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

[SEAL]

9/6/2023 **WR-94,428-01**
JACOB, LEON PHILLIP

Tr. Ct. No. 1543812-A

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Deana Williamson, Clerk

App. 2

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

[SEAL]

9/6/2023 **WR-94,428-02**
JACOB, LEON PHILLIP

Tr. Ct. No. 1543813-A

This is to advise that the Court has denied without written order the application for writ of habeas corpus.

Deana Williamson, Clerk

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

[SEAL]

9/6/2023 **WR-94,428-01**
JACOB, LEON PHILLIP

Tr. Ct. No. 1543812-A

On this day, this Court has denied applicant's "APPLICANT'S MOTION TO FILE AND SET THIS APPLICATION ON IMPORTANT QUESTIONS OF LAW THIS COURT HAS NOT BUT SHOULD DECIDE".

Deana Williamson, Clerk

OFFICIAL NOTICE FROM
COURT OF CRIMINAL APPEALS OF TEXAS
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[SEAL]

9/6/2023 **WR-94,428-02**
JACOB, LEON PHILLIP

Tr. Ct. No. 1543813-A

On this day, this Court has denied applicant's "APPLICANT'S MOTION TO FILE AND SET THIS APPLICATION ON IMPORTANT QUESTIONS OF LAW THIS COURT HAS NOT BUT SHOULD DECIDE".

Deana Williamson, Clerk

No. WR-94,428-01
No. WR-94,428-02

In the
Court of Criminal Appeals

For the
State of Texas

———♦———

Cause No. 1543812-A
Cause No. 1543813-A
In the 263rd District Court
Of Harris County, Texas

———♦———

EX PARTE LEON JACOB

Applicant

———♦———

TRIAL COURT'S FINDINGS OF FACT, CONCLUSIONS OF LAW AND RECOMMENDATION

———♦———

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

(Filed Apr. 24, 2023)

On March 23, 2018, a jury found Applicant guilty of soliciting the capital murders of Meghan Verikas ("Verikas") and Mack McDaniel ("Mack") in cause numbers 1543812 and 1543813.[1] The jury assessed

[1] Applicant was charged along with Valerie McDaniel, Mack McDaniel's ex-wife, with whom Applicant had a romantic relationship in January 2017. (4 RR 24). Valerie committed suicide before

punishment at life in prison and a $10,000 fine in each case. George Parnham ("Parnham") and Matthew Pospisil ("Pospisil") represented Applicant at trial.

The Fourteenth Court of Appeals affirmed Applicant's convictions in a published opinion issued on August 29, 2019. *Jacob v. State*, 587 S.W.3d 122 (Tex.App.–Houston [14th Dist.] 2019, pet. ref'd). The Court of Criminal Appeals refused discretionary review on March 11, 2020. *Jacob v. State*, Nos. PD-1262-19 & PD-1263-19 (Tex.Crim.App. 2020). Scott Shearer represented Applicant on appeal.

Applicant filed habeas corpus applications alleging that Parnham was ineffective at the pretrial and punishment stages on June 3, 2022. The State acknowledged receipt of the applications on June 8, 2022.

On June 13, 2022, the presiding judge of the 263rd District Court, the Honorable Amy Martin, issued an order designating issues; namely, whether Parnham was ineffective at the pretrial and punishment stages of Applicant's trial.[2] Judge Martin referred the habeas applications to Felony Associate Judge Inger Chandler.[3]

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trial. (4 RR 43) (2 WH 54). To avoid confusion, the Court refers to the McDaniels by their first names.

[2] The presiding judge of the 263rd District Court at the time of trial was Hon. Jim Wallace; the presiding judge at the time of the habeas application(s) was Hon. Amy Martin; the current presiding judge is Hon. Melissa Morris.

[3] Chapter 54A of the TEX. GOVT. CODE permits district court judges to refer applications for writ of habeas corpus to criminal

The associate court conducted an evidentiary hearing on September 1-2 and October 6, 2022.

Having reviewed the original applications for writ of habeas corpus in cause numbers 1543812-A and 1543813-A, the documents filed in cause numbers 1543812-A and 1543813-A, the writ hearing record and exhibits in cause numbers 1543812-A and 1543813-A, and the official court records of the challenged convictions in 1543812 and 1543813, the Court recommends that relief be **DENIED** based on the following findings of fact and conclusions of law:

FINDINGS OF FACT

APPLICANT'S FIRST AND SECOND GROUNDS FOR RELIEF

Ineffective Assistance of Counsel at Guilt/Innocence: Failure to Advise Applicant to Plead Guilty

1. Applicant alleges that Parnham was ineffective during the pre-trial stage for failing to advise him to plead guilty, as both charges were "indefensible." *Applicant's Writs* at 6, 8.

2. Applicant alleges that the charge involving Verikas was "indefensible" because the defensive theory was based on an expert opinion that was

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associate judges, and confers on said associate judges the power to conduct hearings, make findings of fact, formulate conclusions of law, and recommend the rulings, orders, or judgment to be made in a case.

inadmissible and foreclosed by law. *Applicant's Writs* at 6.

3. Applicant alleges that the charge involving Mack was "indefensible" because there was no viable defense under the theory of party liability. *Applicant's Writs* at 8.

4. Applicant alleges that but for Parnham's deficient conduct during the pretrial stage, he would have pleaded guilty to both charges and elected for the jury to assess his punishment. *Applicant's Writs* at 6, 8.

5. Applicant concedes/conceded guilt and characterizes/characterized his cases as indefensible throughout his writ applications and hearing.

6. The Court finds that Parnham and Pospisil advised Applicant of his pretrial options. (3 WH 44-45).

7. The Court finds that Applicant was aware of and had reviewed all the evidence in his cases. (7 RR 36) (3 WH 47-48).

8. The Court finds that Applicant consistently maintained his factual innocence in both cases. (2 WH 168-72) (3 WH 20, 30-31, 44-45); *See McCoy v. Louisiana*, 582 U.S. ___, 138 S.Ct. 1500 (2018) (recognizing defendant's Sixth Amendment autonomy right to insist on his innocence).

9. The Court finds that Applicant consistently maintained that he wanted to exercise his right to a jury trial. (2 WH 168-72).

10. The Court finds that the State made a plea-bargain offer of 40 years in the Institutional

Division of the Texas Department of Criminal Justice, which Applicant rejected. (CR 65) (2 WH 167-68). *State's Writ Exhibit 2, "5-25-2017 Reset."*

11. The court finds that there was no evidence presented in the habeas proceeding that Parnham advised Applicant to reject the plea bargain offer. *Lafler v. Cooper*, 132 U.S. 156 (2012) (finding trial counsel ineffective *for advising client to not accept a plea bargain offer*) (emphasis added).

12. The Court finds that regardless of the evidence against a criminal defendant, the U.S. and Texas Constitutions guarantee criminal defendants the unabridged right to a jury trial, upon which Applicant insisted. U.S. CONST. AMEND. VI; TEX. CONST. ART. 1, §§ 10, 15.

13. The Court finds that Applicant has failed to show that Parnham's conduct was deficient because he either 1) encouraged Applicant to go to trial, or 2) failed to convince Applicant to plead guilty. (3 WH 48-49).

14. Assuming, *arguendo*, that Parnham's conduct was deficient for either of the reasons stated in paragraph 13, the Court finds that Applicant was not prejudiced, as he has failed to show that, "but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the trial court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or

sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed." *See Lafler v. Cooper*, 132 U.S. at 164 (factors to establish prejudice in cases where counsel advises client against plea bargain).

15. The Court finds that Applicant has failed to meet his burden under *Strickland v. Washington.*

Indefensibility – The Charge Involving Verikas

16. Parnham's defense to the charge that Applicant solicited the capital murder of Verikas was that audio recordings of Applicant and undercover officer Javier Duran ("Duran"), who posed as a hitman, revealed that Applicant did not intend to have Verikas killed. *Applicant's Writs* at 6; (4 WH 55-56).

17. Parnham filed pretrial notice of his intent to use expert testimony from Dr. Al Yonovitz ("Yonovitz"), a forensic audiologist. (CR 99) (2 WH 62-67, 174, 189).

18. Parnham testified that he believed Yonovitz's expert testimony was admissible and that he would not have engaged him had he thought otherwise. (2 WH 193-194).

19. After the State rested, the trial court held a *Daubert* hearing to determine whether Yonovitz was qualified as an expert and his testimony was relevant under TEX. R. EVID. 702. (6 RR 149, 166).

20. Yonovitz testified that he had been qualified as an expert witness in voice identification and authenticity and had testified "hundreds of times having to do with acoustic issues in forensic sciences," and that he had only once or twice before been prevented from testifying in a court of law as an expert. (6 RR 168-69).

21. Yonovitz testified that he reviewed "a great voluminous amount of audio information [including] text messages" and "assimilate[d] and collate[d]" recordings between Applicant and Duran, enhanced the conversations, and "put them in a manner that would allow perhaps a jury to understand the structure of what was said during the time that those indications [sic] by [Applicant] were made." (6 RR 170, 173-74).

22. Yonovitz's written report concluded that Applicant "was always under the impression that he and the undercover officer had made arrangements to relocate Verikas to Pittsburgh." (6 RR 179).

23. The trial judge excluded Yonovitz's opinion, because "[jurors] don't need an expert to tell them what [Applicant's] intent was." (6 RR 180) (7 RR 17).

24. The trial judge initially agreed to permit Yonovitz to testify about the enhanced recordings, but the State objected that Parnham had not produced Yonovitz's enhancements for the State to review, so the trial judge excluded all of his testimony. (6 RR 181-82).

25. On direct appeal, Applicant raised as a point of error that the trial court abused its discretion when it excluded the testimony and enhanced audio prepared by Dr. Yonovitz. *Jacob*, 587 S.W.3d at 132.

26. The appellate court held that the trial judge did not err in excluding this testimony: "Expert testimony about a defendant's state of mind at the time of the offense is speculative and improper." *Jacob v. State*, 587 S.W.3d at 133.

27. The appellate court further held that the trial court did not abuse its discretion: "Given that the trial court heard all of the audio recordings through the presentation of other witnesses, the trial court stood in the best position to determine whether Yonovitz's proffered testimony – exclusively devoted to a review of that evidence – would assist the jury . . . The trial court's decision to exclude Yonovitz's testimony falls well within the zone of reasonable disagreement and so does not amount to an abuse of discretion." *Id.*

28. The Court finds deficient Parnham's conduct in failing to recognize the inadmissibility of Yonovitz's testimony regarding Applicant's intent.

29. The Court does not, however, find persuasive the claim that Applicant would have pleaded guilty and elected the jury to assess his punishment had he known Yonovitz's testimony was inadmissible or would be excluded.

30. The Court finds that despite the exclusion of Yonovitz's testimony, Parnham and Pospisil persisted in their defensive theory that Applicant

did not have the requisite intent to have Verikas murdered, but that he merely wanted her to move back to Pittsburgh. (4 RR 31-44, 57-58, 271-76) (5 RR 35-68, 74-78) (6 RR 6-51, 55-60, 118-146, 187-226) (7 RR 19-109, 133-37) (3 WH 28-29, 65-66).

31. The Court finds that there is credible evidence that Applicant would not have pleaded guilty to either case under these circumstances because he consistently maintained his factual innocence. (2 WH 168-72) (3 WH 20, 30-31, 44-45).

