

APPENDIX

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APPENDIX A

Order of the United States Court of Appeals for the Fifth Circuit,
Runnels v. Davis, 664 Fed. App'x 371 (5th Cir. 2016)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

No. 16-70012

United States Court of Appeals
Fifth Circuit

FILED

November 3, 2016

TRAVIS TREVINO RUNNELS,

Lyle W. Cayce
Clerk

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 2:12-CV-74

Before GRAVES, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:*

Travis Trevino Runnels was convicted of capital murder and sentenced to death. He seeks a certificate of appealability (COA) from the district court's denial of his petition for writ of habeas corpus. Because reasonable jurists would not find that the district court's assessment of his ineffective assistance of counsel claims is debatable or wrong, we deny his application.

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

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BACKGROUND

Runnels was charged with the 2003 murder of Stanley Wiley, a civilian supervisor at the Texas Department of Criminal Justice's (TDCJ) Clements Unit boot factory. During his work shift as a janitor at the boot factory, Runnels approached Wiley from behind, pulled his head back, and slit his throat. Wiley later died from the injury. The Texas Court of Criminal Appeals ("CCA") summarizes the facts of the case:

Appellant did not enjoy working as a janitor at the prison boot factory. On the morning of the day of the murder, he expressed anger at the fact that he had not been transferred to being a barber as he had requested. He told fellow inmate Bud Williams that he was going to be "shipped one way or another" and that "he was going to kill someone." Appellant said that he would kill Wiley if Wiley said anything to him that morning. Appellant told another inmate, William Gilchrist, that he planned to hold the boot-factory plant manager hostage in the office after the other correctional officers had left. Finally, after appellant had arrived at the boot factory, he told fellow inmate Phillip Yow that he was going to do something.

During the first shift at the boot factory, Appellant approached Wiley, raised a knife, tilted Wiley's head back, and cut his throat. Appellant then wiped the knife with a white rag and walked back toward the trimming tables. When Yow later asked appellant why he had attacked Wiley, appellant said, "It could have been any offender or inmate, you know, as long as they was white." In response to Yow's explanation that appellant could get the death penalty if Wiley died, appellant responded, "[a] dead man can't talk."

Wiley did die from the injury. It was later determined that the cut was a twenty-three centimeter long neck wound that transected the external carotid artery and the internal jugular vein and extended in depth to the spine. A medical examiner found that the force required to inflict the wound was "moderate to severe." Appellant was twenty-six years old when he committed the offense.

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Runnels v. State, 2007 WL 2655682, at *1 (Tex. Crim. App. Sept. 12, 2007).

The record shows that Runnels had been convicted of three other felonies before murdering Wiley. In 1993, he had been convicted of second-degree felony burglary. After being placed on probation, he committed (and was convicted for) another burglary resulting in the revocation of his probation. In 1997, he was convicted of first-degree felony aggravated robbery committed with a firearm. In prison, Runnels committed numerous acts of misconduct including: (1) hitting a guard in the jaw; (2) throwing urine at a guard; (3) and throwing feces at a guard.

Though the State Counsel for Offenders was initially appointed to represent Runnels for murdering Wiley, the trial judge granted their motion to withdraw on grounds that they lacked experience and training in death penalty litigation. On May 17, 2004, Jim Durham and Laura Hamilton were appointed as Runnels' defense counsel. In addition, the court appointed defense investigator, Kathy Garrison; psychiatrist, Lisa Clayton; neuro-psychologist, Richard Fulbright; and attorney, Warren Clark, who acted as capital jury selection consultant. Attorney Robert Hirschhorn helped to prepare the defense's juror questionnaire.

At trial, Runnels entered a guilty plea. He also provided the trial judge with an affidavit stating that he had discussed the strategic and tactical aspects of his guilty plea with counsel and that he voluntarily entered into his guilty plea. On the day of trial, potential defense witnesses including Runnels' mother, father, grandmother, and brother Darmonica did not make themselves available to testify. Darmonica refused to make the trip to Amarillo. Runnels' mother, grandmother, and father made the trip, but Runnels' father remained in the courtroom, thus making himself unavailable to testify. Runnels' mother and grandmother left the courthouse and drove home before they could testify.

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When Garrison called the family members who had left, they told her that they could do nothing for Runnels now and hung up the telephone.

With no defense witnesses present, defense counsel James Durham attempted to show that Runnels did not constitute a future danger by eliciting testimony from seven prosecution witnesses who had been in contact with Runnels on the day of the murder. These inmates testified that Runnels was a good and peaceable prisoner who had cooperated with officers after the attack. After the state rested, Durham informed the court that he had a witness who was teaching a class and who could not arrive until later that day. He had a witness whom he wanted to confer with counsel about. He also had subpoenaed additional out-of-town witnesses for the next day. When the judge asked if Durham could convince his witness who was teaching a class to come sooner, Durham said that he would inquire. After a short break, Durham rested without calling any defense witnesses. The next day, he moved for an instructed verdict on the issue of future dangerousness. The motion was denied.

During closing arguments, the prosecution stated that Runnels' actions demonstrated his future dangerousness despite testimony by the seven inmate witnesses to the contrary. The prosecution also emphasized Runnels' prior convictions, prison misconduct, and the brutal nature of the attack on Wiley. During his closing argument, defense counsel Durham stated that Runnels' decision to plead guilty was his "first act of contrition" He also reemphasized that the State had not carried its burden of proof of future dangerousness. In particular, he argued that the State had not put on any experts regarding Runnels' future dangerousness and that seven inmates had testified that Runnels was peaceful and non-violent. Finally, he pointed out that Runnels had had no major incidents in prison, and that he had never hurt

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or hit anyone before the murder. On rebuttal, the prosecution argued against the need to present an expert on Runnels' future dangerousness.

After sentencing, Runnels filed a motion for a new trial. After an evidentiary hearing at which, inter alia, Mr. Durham testified, it was denied. His conviction was automatically appealed to the CCA, which unanimously confirmed his conviction and death sentence. Runnels' new counsel, Joe Marr Wilson, filed an application for habeas relief in state court. Runnels, through counsel Wilson, alleged that Durham had rendered ineffective assistance at trial for failing to present punishment-phase evidence and failing to conduct an adequate mitigation investigation. Runnels supported his application with affidavits from Runnels, his brother Darmonica, his mother, his grandmother, and two cousins. The affidavits stated, among other things, that: (1) Runnels mother and grandmother drove to Amarillo with Runnels' father for the trial, waited at the courthouse thinking they would testify, but were told either by defense investigator Kathy Garrison or Durham that they would not be needed, and went home; (2) Runnels' brother Darmonica was never served with a subpoena; (3) no one had ever interviewed Runnels' cousins before trial, but they would have cooperated if asked; (4) Durham had recommended Runnels plead guilty and told him that the "real fight would be in showing a jury at the punishment phase that [he] had a good side and that [he] could be rehabilitated;" and (5) Runnels had provided Garrison with the names of at least thirty family members and ten friends to serve as character witnesses and offer information about his upbringing and family history.

After making findings of fact, which summarized the defense's mitigation investigation and strategy, and conclusions of law, the trial judge recommended the denial of habeas relief, determining that Durham's decision not to present testimony was a sound strategy. The CCA held the application in abeyance and ordered the trial court to conduct an evidentiary hearing on

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Runnels' ineffective-assistance of counsel claim and on a claim that his guilty plea was involuntarily. After a hearing during which the trial judge made supplemental findings of fact and conclusions of law, the judge once again recommended that habeas relief be denied. The CCA adopted the trial judge's recommendation including the initial and supplemental findings of fact and conclusions of law.

On December 28, 2012, Runnels filed a federal habeas petition in district court under the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). On March 31, 2016, the district court adopted the United States Magistrate Judge's findings and, after considering and denying Runnel's objections to the same, denied Runnels' application for writ of habeas corpus and request for a COA. Runnels timely appeals and asks this Court to grant a COA.

STANDARD OF REVIEW

Under the AEDPA, a prisoner who has been denied habeas relief by a district court must obtain a COA from a circuit or district judge. 28 U.S.C. § 2253(c)(1); *Miller-El v. Cockrell*, 537 U.S. 322, 335-336 (2003). A COA is granted "only if the applicant has made a substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). When a district court has denied claims on the merits, the petitioner must "demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). Where claims have been denied on procedural grounds, the petitioner must show that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Id.* at 474.

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COA requests require a “threshold inquiry into whether the circuit court may entertain an appeal.” *Miller-El*, 537 U.S. at 336 (quoting *Slack*, 529 U.S. at 482) (internal marks omitted). “This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims.” *Id.* at 323. When assessing COA claims, “[t]he question is the debatability of the underlying constitutional claim, not the resolution of that debate.” *Id.* at 325. “[I]n a death penalty case, ‘any doubts as to whether a COA should issue must be resolved in [the petitioner’s] favor.’” *Ramirez v. Dretke*, 398 F.3d 691, 694 (5th Cir. 2005) (alteration in original) (quoting *Hernandez v. Johnson*, 2013 F.3d 243, 248 (5th Cir. 2000)).

A writ of habeas corpus shall not be granted for any claim that was adjudicated on the merits in state court “unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law” or “resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d)(1), (2). “A state court’s decision is an unreasonable application of clearly established federal law whenever the state court identifies the correct governing legal principle from the Supreme Court’s decisions but applies that principle to the facts of the prisoner’s case in an objectively unreasonable manner.” *Young v. Dretke*, 356 F.3d 616, 623 (5th Cir. 2004) (internal marks omitted). “An unreasonable application may also occur if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply.” *Id.* (internal marks omitted) (alteration in original). “[A] determination of a factual issue made by a State court shall be presumed to be correct. The applicant shall have the burden of rebutting

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the presumption of correctness by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

DISCUSSION

Runnels asserts that his trial counsel was ineffective on grounds that: (1) trial counsel did not retain a mitigation specialist; (2) trial counsel did not formulate a mitigation strategy based on information discovered by defense investigator Kathy Garrison that Runnels had endured a “chaotic and traumatic childhood;” and (3) trial counsel did not call any witnesses.

Ineffective assistance of counsel claims are governed by the two-prong test established in *Strickland v. Washington*, 466 U.S. 668 (1984). According to *Strickland*, Runnels must show that (1) “counsel’s representation fell below an objective standard of reasonableness” and (2) that he was prejudiced by the representation. Prejudice is defined as a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. *Id.* at 688, 694 (1984). “In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.” *Id.* at 691.

Consequently, for his application to be granted, Runnels must demonstrate that it was unreasonable for the state court to conclude that he did not overcome the strong presumption of defense counsel’s competence and that he failed to undermine confidence in the outcome. *See Cullen v. Pinholster*, 131 S. Ct. 1388, 1403 (2011). He must also demonstrate that the state court’s decision was contrary to or involved an unreasonable application of *Strickland*. 28 U.S.C. § 2254(d).

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Here, Runnels fails to show an unreasonable application of *Strickland*. The Magistrate Judge’s 64-page recommendation thoroughly analyzes Runnels arguments and finds the following: First, defense counsel conducted an extensive mitigation investigation. In fact, Runnels concedes that Garrison “conducted a thorough investigation into [his] background.” He claims, however, that defense should have retained a qualified mitigation investigator. This Court has previously stated that defense counsel is not obligated to retain a mitigation expert. *See Ward v. Stephens*, 777 F.3d 250, 264 (5th Cir. 2015) (“That trial counsel decided to use its time and resources on mental-health experts, rather than on a professional mitigation specialist . . . may very well reflect counsel’s reasonable strategic decision ‘to balance limited resources’ . . .”). In addition, there is nothing in the record to support a conclusion that defense counsel’s decision not to retain a mitigation investigator was unreasonable. As the district court noted, “Ms. Garrison has significant experience in death penalty cases. . . .” Also, defense counsel retained a team of specialists to assist in Runnels’ defense including Garrison, a psychiatrist, and a neuro-psychologist.

Second, defense counsel formulated an adequate mitigation strategy. As *Strickland*, 466 U.S. at 690, makes clear, “counsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” There is nothing in the record to overcome this strong presumption. As the district court stated, after “receiving unhelpful reports from his experts,” Durham “intended to present evidence that Runnels had had a rough life, was poor, was shuffled back and forth between parents and grandparents and other family members, had trouble in school and suffered disabilities that made it difficult to function, but that he could serve a life sentence in prison.” “Unfortunately for Runnels, there is uncontradicted testimony that petitioner’s brother, Darmonica, simply refused

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to appear at trial, and there is testimony that the rest of Runnels's family made themselves unavailable by exiting the courthouse and leaving Amarillo before they were called to testify. When Ms. Garrison called them and asked them to return, they told her they could not do anything for Runnels and hung up the phone."

Consequently, defense counsel formulated a mitigation strategy that Runnels would plead guilty to Wiley's murder and then contest that he posed a future danger through the cross-examination of prosecution witnesses. On cross-examination, Durham elicited testimony from seven of the prosecution's "guilt" witnesses that Runnels was peaceable, a good prisoner, and did not have a history of violence. Prosecution witness Bud Williams testified that Runnels was not violent and did not get into prison fights. William Gilchrist testified that he had never seen Runnels engage in violent acts. Jimmy Jordan testified that he had never seen Runnels fight or argue with anyone except for Wiley. Williams Elkins testified that Runnels "seemed like he was a great guy." Tony Irvine testified that Runnels had made no attempt to escape after attacking Wiley and waited for the authorities to come. Eugene Johnson testified that he had not heard that Runnels was a troublemaker. Phillip Yow testified that Runnels cooperated with officers after the attack.

During his closing argument, Durham stated that Runnels' decision to plead guilty was his "first act of contrition" Then he argued that the State had not carried its burden of proof regarding future dangerousness given the testimony presented by the seven inmate witnesses. Finally, he pointed out that Runnels had had no major incidents in prison and that he had never hurt or hit anyone before murdering Wiley.

Third, defense counsel was justified in not calling witnesses. "[O]ur scrutiny of counsel's performance is highly deferential. We must be particularly wary of arguments that essentially come down to a matter of

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degrees . . . Those questions are even less susceptible to judicial second guessing.” *Dowthitt v. Johnson*, 230 F.3d 733, 743 (5th Cir. 2000) (citations omitted). In addition, “to prevail on an ineffective assistance claim based on counsel’s failure to call a witness, the petitioner must name the witness, demonstrate that the witness was available to testify and would have done so, set out the content of the witness’s proposed testimony, and show that the testimony would have been favorable to a particular defense.” *Day v. Quarterman*, 566 F.3d 527, 538 (5th Cir. 2009). Potential defense witnesses made themselves unavailable for trial even after defense investigator Garrison urged them to appear. Thus, Runnels has failed to show that these witnesses were “available to testify and would have done so. . . .” *Id.* at 538.

Furthermore, defense counsel had ample reason to rest without calling witnesses once Runnels’ family members made themselves unavailable to testify. *See Pinholster*, 131 S. Ct. at 1407 (stating that a court is “required not simply to give [the] attorneys the benefit of the doubt, but to affirmatively entertain the range of possible reasons [Appellant’s] counsel may have had for proceeding as they did” (citations omitted)). Given that the prosecution would have likely brought up that the family members had been unwilling to appear, defense counsel could have reasonably assumed that the family members’ testimony would have been “double-edged.” *See Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999) (find that “double-edged” evidence is “even less susceptible to judicial second-guessing” because it “essentially comes down to a matter of degrees”).

Runnels claims that a member of the defense team told family members that they would not need to testify. The state court found otherwise, and that finding “shall be presumed to be correct” without “clear and convincing evidence” to the contrary. 28 U.S.C. § 2254(e)(1). Runnels has presented no such evidence. Regarding any other witnesses that the defense may have

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called, Runnels’ arguments “essentially come down to a matter of degrees . . . [and] are even less susceptible to judicial second guessing.” *Dowthitt*, 230 F.3d at 743 (citations omitted). Consequently, reasonable jurists would not find the district court’s assessment of his ineffective assistance of counsel claims to be debatable or wrong.

Runnels’ application for a COA is DENIED.

APPENDIX B

Order of the United States District Court for the
Northern District of Texas, Amarillo Division,
Runnels v. Davis, No. 2:12-CV-0074-J (N. Dist. Tex. Mar. 31, 2016)

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

TRAVIS TREVINO RUNNELS,	§	
	§	
Petitioner,	§	
	§	
V.	§	
	§	No. 2:12-CV-0074-J
WILLIAM STEPHENS, Director,	§	(death-penalty case)
Texas Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
	§	
Respondent.	§	

**ORDER OVERRULING OBJECTIONS AND
ADOPTING REPORT AND RECOMMENDATIONS OF MAGISTRATE JUDGE**

On March 28, 2016, Travis Trevino Runnels filed his objections to the report and recommendation of the United States Magistrate Judge. (*Petitioner's Objections*, Doc. 38.) On March 29, 2016, Respondent also filed objections to the report and recommendation. (*Respondent's Objections*, Doc. 39.) The above-entitled matter having come before this Court on consideration of said objections, and following a *de novo* review of Runnels's Petition for Writ of Habeas Corpus and related papers filed in this cause, it is the opinion of the Court that such objections be denied in all respects. The Court further finds that the findings and conclusions of the Magistrate Judge are correct and adopts them as the findings and conclusions of the Court.

I.

In overruling Runnels's objections, the Court emphasizes that the state trial judge conducted an evidentiary hearing on Runnels's habeas corpus allegations that Mr. Durham's failure to present a mitigation case was the result of ineffective assistance. Durham's co-counsel, Laura Hamilton, testified on the matter, as did the trial investigator, Kathy Garrison, who also provided her extensive

notes and records from the trial. The state judge made findings that are given deference in a federal habeas proceeding unless they are shown to be unreasonable in fact or law. *See* 28 U.S.C. § 2254(d). (2 SHCR 7.) The state court found that Mr. Durham had secured the presence of Runnels' mother, father, and grandmother at the courthouse for trial and had intended to present testimony from the grandmother, at least. The state court further found that when Garrison went to retrieve them from the courthouse hallway, the family could not be found. Garrison then called the family and learned they had left the city by motor vehicle and refused to return to trial, telling her there was nothing they could do to help Runnels. (2 SHCR 12.) These findings are supported by the testimony of Garrison and Hamilton at the state habeas hearing. (2 SHRR 23, 32-33, 36, 41, 66-67.)

Runnels particularly objects to the Magistrate Judge's conclusion that the family witnesses left the courthouse without telling Mr. Durham. He proposes, rather, that Mr. Durham gave "no thought" toward a mitigation case aimed at humanizing him. In support of this theory, he points to Mr. Durham's testimony on the motion for new trial that, at the time he (Durham) moved for an instructed verdict on the future-dangerousness special issue, he was "flying by the seat of [his] pants." (19 RR 23.) Runnels interprets this remark as an admission by Mr. Durham that he was essentially operating on instinct because he had not prepared a mitigation case. Runnels asserts that there is no evidence in the record showing *why* the family witnesses left the courthouse. As noted above, however, the testimony of Garrison and Hamilton indicates otherwise and supports the state court's ruling.

As a secondary argument, Runnels complains that, although Garrison conducted a thorough investigation into his background, she did not have the qualifications to diagnose psychological issues. The state court made findings, which are supported by the record, that the defense caused

Runnels to be examined by a psychiatrist, Lisa Clayton, and a psychologist, Richard Fulbright. (2 SHRR 10-12, 16-17, 58; 1 CR 68, 69.) The state court found that, based on the reports of these two professionals, the defense concluded their testimony would not benefit Runnels and opted not to call the experts as witnesses. (2 SHCR 9; 2 SHRR 12.) Thus, the defense did not rely on Garrison as a mental health expert, but retained a psychiatrist as well as a psychologist.

II.

Pursuant to Rule 22 of the Federal Rules of Appellate Procedure and 28 U.S.C. § 2253(c), this Court finds that a certificate of appealability should be denied. Runnels has failed to show that reasonable jurists (1) would find this Court's "assessment of the constitutional claims debatable or wrong," or (2) would find "it debatable whether the petition states a valid claim of the denial of a constitutional right" and "debatable whether [this Court] was correct in its procedural ruling." *Slack v. McDaniel*, 529 U.S. 473, 484 (2000); *see Miller-El v. Cockrell*, 537 U.S. 322, 338 (2003).

III.

The Court DENIES the objections filed by Petitioner Runnels and Respondent.

The Court ADOPTS the findings and conclusions of the Magistrate Judge.

The Court DENIES a certificate of appealability.

IT IS SO ORDERED.

Signed this 31ST day of March, 2016.


MARY LOU ROBINSON
UNITED STATES DISTRICT JUDGE

APPENDIX C

Order of the United States Court of Appeals for the Fifth Circuit, *Runnels v. Davis*,
No. 16-70012 (5th Cir. Dec. 11, 2017), denying rehearing and rehearing en banc

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 16-70012

TRAVIS TREVINO RUNNELS,

Petitioner - Appellant

v.

LORIE DAVIS, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL
JUSTICE, CORRECTIONAL INSTITUTIONS DIVISION,

Respondent - Appellee

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 11/3/16 , 5 Cir., _____ , _____ F.3d _____)

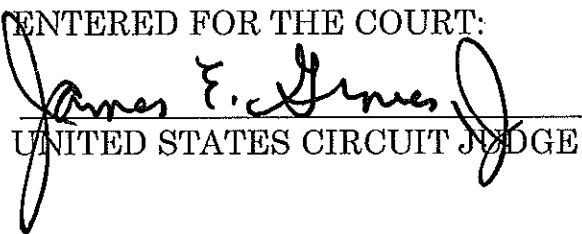
Before GRAVES, HIGGINSON, and COSTA, Circuit Judges.

PER CURIAM:

(✓) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

- () The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED R. APP. P. and 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.
- () A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:


UNITED STATES CIRCUIT JUDGE

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United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

LYLE W. CAYCE
CLERK

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

December 11, 2017

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 16-70012 Travis Runnels v. Lorie Davis, Director
USDC No. 2:12-CV-74

Enclosed is an order entered in this case.

Sincerely,

LYLE W. CAYCE, Clerk



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

Mr. Jefferson David Clendenin
Ms. Janet Gilger-VanderZanden
Mr. Mark Jason Pickett

APPENDIX D

Magistrate's Report and Recommendation on Petition for Writ of Habeas Corpus,
Runnels v. Davis, No. 2:12-CV-0074-J (N. Dist. Tex. Mar. 15, 2016)

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

CLERK US DISTRICT COURT
NORTHERN DIST. OF TX
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TRAVIS TREVINO RUNNELS,

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Petitioner,

v.

WILLIAM STEPHENS, Director,
Texas Department of Criminal Justice,
Correctional Institutions Division,

No. 2:12-CV-0074-J-BB
(death-penalty case)

Respondent.

REPORT AND RECOMMENDATION
ON PETITION FOR WRIT OF HABEAS CORPUS

Travis Trevino Runnels petitions the Court for a writ of habeas corpus challenging his conviction and death sentence out of Potter County, Texas. *State v. Runnels*, No. 48950-D (320th Dist. Ct., Potter Co., Tex. Oct. 28, 2005). He contends his conviction and sentence should be set aside because he received ineffective representation from trial counsel and state habeas counsel. He also raises several constitutional challenges to the Texas death penalty statute. For the reasons stated below, it is the opinion of the undersigned United States Magistrate Judge that the petition should be DENIED.

I. PROCEDURAL HISTORY

After pleading guilty, Runnels was convicted and sentenced to death for the 2003 murder of Stanley Wiley, a civilian prison employee. Runnels killed Mr. Wiley while he (Runnels) was incarcerated in the penitentiary. Runnels filed a motion for new trial, which the trial court denied

after an evidentiary hearing. (19 RR 25).¹ Direct appeal to the Texas Court of Criminal Appeals (“CCA”) is automatic in death penalty cases, and in 2007, the CCA unanimously affirmed the conviction and death sentence in an unpublished opinion. *Runnels v. State*, No. AP-75,318, 2007 WL 2655682 (Tex. Crim. App. Sept. 12, 2007). The Court takes the following recitation of facts from that opinion:

Appellant did not enjoy working as a janitor at the prison boot factory. On the morning of the day of the murder, he expressed anger at the fact that he had not been transferred to being a barber as he had requested. He told fellow inmate Bud Williams that he was going to be “shipped one way or another” and that “he was going to kill someone.” Appellant said that he would kill Wiley if Wiley said anything to him that morning. Appellant told another inmate, William Gilchrist, that he planned to hold the boot-factory plant manager hostage in the office after the other correctional officers had left. Finally, after appellant had arrived at the boot factory, he told fellow inmate Phillip Yow that he was going to do something.

During the first shift at the boot factory, appellant approached Wiley, raised a knife, tilted Wiley’s head back, and cut his throat. Appellant then wiped the knife with a white rag and walked back toward the trimming tables. When Yow later asked appellant why he had attacked Wiley, appellant said, “It could have been any offender or inmate, you know, as long as they was white.” In response to Yow’s explanation that appellant could get the death penalty if Wiley died, appellant responded, “A dead man can’t talk.”

Wiley did die from the injury. It was later determined that the cut was a twenty-three centimeter long neck wound that transected the external carotid artery and the internal jugular vein and extended in depth to the spine. A medical examiner found that the force required to inflict the wound was “moderate to severe.” Appellant was twenty-six years old when he committed the offense.

Runnels filed an application for habeas relief in the convicting court. The trial judge entered findings of fact and conclusions of law recommending habeas relief be denied. (1 SHCR 297). The CCA held the application in abeyance, however, and ordered the trial court to conduct an evidentiary

¹ The 19-volume reporter’s record of the trial is cited “RR,” preceded by volume number and followed by page number. Likewise, the 2-volume trial court clerk’s record is cited “CR,” the 4-volume state habeas reporter’s record is cited “SHRR,” the state habeas clerk’s record is cited “1 SHCR” and its supplement is cited “2 SHCR.” State trial exhibits are “SX.”

hearing on an ineffective-assistance claim and on a claim that Runnels's guilty plea was involuntary. *Ex parte Runnels*, No. WR-46,226-02 (Tex. Crim. App. June 8, 2011) (remand order). The trial judge conducted the hearing, made supplemental findings of fact and conclusions of law, and again recommended that relief be denied. (2 SHCR 7). The CCA adopted both the initial and supplemental findings of fact and conclusions of law and denied relief. *Ex parte Runnels*, No. WR-46,226-02, 2012 WL 739257 (Tex. Crim. App. Mar. 7, 2012) (orig. proceeding).

Runnels filed his federal habeas corpus petition on December 28, 2012 ("Petition," doc. 17). Respondent filed its answer on July 8, 2013 ("Answer," doc. 30). At the Court's request, both parties filed supplemental briefs addressing the Supreme Court's opinion in *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), which held that *Martinez v. Ryan*, 132 S. Ct. 1309 (2011) applies to Texas habeas petitioners. ("Reply," doc. 34; "Surreply," doc. 35). This petition is subject to the amendments of the Antiterrorism and Effective Death Penalty Act of 1996 in 28 U.S.C. § 2254(d) ("AEDPA"), and the Court will address the standard created by the AEDPA where specifically applicable to the issues.²

II. CLAIMS RAISED

Runnels raises the following claims in the federal petition:

1. The state court unreasonably denied his claim that trial counsel rendered ineffective assistance under *Wiggins v. Smith*, 539 U.S. 510 (2003). (Petition at 15-23).
2. State habeas counsel rendered ineffective assistance in failing to obtain psychological testing and "meaningfully participate" in the evidentiary hearing ordered by the CCA. (Petition at 24-27).
3. The Texas capital sentencing statute does not permit meaningful appellate

²Subsequent citations to § 2254 are to 28 U.S.C. § 2254.

review, in violation of the Eighth Amendment. (Petition at 27-36).

4. The Texas capital sentencing statute violates the Constitution in multiple ways. (Petition at 36-42).
- 7.³ The Texas capital sentencing statute violates the Establishment Clause of the First Amendment. (Petition at 42-45).
8. The Texas death-penalty statute violates the Constitution by preventing jurors from knowing the effect of a hold-out juror at sentencing. (Petition at 45-48).
9. The Texas definition of mitigating evidence prevents the jury from considering all evidence relevant to mitigate the death sentence, such as the defendant's potential for rehabilitation. (Petition at 48-58).
10. The Texas statute violates Equal Protection and the Eighth Amendment by failing to set uniform standards for prosecutors in deciding whether to seek the death penalty in a capital case. (Petition at 38-39, 58-86).

Respondent contends claim 2 and portions of claim 1 are unexhausted and procedurally barred. He contends claims 3, 7, 8, 9, and most of claim 4 are procedurally barred because they were dismissed in state court as procedurally barred. Respondent also asserts all of the claims lack merit. Runnels clarifies in his Reply that claim 2 is not a constitutional claim for relief, but an argument under *Martinez v. Ryan*, 132 S. Ct. 1309 (2012) to excuse any procedural default of claim 1 and to allow Runnels to develop and relitigate claim 1 in this Court. (Reply at 3-4, 9). Claims 1 and 2 will be addressed together.

III. EFFECTIVE ASSISTANCE OF COUNSEL (CLAIMS 1 & 2)

Runnels's first claim for relief alleges trial counsel was ineffective. Runnels first contends his trial counsel, Mr. Jim Durham, unreasonably limited or failed to conduct an adequate investigation into potentially mitigating evidence. Specifically, he asserts the report of the trial

³Runnels's petition contains no fifth or sixth ground for relief. Respondent has combined claims 4 and 7 and renumbered them all as 1-7. For the sake of clarity, the Court will use the numbers that Runnels has assigned to his claims.

team's neuropsychologist, Richard Fulbright, should have indicated to Mr. Durham that more psychiatric testing was needed. Secondly, Runnels contends trial counsel Mr. Durham failed to formulate a viable mitigation strategy with the readily available evidence of Runnels's chaotic childhood, a history of misconduct at an extremely young age and diagnosed while Runnels was still a juvenile, and a complete lack of any attempt by family or institutions to provide help. (Petition at 20-23). In claim two, Runnels asserts state habeas counsel, Mr. Joe Marr Wilson, was ineffective in the manner he litigated the ineffective-assistance claim against Mr. Durham. (Petition at 24-27).

A. Procedural Bar

Before state prisoners may seek federal habeas relief, they must first exhaust their available state remedies in order to give the state courts an opportunity to correct alleged violations of federal rights. *See* § 2254(b)(1); *Baldwin v. Reese*, 541 U.S. 27, 29, 124 S.Ct. 1347, 1349, 158 L.Ed.2d 64 (2004). “[T]he petitioner must afford the state court a ‘fair opportunity to apply controlling legal principles to the facts bearing upon his constitutional claim.’” *Johnson v. Cain*, 712 F.3d 227, 231 (5th Cir. 2013) (quoting *Bagwell v. Dretke*, 372 F.3d 748, 755 (5th Cir. 2004)). If a prisoner fails to exhaust a claim, it may be procedurally barred. *See Coleman v. Thompson*, 501 U.S. 722, 735 n.1, 111 S.Ct. 2546, 2557, 115 L.Ed.2d 640 (1991).

Respondent contends the particular allegation regarding Mr. Durham's failure to obtain further psychiatric testing was not presented to the state court and is, therefore, procedurally barred. The Court disagrees. The state habeas application specifically asserted that Dr. Fulbright could not administer additional tests because of prison testing conditions. (1 SHCR 18). It further alleged that Dr. Fulbright's report, along with school and juvenile probation records, all contained information that would have prompted competent counsel to “further investigate some of the information

contained therein.” (1 SHCR 16-19). The Court finds these allegations were sufficient to afford the state court a fair opportunity to apply the controlling legal principles to the facts bearing upon the assertion that Mr. Durham should have obtained more psychiatric testing. Claim one, alleging a failure to conduct an adequate mitigation investigation and a failure to present mitigation evidence, is exhausted.

B. Factual Background

Prior to addressing the allegations of ineffectiveness against Mr. Durham and Mr. Wilson, the facts related to the prosecution and the post-conviction proceedings in this case are set out in some detail below.

1. Pretrial

Stanley Wiley was murdered on January 29, 2003, and the district attorney filed a criminal complaint for the offense of murder. (1 CR 2). The State Counsel for Offenders was initially appointed to represent Runnels but sought to withdraw on the ground that they lacked experience and training in death penalty litigation. (1 CR 7). The trial judge granted the motion to withdraw in November of 2003. (1 CR 14). Runnels was indicted for capital murder several months later, in April of 2004. (1 CR 20). Jim Durham and Laura Hamilton were appointed as counsel on May 17, 2004. (1 CR 20, 24-25). About a month later, Kathy Garrison was appointed as the defense investigator. (1 CR 34). The trial court appointed a psychiatrist, Lisa Clayton, and a neuro-psychologist, Richard Fulbright, for the defense on December 21, 2004. (1 CR 68, 69). On September 6, 2005, the trial court granted Mr. Durham’s request for the appointment of a third lawyer, Warren Clark, to act as a capital jury selection consultant. (1 CR 58; 2 RR 86-87). The record also indicates that Mr. Durham solicited assistance from a fourth attorney, Robert Hirschhorn,

to help prepare the juror questionnaire. (2 RR 87). The State had an open file policy by which defense counsel was permitted to look at everything in the State's file except the internal notes and memoranda of lawyers and in-house investigators. (2 RR 12, 14-15).

The prison unit (Clements Unit) where the murder occurred did not want to house Runnels during trial.⁴ There was some difficulty in obtaining adequate housing facilities during pretrial and trial so that Runnels could have access to his counsel and experts. (2 RR 25-27, 190). Ultimately, Runnels was placed in the Potter County jail. Some difficulties were encountered there because Runnels was considered a high risk inmate and jail standards required extra personnel any time he was moved from his cell. (2 RR 35, 137-142). Because of these conditions, Dr. Fulbright stated he could not administer all the tests he wanted; Runnels also told the trial judge there was an officer standing at the door, listening and making noise during testing. (2 RR 130-32).

2. Trial

After three weeks of jury selection proceedings, the trial was scheduled to begin. On the first day of trial, Runnels entered a guilty plea before the jury that had been assembled. (15 RR 8). The trial judge removed the jury, admonished Runnels about the consequences of a guilty plea, and received an affidavit from Runnels stating he had discussed the strategic and tactical aspects of his guilty plea with counsel and had freely and voluntarily entered it. (15 RR 8-12).

The prosecution introduced evidence relevant to guilt and to the special punishment issues in one unified proceeding. (15 RR 19-20, 246). The State's "guilt" witnesses included seven inmates who had contact with Runnels on the day of the murder. Their direct-examination testimony

⁴ Runnels had been moved from the Clements Unit to another unit shortly after the murder, presumably for Runnels's safety so he would not be in contact with the victim's coworkers at the Clements Unit.

was that Runnels planned Wiley's murder because he was dissatisfied with his job assignment and Wiley's treatment of him. Their testimony was adequately summarized by the CCA on appeal and will not be repeated here. The testimony elicited by Mr. Durham during the cross-examination of these inmate witnesses, however, is important in the analysis of this ineffective assistance claim and is summarized below.

Bud Williams. Williams testified he was serving a fifty-five year sentence for sexual assault. He said jobs are important in prison and if a prisoner's supervisor gives him a hard time, he is an unhappy prisoner. (15 RR 68-69). Williams testified he had known Runnels for eight years and did not know him to be violent. (15 RR 77-78). He saw Runnels on an almost daily basis and had never seen him in a fight. People get in fights in prison every day, but Runnels was a peaceable person and a good prisoner and walked away from situations which could have resulted in a fight. (15 RR78-81).

William Gilchrist. Gilchrist testified he was serving a fifty-nine year sentence for aggravated robbery. He knew Runnels for about nine or ten months and trusted him. He never saw Runnels engage in violent acts or threats, and Runnels seemed to be a good prisoner. (15 RR 113-14). Gilchrist testified Runnels was in minimum custody, meaning the authorities considered him trustworthy and, as far as Gilchrist knew, Runnels did not have a history of violent acts. (15 RR 114).

Jimmy Jordan. Jordan testified he was serving a ninety-year sentence for aggravated robbery. He testified he had a lot of incidents during his twenty-one years in prison and had been disciplined for fighting many times. (15 RR 138, 155-56). Jordan also said he had been paroled but violated his parole. (15 RR 150-51). He testified about disciplinary procedures including solitary

confinement and the loss of privileges. (15 RR 141-42). Jordan, who was fifty-seven, had been in prison since the age of twenty-three and said he was more prone to take offense at that age and “do stupid stuff” than at fifty-seven. (15 RR 157). Jordan said that, during the three months he was at the Clements Unit, he had never seen Runnels involved in any fights or have words with anyone other than Wiley. (15 RR 157). He was transferred to another prison soon after the murder because he had an incident with some “Crip dudes.” (15 RR 137-38).

