No. _____

(CAPITAL CASE)

IN THE
Supreme Court of the United States

TERENCE TRAMAINE ANDRUS,
Petitioner,

vs.

TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

APPENDICES A - D

Gretchen Sims Sween*
P.O. Box 5083
Austin, Texas 78763-5083
(214) 557.5779 (telephone)
gsweenlaw@gmail.com

** Counsel of Record, Member of Supreme Court Bar*
Counsel for Petitioner

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-84,438-01

EX PARTE TERENCE TRAMAINE ANDRUS

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS FROM CAUSE NO. 09-DCR-051034 IN THE 240TH DISTRICT COURT FORT BEND COUNTY

***Per curiam*. RICHARDSON, J., filed a concurring opinion in which KELLER, P.J., and HERVEY and SLAUGHTER, JJ., joined.**

O R D E R

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

In November 2012, a jury convicted applicant of capital murder for intentionally or knowingly causing the deaths of Avelino Diaz and Kim-Phuong Vu Bui by shooting them with a firearm during the same criminal transaction. *See* TEX. PENAL CODE § 19.03(a). The trial evidence generally showed that, on October 15, 2008, a then-unidentified African American man shot Avelino Diaz to death while trying to "carjack" Diaz in a

Kroger's front parking lot in Fort Bend County. While fleeing, Diaz's assailant shot at the two occupants of a car which was entering the Kroger's side lot. The man killed the passenger (Kim-Phuong Vu Bui) and wounded the driver (Kim's husband, Steve Bui).

After investigation, Texas law enforcement officers identified applicant as a suspect. These officers subsequently learned that applicant had been arrested in New Orleans on an unrelated charge. The officers returned applicant to Texas after he waived extradition.

Applicant initially denied any involvement in the Kroger shootings. However, applicant ultimately confessed to the officers that he had shot the complainants. In his written statement, applicant asserted he was high on a mix of "embalming fluid" mixed with marijuana (a street name for marijuana or tobacco cigarettes dipped in phencyclidene (PCP)), cocaine, and beer when the offense occurred.

Applicant also essentially contended that he had acted in self-defense. Applicant admitted that he had been trying to take Diaz's car. However, applicant asserted that he tried to abandon the attempt after he saw that the car was a stick-shift, which he could not drive. But then Diaz got out of the car, trying to pull a pistol out of a holster. While fleeing the scene of Diaz's shooting, applicant asserted, the Buis tried to run applicant over with their car. However, applicant's account of the shootings contradicted the State's physical and testimonial evidence.

The jury found applicant guilty of capital murder as alleged in the indictment. *See*

TEX. PENAL CODE § 19.03(a)(7)(A). At the punishment phase, the State presented evidence of applicant's adjudicated and unadjudicated prior offenses. These included juvenile adjudications for felony possession of a controlled substance in a drug-free zone and criminal solicitation to commit felony aggravated robbery (involving a firearm). They also included evidence that Applicant had committed an aggravated robbery less than a month before the capital offense. During that offense, applicant kicked, beat, and threatened his victim with a knife. The State also showed the jury photographs of applicant's numerous gang-related tattoos. In addition, when applicant testified at the punishment phase, he admitted that he had been a member of the "59 Bounty Hunter Bloods" street gang.

Besides the evidence of his criminal history, the State presented evidence that applicant was confined by the former Texas Youth Commission (TYC) as a result of his criminal-solicitation juvenile adjudication. However, due to his behavior problems, which included aggressive or assaultive behavior towards other youths and staff, and his general failure to progress in TYC's rehabilitation program, applicant was transferred to Texas's adult prison system to complete his sentence. The State additionally presented evidence of applicant's significantly more disruptive, violent, and threatening behavior at the Harris County and Fort Bend County jails while awaiting trial in this case.

As we summarized previously in our opinion on direct appeal, the defense presented a punishment case which emphasized evidence of: applicant's socioeconomic

history; his long-standing drug abuse; the effect of drug abuse on adolescent brain development; and applicant's remorse. *See Andrus v. State*, No. AP-76,936, slip op. at 11–12 (Tex. Crim. App. Mar. 23, 2016) (op. on reh'g) (not designated for publication).

Applicant also testified in his own defense. Applicant asserted that: he had been exposed to drugs as early as 6 years of age, because his mother sold them; he rarely had adult supervision at home, and he started using drugs regularly when he was 15. *See id.* at 12. Applicant acknowledged that he does not like confined spaces and or being told what to do, and that he had previously acted out when feeling agitated. *See id.* at 12–13. However, Applicant stated that he had recently given his life to God, and he asserted that he no longer acted out. *See id.* Applicant additionally testified that he could help other inmates to avoid making the same mistakes that he had made. *See id.* at 13.

The jury answered the special issues submitted under Article 37.071 of the Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Id.* at 2.

In his application, applicant presents seven challenges to the validity of his conviction and sentence. The trial court held an evidentiary hearing. The trial court thereafter entered findings of fact and conclusions of law and recommended that we grant relief as to Claim 1 of applicant's allegations. However, the trial court recommended that we deny relief as to applicant's remaining claims.

We have reviewed the record regarding applicant's allegations. In Claim 2,

applicant alleges that his "due process rights were infringed when the jury was informed [that applicant] was wearing physical restraints during the punishment phase of his trial." In Claim 5, applicant alleges that his "death sentence was arbitrarily and capriciously assigned based on the jury's answer to the unconstitutionally vague [future dangerousness special issue]." Both Claim 2 and Claim 5 are procedurally barred, as they could have been raised on direct appeal. *See Ex parte Chavez*, No. WR-68,051-03, slip op. at 14 (Tex. Crim. App. October 3, 2018); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004). We accordingly deny relief on both Claim 2 and Claim 5 without reaching the merits of either allegation.

In Claims 1, 3, 4, 6, and 7, applicant alleges that trial counsel were constitutionally ineffective for: failing to conduct a reasonable investigation and presentation of available mitigating evidence (Claim 1); failing to preserve potential *Batson*[1] error (Claim 3); conceding the future dangerousness special issue (Claim 4); failing to properly object to allegedly inadmissible victim-impact evidence at the guilt-innocence phase of trial (Claim 6); and failing to preserve the record for direct appeal (Claim 7). However, applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of

[1] *Batson v. Kentucky*, 476 U.S. 79 (1986).

the proceedings would have been different, but for counsel's deficient performance.[2] *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688). Therefore, we deny relief on the merits of Claims 1, 3, 4, 6, and 7.

Furthermore, we decline to adopt any of the trial court's findings of fact and conclusions of law, or its recommendation to grant relief regarding Claim 1. Based on our own review of the record, we deny relief on all of applicant's habeas claims.

IT IS SO ORDERED THIS THE 13TH DAY OF FEBRUARY, 2019.

Do Not Publish

[2] We note that, throughout its findings, the trial court misstates the *Strickland* prejudice standard by omitting the standard's "reasonable probability" language.

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-84,438-01

EX PARTE TERENCE TRAMAINE ANDRUS, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
IN CAUSE NO. 09-DCR-051034 IN THE 240TH DISTRICT COURT
FORT BEND COUNTY**

RICHARDSON, J., filed a concurring opinion in which KELLER, P.J., and HERVEY and SLAUGHTER, JJ., joined.

CONCURRING OPINION

Applicant filed an application for a writ of habeas corpus pursuant to Texas Code of Criminal Procedure 11.071 and presented seven challenges to the validity of his conviction and sentence. The habeas judge held an evidentiary hearing and subsequently entered findings of fact and conclusions of law recommending that we deny relief on Applicant's Claims 2-7. The habeas judge, however, recommended that we grant relief on Applicant's Claim 1. In Claim 1, Applicant alleges that "trial counsel provided ineffective assistance in failing to conduct a reasonable investigation and in their presentation of available mitigating

evidence."[1] In our written order, the Court declines to adopt the habeas judge's findings and conclusions regarding this claim and, based on our own review of the record, we deny relief on Claim 1.[2]

I agree with the Court's recitation of the facts and its decision to deny Applicant relief on all grounds. I write separately only to elaborate on why I conclude that Applicant is not entitled to relief on Claim 1.

BACKGROUND

In determining whether trial counsel failed to reasonably investigate and present mitigating evidence in Applicant's trial, it is necessary to review the evidence that the parties actually presented during the punishment phase. The State presented the following evidence:

- Applicant had two juvenile adjudications for crimes committed when he was about 15 or 16: (1) a May 2004 felony possession of a controlled substance in a drug-free zone; and (2) a January 2005 criminal solicitation to commit felony aggravated robbery (involving a firearm). The juvenile court put Applicant on probation for the 2004 possession offense, sent him to an alternative school, and required him to complete community service hours. But, about two weeks after the juvenile court adjudicated the possession case, police arrested Applicant for the solicitation-aggravated robbery offense.