32. The Court finds that Parnham's deficient conduct relating to Yonovitz did not result in prejudice to Applicant.

33. The Court finds that Applicant has failed to meet his burden under the second prong of *Strickland v. Washington.*

Indefensibility – The Charge Involving Mack

34. Applicant claims Parnham was ineffective for failing to recognize that his defensive theory for the case involving Mack – that Applicant did not know that Valerie intended to have Mack killed – was indefensible under the theory of party liability. *Applicant's Writs* at 8.

35. Applicant claims had he known the case involving Mack was indefensible under the theory of party liability, he would have pleaded guilty and elected the jury to assess punishment. *Applicant's Writs* at 8.

36. The Court finds that Parnham and Pospisil persisted in their defensive theory that Applicant did not want Mack dead, or know that Valerie wanted Mack dead. (4 RR 31-44, 112) (5 RR 92-100) (6 RR 6-51, 55-60, 118-146, 143-46, 150-53, 161-165, 187-226) (7 RR 19-109, 133-37) (3 WH 28, 31-32, 65-66, 72-74).

37. Part of Parnham's defense to the charge that Applicant solicited the capital murder of Mack was based on an audio recording of Valerie openly stating that *she* wanted Mack killed. (3 WH 31).

38. The Court finds that despite the exclusion of the recording itself, Pospisil was able to question Sgt. Quinn about the statements Valerie made on the recording. (6 RR 141-44).

39. The Court does not find persuasive the claim that Applicant would have pleaded guilty and elected the jury to assess his punishment under the theory of party liability.

40. The Court finds that there is credible evidence that Applicant would not have pleaded guilty to either case under these circumstances because he consistently maintained his factual innocence. (2 WH 168-72) (3 WH 20, 30-31, 44-45).

41. The Court finds that Applicant has failed to meet his burden under *Strickland v. Washington.*

Failure to Discourage Applicant from Testifying

42. Applicant testified in his own defense at trial. (6 RR 187-266).

43. The Court finds that Applicant always planned to testify at trial. (3 WH 55-56).

44. The Court finds that Pospisil apprised Applicant of the adverse consequences of testifying well before trial (3 WH 56).

45. The Court finds that Parnham and Pospisil advised Applicant prior to trial that he did not need to testify to present their defense, but Applicant maintained that he wanted to testify anyway. (2 WH 67-69) (3 WH 57).

46. The Court finds that Pospisil conducted mock cross-examinations and gave Applicant specific feedback about how badly he was coming across. (3 WH 55)

47. Pospisil testified at the writ hearing how Applicant acknowledged Pospisil's feedback: "He kind of joked about it and always told me that he would be fine when the time came." (3 WH 55).

48. The Court does not find persuasive the claim that Applicant was not properly advised about his decision to testify and the potential risks.

49. The Court does not find credible that Applicant would have pleaded guilty and elected the jury to assess his punishment had he known in advance that his testimony would not persuade the jury of his innocence.

50. The Court finds that there is credible evidence that Applicant would not have pleaded guilty to either case under these circumstances because he consistently maintained his factual innocence. (2 WH 168-72) (3 WH 20, 30-31, 44-45).

51. The Court finds that Applicant has failed to meet his burden under *Strickland v. Washington.*

APPLICANT'S THIRD GROUND FOR RELIEF

Ineffective Assistance of Counsel at Punishment: Failure to Present Mitigation Evidence

In his third ground for relief, Applicant claims he received the ineffective assistance of counsel at the punishment stage of trial because trial counsel failed to, 1) present readily available mitigating evidence of Applicant's history of mental illness; and 2) present medical records as well as expert testimony from a mental health professional who could have explained to the jury what the evidence meant and why it was mitigating. *Applicant's Writs* at 10.

Readily Available Mitigating Evidence

52. Immediately prior to the start of the punishment stage, the following colloquy ensued outside the jury's presence when Parnham asked to place something on the record:

> MR. PARNHAM: Thank you, Judge. This concerned Dr. Gerald Harris. Dr. Harris is a professor of psychology at the University of Houston. Early on in my representation I had Dr. Harris come down and talk with my client and he was prepared to evaluate my client and to testify as to an evaluation. We had prepared all the necessary paperwork, medical authorization forms, et cetera.

> My client did not want to be evaluated by Dr. Harris and, in effect, refused to do that. We had subpoena forms prepared for Menninger Clinic ready, they were ready to bring in whatever information they had. *And the medical authorization forms on Menninger were refused to be signed by Mr. Jacob.*
>
> *We've made the efforts to produce these individuals and I just wanted the Court and the record to know that we cannot get the medical authorization forms necessary to produce this information signed by Mr. Jacob.* . . . We are not going to call him. *He has nothing to testify about.*
>
> *He has a conversation with* [Applicant] *and that's it. You know, I asked him to call me back after he takes a look at his notes. He has not called me back.*

(8 RR 7-8) (emphasis added)

53. The State obtained Applicant's medical records from Menninger before trial ("Menninger records"). The State obtained a protective order and served it on Parnham on September 22, 2017. The protective order indicated that Parnham requested the records pursuant to CCP Article 39.14(a). The State indicated in its protective order that it would make the records available for Parnham.

54. On September 22, 2017, the State filed the Menninger records in the clerk's office with a business records affidavit. The records were in the

State's file and also on file with the clerk's office at all times and available to the defense. At no time did the State suppress the records, withhold the records, or withhold access to the records from the defense. (3 WH 5).

55. The Court finds that Parnham could not provide a credible explanation for why he informed the court that he had not obtained Applicant's Menninger records for the reasons stated in paragraph 52 when 1) he had a signed power of attorney from Applicant's mother, and 2) the Menninger records had been on file with the Harris County District Clerk since September 22, 2017. (2 WH 43-47, 88).

56. The Court finds that Parnham admitted that he blamed Applicant for his inability to obtain the Menninger records. (2 RR 91).

57. Parnham testified that he had no independent recollection of reviewing the Menninger records but he was "sure" he knew that these records were in the State's file, and assumed he was entitled to copies of his client's own medical records that were in the State's possession. (2 WH 92-93, 209).

58. Parnham testified that once he obtained these records, he would have been able to determine what medical professionals treated Applicant, issue subpoenas for them, and admit them with a business records affidavit. (2 WH 92).

59. Parnham testified that he would then have been able to present testimony through these witnesses regarding the content of those records

during the punishment stage that would have provided the jury with Applicant's medical history as well as his various diagnoses, treatments, and medications. (2 WH 92-93).

60. Applicant's Exhibits 2A and 2B, admitted by Applicant and stipulated to by the State, contain the Menninger records.[4] (3 WH 5-6) (4 WH 201-02); *Agreed Stipulation of Evidence*, filed September 22, 2022.

61. The Menninger records revealed that Applicant was admitted on August 25, 2013, where he was treated by Dr. Michael McClam, and reflect, *inter alia*:

- Applicant was diagnosed with Narcissistic Personality Disorder.
- Applicant was diagnosed with Bipolar Disorder NOS.
- Applicant experienced elevated mood with associated grandiosity, decreased need for sleep, racing thoughts, pressured speech, impulsivity, frequent panic attacks, and acting out behavior, all of which was consistent with his diagnosis of bipolar disorder.

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[4] These records will be referred to as the "Menninger records" and are identified in certified public document number 79390306, filed with the Harris County District Clerk's Office on September 25, 2017. The Menninger records contain 462 pages of medical records. When referencing specific page numbers, the Court will utilize the page number printed vertically by the Clerk's office along the left side of the page.

- Applicant experienced a depressed mood with associated anhedonia, insomnia, fatigue, and feelings of worthlessness.
- Applicant was a victim of both trauma and abuse.
- Applicant was diagnosed with Obsessive Compulsive Personality Disorder.
- Applicant was treated for mania, irritable and impulsive behavior, and with Lithium for manic symptoms.
- Applicant was identified as being aggressive, overbearing, and exerting intense interpersonal pressure in an attempt to control the outcome of an interaction.
- Applicant's family has managed grief and loss, and bipolar illness.
- Applicant's acting out behavior caused him significant functional impairment.
- Applicant witnessed his father die in front of him at age fourteen from a heart attack, had to call 911, and dragged him out of his closet for the paramedics.
- Applicant needed emotional help after his father's death, which he never received.
- Applicant had to help take care of his siblings and got his driver's license at age fourteen.

- Applicant's relationship with his mother was "bizarre."
- Applicant witnessed violence, sexual acts between his parents, and witnessed his mother physically assault his sister.
- Applicant completed all aspects of his wellness and recovery planning and actively participated in individual substance abuse counseling.
- Applicant made a sincere effort to better modulate his behavior and tolerated and appreciated the structure of his unit well.
- Applicant had success moderating his alcohol consumption.
- Applicant progressed to the highest level of unit responsibility and successfully completed his course of treatment.
- Applicant first noticed his bipolar symptoms when he was in medical school.
- Applicant's brother suffers from bipolar disorder and depression.
- Applicant's uncle committed suicide by hanging himself at age 34.
- Applicant's paternal grandfather was a Holocaust survivor and several of his family members died in Auschwitz.

Menninger Records.

62. The Court finds deficient Parnham's conduct in failing to obtain and present readily available mitigating evidence of Applicant's history of mental illness.

63. The Court finds deficient Parnham's lack of candor with the court and/or competence relating to his knowledge of the Menninger records during the bench conference at the start of the punishment phase of trial.

Dr. Gerald Harris

64. Applicant presented the testimony of psychologist Dr. Gerald Harris ("Dr. Harris") during the writ hearing in support of his third ground for relief. (2 WH 97-157) (4 WH 110-189).

65. Dr. Harris was retained pretrial by Parnham to conduct a mental health evaluation on Applicant. (2 WH 120) (4 WH 112-13, 116-17).

66. Dr. Harris visited Applicant in the Harris County jail on May 11, 2017 to proceed with the mental health evaluation. *State's Writ Exhibit 1.*

67. Applicant refused to sign the consent form to proceed with a competency and sanity evaluation on May 11, 2017. (4 WH 113-14).

68. Applicant also refused to talk to Dr. Harris or answer any of his questions; Applicant refused to do anything cooperatively with Dr. Harris. (4 WH 114).

69. Pospisil recalled that Applicant did not want to participate in any kind of mental evaluation and was uncooperative. (3 WH 13, 50-51).

70. Because Applicant did not consent to the evaluation, Dr. Harris did not conduct the mental health evaluation on May 11, 2017. (4 WH 113-14).

71. Dr. Harris did not return to the jail to visit Applicant and did not conduct a mental health evaluation on Applicant at any time while his cases were pending. (4 WH 113-14); *State's Writ Exhibit 1.*

72. Dr. Harris testified that he believed Applicant was experiencing a manic episode at the jail when he visited him in 2017 based on his behavior. (4 WH 153-54).

73. During the 2022 writ hearing, Dr. Harris claimed that he had serious concerns about Applicant's competency and sanity, but Dr. Harris never conducted a retrospective competency or sanity evaluation on Applicant during post-conviction proceedings. (4 WH 171-72).

74. The Menninger records did not document that Applicant was incompetent at the time he was experiencing his bipolar symptoms in 2013 and did not document that Applicant lacked an understanding of his issues. (4 WH 140).

75. Pospisil did not believe Applicant was suffering from any type of mental illness at the time of his representation, and did not believe Applicant was incompetent because he was able to understand what was going on with his case and he

was able to communicate with him about his defense. (3 WH 14, 51-52).

