

No. _____

In The
Supreme Court of the United States

BRANDON DANIEL,
Petitioner,

v.

TEXAS,
Respondent.

APPENDICES

APPENDIX A



IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-83,459-01

EX PARTE BRANDON DANIEL

**ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
FROM CAUSE NO. D-1-DC-12-201718-A IN THE 403RD DISTRICT COURT
TRAVIS COUNTY**

Per curiam. ALCALA, J., concurred.

ORDER

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

In the early morning hours of April 6, 2012, applicant drove his motorcycle to a Walmart store. Several store employees testified that applicant appeared to be intoxicated. Fearing for applicant's safety, a store employee called the police to keep applicant from driving while intoxicated. Uniformed police officer Jaime Padron responded to the call. Upon locating applicant, Padron told applicant that he was from the Austin Police

Department and added, “[S]top, I need to talk to you.” Applicant then began running for the front exit. Padron tackled applicant and they fell to the ground. After hearing an initial gun shot, a Walmart employee witnessed applicant put a gun to Padron’s neck and fire a second shot. When Walmart employee Lincoln LeMere jumped onto applicant to stop him, applicant fired a third shot, barely missing LeMere’s ear. After employee, Archie Jordy, disarmed applicant, applicant raised his head and looked at Padron. Applicant then laughed and said, “I killed a cop.”

In February 2014, a jury found applicant guilty of the offense of capital murder of a peace officer. At punishment, the jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure Article 37.071, and the trial court, accordingly, set applicant’s punishment at death. This Court affirmed applicant’s conviction and sentence on direct appeal. *Daniel v. State*, 485 S.W.3d 24 (Tex. Crim. App. 2016).

Applicant presents eleven allegations in his application in which he challenges the validity of his conviction and resulting sentence. The trial court did not hold an evidentiary hearing, and entered findings of fact and conclusions of law and recommended that the relief sought be denied.

This Court has reviewed the record with respect to the allegations made by applicant. Claim 2 is barred because statutory violations are not cognizable on habeas review. *See Ex parte Graves*, 70 S.W.3d 103, 116-17 (Tex. Crim. App. 2002); *Sadberry v. State*, 864 S.W.2d 541, 542 (Tex. Crim. App. 1993). Claims 3, 4, 5, and 7 are all procedurally barred because

habeas is not a substitute for matters which should have been raised at trial or on direct appeal. *Ex parte De La Cruz*, 466 S.W.3d 855, 864 (Tex. Crim. App. 2015); *see also Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004) (holding that even a constitutional claim is forfeited if the applicant had an opportunity to raise the issue on appeal). Further, due process claims based on the Texas constitution are not cognizable on habeas. *See Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989).

In claim 1, applicant contends that his trial counsel were ineffective for the following reasons: failure to investigate and prepare the mitigation case, failure to suppress applicant's inadmissible oral statements, agreement to work on applicant's death penalty case under a flat fee structure, failure to challenge the constitutionality of Texas Penal Code section 8.04, failure to object to inadmissible victim impact evidence during the guilt/innocence phase, failure to object to improper arguments at both the guilt/innocence and punishment phases, failure to object to inadmissible hearsay testimony, failure to retain an expert on prison classification, and failure to explain to the jury why applicant was writing down the names of correctional officers. Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984). He fails to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense. *Id.* at 689.

Also in claim 1, applicant argues that his trial counsel were ineffective for failing to investigate and present evidence that applicant has Autism Spectrum Disorder (ASD).

Applicant presents an affidavit on habeas from one of his trial experts, psychiatrist Dr. Harold Scott, in which Scott revises his diagnosis to include ASD. Again, applicant can not meet his burden under *Strickland*.

The record shows that the entire defense team, consisting of four doctors and a mitigation specialist, considered whether applicant has Asperger's syndrome or another disorder within the autism spectrum. Trial counsel specifically investigated whether a credible diagnosis could be made in this case. Dr. Scott and psychologist Dr. William Lee Carter both interviewed and completed evaluations of applicant. Dr. Scott indicated that applicant probably did not suffer from Asperger's. Dr. Carter firmly believed that applicant did not suffer from ASD. Mitigation specialist Lisa Lawrence investigated and gathered mitigation and early childhood information regarding applicant. Trial counsel provided that information to the mental health professionals on the defense team.

Trial counsel did not fail to investigate whether applicant suffered from ASD. Trial counsel determined, based upon the investigation of applicant's background and opinions of the mental health experts, that a diagnosis of ASD was not supported.

At trial and punishment, trial counsel presented substantial evidence of applicant's mental health issues, related substance abuse issues, and social impairment that were determined to be verified by evidence from applicant's background and mental health experts. Trial counsel relied upon the opinions of their four mental health experts in developing a credible defense and presented expert testimony at trial regarding applicant's

mental health issues and substance abuse problems and how such issues affected his behavior and how such issues affected his statements to police.

Unlike in *Ex parte LaHood*, 401 S.W.3d 45 (Tex. Crim. App. 2013), where defense counsel failed to inquire into LaHood's mental status despite obvious indicators that it was an issue, trial counsel here made a reasonable investigation into possible mental health issues affecting applicant, including ASD. Counsels' decision not to present evidence of a possible ASD diagnosis was objectively reasonable in light of the evidence of applicant's social and mental health history, and his experts' opinions. Further, applicant fails to show that there is a reasonable probability that the result of this proceeding would have been different with the presentation of a possible ASD diagnosis.