William Elkins. Elkins testified he was serving a life sentence for aggravated rape. He had known Runnels off and on for five years, and Runnels always had a smile on his face and seemed like a great guy. (15 RR 166, 183). He said quite a bit of disagreement exists between inmates and their supervisors, and inmates who do not want to work cause problems for themselves. Elkins said he had gotten warnings in the past for not working. (15 RR 184). Elkins also said he was transferred to another unit after he gave statements about the murder because he had reported that a correctional officer put a note under his door that he alleged contained a racial slur and a death threat. (15 RR 185-90). After his transfer, Elkins said an incident occurred where a guard turned his back while another inmate rammed his (Elkins’s) head into a wall. (15 RR 193-94). Elkins said he felt the threat in the note was real, and he was in fear when the guard turned his back after his head had been busted open. (15 RR 197-98). He also identified some people in the back of the courtroom as some of his supervisors. (15 RR 197).

Tony Irvine. Irvine testified he was serving time for two aggravated robberies, robbery, and obstruction. (15 RR 200). On direct examination, Irvine testified he was threatened about his testimony by a Crips gang member. (15 RR 200-03). On cross-examination, Irvine said Runnels did not threaten him nor try to escape after the incident, and he never had trouble with Runnels. He

did not really know Runnels and did not know if Runnels is a Crip gang member. (15 RR 213-14).

Eugene Johnson. Johnson testified he was serving ninety-nine years for murder and burglary of a habitation. He lived on the same unit as Runnels for about four years and, as far as he knew, Runnels was not a hardhead or troublemaker and that he (Johnson) never had any trouble with him. (15 RR 226-28). Johnson confirmed that, after the murder, Runnels was very calm and did not run. (15 RR 229-30).

Phillip Yow. Yow testified he was serving sixty years for injury to a child. He had known Runnels for several months and had never seen him fight with anybody. (15 RR 243). He said Runnels was compliant with officers' requests after the incident. (15 RR 245).

The State next presented testimony from the medical personnel at the prison as well as from Runnels's actual supervisor at the factory, Calvin Askins, who helped the victim walk to the infirmary. (16 RR 4, 10, 16, 19, 29-30). The State also called correctional officers who testified about the following disciplinary infractions Runnels committed before and after the murder: In 1999, Runnels hit a correctional officer in the jaw, and then ran into his cell and closed the door behind him. (16 RR 45). In May of 2003, four months after the murder, Runnels threw urine in a guard's face after she wrote him up for exposing himself. (16 RR 84-85). In June of 2004, Runnels threw feces at another correctional officer. (16 RR 92).

In November of 2003, Runnels threw a light bulb at Tonia Brown, a correctional officer who was delivering paperwork to him. The bulb broke apart and hit, but did not cut, the officer. (16 RR 54-56). On cross-examination, Mr. Durham had Brown explain the three levels of administrative segregation, the cell size, the conditions of administrative segregation and security measures, feeding procedures, the procedure for moving an inmate from his cell, the punishment available for rules

violations, types of property an inmate might have, the classification levels of general population inmates, and the fact that inmates are reclassified every year on their birthdate. (16 RR 57-63, 65-77). Brown admitted that sometimes “predicting what a person is going to do is highly improbable.” (16 RR 79). Brown explained the training that prison employees and correctional officers receive to stay safe, including six weeks of pre-service training that includes proxemics, basic defense tactics, and how to apply hand restraints and transport offenders. (16 RR 80-81). She described the force-cell move team, which is a five-person team with special equipment that can remove a hostile inmate from an area. (16 RR 82-83).

The State next presented testimony from an expert on prison violence. (16 RR 101). The expert described the prison classification system, as well as the rewards and restrictions available. (16 RR 104-109). Among other things, he stated that a person convicted of capital murder and sentenced to life imprisonment would be classified as a G-3 for a minimum of ten years and be housed with a cellmate, free to come and go unescorted to work, visitation, church, and medical appointments. (16 RR 108). He testified there is no safe place in prison and that 138 prosecutable murders had occurred inside Texas penitentiaries since 1984. (16 RR 118-19).

Finally, the jury received documents showing Runnels had been previously convicted under an alias and placed on probation for the second-degree felony of burglary of a building in 1993. His probation was revoked when he was convicted of another burglary in 1994. In 1997, he was convicted of first-degree aggravated robbery with a deadly weapon and was serving a seventy-year sentence for that crime when he murdered Wiley. (16 RR 137-42; SX 26, 27).

After the State rested on October 27, 2005, Mr. Durham informed the court he had one witness who was teaching a class and could not arrive until later that day, one witness about whom

Mr. Durham wanted to confer, and additional witnesses “out of Dallas” that were subpoenaed for the following day. (16 RR 143-44). When the judge asked if the witness teaching a class could come earlier, Mr. Durham said he would find out. (16 RR 144). The record shows that the parties took a break and when they returned, Mr. Durham elected to rest without calling witnesses.⁵ (16 RR 145-46). The following morning, he moved for an instructed verdict on the future dangerousness special issue, which motion was denied. (17 RR 3).

At final argument, the prosecutor stated there was no question of Runnels’s guilt and that Runnels’s actions demonstrated he would be a future danger despite the fact that inmates testified he had never been in any other fights. (17 RR 15-16). The prosecution emphasized Runnels’s three prior convictions, his disciplinary infractions in prison, the planning, the lack of provocation, and the extent of the victim’s injury. (17 RR 16-19). During his closing argument, Mr. Durham argued, among other things, that all murders are horrific, and he emphasized Runnels’s decision to plead guilty and “bare his soul,” saying, “The first act of contrition is admission.” (17 RR 20, 24-26). Mr. Durham argued you cannot predict the future and asked the jury to hold the State to its burden of proof on future dangerousness. (17 RR 24-25, 27-28). He argued there was “not one word” from an expert that Runnels would be a future danger and that seven inmates, who testified in front of two full rows of correctional officers, all testified about Runnels’s peaceable nature and non-violence. (17 RR 21-22, 24-26). Mr. Durham pointed out Runnels had no major incidents and never actually hurt or hit anyone while incarcerated until this murder. (17 RR 25-26). In rebuttal, the State argued an expert would not have added anything to the evidence and the jury could decide future

⁵There was a chambers conference before Mr. Durham rested the defense case in front of the jury. (1 SHCR 301, Finding No. 11).

dangerousness based on the cold-blooded nature of the crime, Runnels's prior convictions and unsuccessful probation, and his unwillingness to conform to prison rules. (17 RR 28-35).

3. Motion for New Trial

Appellate counsel, Don Schofield, moved for a new trial alleging there was no credible evidence to support the jury's answers to the statutory special issues. (2 CR 400). In support, Mr. Schofield provided an affidavit from Mr. Durham stating his belief that the State failed to offer sufficient proof of future dangerousness and that his motion for an instructed verdict was erroneously denied. (2 CR 404). At a November 19, 2006 hearing, Mr. Durham testified he felt the evidence of future dangerousness fell short of proof beyond a reasonable doubt because, while there was information that might or might not lead to that conclusion, there was no evidence of future probability, in terms of either a direct statement or an expert evaluation. (19 RR 23). Mr. Durham concluded his testimony by saying, "And that's a long way to say I was flying by the seat of [my] pants." (19 RR 23).⁶ The trial court denied the motion for new trial. Mr. Durham, who had been licensed to practice law in 1966, died on November 19, 2006, about a year after the hearing. (1 SHCR 207).

4. State Habeas Proceedings

Mr. Joe Marr Wilson filed the state habeas application about a year after Mr. Durham's death. Mr. Wilson alleged Mr. Durham rendered ineffective assistance at trial because his decision not to present punishment-phase evidence was based on an inadequate mitigation investigation. (1 SHCR 5-31). Mr. Wilson acknowledged that trial counsel had subpoenaed Nancy Taylor (Runnels's

⁶As discussed below, the Court interprets this statement as a reference to the fact that a witness or witnesses Mr. Durham anticipated calling to testify at punishment had left the courthouse without telling him.

mother), Lillie Mae Taylor (Runnels's grandmother), Carol Roark (custodian of records for the Dallas Morning News), and Dr. Keith Price (penologist and former Warden of the Clements Unit). (1 SHCR 7). He also asserted that Nancy Taylor, Lillie Mae Taylor, and Keith Price appeared at the trial on October 27th but were never called. Mr. Wilson alleged Mr. Durham abandoned his intent to present evidence about the 1910 lynching of Runnels's great-great-grandfather because Mr. Durham discovered, on the day of trial, that Lillie Mae Taylor disclosed she could not say Runnels knew about the lynching. (1 SHCR 6-15). Mr. Wilson alleged Mr. Durham unreasonably limited his investigation into Runnels's education, mental health, and family and overlooked evidence of Runnels's troubled childhood. (1 SHCR 16-26). He concluded that if Mr. Durham had conducted the proper mitigation investigation, the decision whether to present mitigation evidence would not have relied entirely on the potential testimony of one witness (Lillie Mae Taylor), whom, he contended, Mr. Durham had not adequately prepared. (1 SHCR 30-31). The state application was supported by affidavits from Runnels, his older brother Darmonica, his mother Nancy, grandmother Lillie Mae, and his cousins LaQueena Garcia and Joel Runnels, Jr. Their affidavits are summarized below.⁷

Nancy Taylor (Runnels's mother). Nancy Taylor dropped out of high school when she became pregnant with Darmonica. She was divorced from her husband when she became pregnant with petitioner Runnels, but she and her estranged spouse lived together until Runnels was about ten years old. Petitioner Runnels was a funny, happy-going kid and was always laughing or smiling. As a child he did not talk right and spoke fast like he was tongue-tied. At the age of ten, he would do funny things like run into the wall with his head. He did not do well in school and may have been

⁷These summarizations include the words and expressions used by the various affiants, to the extent possible.

dyslexic; he did not follow directions and had to be asked several times to do something. He was picked on in elementary school; he collected comic books and enjoyed baseball. He was always restless, and his grandmother once had to tie him to a chair. Nancy Taylor dated a man named Keith until Runnels was about fifteen years old. During this time, Nancy and Runnels, but not Darmonica, lived with Keith's parents. Keith was incarcerated at least once. Keith was controlling, possessive and abusive, and Runnels would try to protect his mother. Keith once choked Nancy, then started choking Runnels, until Runnels managed to run away and call the police. Keith abused and stole from his own mother, and stole from Nancy to buy crack cocaine. Nancy liked to drink and her sons would tease her about losing control. She would "whoop" her sons with belts or switches on their legs and she hit them with her fist on their chest or back. The defense investigator, Kathy Garrison, spoke to Nancy, Lillie Mae, and Darmonica in person. According to Nancy, if anyone would have interviewed her at length about her son's childhood, she would have told them everything she later stated in her affidavit. Nancy was subpoenaed for trial and was also served with Darmonica's subpoena. Garrison definitely wanted Lillie Mae to be at trial, so Nancy and Lillie Mae drove to Amarillo from Dallas with Runnels's father, Noel. Nancy Taylor waited at the courthouse with Lillie Mae Taylor, thinking she would testify, but either Garrison or the defense lawyer told them they would not be needed after all, so they went home. (1 SHCR 151-54.)

Lillie Mae Taylor (Runnels's grandmother). Lillie Mae Taylor was raised in Dallas during segregation. Petitioner Runnels was not a bad kid but got into all kinds of trouble because he played around and ran into things. Once, he ran into a fence and busted his lip, another time he ran into a beehive and was stung; the kind of things he would get into made her laugh sometimes. He was very playful and liked to play and joke and could not stay in one place. His school grades were not too

good; Runnels was not fond of school, and he did not have many school friends when he was young. Sometimes, she thought Runnels did not really understand what she was talking about, even though he would always say, “uh huh” or “yeah.” Nancy paid more attention to Darmonica because he had sickle cell anemia. Runnels did not get along too well with his father, but he was not around very much. Runnels also did not like his mother’s husband, Keith, because Keith would hit her. Runnels would spend the night at Lillie Mae’s house to avoid Keith, and Lillie Mae’s husband would take Runnels to school in the morning. Once, Runnels called the police on Keith. Keith was “just crazy,” and Lillie Mae guessed something happened to him when he was in the military. Lillie Mae and her husband would give Runnels “whoopings” with a belt. Lillie Mae’s brother was killed in a confrontation with the police when Runnels was in elementary school. Lillie Mae’s grandfather, sixty-eight year-old Allen Brooks, was lynched by a mob in downtown Dallas in 1910. Lillie Mae went to Runnels’s trial with Runnels’s mother and father and waited outside the courtroom. They spent the night in Amarillo and came back to court the next day, but no one ever called them to testify. One of the attorneys told them the trial was over and they would not need to testify. She met Runnels’s attorney for the first time at the trial and never talked to anyone before that. (1 SHCR 156-57).

Darmonica Runnels (Runnels’s brother). Darmonica and Runnels grew up in South Dallas “where violence was the norm.” They once passed a dead body in the street on the way to the bus stop and saw police beat up people in the neighborhood many times. The police offered them baseball cards and candy if they could give information about someone’s whereabouts. He had a great uncle, Horace, who had been in some kind of mental facility and was killed by police. Drugs were prevalent in their neighborhood, and there would always be needles on the ground in back of

his great-grandmother's house. His mom's family was dysfunctional, violent, and always fighting. His mother's oldest brother, James, lived in his grandmother's house and was always drinking, getting high and acting out. When Runnels was thirteen or fourteen, James threatened him and Darmonica with a loaded rifle and shot the gun in the air. James took the kids riding around with him when he was drunk and once took them to a dope house where they witnessed a shooting. Another time, James threw a tire rim through the front door of the grandparent's house. Their mother, Nancy, liked to party all the time and drank a lot. Runnels never liked school, but their mother did not notice because she had her own problems. Their parents did not always live together, and he and Runnels went back and forth between their houses. At their dad's house, they were often left alone with their cousin Joel. Darmonica never lived with their mother's abusive husband, Keith, because he got along well with his father and stayed with him. Runnels would tell him that Keith was beating on their mom. Runnels lived with their dad for one or two years at most when he was a teenager, but he left because he was tired of all the whoopings. Darmonica said they would get whoopings with belts or switches that lasted five to ten minutes from their mom, dad, grandparents, and great-grandmother. Runnels got more whoopings because he acted out more and did not learn from mistakes. Darmonica misbehaved less, but also got away with more, because he knew how to be sneaky. Their parents did not keep up with their education and sometimes did not look at their report cards. Runnels was not that smart, did not care about school, did not read when he was young, and did not do homework. Darmonica also did not do homework, but he was an honor student and went to a magnet high school. He once won a mock trial competition and was invited to the state competition, but they did not have the money for him to go. Runnels ran head first into a flagpole in elementary school and knocked himself out. Runnels did things that did not make sense, like

kicking over a bag full of leaves they had raked up and then laughing about it. In high school, Runnels lived with Darmonica for a few months and burned the apartment down after leaving the skillet on; Runnels thought this was funny. Darmonica said Runnels “just played too much as a kid” and “never knew when to stop.” He and his cousin Joel would beat up on Runnels because of this, and Runnels would never give up even though he was younger. Before trial, Darmonica met with the defense team probably two times, along with his mother, grandmother, and uncle. Runnels’s lawyer and investigator came to Dallas about a week before trial and spoke with him and his mother. During these meetings, the investigator or lawyer would say that they wanted to know about Runnels’s life, and he would answer whatever questions they asked. If they had asked, he would have told them everything stated in his affidavit. He did not testify at trial and was never served with a subpoena. (1 SHCR 145-49).

LaQueena Garcia (Runnels’s cousin). LaQueena Garcia stated in her affidavit that she is two days younger than Runnels and was raised by their grandparents, Lillie Mae and James Taylor. Runnels lived around the corner with his mother Nancy and brother Darmonica. Their father, Noel, was not around much. She attended school with Runnels, who did not understand things and was always “trying to catch up.” Runnels could never stay still in school and would wander off like he was distracted. He always had to have help with school work, and if he could not do something on his own, he would give up. His reading comprehension was off; he could not tell you what a story was about after he has read it. He copied his homework and guessed his way through exams. Eventually, he was retained, lost interest, and dropped out in ninth grade. Runnels often came to their grandparents’ house to hang out. He usually spent the night and it was not a big deal because his mom was only a block away. Runnels was always back and forth. Runnels’s mom dated a man

named Keith when Runnels was about ten or eleven. Runnels did not like him at all and would always stay at their grandparent's house. Runnels would tell their grandmother that Keith was hitting on his mom again and Nancy would have bruises on her arms. LaQueena believed Nancy was afraid to leave Keith. Nancy drank and partied a lot on the weekends. She went out all the time and Runnels would then come to their grandparent's house. Runnels was a playful child and thought everything was funny. Sometimes he was too playful and did not know when to stop. He always got into trouble for little stuff, like playing with his school supplies before school started. He was "whooped" with belts or switches, but the whoopings did not matter to Runnels and he repeatedly got into trouble. He would have to be told twice to do something. Their great uncle Horace was mentally slow and was killed by the police when they were in elementary school. Horace talked to himself a lot and it freaked them out. In ninth grade, Runnels started hanging out with kids who had been in the juvenile system and that was when his problems started. Nancy was not the kind of mother who would sit him down and give him a serious talk about the consequences of his behavior. LaQueena's grandparents did not drink or party, her grandmother stayed at home and her grandfather worked. Runnels, on the other hand, had one parent at a time, and his mom was gone every weekend. At their grandparents' house, Runnels was treated just like her, but he was not there all the time. No one ever interviewed her for Runnels's trial, and if they had, she would have told them everything she put in her affidavit. (1 SHCR 184-87).

Joel Runnels, Jr. (Runnels's cousin). Joel Runnels, Jr. is two years older than Runnels and their fathers are identical twins. Joel grew up in Oklahoma and saw Runnels and Darmonica during the summers. Runnels was just a good kid with a big heart who wanted to help others and was usually happy and laughing. Otherwise, he was crying. Runnels joked around and acted out a lot,

and when he did something that got them all in trouble, he would “really get it” from Darmonica. Darmonica bullied Runnels and Runnels was always telling on them. Runnels did a lot of things to get into trouble, but he was also blamed for things he did not do. Runnels liked to play around but sometimes took it too far. Runnels also talked back. Runnels engaged in risky behavior and liked to take chances without thinking about the consequences. Once, he left Joel’s younger brother tied to a tree with a “kid leash” during a family barbeque. Sometimes, Joel, Darmonica, and Runnels would take coins from Runnels’s dad’s piggy bank. He thinks no one ever taught Runnels about consequences or explained how to stay out of trouble and protect himself. Darmonica and Runnels grew up in South Dallas with a lot of crime and exposure to drugs and it was risky growing up there. Nancy was very caring and open, but was also nonchalant and unable to guide Runnels. No one ever interviewed him for Runnels’s trial, but if they had, he would have told them everything stated in his affidavit. (1 SHCR 189-91).

Runnels. Petitioner Runnels stated in his affidavit that when Mr. Durham recommended he plead guilty, Mr. Durham told him the “real fight would be in showing a jury at the punishment phase that [he] had a good side and that [he] could be rehabilitated.” Runnels provided Garrison the names of at least thirty family members and ten friends who could be character witnesses and he offered information about his upbringing and family history. (1 SHCR 160-61).

Based upon the affidavits summarized above, and the procedural and factual history of the trial, the state habeas judge (who was the same judge who presided over the trial) recommended the CCA deny relief. In his Findings of Fact and Conclusions of Law, the state trial judge summarized the mitigation investigation and evidence, addressed the appointment of a mental health expert, the amount of time spent by Mr. Durham, the decision for Runnels to plead guilty and discussed the

mitigation evidence developed in cross-examination. In Finding of Fact No. 11, the judge referenced defense counsel's meeting with the judge in chambers after the State rested and counsel's reasons not to present witnesses. The judge determined that Mr. Durham's decision not to present testimony was sound trial strategy. (Finding of Fact No. 11, 1 SHCR 297, 301). Although the CCA ultimately adopted the Findings of Fact, they did not do so until after they remanded the case for an evidentiary hearing. *Runnels*, No. WR-46,226-02 (Remand Order, June 8, 2011). The trial judge held a hearing at which co-counsel Hamilton and investigator Garrison were called to testify by the State. Following that hearing, the trial judge filed supplemental Findings of Fact and the CCA denied relief. The testimony of Ms. Hamilton and Ms. Garrison is summarized below.

Laura Hamilton (second chair trial counsel). Ms. Hamilton testified this was her first and only capital murder trial, although Mr. Durham had defended several capital murder defendants. (2 SHRR 24-25). The two of them discussed their strategy and felt that guilt was a foregone conclusion. The two agreed Runnels should plead guilty to garner sympathy and not incense the jury. (2 SHRR 9-10). They also thought a guilty plea might restrict the amount of evidence the State would present. (2 SHRR 27). They hired a psychiatrist and a psychologist who both tested Runnels, but they could not testify to anything favorable. (2 SHRR 10-12). The two discovered that Runnels had a unique family history that included the lynching of his great-grandfather and an uncle who had been shot by the police. They tried to figure out a way to show these things affected the person Runnels had become.⁸ (2 SHRR 11, 32). Ultimately, however, Runnels grandmother did not think

⁸As will be discussed in the analysis below, Garrison discovered Runnels had taken an interest in Black history and slavery and had organized Black inmates to enact changes in the prison through violence and bloodshed. This damaging information, however, was never presented to the jury. But a reasonable defense attorney would have been prepared to meet this testimony and it appears that the great-grandfather's lynching and the police shooting of Uncle Horace may have been intended for this purpose. See 4 SHRR 51, 75 (email from Garrison noting Runnels's "inherent racism" because of being a southern Black family with a history, including at least "the two incidents").

the family history was known to Runnels and she had some issue with “airing this . . . dirty laundry.” (1 SHRR 11). Co-counsel wanted some of Runnels’s family to testify, however, and received from Runnels a list of family and friends who Garrison attempted to contact. (2 SHRR 10, 15-16).

The two also had a video recording, on the issue of future dangerousness, that was made by Vince Gonzales. Gonzales was not available to testify, however, and he recommended Keith Price as his replacement. Calling Price as a witness presented two potential problems. Price had been the warden of the prison unit when the murder occurred and may have been knowledgeable about the crime. Also, Price would have been able to sponsor “hundreds of pages of disciplinary action,” including assaults, that had been kept from the jury. (2 SHRR 13-15, 28, 34; 15 RR 110). Garrison’s testimony does not clearly identify anything specific, but her notes describe disciplinary incidents including a sex offense, gambling, extortion, and efforts to organize Black inmates to enact changes through violence and bloodshed, none of which were presented to the jury. (3 SHRR 66, 133-34, 169). Also, Mr. Durham had been successful in excluding over twenty disciplinary infractions from the jury’s consideration, which are contained in State’s trial exhibit 27a. (SX 27a; 16 RR 140-41).⁹

Ms. Hamilton further testified they had explored mental illness in the family, but nothing was helpful. Runnels had an uncle retired from the Navy, his father had owned a business and Darmonica was a mortgage broker. (2 SHRR 18). Initially, they were encouraged by the fact that

⁹ Excluded infractions that occurred prior to the murder were refusal to work (three times), possession of contraband (a telephone speaker), sitting naked on the floor and disrupting operations, assaulting a correctional officer, refusing to leave the day room, refusing to submit to hand restraints, masturbating in public, setting fire to his mattress, kicking shut his cell door during a cell search, tampering with his cell restraint slot, exposing his penis (twice), and possession of gambling paraphernalia.

Excluded infractions that occurred in the year *after* the murder were possession of contraband (sandpaper), exposing his penis (three times), masturbating (three times), refusing to comply with a strip search, and refusing to submit to hand restraints. (SX 27a).

the uncle could testify, but then discovered some facts surrounding a visit to Japan that prevented them from calling him as a witness.¹⁰ (2 SHRR 18). Other potential witnesses had criminal histories, were Runnels's co-defendants in other crimes, or were other inmates. (2 SHRR 19).

Ms. Hamilton testified that Nancy, Noel, and Lillie Mae were at the courthouse for trial and met with them in Mr. Durham's office. They told the family to be at the courthouse the next day, as they planned to call the grandmother and possibly the mother. The grandmother had provided a more stable home for Runnels and could talk about the family history. The father wanted to be in the courtroom to support Runnels, so they knew they would have an issue calling him as a witness. Then, the grandmother backed out of her testimony and said she just did not think the family history really affected Runnels and did not know if he even knew about the lynching. (2 SHRR 20). When asked whether someone on the defense team should have known about this before that time, Ms. Hamilton replied, "Absolutely. But I don't think that's what we were told." (2 SHRR 32). Nevertheless, Lillie Mae, Nancy, and Noel went to the courthouse the next day. After the State rested and Garrison went to call them, however, she discovered they had left. (2 SHRR 20-21). When asked whether the witnesses were told to leave, Ms. Hamilton said she did not know that; all she knew was, when they went to call them, they were gone. (2 SHRR 31).

Ms. Hamilton further stated that the person who could have testified to the pattern of abuse against their mother was Darmonica and he did not come to trial. (2 SHRR 45). When confronted with the information in Darmonica's affidavit, that he was never served with a subpoena, Ms. Hamilton explained that either the mother or grandmother said that the process server could serve

¹⁰ Again, the testimony is unclear, but Garrison's notes shed some light on these events. Runnels's uncle Ricky had wealthy Japanese friends who were interested in helping Runnels. So Ricky planned a "vacation/change of environment/tutoring/exposure to a different lifestyle trip." Ricky made plans for Runnels to live with his friends and attend school, but "socially it became a nightmare, and Travis was sent home early." (4 SHRR 83).

everybody at their house. (2 SHRR 45-46).¹¹ Ms. Hamilton explained that she and Mr. Durham met with Darmonica in Dallas in 2005, and Garrison had met with him more than once and spoke with him many times. He did not have reliable transportation and was upset, possibly about how quickly he needed to be in Amarillo, and he did not accompany his family to court even though he had received a subpoena. (2 SHRR 21-22).

The defense wanted to present mental health experts Lisa Clayton and Richard Fulbright, as well as Runnels's family, and attempt to "humanize" Runnels but that strategy was "just not what was laid out" for them. (2 SHRR 16-17). In the end, counsel tried to develop some redeeming qualities about Petitioner through cross-examination. (2 SHRR 23, 41-42). When asked whether the defense could have tried to get the witnesses to come back, Ms. Hamilton said they could have, but there was also a lot of harm from testimony of Runnels's background because Darmonica did not turn out like Runnels. (2 SHRR 35). She believed they "absolutely" made a good decision not to call the witnesses they had. (2 SHRR 23).

Kathy Garrison (trial investigator). Ms. Garrison testified she had been a criminal defense investigator since 1989 and had worked on twenty to thirty capital murder cases, including writs of habeas corpus. (2 SHRR 52, 55). Her notes, totaling over six hundred pages, were admitted into evidence and are discussed below. (2 SHRR 72). Garrison testified the defense strategy at sentencing was to show that Runnels had had a pretty rough life, was poor, was shuffled back and forth between parents and grandparents and other family members, had trouble in school and disabilities that made it difficult to function, but that he could "make it" in prison on a life sentence.

¹¹ This comports with Nancy's affidavit and Runnels's assertion in his state writ application. (1 SHCR 7, 153). The state habeas application also contains a copy of Darmonica's subpoena with an officer's return dated October 26, 2005, the first day of trial. (1 SHCR 142-43).

(2 SHRR 54-55). They also had evidence of violence (presumably, the lynching and the police shooting), directed toward the family during the lifetimes of Runnels, Nancy, and Lillie Mae. (2 SHRR 54).

The contact information Runnels had provided to Garrison for his family was out of date. Nonetheless, Garrison eventually found Runnels's grandmother, Lillie Mae, by sending her a letter via Federal Express. (2 SHRR 56-57). After her initial meeting with the family, Garrison believed they would "step up to the plate," but she later had difficulty contacting the family. (2 SHRR 57-59, 70). Darmonica became angry when he received his subpoena because he had not had sufficient time, had car trouble, and "it was all unfair." (2 SHRR 59-60). They believed Darmonica could provide compelling testimony about their childhood, but he told them he would not show up. (2 SHRR 61). Another potential witness was Janet Levells, Nancy's friend and "adopted sister," who was very compassionate towards Runnels and had been to prison herself. But, she did not want to testify if Runnels was guilty. Ultimately, Levells said Runnels had taken the law into his own hands and would have to settle with God. (2 SHRR 61). It was never their intent to not put any evidence on; at the very least, they wanted Lillie Mae to testify and they hoped Darmonica, Noel, and Nancy would testify; they were all under subpoena. (2 SHRR 73-75, 81).

Garrison made efforts to locate potential witnesses and records, which are documented in her notes and discussed below. (2 SHRR 70-71). She spoke to ten or fifteen potential witnesses. Of these, Lillie Mae, Darmonica, Noel, and Nancy were potentially good witnesses. (2 SHRR 62). Lillie Mae, Nancy, and Noel rode together to the Amarillo courthouse for trial and met with the defense team to discuss their testimony. (2 SHRR 64, 68). The next day, Runnels's father, ignoring Garrison's advice, insisted on being in the courtroom "to be with his son." This was in violation of

The Rule and hindered his ability to testify. (2 SHRR 63). Garrison believed he did this because he did not want to testify. (2 SHRR 81). Runnels's mother would have testified about his birth, early life, the dissension between her and Noel, the "back and forth" living arrangements, her poverty, unemployment, drug use, and Runnels's disruptive, dysfunctional childhood. (2 SHRR 63). The grandmother would have testified about the mentally-ill uncle who was shot by police and the great-grandfather who was lynched. (2 SHRR 64-66). When Garrison went to find them in the hallway to testify, however, she discovered they had left. (2 SHRR 75). She telephoned them and discovered they were already out of town. They told her, "We can't do nothing for him now," and hung up. Garrison did not tell them they could leave nor, to her knowledge, did anyone else. (2 SHRR 67). Mr. Durham "wasn't very happy" about it, but Runnels "wasn't particularly surprised" and said, "That figures." Garrison had had several conversations with Runnels about her difficulty in contacting the family, and she knew his family had let him down in a prior case for which he had sought their help. (2 SHRR 69-70). Garrison believed the family members were afraid to testify and she wished she could have made them more comfortable, although she does not know what she could have done. (2 SHRR 68, 72, 81). She agreed a defendant's family members sometimes get "cold feet" when asked to testify because they are afraid they will be blamed. (2 SHRR 74). Garrison testified Mr. Durham believed he had been able to keep out some very damaging evidence, but he still wanted the jury to see that Runnels had a family who loved him and cared about him. (2 SHRR 78).

Garrison reviewed the family's affidavits (attached to the state writ application and summarized above) and said they contained essentially the same information the defense trial team knew and believed the family members would testify about. (2 SHRR 82). Garrison testified the

only incorrect statement in the affidavits was that somebody told the family members they could leave. Garrison added, "I don't know why you would want to leave anyway with your child here on trial." (2 SHRR 82-83). Garrison did not remember if counsel discussed seeking a continuance. (2 SHRR 76-77).

After the State's presentation of this testimony, habeas counsel Mr. Wilson made a record of the fact that he had sought a thirty-day continuance of the hearing date to obtain live testimony, which the judge had denied in order to meet the CCA's deadline. (2 SHRR 83). Mr. Wilson made a proffer of the live testimony he would have presented by reurging all the affidavits attached to the writ. (2 SHR 84-85). He acknowledged,

I don't know their testimony would be substantially different. Obviously, we have one conflict that is now very apparent, that they're saying they were told to leave trial; people are saying they weren't. You know, I don't know even if that really becomes—becomes a big deal. That would be the only difference I believe from their affidavits. We might get more into that, as to who told them to leave, if they know.

(2 SHRR 85). Mr. Wilson also said he might offer an expert affidavit on mitigation, which would be more legal argument than evidence, and the court gave him leave to do that. (2 SHRR 85). Mr. Wilson also offered into evidence Mr. Durham's testimony from the motion for new trial. (2 SHRR 84).

The state habeas court then entered supplemental findings and conclusions, again recommending relief be denied. In particular, the court found that Lillie Mae, Nancy, and Noel appeared at the trial, but had departed by the time Garrison went to get them. The court also found that Garrison spoke to them on the telephone but they refused to return, saying they could not help Runnels. (2 SHCR 12). The court found that, once the family had departed, the defense decided the best strategy was to rest the case and rely on the mitigating potential of Runnels's guilty plea and the

mitigating facts developed through the cross-examination of the State's witnesses. (2 SHCR 12-13). The court concluded that Mr. Durham's decision not to present punishment evidence was not based on an inadequate mitigation investigation and that Runnels received effective assistance of counsel. (2 SHCR 13). The CCA adopted the supplemental findings of fact and conclusions of law as well as the initial findings and conclusions, and denied relief.

C. Substantive Law for Ineffective-Assistance-of-Counsel Claims

The clearly established federal law governing claims of ineffective assistance of trial counsel is *Strickland v. Washington*, 466 U.S. 668 (1984). *Cullen v. Pinholster*, 563 U.S. 170, 189, 131 S.Ct. 1388, 1403, 179 L.Ed.2d 557 (2011). Under this well known standard, Runnels must show (1) that counsel's representation fell below an objective standard of reasonableness and (2) a reasonable probability that prejudice, sufficient to undermine confidence in the trial outcome, resulted from counsel's deficiency. *See Strickland*, 466 U.S. at 688, 694. Counsel are "strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Pinholster*, 563 U.S. at 189 (quoting *Strickland*, 466 U.S. at 690)). This standard not only gives trial counsel the benefit of the doubt, but affirmatively entertains the range of possible reasons counsel may have had for proceeding as they did. *Id.* at 196.

D. AEDPA Standard of Review

When a federal habeas petitioner challenges a state court adjudication on the merits, the AEDPA bars relitigation of the claim in federal court unless it (1) is "contrary to" federal law then clearly established in the holdings of the Supreme Court or "involved an unreasonable application of" such law, or (2) "is based on an unreasonable determination of the facts" in light of the record before the state court. *See* § 2254(d); *Harrington v. Richter*, 562 U.S. 86, 100, 131 S. Ct. 770, 785,

178 L.Ed.2d 624 (2011). This determination is limited to the record that was before the state court that adjudicated the claim on the merits. § 2254(d)(2); *Pinholster*, 563 U.S. at 181-82. These conditions are meant to be difficult to meet, but stop short of imposing a complete bar to the relitigation of claims rejected in state proceedings. *Richter*, 562 U.S. at 102, 131 S. Ct. at 786.

A state court's decision is "contrary to" Supreme Court precedent if the state court applies a rule that contradicts governing law or confronts facts that are materially indistinguishable from relevant Supreme Court precedent and arrives at a different result. *Coleman v. Thaler*, 716 F.3d 895, 901 (5th Cir. 2013) (quoting *Williams v. Taylor*, 529 U.S. 362 (2000)). A state court's application of law is "unreasonable" when the state court identifies the correct governing legal principle but applies it unreasonably to the facts of a particular case. *Id.* at 901-02. The petitioner must show that the state court ruling "was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement." *Richter*, 562 U.S. at 103, 131 S. Ct. at 786-87. Thus, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, 562 U.S. at 102, 131 S. Ct. at 786; *White v. Woodall*, – U.S. –, 134 S. Ct. 1697, 1702, 188 L.Ed.2d 698 (2014) (stating a merely wrong holding or even "clear error" will not suffice).

Factual "determinations" in a state court's decision are presumed correct and a petitioner bears the burden of rebutting them by clear and convincing evidence. § 2254(e)(1); see *Burt v. Titlow*, 134 S. Ct. 10, 15 (2013). A "decision adjudicated on the merits in a state court and based on a factual determination will not be overturned on factual grounds unless objectively unreasonable in light of the evidence presented in the state-court proceeding." § 2254(d)(2); *Miller-El v. Cockrell*, 537 U.S. 322, 340, 123 S.Ct. 1029, 1033, 154 L.Ed.2d 931 (2003). A "state-court factual

determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.” *Titlow*, 134 S. Ct. at 15 (citing *Wood v. Allen*, 558 U.S. 290, 130 S.Ct. 841, 175 L.Ed.2d 738 (2010)). The presumption of correctness attaches to explicit findings of fact as well as “unarticulated findings which are necessary to the state court’s conclusions of mixed law and fact.” *Pippin v. Dretke*, 434 F.3d 782, 788 (5th Cir. 2005) (quoting *Pondexter v. Dretke*, 346 F.3d 142 (5th Cir. 2003)).