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[1] Applicant seems to claim that lead counsel performed deficiently because he unreasonably failed to: (1) immediately hire a mitigation specialist, and then, after the first mitigation specialist withdrew, to hire a replacement specialist; (2) discover and present certain lay witness testimony to corroborate Applicant's punishment phase testimony about his upbringing; (3) present testimony from two expert witnesses whom counsel consulted before Applicant's trial—S.O. Woods (a prison classification expert) and Dr. Jerome Brown (a clinical psychologist); (4) consult and present testimony from experts in: (a) child and adolescent development, (b) Houston's Third Ward, and (c) scandals, conditions, and the mental health treatment Applicant received at TYC; and (5) provide their testifying expert, Dr. John Roache, with more information about Applicant and Applicant's family.

[2] As stated in the Court's order, we also decline to adopt any of the habeas judge's findings of fact and conclusions of law, and we deny relief on all of Applicant's habeas claims.

- While confined in the Texas Youth Commission (TYC) for the solicitation-aggravated robbery case, Applicant exhibited "significant assaultive behavior" toward other youths and staff. TYC's efforts to rehabilitate Applicant were unsuccessful and thus, he was transferred to the Texas Department of Criminal Justice (TDCJ) to complete his sentence.

- After being transferred from TYC, Applicant served a few months in TDCJ before being released to parole. In 2007, shortly after being released, Applicant violated parole by being convicted of misdemeanor theft. He served a few more months in TDCJ before being released again.

- On August 21, 2008, Applicant committed aggravated robbery when he entered a dry cleaning business and demanded money from an employee. When the employee ran to the back of the business, Applicant cornered, beat, and kicked the employee before pulling a knife on him. Applicant committed the capital murder underlying this application less than two months after this aggravated robbery.

- Numerous photographs of Applicant's gang-related tattoos. When Applicant later took the stand in his own defense, he admitted that those tattoos included "murder weapons" tattooed on his hands, and that he had been a member of the "59 Bounty Hunter Bloods" street gang.

- Applicant's conduct while he was in the Harris and Fort Bend County jails awaiting trial in this case:

  - On April 18, 2009, Applicant assaulted another inmate. When a detention officer intervened, Applicant told him, "I don't give a fuck," and "I'm going to get the needle anyway."

  - On May 9, 2009, Applicant, who was housed on the "super-max" floor of the jail, claimed to be having chest pains. According to jail protocol, detention officers took Applicant to the medical clinic to be checked out. Applicant asked the nurse at the clinic for decongestants, but she told him that she could not provide those due to his other medications. Applicant told her, "Fuck you," and then screamed and yelled obscenities as detention officers tried to calm him down. The officers then escorted Applicant, who was handcuffed and shackled, back to his cell. Applicant refused to walk on his own, so the officers had to physically push him into the elevator to the super-max floor. When they arrived at Applicant's cell, the officers unshackled him. As soon as one officer unlocked the handcuffs, Applicant turned and punched the officer twice in the face before the officers regained control. That same day, officers also discovered in Applicant's cell a broken razor blade and a sharpened, bent key

ring. Applicant had apparently cut himself and used his blood to draw a picture of the world on his cell wall and to write "Fuck the world. I want to die."

- On May 11, 2009, Applicant jammed open his cell door's "panhole," the opening where food, papers, and medicines can be passed to an inmate without the cell door being opened. When an officer went to investigate and looked into the panhole, [Applicant] threw urine in the officer's face. Applicant then danced around his cell in celebration saying, "I got him, bitch ass, mother fucker. I got his ass." Applicant then taunted the officer, "Come on in and get me. There is nothing you can do to me."

- On July 5, 2009, Applicant attempted to pass contraband pills to another inmate. When a detention officer intercepted the pills, Applicant angrily demanded the pills back. Applicant then threatened to throw urine on the officer. Afterwards, Applicant broke a sprinkler head and flooded his cell. Officers handcuffed Applicant. Applicant threatened one of the officers on duty, saying, "[I'm] going to get him, you just wait and see," and, "Once you take these handcuffs [off of] me, you are going to see how hard I hit." Applicant also told the rest of the staff that he was "going to get all of you." The mental-health unit was called to calm Applicant down.

- Two hours after the initial July 5, 2009 contraband incident, Applicant began complaining of chest pains. Applicant was taken to the medical clinic where he attempted to convince the attending officer to remove his handcuffs. When the officer refused due to Applicant's earlier threats, Applicant told him, "I haven't threatened you though." When the officer again refused, Applicant asked him, "Are you scared?" Two officers put Applicant back in his cell. They had Applicant lie down on his bed while they removed his cuffs. Once the cuffs were removed, Applicant jumped up and began kicking and punching the officers, injuring them. Applicant yelled, "I'm going to kill y'all. I told you I'm going to kill y'all." The Special Response Team (SRT) was called. It took five officers to subdue Applicant.

- On January 4, 2010, Applicant threw an unknown liquid on an officer as he walked past Applicant's cell. When asked to back up to the cell bars to be handcuffed, Applicant wrapped himself in a blanket so that his arms were inaccessible and the officers had to enter his cell to handcuff him. The SRT was called to handcuff Applicant and move him to a more secure cell. Applicant once again displayed obscenity-laced defiance.

- On July 20, 2010, Applicant covered the window of his cell so that officers could not see inside. He refused to remove the cover or to place his hands in

the panhole so that he could be handcuffed. The SRT was called. Upon entering Applicant's cell, the officers discovered that Applicant had stopped up the toilet and the shower drain, and used the shower to flood the cell. The cell walls were covered in feces and 2½ inches of water and feces covered the floor. Applicant was naked, standing by the toilet. Applicant threw liquid on the officers and then resisted their attempts to handcuff him by striking at them.

- On July 27, 2011, Applicant stuck his arms through his cell door's panhole and refused to remove them. He claimed that he was upset that he was denied recreation even though he had refused his recreation opportunity when it was offered to him. Applicant yelled at the detention officer, "You don't know me, bitch. I'm not some peon inmate. You won't find out. You'd better ask around." He continued to refuse the officer's order to put his arms back inside his cell. The SRT was called and Applicant kicked and struck at the team members who tried to subdue him. He yelled that they did not know him and that he was "going to fuck somebody up." The team moved him to a padded cell where Applicant covered his new cell window with feces.

- On July 28, 2011, Applicant told a guard at meal time, "Don't bring that tray over here, bitch. I'm going to throw it and hit somebody with it." As a result of his statements, Applicant was again moved to a padded cell. While being moved, Applicant told the officers, "I have three caps. I have nothing to lose. This will be everyday." Once in the cell, he commented that he "will kill an officer" if given the chance.

The defense then presented its punishment case. Applicant, his mother, and his father testified regarding Applicant's background and upbringing. To summarize, Applicant was raised by a single mother who sold drugs. Applicant was exposed to drugs as early as six years of age, and started using drugs regularly at age fifteen. Throughout his childhood and early teenage years, Applicant and his siblings were often left unattended for extended periods of time and Applicant "practically raised his little brothers and sisters." Applicant's father was incarcerated for drug-related offenses for most of Applicant's life, although Applicant did live with his father during his freshman year of high school until his father was

arrested on new drug charges. Applicant did fairly well in school, but he dropped out of school in tenth grade and started getting in trouble with the law.

Defense counsel also called Dr. John Roache, a pharmacologist and psychiatry professor specializing in the effect of alcohol and drug addiction on the human brain and behavior, to testify about Applicant's drug use and mental development. Dr. Roache testified that by age eleven, Applicant had begun using marijuana, and that his drug use increased during his teenage years. Applicant also periodically used Xanax and alcohol. By nineteen, Applicant was regularly using PCP and ecstasy and was sporadically using cocaine. Dr. Roache testified that drugs impair adolescent brain development in the areas of judgment and impulse control, and that these effects are long lasting. Dr. Roache also testified that an unstable family environment and a lack of role models can adversely affect the development of good judgment and the ability to self-regulate one's emotions.

In addition, defense counsel presented evidence of Applicant's remorse through the testimony of James Martin, a licensed professional counselor with the Fort Bend County Jail. Martin testified that he assisted Applicant with his behavioral issues at the jail and noted that Applicant had hallucinations and a poor history of complying with his medication schedule. Martin testified that, although Applicant "[met] every criteria of [antisocial personality] disorder," he had been making progress and was beginning to show remorse for the murders.

Based on this evidence, the jury answered "yes" to the "future dangerousness" question,[3] and "no" to the "mitigating circumstances" question.[4] The judge accordingly set Applicant's punishment at death.[5]

LEGAL STANDARD

In Claim 1, Applicant alleges that "trial counsel provided ineffective assistance in failing to conduct a reasonable investigation and in their presentation of available mitigating evidence." To prevail on an ineffective assistance of counsel allegation, an applicant must establish by a preponderance of the evidence that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance.[6]

In *Wiggins v. Smith*,[7] the United States Supreme Court specifically discussed and applied *Strickland's* two-part test to a claim of ineffective assistance of counsel for failure

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[3] Issue No. 1 in the Court's Charge on Punishment asked: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).

[4] Issue No. 2 in the Court's Charge on Punishment asked: "Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).

[5] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(g).

