kind of information -- this kind of event going on?

MR. ODIORNE: Your Honor, again, I'm going to object to this entire line of testimony. There's no foundation or basis for his opinion.

THE COURT: I'll overrule your objection and I'll give you a running objection. And -- I suffice that will do for you. Right?

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MR. ODIORNE: That will be fine. Thank you.

THE COURT: Thank you. Go ahead. You may answer.

A. **Yes. Yes, I have.**

Q. (BY MR. FARREN) How many inmates do you think you've come into contact with and spoken with?

A. **About anything or --**

Q. About anything.

A. **Eight, ten thousand.**

Q. And in visiting with these eight to ten thousand inmates, do you believe as an expert it helped you understand in general how -- how the real prison system works among the inmates?

A. **Yes.**

Q. In addition, do you believe your contact with these inmates helps you understand how violence is used in the prison system by inmates?

A. **Yes.**

Q. And as a big part of that, the threat of violence?

A. **Yes.**

Q. I want to direct your attention to the document I made reference to earlier, Predictions of Future Dangerousness, Capital Murder Trials. Is It Time

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to Disinvent the Wheel? And it -- apparently Mr. Edens -- or Dr. Edens helped prepare this.

I want to direct your attention to Page 63 in particular. Towards the bottom of the page. Do you see the portion of the document it says: It's likely that some abusive acts go undocumented in institutional settings.

A. Yes. I mean, I'm aware of it. Yes.

Q. Would you consider that a huge understatement that it's likely that some abusive acts go undocumented?

A. I mean, that's certainly not the way I would put it. I would say that a huge number of aggressive assaultive acts go unreported.

Q. And are you familiar with the term -- usually I think this is used in the field of computer science -- but, garbage in, garbage out?

A. Yes.

Q. What does that mean?

A. It means if you don't have the data -- the full data, then the conclusions you reach may be incorrect. And if you're trying -- if you simply go -- the only data you use to determine whether the -- you know, the base rate of -- of assaults and violence -- criminal violence and so forth in the penitentiary is what's reported, you're going to be way off on your

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data. And so it would say that would be garbage in, garbage out. Not that I'm referring to it as garbage, it's just incomplete.

Q. I understand. That's a cliche that's used in the field of computer science. But am I correct in your suggesting that if you have poor data going in, you are going to get poor results coming out?

A. Yes.

Q. Doctor, the Jury in this particular case has heard a great deal of testimony and seen a great deal of evidence and is aware of evidence that was presented in the guilt/innocence phase of this trial which the Court has ruled is in evidence. I want to ask you a -- a hypothetical question -- or I guess really that's an old term. I want you to assume certain facts to be in evidence and ask whether or not you believe these would assist you in -- in -- in making a prediction or at least giving an opinion as to the probability of -- of future danger in the way -- and by that I mean, the possibility or probability of committing criminal acts of violence in the future against society on the part of Brent Ray Brewer.

I want to ask you to assume that --

MR. ODIORNE: Your Honor, I'm going to object to that as being not a hypothetical. He's asking

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it be applied directly to this Defendant. It's not a hypothetical.

THE COURT: Well, he hasn't asked his question yet.

MR. ODIORNE: Well, he just mentioned as applied to Brent Ray Brewer.

THE COURT: He just told him he was going to ask him one, but he hadn't gotten there yet. Have you?

MR. FARREN: I'm about to recite facts that I want him to assume to be --

THE COURT: That's what I thought.

MR. FARREN: Yes, sir.

MR. ODIORNE: Your Honor, then, are you overruling my objection?

THE COURT: You didn't object. Did you object to something?

MR. ODIORNE: I did, Your Honor.

THE COURT: I overrule it.

MR. ODIORNE: Thank you.

Q. (BY MR. FARREN) I want you to assume that when the Defendant, Brent Ray Brewer, was approximately thirteen years of age he was placed in alternative school for misbehavior. And that that misbehavior was that he had threatened another student with a knife. I

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want you to assume that in evidence are facts that are evidence that the Defendant, at approximately 16 years of age, threatened to kill his former girlfriend and her former boyfriend apparently in response to her ending a relationship with him and beginning a relationship with another young man. I want you to assume in the fall of that same year when he was about 16 or 17 years of age, he got into another disagreement with that same former girlfriend and slammed her -- or shoved her into some lockers at school causing injuries to her spine, which resulted in paralysis of one arm for at least a couple of months, perhaps a little longer. I want you to assume that the Defendant at about 18 years of age was arrested in Florida while sitting in the driver's seat of an automobile that was known to belong or be used by some people -- a family known as the Greenmans, which a law enforcement officer has indicated to the Jury they were well aware of and had dealt with on more than one occasion.

And that the Defendant was in the driver's seat of this vehicle parked in a suspicious area to the police officer, and it was also occupied by at least one of the Greenmans. I want you to assume that as the officer approached the vehicle, he was aware that the Greenmans had indicated they were unhappy with

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what they considered to be unnecessary police contact with them and that they had threatened to do harm to one or more officers with a weapon, such as a gun or a knife. And that when the officer approached the vehicle, he eventually discovered directly beside the driver of the vehicle, Brent Ray Brewer, a buck knife with a 7-inch blade, and that he arrested the Defendant for violating federal laws concerning the possession of dangerous weapons, and that eventually the Defendant was convicted of that crime.

I want you to assume that at the age of 19 that he assaulted his father with a blunt object, perhaps a broom handle, and also by kicking and hitting his father repeatedly causing brain injuries and fracturing his nose and jaw. And that his father suffered disabilities as a result of that for some time afterwards. That, in fact, apparently there was fractures to the face and some --

MR. ODIORNE: Objection, Your Honor. This goes into evidence that this Jury has not heard in this case.

MR. FARREN: It is evidence that was admitted in the guilt/innocence phase of the trial, Your Honor.

MR. ODIORNE: Your Honor, this Jury has

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not heard that evidence.

MR. FARREN: It's in evidence, Your Honor.

THE COURT: Overruled.

Q. (BY MR. FARREN) And that the -- there was a depressed skull fracture and that at least made contact with or somehow --

MR. ODIORNE: Again, Your Honor, I'm going to re-urge this objection. I don't believe that this is -- the Jury has heard any of this hypothetical evidence.

THE COURT: Overruled.

MR. ODIORNE: Ask for a running objection to anything along those lines.

THE COURT: Yes, sir.

MR. ODIORNE: Thank you.

Q. (BY MR. FARREN) At any rate, Doctor, in summary that -- that the -- the Jury has heard evidence the father was injured in this attack and he suffered disabilities for some time. And that -- and that he talked with at least one other person at times about rolling --

MR. ODIORNE: Objection, Your Honor, again, this is getting into things this Jury has not heard.

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MR. FARREN: Kristie Nystrom testified to this, Your Honor.

THE COURT: I'm overruling your objection, and I've given you a running objection on this.

MR. ODIORNE: Thank you, Your Honor.

THE COURT: I don't -- I'm telling you, just keep your seat and let him finish this hypothetical question, and then I will allow you to make another objection at the end of that, but don't interrupt him anymore.

MR. ODIORNE: Yes, Your Honor.

Q. (BY MR. FARREN) That -- that Kristie Nystrom, a lady who was with him for a while, indicated there were plans at times discussed about rolling folks, which she indicated meant somehow approaching and in some unpleasant means or violence taking money from them. I want you to assume that the Defendant and this lady named Kristie Nystrom on or about April 26th of 1990, having been basically ejected from an apartment they were sharing with some other folks in a need for money approached a lady named Ivy Craig and attempted to somehow gain control of her and take money from her. And when that was unsuccessful, they subsequently approached a man named Robert Doyle Laminack, a

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66-year-old man convinced him to give them a ride. And then once they were in the vehicle with this man, after traveling approximately 642 feet, that the Defendant; Brent Ray Brewer, seated in the back seat of a vehicle with a front and back seat -- a vehicle in which the back seat contained four eggs lined up against some seatbelts that were never even disturbed, I want you to assume therefore the Defendant is seated in the front of edge of this seat and never leaned back. They traveled 642 feet.