E. Habeas Counsel’s Representation and *Martinez v. Ryan* (Claim 2)

In claim two, Runnels contends the AEDPA deferential standard should not apply. Runnels contends he is entitled to redevelop and relitigate claim one in federal court on the ground that state habeas counsel Mr. Wilson was ineffective. Runnels asserts Mr. Wilson ignored the recommendation of his investigator to obtain a psychiatric examination of Runnels and failed to present live testimony at the state habeas hearing. Runnels acknowledges § 2254(e)(2) would ordinarily preclude factual development but argues *Martinez v. Ryan* excuses any default and permits the district court to hold a hearing because Mr. Wilson rendered ineffective assistance by virtually abandoning him.¹²

Martinez v. Ryan created an exception to *Coleman v. Thompson*, 501 U.S. 722, 111 S.Ct. 2546, 115 L.Ed.2d 640 (1991). *Martinez* held that the absence of counsel or ineffective assistance

¹²Section 2254(e)(2) provides:

(2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that—

(A) the claim relies on—

- (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
- (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and

(B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

of counsel on initial collateral review could constitute cause to excuse a procedural default, *i.e.* failure to exhaust. In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the court determined *Martinez* applied to states like Texas who, while not barring ineffective assistance claims on direct appellate review, did not afford litigants a meaningful opportunity to develop an ineffective assistance claim on direct review.

Neither *Martinez* or *Trevino* established a Sixth Amendment right to counsel on collateral review. Instead, those cases created what the Supreme Court classified as a “narrow exception” to *Coleman* if the claim of ineffective assistance of trial counsel was a “substantial” claim. *Trevino* at 1917-18.

Petitioner Runnels attempts to use *Martinez/Trevino* as an avenue to again present and/or redevelop the ineffective assistance of trial counsel claim asserted in Runnels’s state habeas petition. Runnels’s argument fails because:

- (1) there was no procedurally defaulted claim;
- (2) state habeas counsel was not ineffective; and
- (3) the claim Runnels classifies as not exhausted is not “substantial.”

1. The *Martinez/Trevino* Exception Does Not Apply
When There Is No Procedurally Defaulted Claim

The Court addressed this issue to some degree when it denied Runnels’s motion for leave to amend and supplement his Petition (doc. 27). *Martinez/Trevino* does not apply to claims which were adjudicated on the merits. Instead, it applies only to procedurally defaulted ineffective assistance claims against trial counsel. Since there are no procedurally defaulted ineffective assistance claims in Runnels’s federal petition, neither *Martinez* nor *Trevino* are applicable. See *Martinez*, 132 S. Ct. at 1320. Federal claim one (ineffective assistance of trial counsel) was adjudicated by the state court

on the merits and this federal district court's review is limited to the record that was before the state court. *See Escamilla v. Stephens*, 749 F.3d 380, 394 (5th Cir. 2014) (concluding that *Martinez* does not apply to claims that were fully adjudicated on the merits by the state habeas court because those claims are, by definition, not procedurally defaulted); *see also Villanueva v. Stephens*, 619 F. App. 269, 275-76 (5th Cir. Jul. 21, 2015) (petition for certiorari filed). Accordingly, *Martinez* does not permit further development of Runnels's exhausted ineffective-assistance-of-counsel claim against Mr. Durham in this proceeding.

If Runnels is arguing he is asserting a new ineffective assistance claim that was not adjudicated and which is now procedurally barred, *i.e.* the failure to have additional psychological testing performed, his contention is without merit. Runnels's ineffective assistance claims in state court alleged ineffective assistance of trial counsel for unreasonably limiting or failing to conduct an adequate investigation into potentially mitigating evidence. As was previously stated in this Report and Recommendation, Dr. Fulbright's report was one of the grounds upon which state habeas counsel contended should have prompted trial counsel to "further investigate." Those allegations were sufficient to exhaust the ineffective assistance claim Runnels contends was procedurally defaulted. *See supra* p. 5.

2. Habeas Counsel Joe Marr Wilson Was Not Ineffective

Alternatively, and assuming for purposes of argument that *Martinez* were expanded to allow the factual development Runnels requests, it would not afford Runnels any relief because the record does not show state habeas counsel was ineffective. Mr. Wilson's investigator, Alma Lagarda, is now an attorney with the Texas Defender Service ("TDS"). She provided a declaration to federal habeas counsel about Mr. Wilson's performance. (Petition, Ex. G). Lagarda stated that during her

fellowship with TDS and before she was licensed to practice law, she offered her services and the services of TDS summer interns to Mr. Wilson for the purpose of summarizing the trial transcript and gathering “preliminary information about Mr. Runnels’s background.” After the CCA remanded the case for a hearing (and Lagarda obtained her law license), Lagarda understood Mr. Wilson would request funds for her assistance at the hearing. She learned, after the fact, that the hearing had taken place without her assistance. In her declaration, Lagarda identified areas of investigation that she did not complete, stated there were people--unidentified--who she had not interviewed, and said that Mr. Wilson did not follow her recommendation to obtain a neuropsychological evaluation. (Petition, Ex. G). The respondent, citing *Pinholster*, argues Lagarda’s affidavit may not be considered by this Court. The undersigned agrees. Lagarda’s affidavit was not before the state habeas court and cannot be considered by this Court on Runnels’s ineffective assistance of trial counsel claim against Mr. Durham. Consequently, the Court considers Lagarda’s affidavit only in the alternative and in connection with Runnels’s argument that *Martinez* allows him to further develop his ineffective assistance of trial counsel claim.

Lagarda’s declaration does not indicate she found or anticipated finding any mitigating facts or psychological diagnoses different from what was known to habeas counsel or, for that matter, to trial counsel. In fact, Lagarda’s affidavit does not address the mitigation evidence Ms. Garrison gathered, nor does it acknowledge the neuropsychological examination by Dr. Fulbright. Instead, the assertion that Mr. Wilson was ineffective rests on Lagarda’s apparent assumption that habeas counsel must reinvestigate the case in its entirety, irrespective of the investigation which had been conducted by the trial team. Even at the trial level, however,

the defense of a criminal case is not an undertaking in which everything not prohibited is required. Nor does it contemplate the employment of wholly unlimited

time and resources. Just as counsel is not obliged to advance every available nonfrivolous argument, . . . so counsel is not necessarily ineffective for failing to investigate every conceivable matter [the] inquiry into which could be classified as nonfrivolous.

Smith v. Collins, 977 F.2d 951, 960 (5th Cir. 1992) (citations omitted). Like trial counsel, state habeas counsel is not obliged to investigate every conceivable, nonfrivolous matter that could be raised on collateral review. The allegation that Mr. Wilson's representation fell outside the wide range of reasonably competent habeas assistance must contain more than a laundry list of subject areas or unnamed people that might have been investigated, without a showing of how the absence of any additional information was prejudicial. Lagarda's affidavit does not demonstrate the habeas investigation was deficient nor does it show to any degree the requisite prejudice.

Nor does Mr. Wilson's decision not to present live testimony from the family demonstrate ineffective assistance. Complaints of uncalled witnesses are especially disfavored because the presentation of testimonial evidence is a matter of trial strategy, and allegations of what a witness would have stated are largely speculative. *See Gregory v. Thaler*, 601 F.3d 347, 352 (5th Cir. 2010). To prevail on this type of claim, a petitioner must name the witness, demonstrate he was available to testify and would have done so, set out the content of the proposed testimony, and show that the testimony would have been favorable to a particular defense. *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985). Although they provided affidavits to state habeas counsel Wilson, who presented them for purposes of the trial-level ineffective assistance allegations against Mr. Durham, the record before this Court contains no indication that Nancy Taylor, Lillie Mae Taylor, Darmonica Runnels, LaQueena Garcia, or Joel Runnels would have appeared and testified *at the habeas hearing*. Nor can the Court simply infer that their live testimony would have differed from their affidavits in a way that benefits Runnels. In short, Runnels provides no evidence that the absence

of live witnesses was a result of ineffective habeas counsel or that it prejudiced him.

Further, the record indicates Mr. Wilson considered the potential importance of live testimony and moved for a continuance to obtain live testimony, which was denied. When no continuance was granted, Mr. Wilson made a proffer of what the testimony would have been by reurging the affidavits. (2 SHCR 4; 2 SHRR 84-85). In doing so, Mr. Wilson accomplished at least two things. He presented the evidence he is accused of not presenting to the state habeas court and he avoided subjecting the affiants to cross-examination. This Court may not second-guess counsel's decision in hindsight but reviews it under the circumstances facing counsel at the time the decision was made. *See Pinholster*, 563 U.S. at 189. Mr. Wilson certainly knew the habeas judge was the same judge who had presided over the trial and therefore was likely to have an independent recollection of the circumstances surrounding the family's leaving the trial based on his meeting with Mr. Durham in chambers. (1 SHCR 307); *Buxton v. Lynaugh*, 879 F.2d 140, 146 (5th Cir. 1989) (holding that such a judge is in a better position to make determinations regarding the facts and circumstances surrounding the trial than other courts on direct or collateral review). Mr. Wilson could have reasonably abandoned the presentation of live testimony on the belief that it would have been futile under the circumstances, that it would not have achieved any significant benefit, and that it would have simply resulted in an unfavorable credibility assessment of his witnesses. As it stands, Mr. Wilson's actions at least possibly preserved a complaint for future litigation. In death penalty cases, preservation of potential error is oftentimes more strategically advantageous than litigating an issue to completion.

With no evidence in the record that live testimony from the family would have improved Runnels's position, this Court, following *Strickland*, must presume Mr. Wilson's competence.

Moreover, the record fails to demonstrate prejudice, meaning a reasonable probability, sufficient to undermine confidence in the outcome, that but for counsel's alleged unprofessional errors the result of the habeas proceeding would have been different. *Strickland*, 466 U.S. at 694.

Lastly, the claim, or the portion of the ineffective assistance claim which Runnels contends he should be allowed to further develop, *i.e.*, additional psychological testing, is not, for the reasons discussed previously, a "substantial" ineffective assistance claim.

Consequently, the Court finds *Martinez/Trevino* inapplicable since Runnels's ineffective assistance of trial counsel claims, and specifically, the asserted failure to adequately investigate mitigation evidence, were presented to the state courts, were exhausted and are not procedurally defaulted. Alternatively, the Court finds any expansion of *Martinez/Trevino* unwarranted because Runnels has not demonstrated state habeas counsel Mr. Wilson was ineffective, nor has he shown the claim he wishes to present to be "substantial."

The Court next turns to Runnels's contention that the state court adjudication of the ineffective assistance claim against Mr. Durham was unreasonable. "The pivotal question is whether the state court's application of the *Strickland* standard was unreasonable." *Richter*, 562 U.S. at 101. It is not a *de novo* determination of whether Mr. Durham's performance fell below *Strickland*'s standard. *Id.* Instead, review is "doubly deferential," meaning the federal court takes a "highly deferential" look at counsel's performance through the "deferential lens of § 2254(d)." *Pinholster*, 563 U.S. at 190. Runnels must demonstrate it was necessarily unreasonable for the CCA to conclude (1) that he did not overcome the strong presumption of competence and (2) that he failed to undermine confidence in the jury's sentence of death. *Id.*

F. Analysis

Runnels first contends the record “clearly shows a complete absence of any idea of how to conduct a mitigation investigation that would satisfy both *Wiggins* . . . and the ABA Guidelines.” (Petition at 20). The objective standard of reasonable representation is defined by prevailing professional norms and, consequently, is necessarily a general standard. *See Bobby v. Van Hook*, 558 U.S. 4, 7, 130 S.Ct. 13, 175 L.Ed.2d 255 (2009) (per curiam). Restatements of professional standards, such as the American Bar Association guidelines, are “only guides” to what is reasonable. They are properly considered only to the extent they describe the prevailing professional norms and standard practice, and are not so detailed that they “interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Id.* at 8-9 n.1. The Constitution imposes “one general requirement: that counsel make objectively reasonable choices.” *Id.* at 9.

1. Mr. Durham’s Mitigation Investigation

The state habeas record does not demonstrate Mr. Durham was ignorant about how to conduct a mitigation investigation. First, Mr. Durham had prior capital murder defense experience. Second, the investigator, Ms. Garrison, had significant experience in death penalty cases and provided over 600 pages of her notes and emails. (2 SHRR 52, 55, 78). The Court has reviewed these records extensively. (3 SHRR, 4 SHRR). They show Ms. Garrison investigated all aspects of the case, including Runnels’s extended family and ancestors, their migration to Texas, their criminal history, their substance abuse history, and their history of mental illness. She sought Runnels’s school records (through his home school district as well as the prison’s Wyndham school district), Runnels’s medical records (at two hospitals and one clinic), his juvenile file, his prison

records and disciplinary infractions, and his jail records. She obtained a 1993 psychological evaluation conducted by Dallas County Juvenile Probation that diagnosed Runnels with conduct disorder. That evaluation stated that Runnels's problems could be mediated if Runnels had family support, but that this was unlikely as he had been on his own for several years without family supervision.

Her notes further show Garrison interviewed Runnels for the first time on September 1, 2004 and several times thereafter. They spoke about his psychiatric history and placements, his criminal history under the alias "Frank Pope," the schools he attended, his employment history, his family tree, his sexual experiences, his past injuries, past "scam" lawsuits filed by his mother on his behalf, the lack of childhood abuse or sexual abuse, his drug use, hobbies, pets, church attendance, two suicide attempts, the people he writes to, the music he likes, his favorite books, his love of hunting and fishing, his talents in sports and art, his "great resentment" over the seventy-year aggravated robbery sentence he was serving, and the facts regarding the instant homicide. Runnels told Garrison he did not want his childhood used as an excuse for his behavior and justified the murder he had committed by saying his manhood was being trampled. Runnels told Garrison about his Uncle Joel, who worked as a "fence" and who was more of a father to him than his own dad, and about his brother, Darmonica, who was his "best friend-in the world." Runnels spoke about his parents' disciplinary methods and how his brother showed him how to commit burglaries. Garrison knew that Darmonica, now a mortgage broker, was on probation for "the same things that Runnels was in trouble for." Her notes describe the abuse of Runnels's mother by his stepfather, Keith, and their drug and alcohol use. Garrison screened a list of potential character witnesses that Runnels wanted to call, but her notes indicate there were a number of them that had criminal records. Ms. Garrison

wrote to trial counsel that “some of those people are going to hurt us.” The notes show Garrison spent time looking for about ten prison guards that Runnels believed could be helpful, but she had difficulty locating them with the minimal identifying information provided.

Garrison first met with Runnels’s mother, brother, uncle, and grandmother on March 4, 2005. Her notes indicate his mother and brother were tearful and agreed to let Garrison read all the letters Runnels had written from prison; they believed the seventy-year sentence he was serving was “devastating” for him. His grandmother indicated Runnels did not know how to express himself when he was young and did not understand when she asked him to do something. Garrison learned about Uncle Ricky, who had sent Runnels to Japan and Thailand for passing all of his classes when he was sixteen years old. In a follow up interview, the uncle said that Runnels had some trouble in Japan and was sent home early. Ricky described Runnels as a social nightmare and a manipulator who, good looking and fairly bright, thought he could smile his way out of anything. He also said Darmonica helped Runnels abscond from a “three strikes” program.

Her notes reflect Garrison arranged for evaluations by a psychiatrist and a neuropsychologist; she investigated the *Atkins* bar to execution and other mental health defenses; she consulted a prison gang expert; and she investigated the victim’s work and education history. Garrison documented the file when information from the District Attorney, though voluminous, did not contain all the information the defense might need. She researched prison classification and custody levels to discover why Runnels had access to factory knives. She proposed defensive strategies early and continued to suggest strategies such as, what the effect of being locked up can do to the mind, the possibility that the victim was worse than the inmate (relying on the prison reform ruling in *Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982)), organic mental problems related to impulsivity, the family’s

history of officer-related violence, Darmonica's terminal illness and its effect on Runnels, the family's financial status and stability, the possible unfairness of Runnels's seventy-year sentence, the family's race relationships, and Runnels "being passed back and forth" between his grandmother and parents.

These notes, when considered together with Garrison's testimony, (2 SHRR 52-83), simply do not support Runnels's claim of a "complete absence of any idea of how to conduct a mitigation investigation." In fact, this evidence shows the opposite, that a thorough investigation into Runnels's background was conducted and evaluated relevant to the plausible options. *See Wiggins*, 539 U.S. at 524 (noting that bar guidelines suggest counsel consider medical history, educational history, employment and training history, family and social history, prior adult and juvenile correctional experience, and religious and cultural influences as potential mitigating topics). While Garrison was not solely a mitigation investigator, and also investigated the facts of the offense as well as potential defenses, she conducted a thorough mitigation investigation.

2. Mr. Durham's Mental Health Investigation

Runnels also contends that, had Mr. Durham "even taken the time to read" Dr. Fulbright's report, it would have spurred him to complete testing so they could have had a more complete picture of Runnels's mental makeup. (Petition at 21). Garrison's notes contain Dr. Fulbright's report, which states that Runnels had not received appropriate psychological services in school, in the juvenile detention system, or in prison. The report also states that prison conditions prevented Fulbright from testing Runnels for attention deficit disorder (ADHD) and from ascertaining three areas of higher-level executive functioning: "reasoning processes, his impulse control, and his ability to plan." (4

SHRR 167, 177).¹³ Dr. Fulbright concluded, however, that Runnels had essentially intact neuro-cognitive functioning and average intelligence. (4 SHRR 177). And he stated, “One cannot assume that Mr. Runnels would *not* have attacked the guard [Wiley] if he had been given appropriate psychological services,” and that ADHD “would *not* explain his violent behavior toward” Wiley. (4 SHRR 178) (emphasis added). Furthermore, an email from Ms. Garrison indicates that the psychiatrist, Lisa Clayton, was likewise unable to help the defense “because of her findings.” (4 SHRR 202). Given the opinions of his experts and considering that Dr. Fulbright was able to provide a diagnosis, Mr. Durham could have reasonably decided it was fruitless to pursue further testing because the results would not have changed his defense strategy. For example, if further testing revealed or substantiated poor impulse control, a prosecutorial argument could be made that such would show future dangerousness. If further testing revealed good impulse control, then the facts of the murder could potentially be presented as more heinous.

Strickland does not require counsel to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing. *Wiggins*, 539 U.S. at 533. When counsel recognizes the possible mental health issues and the need for expert assistance and employs a defense expert, counsel is not ineffective for failing to canvass the field to find a more favorable expert. *See Dowthitt v. Johnson*, 230 F.3d 733, 747-48 (5th Cir. 2000), *overruled in part on other grounds*, *Lewis v. Thaler*, 701 F.3d 783, 790 (2012); *see also Williams v. Cain*, 125 F.3d 269, 278 (5th Cir. 1997) (concluding counsel was not deficient for failing to locate an expert who would conclude that Williams was retarded or suffered from mental illness). Mr. Durham received opinions from two mental health experts whose qualifications are unchallenged

¹³ All page citations to volumes 3 and 4 of SHRR are the .pdf page numbers, as Garrison’s notes are not numbered.

and whose reports ultimately proved unhelpful. He was also in possession of 1993 evaluation diagnosing Runnels with conduct disorder and concluding he was “a difficult and challenging candidate for therapeutic change.” (4 RR 115-16). The state court could have reasonably determined that Mr. Durham had an adequate basis to conclude that a mental health defense was not the best strategy, and to decide that additional testing for ADHD and “higher-level executive functioning” was unnecessary. *See Bell v. Thompson*, 545 U.S. 794, 810, 125 S.Ct. 2825, 2835, 162 L.Ed.2d 693 (2005) (acknowledging that counsel’s investigation and reliance on experts adequately supported the chosen mitigation strategy to present evidence of defendant’s good character and the capacity to adjust to prison, rather than evidence of mental illness); *Charles v. Stephens*, 736 F.3d 380, 391 (5th Cir. 2013) (holding that counsel is not ineffective for failing to obtain mental health records whose mitigating nature “was not altogether clear,” and where counsel had reason to believe they would not be helpful or worse, harmful). Furthermore, as discussed in more detail below, Dr. Fulbright’s report contained damaging information indicating Runnels lacked remorse, resisted institutionalization, and did not intend to go back to prison alive. Mr. Durham could have reasonably concluded that the risk of disclosure of this information outweighed any perceived benefits from a mental health defense.

3. Mr. Durham’s Strategy

Runnels next contends the record shows a pattern of neglect or sheer inability to formulate a viable mitigation strategy with the available evidence of Runnels’s chaotic childhood, early history of misconduct, and the complete lack of any attempt on the part of the family or institutions to provide him with needed help. (Petition at 20-21). The record reflects, however, that after receiving unhelpful reports from his experts, Mr. Durham intended to present evidence that Runnels had had

a rough life, was poor, was shuffled back and forth between parents and grandparents and other family members, had trouble in school and suffered disabilities that made it difficult to function, but that he could serve a life sentence in prison. The testimony of Ms. Hamilton and Ms. Garrison, as well as Garrison's notes, show Mr. Durham possessed the information Runnels now contends should have been presented to the jury. Unfortunately for Runnels, there is uncontradicted testimony that petitioner's brother, Darmonica, simply refused to appear at trial, and there is testimony that the rest of Runnels's family made themselves unavailable by exiting the courthouse and leaving Amarillo before they were called to testify. When Ms. Garrison called them and asked them to return, they told her they could not do anything for Runnels and hung up the phone.

While there was an issue argued by state habeas counsel as to whether Mr. Durham should have sought a continuance and writs of attachment for the departed family witnesses, it would not have been unreasonable for Mr. Durham to conclude their usefulness as potential mitigation witnesses had been seriously diminished by their patent lack of desire to assist Runnels, a fact which would have likely been brought up on cross-examination if they were somehow convinced to testify. *See Pinholster*, 563 U.S. at 196 (holding that federal habeas court is not required to simply give trial counsel the benefit of the doubt but to "affirmatively entertain the range of possible reasons" counsel may have had for proceeding as he did). Also, as Ms. Hamilton noted in her testimony, the benefits of the family's background testimony had to be balanced against the potential harm caused by the fact that Darmonica received a similar upbringing but did not "turn out that way." (2 SHRR 335). There is certainly no basis upon which to find trial counsel was ineffective for failing to anticipate Runnels's grandmother, mother, and father would leave the trial and be unavailable.

In now appears, in hindsight, that it might have been helpful to have the option of calling

Runnels's cousins, LaQueena and Joel, to testify after Runnels's family left the courthouse, but counsel could not have known in advance that the family members under subpoena would leave. Counsel's strategy was not deficient for failing to develop LaQueena and Joel as witnesses, as their testimony would have simply been cumulative of the same evidence counsel had been prepared to present through the absent family members. Judicial second-guessing is especially inappropriate under these circumstances where the argument essentially comes down to a matter of degrees. *See Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009) (quoting *Dowthitt*, 230 F.3d at 743).

a. Lack of Testimony From Family Members

Runnels suggests the family left the courthouse because someone on the defense team told them they would not be needed to testify. The state court, however, specifically found otherwise, and that credibility determination is entitled to AEDPA deference on federal habeas review unless overcome by clear and convincing evidence. *See Summers v. Dretke*, 431 F.3d 861, 871 (5th Cir. 2005). There is no record evidence to overcome the state court's credibility finding. Instead, the evidence supports it.

A note dated March 5, 2005 in Ms. Garrison's file states that Runnels's family on his mother's side "are cooperative and willing to help him and us." (3 SHRR 158). On September 2, 2005, Ms. Garrison wrote that when she asked Runnels about family support and how best to approach his family, Runnels replied that his mother's side was irresponsible and that a face to face meeting was best. Ms. Garrison then told counsel she was willing to take "one more shot" with both sides of the family. (3 SHRR 355). On September 7, 2005, her notes indicate the "family seems to have some difficulty being available." (4 SHRR 31). On September 13, 2005 she states, "I doubt very seriously they will commit to much personal causation in our client's history." (4 SHRR 75).

On October 20, her notes reflect she set aside time to meet the family and called Noel, Nancy, Darmonica, and Lillie Mae but “received no response whatsoever.” (4 SHRR 147). Ms. Garrison’s notes next document that she spoke with Runnels’s father on October 22, who told her to tell Runnels “he is coming.” (4 SHRR 196). On October 25, the day before trial, Ms. Garrison called Lillie Mae, who confirmed that she was “quite sure” Nancy and Darmonica will be there, and maybe Janet (Levells). (4 SHRR 219). These notes indicate that the family’s commitment vacillated over time. This observation coincides with Ms. Garrison’s notes regarding her conversation with Uncle Ricky that Runnels had become unwelcome with the Runnels side of the family and had “alienated many members of his family on both sides.” (4 SHRR 83). Further supporting the finding that the family left Runnels’s trial of their own accord is Mr. Durham’s testimony, at the motion for new trial hearing less than two months after the verdict, that he was “flying by the seat of [my] pants” at the time he moved for an instructed verdict. (19 RR 23).

The state court could have reasonably found that the affidavits of Nancy and Lillie Mae lacked credibility. First, it is clear Lillie Mae’s affidavit is incorrect in the assertion that she never met with anyone on the defense team before the trial, since this conflicts with Ms. Garrison’s notes as well as the affidavits of both Nancy and Darmonica. (1 SHCR 148, 153). Second, neither Lillie Mae nor Nancy identify the person who allegedly told them they could leave, nor do they elaborate in any way on what would have been a surprising, if not disappointing, development for a family who had driven all the way from Dallas to testify. If they had been willing to testify on Runnels’s behalf, reason dictates they would have sought some explanation from counsel or, at a minimum, even if not needed as witnesses, would have stayed in the courtroom to watch what little remained of the trial and learn of the outcome. The fact that they left Amarillo entirely and hung up on Ms.

Garrison, refusing to return when she called them, supports the conclusion that, for whatever reason, they did not want to be available to testify. As Ms. Garrison suggested in her testimony refuting the family's allegation that they were told they could leave, it is difficult to imagine why a supportive family would ever leave their son's trial when closing arguments were imminent, even if they were told they could. (2 SHRR 83).

It is true that Runnels did not have the benefit of live testimony from Nancy or Lillie Mae at the state habeas hearing, but they also avoided potentially damaging cross-examination. These facts do not undermine the state court's credibility decision. The state habeas judge was the same judge who presided at trial. He stated in his initial findings (which were adopted by the CCA), that after the State rested its punishment case, he met with defense counsel in chambers to discuss their intentions. (1 SHCR 301). Such a judge is arguably in a better position to make determinations regarding the facts and circumstances surrounding the trial than courts of review. *See Buxton*, 879 F.2d at 146. Under these circumstances, the trial judge's finding that the affidavits of Nancy and Lillie Mae lacked credibility is a finding entitled to AEDPA deference. *See May v. Collins*, 955 F.2d 299, 310 (5th Cir. 1992) (holding under former version of statute that § 2254(d) does not preclude the federal court from presuming the correctness of findings made from a paper record, especially where the state habeas judge and trial judge are the same person). As previously noted, there is no suggestion in this record that live testimony from Nancy or Lillie Mae would have been any different from their affidavits.

After Runnels's family walked out, Mr. Durham was left with few alternative strategies regarding sentencing. The witnesses had been subpoenaed. He could have pursued writs of attachment and attempted to present their testimony at a later date, with possibly the same outcome

or, worse, end up with hostile witnesses on the stand. But a writ of attachment would not have overcome the problem with Runnels's father violating The Rule against observing trial testimony, nor with Lillie Mae, who had changed her story entirely by saying she did not know if Runnels even knew about the lynching in the family history. In the end, trial counsel Mr. Durham, during the middle of a trial and faced with having to make a tough trial decision, weighed the alternatives of trying to compel testimony of uncertain usefulness from the family who should not have left, and elected to rely on the guilty plea and the testimony he had elicited during cross-examination, in the hope the jury would agree that the State did not prove future dangerousness.

b. Decision Not to Call Dr. Keith Price

Even after Runnels's family left, Mr. Durham could have called Dr. Keith Price on the issue of future dangerousness and prison security. The defense contacted Dr. Price when their chosen expert, Vince Gonzales, became unavailable and recommended Dr. Price in his stead. (2 SHRR 13-14). Ms. Garrison's notes indicate that Dr. Price had retired as warden of the unit where the murder occurred, was teaching at a university, and was not on the State's witness list. (4 SHRR 96). Dr. Price was subpoenaed. (1 SHCR 140). Any benefit from Price's testimony, however, had to be weighed against the significant possibility that, as the former warden, he might provide damaging information on cross-examination about the offense itself or about Runnels's behavior in prison. (3 SHRR 96). Dr. Price could have opened the door to damaging testimony including over twenty disciplinary infractions, the admission of which Mr. Durham had successfully prevented. (SX 27a; 16 RR 140-41).¹⁴

¹⁴ There may also have been other damaging information the prosecution could have developed on cross-examination. Whether there was or not is not relevant. What is relevant is that defense counsel could not have known for sure what information the prosecution might have had available for cross-examination or impeachment.

It is likely Dr. Price, as warden, also knew about Runnels's efforts to organize African-American inmates and in any event, he could have been asked whether or not he was aware of Runnels's efforts. Ms. Garrison's notes indicate Runnels is "anti-TDCJ" and started reading literature in 2001 about Black history, slavery, and economics. Runnels's favorite book was "Breaking the Chains of Psychological Slavery," and according to Ms. Garrison, he has resisted institutionalization, is militant, and has organized Black inmates to use aggression, violence, and bloodshed to enact change. (3 SHRR 66, 101, 114, 134, 355). Her notes about Yow, an inmate who testified, state that Yow was in one of the groups on the yard when Runnels talked about violent change. (3 SHRR 169). In an email to counsel, Ms. Garrison stated, "There is an abundance of stuff for you guys to contend with in the TDCJ files. I can't really see any STG [security threat group] problems at the moment, but it is possible something may pop up. All these Black slavery letters, notes, etc. came from somewhere, and it appears Travis communicated to other O/Fs re his beliefs." (3 SHRR 134). Mr. Durham would certainly be justified in limiting the presentation of evidence in order to avoid "opening the door" to what could have painted an entirely different picture of the nature and motivation behind Wiley's murder.

As summarized above, Mr. Durham was able to elicit information on cross-examination that Runnels was truthful and not violent, that the authorities considered him trustworthy, that he was essentially no worse than any other inmate, that some prisoners mellow with age, that the murder was due to unique circumstances involving harassment from a man who was not his supervisor, that the prison employees received training to stay safe and the prison had restrictions to control him, and that predicting what a person is going to do in the future is highly improbable. It does not appear, therefore, that Dr. Price could have added much to the body of helpful evidence Mr. Durham had

presented and there was a genuine risk he could have provided harmful information. Mr. Durham's decision was not outside the wide range of reasonable decision-making. *See Williams*, 125 F.3d at 278-79 (rejecting ineffective assistance claim where mitigating testimony would have been presented by witnesses whose knowledge would have opened the door to more damaging evidence under cross-examination).

c. Reliance on Cross-Examination

Runnels asserts that Mr. Durham's strategy of relying on cross-examination was undermined by Mr. Durham's constant objections and attempts to impeach the credibility of those same inmate witnesses. The trial record does not support this characterization of the events.

At times, Mr. Durham impeached the inmates with prior inconsistent statements in which they had originally denied knowledge of the murder. This was obviously part of his attempt to show that their testimony incriminating Runnels was coerced by prison officials after multiple interrogations. In fact, Mr. Durham would later argue that the attendance of correctional officers at the trial during the inmates' testimony was meant to intimidate. (17 RR 22). At other times, Mr. Durham's cross-examination elicited information about the serious offenses for which the inmates were incarcerated, their parole violations, and their disciplinary infractions. The Court interprets this tactic as an attempt to show that, by comparison, Runnels was a good inmate or at least no worse than any other, and that disciplinary infractions are common. This supported Mr. Durham's closing argument that Runnels "threw things" at the guards but "that probably will happen twenty times in the next hour at the prisons in Texas" and does not justify taking a man's life. (17 RR 26). Mr. Durham also repeatedly objected to the State's direct examination, making at least forty-seven *sustained* objections for hearsay, leading questions, assuming facts not in evidence, and non-

responsive answers. Indeed, the trial court repeatedly instructed the prosecutor to stop leading his witnesses and eventually admonished him outside the presence of the jury. Far from being ineffective, Mr. Durham was successfully preventing the prosecution from helping its witnesses testify, which was especially necessary because they had all given prior statements inconsistent with their incriminating testimony. Further, not only are such objections by defense counsel in criminal prosecutions a common tactic, but such objections limit the evidence a witness may volunteer, can disrupt the flow of the prosecution's case, and are clearly a strategic tool. (15 RR 101, 108).

Mr. Durham's objections did not undermine the beneficial testimony he elicited on cross-examination regarding prison conditions, classification, and Runnels's history of non-violence. Mr. Durham's objections and attempts to impeach with prior inconsistent statements were designed to impugn the prosecution and the prison authorities rather than the witnesses themselves. Moreover, as often as not, juries expect counsel to object, and repeated objections can cause the witness or the prosecutor to lose their composure. While not favored by the Court, "talking" objections are used strategically to inform or make arguments for the benefit of the jury. Based on the foregoing, Mr. Durham's objections and attempts to impeach witnesses were not unreasonable trial strategy. *See United States v. Shetterly*, 971 F.2d 67, 75 (7th Cir. 1992) (holding that allegedly excessive objections were within the realm of counsel's trial strategies and tactics).

Given the multiple eyewitnesses to the murder and its after effects, Mr. Durham did not give up any viable defense when Runnels pleaded guilty. The defense conducted an extensive mitigation investigation. Counsel developed a strategy to show that Runnels grew up impoverished, was shuffled back and forth between grandparents and parents, and had disabilities that made school difficult, but that Runnels could successfully serve a life sentence. Counsel also knew the family

history of being subject to racial violence and violence at the hands of law enforcement. But the record also reveals that Runnels had a difficult relationship with his family and, for whatever reason, his family abandoned him at the courthouse. At that point, it was not unreasonable for counsel to rely upon the guilty plea in mitigation, arguing as he did that admission is the “first act of contrition.” Further, it was not unreasonable for counsel to rely upon his cross-examination testimony of the State’s witnesses to negate Runnels’s future dangerousness rather than calling Dr. Price, whose cross-examination by the State could have been the proverbial double edged sword and painted a very different, radically violent image of Runnels as an inmate incapable of institutionalization. *See Pinholster v. Ayers*, 590 F.3d 651, 692 (9th Cir. 2009) (Kozinski, C.J., dissenting) (dismissing the “current infatuation with ‘humanizing’ the defendant as the be-all and end-all of mitigation” because not all defendants are capable of rehabilitation and not all juries are susceptible to such a plea), *rev’d sub nom. Cullen v. Pinholster*, 563 U.S. 170 (2011).

4. Prejudice

Runnels concludes that there is no question that Mr. Durham’s ineffective representation prejudiced his case. He makes no discrete argument as to how Mr. Durham’s alleged errors prejudiced him, however. In deciding the question of prejudice under *Strickland*, this Court is required to determine whether it was necessarily unreasonable for the CCA to conclude that Runnels failed to undermine confidence in the jury’s sentence of death. *See Pinholster*, 563 U.S. at 190.

As previously stated, to prevail on a complaint of uncalled witnesses, a petitioner must demonstrate the uncalled witness was available to testify and would have done so. *Alexander*, 775 F.2d at 602. Runnels has failed to show that Noel, Nancy, Lillie Mae, Darmonica, LaQueena, or Joel would have testified. At most, their affidavits say they would have told counsel the information in

their affidavits or, in the case of Nancy and Lillie Mae, they “thought” they would testify. But they do not unequivocally say they would have testified at trial if called. (1 SHCR 148, 153, 157, 187, 192). In fact, their actions and behavior at the trial support the conclusion that Runnels’s family would *not* have testified. Nancy, Noel, and Lillie Mae departed the courthouse during trial, and Darmonica became angry when he received his subpoena and told the defense team that he would not appear at trial. (1 SHCR 149; 2 SHRR 45, 60-61, 75). The Court has previously discussed LaQueena and Joel, who were not at the trial, and determined that Mr. Durham was not ineffective for not predicting the other family members would leave.

The body of evidence presented to the jury showed that Runnels murdered Mr. Wiley because he was irritated with his work assignment and felt hassled by Wiley, who was not his supervisor, to the point he intended to get himself transferred. It is important to note that Runnels’s guilty plea caused the State to remove ten witnesses from its witness list. (15 RR 18, 109). The State also did not offer the contents of Runnels’s written statement and a recorded telephone conversation between Runnels and prison personnel that had survived the defense’s motion to suppress. (2 RR 100-08; SX 46). The trial court excluded three prior instances of Runnels’s refusal to work and about nineteen additional infractions, and there was no evidence of Runnels’s attempt to organize prisoners to use aggression and bloodshed to enact change. All of this evidence was available to the State, and if Mr. Durham had pressed a mitigation theme, it may well have triggered the State and opened the door for the presentation of such damaging information on these subjects through cross-examination or rebuttal.