76. Dr. Harris testified that he never reviewed the Menninger records at the time he was retained pre-trial by Parnham, but reviewed them in post-conviction through Applicant's habeas counsel. (2 WH 114).

77. Dr. Harris testified that he reviewed the Menninger records in post-conviction and that the records reflect that Applicant was treated with lithium, which suggests to him that his bipolar disorder was at a fairly high level of intensity at that time. (2 WH 114, 116).

78. Dr. Harris testified at the writ hearing that had he testified as an expert in mitigation during Applicant's trial, he could have brought value by talking about how Applicant did not have full control over his behavior or actions at the time he was engaging in the charged conduct. (2 WH 127-28).

79. Dr. Harris testified that he could have provided the jury in a hypothetical case with an explanation for the extraneous offenses the State elicited during the punishment stage, and that he could have provided context and explanation for this irrational and abhorrent behavior as mitigating evidence because it was the product of Applicant's mental illness and not his inherent nature. (2 WH 128-29).

80. Dr. Harris did not offer any medical or forensic opinions about Applicant's competency and/or

sanity during the writ proceedings. (2 WH 138-39, 146-47) (4 WH 184).

81. Dr. Harris testified that he "could have" done a useful competency evaluation with the Menninger records in pretrial without Applicant's cooperation, but Dr. Harris did not do this evaluation post-conviction. (4 WH 114-15).

82. Dr. Harris testified that the competency and sanity evaluation would have "probably" been accurate, but again, did not do the evaluations post-conviction. (4 WH 116).

83. The trial court finds that Dr. Harris did not find Applicant incompetent to stand trial.

84. The trial court finds that Dr. Harris did not find Applicant insane at the time he committed the solicitation offenses.

85. The Court finds deficient Parnham's conduct in failing to present expert testimony from a mental health professional who could have explained to the jury what the mitigating evidence was, what it meant, and why it was mitigating.

State's Aggravating Punishment Evidence

86. The State offered some of Applicant's jail phone calls during punishment, the contents of which included, among other things, Applicant calling himself "scientific" and "calculating;" Applicant flirting with a news reporter; Applicant discussing book and movies deals about his cases; and

Applicant fighting other inmates in jail.[5] (8 RR 11-12, 14-16, 209-10); *State's Exhibits 78-80.*

87. The State called complainant Verikas in punishment who testified to the following bad acts and/or extraneous offenses:

a. the night she ended their relationship, Applicant: put his hand over her mouth and caused her pain; threatened to burn down their apartment; followed Verikas to her car as she tried to leave; and threatened to punch her window out if she did not give him their dog;

b. Applicant stalked Verikas when she would not reconcile with him;

c. Applicant withheld Verikas' belongings from her so that she would have to see Applicant again;

d. Applicant harassed Verikas to the point she had to change her number because of his constant calls and text messages;

e. Applicant tried to contact her using other people, spoof numbers, and fake Facebook accounts;

f. Applicant would park outside her work and wait for her to leave;

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[5] No transcripts of these phone calls were provided in the appellate record, but the audio is available from the referenced trial exhibits.

g. Applicant would regularly follow her car when she left work;

h. Applicant was told hundreds of times by Verikas to leave her alone but he would not listen; and

i. Verikas had to obtain a protective order against Applicant.

(8 RR 18-36).

88. The State called Darren Gooden ("Gooden") in punishment who testified to the following bad acts and/or extraneous offenses:

a. Applicant and Gooden's wife Patricia had an extra-marital affair;

b. Gooden had to obtain restraining orders against Applicant because he would sit in front of his house and threaten to kill him;

c. Applicant threatened to blow up Gooden's house;

d. Applicant punched Gooden's 14-year-old son in the chest and encouraged Gooden's son to lie that Gooden had done it so that Gooden would get charged with child endangerment; and

e. Gooden had to obtain a court order against Applicant to prevent him from being around his children when Patricia had visitation.

(8 RR 45-55).

89. The State called Mackenzie Gooden ("Mackenzie") in punishment who testified to the following bad acts and/or extraneous offenses:

a. Applicant and her mother encouraged Mackenzie and her brother to run away from their dad, Darren Gooden;

b. Applicant would sleep over at her mother's house when he was already married with a child;

c. Applicant would have angry screaming matches with her mother and it scared her;

d. Applicant and her mother would tell lies about her dad, and she believed them at the time;

e. one night she and her brother ran away from their dad's house; Applicant and her mother decided to stage a reason that they ran away; that is when Applicant punched her brother in the chest;

f. one time her mother kicked Applicant out of the house and locked the door; Applicant had his 2-year-old son James with him and Applicant was running around the house holding James trying to get back into their house; and

g. Applicant smelled of alcohol whenever he came over to her mother's house.

(8 RR 67-77, 80).

90. The State called Dale Johnston ("Johnston") in punishment who testified to the following bad acts and/or extraneous offenses:

    a. one time, Applicant got into an argument with his mother, Golda Jacob, and yelled at her loudly and in her face; and

    b. when Johnston intervened in the argument and Applicant, shoved Johnston to the ground causing him pain.

(8 RR 81-84).

91. The State called Leslie Jacob ("Leslie"), Applicant's sister-in-law, in punishment who testified to the following bad acts and/or extraneous offenses:

    a. she saw Verikas after the assault by Applicant and observed a handprint on Verikas' face;

    b. Applicant sent Leslie hundreds of text messages that if she did not get Verikas and Applicant back together, then it was Leslie's fault;

    c. when Applicant discovered that Verikas was staying at Leslie and his brother Adam's home after their break-up:

        1) Applicant barged into their home looking for Verikas;

        2) Applicant screamed at Leslie that he knew Verikas was there;

3) Applicant asked Leslie "Where is that bitch?";

4) Leslie asked Applicant to leave because her baby was upstairs sleeping, but Applicant ignored Leslie's request and began to search the house for Verikas; and

5) Applicant left only after Leslie called Adam and Adam threatened to call the police;

d. Applicant sent Leslie's family "nasty" text messages about her and tried to get Leslie fired from her job; and

e. Applicant tried to get into contact with Verikas after the breakup by going to his mom's law office more frequently where Leslie worked because Applicant knew Leslie maintained a relationship with Verikas.

(8 RR 86-97, 102-03).

92. The State called Annie Morrison ("Morrison") in punishment who testified to the following bad acts and/or extraneous offenses:

a. Applicant and Morrison began dating in college and had a volatile relationship with Applicant's violence against Morrison escalating over the course of their marriage;

b. Applicant threw her clothes off the balcony of his apartment on one occasion when they were in college;

c. Applicant threatened her with a knife when they lived in New York;

d. Applicant pushed her, grabbed her, and kicked her leaving bruises when they lived in Houston;

e. Applicant was fired from his third residency position and he never completed his residency;

f. Applicant had an extra-marital affair with Patricia Gooden when Morrison was pregnant with their second child;

g. one time, Applicant pushed her head down to a counter and bruised her face near her eye;

h. Applicant threatened to punch Morrison in the stomach when she was pregnant with their second child;

i. Applicant kicked Morrison in the legs when she was pregnant;

j. Applicant threatened to kill her if she ever left him;

k. Applicant threatened to dissolve her body so that no one would find her;

l. Applicant threatened to take her children away from her if she ever left him;

m. Applicant failed to maintain a job during her pregnancy with her second child or after her second child was born;

n. Applicant would drink during the day and spend tens of thousands of dollars gambling;

o. Morrison would take their children to daycare while she worked because she did not trust Applicant to take care of them;

p. on one occasion, Morrison wanted to sleep in on her birthday when her first child was 3 years old and it angered Applicant:

    1) he pushed Morrison into their guestroom and onto the bed,

    2) he screamed at her, then lifted the mattress to where Morrison rolled off the bed, and

    3) Applicant threw the mattress on her with a blanket and pillow and told her "You can sleep there."

q. one time, Applicant took her keys and cell phone and blocked the front door so she could not leave:

    1) Morrison called the police and left with their youngest child,

    2) she returned to get their oldest child and Applicant pinned

Morrison to the bed and held a razor to her neck in front of their 3-year-old child; and

3) Applicant told her if she ever called the police again he would kill her;

r. Applicant barricaded Morrison and their youngest child in a room together for half an hour and would not let them leave;

s. Applicant told Morrison the only way she was leaving was in a body bag;

t. Applicant would take off with their oldest child after a fight;

u. Morrison obtained a protective order against Applicant in 2013;

v. Applicant did not engage with his children and drank around them;

w. Morrison got a separate checking account to prevent Applicant from draining their joint account and in retaliation, Applicant:

1) wrapped a towel around her,

2) pushed her up the stairs into the laundry room where he raised his fists at her,

3) whipped the laundry at her,

4) and then threw at toolbox at her;

x. Morrison agreed to drop the 2013 protective order if Applicant agreed to let her move with the kids to Chicago, but then Applicant harassed her in Chicago by sending the police to her house for "welfare checks" on their children;

y. Applicant threatened to torture Morrison's parents in front of her by telling her that he would cut off her father's genitalia and shove it down her mother's throat;

z. Morrison obtained a subsequent protective order in Chicago against Applicant; and

aa. Applicant regularly threatened Morrison on telephone calls and on voicemail recordings.

(8 RR 104-148, 157-58).

Applicant's Mitigating Punishment Evidence

93. On cross examination of Morrison in punishment, Pospisil elicited the following:

a. Applicant told Morrison that he got "sick" during this volatile period and he was referring to his mental illness;

b. Applicant entered an in-patient mental facility program in September of 2013 called the Menninger Clinic in Houston, Texas;

c. Applicant spent several weeks at the facility;

d. Applicant received a diagnosis from the facility;

e. Applicant was given medication for his mental illness; and

f. Applicant may have gone into this treatment facility as a part of their agreement for reconciliation.

(8 RR 150-51, 154-55).

94. Parnham called Golda Jacob, Applicant's mother, in punishment who testified to the following mitigating evidence:

a. when Applicant was 13 years old, his father collapsed in front of him;

b. Applicant tried to resuscitate his father but he died right in front of him;

c. Applicant blamed himself when his father did not survive;

d. Applicant was treated in a mental health facility called the Menninger Clinic for 60 days in Houston, Texas;

e. the Menninger Clinic is a psychiatric facility and it is associated with Baylor College of Medicine;

f. Applicant was suicidal and out of control according to Morrison;

g. Applicant had not seen a psychiatrist before he entered the Menninger Clinic;

h. Applicant was diagnosed with bipolar disorder and a personality disorder; and

i. Applicant was depressed during that period of time.

(8 RR 176-180, 187).

95. Parnham did not elicit this testimony from Golda Jacob, but she testified on cross examination in punishment to the following:

a. Applicant was issued lithium as medication to deal with his diagnosis; and

b. Applicant was diagnosed with bipolar disorder and a personality disorder between the ages of 35 and 37.

(8 RR 182-83).

96. Parnham called Heida Thurlow in punishment who testified to the following mitigating evidence:

a. Applicant cared for her husband Wayne over the past 7 years when he was suffering from Alzheimer's disease;

b. Applicant would spend time with her husband at the Autumn Leaves care facility;

c. Applicant would take her husband out of the care facility and spend time with him; and

d. Applicant demonstrated kindness to her husband.

(8 RR 195-200).