[6] *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

[7] 593 U.S. 510 (2003).

to conduct a reasonable mitigation investigation. The Supreme Court held that counsel's investigation into Wiggins's background did not reflect reasonable professional judgment and that counsel's failures prejudiced Wiggins's defense.[8] To assess prejudice, the Court evaluated the "totality of the evidence- 'both that adduced at trial, and the evidence adduced in the habeas proceedings.'"[9] The Supreme Court specifically explained how counsel's deficient performance prejudiced Wiggins's defense. First, the mitigating evidence that counsel failed to discover and present was powerful and not double-edged.[10] Second, Wiggins's jury only heard one significant mitigating factor—that Wiggins had no prior convictions.[11] Third, Wiggins did not have a record of violent conduct that the State could have introduced to offset the undiscovered mitigating evidence.[12]

After evaluating the totality of the evidence, the Supreme Court concluded that, had the jury been confronted with the considerable undiscovered mitigating evidence, there was a reasonable probability that the jury would have returned a different sentence.[13] When analyzing whether Applicant has satisfied *Strickland's* prejudice requirement, it is appropriate to use *Wiggins* as a guide.

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[8] *Id*. at 534, 536.

[9] *Id*. at 536 (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

[10] *Id*. at 534-35.

[11] *Id*. at 537.

[12] *Id*.

[13] *See id*. at 536.

ANALYSIS

In this case, We need not consider the constitutional adequacy of defense counsel's performance because Applicant fails to show prejudice.[14] Assuming without deciding that aspects of defense counsel's performance were deficient, Applicant fails to establish that, had counsel reasonably investigated and presented a stronger mitigation defense, there is a reasonable probability that the jury would have returned a different sentence.

Proposed Additional Mitigating Evidence

From my independent review of the record, it appears that Applicant's strongest proposed mitigating evidence would have been (1) testimony from certain lay witnesses to corroborate Applicant's punishment phase testimony about his upbringing, and (2) testimony from Dr. Jerome Brown, the clinical psychologist who performed a forensic evaluation of Applicant before trial. Applicant alleges that his mother and father gave a "sanitized version" of his life history and that additional lay witness testimony would have provided the jury with a more complete, and therefore a more compelling, narrative of Applicant's life. In regard to Dr. Brown, the report that he created contained potentially mitigating information, including that Applicant had self-reported a history of psychological/psychiatric problems which may have begun as early as childhood, that Applicant's jail records showed that he

[14] *Ex parte Lane*, 303 S.W.3d 702, 707 (Tex. Crim. App. 2009) (holding that applicant's failure to satisfy both prongs of *Strickland's* two-pronged test defeats a claim of ineffective assistance).

was diagnosed with schizophrenia,[15] and that he had a high probability of substance dependence disorder. However, even if the jury heard this mitigating evidence, I cannot say that there is a reasonable probability that the jury would have returned a different sentence.

First, Applicant's proposed additional mitigating evidence is not as powerful as the evidence in *Wiggins*. In *Wiggins*, the petitioner "experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic absentee mother" and "[h]e suffered physical torment, sexual molestation and repeated rape during his subsequent years in foster care."[16] Wiggins was also homeless at times and had diminished mental capacities.[17] This evidence, the Supreme Court concluded, demonstrated that Wiggins had the kind of troubled history that was relevant to assessing his moral culpability.[18]

Here, while not insignificant, Applicant's proposed mitigating evidence does not rise to the level of that discussed in *Wiggins*. Applicant alleges that, through additional lay witness testimony, the jury would have heard the "reality of [Applicant's] childhood"— that Applicant grew up primarily among street hustlers and drug dealers, that Applicant raised his siblings while his mother was dealing drugs out of the house or on the street, and that

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[15] Although this diagnosis appears in Applicant's jail records, the professionals who had a longer opportunity to observe Applicant generally concluded that Applicant suffered instead from antisocial personality disorder.

[16] *Wiggins*, 539 U.S. at 535.

[17] *See id*.

[18] *See id*.

Applicant lacked a stable, supportive parental figure.[19] This is not the same caliber of potentially mitigating evidence that was available, but not presented, in *Wiggins*. In addition, much of this information had already been introduced through the testimony of Applicant, his mother, and his father, a fact which further dilutes the potential effect this evidence would likely have had on the jury. Lastly, unlike in *Wiggins*, much of Applicant's proposed mitigating evidence was extremely double-edged.[20] For example, Dr. Brown's report, which contained some potentially mitigating evidence, also contained evidence that was potentially extremely aggravating, such as Applicant's history of abusing and killing animals.

Mitigating Evidence Presented

Second, unlike in *Wiggins*, Applicant's jury actually heard multiple mitigating factors, but still did not spare Applicant from the death penalty. Wiggins's jury heard just one significant mitigating factor—that Wiggins had no prior convictions.[21] Because the jury heard only one aspect of mitigation, the Supreme Court reasoned that, had the jury "been able to place [Wiggins's] excruciating life history on the mitigating side of the scale," there was a "reasonable probability that at least one juror would have struck a different balance" on the mitigation issue.[22] Applicant's jury, however, heard the following: testimony regarding

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[19] *See* Applicant's Initial Application for Writ of Habeas Corpus at 44.

[20] *See Wiggins*, 539 U.S. at 535.

[21] *Id.* at 537.

[22] *Id*.

Applicant's background and dysfunctional upbringing; testimony from an expert witness who opined about the effects that drugs, alcohol, and an unstable family environment can have on adolescent brain development; and testimony from a professional counselor that Applicant was beginning to show remorse for the murders. The jury was given the opportunity to consider this evidence, to place it on the "mitigating side of the scale,"[23] but still did not resolve the mitigation issue in Applicant's favor.

Violent History

Third, unlike in *Wiggins*, Applicant had an extensive record of violent conduct that the State could have used to offset the proposed additional mitigating evidence.[24] The jury heard evidence about Applicant's multiple prior convictions, including a conviction for solicitation of aggravated robbery. In addition, the jury heard evidence that, just two months before the capital offense underlying this application, Applicant committed aggravated robbery when he beat, kicked, and robbed a victim while brandishing a knife. The jury also heard evidence of Applicant's assaultive behavior while in TYC. Further, the jury heard evidence that Applicant engaged in numerous instances of significant violent and disruptive behavior while he was in jail awaiting trial. In short, Applicant did not have the "powerful mitigating narrative"[25] that was available in *Wiggins*, and the State presented plenty of

[23] *Id*.

[24] *Id*. at 537.

[25] *Id*.

potentially aggravating evidence to offset the potentially mitigating evidence adduced in the habeas proceedings.

CONCLUSION

Even assuming Applicant's lead counsel was deficient,[26] Applicant fails to show how his defense was prejudiced. The State presented a vast amount of aggravating evidence, and the evidence Applicant now alleges counsel should have discovered and presented was largely duplicative, double-edged, and not particularly helpful. In these circumstances, even assuming that counsel could have discovered and presented Applicant's proposed additional mitigating evidence in an admissible form, I cannot say that there is a reasonable probability that the result of the proceedings would have been different. Applicant fails to show prejudice, and that failure defeats his claim of ineffective assistance.[27]

With these comments, I concur and join the majority.

FILED: February 13, 2019

DO NOT PUBLISH

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[26] It is worth noting that, even if lead counsel was deficient, Applicant had other counsel who arguably performed sufficiently. Normally, an applicant cannot obtain relief in this situation. *See McFarland v. State*, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996) (concluding that the defendant had not show prejudice because, even if one of his attorneys was asleep at trial, his other attorney was alert and effective).

[27] *Lane*, 303 S.W.3d at 707.

APPENDIX B

No. 09-DCR-051034-HC1

EX PARTE	§	IN THE 240TH JUDICIAL
	§	
	§	DISTRICT COURT OF
	§	
TERENCE ANDRUS	§	FORT BEND COUNTY

FINDINGS OF FACT & CONCLUSIONS OF LAW

On March 4, 2015, Applicant filed an Application for Writ of Habeas Corpus. This Court held a hearing on Applicant's application and pursuant to Article 11.07 of the Texas Code of Criminal Procedure, the Court hereby enters the following Findings of Fact & Conclusions of Law:

Procedural History

(1) On February 2, 2009, Applicant was indicted for the offense of Capital Murder alleged to have been committed on October 15, 2008. *See* TEX. PENAL CODE § 19.03(a)(7)(A).

(2) Applicant pleaded not guilty to the charges alleged in the indictment and on October 1, 2012, Applicant's jury trial began in the 240th Judicial District Court of Fort Bend County, Texas.[1]

(3) On November 6, 2012, Applicant was convicted of Capital Murder as alleged in the indictment. Pursuant to the Jury's answers to the special issues submitted at the punishment phase of trial, Applicant was sentenced to death on November 14, 2012. *See* TEX. CODE CRIM. PRO. Art. 37.071 §§ 2(b), 2(e).

(4) On March 23, 2016, The Texas Court of Criminal Appeals affirmed Applicant's conviction and sentence. *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

[1] The trial was presided over by the Honorable Thomas R. Culver, III, now deceased. The undersigned was assigned to preside over the Habeas Corpus Proceedings by the Hon. Olen Underwood, Presiding Judge of the Second Administrative Judicial Region.