Additionally, had Mr. Durham relied on a mental health defense, Dr. Fulbright’s report (which would have been discoverable by the State under Texas Rule of Evidence 705), contained

many harmful details about Runnels's drug use, criminal history, "kind of wild" family life, violent personality, failure in school despite an average IQ, and apparent refusal to maintain legitimate employment. In fact, the report revealed the breadth of Runnels's misbehavior in prison, showing he was in administrative segregation for two years, and that he engaged in negative behavior when left alone with nothing to do, such as when he was segregated. The report also reflects Runnels's lack of remorse for Wiley's death and his belief it was justified, his refusal to accept responsibility for the robbery and sentence he was serving at the time of the murder, and his dislike of police and correctional officers. Most damaging of all, it contained statements Runnels made to Darmonica that he did not feel he could complete his robbery sentence, that he was not "going back to jail alive," that "there has got to be another way out," and that "these young white guys can play with your life because you are locked up." The jury could have learned all of this damaging information plus the fact that Runnels was so tired of prison, he had attempted suicide at least once. (4 SHRR 167-72). All of this is direct evidence that Runnels would have been a poor candidate for a life sentence and was likely to commit additional violent acts in prison. This evidence would have completely undermined any attempt to show Runnels could be safely incarcerated if spared the death penalty. In short, his resistance to institutionalization could have been made graphically plain.

While ADHD, poor impulse control, the lack of psychological care, and a dysfunctional childhood can be somewhat mitigating, these facts can also demonstrate a dangerous personality not likely to change. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 1244 (2013) (concluding counsel's decision to not offer evidence of a defendant's troubled, impoverished, and disadvantaged background was reasonable because the evidence could suggest he was a product of his environment and therefore likely to be dangerous in the future). Life-long

problems offered to show a jury why the defendant committed an offense also tend to show the defendant's potential to repeat violent acts. They allow an easy response by the State that acceptance of such evidence as mitigation means no one would ever be held responsible because everyone has such "issues." Moreover, whatever mitigating impact this information may have had in this particular case would have been diminished by the fact that Dr. Fulbright did not believe the lack of psychological care or ADHD contributed to the murder and by the fact that Runnels rejected opportunities for help by getting expelled from an alternative school designed for students with behavior disorders and by absconding from a juvenile halfway house. (4 SHRR 169-70). The mitigation impact would have been further diluted because Darmonica was raised in the same environment but managed to make different choices. *See Guevara v. Stephens*, No. 13-7003, 2014 WL 3894303 at *5 (5th Cir. Aug. 11, 2014) (per curiam) (holding that any information about Guevara's difficult life in El Salvador would have been undermined by, among other things, his brother's clean record despite their shared childhood).

More importantly, the aggravating facts in this case are overwhelming. Runnels planned and committed a calculated, cold-blooded murder of a prison employee who gave him no provocation and who put up no defense to the attack, which Runnels committed from behind the victim's back, while the victim was simply doing his job. At the time, Runnels was already serving a lengthy prison sentence, had committed multiple previous assaults on prison personnel, and committed the murder merely because he did not get the work assignment he wanted. There was also evidence the murder was racially motivated. In sum, the evidence shows that another lengthy prison sentence would likely put more prison employees or other inmates at risk. Given these aggravating factors, Runnels asserted mitigation evidence is not so compelling as to undermine confidence in the

sentencing verdict.

Runnels fails to demonstrate that the CCA unreasonably rejected his claim of prejudice. This Court concludes not only that it was not unreasonable for the CCA to determine that Runnels failed to undermine confidence in the death sentence the jury handed down, but that nothing has been presented to meet that significant burden of showing the result of the trial would have been different. *See Simon v. Epps*, 394 F.App. 138, 148 (5th Cir. Sept. 7, 2010) (holding that state court reasonably found no *Strickland* prejudice based on aggravating factors, including the heinous nature of the crime, as well as the lesser degree of childhood abuse compared to those cases in which Supreme Court found prejudice).

5. Mr. Durham's Death

Finally, Runnels asserts that, given Ms. Hamilton's inexperience as second chair counsel, Mr. Durham's absence from the state habeas proceedings was a *per se* violation of his right to due process and confrontation. To the extent he is claiming Mr. Durham's absence from the habeas proceedings was a constitutional error cognizable on federal habeas, Runnels's argument fails. A claim regarding an alleged deficiency in the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself. *See Nichols v. Scott*, 69 F.3d 1255, 1275 (5th Cir. 1995). As such, it does not present a ground for federal habeas relief. *Kinsel v. Cain*, 647 F.3d 265, 273-74 (5th Cir. 2011); *see also Trevino v. Johnson*, 168 F.3d 173, 180 (5th Cir. 1999) (holding that Fifth Circuit precedent makes clear that infirmities in state habeas proceedings do not constitute grounds for relief in federal court) (citing *Hallmark v. Johnson*, 118 F.3d 1073 (5th Cir. 1997)). To the extent Runnels may be claiming that Mr. Durham's absence through death rendered the state habeas court's ruling unreasonable under § 2254(d), he provides no authority for that claim. Ms.

Hamilton and Ms. Garrison were competent fact witnesses to describe the investigation they pursued on Runnels behalf and the strategies chosen, and Runnels does not show otherwise. If anything, Mr. Durham's absence from the habeas hearing benefitted petitioner Runnels because Mr. Durham was unable to defend himself against the allegations of ineffectiveness and/or incompetence.

While counsel has a duty to make a reasonable investigation, he is not required to present mitigating evidence at sentencing in every case. *Wiggins*, 539 U.S. at 533. Here, Mr. Durham conducted a reasonable mitigation investigation and formulated a strategy that was derailed when Runnels's family walked out or otherwise made themselves unavailable to testify. He conducted rigorous cross-examinations and made difficult strategic decisions about how to defend a man who murdered a prison employee while serving a seventy-year prison sentence, who had stated to more than one person that he could not accept prison, who could not be institutionalized, and who had actively sought to enact changes in prison through violence. Mr. Durham's decision to rely on his cross-examination to rebut future dangerousness, thus preventing the State from possibly introducing a significant body of harmful evidence on cross-examination or rebuttal, was reasonable strategy at the time. In fact, it is this Court's experience that effective defense counsel often try their cases through cross-examination rather than direct-examination to avoid the risk of opening the door to unfavorable facts. This Court may not, in hindsight, second guess Mr. Durham's strategy merely because alternative courses of action existed when Runnels's family became unavailable. *See Pape v. Thaler*, 645 F.3d 281, 291 (5th Cir. 2011); *Crane v. Johnson*, 178 F.3d 309, 312 (5th Cir. 1999) (holding that the failure to present mitigating evidence, if based on well informed, strategic decisions, is well within the range of practical choices not to be second-guessed). Runnels has not demonstrated the state court was unreasonable in its conclusion that the lack of mitigation evidence

was not a product of ineffective representation. The Court recommends claims 1 and 2 be denied.

IV. CONSTITUTIONAL CHALLENGES TO DEATH PENALTY STATUTE

In the remaining claims, Runnels raises various constitutional challenges to the Texas death penalty statute. Respondent contends that claims 3, 7, 8, 9, and most of claim 4 are procedurally barred because they were procedurally barred in state court. (Answer at 19). The Court agrees.

A. Procedural Bar

The CCA found that, in addition to lacking merit, all of Runnels's challenges to the Texas death penalty statute were procedurally barred because they should have been raised on direct appeal or because they had been raised on appeal and were rejected. *Runnels*, 2012 WL 739257, at *1 (citing *Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1989) and *Ex parte Acosta*, 672 S.W.2d 470 (Tex. Crim. App. 1984)). Respondent's position that the claims which were procedurally barred in state court on the ground that they should have been, but were not, raised on direct appeal and are now procedurally barred in federal court is meritorious. *See Swain v. Thaler*, 466 F.App. 393, 403-404 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 476 (2012) (citing *Dorsey v. Quarterman*, 494 F.3d 527 (5th Cir. 2007)). Further, Runnels makes no argument to excuse the procedural default. *See Coleman*, 501 U.S. at 750 (holding that where petitioner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review is barred unless the petitioner can demonstrate cause and prejudice). Therefore, all the challenges to the Texas death penalty statute are procedurally barred except the prosecutorial discretion issue in claims 4 (based on the Eighth Amendment) and 10 (based on Equal Protection), which were adjudicated on the merits in the direct appeal. *Runnels*, 2007 WL 2655682, at *12.

Even if Runnels could overcome the procedural default bar, the CCA's alternative holding

denying the claims on the merits was not an unreasonable application of clearly established federal law. As discussed below, Runnels's defaulted claims seek to change existing law and/or establish a new rule of constitutional law.

B. Meaningful Appellate Review (Claim 3)

In claim three, Runnels asserts the Texas sentencing statute is unconstitutional because it does not permit meaningful appellate review of the mitigation issue. (Petition at 28). This claim has been rejected in this Circuit. *See Rowell v. Dretke*, 398 F.3d 370, 378 (5th Cir. 2005) (holding that no Supreme Court or circuit precedent requires that the mitigation issue be assigned a burden of proof and that circuit precedent rejects the argument that it be subject to appellate review by the state); *Woods v. Cockrell*, 307 F.3d 353, 359-60 (5th Cir. 2002) (explaining that Texas death penalty statute is not constitutionally obligated to provide appellate review of mitigation special issue).

To the extent this claim interweaves an argument that Runnels is entitled under the Texas Constitution to appellate review of the future dangerousness issue under the now abandoned "factual" sufficiency standard, such argument is based on state law and is not a basis for federal habeas corpus relief. (Petition at 28-36). *See Caldwell v. Thaler*, 770 F. Supp. 2d 849, 861 (S.D. Tex. 2011) (holding that federal habeas courts do not sit as super state supreme courts for review of state law issues). To the extent Runnels also interweaves a conclusory argument that the abandoned factual sufficiency review is required by the United States Constitution, (Petition at 34), he cites no clearly established federal law to that effect. On the contrary, on federal habeas review, only the legal sufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1979) need be satisfied, even if the state law would impose a more demanding standard of proof. *West v. Johnson*, 92 F.3d 1385, 1394 (5th Cir. 1996); *e.g.*, *Woods*, 307 F.3d at 358. Petitioner's third claim, if not procedurally barred,

should be denied.

C. Various Constitutional Claims (Claims 4 and 7)

These claims contain the following challenges to the Texas statute: failure to require proof beyond a reasonable doubt, *contra Kansas v. Marsh*, 548 U.S. 163, 173 (2006) (holding that, even after *Walton v. Arizona*, a state death penalty statute may place on the defendant the burden of proving that mitigation circumstances outweigh aggravating circumstances); failure to provide meaningful guidance to the jury regarding mitigation and giving the jury total discretion to make unfavorable findings against a defendant, *contra Tuilaepa v. California*, 512 U.S. 967, 979-80 (1994) (recognizing that juries may be given unbridled discretion in determining whether to impose the death penalty once the defendant is determined eligible to receive it); *Hughes v. Dretke*, 412 F.3d 582, 594 (5th Cir. 2005) (agreeing that the “unrestricted discretion” argument is entirely without merit and *Teague* barred, citing *Callins v. Collins*, 510 U.S. 1141 (1994)); discouragement of “holdout” jurors by requiring ten votes for a life sentence and failing to inform the jury of the impact of an individual vote, *contra Druery v. Thaler*, 647 F.3d 535, 543 (5th Cir. 2011) (rejecting claim that the “12-10 Rule” violated due process and the right to freedom from cruel and unusual punishment); *Hughes*, 412 F.3d at 593-94; failure to define terms in the special issues such that it results in a “mandatory” death sentence, *contra Sprouse v. Stephens*, 748 F.3d 609, 622 (5th Cir.), *cert. denied*, 137 S. Ct. 477 (2014) rejecting argument that Constitution requires Texas to define the terms “deliberately,” “probability,” “criminal acts of violence,” and “continuing threat to society”); *James v. Collins*, 987 F.2d 1116, 1120 (5th Cir. 1993); the admission of unadjudicated extraneous

offenses at punishment violates the Eighth Amendment,¹⁵ *contra Parr v. Thaler*, 481 F.App. 872, 879 (5th Cir. 2012), *cert. denied*, 133 S. Ct. 842 (2013); and the death penalty statute violates the Establishment Clause of the First Amendment, *contra Roach v. Quarterman*, 220 F.App. 270, 278 (5th Cir. 2007) (holding that no reasonable jurists could debate the district court's conclusion that the Texas death penalty statutes do not offend the First Amendment). Accordingly, these claims and their subparts, if not procedurally barred, should be denied.

D. Failure to Inform Jury Regarding Deadlock (Claim 8)

In claim eight, Runnels contends the Texas statute violates the Eighth Amendment because it prevents the jurors from being told that a "hold-out" juror at punishment results in a life sentence. This issue lacks merit. *See Sprouse*, 748 F.3d at 623 (holding that clear Supreme Court and Fifth Circuit precedent forecloses this issue).

To the extent this claim also asserts that the jury was inclined to assess a death sentence because it would underestimate the time Runnels would have to serve on a life sentence before becoming parole-eligible, this claim is refuted by the record. (Petition at 47-48). The jury was instructed that, if given a life sentence, Runnels would not become eligible for parole until the actual time served by him equaled forty years, without consideration of good conduct time. The jury was also instructed that eligibility for parole does not guarantee parole will be granted. (2 CR 339). Runnels's claim that the jury was likely to underestimate his parole eligibility date is refuted by the record. This claim, if not procedurally barred, should be denied on the merits.

¹⁵ In relation to this issue, the Court observes that the trial court's charge instructed the jury not to consider testimony that Runnels committed extraneous offenses or bad acts unless they found, beyond a reasonable doubt, that he committed such offenses or acts. (2 CR 336).

E. Definition of “Mitigating Evidence” (Claim 9)

In claim nine, Runnels asserts that the definition of mitigating evidence as “evidence that a juror might regard as reducing the defendant’s moral blameworthiness” unduly restricts the jury’s discretion to consider all the evidence relevant to mitigate a death sentence. (Petition at 48-58).

Runnels has not identified the evidence he contends the jury was prevented from considering. Further, Runnels has not cited and this Court has not found any Supreme Court opinion mandating a definition of mitigating evidence broader than the one provided by the Texas statute. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(f)(4) (West 1991); *accord Barte v. Quarterman*, 574 F. Supp. 2d 624, 710 (W.D. Tex. 2008). Runnels argues the Texas definition prevents the jury from considering admissible evidence of his potential for rehabilitation. The Fifth Circuit has rejected a similar argument regarding “good character” evidence. Like evidence of good character, evidence of a defendant’s potential for rehabilitation may be adequately considered under the future dangerousness special issue. Furthermore, virtually *any* mitigating evidence is capable of being viewed as having some bearing on the defendant’s moral culpability. *Beazley v. Johnson*, 242 F.3d 248, 260 (5th Cir. 2001) (citing *Graham v. Collins*, 506 U.S. 461 (1993)). The holding in *Beazley* has been reaffirmed in *Blue v. Thaler*, 665 F.3d 647, 666-67 (5th Cir. 2011).

It appears Runnels’s argument seeks to establish a new constitutional rule, not in effect at the time of conviction, that would require jurors to be able to base their sentencing decision on mercy or sympathy. (Petition at 53). Runnels fails to consider that such a rule would arguably also allow jurors to assess a death sentence based on their emotional response to grisly facts or sympathy for the murdered victim. In any event, the adoption of such a rule by this Court would violate *Teague v. Lane*, 489 U.S. 288, 306-07 (1989). *See Saffle v. Parks*, 494 U.S. 484, 489, 110 S.Ct. 1257, 1261-

62, 108 L.Ed.2d 415 (1990) (holding that the Constitution does not require that jurors be allowed to base their sentencing decisions on sympathy they feel for the defendant after hearing his mitigating evidence and that the adoption of such a rule would be barred by *Teague*). As the Supreme Court noted, “It is no doubt constitutionally permissible, if not constitutionally required, for the state to insist that the individualized assessment of the appropriateness of the death penalty [be] a moral inquiry into the culpability of the defendant, and not an emotional response to the mitigating evidence.” *Saffle*, 494 U.S. at 492-93 (citations and internal quotation marks omitted); *see also California v. Brown*, 479 U.S. 538, 544, 107 S.Ct. 837, 841, 93 L.Ed.2d 934 (1987) (O’Connor, J., concurring) (stating that the sentence imposed at the penalty stage should reflect “a reasoned *moral* response to the defendant’s background, character, and crime rather than mere sympathy or emotion.”). This claim, if not procedurally barred, should be denied.

F. Prosecutors’ Discretion to Seek the Death Penalty (Claims 4 and 10)

In claims 4 and 10, Runnels contends unfettered prosecutorial discretion to decide whether to seek a death sentence violates the Eighth Amendment and the Equal Protection clause. (Petition at 38-39, 58-86). Since these issues were adjudicated on the merits in the CCA on direct appeal, they are subject to the AEDPA deferential standard of review. *Runnels*, 2007 WL 2655682, at *12; *Whitehead v. Johnson*, 157 F.3d 384, 387 (5th Cir. 1998) (holding that exhaustion requirement is met when claim is presented to highest state court).

The equal-protection argument Runnels asserts under *Bush v. Gore*, 531 U.S. 98 (2000), has been rejected in this Circuit. *Coleman v. Quarterman*, 456 F.3d 537, 542-43 (5th Cir. 2006). Moreover, Runnels’s conclusion under the Eighth Amendment is not supported by any case law and fails to demonstrate that the state court decision was unreasonable. (Petition at 38-39).

Nevertheless, the Supreme Court has rejected the notion that the Eighth Amendment limits prosecutorial discretion regarding whether to seek the death penalty. *McClesky v. Kemp*, 481 U.S. 279, 306, 107 S.Ct. 1756, 95 L.Ed.2d 262 (1987). Runnels fails to demonstrate that the CCA's rejection of these claims was unreasonable, and they should be denied.

VII. CONCLUSION

After reviewing the trial and state-habeas records and the pleadings filed of record in this case, the Court finds that trial counsel's representation did not deprive Runnels of his Sixth Amendment right to effective assistance of counsel.

At the time this case was tried, counsel was presented with a particularly cold-blooded murder. Runnels had killed a prison employee who was defenseless and was attacked from behind. The evidence was that the "motive" for taking Mr. Wiley's life was either trivial or non-existent. The evidence reflected Runnels showed no remorse. Mr. Durham formulated a strategy for Runnels to plead guilty, which could be argued as remorse and/or acceptance of some responsibility.

The mitigation investigation, however, resulted in evidence that was as detrimental as it was beneficial, and which would have been an evidentiary minefield. The defense's plan to personalize the defendant with the grandmother's testimony was wrecked, and counsel elected to proceed with the evidence he had developed. Even in hindsight, it cannot be said that counsel was ineffective.

The petition for federal habeas relief should be denied because Runnels has not shown the CCA unreasonably adjudicated his ineffective assistance claim against Mr. Durham in claim 1 or his prosecutorial discretion argument in claims 4 and 10. Furthermore, Runnels's contention in claim 2 that *Martinez* allows him to relitigate the ineffective assistance claim against Mr. Durham is an unauthorized extension of *Martinez*. Finally, the remaining challenges to the Texas death penalty

statute in claims 3, 4, 7, 8, and 9 should be denied because they are procedurally barred and alternatively, because they lack merit.

IT IS SO RECOMMENDED.

ENTERED this 15th day of March, 2016.


CLINTON E. AVERITTE
UNITED STATES MAGISTRATE JUDGE

*** NOTICE OF RIGHT TO OBJECT ***

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

Any such objections shall be made in a written pleading entitled "Objections to the Report and Recommendation." Objecting parties shall file the written objections with the United States District Clerk and serve a copy of such objections on all other parties. A party's failure to timely file written objections to the proposed findings, conclusions, and recommendation contained in this report shall bar an aggrieved party, except upon grounds of plain error, from attacking on appeal the unobjected-to proposed factual findings, legal conclusions, and recommendation set forth by the Magistrate Judge in this report and accepted by the district court. *See Douglass v. United Services Auto. Ass'n*, 79 F.3d 1415, 1428-29 (5th Cir. 1996); *Rodriguez v. Bowen*, 857 F.2d 275, 276-77 (5th Cir. 1988).

APPENDIX E

Transcript from Evidentiary Hearing on State Habeas Corpus Petition,
State v. Runnels, No. 48,950-D (Potter Cnty., Tex. Dist. Ct. Sept. 9, 2011)

REPORTER'S RECORD
VOLUME 2 OF 4 VOLUMES
TRIAL COURT CAUSE NO. 48,950-D

THE STATE OF TEXAS) IN THE DISTRICT COURT
VS.) POTTER COUNTY, TEXAS
TRAVIS TREVINO RUNNELS) 320TH JUDICIAL DISTRICT

HEARING ON WRIT OF HABEAS CORPUS

On the 9th day of September, 2011, the following
proceedings came on to be heard in the above-entitled
and numbered cause before the Honorable Don Emerson,
Judge presiding, held in Amarillo, Potter County, Texas;
Proceedings reported by Stenographic Method.

COPY

HEARING ON WRIT OF HABEAS CORPUS - SEPTEMBER 9, 2011

1	REPORTER'S RECORD VOLUME 2 OF 4 VOLUMES TRIAL COURT CAUSE NO. 48,950-D	3	CHRONOLOGICAL INDEX
2	THE STATE OF TEXAS) IN THE DISTRICT COURT	2	September 9, 2011 Pg. Vol
3	VS.) POTTER COUNTY, TEXAS	3	Appearances 2 2
4	TRAVIS TREVINO RUNNELS) 320TH JUDICIAL DISTRICT	4	Case Called 6 2
5		5	STATE'S ORAL EVIDENCE DX CX RDX RCX VO VOL
6		6	LAURA HAMILTON 8 24 47 50 2
7		7	KATHY GARRISON 52 73 82 2
8		8	State Rests 83 2
9		9	Defendant Rests 84 2
10		10	Proceedings Concluded 87 2
11	HEARING ON WRIT OF HABEAS CORPUS	11	Reporter's Certificate 88 2
12		12	
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21	On the 9th day of September, 2011, the following	21	
22	proceedings came on to be heard in the above-entitled	22	
23	and numbered cause before the Honorable Don Emerson,	23	
24	Judge presiding, held in Amarillo, Potter County, Texas;	24	
25	Proceedings reported by Stenographic Method.	25	

2	APPEARANCES	4	ALPHABETICAL INDEX
2	FOR THE STATE OF TEXAS:	2	WITNESS DX CX RDX RCX VO VOL
3	SBOT NO. 18426650	3	KATHY GARRISON 52 73 82 2
4	Mr. Randall Sims	4	LAURA HAMILTON 8 24 47 50 2
5	Potter County District Attorney	5	
6	Potter County District Attorney's Office	6	
7	501 S. Fillmore, Suite 5A	7	
8	Amarillo, Texas 79101	8	
9	(806) 379-2325	9	
10	SBOT NO. 15369200	10	
11	Mr. Jack Owen	11	
12	Potter County District Attorney	12	
13	Potter County District Attorney's Office	13	
14	501 S. Fillmore, Suite 5A	14	
15	Amarillo, Texas 79101	15	
16	(806) 379-2325	16	
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HEARING ON WRIT OF HABEAS CORPUS - SEPTEMBER 9, 2011

1	EXHIBIT INDEX	5
2	STATE'S	
3	NO. DESCRIPTION OFFERED ADMITTED VOL	
4	1 Copy of Kathy Garrison Trial Notes 72 86 2	
5	DEFENDANT'S	
6	NO. DESCRIPTION OFFERED ADMITTED VOL	
7	1 Copy of Motion for New Trial 84 86 2	
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1	THE COURT: Come on up, please.	7
2	MR. SIMS: Before I do that, Your Honor, I	
3	would like to offer State's Exhibit Number 1, which is	
4	an affidavit from Kathy Garrison, the investigator in	
5	this matter, as well as some notes from her	
6	investigation in regards to the mitigation in this case.	
7	THE COURT: Raise your right hand, please.	
8	(Witness duly sworn)	
9	THE WITNESS: Yes.	
10	THE COURT: Take a seat on the witness	
11	stand.	
12	(Witness took stand)	
13	THE COURT: I think the overall	
14	consideration that the Court of Criminal Appeals was	
15	desirous of was live testimony.	
16	MR. SIMS: Yes, sir. But part of that	
17	number one was indicating in regards to inadequate	
18	mitigation evidence, and so that's --	
19	THE COURT: Well, she's present to testify.	
20	MR. SIMS: Okay.	
21	THE COURT: Okay. Go ahead.	
22		
23		
24		
25		

1	<u>PROCEEDINGS</u>	6
2	<u>September 9, 2011</u>	
3	THE COURT: This is Cause Number 48,950, a	
4	Writ of Habeas Corpus filed by Travis Trevino Runnels.	
5	And we have received instructions from the Court of	
6	Criminal Appeals to conduct an evidentiary hearing with	
7	regard to some allegations made in that Writ of Habeas	
8	Corpus.	
9	State ready?	
10	MR. SIMS: State is ready, Your Honor.	
11	THE COURT: The Defense ready?	
12	MR. WILSON: Defendant is ready, Judge.	
13	THE COURT: Okay. The first allegation	
14	that the Court of Criminal Appeals desires to have	
15	explored is as follows, and I quote that Court: In his	
16	first allegation, he claims that he was denied effective	
17	assistance of counsel because trial counsel's decision	
18	not to present any punishment phase evidence was based	
19	on an inadequate mitigation investigation.	
20	Reasons for Counsel's conduct do not appear	
21	in the habeas record. Accordingly, they have remanded	
22	this application for us to consider that claim.	
23	Who will be the State's first witness?	
24	MR. SIMS: Your Honor, we'll call Laura	
25	Hamilton.	

1	LAURA HAMILTON,	8
2	having been duly sworn, testified as follows:	
3	DIRECT EXAMINATION	
4	BY MR. SIMS:	
5	Q. Would you state your name, please.	
6	A. Laura Hamilton.	
7	Q. Are you a licensed attorney in the State of	
8	Texas?	
9	A. Yes.	
10	Q. Through the course of your employment as -- in	
11	private counsel, did you have the opportunity to	
12	represent a Travis Runnels?	
13	A. Yes.	
14	Q. When was that, ma'am?	
15	A. Back in 2004-2005.	
16	Q. Was that in regards to a capital murder	
17	allegation the State had alleged against him?	
18	A. Yes.	
19	Q. Who else was your counsel?	
20	A. Jim Durham was first chair.	
21	Q. Now, you're aware that there is a writ pending	
22	in regards to this matter at this time?	
23	A. Yes.	
24	Q. And one of the allegations is what the Court's	
25	just discussed, the denial of ineffective assistance of	

9 1 counsel due to inadequate mitigation evidence; y'all did 2 not put any punishment evidence on. Is that correct? 3 A. Yes. 4 Q. Who was the investigator in this case? 5 A. Kathy Garrison. 6 Q. Okay. And in regards to that, she assisted you 7 and Mr. Durham in regards to gathering -- collecting and 8 gathering witnesses and information and provided that to 9 you. Is that correct? 10 A. Yes. 11 Q. Now, in regards to that, you and Mr. -- you 12 were lead counsel and Mr. Durham was co-counsel? 13 A. Mr. Durham was lead counsel. I was second 14 chair. 15 Q. Okay. Now, in regards to that, did you and he 16 have discussions in regards to your strategy for how you 17 were going to proceed in the defense of Mr. Runnels? 18 A. Yes. 19 Q. In regards to -- particularly in regards to 20 that and in regards to the presentation of any 21 punishment evidence, what did you -- what did you 22 believe was the main focus -- or y'all believed was the 23 trial strategy, the main focus of your defense would be? 24 A. In terms of punishment? 25 Q. Okay. In regards to punishment, what -- what	11 1 -- a criminal psychiatrist and a forensic psychologist 2 who both had tested Travis. We had done some extensive 3 background -- or Kathy -- really Kathy was the one who 4 did all this investigating. But Kathy had investigated 5 his -- the genealogy in his background. He has a very 6 unique family history. And we really explored the 7 possibility of trying to bring that in because we knew 8 if anybody had heard about what had happened to, I think 9 it's his great-grandfather, and what had happened to his 10 uncle, and we were trying to figure out a way to make 11 that tie into Travis. And show that Travis had become 12 who Travis had become partly because of this family 13 history. 14 And so we talked about that with his family 15 members, specifically with his grandmother and his 16 mother. And what it came right down to when it was 17 crunch time, the grandmother who was the witness we had 18 decided we would put on, we really wanted to put her on, 19 she, A, said she didn't really think that affected 20 Travis because he may not have even known about the 21 unique family history, the -- the -- the thing with his 22 great-grandfather. And she had some issue with kind of 23 airing this laundry, this dirty laundry. And, you know, 24 so those were a couple of issues we had. 25 And then ultimately we were going to -- I'm
10 1 conclusion did you come to in regards to 2 guilt/innocence? 3 A. In regards to guilt/innocence, we -- we felt 4 like because of the nature of the offense, because of 5 the facts surrounding the -- the facts surrounding the 6 offense, that guilt was kind of a foreseen conclusion. 7 And we discussed amongst Mr. Durham, myself and Ms. 8 Garrison, and ultimately with Mr. Runnels, pleading 9 guilty so as not to incense the jury. The facts were 10 pretty -- would have caused a lot of emotion with the 11 jury. And we were trying to maybe garner some sympathy 12 from the jury and show that Mr. Runnels, you know, 13 fessed up basically. 14 Q. By gaining some maybe redeeming value? 15 A. Yes. 16 Q. Now, based on that decision then, in fact, he 17 pled guilty and then y'all moved to the punishment phase 18 of the trial. So in addition to what you had already 19 planned through the -- what you were going to achieve 20 through the guilt/innocence in pleading guilty, what 21 other strategies did you have in regards to the 22 punishment phase of the trial? 23 A. Well, we really wanted to try to put on some of 24 Travis's family. We -- we had a criminal psychologist, 25 I think, is what -- is how she's titled. And we had a	12 1 getting ahead -- but ultimately we were going to call 2 them at -- in the punishment phase. And when our 3 investigator went out there to call the witnesses in, 4 they had left. And they were either in Chillicothe or 5 Clarendon or Childress, one of the three C cities that 6 are -- the closest one is 60 miles away. And -- but 7 they had -- they had appeared for punishment and we had 8 talked to them. And we had talked to them extensively 9 previously. But... 10 Q. Okay. Now, let's back up to the two experts 11 that you hired. 12 A. Okay. 13 Q. Okay. You didn't call either one of them? 14 A. No. 15 Q. Just, in general, why did you not call either 16 one of those as witnesses in the punishment phase of the 17 trial? 18 A. They could not testify as to anything that 19 would be favorable to Travis. 20 Q. Okay. 21 A. Period. 22 Q. In regards to you had another witness, I 23 believe, a Janet Levells (spelled phonetically)? 24 A. I think that was a -- a -- 25 Q. A friend?

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1 **A.** -- like a best friend, kind of a --
2 **Q.** Adopted sister, I think, to mom is how they
3 referred to it?
4 **A.** I think that's right.
5 **Q.** Okay. And tell about that part and why you
6 didn't --
7 **A.** Kathy's the one who spoke with her. I'm not
8 that familiar with her. I just know that, you know, we
9 looked at all those witnesses. And, you know -- but I
10 did not have a conversation with Janet Levells. I don't
11 know if Jim did, but I know -- I know I did not.
12 **Q.** Okay. But Kathy did?
13 **A.** Yes.
14 **Q.** So Kathy could shed light on that as to the
15 reasons why y'all did not call --
16 **A.** Absolutely.
17 **Q.** In regards to Warden Price. That was another
18 subpoena that you had?
19 **A.** Yeah. We had subpoenaed Warden Price. And I
20 believe that he was Warden of the Michael -- Michael
21 Unit at that time. We had a video regarding future
22 dangerousness that we had wanted to bring in. And we
23 had a man named Vince Gonzales who could testify, who --
24 who would have been able to testify regarding the future
25 dangerousness. And he is the one who had made this

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1 video, but he was not available. So the person he had
2 told us would be able to do this was Warden Price.
3 Well, Warden Price was at the time of the offense was
4 the Warden of the Clements Unit where Travis was located
5 where the offense occurred. So we again had to weigh
6 the benefit of calling Warden Price with the -- against
7 the detriment of calling Warden Price. Because in his
8 new role we needed him, but, therefore, if we called
9 him, he could really deliver, again, some testimony that
10 we just did not want brought in because we thought that
11 it would -- the benefits would be certainly outweighed
12 by the harm.
13 **Q.** Okay. He had -- he was -- he was named
14 repeatedly in the emergency action report from that
15 incident. Is that correct?
16 **A.** Yes.
17 **Q.** And also there was a pretty lengthy
18 disciplinary record in regards to Travis Runnels that
19 he would have known about as well?
20 **A.** Absolutely. That was a huge issue for us.
21 Travis unfortunately has been incarcerated for the
22 majority of his adult life. And during the times of his
23 -- during the time he has been incarcerated, since he
24 was about 18 or 19 years old, he's developed -- you
25 know, you can get -- it's my understanding from reading

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1 these reports, you can get disciplined for stepping over
2 the yellow line. Well, his disciplinaries included
3 assault, included behaviors that are really, I think,
4 would be offensive to a jury. They would not understand
5 the prison community and the way people react in a
6 prison community. And, you know, so it wasn't just the
7 assaults. It was the overall picture that if -- if
8 Warden Price testified, we were greatly concerned about
9 the hundreds of pages of disciplinary action. We know
10 some came in already. We didn't want them all in.
11 **Q.** Was there background done in regards to the
12 public school system that he attained -- attended?
13 **A.** Kathy went to Dallas, went to the DISD. Got
14 school records. She went to -- he had had a couple of
15 juvenile issues. She had gone and talked to the people
16 at the juvenile facility in Dallas. I believe she
17 obtained medical records. I think -- and she talked to
18 his family about it.
19 **Q.** Okay. Now, in regards to the family members.
20 Do you -- there's been mention that, like, you got like
21 30 names, but, in fact, what that was is basically a
22 family tree. Is that correct?
23 **A.** I don't -- I don't know if I could characterize
24 it that way. I know that he gave us a list of names and
25 a lot were family, and I think there were some friends

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1 included.
2 **Q.** Okay. Were each of those attempted to be
3 talked to as far as you know?
4 **A.** As far as I know, they were all attempted to be
5 talked to. Kathy had some issues, and she could better
6 testify to this, but she had a lot of issues getting,
7 you know, good contact information. Once she got some
8 good contact information, I think it helped. But it
9 took awhile to get good phone numbers and addresses.
10 **Q.** Now, in regards to the strategy that y'all
11 portrayed and which you've talked about here, did you
12 look at any other possibilities besides that one as
13 possible strategies and then, I guess, soon ruled them
14 out?
15 **A.** Well, you know, when we -- I think any time
16 that you go into a trial situation, you're not trying to
17 not put on witnesses, you know. You want to put --
18 especially in a punishment phase of such a serious case,
19 you want to put on witnesses. We wanted to put on Lisa
20 Clayton and Richard Fullbright and, you know, we wanted
21 to put the family on. But that's just not what was laid
22 out for us. And at the end, you know, we ended up, I
23 think, just trying to develop some redeeming things
24 through cross-examination, you know.
25 But our strategy -- our strategy was to try

17 1 -- we really wanted to -- when we initially started 2 talking to Travis and we initially started talking to 3 the witnesses, to the other witnesses, we had some 4 different strategies in mind. And we started 5 investigating the other strategies, and we couldn't find 6 anything to support some of the theories that we had. 7 And so then you're going, okay, now what's next. And, 8 you know, everything that we kept talking about, we 9 could never find any -- any support for it. 10 Q. Okay. There's kind of general things most 11 defense lawyers will look at in capital cases in trying 12 to do the mitigation. Is that correct? 13 A. Yes. 14 Q. Kind of a laundry list of things to try to go 15 through. Did y'all do that? 16 A. Yes. 17 Q. Okay. Now, in regards to -- like generally, 18 one of them is mental illness. The uncle had been shot 19 by members of the Dallas Police Department and there was 20 some information -- some records that indicate that he 21 might have had some kind of mental illness. Did y'all 22 further investigate that and do anything with that? 23 A. I'm -- I'm -- I think Kathy did check into 24 that. But I don't have any -- you know, and we had -- 25 we had Travis checked by a psychologist and psychiatrist	19 1 more than help him? 2 A. Again, you know, we -- at first, we were 3 excited, thought that would be somebody really good. 4 But once we found out what caused Travis to have to 5 leave Japan and come home, we knew that if that came 6 out, that would not be good. 7 Q. Okay. Would that rationale apply to most of 8 the witnesses that you had talked to, but did not 9 subpoena? 10 A. Yes. There were criminal histories. One 11 person, and I'm sorry, I do not remember his name, one 12 person that I know Travis was interested in us calling 13 had, you know, like a theft conviction. You know, they 14 would have these convictions and -- or they might have 15 been co-defendants or they might have been other 16 prisoners. You know, it... 17 Q. When you say co-defendants, you're talking 18 about co-defendants with Mr. Runnels? 19 A. In previous crimes, yes. 20 Q. Okay. In regards to -- now, in regards to the 21 people that you did subpoena, it was your intention to 22 put those people on? 23 A. Yes. 24 Q. And then I think you said his mother, his 25 grandmother and his father left?
18 1 so... 2 Q. Okay. And then as far as you know, the family 3 -- I mean, y'all went through the questions of with the 4 family, any mental illness in the family and all those 5 sorts of things. Correct? 6 A. Yes. 7 Q. Okay. And none of those things jumped out in 8 any way that would help you? 9 A. No. Travis's dad has -- you know, he had an 10 uncle that's in the Navy, or I think retired from the 11 Navy. I'm not sure if he was retired, but he's been in 12 a long time. He has -- his dad has owned a business in 13 the past. I don't know what his mother does for a 14 living. But his brother's a mortgage broker. You know, 15 these were people that held normal jobs. 16 Q. Okay. Now, in fact, did that uncle not even at 17 one point take Travis to Japan? 18 A. Yes. We were really -- when we heard about 19 uncle, and his name is Ricky, I believe, you know, I 20 think that was -- we were encouraged that we would have 21 this person who could come in and testify for -- for 22 Travis. Unfortunately, there were some facts 23 surrounding that visit to Japan that prevented us from 24 being able to call him as a witness. 25 Q. And the reason for that was that would harm him	20 1 A. They came here and I think -- if I remember 2 correctly, they came to the courthouse. We -- but 3 during the punishment, when the punishment started. 4 They came to the courthouse. They were outside the 5 courtroom. And we went to Mr. Durham's office with 6 them. I believe his father had come into the courtroom, 7 and, you know, the rule of witnesses had been invoked. 8 And, you know, his father said, I just want to be in the 9 courtroom. I just want to be in the courtroom, you 10 know, trying to just be supportive of Travis. And so we 11 knew there would be an issue with calling the father. 12 The -- after we met with them, we told them 13 to come back the next day to the courthouse. And we 14 were going to call, you know, for what it was worth, we 15 were going to try to call Lillie. I don't remember if 16 we were going to call Nancy. But we were going to call 17 his grandmother, Lillie. I think she had provided, you 18 know, a more stable home for him. And she could talk 19 about this family history, which we really wanted to try 20 to get in through -- through Lillie. But when we talked 21 to her, she -- again, she just said, I don't think it 22 really affected Travis. I don't even know if he knows 23 about his great-grandfather. But -- but they were here. 24 And then when we went out to call them, they were -- 25 they had left. So...