I want you to assume whereupon the Defendant attacked the victim, Robert Doyle Laminack, with a butterfly knife and stabbed him repeatedly about the face and neck.

I want you to assume that during some of this attack he requested that the Defendant(sic) produce his wallet. The Defendant(sic) did so. He then requested the Defendant(sic) remove the keys from the ignition of the vehicle. The victim was unable to do so, and at some point his arm collapsed into the front his lap. And that eventually this arm ended up in a different location sometime after the commands to give the wallet and keys up.

I want you to assume that he and his girlfriend -- or friend, Kristie Nystrom, left the

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vehicle, left the assaultive weapon laying on the ground, obtained medical attention to a wound that he received on his hand, which required as many as sixteen stitches.

That they then traveled to a bus station and fled the Amarillo area and went somewhere in the Fort Worth/Dallas area. An area known as Red Oaks, and subsequently were arrested, apprehended, and brought back to Amarillo to stand before the bar of justice.

Given that summary of information, I want to ask you whether or not you believe that you can make -- reach some conclusion -- share some opinion with this Jury about whether there is a probability that the Defendant would commit criminal acts of violence against society, and that would be a threat to society in the future.

A. Yes.

Q. And would you share with the Jury what you believe -- what your opinion is as to the likelihood this man would commit criminal acts of violence in the future?

A. There is that probability, which I believe to be more likely than not.

Q. Okay. Can you share with the Jury some of the factors that you consider in reaching an opinion of this

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kind, first of all in general. And then second, if you could apply those factors to this specific case that you've rendered an opinion on.

A. Yes. The -- the format that I used to look at a case like this is five or six aspects or seven maybe. And the first is, the person's history of violence. Okay? While we've all kinds of threats, and knife, slamming a girl into the locker, paralysis for a period of time, the unlawful carrying of a weapon, that 7-inch blade, assaulting of the father, quite a violent thing, and then the discussion of rolling people and basically robbing money from them, and then the incident offense. That's plenty of violence.

Q. Let me -- let me add some additional information that I neglected to share with you a few moments ago. I want you to assume in addition to all of this information that I think you will recall was shared with you when you testified the first time back some time after April 26th of 1990. Do you recall that?

A. Do I recall --

Q. Do you recall in general that summary of information?

A. Yes.

Q. In addition to that, I want you to assume that after the Defendant is placed on death row in the

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Polunsky Unit at Livingston, Texas, under extreme controls, security, that he somehow manages to overcome the security of death row and comes into the possession of marijuana.

And in addition to that, at some point dismantles a shaving razor he's provided and attempts to commit suicide, or at least claims that he is attempting to commit suicide by slashing or cutting his own risk -- wrist.

Then I have an additional question about the suicide, but I want you to continue sharing with the Jury your opinions in whether or not this assists you in further making predictions.

A. Okay. All right. The first thing was the history of violence, and we've got plenty of that, with weapons. He appears to be quite interested in using a knife, which is about as close as you can get to a shank in the penitentiary, which are manufactured cutting or stabbing devices.

And then the next -- the next area of -- that I consider is the person's attitude about violence. Is violence okay with them, or is it something that they -- they shrink away from.

Well, from what I hear in this hypothetical, violence is just part of his way of

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dealing with people; his girlfriend, her boyfriend, the carrying the knife in the car, the blunt trauma of beating his father, and this -- this offense, quite violent. So violence is okay with him. That's -- that's -- doesn't seem to bother him. Certainly hasn't changed his mind about what he does.

Then the next issue is, what's the -- what's the incident case that we're looking at? It's awful. I mean, it's just a cold-blooded killing somebody for money, and somebody that you have -- that is doing a favor for you. Somebody you don't even know. Just kill them and leave them. That's a -- that's a terrible act.

The next thing that I look at is the -- is what is the person's personality like. What is their usual behavior. Well, it's -- it's -- I mean, he is unemployed. He's -- he's --

MR. ODIORNE: Objection, Your Honor. There's no basis that he was unemployed. That wasn't part of the hypothetical.

MR. FARREN: I'll correct that, Your Honor.

Q. (BY MR. FARREN) I want you to assume that he's unemployed all of this time.

A. Okay. And he is looking to others for money.

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He's -- and the kind of looking is -- is stealing money basically. And if somebody gets in the way of that, well, they would be trouble as Mr. Laminack was. Then -- so in other words, he is not -- he is not a law-abiding person. He doesn't have that as his standard way of living of looking at things. He is not a law-abiding person.

And then the next area is the conscience. Does he have a conscience. And conscience is that part of our personality that makes us feel bad if we do something wrong. Well, none of the things that he's done have seemed to stop him from doing anything else. And so conscience -- we know that his conscience doesn't apply to the things that he has done here. None of that stuff has -- has stopped him from -- from -- from doing things.

He's -- even we talk about being on death row and obtaining marijuana against their rules. Dismantled a razor, cut his wrist. You know, there's another cutting device.

It's -- then the -- the next issue is where will the person be. Where will that person in society be. And if the person will be on death row or population. And in the population it is way more likely that they would have access to injuring other people,

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threatening other people and committing acts of violence.

Q. Yes, sir. Do you find -- I want you to assume that the -- this suicidal event that the Defendant apparently cut his wrist and then reported to a guard, oops, I cut too deep or I didn't mean to cut so deeply or something of that nature, and that this event occurred after he learned that his death penalty sentence had been overturned. Do you find that as a psychiatrist strange or odd?

A. It sounds like a gesture as opposed to an intentional act. I mean, here is a guy that is aided with a -- with a knife and so he cuts himself and decides that it's not deep enough -- or it's too deep -- more deep than he anticipated, it sounds like a manipulative situation.

MR. FARREN: Pass the witness.

CROSS-EXAMINATION

BY MR. ODIORNE:

Q. Dr. Coons, this says you've testified for a total of approximately 150 times involving issues of future dangerousness. Correct?

A. Well, involving capital murder cases.

Q. Yes. Capital murder cases where you were asked to make a determination or make a prediction as to

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future dangerousness?

A. Well, I'm asked a variety of things about it. I've had prosecutors call me and say, what do you think? Is there enough --

Q. Okay. Again, you've been --

A. -- data here or not and so forth.

Q. Okay. You've been asked approximately 150 times to consult in cases to make a determination regarding prediction of future dangerousness?

A. Some of those consults have been just basically curbstone consultants where a prosecutor will call, never send any records or anything. And I'll say, well, if that's all you've got, you know, don't call me.

Q. How many times have you actually testified regarding predictions of future dangerousness?

A. I don't know. Fifty, maybe. I don't know.

Q. How many of those times were for the prosecution?

A. Most of them.

Q. How many for the defense?

A. Several.

Q. Can you give a number to us?

A. No. I can tell you several. A couple of them come to mind. I'm sure there's more.

Q. Are you being paid for your testimony here

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today?

A. I bill the -- the -- I guess the District Attorney's Office.

Q. Okay. And how is that fee calculated?

A. Hourly, or if -- there's a day fee if I'm -- if I'm just gone a day.

Q. And what is your daily fee?

A. 4800.

Q. And what is your hourly fee?

A. 480 per hour.

Q. Have you examined Mr. Brewer as part of your evaluation in making this prediction?

A. No.

Q. Now, this prediction that you've made, you purport to be a scientific opinion. Correct?

A. There are certainly scientific elements to it. I mean, when your behavioral -- when you're a behavioral scientist, it's not like mathematics or chemistry. It's psychics. It's what we call more of a soft science.