In claim 6, applicant claims that his due process rights were violated when the State failed to disclose evidence in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). Specifically, applicant alleges that the State failed to disclose that it promised Louis Escalante a reduced sentence in exchange for his testimony at applicant's trial. However, applicant must do more than state mere conclusions of law or allegations of error; applicant must support his claim with adequate facts. *Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985). Applicant fails to do so here and the evidence before us contradicts his allegation that a deal ever existed.

In claims 8 through 11, applicant challenges the constitutionality of various aspects of Texas Code of Criminal Procedure Article 37.071: the constitutionality of the "10-12"

rule, that the first special issue is unconstitutionally vague, that the punishment phase jury instructions restricted the evidence the jury could determine as mitigating, and that Texas's capital punishment scheme is arbitrarily imposed. These claims have been repeatedly rejected by this Court and applicant raises nothing new to persuade us to reconsider those holdings. *See Davis v. State*, 313 S.W.3d 317, 354-55 (Tex. Crim. App. 2010) ("10-12" rule, arbitrarily imposed capital punishment scheme); *Coble v. State*, 330 S.W.3d 253, 297 (Tex. Crim. App. 2010) (vague first special issue, restriction of evidence that can be considered mitigating).

Based upon the trial court's findings and conclusions and our own review, we deny relief.

IT IS SO ORDERED THIS THE 18th DAY OF OCTOBER, 2017.

Do Not Publish

APPENDIX B

No. D-1-DC-12-201718

PL PATE
BRANDON DANIEL

VS

§ In the 403 District Court
§
§ TRAVIS OF County, TX
§
§

ORDER ON MOTION TO RECUSE AFTER HEARING

On 4/14, 2012, came to be heard the Motion to Recuse filed pursuant to TRCP 18(a) in the above captioned cause. The Court has considered the Motion, all attachments thereto, and all evidence presented, all citations of authority and arguments of counsel.

Therefore, IT IS ORDERED that the Motion to Recuse be and is hereby:

Denied.

IT IS FURTHER ORDERED the Clerk of the Court shall forward a certified copy of this Order to:

Presiding Judge
Third Administrative District
405 Martin Luther King Blvd
Georgetown, TX 78626
Fax Number: 512-943-3767

SIGNED the 14 day of April, 2012.


JUDGE PRESIDING

Filed In The District Court
of Travis County, Texas
on 4/14/2012
at 2:13 P. M.
Velve L. Price, District Clerk

APPENDIX C

NO. WR-83,459-01
AP-77,034

IN THE
COURT OF CRIMINAL APPEALS
OF THE STATE OF TEXAS

EX PARTE	§	IN THE DISTRICT COURT
	§	OF TRAVIS COUNTY, TEXAS
BRANDON DANIEL	§	403 RD DISTRICT COURT

Trial Court No. D-1-DC-12-201718-A

AMENDED FINDINGS OF FACT AND CONCLUSIONS OF LAW
AND
ORDER TO TRANSMIT HABEAS RECORD

(ARTICLE 11.071 POST CONVICTION APPLICATION)

ON THIS 30th day of November, 2016, came on to be considered the Application for Writ of Habeas Corpus in this cause. In resolving the issues raised and presented, this Court has considered applicant's Application for Writ of Habeas Corpus, its attached exhibits and affidavits, the State's answer and all attached exhibits and affidavits, and the court's own personal recollection. Art. 11.071, §9(a), V.A.C.C.P. The court hereby makes the following Findings of Fact and Conclusions of Law:

Filed In The District Court
of Travis County, Texas
on 11-30-16
at 3:20 P M.
Velva L. Price, District Clerk

FINDINGS OF FACT AND CONCLUSIONS OF LAW

A jury convicted applicant of the Capital Murder of Austin Police Officer Jaime Padron. (CR 98, 100, 184). The trial court sentenced applicant to death based on the jury's answers to the punishment issues. (CR 189; RR 26: 221). Applicant timely filed a Motion for New Trial, which was overruled by operation of law. (CR 196). In a unanimous decision on direct appeal, the Texas Court of Criminal Appeals affirmed the trial court's judgment and sentence of death. *Daniel v. State*, 485 S.W.3d 24 (Tex.Crim.App. 2016). The mandate issued in the direct appeal on April 13, 2016.

Ground for Relief One

Applicant presents twelve claims of ineffective assistance of counsel under his first ground for relief.

Findings of Fact Relevant to All Claims in Ground for Relief One

1. Applicant's lead defense counsel, Russ Hunt, has been Board Certified in Criminal Law since 2000 and has handled more than five death penalty cases as first and second chair in both State and Federal Courts.
2. Russ Hunt filed a detailed and credible affidavit in response to applicant's claims of ineffective assistance of counsel.
3. Attorney Brad Urrutia was appointed to represent applicant from the day of

applicant's arrest. Brad Urrutia has experience in representing defendants in capital murder cases. Brad Urrutia has been licensed to practice law in Texas since 1996.