Applicant's Confession and Statements to Law Enforcement

(5) At trial, the jury was presented with Applicant's written confession and statements to law enforcement.[2] Applicant's trial counsel filed a motion to suppress that confession and Applicant's statements to law enforcement. The trial court denied Applicant's motion and entered findings of fact and conclusions of law with respect to the voluntariness of Applicant's statements.

(6) The Texas Court of Criminal Appeals, which will ultimately decide the present case, held that Applicant's confession and his statements to law enforcement were voluntary and were not the product of a violation of his state or federal constitutional or statutory rights; and therefore, the trial court did not err in denying Appellant's motion to suppress. *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

(7) During one conversation with law enforcement, after he was properly *Mirandized*,[3] Applicant described killing the first victim in this case by saying, "Boom, I shot him." Applicant continued:

> I shot him. He was about to pull a pistol out on me. It was life or death with him. If I'd have turned around and started running, I would have been dead --which I am now, don't get me wrong, but -so, I ran towards -out going towards, back towards my house, and people, I guess they heard the gun shots. So, as I came in front of their car, they sped up and tried to hit me with their car. They tried to run me over. So, I started shooting through their windshield, and then I just took out running. And you know that's the honest to God truth.

See HCEH RR10: State's Exhibit HC19.[4]

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[2] In addition to his statements and written confession, after returning to Fort Bend County, Applicant helped the police locate his gun, a .380 automatic, as well as a shovel Applicant used to conceal the gun. Three live rounds were still in the gun's eight-round magazine with one round in the chamber. Investigators recovered four spent bullets from the crime scene that matched the rounds recovered from the gun used to kill the victims in this case. *Andrus v. State*, No. 76,936 (Tex. Crim. App., delivered March 23, 2016).

[3] *Miranda v. Arizona*, 384 U.S. 436 (1966).

[4] The Reporter's Record of the Habeas Corpus Evidentiary Hearing will be referred to as "HCEH."

(8) The Texas Court of Criminal Appeals held further that the evidence in this case is legally sufficient to support Applicant's conviction because "aside from the confessions, the evidence included eyewitness testimony, video surveillance, and Andrus's flight after committing the crime." *Andrus v. State*, No. AP-76,936 (Tex. Crim. App., delivered March 23, 2016).

Applicant's Claims

Each of Applicant's claims will be addressed in the order in which it was presented in Applicant's Petition for Writ of Habeas Corpus filed March 4, 2016. As a preliminary matter, this Court recognizes that to prevail upon a post-conviction petition for a writ of habeas corpus, an Applicant bears the burden of proving, by a preponderance of the evidence, facts that entitle him to relief. *Ex parte Morrow*, 952 S.W.2d 530, 534-35 (Tex. Crim. App. 1997).

(9)Applicant's first claim is as follows:

"TRIAL COUNSEL PROVIDED INEFFECTIVE ASSISTANCE OF COUNSEL IN FAILING TO CONDUCT A REASONABLE INVESTIGATION AND IN THEIR PRESENTATION OF AVAILABLE MITIGATING EVIDENCE."

(a) In *Wiggins v. Smith*, 539 U.S. 510 (2003), the United States Supreme Court held that the failure to present mitigating evidence in a death penalty case is unreasonable where the record reflects that trial counsel did not conduct a thorough investigation into the defendant's background and cited the ABA Standards for Criminal Justice. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(b) The Supreme Court emphasized in *Wiggins* that the question is not whether counsel should have presented a mitigation case. Rather, the focus is on whether the investigation supporting trial counsel's decision not to introduce mitigating evidence was itself reasonable. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(c) Specifically, in *Wiggins*, trial counsel's assistance was found to be ineffective where they failed to investigate and present mitigating evidence regarding the defendant's abusive childhood. *Wiggins v. Smith*, 539 U.S. 510, 517 (2003).

(d) At the hearing on Applicant's Petition for Habeas Corpus relief, James Sidney Crowley testified that he was appointed to represent Applicant in this case on

February 17, 2009. HCEH RR2: 172.

(e) Crowley testified that the first time he visited Applicant in jail was on October 4, 2009 and only visited him a total of six times prior to trial. HCEH RR2: 183, 185.

(f) Crowley agreed that between February 17, 2009, and October 4, 2009, he did not visit Applicant in jail to admonish him that his behavior while incarcerated could be used against him at the punishment of his capital murder trial. HCEH RR2: 186.

(g) Crowley agreed further that he was not aware that during February 17, 2009, and October 4, 2009, Applicant attempted suicide, smeared blood on the walls of the jail, and engaged in altercations with jail personnel. HCEC RR2: 188-89. Crowley stated that he did not believe he needed to investigate the foregoing issues and did not have a mitigation specialist who could have investigated those issues. HCEH RR2: 189.

(h) Crowley admitted that he did not investigate why Applicant was confined to a padded cell for sixty-two days in the Fort Bend County Jail or why he was administered the medications Thorazine and Seroquel. HCEH RR3: 78.

(i) Crowley acknowledged that the first time he had Applicant evaluated by a mental health professional, Dr. Jerome Brown, was "in 2012 sometime." HCEH RR2: 191.

(j) Crowley testified that Amy Martin, a mitigation specialist, was appointed in 2010 after second chair counsel, Jerome Godinich, recommended her. HCEC RR2: 197. However, Crowley never asked Martin to prepare a mitigation packet. HCEH RR2: 198.

(k) In fact, Crowley asked during the hearing on Applicant's Petition for Writ of Habeas Corpus, "What do you mean by a mitigation packet?" and indicated his understanding that a mitigation packet was "something that you give the district attorney's office." HCEH RR2: 199.

(l) Crowley testified that at the time Martin and Godinich withdrew from this case in January of 2012, no experts had been retained despite the fact that trial was set to begin on October 1, 2012. HCEH RR2: 212.

(m) Crowley agreed that as of January of 2012, he had only put in five hours of work on Applicant's case and that no one was attempting to define mitigation themes or determine how to advocate for a life sentence on behalf of Applicant. HCEH RR2: 212.

(n) Crowley agreed further that between January of 2012 and June of 2012, he had no second chair counsel and no mitigation expert in this case. HCEH RR3: 37-38.

(o) Crowley testified that he did not conduct any independent investigation into any of the extraneous offenses alleged by the State during the punishment phase of trial and did not test the veracity of any of the extraneous offense evidence offered by the State, despite Applicant's repeated assertion that he did not commit at least one of the extraneous offenses. HCEH RR3: 64-66.

(p) Crowley acknowledged that he received information from Martin that Applicant was diagnosed with a serious mental illness when he was ten or eleven years old, but did not retain an expert to investigate that mental illness. HCEH RR3: 71.

(q) Crowley learned that Applicant received medication for mental health issues as a child but did not consult a mental health or medical expert to investigate why Applicant received the medication or its affects. HCEH RR3: 73.

(r) Crowley stated that although records from the Texas Youth Commission indicated Applicant had problems at home, Crowley did not investigate what those problems were. HCEH RR3: 73-74.

(s) Crowley testified that he did not investigate anything traumatic in Applicant's background except to speak to Applicant and his mother. HCEH RR3: 88. However, Crowley did not speak with Applicant's mother until she was subpoenaed to come to Court. HCEH RR3: 88.

(t) Crowley testified that he did not conduct any independent investigation into Applicant's mother's version of Applicant's childhood even after Applicant informed Crowley his mother did not testify truthfully at trial. HCEH RR3: 95.

(u) Crowley testified that he did not have any extensive conversations with Appellant's father, Mike Davis, before he testified and in fact, it was the State who brought Davis to the courthouse to testify. HCEH RR3: 98.

(v) Crowley called James Martins, a Fort Bend County Jailer, to testify during the punishment phase of trial, but met with him for the first time during a break in the middle of trial. HCEH RR3: 99. Martins then testified that Applicant may suffer from Antisocial Personality Disorder which, Crowley agreed, was not mitigating. HCEH RR3: 102-03.

(w) Crowley agreed that he retained psychiatrist and pharmacologist Dr. John Roache in late August of 2012,[5] two months prior to the commencement of voir dire in this case. HCEH RR3: 103.

(x) Crowley agreed further that Dr. Roache was not given a mitigation report, memos of interviews with family members or any information from a mitigation specialist, though he regularly relies on that information to render an opinion. HCEH RR3: 103-04.

(y) Crowley acknowledged that Dr. Roache only met with Applicant once, just days before voire dire began, and Crowley took no steps to prepare Applicant for that meeting. HCEH RR3: 105.

(z) When asked if Dr. Roache did a psychological evaluation of Applicant, Crowley responded, "No." HCEH RR3: 110. Crowley responded further that although Dr. Roache was the lone expert that testified at trial, Crowley did not retain him to perform a psychological evaluation. HCEH RR3: 110.

(aa) Crowley testified that he did not investigate Applicant's neighborhood or his childhood experiences. HCEH RR3: 116.

(bb) Crowley testified that he did not investigate any of the facts of the underlying offense that resulted in Applicant's incarceration at the Texas Youth Commission. HCEH RR3: 119-20.