Q. You're still putting it forth, though, as a scientific opinion. Correct?

A. The signs are significant scientific elements to it.

Q. Are you familiar with clinical studies?

A. Any of them, you mean?

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Q. Just clinical studies in general.
A. **Sure.**
Q. Oftentimes before a drug is allowed to be sold to the public, it has to undergo a series of clinical studies?
A. **Yes.**
Q. And that's to make sure that the drug is safe and is valid and helpful to what it purports to help?
A. **Well, it doesn't make sure, but it -- that's the purpose of it.**
Q. And in other words, it's to determine what risks are associated with use of that?
A. **To attempt to do that, yes.**
Q. And if those clinical studies are not performed, then that drug is not allowed to come into market, is it?
A. **Well, the FDA has certain rules about whether you are at stage one, two, or three of your application to have a pharmaceutical come on the market, and -- so whatever they indicate needs to be done must be done.**
Q. And clinical studies are part of that. Are they not?
A. **Yes.**
Q. Along with that, those studies are also revered by what they call peer review. Correct?

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A. **Yes.**
Q. And peer review means that others who also practice in the field, review that literature, review that data, and determine whether or not it appears valid to them?
A. **Well, they can. You know, if -- I don't know that other people do tests on Pfizer's drugs when they come out.**
Q. Well, Pfizer will conduct their own tests, for example.
A. **Yes.**
Q. And that is reviewed by others who look and see if the particular protocol was followed. Correct?
A. **The FDA -- the FDA pharmaceutical folks look at it, see if it --**
Q. A particular protocol must be followed. Correct?
A. **Well, I'm not in the drug manufacturing business, but I suppose that they have -- they need to be satisfied with the -- with whatever tests were done were appropriate.**
Q. Well, you are a medical doctor. Correct?
A. **Yes, I am.**
Q. And you talked a little bit earlier about publications, specifically some by Dr. Edens?

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A. **Yes.**
Q. What publications have you written, Doctor?
A. **The only one I wrote had to do with forensic pathology.**
Q. Okay. Did that have to do with anything with predictions of future dangerousness?
A. **No.**
Q. You mentioned about organizations earlier as well. The American Psychiatrist Association. Are you a member of that organization?
A. **Yes.**
Q. And you also talked about the American Academy of Psychiatry and Law?
A. **Yes.**
Q. Are you a member of that organization?
A. **Yes.**
Q. Does that organization publish a journal of the American Academy of Psychiatry in the Law?
A. **Yes, and a bulletin.**
Q. Would you agree with me that -- going back to clinical studies -- that making a determination as to whether or not a drug is safe is dependent on gathering data and making observations about that. Correct?
A. **Yes.**
Q. You talked earlier about garbage in, garage

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out. And if you don't have any data to make a basis on, then any opinion you give is not going to be very valid, is it?
A. **Well, if there's no data to consider or if the data is faulty or incomplete then that would interfere with the conclusions.**
Q. Okay. You testified earlier that you thought that the conclusions reached by Dr. Edens and others were faulty because it had incomplete data?
A. **Well, the data, yes. I mean, that's part of it.**
Q. Dr. Coons, have you gathered any data to determine the accuracy of your predictions?
A. **Well, I mean, I have -- I have seen plenty of people that -- well, some of the people that I have seen and considered dangerous have committed other acts.**
Q. Okay. How many people have you evaluated and made a prediction that, yes, this person would constitute a future danger to society?
A. **I don't know. Fifty or so.**
Q. And how many of those have you followed up on to see if that prediction were valid?
A. **Well, I mean, I don't -- I -- I -- two or three. And the other aspect of that is --**
Q. Doctor, I'm sorry --

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A. Well, I'm still answering your question.
Q. Well, I asked you how many. You said, two or three. So thank you for your answer.
A. Well, I'd like to -- I'd like to explain that.
THE COURT: Well, let him redo it on -- on redirect.
THE WITNESS: Okay. Yes, sir.
Q. (BY MR. ODIORNE) Talking about the American Psychiatry Association. You had mentioned earlier that they had a position in the past that they felt that psychiatrists should not be making those predictions?
A. I haven't read their amicus curie brief, but my general understanding of it is that they have questions about it.
Q. Okay. Have they issued any new briefs, new opinions?
A. Not that I know of.
Q. Okay. So as far as you know, that's still an opinion they hold today?
A. Oh, I don't know one way or another. When you say, they, you're not -- they don't poll members of the American Psychiatric Association. They've got some -- probably committee or something that considers the matter and promulgates a brief.
Q. Okay. Do you know that to be a fact, or is

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that just your personal opinion?
A. Well, somebody's got to write it and it isn't everybody.
Q. You talked about classification and that the opportunities for danger in general population are much greater. Is that --
A. I'm sorry. I didn't --
Q. Okay. You testified earlier that you felt in general population the opportunities were much greater to commit violence?
A. Yes. Than on death row.
Q. Okay.
A. Yes.
Q. And is that based on any research that you've done or read, or is that just your personal opinion?
A. Well, it's -- I think -- I think what A.P. Merillat testified to speaks to the significant degree of that issue. And I think the way that the -- that the inmates are housed on death row offers way less opportunity for violent acts than general population.
Q. Okay. Again, I'll ask you. Is that based on your personal research or research that you've read or is that just your opinion?
A. Well, it's an opinion. When you say research, I mean, I haven't studied it, but it certainly makes

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sense to me.
Q. Okay. You're aware that general population is not all exactly the same. There are different classifications. Correct?
A. Yes.
Q. And likewise on death row, there are different classifications. Correct?
A. I don't know that for sure.
Q. So you're not familiar with what the classification system is on death row?
A. No. I know that -- that they are way more lockdown than they used to be.
Q. And that's back when they were on the Ellis I Unit?
A. Yes.
Q. Do you have any statistics that you can point to based on your research that would indicate how accurate your predictions have been regarding future dangerousness?
A. No.
Q. And you testified earlier that you have not written any articles dealing with future dangerousness?
A. That's correct.
Q. Have any of your findings or conclusions been subjected to peer review?

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A. Well, I mean, I haven't written articles, so -- but I have discussed the matter with quite a number of different psychiatrists and correction officers, wardens, other forensic psychiatrists, those people.
Q. Okay. Again, I'll ask, your studies have not been subjected to any type of peer review?
MR. FARREN: It's been asked and answered, Your Honor.
THE COURT: Sustained.
MR. ODIORNE: Your Honor, at this time we would move again to strike that -- okay.
Q. (BY MR. ODIORNE) Dr. Coons, you had talked earlier that you had testified back in this case in 1991?
A. Yes.
Q. Okay. And your prediction at that time was what?
A. That he would commit criminal acts of violence in the future.
MR. ODIORNE: I'll pass the witness, Your Honor.
REDIRECT EXAMINATION
BY MR. FARREN:
Q. Dr. Coons, just a couple of issues very briefly. Dr. Coons, I gave you a long hypothetical

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earlier. And as the Jury learned during voir dire, we're in a strange situation because we have a guilt/innocence phase of the trial in which all of that evidence is in, and then we had a punishment phase of the trial in which it's not in, but it might come in depending on whether a witness is available or not and has testified previously, and it sometimes gets confusing.

Out of an abundance of caution, I want you to assume everything I ask -- I want you to -- to -- to respond to this. If everything I asked you to assume earlier is correct, except we take out reference to specific injuries, like the facial fracture or brain -- the skull being -- touching the brain or something in the attack on the Defendant's father, the specific injuries I mentioned, out of an abundance of caution, if we take that out and we don't consider that, would that change your opinion in any way?

A. No.

Q. Okay. A few moments ago you were -- you were asked about follow up on individuals on death row that -- to about whom you had made predictions and whether they had committed other acts of criminal violence. And you indicated two or three and indicated there was some additional information you wanted to

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share with the Jury. What was that information, sir?

A. I'm a little lost.

Q. Well, earlier Defense counsel asked you if you had done any follow up. He asked you how many of your cases have you done follow up on to see whether your predictions were accurate. You said, two or three, but indicated there was additional explanation or something you wanted to provide. If you recall what that is, would you like to share it with the Jury now?

A. I have -- excuse me. I don't -- that doesn't jump back in my mind.

Q. Okay. All right. At any rate -- let me ask you this. You haven't, again, checked each of the approximate 50 defendants in which you have shared an opinion with the Jury about future violence -- you've learned of two or three where you knew of violence, but you haven't gone out and specifically followed up on each of the 45, 50 or however many it may be?