4. Brad Urrutia filed a detailed and credible affidavit in response to applicant's claims of ineffective assistance of counsel.
5. Russ Hunt and Brad Urrutia are competent criminal defense lawyers.
6. In preparation for trial, Russ Hunt and Brad Urrutia assembled a defense team with multiple experts to assist in the investigation and presentation of this case. Hunt and Urrutia retained Dr. Cecil Reynolds, a consulting neuropsychologist, Dr. Walter Harrell, a neuropsychologist, Dr. Harold Scott, a psychiatrist, Dr. William Lee Carter, a psychologist, and Lisa Lawrence, a mitigation specialist.

Conclusions of Law Relevant to All Claims in Ground for Relief One

1. As to all claims, the court concludes that applicant has failed to meet his burden to prove by a preponderance of the evidence that defense counsel rendered ineffective assistance under the standard of *Strickland v. Washington*, 466 U.S. 688 (1984).

Claim 1A

Findings of Fact

1. The entire defense team discussed and considered whether applicant had Asperger's syndrome or another disorder within autism spectrum.
2. Defense counsel specifically investigated whether a credible diagnosis that applicant suffered from Asperger's syndrome or other related autism disorder could be made in this case.
3. Defense counsel asked Dr. Scott and Dr. Carter to interview applicant, complete evaluations of applicant, and assist in his defense.
4. Both Dr. Scott and Dr. Carter interviewed applicant. Dr. Scott indicated that the applicant probably did not suffer from Asperger's syndrome. Dr. Carter firmly believed that the applicant did not suffer from autism spectrum disorder (ASD).
5. Mitigation specialist Lisa Lawrence investigated and gathered mitigation information and early childhood information regarding applicant. Defense counsel provided that information to the mental health professionals on the defense team.
6. Defense counsel did not fail to investigate whether applicant suffered from ASD.
7. Defense counsel determined, based upon its investigation of applicant's background and opinions of the defense team's mental health experts, that a diagnosis of ASD for applicant was not supported.

8. Defense counsel presented substantial evidence at trial of applicant's mental health issues, related substance abuse issues, and social impairment.
9. Defense counsel determined to present evidence of applicant's psychological issues that could be verified by evidence from applicant's background and mental health experts.
10. Defense counsel relied on the opinions of their mental health experts in developing a credible defense for applicant.
11. Defense counsel presented expert testimony at trial in support of the defensive theory.
12. Defense counsel utilized their investigation into applicant's mental health issues, including autism-related disorders, and applicant's social history to develop an appropriate mitigation case.
13. Defense counsel presented evidence at both phases of trial of applicant's mental health issues and substance abuse problems, how such issues affected his behavior, and how such issues affected his statements to police.

Conclusions of Law

1. Defense counsel made a reasonable investigation into possible mental health conditions affecting applicant. *Ex parte Lahood*, 401 S.W.3d 45, 50

(Tex.Crim.App. 2013).

2. Defense counsel's determination not to present evidence of a possible ASD diagnosis was objectively reasonable, particularly in light of the evidence of applicant's social and mental health history.
3. There is no reasonable probability that the result of this proceeding would have been any different with the presentation of a possible ASD diagnosis for applicant.
4. Applicant fails to overcome the strong presumption that his defense counsel performed effectively. *Strickland v. Washington*, 466 U.S. 688, 690 (1984).
5. All requested relief on Claim 1A should be denied.

Claim 1B

Findings of Fact

1. Defense counsel engaged mitigation specialist Lisa Lawrence to investigate applicant's life and background.
2. Lisa Lawrence investigated and gathered information regarding applicant's childhood, friends, family, and employment history.
3. Defense attorney Brad Urrutia and Lisa Lawrence travelled to Colorado to search for further mitigating evidence and interview potential witnesses identified in the mitigation investigation.
4. Defense counsel thoroughly investigated applicant's past and his family

background and history.

5. Based on defense counsel's experience and investigation, defense counsel determined not to present evidence of applicant's immigrant ancestors from war-torn countries.
6. In defense counsel's professional judgement, the history of violence in applicant's family constituted potentially aggravating punishment factors, rather than mitigating, and tended to suggest applicant would constitute a future danger. Defense counsel made a reasoned, strategic decision not to present this potentially aggravating evidence to the jury.
7. Defense counsel made a reasonable strategic decision to present to the jury a compelling, acceptable picture of applicant as a brilliant young man with untreated mental health issues aggravated by a substance abuse problem.

Conclusions of Law

1. Defense counsel conducted a reasonable mitigation investigation into applicant's family history. *Ex parte Buck*, 418 S.W.3d 98, 110 (Tex.Crim.App. 2013).
2. Applicant's family and social history presented evidence that encompassed both potentially mitigating and aggravating factors, which defense counsel determined in their reasonable professional judgment made applicant appear as more of a danger to the community. *McGinn v. State*, 961 S.W.2d 161,

168 (Tex.Crim.App. 1998).

3. Defense counsel's strategic choices made after thorough investigation of the law and facts relevant to plausible options are virtually unchallengeable under *Strickland v. Washington*, 466 U.S. 688 (1984). *Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014).
4. Applicant fails to meet his burden of showing that defense counsel's investigation into applicant's background for possible mitigating evidence fell below an objective standard of reasonableness. *Hernandez v. State*, 726 S.W.2d 53, 56-7 (Tex.Crim.App. 1986).
5. All requested relief on Claim 1B should be denied.
- 6.