Additional Aggravating Punishment – Habeas

97. Dr. Harris offered the following additional aggravating punishment evidence during the habeas proceeding:

a. he cannot rule out that Applicant may have antisocial personality disorder, which is incurable and hard to treat (2 WH 151-52) (4 WH 128-134);

b. Applicant was discharged from the Menninger Clinic in 2013 with a treatment plan, medication, and the tools to manage the symptoms of his mental illnesses (4 WH 134-142, 143-44); *Menninger records*, p. 45-47;

c. Applicant understood in 2013 that managing the symptoms of his mental illnesses was a "life or death" situation for him (4 WH 134-142, 143-44); *Menninger records*, p. 45-47;

d. he characterized the Menninger records as containing "a lot of potentially bad stuff . . . for the defense" (4 WH 155-56);

e. Applicant's abhorrent conduct is consistent with a bipolar disorder and a

narcissistic personality disorder (4 WH 163-64);

f. a previous history of violence is a pretty good predictor for future violence (2 WH 152);

g. the lack of empathy, the failure to take responsibility for one's actions, and the failure to manage an existing mental illness are relevant factors in determining future dangerousness (4 WH 186-87); and

h. bipolar disorder and narcissistic personality disorder cannot be cured, just treated. (2 WH 150).

98. The Menninger records contained the following additional bad acts and/or extraneous offenses that were elicited through Dr. Harris during the habeas proceeding (2 WH 154-156) (4 WH 120-28, 142-43):

a. one time, Applicant gagged Morrison with pantyhose, tied her up, and threatened to rape her (p. 341);

b. one time, Applicant turned their family car on with the garage door closed and put Morrison inside and Morrison believed she was about to die (p. 341);

c. Applicant reported to staff that he was at the Menninger Clinic because of his "rage issues" and because it was no longer safe for his wife and children to be around him (p. 24);

d. Applicant busted in a friend's door and was arrested for burglary (p. 28);

e. Applicant threw a chair at Morrison (p.28);

f. Applicant threatened to kill everyone in his and Morrison's house (p. 341);

g. Applicant told Morrison "I will hurt our son to hurt you." (p. 341)

h. Applicant threatened staff members at the Menninger Clinic by telling one: "If I wasn't on my medication, I would have punched a hole in the wall next to your head." (p. 349);

i. Applicant projected blame onto Morrison for all of the problems during their marriage (p. 38, 87);

j. Applicant went AWOL from the Menninger Clinic facility and told staff that he would not return unless they were able to get Morrison to return his call (p. 113);

k. Applicant called Morrison 60 times in one day (p. 291);

l. Applicant stalked Morrison during his treatment-teamapproved visit to Chicago (p. 378);

m. Applicant called Morrison 70 times upon his initial entry to the Menninger Clinic (p. 333);

n. Applicant told Menninger Clinic staff regarding how he was going to win his wife back that: "I know what's best; I know what my wife wants and needs." (p. 151);

o. Applicant tended to blame everybody other than himself (p. 153, 242);

p. Applicant believed his wife was being unrealistic for being so angry with him (p. 159);

q. Applicant set a deadline for his wife to forgive him by and that if she didn't forgive him by that date, he would find someone else (p. 199);

r. Applicant is unable to see how his behavior affects and impacts others (p. 242);

s. Applicant had poor insight on his family's time for healing from his abuses of them (p. 153, 245);

t. Applicant had every right to be angry with his wife and to be speak to her the way that he did (p. 283);

u. Applicant lacks empathy for others – Applicant struggled to mentalize his wife's experiences and to empathize with her experiences during his treatment (p. 361, 371);

v. Applicant resisted treatment, psychological testing, and blood work by the

Menninger Clinic (p. 40, 309, 315, 324, 328, 332);

w. Applicant threatened a doctor that he better not write in his record that Applicant refused to cooperate with his treatment team (p. 63);

x. Applicant refused to attend regular therapy sessions (p. 162, 345, 353, 368);

y. Applicant attempted to manipulate staff by telling them not to document an incident in which Applicant tried to kiss a female peer after she asked for help on a computer (p. 194);

z. the Menninger Clinic staff told Applicant that he needed to work on the theme: "Leon does what Leon wants to do when he wants to do it." (p. 327);

aa. Applicant insisted that the Menninger Clinic staff and Dr. John Hart call his wife and tell her that Applicant loved him and that she needed to be more supportive (p. 90, 291, 332, 334, 350, 372); and

bb. Applicant used his "prodigious capacities to control [his wife's] mind" (p. 389).

Additional Mitigating Punishment – Habeas (*See also, paragraph 62, supra*)

99. Applicant reported in the Menninger records that his relatives were Holocaust survivors. (4 W.R. 172-73); (p. 22, 338).

100. Applicant reported in the Menninger records that his paternal uncle died by suicide at age 34 and that his uncle suffered from bipolar disorder; Dr. Harris testified that there is evidence that bipolar disorder is genetic and therefore not something Applicant chose. (4 W.R. 177); (p. 22).

101. Applicant reported in the Menninger records that his upbringing was "constant chaos and anger" and Dr. Harris testified that this begins to show that some of the behaviors are learned as a child. (4 W.R. 175).

102. Applicant reported in the Menninger records that he got his driver's license at age 14 so that he could drive his siblings around and Dr. Harris testified that this makes his behavior "understandable" because he had to "function as an adult or even in a parental role very early." (4 W.R. 177).

103. Dr. Harris testified that he would have tried to talk about Applicant's intent on a more global level in that "Was he just trying to satisfy himself; or was he, in fact, doing things to kind of fight against what his mental illness would have brought him to?" (4 W.R. 186).

104. Dr. Harris testified to the following mitigating evidence contained within the Menninger records:

    a. Applicant suffered from bipolar and narcissistic personality disorder (4 WH 156-57);

    b. Applicant was abusing alcohol and it could be a form of self-medication to control the mental illness symptoms (4 WH 157);

    c. bipolar disorder itself suggests that Applicant does not have "full control over his perceptions or reactions to things" (4 WH 157);

    d. the narcissistic personality disorder helps explain in context some of the behavior and "the person's intent" with those behaviors (4 WH 158);

    e. Applicant had partner-relational problems and that is indicative of the bipolar disorder and that they don't have "full control over their emotional reactions and behaviors" (4 WH 158); and

    f. Applicant's occupational problems are due to his mental disorder. (4 WH 158-59).

105. Dr. Harris testified that when a bipolar person is in a depressive[6] state, then you would tend to

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[6] The Menninger records do not document Applicant having any depressive episodes at that time, but Applicant's mother,

see the guilt or remorse if it's within that person. (4 WH 162).

106. Dr. Harris testified that Applicant was not considered an "eminent safety risk" while at the Menninger Clinic; that he progressed to the highest level of unit responsibility; and that he responded well to treatment (4 WH 178-79).

Harm Analysis

107. The Menninger records encapsulated the volatile period of time directly after Morrison separated from Applicant amidst the worst of his abuse detailed in her punishment testimony.

Menninger records.

108. The Menninger records corroborated Morrison's punishment testimony because the incidents she described are documented in the records themselves and Applicant also admitted to the commission of some of these incidents. *Menninger records*, p. 21, 28, 231.

109. The trial court finds that had Parnham offered the Menninger records during the punishment stage of trial, not only would the jury have learned about Applicant's additional abuse of Morrison – including a threat to rape her and an apparently aborted attempt to kill her with carbon monoxide poisoning in a car – but the jury

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Golda Jacob, testified in punishment that Applicant was depressed. (8 RR 179-80).

would have also learned that Applicant demonstrated a lack of empathy and accountability with respect to his behavior towards Morrison.

110. The trial court further finds that had Dr. Harris attempted to explain Applicant's demonstrable lack of empathy and accountability in the Menninger records as being an incurable product of his mental illnesses, Dr. Harris' explanation could have backfired and the State would have then been able to argue that Applicant's particular mental illnesses and/or the combination thereof are what make Applicant especially dangerous, particularly when Applicant was provided with the knowledge and tools in 2013 to manage his symptoms and could not do so.

111. The Court finds that Parnham was unable to articulate that his decision to not present the Menninger records or elicit testimony about them through an expert during the punishment stage of trial was in any way strategic.

112. Applicant does not claim that he would have received a different outcome at sentencing had trial counsel presented this additional mitigating evidence, but instead claims that an expert could have explained to the jury what the evidence meant and why it was mitigating. *Applicant's Writs* at 10.

113. The trial court finds that Applicant's additional mitigating evidence offered during the habeas proceeding in combination with the mitigating evidence offered at trial, when weighing it against the aggravating evidence offered by the State in trial and the additional aggravating evidence

offered by the State during the habeas proceeding, would not have resulted in a more favorable punishment verdict for Applicant. *Ex Parte Rogers*, 369 S.W.3d 858, 863 (Tex.Crim.App. 2012) (the applicant must prove that there is a reasonable probability that, but for counsel's errors, the sentencing jury would have reached a more favorable verdict; it is not enough to show that trial counsel's errors had some conceivable effect on the outcome of the punishment assessed).

114. The trial court finds that none of the allegations of deficient performance shake the trial court's confidence in the outcome at sentencing. *See Ex Parte Salinas*, ___ S.W.3d ___, 2022 WL 16954396, (Tex.Crim.App. 2022).

115. The Court finds that Applicant has failed to meet his burden under the second prong of *Strickland v. Washington.*

CONCLUSIONS OF LAW

1. Applicant is entitled to the effective assistance of counsel under the Sixth Amendment of the United States Constitution and under art. I, § 10, of the Texas Constitution. *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex.Crim.App. 1986).

2. The right to counsel does not provide the right to errorless counsel, but rather the right to objectively reasonable representation. *Lopez v. State*, 343 S.W.3d 137, 142 (Tex.Crim.App. 2011).

3. To prove that trial counsel failed to render the effective assistance of counsel, Applicant must show by a preponderance of the evidence that

their performance was deficient in that it was beyond the bounds of prevailing, objective professional standards, and then show their deficient performance was prejudicial. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex.Crim.App. 1986) (adopting the *Strickland* standard in Texas).

4. For trial counsel's performance to rise to this level, Applicant must show that there is a reasonable probability, one sufficient to undermine confidence in the outcome, that but for their deficient performance, the outcome of the proceeding would have been different. *Ex parte Zepeda*, 819 S.W.2d 874, 876 (Tex.Crim.App. 1991).

5. The trial court's review of trial counsel's representation is highly deferential and there is a presumption that their actions fell within the wide range of reasonable and professional assistance. *Bone v. State*, 77 S.W.3d 828, 833 (Tex.Crim.App. 2002).

6. The allegations in Applicant's writ applications are not evidence, although sworn to, and do not prove themselves. *State v. Guerrero*, 400 S.W.3d 576, 583 (Tex.Crim.App. 2013) (sworn pleadings are an inadequate basis upon which to grant relief).

7. Applicant's conclusory allegations that he would have pleaded guilty in both cases, even if sworn to, do not overcome the State's denials and are insufficient alone to warrant habeas relief. *Ex Parte Empey*, 757 S.W.2d 771, 775 (Tex.Crim.App. 1988).

8. The trial court concludes that Applicant fails to show that but for the alleged deficient conduct of trial counsel, there is a reasonable probability that the result of the proceeding would have been different. *Strickland*, 466 U.S. at 686; *Hernandez*, 726 S.W.2d at 57; *Narvaiz v. State*, 840 S.W.2d 415, 434 (Tex.Crim.App. 1992) (defining the two-part *Strickland* standard).