A. No. I mean, I know of people about whom I issued that opinion that have been on death row that have gotten in trouble for violent acts.

Q. Right. And as you said a few moments ago, there's absolutely no way for you to know how many violent acts these people committed, because most of them go unreported?

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A. That's my opinion.

Q. Right.

MR. FARREN: Your Honor, out of an abundance of caution, I think I did become confused earlier about which testimony was in. I would ask the Court to instruct the Jury to disregard that portion of my hypothetical -- my -- the facts I asked him to assume. I believe everything that was included in that history that I asked him to assume is either in evidence at guilt/innocence or they heard it during punishment, except for reference to specific injuries to the face and skull in the reference to his father.

In abundance of caution, we would ask the Court to instruct the Jury to disregard that, and the Doctor's indicated that he has done so already and still reaches the same conclusion. That's our request.

THE COURT: Any objection from the Defense?

MR. ODIORNE: To the instruction, Judge? No.

THE COURT: Okay. Well, Ladies and Gentlemen, you heard the hypothetical. It went on for some minutes. In the hypothetical was the assumption -- or Mr. Farren requested that the Doctor make the assumption that the -- that there were specific injuries

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to Albert Brewer, the Defendant's father. You're not -- you're not to consider that there was such a fact proved in this case. Just forget that ever got brought up. Is that good enough? Is that enough?

MR. FARREN: Yes, Your Honor. Thank you very much.

THE COURT: Yeah. Okay.

MR. FARREN: I pass the witness, Your Honor.

MR. ODIORNE: Your Honor, I have no further questions of the witness, but I would ask that we be allowed to approach after he is excused.

THE COURT: All right. Dr. Coons, you may step down, sir.

THE WITNESS: Thank you, Your Honor.

THE COURT: Thank you, sir. Y'all want to excuse him?

MR. FARREN: We have no objection, Your Honor.

MR. ODIORNE: We have no objection.

THE COURT: You may go, sir. Thank you for coming.

Can I see the attorneys up here for just a second, please?

(At the bench, on the record)

THE COURT: Did you need to see me?
MR. ODIORNE: Yes, Your Honor. Our understanding is that the State is getting ready to rest. However, before they do so, we would like to make an objection outside the presence of the Jury regarding Dr. Coons' testimony. Now, I don't know how the Court wants to handle that. If you want it done right here, we'll do it right here if you'd like.
THE COURT: Well, we've been going 55 minutes and it's late in the day and that was tough testimony for our reporter. Let's give her a 10-minute break. You need to know this. If they rest, do you have a witness here ready to start?
MR. ODIORNE: Not yet, Judge. We will first thing in the morning.
THE COURT: Who is that guy sitting back there with your other guy?
MR. ODIORNE: Dr. Edens.
THE COURT: Huh?
MR. ODIORNE: Dr. Edens.
MR. FARREN: It's Dr. Edens. The one --
THE COURT: Is he not ready to go? He looks ready to me. You just don't want to start with him?
MR. KEITH: I want to visit with him.

THE COURT: Oh, okay. I got you.
MR. KEITH: I mean, I want to talk to him about what he's just heard.
THE COURT: Then here's what I'm going to do. I'm going to let them go right now.
MR. FARREN: And we'll just rest in the morning.
MR. ODIORNE: Thank you, Your Honor.
(Bench conference concluded)
THE COURT: We're going to quit for the night. We've got some work to do and I don't -- rather than give y'all a ten-minute break and maybe bring you back and maybe not, I'm going to let y'all go. And I'll see you-all at 8:25 in the morning. Is that okay?
What's that?
JUROR: Nine.
THE COURT: Nine? Take a vote. Take a vote. If you do 9:00, you'll be here Saturday morning. Okay.
See you in the morning.
(Jury not present)
THE COURT: Okay. Everybody be seated. Mr. Odiorne, you have a motion?
MR. ODIORNE: I do, Your Honor. I would like to re-urge our motion and ask that the testimony of

Dr. Coons be stricken under 702 and 705. Under the 5th, 6th, 8th, and 14th Amendment of the U.S. Constitution, specifically under the 6th Amendment, confrontation clause, Crawford and Melendez-Diaz versus Massachusetts.
He was asked to assume facts that were not in evidence before this Jury, which violates the 8th Amendment of due process, confrontation, the right to a jury trial under the United States and Texas Constitutions. I'm aware this Court issued an instruction. However, we do not feel that that instruction was adequate. In addition to striking Dr. Coons' testimony, we would move for a mistrial.
THE COURT: Well, that's -- that's a lot of things in that motion.
MR. ODIORNE: I like to keep you active, Judge.
THE COURT: Well, I will overrule your objections to his testimony, and I will overrule the motion for mistrial. Is there anything else?
MR. GORE: Yes, Judge. Can we take that 68 out of evidence, clear that up?
THE COURT: That what?
MR. GORE: Exhibit Number 68, the blood vile that we made reference to yesterday. We were clear -- trying to clear up what was in evidence and

what was not.
THE COURT: Okay.
MR. GORE: I have determined that 68 was not admitted into evidence. And I believe I stated on the record it was. And will the Defense agree that 68 was not admitted?
MR. ODIORNE: Yeah. Your Honor, we weren't there, so I have no idea. But based upon the transcript that we reviewed, I don't recall seeing that it had been admitted into evidence.
MR. GORE: We intend to take possession of it, hand it back over to Ron Jannings and transport it back to Special Crimes.
THE COURT: Does it make any difference?
MR. GORE: It does for your court reporter, Your Honor. It's not in evidence.
THE COURT: What's her pleasure?
THE REPORTER: Take it out.
THE COURT: Take it out. Out it comes. Okay. 8:25, y'all be here and be ready to go.
(Adjournment)

APPENDIX I

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there's a signature line, and the foreperson will sign only one.

Special Issue Number 2. Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Brent Ray Brewer, would commit criminal acts of violence that would constitute a continuing threat to society? And, again, there's two -- there's two answers. Only -- you only use one of them. The foreperson will sign if it's a unanimous yes, or the foreperson will sign if it's ten or more find no.

Special Issue Number 3. Do you find from the evidence taking into consideration all the evidence including the circumstances of the offense, the Defendant's character and background and the personal moral culpability of the Defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than death be imposed? You are instructed that in answering this special issue, that you shall answer the issue yes or no.

You may not answer the issue no unless you agree unanimously. And you may not answer yes unless ten or more of you agree. And, again, there's two signature lines for the foreperson. The top one is no unanimously. And the bottom one is yes with ten or

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more.

The only thing I didn't read is that Special Issue 2 and Special Issue 3 is predicated on the answer to the previous one.

All right. Mr. Gore, are you ready to start?

MR. GORE: I am, Your Honor. May it please the Court.

THE COURT: Okay.

MR. GORE: Counsel.

STATE'S CLOSING ARGUMENT

BY MR. GORE: 19 years ago Bob Laminack -- and you've gotten to know Bob a lot better the last few days -- died alone in the dark in a pickup on the side of the road. A man who had put together a business, a family, who had won the admiration of his competitors, the love of his friends and his family was left to die on the side of the road. For 19 years justice has been left waiting just like he was left waiting for his family to find him. This is the day. This is the day of waiting.

You've got three questions you need to address. And I think we talked to y'all at nauseam about these during voir dire. You know what they are. We talked to you about the law, but you know the facts.

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Now, you know what you didn't have when you sat in that chair a few weeks ago to answer these questions.

First, was the conduct of the Defendant that caused the death of Bob Laminack committed deliberately with a reasonable expectation that his death would result? Absolutely. This was not a chance encounter. This was not a fortuitous crime where somebody just stumbled onto a rouge and decided to roll him. This was a carefully plotted and planned crime.

The Defendant and Kristie Nystrom left that apartment over at Rain Tree knowing exactly what they were going to do. They were going to fool somebody. They were going to get behind them and they were going to kill them and they were going to take their car and anything else they could get from them that they found of value.