21 1 Q. And then when -- when the phone call was made 2 to try to get them back? 3 A. I think they were too far gone. 4 Q. They didn't come. And Kathy made that phone 5 call. Is that correct? 6 A. That's my understanding. 7 Q. So she could give details about that? 8 A. Yes. 9 Q. Okay. Now, in regards to those -- there was 10 one other -- there was one person that gave an affidavit 11 that called -- was subpoenaed, but didn't come, and 12 called. He was quite upset about that. I don't 13 remember -- 14 A. Darmonica? That's his brother. 15 Q. Okay. And he was upset about the -- and 16 basically he refused to come -- 17 A. I don't know why he was upset. You know, we 18 had met with Darmonica in Dallas. We had tried to meet 19 -- we went for advanced family law, I guess that would 20 have been 2005, I think. We had gone to advanced -- 21 both Jim and I had gone to advanced family law. And we 22 had made arrangements to meet with the family at our 23 hotel. Our hotel was downtown. And we -- we made 24 arrangements to meet with the family. We went to Jim's 25 hotel room. We told them -- and Kathy had come in so we	23 1 Q. Okay. 2 A. But I want to say this: Based on -- based on 3 the dealings we had had with -- especially with his -- 4 with Darmonica and his mother, it had been a real 5 struggle to get them to work with us. You know, to get 6 information, to get accurate information, to get other 7 people's contact information. You know, Travis, again, 8 was incarcerated so he didn't have the tools available 9 to him that the family members did. You know, and had 10 that contact with the other family. But -- so we really 11 needed them to give us this information, and I know that 12 it was a very big struggle for Kathy. 13 Q. Knowing all that you know about the case and 14 the punishment evidence that you went through with Kathy 15 and Jim, do you feel that you made a good decision in 16 not calling the witnesses that you -- you know, after 17 the fact -- after the fact, do you feel like you made a 18 good decision in not calling those particular people? 19 A. Absolutely. 20 Q. It was your intent you were going to call at 21 least -- 22 A. We wanted to call the family because we wanted 23 to humanize -- you know, we wanted Travis to have that 24 voice there on the punishment. We wanted to humanize 25 him. You know, the -- the -- so, yes.
22 1 could all meet with them. And Darmonica was the only 2 one who showed up. And he had had some car problems. 3 And Nancy couldn't come. And Lillie couldn't come. 4 And then we had met with, I think -- I know 5 Kathy had met with Darmonica on more than one occasion 6 and spoken with them many times, several times I'm going 7 to say. And we had told them, you know, when we call 8 you, you're going to have to come. You have to be here 9 for the trial. And I -- I don't remember why Darmonica 10 was upset. I don't know because I know it was really 11 hard for him -- I don't think he had reliable 12 transportation. We offered to fly them. I think 13 Travis's grandmother doesn't like to fly. And he was 14 very upset about, I think about how quickly we needed 15 him. Because we really needed them to be ready to drop 16 everything and come. And he did not accompany them, 17 even though he had received a subpoena. 18 Q. Were y'all -- were you present when Travis was 19 informed that his dad, mother and grandmother had left 20 during the trial before y'all could get them called? 21 A. I know what you're talking about, but I don't 22 remember if I was there when that was said. 23 Q. Okay. Again, Kathy could give a little bit 24 more information on -- 25 A. Again, Kathy would remember that.	24 1 Q. Do you feel you did all you could do to try to 2 defend Travis in that punishment phase of the trial? 3 A. Yes. 4 Q. Okay. 5 MR. SIMS: I'll pass the witness, Your 6 Honor. 7 CROSS-EXAMINATION 8 BY MR. WILSON: 9 Q. Ms. Hamilton, was this the first capital murder 10 case you had ever been involved in? 11 A. Yes. 12 Q. Was it the only one you've ever been involved 13 with? 14 A. Yes. 15 Q. Were you at the time that you were involved in 16 this trial, were you familiar with the American Bar 17 Association guidelines as to the representation of 18 persons charged with a capital offense? 19 A. I don't know. No. I'm going to say no. 20 Q. Had you received any -- any training, CLE or 21 otherwise, in the specifics of defending a capital case 22 that -- wherein the death penalty was sought? 23 A. I had not gone to a training -- a CLE that was 24 specifically for capital murder defense. I had gone to 25 advanced criminal law and, you know, things of that

25 1 nature. 2 Q. Are you aware, and if you're not, I'm sure -- I 3 would understand -- are you aware of whether Mr. Durham 4 had had any of that training? 5 A. I'm not aware. I know that he had defended 6 several capital murder defendants. 7 Q. Now, at the time the trial began, after voir 8 dire, Mr. Runnels ended up pleading guilty to the jury. 9 Correct? 10 A. Yes. 11 Q. And you and Mr. Durham and Ms. Garrison and 12 Mr. Runnels all discussed that. Correct? 13 A. Yes, we discussed it before trial. 14 Q. And would you agree with me that -- I mean, 15 Mr. Runnels did that. I'm not saying that anybody 16 forced him to. But did he do that -- was that the 17 advice that you and Mr. Durham were giving him is that 18 that was the best way to proceed? 19 A. Regarding pleading guilty? 20 Q. Yes. 21 A. We felt like that was the better strategy. 22 Q. Okay. And so -- I mean, he followed your 23 advice? 24 A. Yes. 25 Q. All right. What did you and Mr. Durham hope to	27 1 him doing that? 2 A. We felt like that might help. 3 Q. Okay. Were there discussions by you or 4 Mr. Durham or both of you with Mr. Runnels that by 5 pleading guilty that you also might be able to restrict 6 the amount and type of evidence that the State would put 7 on at the trial? 8 A. Probably. 9 Q. Okay. Do you know why that y'all had that 10 thought? 11 A. Just that they would not -- they would not need 12 to put on -- I mean, they still had to put on evidence. 13 They still had to prove up their -- the elements of the 14 offense. But our thought was that we were trying -- we 15 were really trying to minimize the harm. 16 Q. Okay. You would agree with me that they 17 basically put on the same evidence they would have put 18 on if you pled not guilty? 19 A. I don't know what their -- what all their 20 evidence was, but I think they would have put on 21 probably a lot more. 22 Q. Okay. 23 A. Because the trial was very quick then. 24 Q. Now, at the time that Mr. Runnels pled guilty, 25 and more specifically, at the time that you and
26 1 gain by having him plead guilty? 2 A. Again, we hoped to gain some favor with the 3 jury. You know, the facts, again, of this case were 4 such that we did not think that the guilt/innocence 5 phase was going to be the -- was going to be the 6 challenge because of the nature of the facts surrounding 7 the offense. 8 Q. Now, even though I understand this is the only 9 one that you had ever tried from the defense side of it. 10 I mean, it's not a stretch to say that that's almost 11 always the case in a capital murder case, if the death 12 penalty is being sought? I mean, you prosecuted for 13 several years. Correct? 14 A. Yes. 15 Q. The State doesn't usually seek the death 16 penalty if they have a weak guilt case, do they? 17 A. Yeah, but this was particularly -- this was not 18 in a house, in the dark, or multiple people. It was one 19 person in the middle of a boot factory in the prison in 20 open -- you know, in the open public, so -- or not 21 public, but -- 22 Q. I understand. So y'all felt that by him saying 23 the two words -- or saying the word guilty, that that 24 would be sufficient to tell the jury he was sorry and 25 remorseful for what he had done, in and of itself, just	28 1 Mr. Durham had discussed with Mr. Runnels whether he 2 should plead guilty, did y'all have a plan as to what 3 evidence you would offer in the punishment phase? 4 A. The plan was maybe call the prison -- the -- 5 Vince Gonzalez or the Warden Price, and to try to call 6 the family. 7 Q. Okay. Now, you testified earlier that 8 Mr. Gonzalez was not available. 9 A. Yeah. And I don't know when he became not 10 available. I did not handle those -- I mean, that might 11 have been -- Kathy might have known he was not available 12 for a month. I just know that we wanted to call Vince 13 Gonzalez, but I know -- and I know he was not available; 14 therefore, we had to call -- 15 Q. So -- 16 A. -- Mr. Price. 17 Q. So at the time that y'all -- I mean, to -- when 18 he entered his plea of guilty, I mean, that virtually 19 was within a few days of when the punishment evidence 20 was going to have to be put on. Correct? 21 A. Okay. 22 Q. Is that correct? 23 A. Sure. 24 Q. Okay. I mean, so you said the trial -- the 25 trial was only three days long before it gets to y'all.

29 1 Correct? 2 A. Okay. 3 Q. So do you believe y'all knew Mr. Gonzalez was 4 not available at the time that the guilty plea was 5 entered? 6 A. You would have to ask Kathy. 7 Q. All right. Now, you talked about the -- that 8 Warden Price had these others problems that y'all didn't 9 want to offer him as a witness. I assume y'all knew 10 that well in advance of trial. That would have been in 11 all the records. 12 A. Okay. 13 Q. I mean, do you know or not know? 14 A. Yeah. I think you're right. 15 Q. Okay. So at the time that Mr. Runnels pled 16 guilty, I assume then -- we knew at that point in time 17 that Warden Price wasn't going to testify? 18 A. I'm sorry. Say that again. 19 Q. At the time Mr. Runnels pled guilty, you knew 20 Warden Price was not going to testify? 21 A. I can't say whether I knew that or not. 22 Q. Now -- 23 A. Because -- because we -- and I'm sorry, Joe 24 Marr. 25 Q. That's okay. That's fine.	31 1 person we wanted to call was Lillie. Because the dad 2 had come into the courtroom. I don't think the mom 3 would have presented well. And we just felt like Lillie 4 would be a good witness. And I don't -- I'm sorry. I 5 don't remember that. I just know that when we went to 6 call them, they were gone. 7 Q. All right. You agree with me that if they were 8 gone and y'all didn't tell them to leave, if they were 9 under subpoena, you would have at least had the 10 opportunity to ask the Court to delay trial and get an 11 attachment and get them back here? 12 A. Right. 13 Q. Okay. So we obviously -- either y'all told 14 them to go or at that point y'all didn't care if they 15 were here? 16 A. Well, and, you know, this is -- this has been 17 my struggle as I've been trying to remember this. The 18 other thing I remember is when we talked to the 19 grandmother. I mean, I remember her saying to me, he 20 may not have known about the great -- the 21 great-grandfather. I don't know if that -- I don't -- 22 let me back up. I don't think he knew about the 23 great-grandfather, you know, and I think his name was 24 Allen Brooks. I don't think he knew about his history. 25 I don't think that has ever affected his --
30 1 A. Because I don't -- I think we subpoenaed him 2 maybe right at that time. If I -- you know, I could go 3 back and look at the subpoena. But, you know, that -- 4 that might be when she found out that Vince Gonzalez 5 couldn't testify. 6 Q. Okay. Now, the -- what members -- tell me 7 again what members of Mr. Runnels' family were here at 8 some point in time during the trial. 9 A. His dad, his mom, and his grandmother. 10 Q. Okay. How many of those people were under 11 subpoena? 12 A. All of them. 13 Q. Now, have you seen the affidavits that some or 14 all of those persons have signed that were filed with 15 our writ? 16 A. Yes. 17 Q. And you agree with me that I think all of those 18 -- of the persons that actually came to Amarillo, that 19 all of those persons say they were directed or told they 20 could leave. They weren't ordered to leave, but they 21 were told they could leave by members of the defense 22 team? 23 A. Yes. 24 Q. Is that true or not true? 25 A. I don't -- I know that we felt like the only	32 1 Q. Okay. 2 A. And so -- so -- you know, I'm sorry. That has 3 been my quandary. I don't remember. I know Kathy says 4 that they left. And I know what their affidavits say. 5 And -- 6 Q. Okay. And you're talking about what we could 7 refer to as this lynching episode in the past? 8 A. Absolutely. 9 Q. Okay. And that was a huge focal point at one 10 point in time in the mitigation case? 11 A. We sure wanted it -- we wanted it to be. 12 Because that to me was a huge deal, and it was to Jim, 13 and it was to Kathy. But then, you know, you get 14 totally deflated when you get to the point of calling 15 somebody to testify and they go, well, I don't really 16 think it really affected him, because I don't think he 17 even knew about it. 18 Q. All right. Don't you think -- not so much you, 19 but someone on the defense team should have known that 20 before that point in time? 21 A. Absolutely. But I don't think that's what we 22 were told. You know, we had talked to them about that 23 and -- but then when it came right down to it, when you 24 get to where you're at trial, and you have to call your 25 witness, and then the witness said, well, I don't really

33 1 think he knew about it. 2 Q. Okay. Well, let's take the lynching thing out 3 of it. What else could -- could there have possibly 4 been in his family -- any of his family members, his 5 mom, his grandmother, dad, any of those people, could 6 have offered that you -- that you think would have been 7 something of mitigation? 8 A. Okay. They could have offered testimony 9 regarding his -- I think his mom and dad had lived 10 together and then they had not lived together. And so 11 he had gone from his mom's house, to his dad's house, to 12 his grandmother's house. That could be a potential 13 issue. The -- his mom had lived with a person who I 14 think had been physically abusive to her and I think he 15 had witnessed that. There was the uncle who was shot by 16 the police. Those were things that, you know, were 17 potential. 18 Q. Okay. 19 A. Just a few. 20 Q. Sure. Okay. Let me ask you this. By the time 21 y'all got to your -- your part of the penalty case, when 22 Judge Emerson says call your first witness, how much 23 worse could the case have gotten at that point for 24 Travis? 25 A. I don't know. Not much.	35 1 put those things on if they were there. 2 A. Uh-huh. 3 Q. Correct? 4 But did the Defense make any effort at all 5 to show the jury that he was anything other than the 6 person that had cut a guard's throat at the prison? 7 A. The family had left; those were the people we 8 were going to call. 9 Q. Okay. Did you have -- well -- 10 A. The family had left -- 11 Q. If you wanted them back, would you have gotten 12 them back, tried to get them back? 13 A. I guess Mr. Durham could have done that. But, 14 you know, the thing is, the family had left. And the 15 family, while they could say these things about the 16 background, they could also say -- you know, again, the 17 benefit of their testimony, there was a lot of harm that 18 could have come from their testimony, too. Because what 19 they could say for Travis, they could say, but these 20 other family members, Darmonica, haven't turned out that 21 way. 22 Q. Okay. Did you -- did you have photos from the 23 family from when Travis was a baby? 24 A. I don't know. You would have to ask Kathy. 25 Q. Okay. Did you have any information at all on
34 1 Q. I mean, you agree with me, he pled guilty to 2 cutting a civilian worker's throat while he was on a 3 70-year sentence for aggravated robbery? 4 A. Yes. 5 Q. With prison disciplinary problems all along the 6 way? 7 A. Yes. But we had kept out a lot of those 8 disciplinary problems. Those -- the only things that 9 had come in, I think, were the assaults and the -- and 10 maybe some of the urine and feces issues. 11 Q. Okay. But the biggest disciplinary problem was 12 he cut a guy's throat while he was in prison? 13 A. The biggest disciplinary problem, right. 14 Q. And so when the Defense gets their case at that 15 point, that's what the jury knows about him. Would you 16 agree with me? 17 A. Yes. 18 Q. They don't really know much more about him, 19 except this case and what some of his prison stuff was? 20 A. Right. 21 Q. And I understand -- what you and I talked about 22 awhile ago, you're talking about mitigating issues. And 23 you're talking about things that would be really, really 24 good. He -- he -- you know, it wasn't his fault because 25 he was abused, things of that nature. You would like to	36 1 him that at some point in his life he wasn't just some 2 evil person? 3 A. Not -- I don't think that's a good 4 characterization of Travis. But I think that Travis had 5 been troubled, had had -- you know, he -- he had been 6 held back in school. I think there were some happy 7 times in Travis's life. But -- but I can't say that -- 8 you know, I would never say that Travis was always an 9 evil person. 10 Q. Okay. Wouldn't it be important to show the 11 jury, even if you -- you didn't have much, that he 12 wasn't always an evil person? 13 A. We wanted to show that. 14 Q. Okay. Is it your testimony that if those 15 witnesses had still been there, y'all would have put 16 them on the stand? 17 A. No. 18 Q. Okay. In fact, you really can't dispute that 19 they were told they could leave by some member of the 20 defense team? 21 A. I -- I -- I do not recall exactly what went 22 down. I know they weren't going to be helpful, but we 23 wanted them here. Kathy's recollection is clear; they 24 left. 25 Q. All right. Let's shift gears a little bit.

37 1 Isn't it also true that a big part of the strategy for 2 the Defense case in punishment revolved around 3 Mr. Durham's belief that the State could not or did not 4 meet it's burden with regard to future dangerousness? 5 A. Could you either re-ask that or could I have 6 that re-read? 7 Q. Yeah, I'm sorry. There were two special 8 issues. They have to find him a future danger and then 9 they go to mitigation. 10 A. Right. Right. 11 Q. Is it your understanding that Mr. Durham really 12 believed that the State could not prove that first 13 issue? They could not prove -- they did not prove, I'm 14 not saying could not, but did not prove that he was a 15 future danger? 16 A. Yes. 17 Q. Okay. And, in fact, that's what he argued to 18 the jury, isn't it? 19 A. Yes. 20 Q. And what did he base that theory on; do you 21 know? 22 A. Well, I knew you were going to ask that. I'm 23 thinking -- I think a lot of our belief was the fact 24 that we knew that Travis was going to be incarcerated 25 because he had the 70-year sentence. And then he would	39 1 that time and still is today, that the facts of the 2 offense itself, if bad enough, can be completely 3 sufficient to support a finding of future dangerousness? 4 A. Okay. 5 Q. That there does not have to be any additional 6 evidence or testimony if those facts are themselves 7 sufficient? 8 A. Okay. 9 Q. Were you present in a -- on December 15th, 10 2005, when Mr. Durham testified in a Motion for New 11 Trial hearing? 12 A. I don't recall. 13 Q. Were you present when he testified about how 14 strongly he felt that the evidence was insufficient and 15 that's -- 16 A. Was that the same trial I just said I don't 17 recall? I mean, was that -- I'm sorry. I don't recall 18 if I was there. 19 Q. Okay. So you don't recall him testifying at 20 that hearing that he basically ended up saying -- he 21 ended up saying at the end of his testimony, I was 22 really just flying by the seat of my pants? 23 A. Okay. 24 Q. You don't recall that? 25 A. I don't. I'm sorry.
38 1 -- you know, our hope was that he would get life and not 2 death. So that was our -- that was our hope because 3 he's going to be in prison. 4 Q. Well, would you agree with me, there's a 5 difference between a hope and a belief that the evidence 6 is insufficient? 7 A. Right. 8 Q. A hope might not be what you would base 9 strategy decisions on? 10 A. I understand. And I may not be using the 11 proper word. 12 Q. I understand that. And -- but do you -- do you 13 -- do you realize or looking in retrospect that the 14 biggest evidence of future dangerousness was that he 15 killed someone while he was in prison? It takes away 16 your incarceration argument right there. 17 A. Well, that's your hindsight, Joe Marr. 18 Q. Well, I'm -- I'm -- all hindsight. 19 A. You know. 20 Q. Do you know what the case -- at that time that 21 y'all tried Mr. Runnels' case, what the case law said 22 about sufficiency of the evidence with regard to future 23 dangerousness? 24 A. At the time, I probably had that information. 25 Q. Okay. Are you aware that it was quite clear at	40 1 Q. Okay. Were there any discussions that you were 2 privy to, either yourself with Mr. Runnels, Mr. Runnels 3 with Ms. Garrison, or Mr. Runnels with Mr. Durham, that 4 you were present during where -- and this would have 5 been at or before the time that he pled guilty. Okay? 6 A. Okay. 7 Q. And y'all are making that decision. 8 A. Right. After guilty? 9 Q. No, before he pled guilty. 10 A. Okay. 11 Q. Wherein y'all talked about witnesses you were 12 going to put on in punishment? 13 A. I -- I -- I probably was. I don't recall any 14 specific. I mean, I don't have anything right here 15 specifically that we talked about. 16 Q. Okay. Would -- would it be reasonable or 17 unreasonable in your belief or opinion that at the time 18 Travis pled guilty, at that time, before the State put 19 on their evidence, before y'all made your decision not 20 to put on any evidence, that it was the Defense team's 21 belief that they were going to put on evidence? 22 A. Yes. 23 Q. Okay. And -- 24 A. And I do believe we had that conversation. I 25 mean, I think I went out to the jail and had a

41 1 conversation with Travis with Kathy about it. 2 Q. And so at the time that he pled guilty, it 3 would not -- do you believe that he probably thought 4 there was going to be witnesses put on? 5 A. I believe that we all wanted to put witnesses 6 on. 7 Q. Okay. Did you ever sit down with Travis or did 8 you observe Mr. Durham sit down with Travis and discuss 9 the fact that a decision was going to be made to not put 10 these witnesses on because what they would say would 11 hurt him worse than it would help him? In other words, 12 did he get any input into that decision? 13 A. Yes. 14 Q. What was the substance of that conversation 15 then? 16 A. Well, I know that -- and, you know, I'm trying 17 to recall if it was Jim talking to Travis. I know that 18 sometimes when we would -- during trial or before trial, 19 I think Jim would have talked to Travis or maybe talked 20 to Travis through Kathy. And I kind of -- I would talk 21 to Travis and Travis would say, you know, Mr. Durham 22 wants to do this or Jim wants to do this. What do you 23 think. And, you know, I just -- I know that Jim -- we 24 wanted to call the family. That's what we wanted to do 25 was we wanted to call the family. And I know that they	43 1 the worst thing that happened to Travis because he 2 wouldn't be here today. 3 Q. Was there any investigation done -- let me back 4 up from there. Are you aware that the prison system has 5 a certain procedure or method of dealing with persons 6 who are either convicted or administratively found to 7 have committed assaults against staff members? 8 A. Can you be more specific as to what you're 9 wanting? 10 Q. That -- did you put on any evidence or 11 investigate any evidence that you could show the jury 12 that because his -- the murder was against a staff 13 member at TDC that he would be in -- almost the very 14 most restrictive circumstance of incarceration? In 15 other words, he wouldn't have a lot of unrestricted 16 access to other guards or other inmates or anything of 17 that nature? 18 A. I'm sorry. I don't remember. You know, I 19 remember -- I'm not surprised to hear that. But I don't 20 remember if we developed that or not. That's -- Kathy 21 would probably be able to answer that. 22 Q. Do you recall back in 2007 being approached by 23 or contacted by an investigator working for me? A lady 24 named -- the last name of Lagarda (spelled 25 phonetically)?
42 1 -- they just turned out to not be able to give us strong 2 enough testimony. 3 Q. And I keep coming back to this question. What 4 specific fact do you know of that possibly they could 5 have said that could possibly been worse than what the 6 State had already put on? 7 A. Well, you know, you've already said it, Joe 8 Marr. There's nothing worse than the fact that, you 9 know, that he killed -- that he killed a person. So 10 you're right. What's going to be worse than that? But 11 -- but that was already there. They weren't going to be 12 able to testify about anything worse than that. 13 Q. Were they going to be able to get up and say 14 they loved him and didn't want him to die? 15 A. I guess. I don't know. 16 Q. I mean, did anybody ever -- did any of them 17 ever tell you, we don't love him. We don't care if he 18 lives or dies? 19 A. No. 20 Q. I mean, it's pretty obvious he didn't have a 21 very good past or he wouldn't have been in the position 22 in the first place. Correct? He wouldn't have been in 23 prison? 24 A. I think the worst thing that happened to Travis 25 was the Dallas County criminal justice system. That's	44 1 A. No. 2 Q. Okay. 3 A. I was -- somebody named -- and I thought this 4 was funny, I think her name was Rebecca Herman, 5 contacted me. 6 Q. Okay. That worked for me or worked for the 7 Texas Defender's Office? 8 A. I had no clue. 9 Q. Okay. 10 A. I think -- but I think she may work for Texas 11 Defender's or for somebody. I don't know. 12 Q. Okay. Did you talk with them? 13 A. Very briefly. But I think she wanted an 14 affidavit or something. 15 Q. Okay. 16 A. And I think it states in -- in either your writ 17 or the State's writ, I don't know whose, that, you know, 18 I didn't speak with either side. 19 Q. Why not? 20 A. I don't know. I guess I just didn't want to. 21 Q. Have you reviewed the affidavits in our writ of 22 the family members that were here to testify? 23 A. I've looked them over. 24 Q. Okay. Were there things set forth in there 25 that you were not aware of previously; facts of Travis's

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1 life, good or bad, that you weren't aware of?

2 **A. You know, I would have to look at the**

3 **affidavits again.**

4 **Q.** Were you aware of what -- there appeared to be

5 a pattern of abuse to Travis's mother while he was a

6 child?

7 **A. Yeah, I testified to that.**

8 **Q.** Y'all didn't believe that that was something

9 that was helpful to put -- given the state of the case

10 at the time that you got to the punishment, that that

11 would have been helpful to put on?

12 **A. The person who really could have testified to**

13 **that was Darmonica and he did not come to trial.**

14 **Q.** Did you review his subpoena -- I mean, his

15 affidavit wherein -- and also I believe someone else's

16 -- wherein he was not subpoenaed?

17 **A. He was subpoenaed. The subpoena is included in**

18 **either one of y'all's writs. In one of y'all's --**

19 **either the writ or the answer. And, I believe, either**

20 **Nancy or Lillie had told us that, you know, that the --**

21 **the process server could serve everybody, I think, at**

22 **Nancy's house. I don't remember. Nancy or Lillie's.**

23 **And -- and I was looking at those, at the subpoenas,**

24 **because I thought that's just not right. And he did**

25 **serve those subpoenas and he's got different times on**

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1 **them. I didn't -- I thought if they served everybody at**

2 **the same time -- they told the process server to be**

3 **there on such and such date at such and such time, and**

4 **he was.**

5 **Q.** Now, these subpoenas were issued instanter.

6 Correct?

7 **A. Okay.**

8 **Q.** They were -- they were not issued until October

9 27th, to be present immediately. Is that correct?

10 **A. Okay.**

11 **Q.** I mean, I'm just --

12 **A. I mean, I'd just have to look at them, Joe**

13 **Marr. You've got them there so...**

14 **Q.** Okay.

15 MR. WILSON: May I approach the witness,

16 Judge?

17 **A. I mean, I'm not --**

18 THE COURT: Sure.

19 **A. I think we had --**

20 **Q.** (BY MR. WILSON) They're all the same, but I'll

21 just show you --

22 **A. Okay.**

23 **Q.** -- that they were -- they were -- they were

24 issued instanter and they were issued just a few days

25 before --

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1 **A. Sure.**

2 **Q.** -- y'all's punishment hearing.

3 **A. Okay.**

4 **Q.** And these people lived in Dallas. Correct?

5 **A. Yes.**

6 **Q.** Did you -- did you have -- did you have funds

7 to be able to pay to get them here?

8 **A. Yes.**

9 **Q.** Okay. Why were they not subpoenaed earlier?

10 **A. I think things had progressed a lot faster.**

11 **They were actually subpoenaed, I think, to be here later**

12 **because we thought it was going to take longer. So then**

13 **-- and, you know, again, Kathy's the one who issued --**

14 **who worked on the subpoenas. But the subpoenas were**

15 **then reissued for shorter because things had progressed**

16 **quicker, more quickly.**

17 **MR. WILSON: I'll pass the witness.**

18 **REDIRECT EXAMINATION**

19 **BY MR. SIMS:**

20 **Q.** In regards to the strategy involving the

21 pleading guilty and believing that there would be less

22 evidence that we put on. Do you recall that at the

23 beginning of trial, after he pled guilty, the State

24 asked for 15 minutes before we started so that we could

25 limit the amount of witnesses that we would, in fact,

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1 have to call? Do you remember that occurring?

2 **A. Yes.**

3 **Q.** The -- in regards to issues involving the

4 prison guards or prison. Y'all, in fact, made efforts

5 try to find guards that would say something favorable

6 about Travis. Isn't that correct?

7 **A. I believe that's correct.**

8 **Q.** Now, the real summation of the deal is, you

9 feel like you've done a lot of work and the defense team

10 did a lot of work, found a lot of bullets, but a lot of

11 them were going to be duds because of various reasons

12 that were going to be more harmful than helpful to you.

13 Is that correct?

14 **A. I think that's -- I guess that's one way to say**

15 **it.**

16 **Q.** The -- and you selected the ones that you felt

17 like would be helpful to come; some came, some didn't.

18 Is that also correct?

19 **A. Yes.**

20 **Q.** The ones that came, were the three; the mother,

21 the dad and grandmother?