Claim 1C

Findings of Fact

1. Defense counsel evaluated the facts and law regarding applicant's oral statements to police and determined that applicant's statements were clearly admissible.
2. Defense counsel decided not to file a motion to suppress or have a hearing on a motion to suppress that did not have any merit.
3. Defense counsel utilized applicant's statements to police to reinforce their defensive theory of the case that applicant was highly intoxicated at the time

of the offense.

Conclusions of Law

1. Applicant fails to show that his statements to police were involuntary and should have been suppressed.
2. An accused's statements that are *res gestae* of his arrest are admissible.
Art. 38.22, §5, V.A.C.C.P.
3. An accused's intoxication does not, in and of itself, render his statements to police involuntary *per se*. *Harryman v. State*, 522 S.W.2d 512 (Tex.Crim.App. 1975).
4. Defense counsel's decision to not challenge the admissibility of applicant's statements to police was objectively reasonable based on the facts and applicable law.
5. Applicant fails to overcome the strong presumption that defense counsel made the decision to not challenge the admissibility of applicant's statements in light of reasonable professional judgment.
6. All requested relief on Claim 1C should be denied.

Claim 1D

Findings of Fact

1. Defense counsel Russ Hunt and Brad Urrutia zealously represented

- applicant in the trial court proceedings.
2. Defense counsel Brad Urrutia investigated whether the fee structure was appropriate and adequate.
 3. Defense counsel felt adequately compensated for their representation of applicant in the trial court proceedings.
 4. The fee arrangement did not create any conflict of interest between defense counsel and applicant.

Conclusions of Law

1. Applicant fails in his burden to prove by a preponderance of evidence that a conflict existed between defense counsel and applicant due to the fee arrangement. *Ex parte McFarland*, 163 S.W.3d 743 (Tex.Crim.App. 2005).
2. Applicant's speculation of a conflict of interest between defense counsel and applicant due to the fee arrangement is insufficient to establish facts that would entitle him to relief.
3. Applicant fails to show that defense counsel's representation fell below an objective standard of reasonableness due to the fee arrangement.
4. All requested relief on Claim 1D should be denied.

5. Claim 1E

Findings of Fact

1. Defense counsel did not challenge the constitutionality of Penal Code §8.04.
2. Defense counsel determined that any challenge to the constitutionality of Texas's voluntary intoxication statute would be meritless.

Conclusions of Law

1. Penal Code §8.04 does not relieve the State of its burden of proving all elements of an offense beyond a reasonable doubt. *Sakil v. State*, 287 S.W.3d 23 (Tex.Crim.App. 2009).
2. Defense counsel's decision to not challenge the constitutionality of Penal Code §8.04 was reasonable in light of case law upholding the constitutionality of the statute.
3. Reasonably competent counsel is not required to perform useless or futile acts or to engage in the filing of futile motions. *Ex parte Chandler*, 182 S.W.3d 350 (Tex.Crim.App. 2005), and *Mooney v. State*, 817 S.W.2d 693 (Tex.Crim.App. 1991).
4. Applicant fails to show that defense counsel's representation fell below an objective standard of reasonableness.
5. All requested relief on Claim 1E should be denied.

Claim 1F

Findings of Fact

1. Prior to trial on the merits, the State and the defense agreed to allow certain

family members of the victim and applicant to remain in the courtroom. By agreement, Johnny Padron, Samantha Daniel, and Kenneth Daniel were excused from operation of the rule. (RR 18: 7-8).

2. As a matter of trial strategy, defense counsel determined not to object to the limited testimony from Johnny Padron at guilt/innocence.
3. Defense counsel determined not to object to Johnny Padron's testimony because it was brief, partly admissible, and uncontested that applicant caused the death of Jaime Padron.
4. Defense counsel determined based on their experience, not to object to Johnny Padron's testimony at guilt/innocence so as not to alienate the jury.

Conclusions of Law

1. Defense counsel did not object to the testimony of Johnny Padron at guilt/innocence as a matter of sound trial strategy.
2. Defense counsel's decision to not object to Johnny Padron's testimony did not fall below an objective standard of reasonableness.
3. The reasonableness of counsel's representation should not be viewed through hindsight. *Ex parte Jimenez*, 364 S.W.3d 866 (Tex.Crim.App. 1993).
4. Applicant fails to overcome the strong presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance. *Ex*

parte Kunkle, 852 S.W.2d 499 (Tex.Crim.App. 1993).

5. Applicant fails in his burden to show that counsel's performance, in failing to object to Johnny Padron's testimony, affirmatively affected the jury's verdicts in this cause.
7. All requested relief on Claim 1F should be denied.

Claim 1G

Findings of Fact

1. Defense counsel determined in their experience and professional judgment that the State's jury argument did not strike at applicant over the shoulders of counsel and did not warrant an objection.
2. Defense counsel determined in their experience and professional judgment that the State's jury argument did not accuse counsel of lying to the jury.
3. Defense counsel determined based on their experience and professional judgment that the State's jury argument reflected its disagreement with the defense's interpretation of the evidence and was not improper.