You heard the evidence of Ivy Craig. They tried to get in her car, but they couldn't fool her. She was too skittish and she got away. Bob on the other hand, he was a nice guy. The Defendant and Kristie walked up and said, hey, can we have a ride? We need to go to the Salvation Army. My girlfriend is sick, my girlfriend is cold, my girlfriend is pregnant. Who knows. What we do know is they said, can we have a ride and Bob said sure, because that's who Bob Laminack was.

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And he went inside and told his daughter what he was going to do and she became very concerned. She said, Dad, don't do this. This isn't very smart. This isn't very good. They're a couple of kids who need some help. I'll be fine. And she said, Dad, let me go with you. No, I'll be fine.

And I'll tell you there's no amount of begging or pleading that Anita Laminack could have ever made -- Anita Piper could have made that would have changed Bob's mind, because that's just who Bob Laminack was.

So he went out and got in the truck with the Defendant sitting behind him per planned and he drove out onto 49th Street. He got 642 feet. That was as far as he got, a little more than a football field. Just far enough to get around the curve and get out of sight of the witnesses he knew that were back at Mr. Wonderful's bar and the witness he knew was over there at Amarillo Floor.

Now, the Defendant told you, I didn't know what I was going to do. I didn't have a plan. Do you really believe that? Come on. They plotted everything down to what they were going to say to get into the vehicle, but then they just sort of forgot what they were going to do after that? No, he knew exactly

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what he was going to do. He went from zero to homicidal with no stops in between, bam, just like that.

As they rolled out of that parking lot, he reached into his pocket and started unfolding that knife, and as soon as he got around the curve, he killed Bob Laminack. Was it deliberate? Absolutely. Every thrust of that knife into Bob Laminack's throat answers that question: Yes, yes, yes, yes.

We know at least four times he stabbed that man. There's similar wounds on the back of his hand, maybe that happened to coincide with some others. We know at least four. This wasn't some sudden spur of the moment thing. This was a carefully-plotted murder.

You'll next be asked to answer the next question. Do you find beyond a reasonable doubt that there is a probability that the Defendant will commit criminal acts of violence that will constitute a continuing threat to society. Is he a future danger?

Now, I can tell you right now the Defense is going to get up here and tell you, hey, he's been on death row for 16 years, he's been incarcerated for 19 years. He hasn't had any acts of violence in there so it turns out that the first jury was wrong, Dr. Coons was wrong, he's a changed man, everything is different.

No. He's not changed one bit. He simply

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has not had an easy target. Because on death row and in the prison, when you act up, they don't send girls, they don't send old men, they don't send pot-bellied truck drivers to take you down. They send men in riot gear with shields, clubs and pepper spray. And he doesn't want to face that. He knows what's going to happen when he acts up on death row. He is going to get a whoopin. It's not going to go down easy.

And the question for you is not whether he's behaved himself in jail. And the question is not whether he could have done more bad things. This man is to be judged by the bad things he's already done, not by the opportunities he let go by. Do you think for a minute if the police had not caught up with him in Red Oak, Texas, and put him in a cage that he would stop committing acts of violence? Absolutely not.

You heard testimony from Dr. Coons, who told you in his professional opinion the Defendant is a -- is a threat. He will commit acts of violence in the future. And Dr. Edens predictably took exception to that. He told you that Dr. Coons' method s were unscientific, that they were unreliable, that there wasn't peer review. He told you there are scientific instruments out there that are used for risk assessments that are much more reliable than Dr. Coons' intuition.

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Did any of y'all kind of sit up on the edge of your seats when you heard that? I know I did. Because my first thought was, well, what do they tell us? Well, Dr. Edens didn't say. All he said was, there are better ways to do it and Dr. Coons didn't do it right, but I'm going to tell you what the real answer is. Why do you suppose?

It's kind of like standing in the wreckage of your living room describing to someone the plywood you could have put on your window before the hurricane arrived. Does it make sense to you? No.

Now, both good doctors told you that to some extent future conduct can be accurately predicted by past behavior. Well, let's look at what we've got here. We have a person whose life has been a spiral of ever increasing violence culminating in this crime. Pulled a knife on a little kid in junior high, then he moves up to slamming his girlfriend against the locker in high school paralyzing her arm. Then he moves up to beating his father with a broom and putting him in the hospital for weeks at a time. It took him a while before he could start using his body again and talking. And then he got caught with a 7-inch-bladed knife and then he moved up to this. Well, what did he do here?

Well, he took Bob Laminack and he fooled

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him. And we all know that old saying, you know, fool me once, shame on you; fool me twice, shame on me. Well, Bob unfortunately didn't have the benefit of hindsight. He only got one opportunity and it ended very badly.

But the Defendant didn't take advantage of Bob's bad side. He took advantage of what was good about him. You know, unlike a con man who took advantage of selfishness or greed, no, no. He took advantage of what was best in Bob; of his strengths, of his kindness, his generosity, his mercy, his compassion. And he convinced him that he needed help. And the Defendant got in a position to kill Bob Laminack based on that.

And after he sprained the trap and after Bob was completely at his mercy, Bob begged -- he said please, boy, don't kill me. And what did he say? Give me your wallet. Because that's who Brent Ray Brewer is. No amount of begging, no amount of pleading would have ever changed that outcome because that's who he is. That's who he was then, that's who he is now. And as long as men like Bob Laminack walk the earth, he will continue to take advantage of them. He is a future danger.

Once you answer that second question yes, I am confident that you will. You are going to be asked

to look at the mitigation question. I seem to have lost it in my notes. You will be asked to consider all the circumstances of the offense, the background and character of the Defendant, and decide if there is sufficient mitigating circumstance or circumstances that would justify imposing a sentence of life instead of death.

Now, the vast majority of what might be considered mitigation, you heard from the Defendant on the stand.

THE COURT: Three minutes, Mr. Gore.

MR. GORE: Thank you, Judge.

His sister said life was okay until he was fifteen. His mom said it was okay until he turned five, everything else pretty much came from the Defendant. Well, why shouldn't you believe the Defendant? Well, I'll tell you why. Let's talk about that suicide attempt in TDC.

This man lived under a death sentence for sixteen years, yet within two months of getting what probably has been the best news of his entire life, he decides to cut his wrist. He's got a new lease on life. He's got a new shot at getting off death row, and yet he becomes suicidal. And you can look at those records if you want to go through all of those hundreds of pages.

For sixteen years no contact with mental health at all except regular checkups. It's like going to the dentist.

Why do you suppose he got suddenly suicidal? Because he knew he was coming to see you. Because he is now here to pray on your generosity, your compassion, your kindness and your mercy. This is all a put on. He is not any more depressed than I am.

Bob Laminack did not have the luxury of hindsight when he was dealing with this Defendant, but you do. Fool me once . . .

Folks, for 19 years, Bob Laminack's voice has been silent and there's not a thing you can do to bring that back. He's gone. But you can give voice to justice through your verdict. You tell that man, you tell that family, you tell the world that as long as people like Bob Laminack walk the earth, you will protect them. And you tell that family that he was not a fool for being kind and generous and compassionate and merciful. And you tell that Defendant and everybody like him, that if they try to take what is good in all of us and turn it to our own destruction, they will reap what they sew.

This man has cast a shadow over the Laminack family for 19 years. A wife sent into the

twilight of her life alone, a grandchild who will never know the sound of his grandpa's voice, a daughter whose last memory of her father is watching him drive off to be murdered. Let this family walk in the light again.

THE COURT: Thank you, Mr. Gore.

Mr. Keith.

MR. KEITH: Thank you, Your Honor.

May it please the Court.

THE COURT: Mr. Keith.

MR. KEITH: Counsel.

MR. FARREN: Counsel.

DEFENSE'S CLOSING ARGUMENT

BY MR. KEITH: Good afternoon.

Brent Brewer murdered Robert Laminack. You know he was convicted of it in 1991 and he told you about it today. I can't stand here before you and try to convince you otherwise. It's a fact. And Mr. Brewer has sat before you and told you in detail what happened. There is no excuse. There is no justification. It wasn't a mistake. It wasn't an accident. It was capital murder.

