No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

GABRIEL PAUL HALL,
Petitioner,

v.

TEXAS,
Respondent.

On Petition for a Writ of Certiorari to
the Texas Court of Criminal Appeals

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

THIS IS A CAPITAL CASE

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Appendix A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-86,568-01

EX PARTE GABRIEL PAUL HALL, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. 11-06185-CRF-272 IN THE 272ND JUDICIAL DISTRICT COURT BRAZOS COUNTY

Per curiam.

O R D E R

In September 2015, a jury found Applicant guilty of the offense of capital murder. *See* TEX. PENAL CODE § 19.03(a). Based on the jury's answers to the statutory punishment questions set out in Texas Code of Criminal Procedure Article 37.071, the trial court sentenced Applicant to death.[1] We affirmed Applicant's capital murder conviction and death

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

sentence on direct appeal. *Hall v. State*, 663 S.W.3d 15 (Tex. Crim. App. 2021).

Applicant filed his initial Article 11.071 habeas application in the trial court on October 17, 2019, while his direct appeal was still pending before us. In his habeas application, Applicant raises seven claims for relief:

- "[Applicant's] death sentence violates the Fourteenth Amendment's Due Process Clause because the State failed to correct false testimony offered by employees of the Brazos County Detention Center" (Claim 1);

- "[Applicant's] death sentence is arbitrary, in violation of the Eighth and Fourteenth Amendments to the United States Constitution, because the punishment is based on the jury's decision that he would commit future acts of violence, which has proved false"[2] (Claim 2);

- "[Applicant's] death sentence violates the Eighth Amendment because it was not based on his moral culpability at the time of trial" (Claim 3);

- "The Court should have found at trial and should now find that as a matter of law [Applicant] is ineligible for a death sentence" because he was eighteen when he murdered the victim in this case or because he suffers from severe mental illness (or both) (Claim 4);

- "This Court should find as a matter of law that the evidence was sufficient to dictate an affirmative answer to the mitigation special issue" (Claim 5);

- "[Applicant] received ineffective assistance of [trial] counsel" (Claim 6); and

- "The jury in [Applicant's] case was misled, if not lied to, in violation of *Simmons v. South Carolina*, 512 U.S. 154 (1994),] thereby violating [Applicant's] rights under the Eighth and Fourteenth Amendments" (Claim 7).

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[2] In point of error six on direct appeal, Applicant raised a facial constitutional challenge to the future-dangerousness punishment phase special issue. *See* Art. 37.071, § 2(b)(1); *Hall*, 663 S.W.3d at 37–38. In habeas Claim 2, we understand Applicant to raise an *as-applied* constitutional challenge to the future dangerousness special issue, which renders it distinct from direct appeal point of error six.

On January 30, 2023, the trial court held a live evidentiary hearing on Claim 6, Applicant's ineffective assistance of trial counsel claim. On February 7, 2023, we received the reporter's record for the January hearing. Eight days later, we received Applicant's "Motion to Correct Record Filed Pursuant to [Texas Rule of Appellate Procedure] 34.6(e)(3)"[3] ("Motion to Correct"). Therein, habeas counsel David R. Dow and Jeffrey R. Newberry alleged that the reporter's record for the January 30 evidentiary hearing was inaccurate. More specifically, they complained that the evidentiary hearing record did not include certain remarks that Newberry asserted he heard Applicant's trial counsel, John Wright, make to the trial judge after Wright had finished testifying and had been excused as a witness. Invoking Rule 34.6(e)(3), habeas counsel asked this Court to submit their dispute with the evidentiary hearing record to the trial court for resolution.