Conclusions of Law

1. Defense counsel does not render ineffective assistance by failing to object to proper jury argument. *Richards v. State*, 912 S.W.2d 374 (Tex.App. – Houston [4th Dist.] 1995, pet.ref'd.).

2. The State's jury arguments were proper as reasonable deductions from the evidence and as response to argument from opposing counsel. Any objection to the State's jury argument at guilt/innocence would have been properly overruled.
3. The reasonableness of counsel's representation should not be viewed through hindsight. *Ex parte Jimenez*, 364 S.W.3d 866 (Tex.Crim.App. 1993).
4. Applicant fails to show that counsel's performance fell below an objective standard of reasonableness.
5. Even if defense counsel erred in failing to object to the State's jury argument, such error was harmless in light of the overwhelming evidence that applicant caused the death of Officer Padron.
6. All requested relief on Claim 1G should be denied.

Claim 1H

Findings of Fact

1. In their professional judgment during trial, defense counsel determined that the State's jury arguments were not improper.
2. Defense counsel Russ Hunt objected to the State's jury argument to prevent a potentially erroneous jury argument by the State.

3. As a matter of strategy, defense counsel determined not to object to the State's argument about the value of applicant's life and Jaime Padron's life so as not to draw attention to that brief portion of the State's argument.

Conclusions of Law

1. Defense counsel does not render ineffective assistance by failing to object to proper jury argument. *Richards v. State*, 912 S.W.2d 374 (Tex.App. – Houston [4th Dist.] 1995, pet.ref'd.).
2. The State's jury arguments, viewed in the context of the record, were proper in response to defense counsel's argument that applicant did not constitute a future danger to society, reasonable deductions and summation of the evidence, and constituted a proper plea for law enforcement.
3. Applicant fails to judge defense counsel's representation by the totality of their representation. *Moore v. State*, 700 S.W.2d 193 (Tex.Crim.App. 1985).
4. Applicant fails in his burden to prove by a preponderance of the evidence that defense counsel's representation fell below an objective standard of reasonableness.
5. All requested relief on Claim 1H should be denied.

Claim 1I

Findings of Fact

1. Defense counsel Brad Urrutia and his investigator interviewed Louis Escalante in preparation for his testimony at trial.
2. Defense counsel Brad Urrutia effectively cross-examined Louis Escalante at trial.
3. As part of the trial strategy of the defense team, defense counsel did not to object to portions of Louis Escalante's trial testimony to allow Escalante to discredit himself.
4. Defense counsel utilized Louis Escalante's testimony to support his jury argument on applicant's behalf at punishment.

Conclusions of Law

1. Louis Escalante's testimony of applicant's statements about an escape plan constituted an admission by a party opponent and was not hearsay.
Tex.R.Evid. 801(e)(2)(A).
2. Defense counsel did not err in failing to object to non-hearsay testimony from Louis Escalante.
3. As a matter of sound trial strategy to discredit Louis Escalante, defense counsel determined not to object to testimony from Louis Escalante.
4. Applicant fails to overcome the presumption that, under the circumstances, defense counsel's challenged action might be considered sound trial strategy. *Ex parte Kunkle*, 852 S.W.2d 499 (Tex.Crim.App. 1993);

Strickland v. Washington, 466 U.S. at 690.

5. Even if counsel failed to object to isolated instances of inadmissible hearsay testimony from Louis Escalante, the admission of such evidence was harmless as the same evidence was properly admitted without objection.
6. Applicant therefore fails in his burden to show that there is a reasonable probability that, but for counsel's unprofessional error, the result of his trial would have been different.
7. The constitutional right to counsel does not mean errorless counsel. *Ingham v. State*, 679 S.W.2d 503 (Tex.Crim.App. 1984).
8. An isolated instance of a failure to object to inadmissible testimony does not constitute ineffective assistance of trial counsel. *Moore v. State*, 700 S.W.2d 193 (Tex.Crim.App. 1985).
9. All requested relief under Claim II should be denied.

Claim 1J

Findings of Fact

1. Stephen Rogers testified at trial as a prison classification expert.
2. Defense counsel was aware that Rogers would testify as an expert and that Rogers was a very knowledgeable prison classification expert. Defense counsel therefore determined that an additional classification expert was not necessary to educate the jury about behavior controls in prison.

3. Defense counsel extensively cross-examined Rogers in an informative manner about the behavior control features in the prison system.
4. Defense counsel presented testimony to the jury through Stephen Rogers of the highly controlled prison system and the methods used by the prison system to manage behavior of inmates regardless of the crime of conviction.

Conclusions of Law

1. As a matter of reasoned, professional judgement, defense counsel determined that utilizing an additional prison classification expert was not necessary.
2. Defense counsel did not render ineffective assistance by deciding not to present cumulative testimony through its own classification expert. *Coble v. Quarterman*, 496 F.3d 430 (5th Cir. 2007).
3. Applicant fails in his burden to prove by a preponderance of the evidence that defense counsel's decision to not retain a prison classification expert fell below an objective standard of reasonableness.
4. All requested relief under Claim 1J should be denied.