As we've gone through the evidence in this case and you've listened to the testimony particularly of Ms. Laminack and Ms. Piper, I've seen you look at the family. I've seen you watch their testimony and I know

how impactful it is. I've seen your reactions to Ms. Laminack telling her story. I've seen your reaction to Ms. Piper. There's no dispute that their lives have been devastated. For me to stand here and try to convince you otherwise or to cast some doubt on that would be beyond decency. It's the truth.

And I know the testimony from those two ladies resinates with you. It certainly resinates with me. I heard Ms. Piper talk about what Mr. Laminack was doing before he got in that truck and she said he was piddling. And I don't know how, but I guess we go through life thinking our own words in our own little family terms are our own, but piddling struck home with me because my father piddled too. My father piddled in the barn. So I'm not trying to tell you that the Laminacks are not entitled to feel exactly the they do. I can't understand what they have been through. I can't pretend to and I can't convince you that I have, but I can tell you that I know what they've been through is real and I know you know it's real, but that's the beginning of this inquiry for you.

Mr. Brewer is guilty of capital murder. And you've spent the last week in excruciating detail and in horrible detail hearing about this crime, and it is up to you to determine what his sentence will be.

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In Texas as you know and as you heard throughout voir dire at great length, there are two punishments for a capital murder in Texas; life in prison or the death penalty. You immediately know that the death penalty is not appropriate punishment in every case, that the law is satisfied with a life sentence for a capital murder.

No sense of justice demands that you sentence Brent Brewer to die. And you each back in that long voir dire process expressed to us an understanding that you knew that. That there were no automatic death sentences for you. And we worked through these special issues, those three questions on the big boards out there, and you-all committed that you would consider the evidence in those cases in dealing with those questions, and I know that you will.

I tell you about my -- I guess my view or my feelings about the Laminacks because -- and their feelings because I can't imagine a capital murder that is not horrific. This table is filled with horror, and you've been treated to it this week and it's awful, and they are all awful. And if awful weren't the standard -- if awful were the standard for capital murders, we would execute everybody, because they are awful.

With Brent Ray Brewer guilty and having

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told you what he did, now you must determine what is the punishment for him; a life penalty or a death penalty? Brent Brewer sat here today in front of you for quite awhile. You got to look at him, you got to listen to him and you get to make your determinations about him.

Mr. Gore would have you believe that everything you saw is a put on. I could suggest to you otherwise, but it's up to you. One of the good things about this charge is that in the end it tells you that you are the judges of the credibility of what you hear. You folks get to determine if Brent Brewer was truthful with you. You get to make that determination about each witness that you saw, and I'm going to talk about those in just a little more detail. But when you read that charge, it will tell you that you are the exclusive judges of the facts and of the credibility of the witnesses.

I assure you that if Mr. Brewer had done something horrible in prison, you would have heard about it and it would have been used against him. And you have now heard that Mr. Brewer's life in prison he smoked a joint, he possessed marijuana -- is about the worst there is. There is a hair cut -- refusing to get a hair cut. There's an extra towel. And that record now is also being used against him.

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Well, he couldn't -- he couldn't hurt anybody or it's all a stunt because he hoped one day to be back here. He's been under a sentence of death since 1991. You get to look at him and you get to determine whether his behavior on death row was a stunt, because either way in the eyes of the Prosecution, Mr. Brewer is a fatal. Had he acted out, he'd be -- they would be after him. He's good, they're after him. Had he not got up in front of you and explained his feelings about what his acts had done to this family, he'd have no remorse. He tells you what his feelings are about his -- his acts and his consequences on that family, he's a liar. That's why that paragraph reads the way it does, because you folks got to sit and listen about Brent Brewer.

They've told you every horrible thing they can think about and find to tell you about him. At thirteen that's where it starts, and they tell you that's a summary of his life. That's every bad thing they could come up with. If somebody listed all the bad things I did in my first 19 years, it wouldn't look very good.

Way back when we put three pictures into evidence and I'm sure you remember them, just three pictures of Brent Brewer as a child. And you may think

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to yourself that's ridiculous. Folks, I'll admit to you I cannot compete with this table of horror. I can't show you pictures that somehow make that awfulness not here anymore. It is.

Those pictures show you that there is more to Brent Brewer than the worst three or four minutes of his life. Has he done bad things? Yes, he has. Has he told you about them? Yes, he has. You're entitled to know that Brent Brewer was a kid that liked to play football, not because you should feel sorry for him, but because he is a human being. He is not the monster that they have described for you. He has testified and you've got to listen to him, that that was -- that his conduct on death row was all he could do. What else could he do than try to be good? And you've got to see him tell you about that and I'm leaving it to you to determine whether that was a lie. But know that either way, Brent Brewer wasn't going to be spared this argument that he's just a liar.

Your Honor, may I have a warning at 10 minutes?

THE COURT: At what time?

MR. KEITH: 10 minutes.

THE COURT: Yes, sir.

MR. KEITH: Thank you, Your Honor.

The special issues, those three big boards that were out there, that's how you will make your decision about whether Brent Brewer lives or dies. It's not some nebulous question about justice. It's the answers to those questions.

The first question was the deliberate question. And all of you at some point during your voir dire heard about hypotheticals from the State. They may have been a convenience store where the convict shot the clerk because he wanted to leave no witnesses or you may have heard one about signing a real estate contract with a blue pen or a pen instead of a pencil. And it was to try to explain some distinction between an intentional act and a deliberate act.

Special Issue Number 1 asks you to determine whether they have proved to you that Mr. Brewer's conduct was deliberate beyond a reasonable doubt. In the hypothetical it's real easy because you have the thought box that says, I don't want them to erase my name. I don't want to leave any witnesses. It's not that easy. And it's not that simple. Beyond a reasonable doubt means more than that. You must consider the testimony that you have heard. You have heard Mr. Brewer's version of what happened in that truck. You have heard Ms. Nystrom's version of what

happened in that truck.

I don't think Mr. Brewer minimized his actions in that truck. I'm hard-pressed to figure out exactly why Kristie Nystrom is guilty of capital murder according to her. But at the end of her testimony, those last few minutes Mr. Farren is trying repeatedly to get her to tell you that he gave him that one last one, and she didn't do it. And she was upset and she said, I just don't remember that. Because that's what they want you to believe convinces you that it's deliberate.

You know Mr. Brewer intentionally killed Robert Laminack, you must consider that evidence in answering that first special issue of was it deliberate. And the answer to that question, folks, is no. They have not proved that to you beyond a reasonable doubt.

That second question in the middle was the one about future danger. Whether Mr. Brewer -- you are asked to make a prediction about his behavior. Dr. Coons has been brought up, and I don't want to belabor this, and you got to see Dr. Coons and he told you lots of stuff. And then he got a hypothetical and he dutifully picked up his pad and he wrote it all down, and he would have you believe that he made some kind of scientific decision looking at that legal pad and

sitting in that chair. That was nonsense.

Dr. Coons doesn't even have a concern about whether he is accurate or not. Did you ever go back and try to find out if you're right? Not really. If you're coming into court 50 times or however many it is he claims to have testified where people's lives are on the line and he doesn't even care to know if his supposed method is correct, that's beyond the pale.

This is not some ordinary lawsuit. This is a determination of whether Brent Brewer lives or dies, and he could really care less if it's accurate or not.

I don't think that I'd have to bring Dr. Edens in here to try and explain why that was not scientific because I think you could watch what was happening and understand it. And the interesting thing about Dr. Coons is, he told you all kinds of stuff, but he never told you, oh, by the way I was here in '91, and I made the same prediction then, and I've been wrong for the last 18 years.

Mr. Odiorne asked him, by the way, what was your prediction? Oh, I believe -- I predicted he would be a future danger. I would think that some sense of accuracy or integrity would lead him to believe that he needs to tell you I was here 18 years ago and I got a

hypothetical and I said the same thing. Dr. Coons is nothing for you to make a determination on Question Number 2.