9. The trial court further concludes that Applicant fails to demonstrate that the totality of the available mitigation evidence at trial and at habeas outweighed the evidence against him in aggravation. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (the Court must evaluate the totality of the available mitigation evidence – both that adduced at trial and the evidence adduced in the habeas proceeding – in reweighing it against the evidence in aggravation); *Wiggins v. Smith*, 539 U.S. 510, 534-35 (2003) (in assessing prejudice, the Court reweighs the evidence in aggravation against the totality of available mitigating evidence).

Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be **DENIED** on all grounds.

ORDER

THE CLERK is hereby **ORDERED** to prepare a transcript of all papers filed in cause nos. 1543812-A and 1543813-A and transmit them to the Court of Criminal Appeals as provided by TEX. CRIM. PROC.

CODE ANN. art 11.07. The transcript shall include certified copies of the following documents:

1. the applications for writ of habeas corpus and all attachments in cause numbers 1543812-A and 1543813-A;

2. the trial court's order(s) in cause numbers 1543812-A and 1543813-A;

3. the indictment, judgment and sentence, and docket sheets in cause numbers 1543812 and 1543813;

4. the appellate record (including the clerk's record and reporter's record) in cause numbers 1543812 and 1543813;

5. the appellate opinion in cause numbers 1543812 and 1543813;

6. the writ record, the writ hearing record, and all exhibits in cause numbers 1543812-A and 1543813-A;

7. the Menninger records filed on September 25, 2017 and identified as certified public document number 79390306 containing 462 pages;

8. the trial court's Findings of Fact, Conclusions of Law, Recommendation and Order in cause numbers 1543812-A and 1543813-A;

9. the State's Proposed Findings of Fact and Conclusions of Law and Applicant's Proposed Findings of Fact and Conclusions of

Law in cause numbers 1543812-A and 1543813-A;

10. objections filed by either party to the trial court's Findings of Fact, Conclusions of Law, Recommendation and Order.

THE CLERK is further **ORDERED NOT** to transmit the record(s) in these causes to the Clerk of the Court of Criminal Appeals as required by art. 11.07, § 9(f), for a period of ten (10) days to permit the parties to file objections, if any, to these Findings of Fact, Conclusions of Law, Recommendation, and Order of the Court.

THE CLERK is further **ORDERED** to send a copy of this order to counsel for Applicant: Josh Schaffer, 1021 Main Street, Suite 1440, Houston, Texas 77002, josh@joshschafferlaw.com ***and*** Brian Wice, 440 Louisiana Street, Suite 900, Houston, Texas 77002, wicelaw@att.net, and to counsel for the State, Rehana Vohra, Harris County District Attorney's Office, 1201 Franklin Street, Suite 600, Houston, Texas 77002, vohra_rehana@dao.hctx.net.

SIGNED this 24th day of April, 2023.

/s/ Inger H. Chandler

The Honorable Inger H. Chandler
Associate Judge, Harris County Felony Courts

on behalf of the
263rd District Court, Harris County, Texas

[SEAL]

MANDATE

The Fourteenth Court of Appeals

NO. 14-18-00304-CR

Leon Phillip Jacob, Appellant v. The State of Texas, Appellee	Appealed from the 263rd District Court of Harris County. (Trial Court No. 1543812). Opinion delivered by Chief Justice Frost. Justices Jewell and Bourliot also participating.

TO THE 263RD DISTRICT COURT OF HARRIS COUNTY, GREETINGS:

Before our Court of Appeals on August 29, 2019, the cause upon appeal to revise or reverse your judgment was determined. Our Court of Appeals made its order in these words:

Cause No. 14-18-00304-CR was heard on its appellate record. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment of the court below **AFFIRMED**. We further order this decision certified below for observance.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things have it duly recognized, obeyed, and executed.

WITNESS, the Hon. Kem Thompson Frost, Chief Justice of our Fourteenth Court of Appeals, with the Seal thereof affixed, at the City of Houston, Texas, April 9, 2020.

[SEAL]

CHRISTOPHER A. PRINE,
CLERK

/s/ Christopher A. Prine

[SEAL]

MANDATE

The Fourteenth Court of Appeals

NO. 14-18-00305-CR

Leon Phillip Jacob, Appellant v. The State of Texas, Appellee	Appealed from the 263rd District Court of Harris County. (Trial Court No. 1543813). Opinion delivered by Chief Justice Frost. Justices Jewell and Bourliot also participating.

TO THE 263RD DISTRICT COURT OF HARRIS COUNTY, GREETINGS:

Before our Court of Appeals on August 29, 2019, the cause upon appeal to revise or reverse your judgment was determined. Our Court of Appeals made its order in these words:

Cause No. 14-18-00305-CR was heard on its appellate record. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment of the court below **AFFIRMED**. We further order this decision certified below for observance.

WHEREFORE, WE COMMAND YOU to observe the order of our said Court in this behalf and in all things have it duly recognized, obeyed, and executed.

WITNESS, the Hon. Kem Thompson Frost, Chief Justice of our Fourteenth Court of Appeals, with the Seal thereof affixed, at the City of Houston, Texas, April 9, 2020 .

[SEAL]

CHRISTOPHER A. PRINE,
CLERK

/s/ Christopher A. Prine

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

[SEAL]

3/11/2020 **COA No. 14-18-00304-CR**
JACOB, LEON PHILLIP **PD-1262-19**

Tr. Ct. No. 1543812

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

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

[SEAL]

3/11/2020 **COA No. 14-18-00305-CR**
JACOB, LEON PHILLIP **PD-1263-19**

Tr. Ct. No. 1543813

On this day, the Appellant's petition for discretionary review has been refused.

Deana Williamson, Clerk

Affirmed and Opinion filed August 29, 2019.

[SEAL]

In The
Fourteenth Court of Appeals

NOS. 14-18-00304-CR &
14-18-00305-CR

LEON PHILLIP JACOB, Appellant

V.

THE STATE OF TEXAS, Appellee

On Appeal from the 263rd District Court
Harris County, Texas
Trial Court Cause Nos. 1543812 & 1543813

OPINION

Appellant Leon Phillip Jacob challenges his convictions for solicitation to commit capital murder of two complainants, his ex-girlfriend and his girlfriend's ex-husband. The central issue in the jury trial was whether the evidence established beyond a reasonable doubt that appellant intended for a hitman to murder the complainants. Appellant's sufficiency-of-the-evidence challenge focuses on whether the use of initials to refer to the complainant in each indictment creates a material variance because the trial evidence proved the full names of each complainant. Appellant also

complains that the trial court abused its discretion in excluding enhanced audio recordings that appellant's expert prepared for the stated purpose of assisting the jury in understanding recorded phone conversations. Appellant claims the enhanced audio recordings would have given the jury a more complete picture on the element of intent. In his third issue appellant asserts that a comment the trial court made during voir dire violated his right to an impartial judge. Finding no merit in these challenges, we affirm.

I. Factual and Procedural Background

Appellant met and began dating Meghan Verikas in 2014 in Pittsburgh. She moved with appellant back to his hometown of Houston. While living together in January 2017, appellant and Verikas had a fight, in which appellant allegedly assaulted Verikas. Verikas moved out but had difficulty avoiding appellant, who allegedly harassed her at her workplace. In February 2017, charges were brought against appellant for assault and stalking.

After appellant was arrested on the stalking charge, he sought out Felix Kubosh, whose company had provided the bail bond for the stalking offense. Appellant told Kubosh that he needed "Zack's number." Kubosh had no clue what appellant was talking about. To further clarify for Kubosh, appellant explained to Kubosh that he had paid Zack "a lot of money" to "take care of this matter" and he needed Verikas "to not testify against him on these cases because it would . . .

hurt his medical license." Kubosh was concerned and notified the police.

Further details were later uncovered as to the events that occurred before appellant's arrest on the stalking charge. In January 2017, appellant had asked a law-firm employee, Laura Thurlow, to determine the status of any criminal charges pending against him. Thurlow later would testify that appellant also had asked a series of contingent requests—(1) to approach Verikas to help him get Verikas back, and (2) if she could not help him get Verikas back, he wanted Thurlow to ask Verikas to "please leave town," and (3) if Verikas refused to leave town, he wanted Thurlow to "grab her, put her in a car, and take her to him or have somebody do that" and appellant suggested he had a syringe Thurlow could use and he would "take care of the rest." Thurlow ultimately refused to help appellant, and referred Moataz Azzeh, known as "Zack," to appellant.

Azzeh had served in the military. Appellant wanted Azzeh to kidnap Verikas and convince her to "drop" the criminal case against him, and if that did not happen, he wanted Azzeh to "make her disappear," which Azzeh interpreted as make her "dead." After Kubosh notified the police, the police contacted Azzeh, who became a confidential informant.

Azzeh assisted in arranging for a face-to-face meeting between appellant and an undercover officer, Javier Duran, who was introduced to appellant as a hitman. Valerie McDaniels, with whom appellant had

become romantically involved, also took part in the meeting. Information that the police learned at the meeting indicated that appellant and Valerie were seeking to hire someone to murder Verikas and Marion "Mack" McDaniels, Valerie's ex-husband.

In addition to seeking assistance from Azzeh, the police asked Verikas and Mack to assist in the police investigation. Verikas and Mack posed in pictures that the police would use to assist officer Duran in convincing appellant and Valerie that he was carrying out the hitman's end of the bargain. Mack posed for pictures in which it appeared that he had been shot in a carjacking. Verikas posed for pictures in which it appeared that she was bound and held hostage. These pictures assisted the police in building the case against appellant and Valerie.

After appellant and Valerie were charged by indictment with solicitation to commit capital murder as to each of the complainants, Valerie took her own life. Appellant pled "not guilty" to each indictment and stood trial before a single jury on both charges.

The jury heard evidence of the events leading to the solicitation-to-commit-capital-murder charges, including recorded phone conversations between appellant and officer Duran, and testimony from Thurlow, Azzeh, and Kubosh about appellant's expressed intentions before the police undercover unit became involved. Azzeh, Verikas, Mack, and various members of the police department testified about their respective involvement in the investigation and undercover

operation. Verikas and Mack testified about their respective personal relationships with appellant and Valerie. Jacob's mother, an attorney, testified that she had represented Valerie in her divorce proceeding with Mack and that Valerie had expressed intentions to kill Mack. Undercover police officer Duran, who was named as the solicitee in the indictment, testified that he had handled similar operations before. He explained that only about half the time do such operations result in criminal charges, because the targets of the investigation sometimes choose not to follow through with the plan.

At the close of the evidence, the trial court charged the jury to determine if appellant was guilty of solicitation to commit capital murder of either Verikas or Mack. In the charge, the trial court inquired of appellant's guilt both as a principal and as a party to the offenses, with Valerie acting as the principal.

The jury found appellant guilty as charged as to each offense. As to each offense, the jury assessed appellant's punishment at confinement for life and a $10,000 fine.

II. Issues and Analysis

A. Sufficiency of the Evidence

In his first issue, appellant challenges the sufficiency of the evidence to support his solicitation-to-commit-capital-murder convictions.[1] Appellant asserts

[1] Appellant filed a separate appellant's brief as to each conviction but asserts the same issues in each brief, and appellant's

that the trial evidence is insufficient to prove the allegations as to the identity of the complainant in each indictment. Appellant does not assert that the evidence is insufficient in any other respect. Appellant claims the proof at trial on the identity of each complainant is insufficient because it shows that appellant solicited the capital murders of "Meghan Verikas" and "Marion 'Mack' McDaniel," as opposed to showing that appellant solicited the capital murders of "M.V." and "M.M.," as alleged in the indictments. Appellant asserts that there is a fatal and material variance between each indictment's allegations as to the identity of each complainant and the proof at trial. On this basis, appellant asks this court to overturn both convictions and render a judgment of acquittal in each case.