22 **A. Yes.**

23 **Q.** Once she let you know -- the grandmother let

24 you know that she didn't believe that Travis knew about

25 the great-grandfather, and even if he did, that it had

49 1 not affected him, she basically at that point gutted 2 your point that you were going to call her for. Is that 3 correct? 4 A. Pretty much, yeah. You know, and the other 5 thing was our other -- one of our other issues was the 6 fact that, you know, if you're going to talk about 7 somebody's bad home life, and, you know, going from 8 lived with mother or father or grandmother, you know, 9 you also had to take into account the rest of the family 10 that was not affected. You know, the brother who was 11 the mortgage broker, who had maintained a -- you know, 12 not a crime-free, but much -- had an almost crime-free 13 life. 14 Q. Would you agree with me that obviously if -- if 15 she had told you previously that Travis didn't know 16 about it, you can't establish relevancy, so you wouldn't 17 have even -- couldn't have got -- wouldn't have even got 18 her down here to begin with? 19 A. It was very deflating to meet with her. You 20 know, we had met with them before. We had talked to 21 them before. And it was very deflating to us that they 22 really backed out of their testimony. 23 Q. The primary -- the facts and circumstances of 24 the guilt/innocence were -- were really pretty airtight 25 in this case. Correct? I'll ask it this way: Have you	51 1 is, is whether or not the mitigation investigation was 2 sufficient. 3 A. I understand. 4 Q. And it is hindsight of 20/20 a little bit on -- 5 can you point to one piece of evidence that you consider 6 mitigating that was placed before the jury in his case? 7 A. Well, I have not reviewed the trial transcript, 8 but just from my independent recollection from five 9 years ago, no. 10 MR. WILSON: I'll pass the witness. 11 MR. SIMS: No further questions. 12 THE COURT: All right. You can step down. 13 MR. SIMS: Call Kathy Garrison. 14 (Pause in proceedings) 15 MR. SIMS: May Laura be excused, Your 16 Honor? 17 THE COURT: If she wants to. I don't know 18 that she wants to. 19 MR. SIMS: You can leave if you want to, 20 Laura. 21 MS. HAMILTON: I'll stay. 22 (Witness entered courtroom) 23 THE COURT: Come up, please. 24 Raise your right hand, please. 25 (Witness duly sworn)
50 1 ever seen a stronger case for the State of Texas in your 2 career for guilt/innocence? 3 A. I've seen some strong ones; this is pretty 4 strong. 5 Q. Would -- again, I'll conclude with, do you 6 believe that y'all did the best that you could possibly 7 do with what you had and obtained in regards to his 8 defense? 9 A. Yes. 10 Q. In regards to these -- the offense itself being 11 -- being very prolific, there's also the circumstances 12 of -- in regards to future dangerousness of having more 13 and more offenses having occurred. Even though one 14 offense might get it, would you agree that if there's 15 accumulation of more circumstances showing, I'll call 16 bad character, that are added to that, that increases 17 the likelihood that a death sentence would be imposed? 18 A. Yes. 19 MR. SIMS: I'll pass the witness, Your 20 Honor. 21 RE CROSS-EXAMINATION 22 BY MR. WILSON: 23 Q. And, Laura, I want to be clear. It's not about 24 whether y'all did the best you can do, and it's not -- 25 that's not what we're attacking here. But the question	52 1 THE WITNESS: I do. 2 THE COURT: All right. 3 KATHY GARRISON, 4 having been duly sworn, testified as follows: 5 DIRECT EXAMINATION 6 BY MR. SIMS: 7 Q. Would you state your name, please. 8 A. Kathy Garrison. 9 Q. How are you employed? 10 A. I'm a criminal defense investigator. 11 Q. How long have you been performing that job? 12 A. Since late 1989. 13 Q. Since when? 14 A. Late 1989. 15 Q. Okay. Did you have an opportunity to work with 16 Jim Durham and Laura Hamilton in regards to a capital 17 murder trial that occurred in 2005 here in Potter 18 County? 19 A. I did. 20 Q. And that was involving Travis Runnels? 21 A. Yes, sir. 22 Q. Were you the investigator that was assigned to 23 work with them at that point? 24 A. Pardon me? 25 Q. Were you the investigator that worked with them

53 1 on that case? 2 A. Yes, I am. 3 Q. Do you recall approximately when your 4 employment started? 5 A. September '04. 6 Q. Now, through the course of your work with them, 7 with the defense team, and that's how I'll refer to 8 them, if that's fine, was there a whole lot of work done 9 on the guilt/innocence phase of the trial? 10 A. There was. 11 Q. Okay. At the conclusion of doing all of that 12 work, was a determination made as to what the defense 13 team felt was the best in regards to the strategy for 14 what to do about the guilt/innocence phase? 15 A. There was, yes. 16 Q. What was that? 17 A. For Travis to plead guilty. 18 Q. Can you explain some of the reasons why that 19 decision was made? 20 A. There were several reasons. One of which the 21 evidence was overwhelming and we had hoped that with 22 Travis taking responsibility for his actions, that that 23 could help with the jury. And then there were other 24 reasons as well. There was some evidence that was very, 25 very damaging to Travis that Jim wanted to keep out, if	55 1 him to function in life. And that with a life finding, 2 that he could make it in prison. 3 Q. Now, was this -- how many capital murder cases 4 had you worked on before this one? 5 A. Oh, golly. Maybe 25 or 30. Actually maybe 6 more than that, including writs. 7 Q. Including this one? 8 A. Well, including this one and including writs. 9 Q. Writs? Okay. 10 A. Uh-huh. 11 Q. Now, in regards to -- as a matter of fact, you 12 even made a trip to the Philippines one time searching 13 for mitigation evidence on a Potter County case. Isn't 14 that correct? 15 A. I did, yes. 16 Q. Now, in regards to these witnesses that you 17 eventually -- well, I'm going to back up. Do you have 18 some notes and records that you've provided to us in 19 regards to your investigation? 20 A. I do. 21 MR. SIMS: May I approach, Your Honor? 22 THE COURT: Sure. 23 Q. (BY MR. SIMS) Are those, in fact, them? 24 A. They are. 25 Q. Will they help you in further discussing your
54 1 at all possible. And by pleading guilty, he felt that 2 that would -- would help. 3 Q. Okay. And then once that had been determined 4 in regards to the punishment phase of the trial, I 5 assume that y'all had developed -- by pleading guilty, 6 that is, in fact, being part of the strategy, obviously, 7 already based on what you've said -- 8 A. It was. 9 Q. -- for punishment. What else went into the 10 strategy behind the punishment phase of the trial? 11 A. I was also working on the punishment part of 12 the trial. And so we had wanted to -- are you asking me 13 what our plan was for our punishment case? 14 Q. Correct. 15 A. Okay. Okay. We had wanted to show that Travis 16 had had a pretty rough life. And that he was poor and 17 had gone back and forth between his parents and his 18 grandparents and other family members. And that there 19 had been quite a bit of violence directed toward the 20 Runnels family. From not only Travis's time, but prior 21 to that, through his mother's and through his 22 grandmother's lives. 23 We also wanted to be able to show that 24 Travis had quite a bit of trouble in school, and maybe 25 had some disabilities that, oh, made it difficult for	56 1 testimony here today? 2 A. Hope so, if I can find what I need to in them. 3 Q. Now, in regards to the punishment phase of the 4 trial. First off, talk to me about the efforts you made 5 in regards to contacting -- contacting Travis and what 6 information that you could get from him. 7 A. I interviewed Travis on several occasions, both 8 at the Coffield Unit and in Potter County jail. 9 Q. Was some of the information that you obtained 10 from him in regards to locations of his family members 11 or witnesses that he felt like would be amenable to 12 helping him in regards to his case? 13 A. Yes. He was going to help us with addresses, 14 phone numbers. 15 Q. Okay. Tell us -- tell the Court about your 16 efforts in regards to trying to follow up with that 17 particular bit of information? 18 A. The information that we had initially for 19 contacting his family was old, and phone numbers that we 20 had been provided and addresses weren't any good. And 21 so my first contact with them, I was able to locate his 22 grandmother's address, but the phone numbers we had for 23 everybody were no good. So I Fed-Ex'd a letter, a 24 handwritten letter from me to her. And that would have 25 been, I think, in March of '05. And I had requested

57 1 that she contact me or Laura or Jim or any of us. And, 2 in fact, that happened. I think that Nancy maybe is the 3 first one who called. 4 Q. Okay. Now, initially, did it appear that they 5 were going to be quite helpful? 6 A. At first, yes. I thought the family was really 7 going to step up to the plate. And on our initial 8 meeting, which lasted four or five hours, they provided 9 me with some information. And, of course, Travis had 10 already provided me with some information. So I had a 11 pretty good feel about how it might go. 12 Q. Now, isn't it customary through the defense bar 13 on capital cases, there's absolutely certain things that 14 you're going to want to try to look for in defending 15 those type of cases in regards to mitigation and future 16 dangerousness? 17 A. Sure. 18 Q. It's pretty standard. 19 A. There is. 20 Q. It's expanded some, but it's pretty standard. 21 Correct? 22 A. Yeah; yeah. 23 Q. And you had gone through those steps previously 24 in other capital murder trials that you worked? 25 A. Yes; yes.	59 1 A. No, it did not stay that way. 2 Q. What happened? 3 A. They became very difficult to contact, 4 especially on a face-to-face basis. There was quite a 5 bit of difficulty with the phone numbers also. 6 Sometimes the phone numbers worked; sometimes they 7 didn't. I made three additional trips down to Dallas 8 obtaining records and trying to -- trying to interview 9 the family further to develop what we were trying to do. 10 We also -- we had the names of some friends and family 11 members that Travis had provided. And so I tried to do 12 background on those people also, and did do background 13 on many of those people. 14 Q. Okay. And as that turned out, several of the 15 witnesses were either in the penitentiary, or had bad 16 criminal histories, or even co-defendants of 17 Mr. Runnels. Is that correct? 18 A. That's correct. And we made a decision not to 19 present those witnesses. 20 Q. And I assume that was based on that they would 21 cause more harm than they would -- 22 A. We believed so. We didn't want to present a 23 lot of witnesses who had been involved with Travis and 24 in some of his criminal behavior. Although, there were 25 some family members who did have criminal histories that,
58 1 Q. Did you go through those steps in this 2 particular case? 3 A. We did. Of course, we wanted a good -- a 4 pretty good family background on Travis and his 5 immediate family and other family members, as well. We 6 would be looking for -- how should I put it -- to test 7 him neurologically. Also to have him interviewed by an 8 expert, a psychiatrist. A review of, obviously, his 9 education records, medical records. Anything that we 10 could find really to help us on presenting any kind of 11 mitigation to a jury. 12 Q. Which is pretty much what you've done in the 13 past with other capital cases? 14 A. Yes. 15 Q. Anything that you got -- anything that you 16 could lay your hands on? 17 A. Anything. Anything. 18 Q. Okay. And that's what you did in this 19 particular case? 20 A. That's what I did. 21 Q. Now, in regards to -- let's start off with the 22 -- well, just continue with the family at this point. 23 While initially it was looking very helpful that they 24 were going to really step up to the plate and assist, 25 did it always stay that way?	60 1 we thought would be okay. I mean, they had accepted 2 that and talked to us about that. 3 Q. All right. And in regards to that, that's -- 4 one of the -- one in particular, Darmonica. Is that 5 correct? 6 A. Travis' brother. 7 Q. That was on probation? 8 A. He was on probation. 9 Q. So while we're on that particular. Tell the 10 Court about Darmonica having been served. How that 11 conversation went with you and why he wound up not 12 coming? 13 A. He was very angry with me probably, with us, 14 anyway. And he was very upset that he hadn't had time 15 and it was all unfair. And he had something wrong with 16 his car. I don't remember now what it was. I don't 17 know if it was something so simple as an oil change, but 18 he was very, very angry with me. And he called me. And 19 pretty much -- 20 Q. Let me interrupt you just a second. When was 21 it when he called you? What triggered him to call you? 22 A. Subpoena. 23 Q. Okay? 24 A. A subpoena. 25 Q. Go ahead.

61 1 A. And we had -- we had really wanted Darmonica to 2 testify. He had some very compelling testimony about 3 their growing up years. Subsequently, he didn't come. 4 Q. He just flat didn't show up? 5 A. He just didn't come. 6 Q. And told you that ahead of time, didn't he? 7 A. Told us that ahead of time. 8 Q. Then I believe another witness that you talked 9 to is the adopted sister, Janet Levells? 10 A. Yes. 11 Q. Can you tell the Court about that? 12 A. Janet Levells and Nancy were very, very good 13 friends. Travis's mother. And she was very 14 compassionate towards Travis and also presented some of 15 the information that we already had. The problem with 16 Janet was, if Travis was guilty, she didn't want to 17 testify. She felt that he had taken the law into his 18 own hands and he was going to have to settle up between 19 him and God. And she had also been to prison and she 20 was upfront about it, and had made a -- and she told us 21 upfront. And so we didn't have any problem with her 22 criminal background because of what she could say about 23 Travis's upbringing. 24 Q. But the problem came that she didn't want to 25 testify if he was guilty?	63 1 Q. What circumstance started causing problems in 2 regards to calling the father, Noel, as a witness? 3 A. When they got here, Noel came into the 4 courtroom. And I asked him please not to do that 5 because it was possible that we were going to use him as 6 a witness to testify on Travis's behalf. And he pretty 7 much just sort of ignored that and came on in. So it 8 negated our ability, we felt, to use him as a witness. 9 Q. Did you advise him that that would cause that 10 problem? 11 A. I did. 12 Q. Why was he so insistent in being in the 13 courtroom? 14 A. He said that he needed to be with his son at 15 this time. 16 Q. Okay. Now, in regards to Nancy, what kind of 17 evidence was it that you were hoping to obtain from her? 18 A. We wanted to use Nancy and her information 19 about Travis's birth and early life and the dissension 20 between her and Noel, and the back and forth for all the 21 years. Her poverty. Her unemployment. Her drug use. 22 All the things that -- all the things that would go into 23 a kid being raised and what happened when he was 24 younger. 25 Q. Illustrating he had a bad childhood?
62 1 A. If he was guilty. 2 Q. Now, in these trips that you -- well, the other 3 -- in all -- in all of the individuals that you talked 4 to in regards to this, how many would you say those were 5 of the witnesses -- now, I'm not talking about the 6 school people or anything like that. I'm talking about 7 just the individual people that might have been -- had 8 been indicated you might could contact that might have 9 something to say. Just a rough figure. I know you 10 don't know to the -- 11 A. No, I don't. Maybe 10, 12, 15, somewhere in 12 there. 13 Q. Okay. Out of all of those people, how many did 14 the defense team decide that they could absolutely 15 utilize without causing Travis more harm than good? 16 A. Lillie Mae; Nancy; Darmonica; Noel, his father; 17 and that's pretty much what we were reduced to. 18 Q. Okay. And we've already talked about 19 Darmonica? 20 A. Yes. 21 Q. Now, Nancy, the mother? 22 A. Yes. 23 Q. The mother, grandmother and father came. Is 24 that correct? 25 A. Yes, they did. They drove up.	64 1 A. Disruptive, dysfunctional, all of those things. 2 Q. Why wasn't she called? She showed up for -- 3 with her subpoena, didn't she? 4 A. They left. 5 Q. Okay. Noel, Nancy and Lillie Mae; the mom, 6 grand mom and dad had all ridden here together. Is that 7 correct? 8 A. They did. 9 Q. Okay. We'll come back to them leaving here in 10 a minute. And then Lillie Mae, the grandmother. What 11 information was it that you were -- well, and Nancy, is 12 the other thing y'all were looking for, is that correct, 13 going to be information about the uncle that was shot? 14 A. She had information -- they knew about the 15 uncle who was shot. That was Lillie Mae's younger 16 brother. Horace Brooks? I think Horace Brooks, Jr.? 17 Q. I think so, yes. 18 A. I think that's right. 19 Q. Okay. What -- Brooks is his last name. I 20 can't remember if it's Allen or not. I think Allen -- 21 A. Allen was a great -- 22 Q. Grandfather? 23 A. -- a great-grandfather, yes. 24 Q. And he got hung? 25 A. He was lynched in Dallas.

65 1 Q. Okay. 2 A. In 1910. 3 Q. And your -- Lillie Mae was the grandmother that 4 was going to help with that part of the case. Is that 5 correct? 6 A. The family -- all the family knew about it. 7 The whole purpose of that was the violence which had 8 been done to the family over the years. 9 Q. Okay. And then you were going to do some 10 presentation in regards to the uncle having been shot. 11 Is that correct? 12 A. By the police, Dallas police. 13 Q. Now, through your -- through your investigation 14 about that particular circumstance, you ran across some 15 records that indicated that perhaps he had -- was 16 suffering from some mental illness or disabilities. Is 17 that correct? 18 A. That's correct. 19 Q. Did you talk to the family about that in 20 regards to Travis and the family history? 21 A. Yes, I did. 22 Q. What did the family have to say about all of 23 that? 24 A. It was kind of strange. In my first interview, 25 I asked them about family illnesses, family mental	67 1 leaving. What happened? 2 A. I don't know what happened. They left. I left 3 -- I went out of the courtroom to talk to them and they 4 weren't anywhere outside. And so I thought, well, maybe 5 they've gone to get coffee or something. And I called 6 and they were in one of the C towns. I think it was 7 Childress. It was either Clarendon, Childress or 8 Chillicothe. I'm thinking Childress. And I asked, I 9 said, where are y'all? And they said -- well, where 10 ever they were. And they said -- and I said, what are 11 you doing? And they said, we can't do nothing for him 12 now. And just hung up. 13 Q. To your knowledge -- well, did you or anybody 14 on the defense team to your knowledge tell them they 15 could leave? 16 A. I didn't. I don't think anybody else did 17 either. 18 Q. To tell them they could leave, would that have 19 totally disrupted the entire defense strategy for the 20 punishment phase of the trial? 21 A. They were our witnesses. 22 Q. The only ones that you had? 23 A. They were the only ones that we had left. 24 Q. So the answer would be yes? 25 A. We didn't have anything to put on. It
66 1 illness. And they denied anything like that. They did 2 tell me about Allen Brooks and they did tell me about 3 Horace. And so I did research on each one of those 4 individuals and discovered that Horace was, in fact, 5 suffering from a mental illness. And I don't remember 6 now what it was. But had been in mental hospitals, I 7 think. And that the family had quite a time trying to 8 deal with him. So I knew that there had been mental 9 illness. I don't -- and I -- I don't -- I didn't really 10 understand why they didn't want to tell me about it. 11 And do we have any water or -- 12 THE COURT: Gary, get Kathy some water, 13 please. 14 A. Just a little. 15 (Pause in proceedings) 16 Q. So the overall strategy was to show through 17 Darmonica, the mother, the grandmother, and the father, 18 a disruptive childhood, those sort of things. Is that 19 correct? 20 A. Yes. 21 Q. What happened to Lillie Mae? 22 A. The day they were here to testify? 23 Q. Yes, ma'am. 24 A. They -- she took off. They left. 25 Q. Okay. Tell the Court about the three of them	68 1 disrupted -- yeah, that was it. 2 Q. Was it clearly the defense's intent to put 3 those -- at least one of those people on, if not all 4 three of them? 5 A. At least one. We couldn't put Noel on because 6 he had come into the courtroom. We felt that Lillie Mae 7 was probably our most stable and most knowledgeable as 8 far as the entire family history. And I know -- I knew 9 she was afraid to testify. I did know that. 10 Q. Okay. Now, before you had been to the 11 courtroom that day and started, had y'all had a meeting 12 with them before y'all came to Court? 13 A. Yes, at Jim's office the day before. 14 Q. Okay. Tell the Court about that. 15 A. We discussed with them again the things that we 16 wanted to present, which was essentially Travis's story. 17 And again, Lillie Mae, because of her age, obviously, 18 and her ongoing -- ongoing relationship with Travis, we 19 felt was our best witness. And I can't remember now. 20 Nancy was also afraid to testify. But we had hoped -- 21 we had records and we had hoped that Nancy would be able 22 to confirm for us and just talk about what had happened 23 during his life. 24 Q. You were going to do a -- basically his 25 history?

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1 A. Essentially. 2 Q. Travis's history? 3 So you went through all of that with them 4 about what you were going to try to do, to accomplish 5 the next day? 6 A. Yes. 7 Q. Do you believe if they had stayed, that effort 8 would have been made by calling at least one of them? 9 A. Yes. 10 Q. How did Mr. Durham react when you let him know 11 that they had left? 12 A. He wasn't very happy. 13 Q. What did Travis have to say -- how -- when 14 y'all let Travis know that they had left, tell the Court 15 about that conversation. 16 A. Travis wasn't particularly surprised. We had 17 had several conversations between he and I. And his 18 family had, I guess you would say, let him down on 19 certain occasions on a prior case he had been trying to 20 get them to help him. And they lost his documents and 21 weren't in contact with him. And he just kind of said, 22 well, that figures. 23 Q. Okay. And, in fact, them leaving was not the 24 first time in regards to this specific case he was aware 25 that they had said they would do something and then they	1 seven-year rule. And so, essentially, what we were able 2 to get was just the permanent records. But Travis had 3 given me the names of the schools where he had gone to 4 school. And I had hoped that -- that I might be able to 5 find a counselor or a particular school -- because 6 occasionally, they will still have some records. And so 7 we had hoped to be able to obtain additional records, 8 and I wasn't -- I was unsuccessful. I couldn't find 9 anymore. The school said they didn't have them. And I 10 called a special -- there was a special, oh, for lack of 11 a better word, a Special Ed facility location. And I 12 had been given that number by our neuro-psych, but they 13 didn't have anything. So all we had were the permanent 14 records. 15 Q. Through the numerous cases that you've done and 16 then the work that you've done on this particular case, 17 do you believe a thorough job was done in regards to 18 searching and trying to obtain mitigation evidence in 19 regards to this case? 20 A. I do. We had decided on what we wanted to do 21 and where we were going to try and go with this case. 22 And then I operated through -- through the decisions 23 that we had made about that. 24 Q. Okay. If you had any -- any hindsight 20/20 or 25 regret about the effort made in regards to the
70	72
1 didn't do it. Isn't that correct? You had let me know 2 of other instances -- 3 A. Well, yeah. I was having -- I was having a 4 hard time making contact with them, when I would go to 5 Dallas. And I asked him what is the problem. I mean, 6 was there any reason, because they initially started out 7 very supportive. And then he had told me about the 8 other occasions when he had been trying to communicate 9 with them and they just -- just didn't help him. 10 Q. Okay. Now, you also then at that point, 11 additional other things that you had done, you tried to 12 find prison guards that could say something nice about 13 him. Is that correct? 14 A. That's correct. He had some guards that he had 15 gotten along well with and gave us those names. And 16 then I made attempts to locate them. And I think that 17 copy -- those copies are maybe in this file. I'm not 18 sure. 19 Q. You also made efforts to get records from -- 20 records in -- from school systems he had gone to. You 21 had talked to juvenile probation people about Travis? 22 A. We did. I did. 23 Q. You talked to a lot of people about Travis? 24 A. Yes. Got all the records we could. The school 25 records in Dallas, they have -- I think it's a	1 mitigation evidence in this case, can you name one? 2 A. Yes and no. I wish that I had been able to 3 have worked with his family better. I wish that -- a 4 lot of families are fearful of testifying and his was. 5 I don't know what I could have done actually to have 6 made them more comfortable. So in that respect, I don't 7 know that I would have been able to get many more 8 records. I don't know that there was much more to get 9 for Travis. 10 Q. You think pretty much based on what you were 11 able to -- the information that you were able to get 12 from the family, you obtained just about every record 13 you could get your hands on? 14 A. Yeah, I believe so. 15 Q. Between that and plus what we had? 16 A. Sure. 17 Q. Been provided to you? 18 A. Sure. 19 Q. Okay. 20 MR. SIMS: Your Honor, I would like to 21 offer State's Exhibit Number 1, which would be her notes 22 in regards to this investigation. 23 MR. WILSON: No objection. 24 THE COURT: Okay. 25 MR. SIMS: I'll pass the witness, Your

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1 Honor. 2 CROSS-EXAMINATION 3 BY MR. WILSON: 4 Q. Kathy, how you doing? 5 A. I'm doing pretty good, Joe Marr. Thank you. 6 Q. I want to talk to you about something that's 7 kind of -- it's been brought up in and it's a little 8 different than where I thought we were going on it. 9 A. Oh. 10 Q. Was it your belief from what you've told 11 Mr. Sims, it sounds like to me, that y'all continued to 12 have an intent to call one of these family members, I 13 think you said Lillie was who you probably wanted to 14 call? 15 A. At the very least, Lillie Mae. 16 Q. I mean, it was never y'all's intent to do -- 17 put nothing on? 18 A. Oh, no. 19 Q. And even though there may have been some warts 20 on it, I mean, the case was so bad you -- you had to put 21 something positive on for him, didn't you? 22 A. We certainly wanted to. 23 Q. Yeah. And you believe it was the intent from 24 -- and unfortunately, Mr. Durham is not with us any 25 longer and we can't talk to him about it -- but you	1 A. And I think they would have. 2 Q. Okay. And so there wasn't a decision made not 3 to put one of these witnesses on; your testimony is that 4 they left and you couldn't put them on? 5 A. They left. 6 Q. Okay. 7 A. They left. 8 Q. Okay. And we all know that they've got an 9 affidavit saying something different and that's not 10 really even the point I'm talking about here. It's just 11 that if they had been there, you believe that it was 12 your's and Laura's and Jim's intent, and Travis's, that 13 at least one of those witnesses were going on the stand? 14 A. Yes. 15 Q. Okay. Now, those witnesses were under 16 subpoena? 17 A. Yes. 18 Q. Darmonica was even under subpoena. Regardless 19 of what he says, you believe he was under subpoena? 20 A. I believe he was under subpoena. 21 Q. Now, when you told Jim that these folks had 22 left, he -- he -- obviously, he was upset. Correct? 23 A. He wasn't happy. 24 Q. Okay. Do you -- were you present in the 25 courtroom -- after the witnesses had left, I guess, were
74	76
1 believe it was the intent to put Lillie on when y'all 2 decided to plead guilty -- when Travis decided to plead 3 guilty, that at the very least, everybody felt like 4 Lillie was going on? 5 A. We thought Lillie was going on. We hoped that 6 Darmonica would go on. We hoped that Noel would 7 testify. We also hoped that Nancy would testify. 8 Q. Okay. And you agree with me that, and I think 9 you stated this awhile ago, that a lot of times people 10 in this situation will get cold feet when they get here? 11 A. They're scared. 12 Q. Yeah. They -- they love their family member, 13 but then again, they look like they're on -- for lack of 14 a better word, they're on the wrong side of the deal and 15 they don't want to get up and talk about it? 16 A. My belief is that if a family steps up to the 17 plate immediately, that sometimes they'll follow through 18 with it. But they are afraid that they're going to be 19 blamed. 20 Q. Okay. And is it also your experience that a 21 good part of the time, if not most of the time, when -- 22 when you judiciously use these witnesses, that they will 23 actually, if you put them on the stand, they may not be 24 as good as they were when you first talked to them, but 25 they'll still say -- they'll still tell the truth?	1 you present in the courtroom then? 2 A. To tell him that? 3 Q. I mean, you wouldn't have had any reason to be 4 out because there weren't any witnesses outside anymore? 5 A. No. I had gone out to talk to them and say 6 that we were about to start. And so I was out there for 7 awhile. I couldn't find them. 8 Q. Let me point you to this and I'll be more 9 precise. Were you in the courtroom when Jim rested? 10 A. Joe Marr, I can tell you I was in and out of 11 the courtroom. 12 Q. Okay. 13 A. As you know, it was very short. 14 Q. Okay. Do you have any knowledge or 15 recollection at all that Mr. Durham notified the Court 16 that subpoenaed witnesses had left, that he needed one 17 of those witnesses, that he needed a continuance, he 18 needed to attach them, that he needed to do something to 19 go on? 20 A. I don't know. I don't know if there was a 21 discussion between -- 22 Q. Okay. If it isn't in the court reporter's 23 record, then you don't -- you don't recall any other 24 discussion that happened about -- do you recall a 25 discussion with Jim between you and Laura about asking

77 1 for a continuance? 2 A. I don't. 3 Q. All right. 4 A. That doesn't mean it didn't happen. 5 Q. I understand. Do you think it's possible that 6 -- I mean, that Jim was upset about it and then he 7 basically said, his family's not going to help him out, 8 I guess that's all we have. We have to rest. 9 A. Well, we didn't have any other witnesses. 10 Q. Okay. Do you believe that even with the 11 apprehensions you had about some of these witnesses, 12 that at the very least, if you put Lillie on, you know, 13 if Darmonica would have shown up, that those things had 14 some possibility of helping? 15 A. Yes, I do. 16 Q. Okay. Will you agree with me that by the time 17 that y'all got to the punishment phase, it couldn't get 18 a heck of a lot worse for him, could it? 19 A. It wasn't very good. 20 Q. I mean, everything bad that could be said was 21 -- I mean, any of the other bad stuff y'all were worried 22 about at that point in time, kind of paled in comparison 23 to where he was at that point? 24 A. By the time it got to punishment? 25 Q. Yes.	79 1 Q. Positives and negatives. Certainly you have to 2 welgh the negatives. 3 A. Yes. 4 Q. But you can't get too hung up on every little 5 thing to keep out because it's such a bigger picture? 6 A. I would agree generally, yes. 7 Q. And by the time y'all got to the defense case, 8 to the defense punishment case, the two worst things 9 that Travis had done in his life, the jury already -- he 10 had pled guilty to. That he was in prison for 70 years 11 for aggravated robbery? 12 A. Yes. 13 Q. And that he had killed someone in prison? 14 A. Yes. 15 Q. Do you remember -- did you -- were you able to 16 get anything such as childhood photographs, baby books, 17 baby photographs, any of those type of things in this 18 case? Do you know if they existed? 19 A. They said they existed. The family said they 20 existed. And I can't remember if they brought some. 21 But when I met with them, they had letters, they had 22 photos, they had -- oh, I can't remember what all. They 23 were going to get some of those things together. There 24 was a photograph of him in a yellow shirt or a -- maybe 25 a little gold cap and gown or something.
78 1 A. I hope I'm understanding your question 2 properly. I believe that Jim was able to keep some very 3 damaging things out and -- is that what you're asking 4 me? 5 Q. Yeah. Yeah. Uh-huh. 6 A. Okay. I think that he was able to keep some 7 very damaging things out of the case by doing it the way 8 that he did it, or that was his belief. 9 Q. Okay. 10 A. But we still wanted the jury to be able to see 11 something about Travis. 12 Q. Okay. 13 A. That he had family who loved him and cared 14 about him. 15 Q. You've been doing this a little longer than I 16 have, but we've both been doing this a long time. You 17 would agree with me the whole concept of mitigation has 18 evolved in the last 25 years? 19 A. Oh, boy, yes. Wow. 20 Q. And that a lot of things that 10 or 15 years 21 ago, we weighed a lot, oh, we don't want this thing to 22 come in, the positive/negative thing, that -- that the 23 evolution of mitigation is that you just -- you need to 24 show humanity to juries? 25 A. I would agree.	80 1 Q. Uh-huh. 2 A. And other -- other things, other mementoes, but 3 -- and I can't remember if they brought some of those up 4 here. But I know that when we initially talked, they 5 had some of those things, and they were going to get 6 some of those things for us. 7 Q. Okay. 8 A. To assist us. 9 Q. And if you have those things, those are nice to 10 have. They don't necessarily mean a lot, but it's nice 11 to show a jury something other than what a person has 12 done when they're older? 13 A. Well, yeah. He had a family. 14 Q. Do you believe that Lillie and Nancy, that any 15 of his family would at the very least testified that 16 they loved Travis and they didn't want him to be 17 executed? 18 A. Yes. We had hoped at the very least that -- I 19 guess this sounds kind of trite, but we had hoped at the 20 very least that Lillie Mae or Nancy could ask for his 21 life to be spared. 22 Q. Okay. Now, with regard to Noel, I know that 23 put you in a -- put y'all in a heck of a bind. He -- do 24 you agree with me, him wanting to be in the courtroom 25 with his son, in some -- that's positive in some

81 1 regards? 2 A. I suppose. 3 Q. Do you think he had other ulterior motives or 4 do you think -- 5 A. I don't think he wanted to testify. 6 Q. Okay. Did -- do you recall either the lawyers 7 asking him to be excused from the rule? 8 A. I don't recall. I don't know if they did. 9 Q. Okay. Do you recall either of the two lawyers 10 asking the Court to direct him not to be in the 11 courtroom? 12 A. I don't know. I don't remember. I'm sorry. 13 Q. I understand. So to sum up the main point, I 14 want to talk about it, and I'll be through. 15 When y'all are all -- and I know this 16 didn't happen in a one to two-minute period. But when 17 y'all are discussing if Travis was going to plead 18 guilty, the -- that process coming up to when he has to 19 stand up and say that, everyone is assuming at that 20 point y'all are putting witnesses on? 21 A. Our belief was we were putting witnesses on. 22 Q. Okay. And at least from your standpoint, 23 especially with regard to Lillie, and really with regard 24 to all the witnesses that were here, let's take Noel out 25 of the picture, you -- nothing really changed about what	83 1 Q. Okay. 2 A. I don't know why you would want to leave anyway 3 with your child here on trial. 4 MR. SIMS: I pass the witness, Your Honor. 5 MR. WILSON: Nothing further. 6 THE COURT: Okay. You can step down. 7 MR. SIMS: State rests, Your Honor. 8 MR. WILSON: Your Honor, we have no 9 witnesses here to testify. I would -- just some 10 housekeeping things because some of this we did verbally 11 over the phone. 12 I'd like the record to reflect that I did 13 on September 7th file a motion for continuance based 14 then on a setting of September 14th. It was my 15 understanding that continuance was denied. This hearing 16 was set for yesterday morning. You graciously allowed 17 us to go today because I had a conflict yesterday, 18 because you wanted to get it in as close to the 90-day 19 period as possible. But I just wanted to reflect that 20 in case I'm not a lawyer that's working on it later and 21 they want to know what happened on it. 22 I'm not going to offer them as exhibits 23 because they're already attached to our writ. But we 24 re-urge all of the affidavits from the witnesses that 25 have been discussed in this hearing, that were attached
82 1 you believed y'all could get out of them in testimony? 2 You would have liked it to have been the way it was when 3 you first talked to them, but you thought there was 4 certain elements you could get -- they would testify to 5 that were helpful to Travis? 6 A. We did. I did believe that. 7 Q. And that never changed; they just left? 8 A. They just left. 9 Q. Okay. 10 MR. WILSON: I'll pass the witness. 11 REDIRECT EXAMINATION 12 BY MR. SIMS: 13 Q. You've had an opportunity to review the 14 affidavits that are in the writ. Is that correct? 15 A. Yes. 16 Q. Five? Was there anything in there that you can 17 recall that shocked you or surprised you in any of them? 18 A. They're essentially the same things that we 19 knew already, and had hoped that -- believed that his 20 family members would -- would testify to. 21 Q. Okay. Were there anything -- do you recall 22 anything being in there that you felt like were not 23 correct? 24 A. Well, except for saying that somebody came out 25 and told them they could leave.	84 1 to our writ. We re-urge Mr. Runnels's affidavit that is 2 attached to the writ. 3 I would like to offer -- I need to make a 4 copy of it. I thought I had a copy, but I only have the 5 -- my original -- a copy of the excerpted testimony of 6 -- or, I guess, the full testimony on the Motion for New 7 Trial that was held on December 15th, 2005. It's in the 8 Court of Criminal Appeals appellate record, but it is 9 not in the writ record, I don't believe, that has 10 testimony from Mr. Durham regarding his trial strategy. 11 And since he's deceased, that's the only way we can get 12 that into evidence. And so we would offer a copy of 13 that. 14 So if the State has an objection to it, we 15 can discuss it. But if they don't, we would offer that 16 copy. And then we would rest. 17 THE COURT: Okay. You indicated to me 18 yesterday that because I had moved this up to try to 19 comply with the 90-day request to the Court of Criminal 20 Appeals, that if you had more time, you might -- or you 21 originally asked for 30 days. And indicating that you 22 might want to present some live testimony. I suggested 23 to you that we just -- you just make an offer of what 24 those witnesses, you believe their testimony would be. 25 Do you want to put that in now?

85 1 MR. WILSON: Judge, and I'm sorry. I 2 really am doing that by re-urging those affidavits. 3 Those would have been the witnesses that are brought. I 4 don't know their testimony would be substantially 5 different. Obviously, we have one conflict that is now 6 very apparent, that they're saying they were told to 7 leave trial; people are saying they weren't. You know, 8 I don't know even if that really becomes -- becomes a 9 big deal. 10 That would be the only difference I believe 11 from their affidavits. We might get more into that, as 12 to who told them to leave, if they know. 13 The only other that I would have offered 14 live would have been potentially some expert testimony 15 on mitigation. I don't have anything that I can proffer 16 on that, absent maybe being able to get an affidavit on 17 that. But I don't know that that's particularly 18 evidentiary in nature. That may be more a legal 19 argument anyway. 20 So I would potentially ask the Court's 21 leave for me to maybe -- if I do get an expert affidavit 22 within the next few days, before the record is completed 23 and sent to the Court of Criminal Appeals, to submit 24 that by affidavit form, if I can do that. If I can't, I 25 would just not be able to present that.	87 1 MR. SIMS: Thank you, sir. 2 (End of proceedings) 3 4 5 6 7 8 9 10 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25
86 1 THE COURT: You mean with regard as to what 2 the standard is -- 3 MR. WILSON: Yes; yes. 4 THE COURT: -- in the industry for, lack of 5 a better word, of mitigation specialists? 6 MR. WILSON: Yes, sir. 7 THE COURT: Yeah. I don't have any problem 8 with that. Does the State have any problem with that? 9 MR. SIMS: No, Your Honor. 10 THE COURT: Okay. All right. Well, all 11 those exhibits that have been offered are received, if I 12 didn't do so at the time. 13 MR. WILSON: Okay. 14 THE COURT: And the -- this that you want 15 to make a copy of, we can do that now. 16 MR. WILSON: It's just a few pages, Judge. 17 THE COURT: All right. That's fine. And 18 we can copy that before we leave the courtroom today, if 19 you like. 20 MR. WILSON: All right. 21 THE COURT: Anybody have anything else 22 that -- 23 MR. SIMS: No, Your Honor. 24 MR. WILSON: No, Your Honor. 25 THE COURT: Okay. Thank you.	88 1 REPORTER'S CERTIFICATE 2 THE STATE OF TEXAS) 3 COUNTY OF POTTER) 4 5 I, Jana Smith, Official Court Reporter in and for 6 the 108th District Court of Potter County, State of 7 Texas, do hereby certify that the above and foregoing 8 contains a true and correct transcription of all 9 portions of evidence and other proceedings requested in 10 writing by counsel for the parties to be included in 11 this volume of the Reporter's Record, in the 12 above-styled and numbered cause, all of which occurred 13 in open court or in chambers and were reported by me. 14 I further certify that this Reporter's Record of 15 the proceedings truly and correctly reflects the 16 exhibits, if any, admitted by the respective parties. 17 WITNESS MY OFFICIAL HAND this the 4th day of 18 October, 2011. 19 20 Jana Smith, Texas CSR 3179 21 Expiration Date: 12/31/11 22 Official Court Reporter 23 108th District Court 24 Potter County, Texas 25 Amarillo, Texas 79101

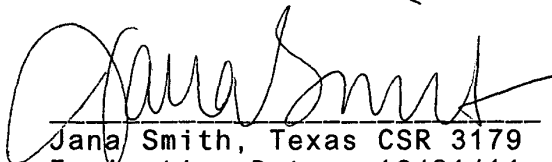
REPORTER'S CERTIFICATE

THE STATE OF TEXAS)
COUNTY OF POTTER)

I, Jana Smith, Official Court Reporter in and for
the 108th District Court of Potter County, State of
Texas, do hereby certify that the above and foregoing
contains a true and correct transcription of all
portions of evidence and other proceedings requested in
writing by counsel for the parties to be included in
this volume of the Reporter's Record, in the
above-styled and numbered cause, all of which occurred
in open court or in chambers and were reported by me.

I further certify that this Reporter's Record of
the proceedings truly and correctly reflects the
exhibits, if any, admitted by the respective parties.

WITNESS MY OFFICIAL HAND this the 4th day of
October, 2011.



Jana Smith, Texas CSR 3179
Expiration Date: 12/31/11
Official Court Reporter
108th District Court
Potter County, Texas
Amarillo, Texas 79101

APPENDIX F

Excerpts from Exhibits Submitted into Evidence in
State Habeas Corpus Proceedings,
State v. Runnels, No. 48,950-D (Potter Cnty., Tex. Dist. Ct. Sept. 9, 2011)



kgroklak@hotmail.com

Printed: Tuesday, September 13, 2005 11:00 PM

From : Kathy Garrison <kgroklak@hotmail.com>
Sent : Tuesday, September 13, 2005 3:23 PM
To : deitra.hill@amarilloattorney.com, mylawyer@arn.net, lucinda@arn.net, pumpkingirl1666@aol.com
CC : kgroklak@hotmail.com
Subject : Runnels/Ricky Runnels Interview 9/11/2005

Ricky Runnels, DOB 6/9/1955.
Phone-972-223-8365
Cell-214-207-3177

Ricky is Travis's uncle. He is the youngest child in the James Runnels and Mae Thelma Burch Runnels family.

Ricky Runnels provided some family background on Nancy Taylor's family as well as his own.