You folks do not have to check your common sense at the door. And the part about assessing the credibility of witnesses applies with as much force to Dr. Coons as it does to Brent Brewer. Can you imagine going to a medical doctor, which Dr. Coons is, and he says you have a horrible disease and it doesn't look good and nothing ever happens, and you go back to him 18 years later and he says, oh, you have a horrible disease and it doesn't look good, well, that's what you told me 18 years ago. What Dr. Coons, in essence, has told you, don't worry, I'm just not right yet. How outrageous. How outrageous in making decisions about whether Brent Brewer lives or dies.

The third question was that long, confusing one that sat in front of the State's table about mitigating evidence and we talked at length that mitigating evidence was whatever you believed it to be, a reason that justifies a life penalty instead of a death penalty.

Personal moral judgments are about whether Brent Brewer lives or dies. And each of you is entitled to your personal moral judgment about whether

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Brent Brewer should live or die.

Mr. Brewer's childhood, you've listened to. Did Mr. Brewer have the worst childhood in the world? Of course not. Is it an excuse for what he did? Of course not. But before you decide that someone should be put to death, you should know the thousand-mile journey that Mr. Odiorne mentioned to you way back in opening, that Mr. Brewer's life is more than its worst three or four minutes. And I don't think it's beyond the pale to understand that things happen in our life that change the way we are in the paths we take.

The fact that Brent Brewer had scoliosis, is that some justification to tell you that you should forgive all of this? Of course not. But it does, I think, explain why Brent Brewer then starts to go and hang around with different types of people, use drugs and use alcohol. The paths people take have a lot of -- there are lots of reasons lives go the way they go. At age 19 we are prone to do things like that.

Can I imagine that the Laminack family was offended beyond imagination had they seen that (indicting), and I don't know that they did. Of course. How callous. How outrageous. Mr. Brewer has lived almost as much of his life on death row as he has outside.

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THE COURT: Ten minutes, Mr. Keith.

MR. KEITH: Thank you, Your Honor.

THE COURT: Yes, sir.

MR. KEITH: The State would have you believe that this is an act, that this is a charade that Mr. Brewer telling you I've tried to do right even though it's on death row, that that's all ridiculous.

You have to examine your belief system about redemption and about whether people change from the time we're 19 years old to the time that we're nearly 40. I don't think that many of us can say that we're the same person we were at 19, but most of us have not done what Brent Brewer has done. So it makes it easy to say it's all nonsense. You are just here to save your skin now. You folks got to see him, you got to listen to him and you're entitled to make your determinations about what you heard.

These three questions ask you to determine whether he lives or dies. Question 2 wants you to predict whether he's a future danger. Because he hasn't done anything wrong, the State tells you that couldn't possibly be indicative. Had he been -- had he done something violent, you would have heard about it, and it would have been the reason he's a continuing threat. The State hasn't come close to proving to you

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beyond a reasonable doubt that there's a probability he is going to continue to commit criminal acts of violence. Everything they can point to is on the table of horror, and it's what Brent Brewer did from age 13 to age 19.

A jury in 1991 had to make a prediction about the future and the future conduct of Brent Brewer. You folks have 18 year's worth of evidence of that conduct. You don't have to look into crystal balls or listen to charlatans like Dr. Coons. You folks can examine the evidence and what's been put before you. Brent Brewer is clearly not a future danger. The answer to Question 2 is no, because they have failed to prove that answer.

Question 3 involves your personal moral judgment. Is there evidence in this case, when I consider everything, that indicates that a life sentence is appropriate for Brent Brewer and not death, and each one of you make your own determinations, your own moral judgment about what that is and whether you believe that to be the case. And you never have to violate your conscience about what your decision is, that you make your personal moral judgments about Brent Brewer.

You will read this document. It's lengthy as the Judge told you. There is no esoteric

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concept that demands death for Brent Brewer and I'm asking you to choose life penalty for Brent Brewer. The answer to Question 1 no. They have not proved it, and that's where it would end.

If you got to Question 2 about Brent Brewer's future danger, the answer is no. They have not proved that. And as to Question 3, each of you get to make your personal moral judgment and determine if there is mitigating evidence that is sufficient for a life penalty for you. And if there is, the answer to that question is yes if you get to it. Thank you.

MR. KEITH: Thank you, Your Honor.

THE COURT: Thank you, Mr. Keith.

Mr. Farren.

MR. FARREN: Thank you, Your Honor. Counsel. Counsel.

MR. KEITH: Counsel.

STATE'S FINAL CLOSING ARGUMENT

BY MR. FARREN: I didn't know Tony Odiorne nor Ray Keith before the trial. I have gotten to know them during this trial. They're very accomplished attorneys. They are very good at what they do, but what Mr. Keith tells you in final argument is not evidence. That's his spin on the evidence. Let's see how accurate that spin is.

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First of all, he tells you he's not sure why Kristie Nystrom would plead guilty to capital murder. The reason she pled guilty to capital murder is because she knows there was a plan, that's why the blood is all on her back and in the back of her hair. You see she is looking out the window because she knows what's coming. She is not going to watch. Kristie Nystrom knew there was a plan, but there doesn't have to be a plan for an act to be deliberate. There has to be deliberation, and it can be very brief. It can be as brief as -- as deciding to sign a contract with a pen instead of a pencil. Let's look at the actual evidence in the case.

We're in the midst of an attack where we're holding onto a knife, a very sharp knife. A knife that hurts when you cut yourself. But you've had paper cuts. You've cut yourself with a knife. It's a second or two before you realize, I've -- I've cut my hand.

The Defense would have you believe he holds onto this knife, stabbing -- and cuts himself and keeps stabbing him with this thing, but that's not what the evidence shows and that's not what common sense tells you. Here's what really happens.

The attack began, he's stabbing Mr. Laminack repeatedly -- and by the way, just because

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there's four blows and some defensive wounds, doesn't mean that's the only efforts to stab. We have no idea how many efforts were made. But at some point he cuts his hand so badly that when he tries to grab those keys, he can't, he's having trouble. It's hurting. Does anybody think he held them and kept stabbing after he cut his hand? The cut came at the end, and that's also the reason the arm that was in his lap is now on the other side of that cooler.

Because when he asked for the wallet and the keys and he got the wallet, but not the keys, then after a moment's deliberation the death blow. Now, he reaches for the keys, and here's how we know. Now, did Kristie go after the keys? Probably. But did she get them? I don't know. But they both went after the keys, and here's how I know. The evidence says so. Her fingerprint is on that steering column and Brent Ray Brewer's blood is on that steering column. There's only two places we found Brent Ray Brewer's blood, on the knife and the steering column. He probably did go after the keys. The last blow cut his hand. He went after the keys and left blood on the steering column or the last blow cut his hand and blood splattered onto the steering column. Now, that's not a spin, that's the evidence. Was there a plan? I certainly think so.

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Kristie Nystrom apparently thinks so, but there was sure deliberation.

Now, we're told that Dr. Coons is a lying perjurer. This is a man who gets in here for money and tells you what we want him to say. That's their evaluation of a man with 38 years of a distinguished career as a psychiatrist, so recognized the governor picks him for various projects. Credentials out the kazoo, and you're to believe that he is a lying perjurer. I'll let you decide which is spin, which is reality.

And by the way, he was right 19 or 18 years ago or however long it's been and he's still right today. This is a probability, not a certainty.

Now, we're told by Defense that if he had done nothing wrong in prison, you would have been told about it. I have no idea whether he did anything wrong in prison. I have no idea whether any prisoner has done anything wrong in prison because I have no idea what's reported and what's not. I know tons is not. Common sense tells you that.

In the real world when you show a knife to a kid in school, somebody tells. In the real world when you slam a girl into a locker and paralyze her, she tells. In the real world when you murder a man and

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leave his body out there on the street in a pickup, somebody finds it and tells, but not in prison. If you get beat up in prison and tell, you get dead. I have no idea what any prisoner has done in the last 17, 18, 19 years in prison, including him, and neither do you. But I do know what the probability is that he's done something and I know what the probability is in the future, because I have a distinguished, eminent expert and my common sense tells me based on the first 19 years of his life it would be incredible for me not to think that I'm going to continue to see a probability of continued acts. And I'd have to be insane to believe that they will only get reported.