(cc) Crowley testified that despite the widely-known scandal concerning the Texas Youth Commission, which occurred prior to the trial of this case, Crowley did not consult an expert regarding the Texas Youth Commission. HCEH RR3: 122-23.

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[5] The record reflects "August 2002, late August." HCEH RR3: 103). This appears to be either a typo by the Court Reporter or an accidental misstatement by Applicant's attorney. The context is clear that the time period referred to was late August of 2012.

(dd) Crowley testified that he did not interview Applicant's brother, Torad Andrus; his sister, Tafarrah Andrus; his sister, NormaRaye Andrus; his stepmother, Rosalind Cummings; his stepbrother, Jamontrell Seals; his mother's live-in boyfriend, Sean Gilbow; or family friend Stephanie Garner. HCEH RR3: 135-36.

(ee) Crowley testified that he received a report from Dr. Brown, dated October 12, 2012, but claimed he did not receive that report until after trial was completed because Dr. Brown sent the report by email to an old email address. HCEH RR3: 255, 257.

(ff) Crowley agreed that Dr. Brown's report indicated that Applicant was referred for psychiatric evaluation in 2009 while in the Harris County Jail and received psychiatric treatment. HCEH RR3: 258.

(gg) Crowley agreed further that Dr. Brown's report indicated that Applicant had been prescribed psychoactive, antipsychotic, psychotropic and antidepressant medications. HCEH RR3: 258, 260.

(hh) Crowley agreed further that Dr. Brown's report indicated that Applicant had suffered auditory hallucinations since the age of fourteen years, suffers from severe mental illness and had been diagnosed with schizophrenia. HCEH RR3: 261-64.

(ii) Crowley testified that he is not a mitigation specialist and after Martin left the case, no one he spoke to about Applicant's case was a mitigation specialist. HCEH RR3: 253. Crowley testified further that he had used mitigation specialists in the past. HCEH RR3: 254.

(jj) Crowley stated that he expected to be compensated for his time testifying at the habeas corpus evidentiary hearing. HCEH RR3: 254.

(kk) The Court finds portions of Crowley's testimony credible and portions of Crowley's testimony not credible.

(ll) Diana Olvera testified that she was appointed as second chair trial counsel on June 7, 2012, four months before trial was set to begin. HCEH RR4: 12-13.

(mm) Olvera clarified that she was not a mitigation specialist and that there was no one in that role when she joined the defense team in this case or any time after. HCEH RR4: 15. However, in her affidavit, Olvera stated that she was in charge of presenting mitigating evidence at trial. HCEH RR11: State's Exhibit 2.

(nn) Olvera testified that she spoke to Cynthia Andrus, Applicant's mother, on a few occasions and decided to call her as a witness at trial, but only interviewed her in person on the day she testified. HCEH RR4: 16-17.

(oo) Olvera agreed that she had not met with any of Applicant's family members in person before this case went to trial. HCEH RR4: 25-26.

(pp) Olvera testified that she did not investigate the facts of the underlying facts of the present case and did not discuss the facts of the case with Applicant. HCEH RR4: 23-24.

(qq) Olvera testified that she contacted the Texas Defender Service prior to trial to get guidance about a potential expert on the Texas Youth Commission and its internal problems, and was given the name of John Niland who referred her to the appropriate expert. HCEH RR4: 30. However, Olvera never contacted the expert. HCEH RR4: 31.

(rr) Olvera explained that Crowley was in charge of contacting and retaining experts. HCEH RR4: 33. Olvera testified that it was not reasonable for Crowley to wait to communicate with potential experts just before voir dire began in October of 2012, especially considering he was appointed in February of 2009. HCEH RR4: 34-35.

(ss) Olvera testified that she did not investigate the extraneous offense evidence presented by the State at the punishment phase of trial. HCEH RR4: 37.

(tt) Olvera testified that Crowley was responsible for the strategic decisions in the case, including the decision to proceed without a mitigation specialist. HCEH RR4: 39.

(uu) The Court finds Olvera's testimony credible.

(vv) Fred Felcman, the Fort Bend County First Assistant District Attorney who prosecuted this case, testified that in another capital murder case, Crowley

admitted to misleading the trial court. HCEH RR5: 21-22.

(ww) Felcman testified that no one from the defense team ever approached him with an offer that Applicant would plead guilty to the offense of capital murder in exchange for a sentence of life without parole. HCEH RR5: 25.

(xx) The Court finds Felcman's testimony credible.

(yy) Will Harrell, Southern Regional Policy Counsel for the American Civil Liberties Union, testified that he was appointed by Governor Rick Perry to serve as the first Chief Independent Ombudsman over the Texas Youth Commission. HCEH RR5: 112.

(zz) Harrell reviewed Applicant's Texas Youth Commission Records and determined that Applicant was unfairly held accountable for failing to succeed in a behaviorial program that has since been discredited and "scrapped" by the State. HCEH RR5: 121. The result was that Applicant was sent to the Texas Department of Criminal Justice when he should not have been. HCEH RR5: 121-22.

(aaa) Harrell detailed the scandal which caused the Texas Youth Commission to be reformed by legislation. He explained that Applicant was incarcerated prior to the legislative reform and was incarcerated at the Texas Youth Commission while the events that were uncovered by the scandal were occurring. HCEH RR5: 140-60.

(bbb) Harrell explained that Applicant was not properly diagnosed while at the Texas Youth Commission because of undertrained staff. HCEH RR5: 158.

(ccc) Harrell detailed Applicant's time of incarceration at the Texas Youth Commission including the dangerousness of the facility he was placed in, the lack of appropriate mental health care, the fact that he was unduly placed in isolation for weeks at a time, and the fact that his prescribed medication was not appropriate or adequately distributed. HCEH RR5: 161-63, 179-81.

(ddd) Harrell testified that Applicant's time at the Texas Youth Commission damaged and traumatized him and that he got no meaningful assistance from the program. HCEH RR5: 246.

(eee) Harrell testified that he was not contacted by Applicant's trial counsel, but would have been available to testify at trial in 2012 had he been contacted. HCEH RR5: 192.

(fff) The Court finds Harrell's testimony credible.

(ggg) Sean Gilbow testified that he met Applicant when they were both living in the Third Ward because his brother, Seneca Booker, was Applicant's mother's boyfriend. HCEH RR6: 24, 29. Gilbow characterized the Third Ward as "[d]rug infested," with prostitution, shootings, crime and violence. HCEH RR6: 24-26.

(hhh) Gilbow testified that he learned how to obtain and sell drugs from Applicant's mother, Cynthia Andrus, when he was nineteen years old. HCEH RR6: 26-27, 35-36. Applicant was ten years old at this time. HCEH RR6: 37.

(iii) Gilbow testified that several other adults used and sold drugs around Applicant when he was a child. HCEH RR5: 39-40.

(jjj) Gilbow explained that when Applicant's mother was not at home, she would leave Applicant in charge of his many siblings, including his special needs brother. HCEH 6: 41-42. Specifically, Applicant cooked, cleaned, made sure his siblings did their homework and made sure they went to school. HCEH RR6: 42.

(kkk) Gilbow testified that Applicant and his family later moved to Mission Bend, but the same problems existed there as in the Third Ward. HCEH RR6: 46-47. In addition, Applicant and his siblings were exposed to gang activity. HCEH RR6: 47.

(lll) When Applicant was released from prison, he went to live with Gilbow; Gilbow's wife, Phyllis Garner; and Garner's daughter. HCEH RR6: 49.

(mmm) Gilbow testified that Applicant was respectful, cooked meals, and "cleaned up" when he lived with Gilbow. HCEH RR5: 49.

(nnn) Gilbow visited Applicant prior to the trial in this case, but was never contacted by Applicant's trial counsel. HCEH RR5: 50. Gilbow testified that he would have talked to trial counsel had they contacted him and would have

testified at trial if asked. HCEH RR5: 50-51.

(ooo) The Court finds Gilbow's testimony credible.

(ppp) Phyllis Garner testified that she is a field staff supervisor for Girling Community Care and that she and Gilbow have lived together for fourteen years. HCEH RR6: 75-76.

(qqq) Garner testified that she met Applicant when he was sixteen years old through Gilbow because Gilbow's brother, Seneca Booker, was Applicant's mother's boyfriend. HCEH RR6: 79-80.

(rrr) At the time Garner met Applicant, he and his family were living in Public Assistance Housing in Mission Bend, an area that was infested with drugs and gangs. HCEH RR6: 83.

(sss) Garner testified that Applicant's mother, Cynthia Andrus, supported herself and her children by selling drugs and prostitution. HCEH RR6: 85-86. Cynthia also used drugs in front of her children. HCEH RR6: 88-89

(ttt) Garner explained that Applicant took care of his brothers and sisters by getting them dressed and ready for school, making sure they got to bed on time, and watching out for his brother, Torad, who had special needs. HCEH RR6: 889.

(uuu) Garner explained further that on their days off, she and Gilbow would take Applicant to the movies or to get a haircut, and then Garner would cook Applicant his favorite meal, breakfast, for dinner. HCEH RR6: 90. During those visits, Applicant was "laughing, talking, smiling and just being a kid" because he did not have the responsibilities he had at home. HCEH RR6: 91.