When Nancy and Noel met, she was in high school. She did not finish school. Noel did not finish school either, completing possibly the 11th grade. They married but had a rocky relationship. They were married when Darmonica was born, though apparently not when Travis was born. Even after Travis's birth, they were off and on. When Ricky was asked about Travis's paternity re the birth records, etc. he was silent for a bit. He said Noel had never given indication of denying paternity, and Travis possessed features and coloring of Mae Thelma's family, but could not say there were no other possibilities. There have been no family rumors re this matter.

Nancy's family has many members afflicted with substance abuse, alcohol and drugs. There is one brother who is a fine gentleman, but the others have little ambition or regard for education, and are considered party people.

The Runnels family generally does not have these problems, but they do exist to some extent. Education is stressed somewhat more, although Noel and Joel, Noel particularly, does not think education is important. Ricky said Noel does not read or write well. It is possible Noel had some learning disabilities. Noel is a stubborn man, and "knows" everything. So does his twin Joel, and although Ricky perceives they do not like each other, they do not allow criticism of the other by outside individuals.

Noel dated and married Nancy and Joel dated and married a close friend of Nancy's. Both marriages were brief but produced children. In the Runnels family Joel is referred to as Dr. Chickenshit and will not help his own children, although he has acquired material things.

James Runnels, 10/22/1949, is the oldest of the Runnels family. He is level headed and owns several businesses, including convenience stores at DFW and two restaurants.

There is a brother Daniel, aka Hop, whom we did not discuss at this time. There is a sister Gwen whom we did not discuss.

Mae Thelma Burch was born in Crockett, Texas in 1931, her father Charles Burch DOB c. 1905-08 being born in Mississippi. That branch of the family originated in Linscomb, South Carolina (sp?) and they were slaves. There is white blood in this family. She married James Runnels when she was 15 years old. They divorced after about 20 years. Mae Thelma was diabetic and is now deceased.

The Runnels family took their names from a slave owner named Runnels, who moved to Texas from Georgia or Mississippi, and brought his slaves with him. This guy was governor, perhaps of Texas, or maybe one of these other states, but ended up here. Runnels County is allegedly named after this man. The immediate Runnels family came from Ferris, Texas. All the grandfathers were named James and have passed the name along. The Runnels descendants now live primarily in Minnesota, Texas and California.

In the hush hush realm of Runnels/Burch/Linscomb family history there are Baptist ministers co-habiting with young female family members of the church and producing numerous children. Someone in this family is doing genealogical research and the tree is taking shape, according

to Ricky. Noel knows something of this history as he has contact with people (family) in Mississippi. I expect this is true as Noel lived there for a time and his daughter Brittney still lives there.

Ricky's knowledge of Travis's early years is somewhat sketchy as Ricky graduated and went to the Navy, only returning home for visits. He did state Travis was shuffled about quite a bit - first with Nancy, then Noel, the grandmothers, and all around. In Ricky's opinion neither Nancy or Noel should have been parents, and showed no consistency or support for Travis.

He cited some instances in which Travis asked for help on homework as a small child and Noel told him to do it himself. Ricky believes Noel was unable to help Travis and could not do the work himself. In addition, Noel was inconsistent in discipline, punishing behavior one time, then allowing the same behavior the next. Ricky did not feel Noel's kids were acknowledged as people by either of the parents, and Darmonica's illness was an aggravating factor.

The family tried to talk to Noel about some of the behaviors they began to observe in Travis when he was about 12 years old. Noel was resistant to any advice. Nancy and Noel blame each other for everything regarding Travis. When one of them became tired of dealing with Travis he was sent to the other one.

Ricky spent some time trying to help Travis by counseling with him, and brought him to Japan for a vacation/change of environment/tutoring/exposure to a different lifestyle trip. He had some well to do Japanese friends who were interested in helping Travis to the extent arrangements were in the process for Travis to live with them and attend school. In some respects the trip was a step in the right direction. However, socially it became a nightmare and Travis was sent home early.

I am unaware of the exact details, but Ricky stated before Travis was ever incarcerated he was exhibiting manipulative behaviors and instigating problems at home. Travis also began to run with a "thug" element. He would lie about things, set people off, cause problems in general and pick at family members. When Ricky asked him why, Travis would only say his friends were his family. Ricky is not aware of Travis stealing from family members, but his behavior was divisive and upsetting.

Darmonica has some of the same traits and tendencies, but Ricky believes he is making efforts to straighten himself up. He mentioned a time Travis was in juvenile placement and called Darmonica to pick him up, thereby "breaking out" of the facility. Darmonica told Ricky about it and was conflicted, but did go get Travis. Ricky commented Travis got the idea he could smile his way out of anything. He was good looking, fairly bright, but really made some bad choices early on, then did not try to correct himself.

Ricky is aware of the Brooks lynching as Darmonica had talked about it on occasion. He indicated that kind of history could cause some distress in this family and said the family was certainly aware of it. When asked about mental illness in the family, i.e. Horace Brooks, and the maternal side of the family's reluctance to reveal information, he stated some Blacks do not regard people to be mentally ill if they can function.

Ricky indicated class levels existed in Black society just as in White society, of course. Blacks might have the intrinsic discrimination thing going on, but within their own structures they also faced the same thing anybody else does in society.

When asked specifically what could have led to Travis's current situation, Ricky stated nobody took charge and guided him when something could have been done for Travis. Noel has only recently admitted he made mistakes with his son. Ricky had no comment on whether Nancy felt any responsibility as he does not know. Travis himself made poor decisions and alienated many members of his family on both sides. Generations of hush hush behaviors, poor communication, lack of education, neglect, little stability and just didn't care have culminated in the present situation.

Ricky said if I told Noel we had talked, and Travis received the death penalty, Noel would blame him. He also said Travis was resentful of his father and never said bad things about his mother. His resentment wasn't fully articulated according to Ricky, but exists. Travis resented his little sister for her relationship with Noel, and to some extent Darmonica, who was ill quite often. Travis became unwelcome with the Runnels side of the family, rejecting their help and causing problems.



kgroklak@hotmail.com

Printed: Thursday, December 29, 2005 1:59 PM

From : Kathy Garrison <kgroklak@hotmail.com>
Sent : Thursday, September 29, 2005 12:26 PM
To : deitra.hill@amarilloattorney.com, mylawyer@arn.net, lucinda@arn.net, pumpkingirl1666@aol.com
CC : neuron1@sbcglobal.net, ece310@peoplepc.com, kgroklak@hotmail.com
Subject : Runnels-Dallas 9/21-9/27/2005

I traveled to Dallas 9/21/2005. The purpose of this trip was to attempt final access to medical records from Children's Hospital, MLK Center, review Travis's juvenile file and any other information the family might share with us.

At 6:55 PM, 9/21/2005 I received a call from Nancy Taylor. She wanted to know if we were aware Travis was still at Potter County. I told her we were aware. She wanted to know if we had received the money order from Noel (which I now know we have). At some point in the conversation she indicated Travis was on the line so the call ended up being a three way call from the Detention Center.

I could not hear Travis on this call. However, he requested someone come see him. He also requested copies of the witness statements and the witness list. I told Nancy someone would come see him but as I was virtually in Dallas at the time, and would be for a number of days, it would not be me, at least not until the following week.

I also told her I could not provide him copies of the statements, but he could certainly review them with someone present. Re the witness list, I think he may already have that. Whatever the lawyers decide on this matter is fine with me.

I called Laura and left a message for her re this conversation. She returned my call sometime later and we discussed this call. Then I made a right instead of a left on George Bush and things got a little complicated for a few minutes.

Friday AM, 9/23/2005, I placed calls and left messages for MLK Center and Children's Hospital to inform them I was in town and would be picking up any records they had found on Monday.

Over the weekend I placed calls to various of the family members. There was no response.

Monday morning I began contacting the medical facilities again, and also called Marilyn Shipp at Dallas Juvenile Probation. Children's Hospital's system was down so they were unable to provide the status for our order request # 10516148. I offered to come to their facility and was informed it would be of no use as they would be unable to locate this file until their system was up and running again.

Calls to MLK Center were virtually fruitless on Monday. I left messages on every line possible.

It should be noted I began calling these facilities at 7:00 AM. They have automated phone systems. By 8:30 AM I was able to talk to a few actual people, very few. These people could only route me to voice mail boxes in which I left messages with my cell number and Jim's office number. At 11:30 AM I ceased efforts and left for the Dallas Public Library.

At the library I reviewed old city directories to establish the current Brooks family connection to Allen Brooks (and his lynching in 1910) and on up to more modern times-just in case.

I drove to the Henry Wade Juvenile Center and reviewed the juvenile file on Travis. I began actual review at 2:50 PM. The file was sizeable. It did not include complete records of Travis's confinement at the Willingham Shelter on two occasions. It did indicate he showed good progress the first time he was placed and then released to his mother. The second time he was placed he simply left without completing his time.

On 11/9/1993 Travis was examined by Barbara Crowley, Intern, and Saleem S. Ateeh, Psy. D., Chief Psychologist, apparently contracted to by Dallas Co. Juvenile Probation, on a referral from James Bates, probation officer, at the Willingham Shelter.

Clinical Interview and Tests administered were as follows:

Culture Fair Intelligence Test
WRAT
Draw-a-Person
Kinetic Family (?) drawing
Rotter Incomplete Sentences
Thematic Apperception Test
Rorschach

The report states Travis is living with his grandmother and mother at the present time. He is closer to his grandmother. His relationship with Darmonica is okay. His dad is currently in Mississippi operating a BBQ restaurant and has a daughter, Travis's 1/2 sister.

Travis reports no mental illness in the family.

He reports he and his mother moved a LOT, and he has been in 8 different schools. No special ed classes, but many absences, so school is not a positive experience. He was to enroll in Dallas Can!, but there were no spots available so he did not enroll.

He reports no extra-curricular activities.

He drinks beer and has used marijuana, beginning at around 14 yoa.

PO Bates indicated to the psychs Travis may be involved with the Crips, but that is unconfirmed.

Upon questioning, Travis did not reveal he was on Adult Probation as Frank Pope (and of course, the authorities were aware). He denied any abuse from his family, stated he had never run away, and sometimes lived with Darmonica. PO Bates had informed the examiners Travis comes and goes, lived wherever, and basically had raised himself.

Behavioral Observations-Travis has difficulty with rapport. He has a cold resistant attitude with blunt affect. He indicates no suicidal, homicidal thoughts, nor hallucinations. He states he has no guns.

Test results-

Culture Fair Int. 99

WRAT-

	Score	Percentile	Grade Equiv.
Reading	117	87	12 +
Spelling	86	18	End of 7th
Math	81	10	Beginning of 7th

Overall-47th percentile w/peers

Personality Tests-

Limited coping skills, likely not good with dealing with stress; if stress is unexpectedly intense or of long duration, Travis becomes frustrated and has difficulty controlling his behavior. He may then be aggressive without regard for social demands.

These problems might be mediated if Travis could talk with his family, receive support from then, etc. The examiner states this as unlikely as Travis has been on his own for several years without family supervision.

Travis's communication problems extend beyond family to his relationships with others. Since he does not expect positive interaction with others he may refrain. It is indicated he does not exhibit much verbal exchange and lacks overall verbal skills for conversation.

His lack of cooperation, hostile demeanor contributes to the perception he is aloof and distant. This is observed in his behavior during interviewing and testing. He may be uncomfortable with emotion and so he avoids those situations. He is observed to be one sided and non-reciprocal in relationships. These superficial relationships reinforce his low self-confidence and extreme defensiveness.

His low self-confidence may prevent his confidence in decisions. He may waiver and produce errored judgments and inflexible thinking and values. This makes him a difficult and challenging candidate for therapeutic change.

DSM-III-R: 312.9 Conduct disorder, undifferentiated/moderate

Recommendations:

Travis needs a highly structured environment with constant supervision; vocational training; he could use a mentoring program with a male role model; perhaps group counseling for peer support to confront maladaptive thinking and facilitate appropriate social and communication skills.

There you have it.

Probation recommended Travis be sent to TYC. In the meantime he ran off from the Willingham Shelter (with Darmonica's assistance) and was later found in adult jail and was in fact on his way to TDCJ. (PIA thing in Dallas or Tarrant).

All this juvenile record began in 1991. However, on other earlier occasions cases weren't filed. Travis was living everywhere. Nancy was living everywhere. Papers were issued and returned unseved numerous times as they could not be located. Sometimes Nancy was the responsible party and sometimes Lillie Mae was. She did have a permanent address. Travis was "lost" off and on, using different names off and on, in school off and on, being ordered not to associate with certain individuals off and on, ad infinitum. I could not begin to tell you who he was living with at any given time, the family cannot and any documentable information we have in that regard is suspect.

I will be forwarding by fax the Order of Adjudication and Judgment of Disposition on Travis. There is no formal disposition for obvious reasons. This document was signed late Feb. 1994.

On 9/27/2005, at 8:10 AM, another message was left with Children's Hospital re our request for records. As of this date, 9/29/2005, I have received no response.

Tuesday, 9/27/2005, at 8:20 AM, I was able to speak with Clifton Jones, Medical Records at MLK Center. He has been able to locate Travis's immunization records only. We are in possession of those. Clifton said he was able to locate the charts for the two other kids and they have been ordered. He was hoping Travis's records might be included. Otherwise, we have what we are going to get.

Kathy



kgroklak@hotmail.com

Printed: Tuesday, September 13, 2005 11:02 PM

From : Kathy Garrison <kgroklak@hotmail.com>
Sent : Tuesday, September 13, 2005 10:02 AM
To : deitra.hill@amarilloattorney.com, mylawyer@arn.net, lucinda@arn.net, pumpkingirl1666@aol.com
CC : kgroklak@hotmail.com
Subject : Runnels-Psych/Dallas/

Dr. Clayton will be coming in tomorrow. Should I get her and take her to jail? When might you want to meet with her?

Received Stacey's call yesterday re Children's Hosp. and will pick up those records next week. Still no word from MLK Center/Clinic in Dallas, but will call them re pedi records. I imagine those records are buried and difficult to locate. As far as Juvie, I will review those records next week in Dallas also. If they are no good for us, I will simply make notes and document for our file, unless you guys think we should have them. Quite frankly, they may be bad for us-just have to see.

I interviewed Ricky Runnels Sunday PM by phone. He is Travis's youngest uncle-the one who was in the Navy, taught English in Japan, and brought Travis to visit him while there. I will send a memo on that interview. There is good and bad.

Re Fulbright-we are not going to see anything such as MR or mental illness. Travis is not stupid nor mentally ill. He did take nose dives education wise starting about 3rd grade, perhaps somewhat earlier. Fulbright suspects he was shuffled around quite a bit for various reasons-some family, some perhaps through the school district itself.

DISD will probably have what is called a Comprehensive Individual Assessment through their Special Education Department. Though I asked those people if they maintained any other records and received a negative response, it is worth another shot with a call and another release to the Special Ed. Dept. down there.

This department may not have kept these records, (I don't know the retention requirements) but if our guy had behavioral or learning problems, for whatever reason, they MAY still have them. ARD meetings, referrals, testing, special placements would be in the files. Ruth Turner would have been in charge and signing off at that time.

My opinion is we are going to be left with unstable home life, poverty, inconsistency in parenting, neglect, whether intentional or not, the potential effects of Darmonica's illness on a young family, and inherent racism simply because of being a Southern Black family with cloudy history (although we do have at least the two incidents). Unless Lisa Clayton finds some startling something, this is all I can see at the moment.

Our client is not overburdened with insight. He is manipulative-probably became so to get what he needed in his life even as a little kid. Additional cultural issues are here as well, free world and prison being among them. Dr. Clayton should be able to address those issues as I know she does work for SPU-don't know if she also works for SCFO.

That is how I see it. It could change. I do not know what else I might be able to extract from the family. I doubt very seriously they will commit to much personal causation in our client's history. So here we are back at the Dallas Morning News.

Kathy

JUDGMENT OF DISPOSITION

On the 25th day of February, 1994, all parties who were present for the adjudication hearing were present for the Disposition and the Court proceeded to consider the reports referred to in Section 54.05(f) of the Texas Family Code.

The Court finds that the Respondent Child's attorney has had access prior to the hearing to all reports to be considered by the Court for purposes of determining a Disposition.

The Court further finds that the Respondent Child, to wit: Travis T. Runnels was declared a Child Engaged In Delinquent Conduct.

The Court further finds that no formal disposition of the Respondent Child is necessary for rehabilitation of child or for the protection of the Public.

IT IS THEREFORE ORDERED AND DECREED by the Court that No Formal Disposition is ordered in this cause.

RESTITUTION FEES

IT IS THEREFORE ORDERED AND DECREED by the Court that Nancy Neal, mother and Respondent, Travis T. Runnels, are jointly and severally libel for restitution, in the amount of \$12,804.00. Make checks payable to Dallas County. Mail or bring your Check or Money Order for the above restitution payments to Budget Manager, Dallas County Juvenile Department, 4711 Harry Hines Boulevard, Dallas, Texas 75235.

COSTS OF COURT

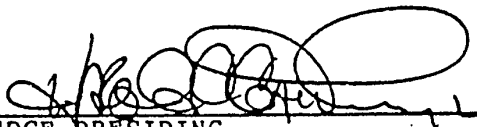
All costs of Court expended in this cause, including the \$20.00 fee required under Section 54.0411, Texas Family Code, are taxed against the parent or parents of the Respondent Child, jointly and severally, for which let execution issue.

All fees not specifically ordered are waived.

COSTS TO COLLECT

Any default on any fee ordered herein to be paid may be assigned to an attorney for collection. In addition to being charged with Contempt of Court, the person obligated to pay said fees will be ordered to pay all attorney's fees which are necessary to collect said fees in the amount of 15% of the arrearage collected or \$100.00 whichever is greater, plus all costs of Court.

SIGNED THIS THE 4th DAY OF MARCH, 1994.


JUDGE PRESIDING

Clinical Neuropsychology
Richard L. Fulbright, Ph.D.
Clinical Psychology
Kenneth I. O'Krent, Ph.D.
Case Management
Jody L. Fulbright, M.S., C.R.C., L.P.C.



Supervised by Richard L. Fulbright,
Ph.D.
Elizabeth A. Thompson, M.S., L.P.A.
Mary C. Mikhail, Psy.D.
Loryssa C. Howard, M.A., L.P.A.

NEUROPSYCHOLOGICAL EVALUATION

Name: Travis Trevino Runnels
Age: 29 years
Education: 8 years
Cause No.: 49,950-D

Date of Birth: 7/21/1976
Dates of Evaluation: 9/8 & 9/9/2005
Referred by: Attorney Jim Dunlop
Evaluated by: Richard L. Fulbright, Ph.D.

IDENTIFYING INFORMATION: Travis Trevino Runnels is a 29-year-old African-American male seen for a neuropsychological evaluation at the Potter County Detention Center. This evaluation was court ordered by Judge Don Emerson of the 320th District Court of Potter County.

REASON FOR REFERRAL: Mr. Runnels is accused of capital murder in which he allegedly killed a prison guard at the Clements Unit of the Texas Department of Criminal Justice. This evaluation was requested in order to assess Mr. Runnels' cognitive status as it may have pertained to the alleged crime.

BACKGROUND: Mr. Runnels is accused of cutting the throat of a TDCJ guard in the Clements Unit on 1/29/2003, resulting in his death. Mr. Reynolds reported that he had become increasingly angry about his treatment in TDCJ, with particular complaints about his treatment in the Clements Unit, which he described as abusive. He reported that he planned to kill a guard, and this has been corroborated by other inmates who have given statements to this effect. He had met the victim only the day before. He had an argument with the guard the day before, and he reported that he planned to kill the individual. He stated that he does not know what he was thinking at the time of the incident, but he indicated that did not care about the consequences prior to assaulting the guard.

Mr. Runnels was working in the shoe factory of the prison at the time of the offense and took a knife from the shoe manufacturing area. He reported that he subsequently cut the throat of the guard. The guard was able to walk away from the scene to go to the

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infirmary with a coat wrapped around his neck. The guard later died from exsanguination after he was laid back on a gurney.

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Mr. Runnels reported having no feelings about the incident. He stated that he had tried to avoid altercations in prison during this time, and he stated, "So if I had to do anything, I know it's justified, because I didn't do anything." Mr. Runnels was transferred to the Coffield Unit in Tennessee Colony after the event. He stated that he felt that he was treated more fairly at Caulfield, even after being accused of murdering the prison guard. Mr. Runnels is currently awaiting trial on capital murder charges in Potter County.

BACKGROUND: Mr. Runnels provided interview data in this evaluation. His brother, Darmonica Runnels was also interviewed in Dallas before this evaluation on 8/8/2005. His observations about Mr. Runnels, as well as Mr. Reynolds' account of his history, are contained below.

Developmental History: Mr. Runnels reported suspecting that his mother smoked during her pregnancy. He is unsure as to whether she drank or used drugs during pregnancy, although he described her as drinking throughout his life. Mr. Runnels was born at Parkland Memorial Hospital and indicated that his delivery was normal. His brother, Darmonica Runnels, is 32 years of age. Mr. Runnels also has a half-sister from his father and stepmother. Mr. Runnels reported attaining his developmental milestones on time. He denied any significant illnesses or injuries as a child. Mr. Runnels grew up in Dallas.

Mr. Runnels described his family life as being "kind of wild." He described his mother and her siblings as living together and stated that they all drank alcohol excessively and frequently fought physically. He reported that his parents divorced and that his father was not living in the home from as early as he can remember. However, his father remained involved in his life. Mr. Runnels stated that he stayed largely with his grandparents, who lived next door to his mother. Several aunts and uncles also lived in his mother's house. Although his mother and her siblings abused alcohol daily, his grandparents did not drink. He described them as "like a second set of parents to me." He stated that he and his brother and cousins would go to his grandparents' home when fights broke out among his aunts and uncles. He stated that his grandfather would intervene with his children when fights would break out among them in the house next door. Mr. Runnels denied any outright neglect or abuse from his mother. However, he did report that his mother did not communicate with him about important issues while he was growing up. Mr. Runnels' brother stated that the defendant was physically abused by his stepfather.

Mr. Runnels described his father's side of the family as being more financially successful than his mother's side. He stated that his father's home was not violent and that the atmosphere was "middle class." Mr. Runnels went to live with his father while he was in the fifth grade and returned to his mother's home at the end of his sixth grade year. Although his financial situation was favorable at his father's home, he stated that his father would tell him, "You're not going to be anything" and other derogatory statements.

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Mr. Runnels' father developed apartments in white neighborhoods in far East Dallas. Mr. Runnels' brother stated that while they were growing up, white people would throw things at them as they drove by, including firecrackers, beer, and rocks. He stated that they were the only African-Americans in the neighborhood and that people referred to them as "niggers."

Behaviorally, Mr. Runnels' brother stated that during childhood, the defendant would tear up his belongings during fits of anger. He stated that their mother's temper outbursts would precipitate his episodes of anger. He described Mr. Runnels as being very persistent in physical fights, stating, "He wouldn't give up. He would keep coming after the fight was over." He fought primarily with family members but did not apparently fight with other people outside the family. Mr. Runnels' brother stated that he did not bully people but would become angry when provoked by them. He apparently did not initiate attacks on others until he felt he was being provoked.

Family Medical History:

- ◆ maternal grandfather died of unknown causes
- ◆ maternal grandmother is healthy
- ◆ paternal grandmother died after several surgeries
- ◆ paternal grandfather is alive
- ◆ apparent history of mental illness in one uncle
- ◆ reports history of apparent mental retardation or developmental delay in a paternal cousin
- ◆ reports alcoholism in his mother and her siblings
- ◆ brother suffers from sickle cell anemia

School History: Mr. Runnels reported starting kindergarten at age five in the Dallas Independent School District. He was in schools in the South Dallas area. He stated that he initially liked school but began "despising it" during the second grade. He indicated that he did not like doing schoolwork and resisted, although he was able to do it. He indicated that after the second grade, he began getting in trouble consistently due to refusing to work, talking, or failing to pay attention. He began receiving paddling for punishment in school in the third or fourth grade. His elementary school records clearly reflect a gradual decline in his school performance beginning in the second grade. His achievement testing on standardized testing remained largely at or slightly below grade level throughout his eighth grade year.

Halfway through the fifth grade, Mr. Runnels moved to his father's home. He stated that his father never whipped him as his mother did, despite the father verbally abusing him. He reported that his father expected him to perform well in school, and he denied ever been expelled from school because of his effort to comply with these expectations. Mr. Runnels reported attending approximately 10 schools throughout his nine years in the DISD. He attended one junior high school and then was placed in the Metro Academy, an alternative school in the DISD for students with behavioral disorders. He stated that he was placed in this setting because he was defiant, skipping school, and failing to follow the rules. He reported being at Metro for a few weeks before being expelled for

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the rest of the year. He indicated that he stayed home through the year and then repeated the seventh grade. He reported that halfway through his seventh grade year, he returned to his father's home. His school records actually indicate that he failed his first attempt at the seventh grade in 1988-89 and was retained. He appears to have completed one semester of his 1989-90 attempt at the seventh grade, but the remainder of his transcript for that year was not available. This may reflect when he was placed at Metro. He did not receive credits for his eighth grade year, but records indicate that he was "placed in 9th 6-7-91."

Mr. Runnels began high school but never completed the ninth grade. School records indicate failing grades in all areas on two attempts at the first semester of the ninth grade in 1991 and again in 1992. He later earned his GED in prison. Regarding this time (early high school), Mr. Runnels stated "that's when all the trouble started." He began engaging in criminal activity and was arrested and incarcerated on charges of auto theft, burglary of a motor vehicle, and robbery. He stated that he was incarcerated several times at the Dallas County Juvenile Detention Center. On one occasion at age 17, he was released to a halfway house, but he left the next day.

Mr. Runnels reported working for a few months at McDonald's at age 16. He also did some inventory work briefly. He worked in the shipping department of a company for about three months and also bussed tables in two of his uncles' restaurants. He also reported having a few temporary jobs.

Mr. Runnels' adult criminal history began when he was arrested after burglarizing a building. He gave the authorities someone else's name, and he was tried and given a 10-year probated sentence under this name. He was later arrested for another burglary, and at that point, he gave his actual name to the authorities. Fingerprints cross-referenced him to the other identity, and he ultimately received a five-year sentence. He served approximately one year of that sentence before being released on parole at age 18. He reported working several jobs briefly after getting out of prison.

His most recent sentence came about as the result of his driving a car from which two of his friends were committing robberies. He denied being involved in the robberies other than driving, but he stated that he was the only person arrested. He was convicted at trial and given a 70-year sentence. He reported being "shocked" by the length of his sentence, since his only prior offense was a burglary. He was subsequently placed in the Robertson Unit in Abilene for four years and had been at the Clements Unit for two years at the time of the alleged murder. He has since been placed in the Coffield Unit and was transferred to Potter County for his upcoming trial.

Mr. Runnels reported feeling that his sentence was unfair because of his limited involvement in the robberies for which he was convicted. He appealed the conviction, but this was denied. He stated, "I know I wasn't guilty of the actual robbery – if I had the money to hire proper representation, I probably wouldn't be here [prison]. I feel that my counsel was inadequate." He stated that he would have had to serve 35 years on the sentence before being eligible for parole.

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Mr. Runnels' brother reported that the defendant told him "I can't stand them [the police and correctional officers]; I ain't going back to jail alive." His brother stated that the defendant was not particularly angered by white people as much as he was by police and authority figures. Mr. Runnels apparently told his brother he did not feel he could complete his sentence and that "there has got to be another way out." Regarding prison guards, his brother stated that the defendant told him "these young white guys can play with your life because you are locked up."

Mr. Runnels stated that he had significant behavioral problems at the Robertson Unit. He was placed in segregation for staff assault in which he threw liquid in a guard's eyes. He had mixed up a combination of lotion and shampoo. On another occasion, he slapped a guard. He was placed in segregation for two years. He reported being in solitary confinement during this time with only one hour of recreation per day. After this event, he reported that he was able to stay out of segregation and had been in the general population for two years at Clements until the time of the incident. He was involved in other behavioral incidents at the Clements unit, but these did not result in his being segregated from the other inmates.

Medical History: Mr. Runnels reported being diagnosed with a large mass in his left chest wall while in jail in 1997. Hospital records indicate that this was accompanied by a 10-pound weight loss, night sweats, and bone loss of the rib. The mass was diagnosed as acid fast bacilli and was excised surgically. Mr. Runnels also reported breaking his wrist at age 15. This was treated with closed reduction and a splint. Some concern was voiced about injury to the growth plate. However, he later tore the ligaments in this wrist while he was an inmate in the Dallas County Jail. He underwent a wrist fusion about five years after the injury while in TDCJ. He reported being unable to move his wrist, although he is able to move his fingers. Mr. Runnels denied any prior history of traumatic brain injury or other neurological insult. However, Mr. Runnels' brother stated that the defendant ran into a flagpole once and suffered a loss of consciousness. There was no subsequent hospitalization or medical care.

Mr. Runnels denied any history of unusual alcohol use or abuse. He did report smoking marijuana in the past, but he stated that he smoked regularly only between his first and second prison sentences. He admitted to smoking "whack" (marijuana with embalming fluid) on several occasions. He denied any use of inhalants, including toluene or gasoline.

Mr. Runnels reported attempting suicide by overdose at the Coffield unit last year. He reported being "tired of prison." He reported taking another inmate's muscle relaxers and saving them, ultimately mixing them into benzyl peroxide. He assumed that he would die after ingesting this mixture, but he simply slept overnight and through the next day. He did not receive any medical attention for this event. On another occasion prior to this, he took an excessive amount of blood pressure medication. He stated that he overdosed in an attempt to calm himself down but denied any suicidal intent related to this event. He reported that he was taken to the hospital, where his stomach was pumped.

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Mr. Runnels as never received any psychological treatment, despite being placed in an alternative school and having chronic behavioral problems throughout school. He also reported receiving no psychological services in his multiple incarcerations through the Dallas Juvenile Detention Center.

Mr. Runnels reported having "chronic problems with masturbation in jail." He reported that he has exposed himself to female guards while serving his current sentence. He stated that he has been written up and has received commissary restrictions because of this behavior. He attributed this behavior to being denied companionship. He also reported that sex "consumes" his thoughts at times.

Current Status: Mr. Runnels reported no physical difficulties other than his immobilized wrist resulting from fusion surgery. He denied any cognitive difficulties as well. In terms of his emotional functioning, he did complain of having some difficulty with depression. He attributed his mood fluctuations to "how I'm being treated – it affects me a lot." He stated that he works to keep himself in touch with reality while incarcerated. Mr. Runnels reported becoming increasingly frustrated if he is left alone and has nothing to do, as when he was in segregation. He stated that at times, the only way to entertain himself is to engage in negative behaviors. Regarding his behavioral volatility, he stated that he does not initiate aggression until he feels he is being provoked. He stated, "It takes a lot, but when I'm mad, I get a 'don't care' attitude." He reported having no fights with other inmates and stated that his conflicts have usually been with guards. Mr. Runnels stated that he oftentimes feels like crying but does not. He reported enjoying social contact.

Behavioral Observations: Mr. Runnels was initially brought to a visitation room in which we were separated by a glass pane. The initial clinical interview was conducted over the telephone connecting the two rooms. Mr. Runnels appeared to be alert and oriented to person, place, and time. His mood was neutral, and his affect was normal in range and intensity. His speech was clear and coherent, and there was no evidence of disorganized thought processes or unusual thought content. His attention, concentration, and short-term memory appeared to be reasonably intact upon informal examination. His insight into his current psychological status appeared to be fair, and his judgment was intact throughout the evaluation. His behavior was quite appropriate throughout the assessment.

SPECIAL NOTE ON TESTING PROCEDURES AND CONDITIONS: At 4:00 p.m. on 9/8/2005, I arrived at the Potter County Detention Center with Investigator Kathy Garrison, who had made advance arrangements for this evaluation with PCDC staff. Jail staff was supposedly told in advance that we specifically needed Attorney Room 3 for the clinical interview with defendant Runnels. We were told that the district attorney was using the room and that it was used only for parole officers outside these times. Ms. Garrison attempted to contact the supervising officer, but none was available. With assistance from Corporal Atkins, we eventually gained access to Mr. Runnels, but only in Attorney Room 2, which had a glass barrier and required the interview to be conducted by phone across the glass. Ms. Garrison was unable to actively participate

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in the interview, as I had requested due to his level of familiarity and trust with her as a facilitator to the interview. Interview was completed at 6:00 p.m., and we informed staff we would be back at 8:00 a.m. for testing, which would take most of the day. We were told we could evaluate Mr. Runnels in a room in the medical area containing a desk and an electrical outlet and with his having at least one hand free.

On 9/9/2005, Kathy Garrison and I arrived at PCDC at 8:00 a.m. as planned for testing. The same desk officer (Officer Chittavong), who had been there on 9/8/2005, was there that morning. We were taken to the medical area as planned. Medical staff in green scrubs said they had no notice of the evaluation taking place. I set up for testing in the room, which had the necessary equipment/furniture and fixtures (face-to-face desk, two chairs, and electrical outlet) to perform a complete evaluation. Medical staff next came in and informed us they had not received a court order for the evaluation and that we would have to get one in hand before we could see Mr. Runnels.

We went to the administration office, eventually talked to a supervisory officer, who stated the following:

1. Mr. Runnels would have to be tested shackled with no hands free.
2. If I wanted his hands free, I would be required to sign a waiver accepting all risk and releasing Potter County from any liability if Mr. Runnels became aggressive.
3. They would not provide a guard outside the door if I tested him in this setup in the medical area, which had a door that opened freely from inside into the medical area.
4. I could test in the wire room in which we would be separated by a wire barrier with a pass-through.

I explained that I would not be able to do a proper evaluation with no contact or without his having both hands free. I stated that I could work with him with one hand free if I could be face to face without a barrier. I was told that I would do so at my own risk. I agreed to proceed with the higher security measures proposed by facility administration, since I did not feel it was my place to interfere with the security measures PCDC felt were necessary. In addition, the unavailability of guard supervision in or just outside the open room was not felt to be appropriate given the level of security that the facility had exercised with him to this point. I felt that it was the County's responsibility to provide a secure environment (with some compromise on my part) to perform this evaluation as part of his defense.

I met with Mr. Runnels in the room with a wire barrier separating us (Attorney 3). A very small pass-through allowing a pencil and one sheet of paper to be pass-through at a time significantly limited my ability to present Mr. Runnels with testing materials on a wide variety of tests. In addition, there was no electrical outlet in the room, which prevented me from administering to tests of attention and information processing which would have been very useful in determining the presence or absence of attention-deficit/hyperactivity disorder.

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Mr. Runnels was brought into the room by correctional officers in full shackles, and both hands were freed. Although I had been told that a guard would not be made available if I used an open room with full access to Mr. Runnels, a series of three guards rotated at the door throughout the evaluation, constantly supervising the evaluation. One of them, a Hispanic male, was loudly rattling the shackle chains outside the door for an extended period of time (10 minutes). I caught his eye and motioned for him to be quiet (finger to my lips). He subsequently stopped rattling the chains. The evaluation was completed as far as it could proceed with the limitations imposed on the process.

Limitations on Testing Procedures: Below is a listing of the tests that could be administered. In addition, a list of tests that could not be administered under the physical restrictions of the testing room is provided below, with specific reasons why the test could not be administered under these conditions.

Tests Administered	Modifications
WAIS-III Verbal subtests	None
WAIS-III Coding	Unable to demonstrate task to subject-had to talk through learning portion
Stroop Neuropsychological Screening Test	None
Ruff 2&7 Test of Selective Attention	None
California Verbal Learning Test	None
Wechsler Memory Scale-III (Logical Memory)	None
Trail Making Test Parts A&B	Could not demonstrate task to subject-had to talk through learning portion
MAE Visual Naming Test	Had to show visual stimuli (pictures of objects to be named) through wire barrier
MAE Controlled Word Association Test	None
MAE Sentence Repetition Test	None
Wide Range Achievement Test-3	None
Lateral Dominance Examination	Could not administer grip strength test
Luria Tests of Motor Programming & Inhibition	None
Validity Indicator Profile (Verbal Subtest)	None but could not administer Visual portion of test

Tests Not Administered	Modifications
WAIS-III Performance subtests	Could not pass materials (blocks, cards) through slot; detailed visual test stimuli could not be shown through wire barrier-would have rendered test administration invalid
IVA Continuous Performance Test	Could not administer computer test through pass-through or across wire barrier
Paced Auditory Serial Addition test	No electrical outlet in room to operate tape recorder (need for battery power not anticipated due to testing other capital cases in PCDC)
Seashore Rhythm Test	No electrical outlet in room to operate tape recorder
Wechsler Memory Scale-III (Visual Reproduction)	Detailed visual test stimuli could not be shown through wire barrier-would have rendered test administration invalid
Rey-Osterrieth Complex Figure Memory Test	Same as above
Category Test	Could not pass materials (blocks, cards) through slot; detailed visual materials could not be shown through wire barrier-would have rendered test administration invalid

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Tests NOT Administered as Planned (continued)	administration invalid
	Modifications
Tactual Performance Test	Could not pass test materials through slot
Tower of Hanoi Test	Could not administer computer test through pass-through or across wire barrier
Reitan-Klove Sensory Perception Test	No physical access to patient to test senses of touch, hearing, and vision
Finger Oscillation Test	Could not pass test equipment through slot
Grooved Pegboard Test	Could not pass test equipment through slot
Graphomotor Programming	Could not pass test equipment through slot

TEST RESULTS:

Intellectual: Intellectual testing could only be partially administered due to restricted physical access to Mr. Runnels. Consequently, the Verbal Subtest of the WAIS-III was administered, but only one subtest of the Performance measures could be administered. Mr. Runnels obtained a Verbal I.Q. of 99, reflecting a score in the average range. His vocabulary, abstract verbal reasoning, and auditory attention span were in the average range. He performed in the high average range on measures of his general fund of information and his knowledge of general social conventions. His responses were generally organized and fairly concise. Mr. Runnels performed in the low average range on a measure of mental arithmetic. It is difficult to determine to what extent this may reflect limited math skills versus problems with his auditory attention span, which is critical to this task.