Claim 1K

Findings of Fact

1. Defense counsel contended at trial that the alleged notes did not exist.
2. Defense counsel determined that proving why the alleged notes were written

undercut the defensive theory that the notes did not exist.

3. Mary O'Dell, applicant's mother, was uncooperative with defense counsel prior to and during trial in this cause.
4. Mary O'Dell communicated in a code with applicant while he was jail pending trial, and O'Dell did not explain that code to defense counsel.
5. Defense counsel made a strategic decision to not present testimony from Mary O'Dell, applicant's mother, as to why applicant was allegedly writing the notes.
6. In defense counsel's professional judgment, calling Mary O'Dell as a witness potentially opened the door to highly damaging testimony of her criticism of the Austin Police Department, of her agreeing and encouraging applicant to seek the death penalty, of her purposeful avoidance of a grand jury subpoena, of applicant's prior federal charges for possession of child pornography, and of the coded messages between her and applicant.
7. Defense counsel determined in their professional judgment that using Mary O'Dell as a witness to establish the reason for applicant's alleged notes regarding jailers was potentially more damaging to the defense than helpful.

Conclusions of Law

1. Reasonably effective counsel is judged by the viewpoint of counsel at the time he acted, rather than through hindsight.

2. Defense counsel's decision to not call Mary O'Dell as a witness to explain the reason for the alleged notes was a matter of sound trial strategy.
3. Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable under *Strickland v. Washington*, 466 U.S. 688 (1984).
4. Applicant fails in his burden to show that counsel's performance was deficient.
5. All requested relief under claim 1K should be denied.

Claim 1L

Conclusions of Law

1. Non-errors in their cumulative effect do not cause error. *Gamboa v. State*, 296 S.W.3d 574 (Tex.Crim.App. 2009).
2. Applicant has failed to affirmatively demonstrate deficient performance or errors by his trial counsel.
3. Applicant fails to establish either the error or prejudice prong of *Strickland v. Washington*.
4. All requested relief under Claim 1L should be denied.

Ground for Relief Two

Findings of Fact

1. The trial court provided the jury with a written charge at the punishment

phase of trial. (CR 186-189).

2. The trial court's punishment charge did not contain the term "future dangerousness" or provide a definition of that term. (CR 186-189).
3. The trial court did not provide any additional or supplemental written instruction to the jury during its punishment deliberations beyond what was contained in the court's charge. (CR 186-189).

Conclusions of Law

1. Applicant's claim under Art. 36.27, V.A.C.C.P., is not cognizable on an application for writ of habeas corpus. *Ex parte Graves*, 70 S.W.3d 103 (Tex.Crim.App. 2002).
2. Any due process claim under the Texas Constitution is not cognizable on this application for writ of habeas corpus. *Ex parte Dutchover*, 779 S.W.2d 76 (Tex.Crim.App. 1989).
3. Any federal due process claim based on the notification requirement of Art. 36.27, V.A.C.C.P., is not cognizable on this application for writ of habeas corpus. *Ex parte Graves*, 70 S.W.3d at 116-117.
4. Applicant's second ground for relief should be dismissed since the claims are not cognizable.
5. Applicant fails to sustain his burden of proving facts by a preponderance of the evidence that would entitle him to relief.

6. Applicant's fails to show how the alleged error so infected the punishment proceedings that he was denied a fair and impartial trial. *Ex parte McPherson*, 32 S.W.3d 860 (Tex.Crim.App. 2000).
7. All requested relief under ground for relief two should be denied.

Grounds for Relief Three and Four

Findings of Fact

1. Applicant did not object to testimony from Stephen Rogers of which he now complains.
2. Applicant affirmatively stated that he had no objection to SX96, and applicant did not object to testimony from Stephen Rogers describing what was shown in the video, including a color television. (RR 23: 139).
3. Applicant did not raise in his motion for new trial any allegation of knowing or unknowing use of false testimony by the State. (CR 196).

Conclusions of Law

1. A writ of habeas corpus cannot be used to litigate matters that should have been raised at trial or on direct appeal. *Ex parte Bagley*, 509 S.W.2d 332 (Tex.Crim.App. 1974).
2. Applicant may not raise a claim for the first time in a habeas corpus proceeding if he had a reasonable opportunity to raise the issue at trial or on direct appeal and failed to do so. *Ex parte De La Cruz*, 466 S.W.3d 855, 864

(Tex.Crim.App. 2015).

3. Claims of constitutional dimension are forfeited on habeas if the applicant had the opportunity to raise the issue on appeal. *Ex parte De La Cruz*, 466 S.W.3d at 864.
4. Applicant should have raised his third and fourth grounds for relief in a motion for new trial or on direct appeal.
5. Applicant's claims in his third and fourth grounds for relief have been procedurally defaulted and are not cognizable on an application for writ of habeas corpus.
6. The State did not use material false evidence to procure applicant's conviction or sentence.
7. Applicant fails in his burden to show that the State knowingly or unknowingly used false evidence at trial in the testimony of Stephen Rogers, Louis Escalante, that applicant lacked remorse, or in regard to applicant's notes of correctional officers' names.
8. Applicant fails in his burden to prove by a preponderance of the evidence that false evidence was material to the verdicts. *Ex parte Weinstein*, 421 S.W.3d 656 (Tex.Crim.App. 2014).
9. Applicant's state constitutional claim under *Ex parte Chabot*, 300 S.W.3d 768 (Tex.Crim.App. 2009), is not cognizable. *Ex parte Dutchover*, 779

S.W.2d 76.