(vvv) Garner testified that Applicant came to live with her and Gilbow when he was released from prison. HCEH RR6: 95. Applicant abided by the rules of the house and did his assigned chores. HCEH RR6: 96.

(www) Garner testified that no one from Applicant's trial team ever contacted her but she would have spoken to them if they had and she would have testified at trial if asked. HCEH RR6: 100.

(xxx) The Court finds Garner's testimony credible.

(yyy) Dr. Scott Hammel, a clinical psychologist testified that he was formerly employed at the Texas Youth Commission. HCEH RR6: 127. Dr. Hammel interviewed Applicant on three occasions, spoke to his family members and reviewed relevant records. HCEH RR6: 130.

(zzz) Dr. Hammel testified that his evaluation revealed that Applicant suffered physiological changes to his brain as a result of trauma in his childhood. HCEH RR6: 168. Specifically, Dr. Hammel testified that Applicant was exposed to violence, death, severe emotional neglect, substance abuse, domestic violence and distrust. HCEH RR6: 168-69.

(aaaa) According to Dr. Hammel, the trauma Applicant suffered stunted his emotional development. HCEH RR6: 181.

(bbbb) Dr. Hammel detailed Applicant's social history including his relationship to his relatives, the circumstances of his neighborhood, the incarceration of family members, and the violence and drug use in Applicant's family. HCEH RR6: 169-215.

(cccc) Dr. Hammel explained that his evaluation revealed that Applicant was exposed to trauma in such a way that he exhibits post-traumatic-stress-disorder symptoms and suffers from mood disorder. HCEH RR7: 52.

(dddd) The Court finds Dr. Hammel's testimony credible.

(eeee) Dr. Roache submitted an affidavit, which the Court finds credible, in which he explains:

"Based on my prior experiences consulting and testifying in capital cases, I was struck by the extent to which Mr. Crowley appeared unfamiliar or naive with issues relating to brain development, drug addiction, and other such mitigation issues relative to other capital attorneys I have worked with. During my testimony, Mr. Crowley seemed to struggle to provide direction while I was on the stand. Also, following a rather rough cross-examination by the prosecutor, who made mocking comments about my testimony, Mr. Crowley seemed to be at a loss to ask follow up questions to address the prosecution's damaging statements. Another part of my involvement in the Andrus case that stuck out to me was that Mr. Crowley asked me to speak to the prosecution prior to my testimony. Mr. Crowley told me that the prosecutor wanted to know the factual basis of my intended testimony. I found this to be an unusual request based on

my prior capital case experience. During the phone call, I was very uncomfortable with the extent to which the prosecutor wanted to go broadly into the subject of my testimony. Our conversation was certainly not limited merely to my own qualifications to testify." HCEH RR13: Applicant's Exhibit 6.

(ffff) Dr. Brown submitted an affidavit, which the Court finds credible, in which he explains he was contacted by Crowley in September of 2012 to perform a psychological evaluation of Applicant. Dr. Brown was provided only collateral information upon which to perform his evaluation. Dr. Brown visited Applicant on September 20, 2012, and submitted a report to Crowley on October 12, 2012. Dr. Brown was never asked to testify although he was available to do so. HCER RR13: Applicant's Exhibit 2.

(gggg) Dr. Michael Lindsey, a clinical psychologist, submitted an affidavit, which the Court finds credible, in which he explains that he performed a psychological evaluation on Applicant and considered Applicant's criminal history records, education records, medical records, jail records and affidavits from Applicant's family and friends. Dr. Lindsey also met with Applicant over the course of two days, February 12-13, 2015 at the Texas Department of Criminal Justice. Dr. Lindsey offered his opinion that Applicant suffered from inadequate childhood development which produced "strongly mitigating circumstances," in Applicant's case including "overall deprivation of a nurturing childhood, his parental abuse and neglect, witnessing violence and trauma, the lack of adequate supervision and guidance. Inadequate stimulation for his brain for learning. and multiple factors leading to substance abuse and misconduct, his cognitive and psychological development is unquestionably compromised and is unquestionably compromised and less that of an adult." Dr. Lindsey states he was available to testify at Applicant's trial but was not contacted by Applicant's trial counsel. HCEH RR13: Applicant's Exhibit 5.

(hhhh) Jerome Godinich submitted an affidavit, which the Court finds credible, in which he explains that he was appointed as second chair in this case but withdrew in 2012 because the case was not ready to be tried. HCEH RR13: Applicant's Exhibit 27. Specifically, he had a "lack of confidence" in Crowley's "willingness to handle the case in the manner it needed to be." HCEH RR13: Applicant's Exhibit 27.

(iiii) Amy Martin submitted an affidavit, which the Court finds credible, in which she explains she was appointed as a mitigation specialist on July 19, 2010 but

was told by Crowley that no mitigation packet was needed because he was awaiting the State's confirmation that they would accept an offer of life without parole. HCEH RR13: Applicant's Exhibit 28.

(jjjj) Martin informed Crowley he needed a juvenile development expert, a prison classification expert, a Texas Youth Commission Expert, and a medical professional. HCEH RR13: Applicant's Exhibit 28.

(kkkk) Martin also informed Crowley that he needed to interview Applicant's family, friends and teachers. HCEH RR13: Applicant's Exhibit 28.

(llll) Martin ultimately withdrew from the case because in her opinion, it was not ready to be tried. HCEH RR13: Applicant's Exhibit 28.

(mmmm) Torad Davis, Cynthia Booker, Latoya Cooper, Sade Scroggins, Jamontrell Seals, Kailyn Williams, and NormaRaye Williams, all submitted affidavits, each of which, the Court finds credible. HCEH RR13: Applicant's Exhibits 9-18. The affidavits provide mitigating information which could have been presented at the punishment phase of Applicant's trial. HCEH RR13: Applicant's Exhibits 9-18.

(nnnn) The Court finds and concludes that in the present case, there was ample mitigating evidence which could have, and should have, been presented at the punishment phase of Applicant's trial. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(oooo) The Court finds and concludes that relevant, available, and persuasive mitigating evidence was not presented at Applicant's trial because his lead trial counsel failed to conduct a thorough investigation into Applicant's background. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003).

(pppp) The Court finds and concludes that lead trial counsel's decision not to introduce mitigating evidence was unreasonable. *Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(qqqq) The Court finds and concludes that just as in *Wiggins*, Applicant's lead trial counsel was ineffective in failing to investigate and present mitigating evidence regarding the defendant's abusive and neglectful childhood. *Wiggins v. Smith*, 539 U.S. 510, 517 (2003).

(rrrr) The Court finds and concludes that Applicant's lead trial counsel was ineffective in failing to investigate and present all other mitigating evidence, including, but not limited to: mental health history, his incarceration at the Texas Youth Commission, the scandal at the Texas Youth Commission, educational history, the circumstances of Applicant's child development, Applicant's family history, and the diagnosis of serious mental illness, which was available at trial, as detailed above. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(ssss) The Court finds and concludes that Applicant's lead trial counsel was ineffective in failing to retain the necessary experts to investigate and present all available mitigating evidence at the punishment phase of Applicant's trial. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(tttt) The Court finds and concludes that Applicant is entitled to Habeas Corpus Relief with respect to his first claim. *See Wiggins v. Smith*, 539 U.S. 510, 523 (2003).

(10) Applicant's second claim is as follows:

"ANDRUS'S DUE PROCESS RIGHTS WERE INFRINGED WHEN THE JURY WAS INFORMED ANDRUS WAS WEARING PHYSICAL RESTRAINTS DURING THE PUNISHMENT PHASE OF TRIAL."

(a) In *Deck v. Missouri*, the United States Supreme Court held that while shackling of a defendant during trial is inherently prejudicial because it infringes upon the presumption of innocence, due process is only implicated when the jury can see the restraints. *Deck v. Missouri*, 544 U.S. 622, 628 (2005); *Bell v. State*, 415 S.W.3d 278, 281-82 (Tex. Crim. App. 2013). The *Deck* Court was clear that it is not the mere shackling alone, but rather the jury's perception of the shackles, that undermines a defendant's presumption of innocence. *Bell*, 415 S.W.3d at 281-82. If it is determined beyond a reasonable doubt that shackling the defendant did not contribute to the conviction or punishment, relief is not justified. *Id.* at 284.

(b) In the present case, virtually all of the jurors and alternates filed affidavits with respect to Applicant's second claim.

(c) All but one juror either did not remember when they realized Applicant was constrained or remembered that it was during the punishment phase when

they were apprized that Applicant was wearing restraints. *See* HCEH RR10: State's Exhibits 3-12; RR13: Applicant's Exhibits 19, 24.

(d) Applicant concedes the bailiff did not inform the jury that Applicant was restrained until after he had been found guilty and before the punishment phase. Applicant's writ at 80.

(e) All of the jurors that submitted affidavits averred that the fact that Applicant was shackled had no effect on their verdict. *See* HCEH RR10: State's Exhibits 3-12; RR13: Applicant's Exhibits 19, 24.