Mr. Runnels performed in the high average range on a measure of visuospatial processing speed from the performance measures of the WAIS-III. He could not be accessed physically, since he was tested through a wire grid with a narrow pass-through. Therefore, he could not be administered other spatial measures from the WAIS-III. Mr. Runnels' age-corrected scaled scores on the WAIS-III are listed below:

Verbal Tests	Scaled Scores	Performance Tests	Scaled Scores
Vocabulary	9	Picture Arrangement	--
Similarities	9	Picture Completion	--
Information	12	Block Design	--
Comprehension	13	Matrix Reasoning	--
Arithmetic	7	Digit Symbol	12
Digit Span	10	Letter-Number Sequencing	10

(Average = 10; Standard Deviation = 3)

Attention & Information Processing: Mr. Runnels performed in the average range on a measure of his auditory attention span. His selective visual attention was also found to be within normal limits on a task requiring him to cross out the numbers "2" and "7" embedded among other numbers and letters. He performed in the average range on a measure of auditory attention span and concentration, requiring him to re-sequence numbers and letters in order after they were presented mixed together.

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Mr. Runnels could not be administered three other measures of attention due to a lack of an electrical outlet in the room provided for testing. This had been requested, but the room in which I was allowed access to him did not have the requested electrical outlet. In addition, he could not access the computer necessary for him to take the computerized measure of his sustained attention.

Memory: Mr. Runnels' spatial memory could not be measured due to restricted physical access to him. However, he performed normally on measures of his memory for verbal information. He was administered a list of 16 words presented over five trials, and his immediate and delayed recall on this measure were both normal. He was also able to learn and effectively retain the content of two paragraph-length stories read aloud to him. Based on these findings, there is no indication of impairment in his verbal memory. However, there is no data to allow assessment of his visual memory.

Complex Cognitive Functioning: Again, due to restricted physical access to Mr. Runnels, he could not be administered the normal range of tests measuring his higher-level reasoning and problem solving abilities. Since this area, particularly executive functioning, is quite relative to impulsive behavior and impaired self-regulation, this represents a significant deficiency in the range of this evaluation. Mr. Runnels performed normally on a measure of basic cognitive flexibility requiring him to alternately sequence numbers and letters on a page. However, he could not be administered the Category Test, the Tactual Performance Test, or the Wisconsin Card Sorting Test, standard measures of abstract reasoning and logical analysis.

Language & Academic: Mr. Runnels demonstrated no deficits in his expressive or receptive language. His ability to name objects, generate a high volume of words (verbal fluency), and understand fairly lengthy sentence-length spoken communications were all above average.

Academic testing revealed average reading and spelling abilities. However, Mr. Runnels' math skills were in the low average range, with a score reflecting seventh-grade math proficiency. This most likely reflects his limited educational exposure rather than a formal learning disability in math.

Sensorimotor: Mr. Runnels' sensory functioning could not be assessed at all due to the restricted physical access to him. This testing requires close physical proximity and some touching of the subject. Likewise, motor testing could not be performed in the normal manner, since tools required for measuring grip strength, finger oscillation speed, and fine motor speed and dexterity could not be transferred through the pass-through. Mr. Runnels was administered the Luria Tests of Motor Programming and Motor Inhibition. These are clinical observation techniques that assess certain frontal lobe functions. He performed normally on these measures and also on a measure of motor inhibition.

Symptom Validity Testing: Mr. Runnels was administered the Validity Indicator Profile, a pencil-and-paper measure of effort sensitive to suboptimal motivation and

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malinger. He performed in the "compliant" range, indicating that he put forth a consistent effort on this measure. This finding is consistent with his other largely normal findings on neuropsychological and intellectual testing. Consequently, these data reflect no malingering or efforts to negatively influence his test results.

SUMMARY: Mr. Runnels demonstrated essentially intact neurocognitive functioning in the limited areas that could be assessed with the limitations on physical access imposed on the evaluation. Mr. Runnels demonstrated average intellectual abilities. His performance on measures of attention and memory were also average. Higher cognitive abilities could not be adequately measured. However, he performed in the average range on a simple measure of basic cognitive flexibility. His performance on measures of language and academic functioning were normal. However, his math score was in the low average range, most likely reflecting a limited educational exposure. Motor functioning could not be properly assessed. However, motor programming and motor inhibition were within normal limits. There was no indication of malingering or suboptimal motivation on symptom validity testing.

Several hypotheses were raised by Mr. Runnels' clinical interview data. However, due to insufficient data, the validity of these hypotheses cannot be established. Specifically, Mr. Runnels presents with a history suggestive of attention-deficit/hyperactivity disorder. Unfortunately, tests critical to identifying ADHD could not be administered due to the limited physical access to Mr. Runnels and the lack of an electrical outlet as had been requested so that tape recorded measures could be administered to him.

Questions about Mr. Runnels' higher-level executive functioning, including his reasoning processes, his impulse control, and his ability to plan ahead also were unanswerable due to our inability to administer sufficient testing in these areas. It is uncertain whether sensorimotor data would have provided any significant information regarding Mr. Runnels' cognitive or behavioral status, but without this data, the value of this information cannot be excluded.

It is likely that Mr. Runnels has attention-deficit/hyperactivity disorder. Consistent with ADHD, he may have deficits in his executive functioning that result in his having poor planning, poor impulse control, and difficulty anticipating consequences.

It appears that as a child and teenager Mr. Runnels never received any therapeutic or psychological services beyond special education programming and brief psychological testing while in juvenile detention. His marginal performance in school, his defiant behavior, and the lack of structure in his childhood home all suggest a need for more individualized attention in school. Since he did not simply have an educational problem but demonstrated serious behavioral difficulties, it would have been appropriate and clinically indicated for the school system to provide him with some psychological counseling and behavioral intervention. This does not appear to have ever been provided to him in the school system. It is impossible to determine if this would have improved his educational or behavioral outcome. However, the absence of these services is rather striking in an individual with behavioral problems as pronounced as

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his. Likewise, Mr. Runnels was apparently never afforded any psychological services (other than testing) in the juvenile detention system. He was placed in a halfway house but left after one day without being required return for further treatment. Some form of counseling could have been provided or mandated by the Court during this time.

While in prison, Mr. Runnels has shown obvious problems with inappropriate and aggressive behavior, agitation, and depression. He reported feeling extremely pessimistic and hopeless about his ability to serve his sentence. In addition, he has overdosed on two occasions, once with the intention of committing suicide. His behavioral problems in prison resulting in his being placed in segregation also point toward an individual with a greater level of psychological disturbance than is typical of the average inmate. The absence of psychological services (which are available in the prison system) is difficult to justify in his case.

One cannot assume that Mr. Runnels would not have attacked the guard if he had been given appropriate psychological services. Nonetheless, it seems probable that the likelihood of aggressive behavior on his part would have been significantly reduced if he had been given appropriate psychological and psychopharmacologic intervention. Medication could have diminished his level of agitation, and counseling of some kind may have allowed for some monitoring of his potential for aggressive acting out at any given time. He reported taking contraband medication (blood pressure medication) in an attempt to settle himself down while he was in segregation. This again supports the idea that he might have benefited from pharmacologic intervention as a means of helping him manage his frustration and internal agitation more effectively.

Based on the data obtained in this evaluation, Mr. Runnels may have attention-deficit/hyperactivity disorder. This would not explain his violent behavior toward the guard. However, it may be a contributing factor in light of other psychological difficulties, since the ADHD may have diminished his frustration tolerance and behavioral control. Other possible neurocognitive or neurobehavioral deficits cannot be addressed as potential contributors to his behavior, since these areas could not be appropriately measured in light of the limitations imposed on this examination.

It does appear, however, that Mr. Runnels never received appropriate psychological services in school, the juvenile detention system, or in TDCJ. Given his pattern of disturbed behavior, this appears to represent an oversight on the part of authorities, both in terms of helping Mr. Runnels and in terms of managing the impact of his behavioral problems on his environment, both in the community and in prison.

Richard L. Fulbright, Ph.D.
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APPENDIX G

Petitioner's Request for the Issuance of a Certificate of Appealability and
Supporting Brief, *Runnels v. Davis*, No. 16-70012 (5th Cir. June 30, 2016)

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

TRAVIS TREVINO RUNNELS.

Petitioner,

v.

LORIE DAVIS, Director,
Texas Department of Criminal Justice,
Institutional Division,

Cause No. 16-70012

Respondent

**REQUEST FOR THE ISSUANCE OF A CERTIFICATE OF
APPEALABILITY AND SUPPORTING BRIEF**

Comes now Travis Trevino Runnels and pursuant to 28 U.S.C. §2253(c) respectfully requests that this Court issue a Certificate of Appealability and submits the following brief in support of the Request.

I. NATURE OF THE CASE

Mr. Runnels is a Texas inmate under sentence of death who has filed a notice of intent to appeal from a District Court Order denying his petition for writ of habeas corpus and denying a certificate of appealability (COA). *Runnels v. Stephens*, No. 3:09-cv-01591-M (N.D. Tex. May 28, 2015) ECF No. 87, ROA 797 *et. seq.*

II. PROCEDURAL HISTORY

On April 29, 2003, the Petitioner was indicted for capital murder for the death of Stanley Allen Wiley a Texas Department of Criminal Justice (TDCJ) prison guard.

On October 26th, 2005, the Petitioner entered a plea of guilty to capital murder in the 320th District Court of Potter County, Texas. After the jury rendered its verdict on the two special issues, on October 28, 2005 the trial court imposed a sentence of death on the Petitioner.

On December 15, 2005 the District Court held a hearing on the Petitioner's Motion For a New Trial, and after hearing testimony denied the motion.

The Petitioner appealed the jury's verdict to the Court of Criminal Appeals, and on September 12, 2007, the Texas Court of Criminal Appeals issued its decision denying the Petitioner's appeal. *Runnels v. State*, No. AP-75,318 (Tex. Crim. App. 2007) (unpublished).

On September 17, 2007 counsel for the Petitioner filed a Petition for Habeas Corpus in the District Court setting forth eleven grounds for relief, along with a request for an evidentiary hearing. The district court denied the hearing request and adopted the State's proposed findings of fact and conclusions of law. *Ex Parte Runnels*, No. 48,950-D, 320TH District Court, Potter County, TX.

On Jun8, 2011 the Court of Criminal Appeals issued an Order remanding the Petitioner's case to the district court for an evidentiary hearing on the issue of the Petitioner's claim that trial counsel were ineffective. *Ex Parte Runnels*, No. WR-46,226-01 Tex. Crim. App. 2011).

On September 9, 2011 the district court held an evidentiary hearing on the Petitioner's ineffective assistance of counsel claim.

After the hearing the parties submitted proposed finding of fact and conclusions of law, and on October 13, 2011 the district court adopted the State's proposed finding and recommended that the Petitioner's writ of habeas corpus be denied.

On March 7, 2012 the Court of Criminal Appeals issued an Order adopting the district court's findings of fact, conclusions of law and recommendation and denied the Petitioner's application for habeas corpus. *Ex Parte Runnels*, No. WR-46,226-01 (Tex. Crim. App. 2012) (unpublished).

On December 28, 2012 the Petitioner filed a Petition for Habeas Corpus in U.S. District Court for the Northern District of Texas. *Runnels v. Thaler*, No. 2:12-cv-0074 (Tex. N.D. Dec. 28, 2012).

On July 8, 2013 the Respondent filed its Answer, ECF No. 30, ROA213 *et. seq.*

On October 11, 2013 the Petitioner filed his Reply, ECF No. 34, ROA 927, and on October 24, 2013 the Respondent filed its surreply. ECF No. 35, ROA 937.

On March 15, 2016 the Magistrate issued a Report and Recommendation on the Petition for Habeas Corpus recommending that the Petitioner be denied relief. ECF No. 37, *sub nom Runnels v. Stephens*. ROA 966 *et. seq.*

On March 31, 2016 the District Court issued an order and judgment adopting the Magistrate report and denying the Petitioner relief and a Certificate of Appealability. ECF Nos. 41, 42 and 43. ROA 1045-1049.

The Petitioner filed a timely Notice of Appeal on April 29, 2016. ECF No. 45, ROA 89, ROA 1050.

III. The Antiterrorism and Effective Death Penalty Act

Since Mr. Runnels was convicted in 2005, his claims are governed by the provisions of the Antiterrorism and Effective Death Penalty Act (AEDPA), which provide, in pertinent part, as follows:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim –

(1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d)

Thus, a federal court reviewing a state court's decision under § 2254(d)(1) must conduct a two part inquiry. The United States Supreme Court set forth the nature of this inquiry in *Williams v. Taylor*, 529 U.S. 362, 120 S.Ct. 1495 (2000). After addressing the mandatory language of § 2254(d) pertaining to the granting of a writ of habeas corpus, the Court went on specifically to address § 2254(d)(1):

This basic premise informs our interpretation of both parts of § 2254(d)(1): first, the requirement that the determinations of state courts be tested only against "clearly established Federal law, as determined by the Supreme Court of the United States," and second, the prohibition on the issuance of the writ unless the state court's decision is "contrary to, or involved an unreasonable application of," that clearly established law. . . .

529 U.S. at 379, 120 S.Ct. at 1505.

In addressing the “clearly established law” requirement of § 2254(d)(1), the Court analogized this requirement to the antiretroactivity rule set forth in *Teague v. Lane*, 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), wherein the Supreme Court held that a petitioner was not entitled to habeas relief, because he relied on a rule that had not been announced at the time his state conviction became final. The Court further stated:

The antiretroactivity rule recognized in *Teague*, which prohibits reliance on "new rules," is the functional equivalent of a statutory provision commanding exclusive reliance on "clearly established law." Because there is no reason to believe that Congress intended to require federal courts to ask both whether a rule sought on habeas is "new" under *Teague*--which remains the law--and also whether it is "clearly established" under AEDPA, it seems safe to assume that Congress had congruent concepts in mind. It is perfectly clear that AEDPA codifies *Teague* to the extent that *Teague* requires federal habeas courts to deny relief that is contingent upon a rule of law not clearly established at the time the state conviction became final.

529 U.S. at 379-380, 120 S.Ct. at 1506 (footnotes omitted).

Further, the issue is not merely whether the state court got the right result but, in some cases, the rationale the state court used to obtain its result. In *Fratta v. Quarterman*, 536 F.3d 485 this Court (5th Cir. July 2, 2008) explained the standard:

Finally, we offer these additional thoughts in response to the State's assertion that the district court improperly reviewed the CCA's reasoning, rather than its ultimate decision. The State correctly notes that the "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir.2002) (*en banc*). But from this premise the State appears to suggest that the district court was powerless to consider anything but the state court's ultimate decision finding no Confrontation Clause error. This argument is most obviously flawed in that it ignores the fact that the "unreasonable application" test is but one of two clauses in Section 2254(d)(1) which permit habeas relief to be granted, the other being the "contrary to" test. Section 2254(d)(1) is "unmistakably disjunctive, and the Supreme Court has held that independent meaning must be given to both the statute's 'contrary to' clause and its 'unreasonable application of' clause." *Robertson v. Cain*, 324 F.3d 297, 302 (5th Cir.2003) (citing *Williams [v. Taylor]*, 529 U.S. [362,] 404-05, 412-13 [2000])). And in assigning meaning to the "contrary to" clause, the Court clearly has contemplated that a federal court will sometimes look beyond the state court's ultimate decision -- for example, to determine if the state court applied a rule that contradicts governing law. *See Williams*, 529 U.S. at 405-06. Additionally, while it is certainly true that *when the state court has identified the correct governing legal principle*, the federal court's "unreasonable application" determination is limited to examining the state court's ultimate legal conclusion (and not the "method by which the state court arrives at its conclusion"), *see Neal*, 286 F.3d at 244-46, in other situations the "unreasonable application" determination may permissibly take a different form -- for example, the question whether the state court has "unreasonably extend[ed] a legal principle ... to a new context where it should not apply (or unreasonably refuse[d] to extend a legal principle to a new context where it should apply)," *Williams*, 529 U.S. at 408, will certainly require consideration of more than the state court's ultimate decision. The bottom line is that satisfaction of *either* the "contrary to" *or* the "unreasonable application" test -- under *any* of the multiple scenarios described by the Court -- will free the federal court from the constraints of Section 2254(d)(1). *See id.* at 406; *Robertson*, 324 F.3d at 302.

536 F.3d at 504-505.

IV. STANDARDS FOR THE ISSUANCE OF A CERTIFICATE OF APPEALABILITY

The standards for issuing a Certificate of Appealability were clarified by the United States Supreme Court in *Miller-El v. Cockrell*, 537 U.S. 322, 123 S.Ct. 1029 (2003). 28 U.S.C. Sec. 2253 mandates that Mr. Runnels demonstrate a substantial showing of a denial of a constitutional right. Because the District Court ruled on a procedural basis, Mr. Runnels must show both that “jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.” *Slack v. McDaniel*, 529 U.S. 473, 484 (2000).

As the *Miller-El* Court noted:

This threshold inquiry does not require full consideration of the factual or legal bases adduced in support of the claims. In fact, the statute forbids it. When a court of appeals side steps this process by first deciding the merits of an appeal, and then justifying its denial of a COA based on its adjudication of the actual merits, it is in essence deciding an appeal without jurisdiction.

To that end, our opinion in *Slack* held that a COA does not require a showing that the appeal will succeed. Accordingly, a court of appeals should not decline the application for a COA merely because it believes the applicant will not demonstrate an entitlement to relief. The holding in *Slack* would mean very little if appellate review were denied because the prisoner did

not convince a judge, or, for that matter, three judges, that he or she would prevail. It is consistent with § 2253 that a COA will issue in some instances where there is no certainty of ultimate relief. After all, when a COA is sought, the whole premise is that the prisoner "has already failed in that endeavor." (citation omitted).

. . .

A prisoner seeking a COA must prove "something more than the absence of frivolity" or the existence of mere "good faith" on his or her part. *Barefoot, supra*, at 893, 103 S.Ct. 3383. We do not require petitioner to prove, before the issuance of a COA, that some jurists would grant the petition for habeas corpus. Indeed, a claim can be debatable even though every jurist of reason might agree, after the COA has been granted and the case has received full consideration, that petitioner will not prevail.

537 U.S. at 336-338, 123 S.Ct. at 1039-1040.

The foregoing standard does not require a petitioner to prove that some jurists would grant the petition for writ of habeas corpus; a claim can be debatable even "though every jurist of reason might agree [after full consideration] that the petitioner will not prevail." 537 U.S. at 338. *See also Gonzales v Thaler*, 132 S.Ct. 641, 650 (2012) ("The COA process screens out issues unworthy of judicial time and attention and ensures that frivolous claims are not assigned to merits panels.").

In the recent Fifth Circuit Court of Appeals case of *Buck v. Stephens*, No. 14-70030 (5th Cir. 2016)(unpublished), the United States Supreme Court has

granted certiorari on the question of whether “[t]he Panel Improperly Sidestepped the COA Process by Denying Relief Based on its View of the Merits.” *Buck v. Stephens*, No. 15-8049 (June 6, 2016) at iv. *See also*, *Buck v. Stephens*, No. 14-70030.1 at 2-6 (Dennis, J. dissenting)(Nov. 6, 2015) (unpublished).

V. REASONS FOR GRANTING A CERTIFICATE OF APPEALABILITY (COA)

The primary issue before this Court is whether jurists of reason would find the lower court’s decision denying the Petitioner’s claim of ineffective assistance of trial counsel debatable.

Claims regarding the a violation of a Petitioner’s Sixth Amendment right to effective assistance of counsel are governed by *Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052 (1984). To demonstrate a violation of this right a petitioner must prove: 1) that counsel’s representation fell below professional norms; and 2) there is a reasonable probability that but for counsel’s deficiency, the result of the trial would have been different. 466 U.S. at 687, 694, 104 S. Ct. at 2064, 2068.

Upon his indictment for capital murder Mr. Runnels was appointed two attorneys to represent him; James Durham and Laura Hamilton. According to the record of the state writ evidentiary hearing, Ms. Hamilton had never participated in the trial of a capital case, had never taken any training in the defense of death

penalty cases, nor did she have any familiarity with the ABA Guidelines pertaining to the representation of capital defendants. *See* State Writ Transcript Vol. 2 at 24-25 (hereinafter SWTR). With respect to Mr. Durham, who had passed away prior to the state writ hearing, Ms. Hamilton indicated that she was unaware of whether he had taken any training, but believed he had defended several capital murder defendants. *Id.*

As a part of their defense, trial counsel retained Kathy Garrison, a private investigator, to conduct background investigation of the case. Although the ABA Guidelines call specifically for “at least one mitigation specialist and one fact investigator,” no mitigation investigator was retained. *See* American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (2003), Guideline 10.4. (hereinafter ABA Guidelines). Because trial counsel elected to have Mr. Runnels enter a plea of guilty to the offense, Ms. Garrison confined her background investigation to the punishment phase of the proceedings. SWTR at 25.

During the course of her investigation Ms. Garrison interviewed family members, requested and obtained school, hospital and police and offense records as well as Mr. Runnels’ TDCJ files. Ms. Garrison executed an affidavit during the course of state habeas proceedings which was introduced by the State as an exhibit at the evidentiary hearing ordered by the Court of Criminal Appeals.

As a result of her investigation and interviews of family members, a clear pattern began to emerge of a troubled childhood, a family history of drugs, alcohol and substance abuse on the part of family members and escalating instances of misconduct on the part of the Petitioner. *See* 2 SWTR at 83-85. When specifically asked by Ms. Garrison what could have led to Mr. Runnels' situation, according to Ms. Garrison's notes, Mr. Runnels' uncle related that "nobody took charge and guided him when something could have been done for Travis." *Id.* at 84.

The failure on the part of family members to take any action or get any help for the Petitioner resulted in his quitting school and beginning to engage in criminal behavior, resulting in the Petitioner as a juvenile being charged with a number of offenses and incarcerated as an adult under the name of Frank Pope. *See Id.* at 193.

Ms. Garrison also examined Mr. Runnels' juvenile record which revealed he was confined to a shelter on two occasions and indicated some progress and a release to the custody of his mother on the first confinement, but on the second he simply left without completing his time. *Id.* at 115. There were no records of any treatment during this confinement

A further examination of the Petitioner's juvenile record revealed a 1993 psychological evaluation conducted in conjunction with a juvenile adjudication for a burglary offense, which recommended:

Travis needs a highly structured environment with constant supervision; vocational training; he could use a mentoring program with a male role model; perhaps group counseling for peer support to confront maladaptive thinking and facilitate appropriate social and communication skills.

Id. at 117.

Notwithstanding the foregoing recommendation, the juvenile court followed none of the recommendation in its adjudication of the offense and simply ordered restitution. *Id.* at 120.

In her communication with counsel Ms. Garrison summed up her investigation into Mr. Runnels' juvenile background as follows:

Probation recommended Travis be sent to TYC. In the meantime he ran off from the Willingham Shelter (with Darmonica's assistance) and was later found in adult jail and was in fact on his way to TDCJ. (PIA thing in Dallas or Tarrant).

All this juvenile record began in 1991. However, on other earlier occasions cases weren't filed. Travis was living everywhere. Nancy was living everywhere. Papers were issued and returned unserved numerous times as they could not be located. Sometimes Nancy was the responsible party and sometimes Lillie Mae was. She did [not] have a permanent address. Travis was "lost" off and on, using different names off and on, in school off and on, being ordered not to associate with certain individuals off and on, ad infinitum. I could not begin to tell you who he was living with at any given time, the family cannot and any documentable information we have in that regard is suspect.

Id. at 117.

In addition to retaining Ms. Garrison, trial counsel retained a neuropsychologist and a psychiatrist to evaluate the Petitioner. The neuropsychologist, Dr. Richard Fulbright, reviewed Mr. Runnels's entire history

and evaluated Mr. Runnels on September 8-9, 2005, but due to restrictions placed upon him and the Petitioner, he was unable to perform a complete neuropsychological evaluation, but he did prepare comprehensive report addressing some of the issues that should have been addressed by counsel. Of significance in his report are some of the following observations:

It appears that as a child and teenager Mr. Runnels never received any therapeutic or psychological services beyond special education programming and brief psychological testing while in juvenile detention. His marginal performance in school, his defiant behavior, and the lack of structure in his childhood home all suggest a need for more individualized attention in school. Since he did not simply have an educational problem but demonstrated serious behavioral difficulties, it would have been appropriate and clinically indicated for the school system to provide him with some psychological counseling and behavioral intervention. This does not appear to have ever been provided to him in the school system. It is impossible to determine if this would have improved his educational or behavioral outcome. **However, the absence of these services is rather striking in an individual with behavioral problems as pronounced as his.** Likewise, Mr. Runnels was apparently never afforded any psychological services (other than testing) in the juvenile detention system. He was placed in a halfway house but left after one day without being required return for further treatment. Some form of counseling could have been provided or mandated by the Court during this time.

Fulbright Report at 11-12. Vol 3 SWTR at 178-179.

Doctor Fulbright further noted that:

One cannot assume that Mr. Runnels would not have attacked the guard if he had been given appropriate psychological services. Nonetheless, it seems probable that the likelihood of aggressive behavior on his part would have been significantly reduced if he had been given appropriate psychological and psychopharmacologic intervention. Medication could have diminished his level of agitation, and counseling of some kind may

have allowed for some monitoring of his potential for aggressive acting out at any given time. He reported taking contraband medication (blood pressure medication) in an attempt to settle himself down while he was in segregation. This again supports the idea that he might have benefitted from pharmacologic intervention as a means of helping him manage his frustration and internal agitation more effectively.

Based on the data obtained in this evaluation, Mr. Runnels may have attention deficit/ hyperactivity disorder. This would not explain his violent behavior toward the guard. However, it may be a contributing factor in light of other psychological difficulties, since the ADHD may have diminished his frustration tolerance and behavioral control. Other possible neurocognitive or neurobehavioral deficits cannot be addressed as potential contributors to his behavior, since these areas could not be appropriately measured in light of the limitations imposed on this examination.

It does appear, however, that Mr. Runnels never received appropriate psychological services in school, the juvenile detention system, or in TDCJ. Given his pattern of disturbed behavior, this appears to represent an oversight on the part of authorities, both in terms of helping Mr. Runnels and in terms of managing the impact of his behavioral problems on his environment, both in the community and in prison.

Id. at 12, 3 SWTR at 179.

Trial counsel also had Dr. Lisa Clayton examine the Petitioner, but the record provided to undersigned counsel contains no indication as to what she was provided with in terms of background information, nor does it contain a report.

Further, evidence existed in the record of the possibility that Mr. Runnels had sustained a number of head injuries, a fact which was neither raised or pursued by either trial counsel or their investigator. *See discussion infra.*

Notwithstanding the documentation of a chaotic and traumatic childhood provided by the investigation of Ms. Garrison, and the clear evidence of institutional and familial failure in getting Mr. Runnels the help he needed as a child and adolescent, defense counsel neither arranged for Doctor Fulbright to complete his neuropsychological testing , nor did they in any way attempt to formulate a mitigation case based upon this information. Instead, when questioned by the State as to why they did not call either of the experts, Ms. Hamilton testified that “[t]hey could not testify as to anything that would be favorable to Travis.” 2 SWTR at 12

Trial counsel instead based their punishment case on challenging future dangerousness solely through cross examination of the State’s witness and somehow attempting to “humanize” their client through calling members of his family, although this so-called strategy was never fully articulated either prior to trial or at the evidentiary hearing.¹ Given the fact that lead counsel, who tried the whole case, was deceased at the time of state postconviction proceedings, there is a paucity of information with respect to counsel’s formulation of a trial strategy other than a few pages of testimony by Mr. Durham at the hearing on the motion for a new trial in which he voices his opinion that the State’s punishment evidence

¹ It seems that there also was some attempt to formulate a strategy based upon the fact that Mr. Runnels’ great grandfather was lynched in Dallas. *See* SWTR, Vol 2 at 11.

on the issue of future dangerousness could not withstand his motion for a directed verdict. *See* 19 RR at 22-23.

Although Mr. Runnels entered a plea of guilty at the commencement of his trial, this was done with the express assurances of defense counsel that they would put on a mitigation case during the punishment phase of his trial. a copy of Mr Runnels' Declaration addressing this issue is annexed hereto as Exhibit A.

Notwithstanding the entry of a guilty plea, after its opening statement, the prosecution nonetheless put on nine witnesses at the "guilt" phase of the trial, in which it provided the details of the offense and Mr. Runnels' actions in connection therewith, and eleven witnesses at the punishment phase, for a total of twenty individuals who testified against the Petitioner.

In contrast to the case presented by the prosecution and in express violation of the assurances made to Mr. Runnels, defense counsel made no opening statement, introduced no evidence and although defense counsel subpoenaed members of Mr. Runnels' family², they put on no witnesses, and confined its presentation to a nine page closing statement, thus leaving virtually unblemished the horrific picture of the Petitioner painted by the prosecution. *See* Declaration of Travis Trevino Runnels, ECF No. 17-1, ROA 131.

² The dispute regarding the Petitioner's family members' claim that they were told by defense counsel they would not be called and defense counsels' claim that the family members simply left will be addressed *infra*.

As one of the jurors who testified at the hearing on appellate counsel's motion for a new trial noted:

A. I came to be a juror on a trial here that carried two people's lives. We had a defendant and we had a -- the -- the deceased man. I assumed that -- I have concern in my heart for everyone who was involved in this -- in this trial who -- whose lives are at stake in this trial. I have just simply felt badly that there was no one to testify in the other young man's defense, that I was going to get the opportunity to hear.

Q. Did you feel, if there was evidence, that you should have heard that?

A. If there was evidence, yes, I expected to hear any kind of evidence there was, but I don't know if there was evidence. It was a heartfelt thing for me more than anything. I had no opinion against anything that happened in the trial. My heart just went out to the other young man as well, -- to this young man as well. Plain and simple

19 RR at 12.

Although the Magistrate Report and the Court gave great weight and emphasis to the inmate testimony (all of whom were called by the prosecution, as the defense put on no witnesses)³, it failed to address Mr. Durham's hubris at hearing on the motion for new trial in stating he was "flying by the seat of his pants," by instead attributing the statement to a **completely unfounded**

³ The absurdity of basing the entire mitigation case solely on testimony of inmates from the same prison in which Mr. Runnels committed the murder of a prison guard defies understanding.

assumption not contained in the record that the witnesses left without telling him.

Neither Ms. Hamilton nor Ms. Garrison knew the reason that the Runnels family and witnesses left. The only testimony regarding this issue is contained in the affidavits obtained by state habeas counsel. For example, Nancy Taylor, who appeared at the court house prepared to offer testimony, stated under oath that:

I thought I would testify at Travis' trial. My mother and I just waited and waited outside the courtroom. Someone - either Kathy or Travis' lawyer - finally told us that they weren't going to be needing us after all. We went home after that.

ECF No. 17-2 at 5, ROA 138. *See* discussion *infra* regarding the potential importance of Ms. Taylor's testimony. *See also* Affidavit of Lillie Mae Taylor, ECF 17-5, in which she stated under oath that "[o]ne of the attorneys just came out and told us the trial was over and they wouldn't need us to testify."

While the Court gave credence to Mr. Durham's unsubstantiated cavalier remarks in the context of an alleged "strategy" for failing to present any mitigation evidence, it challenged the credibility of the sworn testimony of these witnesses because years after the trial they couldn't or didn't recite the names of the attorney or attorneys who told them they would not be needed.

It is respectfully submitted that the foregoing testimony under oath completely debunks the assumption set forth in Note 6 of the Report and

Recommendation that Mr. Durham was referring to the fact that the Runnels family had left without notice in his flippant remark about his handling of the Petitioner's case, which is total unsupported by the evidence⁴.

Similarly, Ms. Hamilton's testimony at the hearing that the experts "could not testify as to anything that would be favorable to Travis", 2SHCR at 12, simply is without foundation for a number of reasons. First, and as noted above, this lawyer had absolutely no experience in capital litigation and building a mitigation case, and thus was not qualified to offer an opinion on an issue of this nature.

Second, although Ms. Garrison conducted a thorough investigation into the Petitioner's background, she simply did not have the background or qualifications to assess or diagnose potential mental or psychological issues as required in Guideline 4.1A2.

A qualified mitigation investigator or, more importantly, an experienced and trained capital litigator, would have insisted that the neuropsychologist retained by the defense team be allowed to complete his evaluation in a proper atmosphere, rather than through the glass at the jail, particularly in light of some of the evidence in the Petitioner's background..

⁴ Clearly, both state and federal habeas counsel were hamstrung by the fact that Mr. Durham, who tried the entire case himself with second chair counsel doing virtually nothing, was dead at the time of the state habeas hearing and thus could neither be called nor cross-examined by the Petitioner's habeas counsel, although both the Magistrate and the District Court somehow divine a mitigation strategy from one flippant remark made by Mr. Durham which states nothing about witnesses leaving the courtroom.

The importance of this omission is highlighted in some of information set out in the Court's discussion of the potential mitigation witnesses in the Report and Recommendation. For example, in her affidavit supplied to state habeas counsel, in talking about the Petitioner's Nancy Taylor stated that "[a]t the age of ten, he would do funny things like run into the wall with his head." ECF No.37 at 14. Similarly, Darmonica Runnels, the Petitioner's brother stated in his affidavit that "Runnels ran head first into a flagpole in elementary school and knocked himself out." *Id.* at 17.

These events, more commonly known as traumatic brain injuries (TBI) are of serious consequence, particularly to a young child whose brain is still in the developmental stage, and can result in damage to the frontal lobe area of the brain which controls impulse and executive functions, and could very well have cast light on the impulsive nature of the crime had the proper testing been performed.

Instead, both counsel and their investigator blindly ignored both these and other facts about the Petitioner's family background and the further fact that the neuropsychologist was not allowed properly to complete his evaluation, thus prejudicing their client by leaving the jury with a picture of Mr. Runnels as a cold-blooded killer who murdered his supervisor over a minor dispute, which resulted in a sentence of death.

In sum, then, the decision of both the Magistrate and the District Court to deny the Petitioner's ineffective assistance of counsel claim is based almost solely on unreasonable assumptions made by the Court regarding the deceased Mr. Durham, none of which are supported by the record, particularly with respect to the issue of defense counsel's total abdication of their duty to put on a mitigation case as required by both the ABA Guidelines and the United States Supreme Court decisions in *Wiggins v. Smith*, 123 S.Ct. 2527 (2003) and *Strickland v. Washington*, *supra*.

It is therefore respectfully submitted that in light of the foregoing discussion that jurists of reason would find it debatable that the District Court's rulings that

VI. CONCLUSION

Based upon the foregoing discussion, counsel for the Petitioner respectfully submits and concludes that jurists of reason would find it debatable that the District Court's ruling dismissing the Petitioner's ineffective assistance of counsel claim as being without merit was correct.

RESPECTFULLY SUBMITTED this 30th day of June, 2015

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CERTIFICATE OF SERVICE

I hereby certify that on this the 30TH day of September 2016 a true and correct copy of the above Request for a Certificate of Appealability and Brief in Support of Request for Certificate of Appealability was served electronically and/or by first class mail, postage prepaid, upon the following:

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CERTIFICATE OF COMPLIANCE

This is to certify that this document was prepared on 8 ½ by 11 inch paper in native PDF text format with a 14 point font and contains approximately 5,413 words exclusive of the Certificate of Service and Certificate of Compliance.

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/s/Donald Vernay
Donald Vernay