10. All requested relief under applicant's grounds for relief three and four should be denied.

Ground for Relief Five

Findings of Fact

1. The trial court denied a pretrial motion regarding defense funding on November 27, 2102. In said motion, the trial court rejected applicant's requested finding that certain guidelines regarding fees in capital cases applied in Texas, that an additional 700 hours work at the rate of \$100/hour was required and reasonable by a mitigation specialist, and that the mitigation specialist would be paid a specified amount.
2. Applicant did not raise in his motion for new trial any issues regarding the denial of this pretrial motion or rejected fact finding.
3. Applicant did not raise any issues regarding defense funding on direct appeal.
4. The defense counsel were adequately compensated and zealously represented applicant.

Conclusions of Law

1. Applicant had a reasonable opportunity to raise the issue of funding of the

- defense and mitigation specialist on motion for new trial or direct appeal.
2. Applicant may not raise these claims for the first time on an application for writ of habeas corpus. *Ex parte De La Cruz*, 466 S.W.3d 855 (Tex.Crim.App. 2015).
 3. Applicant's allegation that the trial court improperly limited funding of his defense is insufficient to entitle him to relief.
 4. Applicant's allegation that the trial court insufficiently funded his defense is insufficient to entitle him to relief.
 5. Applicant fails in his burden to prove facts by a preponderance of the evidence entitling him to relief.
 6. All requested relief under ground for relief five should be denied.

Ground for Relief Six

Findings of Fact

1. Louis Escalante testified under oath that he did not have a deal with the State in exchange for his testimony.
2. Credible evidence establishes that lead prosecutor Bill Bishop and Detective Fugitt did not promise Louis Escalante any benefit for testifying against applicant.
3. Credible evidence from Kelley West established that Louis Escalante's conditions of supervision were modified to delete ISF due to threats on

Escalante's life for testifying in applicant's trial.

Conclusions of Law

1. Applicant fails to support his claim with adequate facts to entitle him to relief. *Ex parte Maldonado*, 688 S.W.2d at 116. Applicant's speculation that Louis Escalante had a deal with the State is insufficient to sustain his burden.
 2. Affirmative, credible evidence establishes that Louis Escalante was not promised a benefit in exchange for his testimony. The State did not violate applicant's rights under *Brady v. Maryland*, 373 U.S. 83 (1963).
 3. Applicant's sixth ground for relief is without any factual support or merit.
- All requested relief should be denied.

Ground for Relief Seven

Findings of Fact

1. The court instructed the jury at guilt/innocence that "Voluntary intoxication does not constitute a defense to the commission of crime." (CR 180).
2. Applicant did not object to the court's instruction under Penal Code §8.04 in the court's charge at guilt/innocence. (RR 20: 238).
3. Applicant had no objections to the court's charge at punishment. (RR 26:

113).

Conclusions of Law

1. The issue of the constitutionality of Penal Code §8.04 should have been raised on direct appeal; therefore, applicant's claim is not cognizable on this application for writ of habeas corpus.
2. Applicant's ground for relief should be dismissed.
3. Applicant fails to show that Penal Code §8.04 is unconstitutional as applied to him.
4. Penal Code §8.04 is not unconstitutional.
5. Applicant was not entitled to an instruction under Penal Code §8.04(b) at punishment.
6. Applicant's ground for relief seven is without merit and all requested relief should be denied.

Grounds for Relief Eight – Eleven

Applicant raises challenges to the constitutionality of Art. 37.071, V.A.C.C.P. No factual findings are needed to resolve these claims.

Conclusions of Law

1. Applicant's challenge to the "10-12" rule in Art. 37.071 is without merit. *Davis v. State*, 313 S.W.3d 317 (Tex.Crim.App. 2010); *Smith v. State*, 297 S.W.3d 260, 278 (Tex.Crim.App. 2009); *Ladd v. State*, 3

S.W.3d 547, 574 (Tex.Crim.App. 1999); *Escamilla v. State*, 143 S.W.3d 814, 828 (Tex.Crim.App. 2004). Applicant should be denied all requested relief on his eighth ground.

2. Applicant's death sentence was not arbitrarily and capriciously imposed, as the first special punishment issue is not unconstitutionally vague. *Coble v. State*, 330 S.W.3d 253, 297 (Tex.Crim.App. 2010), *cert.denied*, 131 S.Ct. 3030 (2011); *Gardner v. State*, 306 S.W.3d 274, 302-303 (Tex.Crim.App. 2009); *Saldano*, 232 S.W.3d 77, 107-108 (Tex.Crim.App. 2007) (not arbitrary and capricious). Applicant should be denied relief on his ninth ground.
3. Art. 37.071 did not unconstitutionally impair applicant's right to have mitigating evidence considered by his jury. Applicant's claim is without merit. *Threadgill v. State*, 146 S.W.3d 654, 672 (Tex.Crim.App. 2004); *Blue v. State*, 125 S.W.3d 491, 505 (Tex.Crim.App. 2003); *Massey v. State*, 933 S.W.2d 141, 156 (Tex.Crim.App. 1996); and *Perry v. State*, 158 S.W.3d 438, 449 (Tex.Crim.App. 2004) (mitigation issue does not unconstitutionally narrow the jury's discretion to factors concerning only moral blameworthiness). Applicant's tenth ground for relief should be denied.
4. Texas's capital punishment scheme is not arbitrarily imposed under the