We ordered: (1) the trial court to make findings of fact and conclusions of law regarding the accuracy of the January 30 hearing record within twenty days of our order and

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[3] Texas Rule of Appellate Procedure ("TRAP") Rule 34.6(e)(2) specifies that:

> If the parties cannot agree on whether or how to correct the reporter's record so that the text accurately discloses what occurred in the trial court and the exhibits are accurate, the trial court must—after notice and hearing—settle the dispute. If the court finds any inaccuracy, it must order the court reporter to conform the reporter's record (including text and any exhibits) to what occurred in the trial court, and to file certified corrections in the appellate court.

TEX. R. APP. P. 34.6(e)(2). TRAP Rule 34.6(e)(3) provides that "[i]f the dispute arises after the reporter's record has been filed in the appellate court, that court may submit the dispute to the trial court for resolution. The trial court must then proceed as under subparagraph (e)(2)." TEX. R. APP. P. 34.6(e)(3).

to conclude its review of Applicant's habeas claims within sixty days of our order; and (2) the district clerk to immediately thereafter transmit the complete record to this Court. *Ex parte Hall*, No. WR-86,568-01 (Tex. Crim. App. Apr. 5, 2023).

We subsequently received the trial court's findings of fact and conclusions of law regarding both the accuracy of the January 30, 2023 evidentiary hearing record and the appropriate disposition of Applicant's habeas application. As to the accuracy of the January 30 evidentiary hearing record, the trial court generally concludes that the remarks at issue did not constitute testimony and should not be made part of the official reporter's record of the hearing. As to Applicant's habeas claims, the trial court recommends that we deny habeas relief on all of Applicant's claims, either on the merits or on procedural grounds. *See Ex parte Hood*, 304 S.W.3d 397, 402 n.21 (Tex. Crim. App. 2010) ("[T]his Court does not re-review claims in a habeas corpus application that have already been raised and rejected on direct appeal."); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004) ("We have said countless times that habeas corpus cannot be used as a substitute for appeal, and that it may not be used to bring claims that could have been brought on appeal.").

We have reviewed the record concerning Applicant's Motion to Correct. The record supports the trial judge's determination that Wright's remarks at issue should not be made part of the official record of the January 30, 2023 evidentiary hearing. Applicant's Motion to Correct is hereby DENIED.

We have also reviewed the record regarding Applicant's habeas allegations. Claims

1, 3, 4, 5, and 7 are procedurally barred because they were raised and rejected on direct appeal, or they could have been raised on direct appeal, but they were not. *See Hood*, 304 S.W.3d at 402 n.21; *Nelson*, 137 S.W.3d at 667.

Claims 2 and 6 fail on the merits. In Claim 2, Applicant contends that his death sentence is unconstitutional because the jury's affirmative answer to the future dangerousness special issue—"whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society"—has proven to be wrong in his case. Applicant emphasizes that his post-conviction prison disciplinary record includes no incidences of violence. But Applicant misapprehends the future dangerousness special issue, which

> focuses upon the internal restraints of the individual, not merely the external restraints of incarceration. It is theoretically possible to devise a prison environment so confining, isolated, and highly structured that virtually no one could have the opportunity to commit an act of violence, but incapacitation is not the sole focus of the Legislature or of our death penalty precedents.

Coble v. State, 330 S.W.3d 253, 269 (Tex. Crim. App. 2010). Therefore, "concerns over [the] predictive accuracy" of the future dangerousness special issue "should be addressed to the Legislature rather than this Court." *Hall*, 663 S.W.3d at 38 (internal quotation marks omitted).

In Claim 6, Applicant contends that his trial counsel rendered constitutionally ineffective assistance because they hired Dr. Ruben Gur as an expert witness, but they then did not call Gur at trial as a punishment phase witness. However, Applicant fails to meet his

burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance. *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688).

We adopt the trial court's findings of fact and conclusions of law except for Finding of Fact 16 and Conclusions of Law 5 and 6. Based upon the trial court's findings and conclusions that we adopt and our own review, we deny habeas relief as to all of Applicant's claims.

IT IS SO ORDERED THIS THE 7th DAY OF FEBRUARY, 2024.

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