Standard of Review

In evaluating a challenge to the sufficiency of the evidence supporting a criminal conviction, we view the evidence in the light most favorable to the verdict. *Wesbrook v. State*, 29 S.W.3d 103, 111 (Tex. Crim. App. 2000). The issue on appeal is not whether we, as a court, believe the State's evidence or believe that appellant's evidence outweighs the State's evidence. *Wicker v. State*, 667 S.W.2d 137, 143 (Tex. Crim. App. 1984). The verdict may not be overturned unless it is irrational or unsupported by proof beyond a reasonable doubt. *Matson v. State*, 819 S.W.2d 839, 846 (Tex. Crim.

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arguments in support of each issue are substantially similar. So, for ease of reference, we refer to each issue in singular terms rather than plural terms.

App. 1991). The jury "is the sole judge of the credibility of the witnesses and of the strength of the evidence." *Fuentes v. State*, 991 S.W.2d 267, 271 (Tex. Crim. App. 1999). The jury may choose to believe or disbelieve any portion of the witnesses' testimony. *Sharp v. State*, 707 S.W.2d 611, 614 (Tex. Crim. App. 1986). When faced with conflicting evidence, we presume the jury resolved conflicts in favor of the prevailing party. *Turro v. State*, 867 S.W.2d 43, 47 (Tex. Crim. App. 1993). So, if any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, we must affirm. *McDuff v. State*, 939 S.W.2d 607, 614 (Tex. Crim. App. 1997).

Elements of Solicitation-to-Commit-Capital-Murder Offense

The indictment in trial court cause number 1543812 alleged that on or about March 8, 2017, appellant "with the intent that the offense of capital murder be committed, request, command and attempt to induce J. DURAN, hereafter called the solicitee, to engage in specific conduct, namely, the MURDER for remuneration of M.V., and that under the circumstances surrounding the conduct of the solicitee as the Defendant believed them to be, would constitute and make the solicitee a party to the offense of capital murder." The indictment in trial court cause number 1543813 contained an identical paragraph except that the initials were "M. M." rather than "M.V."

A person commits murder if the person "intentionally or knowingly causes the death of an individual." Tex. Pen. Code Ann. § 19.02(b)(1). And, a person commits capital murder if the person commits a murder that way and "employs another to commit the murder for remuneration or the promise of remuneration." Tex. Pen. Code Ann. § 19.03(a). A person commits a solicitation-to-commit-capital-murder offense, if with intent that a capital murder be committed, the person "requests, commands, or attempts to induce another to engage in specific conduct that, under the circumstances surrounding [the person's] conduct as the [person] believes them to be, would constitute [capital murder] or make the other a party to its commission." Tex. Pen. Code Ann. § 15.03(a). The trial court's jury instructions tracked the respective indictments in the disjunctive and were consistent with the statutory elements of the solicitation-to-commit-capital-murder offense under the Penal Code. The jury charges referred to each complainant by initials rather than by name, consistent with the indictments.

The trial court also instructed the jury on the law of parties under Penal Code section 7.02(a)(2). *See* Tex. Penal Code § 7.02. Under section 7.02, "[a] person is criminally responsible for an offense committed by the conduct of another if: . . . (2) acting with intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense." *Id.* Thus, even if the jury failed to find appellant guilty as a principal, the jury could have found appellant guilty if it found the

evidence showed that Valerie was guilty of the solicitation-of-capital-murder offenses and that appellant, acting with intent to promote or assist the commission of each offense solicited, encouraged, directed, aided, or attempted to aid Valerie to commit each offense.

Law Regarding Material Variances

A "variance" occurs when there is a discrepancy between the allegations in the indictment and the proof at trial. *See Gollihar v. State*, 46 S.W.3d 243, 246 Only a "material" variance, one that prejudices a defendant's substantial rights, will make the evidence insufficient. *Ramjattansingh v. State*, 548 S.W.3d 540, 547 (Tex. Crim. App. 2018). This circumstance occurs when the indictment, as written, 1) fails to inform the defendant of the charge against the defendant sufficiently to allow the defendant to prepare an adequate defense at trial, or 2) subjects the defendant to the risk of being prosecuted later for the same crime. *Id*. The Court of Criminal Appeals has recognized three different categories of variance:

> (1) a statutory allegation that defines the offense, which is either not subject to a materiality analysis, or, if it is, is always material; the hypothetically correct jury charge always will include the statutory allegations in the indictment;
>
> (2) a non-statutory allegation that is descriptive of an element of the offense that defines or helps define the allowable unit of prosecution, which is sometimes material; the

> hypothetically correct jury charge sometimes will include the non-statutory allegations in the indictment and sometimes will not;
>
> (3) a non-statutory allegation that has nothing to do with the allowable unit of prosecution, which is never material; the hypothetically correct jury charge will never include the non-statutory allegations in the indictment.

Id. The bottom line is that, in a sufficiency review, courts tolerate variances as long as they are not so great that the proof at trial "shows an entirely different offense" than what was alleged in the charging instrument. *Id*.

Waiver of Defect or Error in Each Indictment

The State asserts that under article 21.07 of the Code of Criminal Procedure, a complainant may be identified in an indictment only by initials, without stating the complainant's given name or surname. *See* Tex. Code Crim. Proc. Ann. art. 21.07 ("In alleging the name of the defendant, or of any other person necessary to be stated in the indictment, it shall be sufficient to state one or more of the initials of the given name and the surname."). To determine if the State is correct, we need to decide whether the complainants are persons "necessary to be stated in the indictment." *See id*.

If a defendant does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merits

commences, the defendant forfeits the right to object to the defect, error, or irregularity and may not raise the objection on appeal or in any other post-conviction proceeding. Tex. Code Crim. Pro. Ann. art. 1.14(b). On or before the date on which the trial started, appellant did not object that (1) either indictment was required to state the given name or the surname of the complainant or (2) it was improper to identify the complainants in the indictments as "M.V." and "M.M." Thus, appellant waived any such objection, and we need not and do not address whether, under article 21.07 of the Code of Criminal Procedure, a complainant may be identified in an indictment only by initials, without stating the complainant's given name or surname. *See* Tex. Code Crim. Pro. Ann. art. 1.14(b); *Grant v. State*, 970 S.W.2d 22, 23 (Tex. Crim. App. 1998); *Martin v. State*, 346 S.W.3d 229, 231–33 (Tex. App.–Houston [14th Dist.] 2011, no pet.). We presume for the purposes of our analysis that the indictments properly identified each complainant.

The State's No-Variance Argument

Appellant argues that there is a material and fatal variance between the allegations in the indictments and the proof at trial because the indictments alleged that appellant solicited the capital murder of "M.V." and "M.M." yet the proof at trial showed that appellant solicited the capital murders of "Meghan Verikas" and "Marion 'Mack' McDaniel."

In *Grant v. State*, the charging instrument alleged that the complainant was "Officer Lawson," and the proof at trial showed that the complainant was peace officer "Lieutenant Craig Lawson." *See Grant*, 970 S.W.2d at 22. The court of appeals concluded that (1) article 21.07 of the Code of Criminal Procedure required the charging instrument to allege the complainant's given name; (2) the charging instrument alleged that the complainant's given name was "Officer"; (3) there was no proof at trial that the complainant's given name was "Officer"; and (4) thus, there was a fatal variance between the charging instrument's allegation of the complainant's name and the proof at trial on this point. *See id*. n.1.

The Court of Criminal Appeals determined that the charging instrument did not allege that the complainant's given name was "Officer"; instead, the charging instrument failed to allege the given name of the complainant. *See id*. at 22. The high court concluded that under article 1.14(b), the appellant in that case had waived any complaint as to the charging instrument's failure to allege the complainant's given name by failing to object to the indictment on this basis. *See* Tex. Code Crim. Pro. Ann. art. 1.14(b); *Grant*, 970 S.W.2d at 23. Because the charging instrument in *Grant* only identified the complainant as an officer whose surname was Lawson, the State was not required to prove the complainant's given name, and the State only had to prove that the complainant was an officer whose surname was Lawson. *See Grant*, 970 S.W.2d at 23. The high court did not address whether

there was a material variance because the court concluded that there was no variance at all given that the instrument alleged that the complainant was an officer whose surname was Lawson and the proof at trial showed that the complainant was an officer whose surname was Lawson. *See id*. at 22–23.

Appellant asserts that "M.V." and "M.M." are pseudonyms for the complainants rather than initials.[2] Appellant asserts that there was a discrepancy between the allegations in the indictments and the proof at trial because the indictments alleged these two pseudonyms for the complainants and the proof at trial did not show that "M.V." was a pseudonym for "Meghan Verikas" or that "M.M." was a pseudonym for "Marion 'Mack' McDaniel."

The State relies on *Grant* and argues that appellant waived any objection to the indictment's use of initials to identify the complainants and that there was no variance at all because there was no discrepancy between the allegations in the indictments and the proof at trial. *See id*. In effect, the State asserts that there was no variance at all because the indictments alleged that the complainants were a person with the initials "M.V." and a person with the initials "M.M." and the proof at trial showed that the

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[2] Some statutes allow complainants in certain criminal cases to choose a pseudonym to be used in public files and records concerning the offense, but none of these statutes apply to the offenses in today's case. *See* Tex. Code Crim. Pro. Ann. arts. 57.01(4), 57.02, 57A.01(4), 57B.01(4), 57D.01(4), 62.001(5); Tex. Pen. Code Ann. §§ 3.01, 20A.02.

complainants were a person with the initials "M.V." and a person with the initials "M.M." If the State is correct that there was no variance, then there could not have been a material variance and appellant's sufficiency point lacks merit. *See id*. But, we do not have to address this issue if appellant's material-variance argument lacks merit, even presuming that there was a variance. Therefore, we presume for the sake of argument that there was a variance between the allegations in the indictments and the proof at trial, and we examine whether this variance would be material.

Material-Variance Analysis

Appellant argues that there is a material variance because the variance in this case involves a statutory allegation that defines the offense, which is either not subject to a materiality analysis, or, if it is, is always material. *See Ramjattansingh*, 548 S.W.3d at 547. The name of the complainant is not part of the definition of the solicitation-to-commit-capital-murder offense. *See* Tex. Pen. Code Ann. §§ 19.02(b)(1), 19.03(a), 15.03(a). To support the notion that the complainant's name is one of the statutory elements of the offenses in this case, appellant asserts that the applicable law requires the indictment to allege the name of the complainant and the evidence to prove beyond a reasonable doubt the complainant's name as alleged in the indictment. But, cases from the Court of Criminal Appeals show that the evidence must prove the complainant's name beyond a reasonable doubt based on the charging instrument's allegation of the complainant's name, not

because the complainant's name is part of the statutory definition of the offense. *See Gollihar*, 46 S.W.3d at 254; *Curry v. State*, 30 S.W.3d 394, 404–05 (Tex. Crim. App. 2000). We conclude that the complainant's name is not a statutory allegation that defines the offense of solicitation to commit capital murder. *See* Tex. Pen. Code Ann. §§ 19.02(b)(1), 19.03(a), 15.03(a); *Ramjattansingh*, 548 S.W.3d at 547; *Fuller v. State*, 73 S.W.3d 250, 253 (Tex. Crim. App. 2002); *Gollihar*, 46 S.W.3d at 254; *Curry*, 30 S.W.3d at 404–05; *Steele v. State*, 490 S.W.3d 117, 124 (Tex. App.—Houston [1st Dist.] 2016, no pet.). This case falls in the second category for analyzing material-variance complaints, the category containing non-statutory allegations that describe an element of the offense that defines or helps define the allowable unit of prosecution and that sometimes are material. *See Ramjattansingh*, 548 S.W.3d at 547. Thus, to determine whether the variances are material, we must decide whether each indictment informed appellant of the respective charge against him sufficiently to allow him to prepare an adequate defense at trial, and whether prosecution under the indictments would subject him to the risk of being prosecuted later for the same respective crimes. *See Gollihar*, 46 S.W.3d at 258.