(f) As such, Applicant is not entitled to relief on his second claim for habeas corpus relief. *Deck*, 544 U.S. at 628; *Bell*, 415 S.W.3d at 284.

(11)Applicant's third claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE POTENTIAL *BATSON* ERROR."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) The Texas Code of Criminal Procedure prohibits the use of peremptory challenges to exclude prospective jurors on the basis of race. TEX. CODE CRIM. PRO. Art. 35.261. Additionally, striking a prospective juror on the basis of race violates the equal protection guarantees of the United States Constitution. *Batson v. Kentucky*, 476 U.S. 79 (1986).

(c) Crowley testified that he did not make a *Batson*[6] challenge because he did not feel a prima facie case for striking minority jurors had been made. HCEH RR3: 187.

(d) Olvera testified, and included in her affidavit, her opinion that during the jury selection process, she never got the impression the State was purposely striking jurors based on race, so the defense did not lodge any *Batson* challenges. HCEH RR4: 125.

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[6] *Batson v. Kentucky*, 476 U.S. 79 (1986).

(e) Felcman testified that "not one" of the peremptory strikes against a minority venire member was racially motivated. HCEH RR5: 49.

(f) Using his notes and the answers to Juror Questionnaires, Felcman then offered race neutral reasons for the minority jurors he used peremptory strikes on. HCEH RR5: 51-78.

(g) Based on this record, Applicant is unable to show his attorney's performance was deficient or that but for counsel's allegedly deficient performance, the outcome of his trial would have been different. *See Strickland v. Washington*, 466 U.S. 668 (1984).

(12)Applicant's fourth claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR CONCEDING THE FIRST SPECIAL ISSUE."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) The complained-of argument is as follows:

> Let's go the Question 1. It's that "future danger"' question. Remember, we talked about it. Is there's a probability --do you find from the evidence beyond a reasonable doubt that there's a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society? You've heard all kinds of evidence, based upon that, to help you - - aid you in answering this question. You know, I told you all along, the guilt or innocence argument –I'm not going to try to snow the jury. You've heard evidence, even from some of our own witnesses, that Mr. Andrus was probably a violent kind of guy. Okay? That's kind of a double-edged sword to put on evidence. Hopefully, you know, our case, you have to take the good with the bad. You've heard all of this evidence, basically what happened in the jail and TYC. There is probably a good probability that you're going to answer this question yes.

(c) At the hearing on Applicant's Petition for Writ of Habeas Corpus, Crowley testified that his statement was not, in fact, a concession, but rather a strategy in focusing on mitigation. HCEC RR3: 83.

(d) The Court finds and concludes that Crowley's statement was the product of trial strategy to focus on mitigation and gain credibility with the jury. While not the desired strategy of all, it is still, a plausible strategy. Therefore, Applicant is unable to show his counsel's performance was deficient. Further, Applicant is unable to show the outcome of the punishment phase of his trial would have been different had Crowley not made the complained-of statement.[7] *See Strickland v. Washington*, 466 U.S. 668 (1984).

(13)Applicant's fifth claim is as follows:

"ANDRUS'S DEATH SENTENCE WAS ARBITRARILY AND CAPRICIOUSLY ASSIGNED BASED ON THE JURY'S ANSWER TO THE UNCONSTITUTIONALLY VAGUE FIRST SPECIAL ISSUE."

(a) The United States Supreme Court and the Texas Court of Criminal Appeals have previously considered challenges to the constitutionality of Texas Code of Criminal Procedure Article 37.071, Section 2(b)(1) and have denied those challenges. *See Jurek v. Texas*, 428 U.S. 262 (1976; *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003); *Robinson v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994).

(b) The United States Supreme Court and the Texas Court of Criminal Appeals have ruled contrary to Applicant's position and thus, he is not entitled to habeas corpus relief with respect to his fifth claim. *See Jurek v. Texas*, 428 U.S. 262 (1976; *Rayford v. State*, 125 S.W.3d 521, 534 (Tex. Crim. App. 2003); *Robinson v. State*, 888 S.W.2d 473, 481 (Tex. Crim. App. 1994).

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[7] As discussed above, the Court does find and conclude that Applicant is entitled to relief, and specifically, a new punishment trial, because his counsel was ineffective in failing to investigate and present mitigating evidence at the punishment phase of trial. Therefore, the resolution of this claim is rendered moot assuming the Court of Criminal Appeals accepts this Court's recommendation.

(14)Applicant's sixth claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PROPERLY OBJECT TO INADMISSIBLE VICTIM IMPACT EVIDENCE AT THE GUILT/INNOCENCE PHASE OF TRIAL."

(c) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(d) Applicant signed a written confession, made several statements to law enforcement explaining how he killed the victims in this case, and led law enforcement to the gun he used to kill the victims. In addition, there was videotape and eyewitness evidence which inculpated Applicant.

(e) Based on the overwhelming evidence of Applicant's guilt, he is unable to show that any alleged deficient performance on the part of his trial counsel affected the jury's verdict at the guilt or innocence phase of trial or that but for counsel's allegedly deficient performance, the outcome of the guilt or innocence phase of his trial would have been different. Accordingly, Applicant is not entitled to relief with respect to his sixth claim for habeas corpus relief. *See Strickland v. Washington*, 466 U.S. 668 (1984).

(15)Applicant's seventh claim is as follows:

"TRIAL COUNSEL WAS INEFFECTIVE FOR FAILING TO PRESERVE THE RECORD FOR APPEAL."

(a) To prove a claim of ineffective assistance of counsel, an Applicant must show that his attorney's performance was deficient and that as a result of that performance, the outcome of his trial would have been different. *Strickland v. Washington*, 466 U.S. 668 (1984).

(b) Applicant's claim is essentially that a number of bench conferences and off-the-record discussions were not recorded by the Court Reporter and that as a result, he was prejudiced. However, Applicant does not set forth what the bench conferences or off-the-record discussions consisted of and does not demonstrate how he was prejudiced by their omission from the Reporter's

Record of his trial.

(f) Because Applicant is unable to show the importance of any bench conferences or off-the-record discussions, or how they impacted his trial, he is unable to show the outcome of his trial would have been different had they been included in the record. As such, Applicant is not entitled to relief on his seventh claim for habeas corpus relief. *See Strickland v. Washington*, 466 U.S. 668 (1984).

RECOMMENDATION

This Court recommends that Applicant be granted habeas corpus relief with respect to the first claim set forth in his writ application. Specifically, the Court recommends that Applicant be granted a new punishment trial because his lead trial counsel was ineffective in failing to investigate and present mitigating evidence. This Court recommends that Applicant's remaining claims be denied.

The District Clerk shall immediately transmit to the Court of Criminal Appeals these findings and conclusions as provided by law.

The Clerk shall send a copy of this order to Applicant and the State of Texas.

Signed on this 8 day of September, 2017.

Hon. James H. Shoemake
Sitting by Assignment
240th Judicial District Court
Fort Bend County, Texas

APPENDIX C

CODE OF CRIMINAL PROCEDURE

TITLE 1. CODE OF CRIMINAL PROCEDURE

CHAPTER 11. HABEAS CORPUS

. . . .

Art. 11.071. PROCEDURE IN DEATH PENALTY CASE

Sec. 1. APPLICATION TO DEATH PENALTY CASE. Notwithstanding any other provision of this chapter, this article establishes the procedures for an application for a writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.

Sec. 2. REPRESENTATION BY COUNSEL. (a) An applicant shall be represented by competent counsel unless the applicant has elected to proceed pro se and the convicting trial court finds, after a hearing on the record, that the applicant's election is intelligent and voluntary.

(b) If a defendant is sentenced to death the convicting court, immediately after judgment is entered under Article 42.01, shall determine if the defendant is indigent and, if so, whether the defendant desires appointment of counsel for the purpose of a writ of habeas corpus. If the defendant desires appointment of counsel for the purpose of a writ of habeas corpus, the court shall appoint the office of capital and forensic writs to represent the defendant as provided by Subsection (c).

(c) At the earliest practical time, but in no event later than 30 days, after the convicting court makes the findings required under Subsections (a) and (b), the convicting court shall appoint the office of capital and forensic writs or, if the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, other competent counsel under Subsection (f), unless the applicant elects to proceed pro se or is represented by retained counsel. On appointing counsel under this section,

the convicting court shall immediately notify the court of criminal appeals of the appointment, including in the notice a copy of the judgment and the name, address, and telephone number of the appointed counsel.

(d) Repealed by Acts 2009, 81st Leg., R.S., Ch. 781, Sec. 11, eff. January 1, 2010.

(e) If the court of criminal appeals denies an applicant relief under this article, an attorney appointed under this section to represent the applicant shall, not later than the 15th day after the date the court of criminal appeals denies relief or, if the case is filed and set for submission, the 15th day after the date the court of criminal appeals issues a mandate on the initial application for a writ of habeas corpus under this article, move for the appointment of counsel in federal habeas review under 18 U.S.C. Section 3599. The attorney shall immediately file a copy of the motion with the court of criminal appeals, and if the attorney fails to do so, the court may take any action to ensure that the applicant's right to federal habeas review is protected, including initiating contempt proceedings against the attorney.