And by the way, when we talk about probability, I can't tell you with certainly what will happen in the future, neither can Dr. Coons, but don't leave this courtroom today -- don't leave this courtroom today after having made a decision and pick up a newspaper or turn on a radio or television and see and hear his name and say to yourself, oh, my God, what have I done. Because the probability, if he gets a life sentence, is that that's what is going to happen.

By the way, in prison there are some big guys who will come right at you like a freight train and then there's some guys who will come up behind you like

a little snitch and get you. I'll let you decide whether you think he's the kind of guy who will come head on or come up from behind. I know Robert Laminack knows the answer.

Mitigation -- again, it's your call. We have no burden of proof there. No one has a burden of proof. You decide whether you've heard any mitigating evidence, and if so, whether it's sufficient. Is it sufficient -- I had scoliosis so I get to kill people? My dad was -- I didn't like my dad. He was mean to me. I'm not going to waste your time rehashing it. If -- if -- if what you've heard about his life is the kind of life that means you don't get the death penalty when you commit a brutal murder like this, with all the other evidence, and then you hear what you heard about him, if that means you don't get the death penalty, then we're done, because there will never be another one because almost anybody can present a life like that.

There's been a little bit of new evidence in this case that nobody ever heard before, Kristie Nystrom. And I think it helps a lot. I think it helps us know for sure there was a plan. The other jury apparently believed there was, but now we have even more evidence from Kristie Nystrom.

Now, I realize that she may have a motive

to lie to you. I realize that. She's been up for parole twice. She's hoping --

MR. KEITH: I'm going to object at this point and renew my previous objection.

THE COURT: Overruled.

MR. FARREN: She's been up for parole twice and she is hoping the parole board will hear this time that she did cooperate for the first time and testified. I understand that. But you saw her testimony. I -- I truly believe part of it is she finally wants to try to do what is right by the Laminack family.

It's been 19 years and as my colleague pointed out, this is an opportunity to you -- for you to give voice to justice. It's been 19 years and it's time for a final verdict that will determine the proper sentence for Brent Ray Brewer.

I -- I take no joy in the death of any person. I -- if -- if you believe I'm up here and that -- that I relish the thought of Brent Ray Brewer dying, I do not. I take no pleasure in the death of any person, but there are some things that are just right and just. Sometimes it's just not easy.

I was in Vietnam. I was scared to death. It's hard, but I had a duty and I did it. When my dad

flew 101 missions over China in World War II against the Japanese and was shot down three times, he was scared to death. It was hard, but he had a honor -- a duty to do his duty. He had an obligation.

You're not supposed to go back there and decide, gosh, I don't -- I don't want to be involved in a death penalty. You are supposed to go back there and answer those questions. And the answer to one is yes. There was a plan. But even if there wasn't, he sure deliberated.

Number 2. There is a probability -- there is a probability that he not only will, but he already has, but we don't have anyway to know. And, 3, if there's any mitigating evidence, it's sure not enough.

It's time to do our duty to Robert Laminack. It's right, it's just, and God knows it's time. Thank you.

THE COURT: Thank you, Mr. Farren.

Ladies and gentlemen, it's in your hands. Before I let you go, I've got to do one other thing.

Ms. Robinson, you're my alternate. I told you when I swore you in that you were going to go back and deliberate. But since I talked to you that day, I have read a case out of San Antonio, Trinidad

versus State, that says I cannot let you go in there. It's brand-new law. It just happened, so -- and the reasoning was -- is because the U.S. -- the Texas Constitution requires 12 jurors and it does not require more or less and won't allow more or less, and that was the reasoning behind that.

If I could let you go in there, I would. But if I did, it would come back. So I want to thank you for serving. You remain a juror until that verdict comes back in. So please don't go read anything or talk to anybody just yet. You are free to stick around the courthouse, see what happens, if you want, or anything you'd like, but --

MR. FARREN: I'm sorry to interrupt, Your Honor. It's just out of an abundance of caution. Many times folks in the audience or others see someone who is an alternate and go up and kind of ask them, well, what do you think and so forth trying to get a feel for it. And I just -- it might be wise, if they don't understand, let them know that they're not supposed to talk to her.

THE COURT: Well, leave that juror badge on if you stay in the courthouse, will you?

JUROR ROBINSON: Yes, sir.

THE COURT: And stick around if you want

or go and we'll let you know. We'd be glad to do it either way. But I sure thank you, and I will thank the rest of you when you're done.

And if something happens to one of them, God forbid, in the next few hours, then you will be brought in. That's why you are here. Thank you.

Thank y'all. And here's the charge.

(Jury deliberations)

THE COURT: We'll be in recess until we hear from them. Everybody stay close in case we get a note. I sure expect one.

(Recess)

(Open court, defendant present, no jury)

(Off the record discussion)

THE COURT: Let's go on the record and I'm going to tell everybody what I have. I have two notes. The first part of the note on top here says, "we would like to see evidence, the letter -- Number 1, the letter submitted today Brent Brewer to K. Nystrom."

We have that. That's in evidence. They're entitled to that. Then they want to see the report submitted papered by the, doctor, Dr. Evers.

MR. KEITH: Dr. Edens.

THE COURT: Edens. Why can't I remember that?

MR. FARREN: The what from Dr. Edens?

THE COURT: A report --

MR. KEITH: The study.

THE COURT: It's not in evidence. They can't have it.

Then they want what I just read, autopsy photos or drawings showing wounds.

MR. FARREN: Here's the photos from the autopsy, Your Honor.

THE COURT: Look at them and make sure that's everything. And if there's anything you want.

Now, I have some more notes.

MR. FARREN: Oh.

THE COURT: We ain't done.

MR. KEITH: Okay.

THE COURT: In the bottom -- on the bottom part of the page of the first note they say, "Judge Miner -- they misspelled my name after a week -- is life sentence, quotation marks, without chance of parole, closed quotation marks, signed Mr. Treat?"

Now --

MR. FARREN: He's the CPA.

THE COURT: Byron Treat.

Now, I knew we'd get a note about parole without question. I didn't know we would get two at once. Here's the second note.

"Does a life sentence constitute life without parole? Is there a possibility of parole in the future?"

MR. FARREN: Read your charge and continue deliberations.

THE COURT: That's right. Okay. Let me -- let me start with -- okay. I propose to give them the evidence they've asked for that's in evidence.

MR. KEITH: Can you read your response?

THE COURT: And here's what I propose to respond, and I'm willing to hear all sides on this.

Mr. Foreman, here is the evidence you asked for. If it's not included, then it is not in evidence before you and you cannot consider it.

As to the questions you asked, please reread the charge, and that is all I can tell you.

MR. KEITH: I just want to put objections on the record before it goes back, Judge, but that's --

THE COURT: Go ahead.

MR. KEITH: At this point, Your Honor, we would object to sending back Exhibits 34, 35, 46, 47, 48, 49, 50, 51, 52, 82 and 82A. Your Honor, we would object to those being sent back for our previous objections to these exhibits under the 6th Amendment

Crawford versus Washington, Melendez-Diaz versus Massachusetts. These were purported to be reintroduced as evidence in this case. They were not before this jury, while they were introduced before the jury in 1991. At this point, we would renew the objection to those going back on that basis.

Further, Your Honor, we would ask at this point for a mistrial based upon the jury's request for instructions regarding the issue of parole. Parole by pretrial order of this Court was not to be introduced into this case. It was introduced and put into this case by the State. This jury is not entitled to be considering parole. The note is evidence that they are indeed considering parole and so we would ask for a mistrial on that basis -- on the basis that we initially requested that parole be kept out of this case under the 8th and 14th Amendments, that it is extreme prejudice to Mr. Brewer and that there is no basis for the jury considering parole under the Texas law applicable for this case. I believe that is it. Is that it?

We would just re-urge our objections to the autopsy photos and to the issue of parole, Your Honor.

THE COURT: Yes, sir. I will overrule your objection, and I will deny your Motion for