As to the first point, the record does not reflect that the use of initials in the indictments rather than the names of each complainant interfered with appellant's ability to prepare an adequate defense to either charge at trial. Appellant does not argue that either indictment failed to inform him of the respective charge

against him sufficiently to allow him to prepare an adequate defense at trial. On appeal, appellant states that "the present case involves protection from double jeopardy [the second point in this analysis], and not lack of notice [the first point]." We conclude that each indictment informed appellant of the respective charge against him sufficiently to allow him to prepare an adequate defense at trial. *See id*.

As to the second point, appellant argues that even after his convictions under the indictments, he still is subject to the risk of being prosecuted later for soliciting the capital murder of "Meghan Verikas" or for soliciting the capital murder of "Marion 'Mack' McDaniel" because the convictions only bar future prosecution for soliciting the capital murder of a person whose "proper name" is "M.V." or whose "proper name" is "M.M." But, if appellant were prosecuted again, appellant could avail himself of the entire record in each of these cases, not merely the two indictments. *See id*. Verikas testified her name is Meghan Verikas. The first letter of her given name is an "M" and the first letter of her surname is a "V," so her initials are "M.V.". Appellant referred to "Meghan" during his interactions with the solicitee and ample other evidence in the record shows Meghan Verikas was one of the complainants in the two solicitation-to-commit-capital-murder offenses. Likewise, Marion "Mack" McDaniel testified his name is Marion "Mack" McDaniel. The first letter of his given name is an "M" and the first letter of his surname is an "M," making his initials "M.M.". Appellant referred to Mack as

Valerie's ex-husband during appellant's interactions with the solicitee and ample other evidence shows that Mack (M.M.), was Valerie's ex-husband and the other complainant.

The clerk's record in each case in the trial court and the reporter's record from trial, as well as this court's opinion on appeal, make it clear that appellant was convicted for soliciting the capital murder of "Meghan Verikas" and for soliciting the capital murder of "Marion 'Mack' McDaniel" and that appellant is not subject to another prosecution for either offense. *See Santana v. State*, 59 S.W.3d 187, 195 (Tex. Crim. App. 2001); *Ramos v. State*, 688 S.W.2d 135, 136–37 (Tex. App.—Corpus Christi 1985, no pet.). We conclude that prosecution under the indictments has not subjected appellant to the risk of being prosecuted later for the same respective crimes. *See Gollihar*, 46 S.W.3d at 258.

On appeal, appellant asserts that the State erred in failing to make sure that the indictments alleged the full names of the complainants and that appellant structured his defense around the allegations in the indictments. Appellant claims that he "had absolutely no obligation to make the State aware of its error and was fully justified in 'laying behind the log' to see if the State could carry its burden [of proving that the complainants were named "M.V." and "M.M."]." Appellant asserts that, "[h]ad the State properly alleged the name[s] of the [complainants], [a]ppellant would have put on a completely different defense case and may have even pleaded guilty and received a lesser punishment." This lay-behind-the-log strategy runs afoul of

article 1.14(b), under which a defendant who does not object to a defect, error, or irregularity of form or substance in an indictment before the date on which the trial on the merits commences waives the right to object to the defect, error, or irregularity and may not raise the objection on appeal or in any other post-conviction proceeding. *See* Tex. Code Crim. Pro. Ann. art. 1.14(b); *Grant*, 970 S.W.2d at 23; *Martin*, 346 S.W.3d at 231–33.

Either there was a material variance between each indictment's allegation as to the identity of each complainant and the proof at trial or there was not. If there was no variance, as the State argues, then there could not be a material variance, and each hypothetically correct charge only requires proof that each complainant has the initials alleged in the indictment. *See Grant*, 970 S.W.2d at 23. The trial evidence would allow a rational trier of fact to find beyond a reasonable doubt that one complainant has the initials "M.V." and that the other complainant has the initials "M.M." *See id*. If there were variances, then we would determine that each variance was not material and thus did not prejudice appellant's substantial rights. *See Ramjattansingh*, 548 S.W.3d at 547–48; *Santana*, 59 S.W.3d at 195; *Gollihar*, 46 S.W.3d at 258. Under the applicable standards of review, we conclude that there was no material variance, as alleged under the first issue, and we conclude that the trial evidence is sufficient to support each conviction for solicitation to commit capital murder. We overrule appellant's first issue.

B. Exclusion of Expert Evidence

Appellant challenges the trial court's decision to exclude the testimony (and demonstrative aids) of his forensic audio expert, Dr. Al Yonovitz.

Standard of Review

Texas Rule of Evidence 702, entitled "Testimony by Expert Witnesses," provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue.

To fall under this rule, the offering party must show (1) the expert's knowledge and experience on a relevant issue exceeds that of the average juror and (2) the expert's testimony will help the jury understand the evidence or determine a fact issue. *See Duckett v. State*, 797 S.W.2d 906, 914 (Tex. Crim. App. 1990), *overruled on other grounds, Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993). When the jury stands equally competent to form an opinion about an ultimate fact issue, or the expert's testimony falls within the common knowledge of the jury, the trial court should exclude the expert's testimony. *Id.*; *Heidelberg v. State*, 36 S.W.3d 668, 676 (Tex. App.—Houston [14th Dist.] 2001, no pet.). Expert opinions must aid, not supplant, the jury's decision. *Schutz v. State*, 957 S.W.2d 52, 59 (Tex.

Crim. App. 1997). If the proffered testimony does not meet the criteria, the trial court should exclude it.

We use an abuse-of-discretion standard in reviewing both the trial court's determination of a witness's qualifications as an expert and the trial court's decision to exclude expert testimony. *Ellison v. State*, 201 S.W.3d 714, 723 (Tex. Crim. App. 2006). We will not disturb the trial court's decision absent a clear abuse of discretion. *Id.* The trial court abuses its discretion when its ruling is arbitrary, unreasonable, or without reference to any guiding rules or legal principles. *Lyles v. State*, 850 S.W.2d 497, 502 (Tex. Crim. App. 1993). Under this standard, we must uphold the trial court's ruling if it falls within the zone of reasonable disagreement. *Montgomery v. State*, 810 S.W.2d 372, 391 (Tex. Crim. App. 1991) (op. on reh'g).

Proffered Expert Evidence

During Yonovitz's voir-dire examination, when asked about why the defense had called him to assist the jury, Yonovitz testified that he was asked to take the "voluminous amount of audio information" in this case and "assimilate" and "collate" the material. He explained:

> There are a great number of times through the hours and hours of conversations where [appellant] made commentary about what his intention was with Meghan. And I was asked to take those conversations and to organize; not to linguistically interpret them, but

> instead to put them in a manner that would allow perhaps a jury to understand the structure of what was said during the time that those indications by [appellant] were made.

With respect to the recordings, Yonovitz explained that the defense team asked him to put the recordings into "topical" areas of what appellant said should happen to Verikas. Yonovitz noted that he occasionally "enhanced the audio on the recordings," removing background noise, where he thought it was needed, and drew a conclusion on what appellant's "words clearly indicated." In his report Yonovitz listed as conclusions his impressions from the words spoken in the recordings.

Analysis

When a jury stands just as competent as an expert to form an opinion about an ultimate fact issue, or the expert's testimony falls within the jury's common knowledge, the trial court should exclude the expert's testimony. *See Duckett*, 797 S.W.2d at 914; *Heidelberg*, 36 S.W.3d at 676; *see also Davis v. State*, 313 S.W.3d 317, 350 (Tex. Crim. App. 2010) (holding the expertise beyond that of an average person "need not necessarily be monumental"). Expert testimony about a defendant's state of mind or intent at the time of the offense is speculative and improper. *See Jackson v. State*, 548 S.W.2d 685, 692–93 (Tex. Crim. App. 1977); *Winegarner v. State*, 505 S.W.2d 303, 304 (Tex. Crim. App. 1974), *overruled on other grounds by White v. State*, 576 S.W.2d 843, 845 (Tex. Crim. App. 1979). So, it should

not be presented to the jury. *See Jackson*, 548 S.W.2d at 692–93; *Winegarner*, 505 S.W.2d at 304.

It does not take an acoustics expert to listen to recordings. An average person can do so. While it might take time and effort to collate statements from recordings into topical areas, the task does not require an audiologist or expert in acoustics. No evidence suggests that it does.

Given that the trial court heard all of the audio recordings through the presentation of other witnesses, the trial court stood in the best position to determine whether Yonovitz's proffered testimony—exclusively devoted to a review of that evidence—would assist the jury. *See Montgomery*, 810 S.W.2d at 391. The trial court's decision to exclude Yonovitz's testimony falls well within the zone of reasonable disagreement and so does not amount to an abuse of discretion. *See Jackson*, 548 S.W.2d at 692–93; *Winegarner*, 505 S.W.2d at 304. Having concluded that the trial court did not abuse its discretion in excluding the evidence, we overrule appellant's second issue.

C. Did the trial court commit error when it stated that a fine was "meaningless" during voir dire?

In his third issue, appellant complains of a statement the trial court made during voir dire, while explaining the punishment range to the jury. Appellant argues the trial court committed fundamental error when the court stated: "And I forgot to add, by the way,

it's five years to life and up to a fine of $10,000, which is meaningless, frankly." Appellant asserts that the trial court, in making this comment, encouraged the jury to ignore the full range of punishment and showed a lack of impartiality. The trial court's comment on the fine is not the first time this trial court has made such a statement or the first time such a statement has drawn an objection. *See Loge v. State*, 550 S.W.3d 366, 378 (Tex. App.—Houston [14th Dist.] 2018, no pet.) (involving a complaint that the same judge told the panel "don't worry about the fine").

As in *Loge*, today we presume, without deciding, that appellant need not have objected in the trial court to preserve this complaint for appellate review. *Loge*, 550 S.W.3d at 382. The trial judge informed the venire members "the State's got the full and complete burden to prove [appellant] guilty beyond a reasonable doubt," "the range of punishment . . . is a minimum of 5 years to life in the penitentiary, or any in between" (with examples of "10 years, 6 years, 20 years, 30 years to life"), and its "[s]trictly up to you to make a decision on punishment in the case." The remark at issue was made during the trial court's discussion with the venire panel about their ability to consider the full range of punishment, throughout which, the panel was frequently prompted to ask the court (and did ask the court) questions. After this remark, no one asked questions, made comments, expressed concerns, or otherwise exhibited an inability to consider the full range of punishment.

The jury, rather than the trial court, assessed punishment. In both cases the jury assessed punishment at confinement for life and a $10,000 fine. Considering the trial court's statements in proper context, the comment about the fine being meaningless, though better left unsaid, does not show the trial court was biased, that the trial court failed to act impartially, or that the trial court instructed the jury to ignore the full range of punishment. *See id*. So, the comment did not constitute error, and we overrule appellant's third issue. *See id*.