- Texas and federal constitutions. *Green v. State*, 934 S.W.2d 92 (Tex.Crim.App. 1996).
5. Applicant's claim under the Texas constitution is not cognizable and should be dismissed. *Ex parte Dutchover*, 779 S.W.2d 76.
 6. Applicant's claim under the federal constitution is without merit. *Threadgill*, 146 S.W.3d at 672; *Luna v. State*, 268 S.W.3d 594, 608 (Tex.Crim.App. 2008), *cert.denied*, 558 U.S. 833 (2009); *Roberts v. State*, 220 S.W.3d 521, 535 (Tex.Crim.App. 2007).
 7. Applicant has not made a threshold showing of disparate treatment between himself and other similarly situated defendants. *See Crutsinger v. State*, 206 S.W.3d 607, 612 (Tex.Crim.App. 2006).
 8. All requested relief under the eleventh ground should be denied.

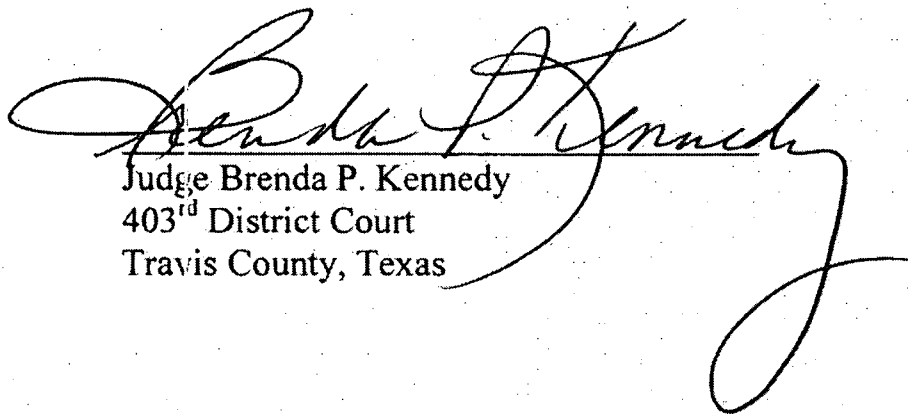
Conclusion

On the basis of the above *amended* findings and conclusions, the Court recommends that all requested relief be **DENIED**. The Court finds and concludes that the instant Application contains no sworn allegation of fact which, if true, would render Applicant's confinement illegal, and further concludes that the applicant has not met his burden of establishing facts which would entitle him to relief.

This Court, having found no fact in issue requiring an evidentiary hearing,

hereby **ORDERS** that the District Clerk of Travis County prepare and transmit the record herein to the Court of Criminal Appeals and recommends that all requested relief be denied.

Signed on this the 30th day of November, 2016.



Judge Brenda P. Kennedy
403rd District Court
Travis County, Texas

APPENDIX D

EX PARTE

§

IN THE DISTRICT COURT

§

OF TRAVIS COUNTY, TEXAS

BRANDON DANIEL

§

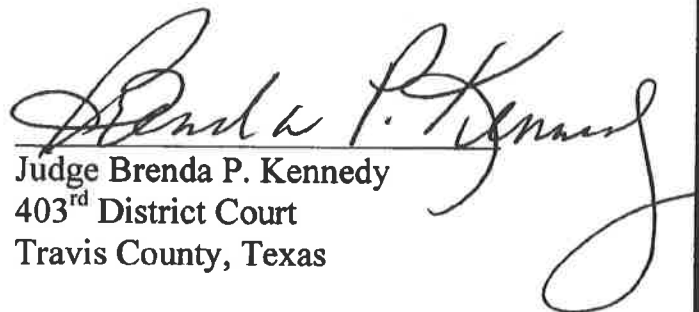
403RD DISTRICT COURT

APPLICANT

Trial Court No. D-1-DC-12-201718-A

ON THIS the 30th day of November, 2016, came on to be considered the Motion Requesting A Hearing to Challenge Adverse Evidence. After considering the applicable provisions of the law along with all matters mentioned within the said motion, this Court hereby DENIES the said motion.

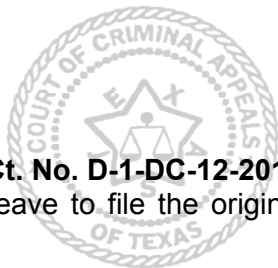
Signed on this the 30th day of November, 2016.


Judge Brenda P. Kennedy
403rd District Court
Travis County, Texas

Filed In The District Court
of Travis County, Texas
on 11-30-16
at 3:20 P M.
Velva L. Price, District Clerk

APPENDIX E

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



7/27/2016

DANIEL, BRANDON Tr. Ct. No. D-1-DC-12-201718

WR-83,459-02

On this day, the motion for leave to file the original writ of mandamus has been denied without written order.

Abel Acosta, Clerk

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