III. Conclusion

There is no material variance between each indictment's allegations as to the identity of each complainant and the proof at trial. Under the applicable standards of review, we conclude the trial evidence is legally sufficient to support each solicitation-to-commit-capital-murder conviction. We also conclude that the trial court did not err in excluding appellant's audio expert and the expert's demonstrative exhibits, and that the trial court's voir-dire comment challenged in the third issue does not constitute error. Having overruled all of appellant's issues, we affirm both of the trial court's judgments.

/s/ Kem Thompson Frost
Chief Justice

Panel consists of Chief Justice Frost and Justices Jewell and Bourliot.

Publish—TEX. R. APP. P. 47.2(b).

[SEAL]

JUDGMENT

The Fourteenth Court of Appeals

LEON PHILLIP JACOB, Appellant

NO. 14-18-00304-CR
NO. 14-18-00305-CR

V.

THE STATE OF TEXAS, Appellee

Cause No. 14-18-00304-CR was heard on its appellate record. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment of the court below **AFFIRMED**. We further order this decision certified below for observance.

Cause No. 14-18-00305-CR was heard on its appellate record. Having considered the record, this Court holds that there was no error in the judgment. The Court orders the judgment of the court below **AFFIRMED**. We further order this decision certified below for observance.

Judgments Rendered August 29, 2019.

Panel Consists of Justices Chief Justice Frost and Justices Jewell and Bourliot.
Opinion delivered by Chief Justice Frost.

[SEAL] **CASE NO. 154381201010**
INCIDENT NO./TRN: 9265071737A001

THE STATE OF TEXAS	§	**IN THE 263RD DISTRICT**
	§	
v.	§	**COURT**
	§	
JACOB, LEON PHILLIP	§	**HARRIS COUNTY, TEXAS**
	§	
STATE ID NO.: TX16560147	§	

JUDGMENT OF CONVICTION BY JURY

Judge Presiding: **HON. JIM WALLACE**	Date Judgement Entered: **03/26/2018**
Attorney for State: **C. CALLIGAN/S. KNECHT**	Attorney for Defendant: **PARNHAM, GEORGE J.**
Offense for which Defendant Convicted: **SOLICIT CAPITAL MURDER**	
Charging Instrument **INDICTMENT**	Statute for Offense: **N/A**
Date of Offense: **03/08/2017**	
Degree of Offense: **1ST DEGREE FELONY**	Plea to Offense: **NOT GUILTY**
Verdict of Jury: **GUILTY**	Findings on Deadly Weapon: **N/A**
Plea to 1st Enhancement Paragraph: **N/A**	Plea to 2nd Enhancement/ Habitual Paragraph: **N/A**

Findings on 1st Enhancement Paragraph: **N/A**	Findings on 2nd Enhancement/ Habitual Paragraph: **N/A**

Punished Assessed by:	Date Sentence Imposed:	Date Sentence to Commence:
JURY	**03/26/2018**	**03/26/2018**

Punishment and Place of Confinement: **LIFE INSTITUTIONAL DIVISION, TDCJ**

THIS SENTENCE SHALL RUN **CONCURRENTLY.**

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR **N/A.**

Fine:	Court Costs:	Restitution	Restitution Payable to:
$**10,000**	**As Assessed**	$ **N/A**	☐ **VICTIM** (see below) ☐ **AGENCY/AGENT** (see below)

Sex Offender Registration Requirements apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was **N/A years**.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:

From: 03/10/2017 to 03/26/2018	**From**: to	**From**: to
From: to	**From**: to	**From**: to

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

N/A DAYS NOTES: **N/A**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Harris County, Texas**. The State appeared by her District Attorney.

Counsel/Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and **ORDERED** it entered upon the minutes of the Court.

Punishment Assessed by Jury/Court/No election (select one)

☒ **Jury**. Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.

☐ **Court**. Defendant elected to have the Court assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

☐ **No Election**. Defendant did not file a written election as to whether the judge or jury should assess punishment. After hearing evidence relative to the question of punishment, the Court assessed Defendant's punishment as indicated above.

The Court **FINDS** Defendant committed the above offense and **ORDERS, ADJUDGES AND DECREES** that Defendant is **GUILTY** of the above offense. The Court **FINDS** the Presentence Investigation, if so ordered, was done according to the applicable provisions of TEX. CODE CRIM. PROC. art. 42.12 § 9.

The Court **ORDERS** Defendant punished as indicated above. The Court **ORDERS** Defendant to pay all tines, court costs, and restitution as indicated above.

Punishment Options (select one)

☒ **Confinement in State Jail or Institutional Division**. The Court **ORDERS**the authorized agent of the State of Texas or the Sheriff of this County to take,

safely convey , and deliver Defendant to the **Director, State Jail Division, TDCJ**. The Court **ORDERS** Defendant to be confined for the period and in the manner indicated above. The Court **ORDERS** Defendant remanded to the custody of the Sheriff of this county until the Sheriff can obey the directions of this sentence. The Court **ORDERS** that upon release from confinement. Defendant proceed immediately to the **Harris County District Clerk's office**. Once there, the Court **ORDERS** Defendant to pay. or make arrangements to pay. any remaining unpaid lines, court costs, and restitution as ordered by the Court above.

☐ **County Jail—Confinement / Confinement in Lien of Payment**. The Court **ORDERS** Defendant immediately committed to the custody of the Sheriff of Harris County, Texas on the date the sentence is to commence. Defendant shall be confined in the **Harris County Jail** for the period indicated above. The Court **ORDERS** that upon release from confinement. Defendant shall proceed immediately to the **Harris County District Clerk's office**. Once there, the Court **ORDERS** Defendant to pay. or make arrangements to pay. any remaining unpaid tines, court costs, and restitution as ordered by the Court above.

☐ **Fine Only Payment**. The punishment assessed against Defendant is for a **FINE ONLY**. The Court **ORDERS** Defendant to proceed immediately to the **Office of the Harris County District Clerk**. Once there, the Court **ORDERS** Defendant to pay or make arrangements to pay all fines and court costs as ordered by the Court in this cause.

Execution / Suspension of Sentence (select one)

☒ The Court **ORDERS** Defendant's sentence **EXECUTED.**

☐ The Court **ORDERS** Defendant's sentence of confinement **SUSPENDED**. The Court **ORDERS** Defendant placed on community supervision for the adjudged period (above) so long as Defendant abides by and does not violate the terms arid conditions of community supervision. The order setting forth the terms and conditions of community supervision is incorporated into this judgment by reference.

The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated. The Court **ORDERS** that Defendant is given credit noted above on this sentence for the time spent incarcerated. The Court further **ORDERS** that if the defendant is convicted of two or more offenses in a single criminal action, that each cost or fee amount must be assessed using the highest category of offense. Tex. Code Crim. P. art. 102.073.

Furthermore, the following special findings or orders apply:

Signed and entered on 03/26/2018

X Jim Wallace
JIM WALLACE
JUDGE PRESIDING

[IMAGE OMITTED]

Notice of Appeal Filed: **MAR 26 2018**

Mandate Received: _____

Type of Mandate: _____

After Mandate Received, Sentence to Begin Date is:

_____

Jail Credit: _____
Def. Received on at ☐AM ☐ PM
By: , Deputy Sheriff of Harris County

Clerk: **W JONES**
Case Number: **154381201010**
Defendant: JACOB, LEON PHILLIP
EN/KR04: LCBT: LCBU: EN/KR18:

[SEAL] **CASE NO. 154381301010**
INCIDENT NO./TRN: 9265072474A001

THE STATE OF TEXAS	§	**IN THE 263RD DISTRICT**
	§	
v.	§	**COURT**
	§	
JACOB, LEON PHILLIP	§	**HARRIS COUNTY, TEXAS**
	§	
STATE ID NO.: TX16560147	§	

JUDGMENT OF CONVICTION BY JURY

Judge Presiding: **HON. JIM WALLACE**	Date Judgement Entered: **03/26/2018**
Attorney for State: **C. CALLIGAN/S. KNECHT**	Attorney for Defendant: **PARNHAM, GEORGE J.**
Offense for which Defendant Convicted: **SOLICIT CAPITAL MURDER**	
Charging Instrument **INDICTMENT**	Statute for Offense: **N/A**
Date of Offense: **03/08/2017**	
Degree of Offense: **1ST DEGREE FELONY**	Plea to Offense: **NOT GUILTY**
Verdict of Jury: **GUILTY**	Findings on Deadly Weapon: **N/A**
Plea to 1st Enhancement Paragraph: **N/A**	Plea to 2nd Enhancement/ Habitual Paragraph: **N/A**

Findings on 1st Enhancement Paragraph: **N/A**	Findings on 2nd Enhancement/ Habitual Paragraph: **N/A**

Punished Assessed by:	Date Sentence Imposed:	Date Sentence to Commence:
JURY	**03/26/2018**	**03/26/2018**

Punishment and Place of Confinement: **LIFE INSTITUTIONAL DIVISION, TDCJ**

THIS SENTENCE SHALL RUN **CONCURRENTLY.**

☐ SENTENCE OF CONFINEMENT SUSPENDED, DEFENDANT PLACED ON COMMUNITY SUPERVISION FOR **N/A.**

Fine:	Court Costs:	Restitution	Restitution Payable to:
$**10,000**	**As Assessed**	$ **N/A**	☐ **VICTIM** (see below) ☐ **AGENCY/AGENT** (see below)

Sex Offender Registration Requirements apply to the Defendant. TEX. CODE CRIM. PROC. chapter 62.

The age of the victim at the time of the offense was **N/A years**.

If Defendant is to serve sentence in TDCJ, enter incarceration periods in chronological order.

Time Credited:	**From:** 03/10/2017 to 03/26/2018	**From**: to
	From: to	**From**: to
	From: to	**From**: to

If Defendant is to serve sentence in county jail or is given credit toward fine and costs, enter days credited below.

N/A DAYS NOTES: **N/A**

All pertinent information, names and assessments indicated above are incorporated into the language of the judgment below by reference.

This cause was called for trial in **Harris County, Texas**. The State appeared by her District Attorney.

Counsel/Waiver of Counsel (select one)

☒ Defendant appeared in person with Counsel.

☐ Defendant knowingly, intelligently, and voluntarily waived the right to representation by counsel in writing in open court.

It appeared to the Court that Defendant was mentally competent and had pleaded as shown above to the charging instrument. Both parties announced ready for trial. A jury was selected, impaneled, and sworn. The INDICTMENT was read to the jury, and Defendant entered a plea to the charged offense. The Court received the plea and entered it of record.

The jury heard the evidence submitted and argument of counsel. The Court charged the jury as to its duty to determine the guilt or innocence of Defendant, and the jury retired to consider the evidence. Upon returning to open court, the jury delivered its verdict in the presence of Defendant and defense counsel, if any.

The Court received the verdict and **ORDERED** it entered upon the minutes of the Court.

Punishment Assessed by Jury/Court/No election (select one)

☒ **Jury**. Defendant entered a plea and filed a written election to have the jury assess punishment. The jury heard evidence relative to the question of punishment. The Court charged the jury and it retired to consider the question of punishment. After due deliberation, the jury was brought into Court, and, in open court, it returned its verdict as indicated above.

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Furthermore, the following special findings or orders apply:

Signed and entered on 03/26/2018

X Jim Wallace
JIM WALLACE
JUDGE PRESIDING

[IMAGE OMITTED]

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