(f) If the office of capital and forensic writs does not accept or is prohibited from accepting an appointment under Section 78.054, Government Code, the convicting court shall appoint counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code. The convicting court shall reasonably compensate as provided by Section 2A an attorney appointed under this section, other than an attorney employed by the office of capital and forensic writs, regardless of whether the attorney is appointed by the convicting court or was appointed by the court of criminal appeals under prior law. An attorney appointed under this section who is employed by the office of capital and forensic writs shall be compensated in accordance with Subchapter B, Chapter 78, Government Code.

Sec. 2A. STATE REIMBURSEMENT; COUNTY OBLIGATION. (a) The state shall reimburse a county for compensation of counsel

under Section 2, other than for compensation of counsel employed by the office of capital and forensic writs, and for payment of expenses under Section 3, regardless of whether counsel is employed by the office of capital and forensic writs. The total amount of reimbursement to which a county is entitled under this section for an application under this article may not exceed $25,000. Compensation and expenses in excess of the $25,000 reimbursement provided by the state are the obligation of the county.

(b) A convicting court seeking reimbursement for a county shall certify to the comptroller of public accounts the amount of compensation that the county is entitled to receive under this section. The comptroller of public accounts shall issue a warrant to the county in the amount certified by the convicting court, not to exceed $25,000.

(c) The limitation imposed by this section on the reimbursement by the state to a county for compensation of counsel and payment of reasonable expenses does not prohibit a county from compensating counsel and reimbursing expenses in an amount that is in excess of the amount the county receives from the state as reimbursement, and a county is specifically granted discretion by this subsection to make payments in excess of the state reimbursement.

(d) The comptroller shall reimburse a county for the compensation and payment of expenses of an attorney appointed by the court of criminal appeals under prior law. A convicting court seeking reimbursement for a county as permitted by this subsection shall certify the amount the county is entitled to receive under this subsection for an application filed under this article, not to exceed a total amount of $25,000.

Sec. 3. INVESTIGATION OF GROUNDS FOR APPLICATION. (a) On appointment, counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus.

(b) Not later than the 30th day before the date the application for a writ of habeas corpus is filed with the convicting court, counsel may file with the convicting court an ex parte, verified, and confidential request for prepayment of expenses, including expert fees, to investigate and present potential habeas corpus claims. The request for expenses must state:

(1) the claims of the application to be investigated;

(2) specific facts that suggest that a claim of possible merit may exist; and

(3) an itemized list of anticipated expenses for each claim.

(c) The court shall grant a request for expenses in whole or in part if the request for expenses is timely and reasonable. If the court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant.

(d) Counsel may incur expenses for habeas corpus investigation, including expenses for experts, without prior approval by the convicting court or the court of criminal appeals. On presentation of a claim for reimbursement, which may be presented ex parte, the convicting court shall order reimbursement of counsel for expenses, if the expenses are reasonably necessary and reasonably incurred. If the convicting court denies in whole or in part the request for expenses, the court shall briefly state the reasons for the denial in a written order provided to the applicant. The applicant may request reconsideration of the denial for reimbursement by the convicting court.

(e) Materials submitted to the court under this section are a part of the court's record.

(f) This section applies to counsel's investigation of the factual and legal grounds for the filing of an application for a writ of habeas corpus, regardless of whether counsel is employed by the office of capital and forensic writs.

Sec. 4. FILING OF APPLICATION. (a) An application for a writ of habeas corpus, returnable to the court of criminal appeals, must be filed in the convicting court not later than the 180th day after the date the convicting court appoints counsel under Section 2 or not later than the 45th day after the date the state's original brief is filed on direct appeal with the court of criminal appeals, whichever date is later.

(b) The convicting court, before the filing date that is applicable to the applicant under Subsection (a), may for good cause shown and after notice and an opportunity to be heard by the attorney representing the state grant one 90-day extension that begins on the filing date applicable to the defendant under Subsection (a). Either party may request that the court hold a hearing on the request. If the convicting court finds that the applicant cannot establish good cause justifying the requested extension, the court shall make a finding stating that fact and deny the request for the extension.

(c) An application filed after the filing date that is applicable to the applicant under Subsection (a) or (b) is untimely.

(d) If the convicting court receives an untimely application or determines that after the filing date that is applicable to the applicant under Subsection (a) or (b) no application has been filed, the convicting court immediately, but in any event within 10 days, shall send to the court of criminal appeals and to the attorney representing the state:

(1) a copy of the untimely application, with a statement of the convicting court that the application is untimely, or a statement of the convicting court that no application has been filed within the time periods required by Subsections (a) and (b); and

(2) any order the judge of the convicting court determines should be attached to an untimely application or statement under Subdivision (1).

(e) A failure to file an application before the filing date applicable to the applicant under Subsection (a) or (b)

constitutes a waiver of all grounds for relief that were available to the applicant before the last date on which an application could be timely filed, except as provided by Section 4A.

Sec. 4A. UNTIMELY APPLICATION; APPLICATION NOT FILED. (a) On command of the court of criminal appeals, a counsel who files an untimely application or fails to file an application before the filing date applicable under Section 4(a) or (b) shall show cause as to why the application was untimely filed or not filed before the filing date.

(b) At the conclusion of the counsel's presentation to the court of criminal appeals, the court may:

(1) find that good cause has not been shown and dismiss the application;

(2) permit the counsel to continue representation of the applicant and establish a new filing date for the application, which may be not more than 180 days from the date the court permits the counsel to continue representation; or

(3) appoint new counsel to represent the applicant and establish a new filing date for the application, which may be not more than 270 days after the date the court appoints new counsel.

(c) The court of criminal appeals may hold in contempt counsel who files an untimely application or fails to file an application before the date required by Section 4(a) or (b). The court of criminal appeals may punish as a separate instance of contempt each day after the first day on which the counsel fails to timely file the application. In addition to or in lieu of holding counsel in contempt, the court of criminal appeals may enter an order denying counsel compensation under Section 2A.

(d) If the court of criminal appeals establishes a new filing date for the application, the court of criminal appeals shall notify the convicting court of that fact and the convicting court shall proceed under this article.

(e) Sections 2A and 3 apply to compensation and reimbursement of counsel appointed under Subsection (b)(3) in the same manner as if counsel had been appointed by the convicting court, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

(f) Notwithstanding any other provision of this article, the court of criminal appeals shall appoint counsel and establish a new filing date for application, which may be no later than the 270th day after the date on which counsel is appointed, for each applicant who before September 1, 1999, filed an untimely application or failed to file an application before the date required by Section 4(a) or (b). Section 2A applies to the compensation and payment of expenses of counsel appointed by the court of criminal appeals under this subsection, unless the attorney is employed by the office of capital and forensic writs, in which case the compensation of that attorney is governed by Subchapter B, Chapter 78, Government Code.

Sec. 5. SUBSEQUENT APPLICATION. (a) If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application;

(2) by a preponderance of the evidence, but for a violation of the United States Constitution no rational juror could have found the applicant guilty beyond a reasonable doubt; or

(3) by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071, 37.0711, or 37.072.

(b) If the convicting court receives a subsequent application, the clerk of the court shall:

(1) attach a notation that the application is a subsequent application;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) immediately send to the court of criminal appeals a copy of:

(A) the application;

(B) the notation;

(C) the order scheduling the applicant's execution, if scheduled; and

(D) any order the judge of the convicting court directs to be attached to the application.

(c) On receipt of the copies of the documents from the clerk, the court of criminal appeals shall determine whether the requirements of Subsection (a) have been satisfied. The convicting court may not take further action on the application before the court of criminal appeals issues an order finding that the requirements have been satisfied. If the court of criminal appeals determines that the requirements have not been satisfied, the court shall issue an order dismissing the application as an abuse of the writ under this section.

(d) For purposes of Subsection (a)(1), a legal basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the legal basis was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date.

(e) For purposes of Subsection (a)(1), a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date.

(f) If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a subsequent application under this section.

Sec. 6. ISSUANCE OF WRIT. (a) If a timely application for a writ of habeas corpus is filed in the convicting court, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b) If the convicting court receives notice that the requirements of Section 5 for consideration of a subsequent application have been met, a writ of habeas corpus, returnable to the court of criminal appeals, shall issue by operation of law.

(b-1) If the convicting court receives notice that the requirements of Section 5(a) for consideration of a subsequent application have been met and if the applicant has not elected to proceed pro se and is not represented by retained counsel, the convicting court shall appoint, in order of priority:

(1) the attorney who represented the applicant in the proceedings under Section 5, if the attorney seeks the appointment;

(2) the office of capital and forensic writs, if the office represented the applicant in the proceedings under Section 5 or otherwise accepts the appointment; or

(3) counsel from a list of competent counsel maintained by the presiding judges of the administrative judicial regions under Section 78.056, Government Code, if the office of capital and forensic writs:

(A) did not represent the applicant as described by Subdivision (2); or

(B) does not accept or is prohibited from accepting the appointment under Section 78.054, Government Code.

(b-2) Regardless of whether the subsequent application is ultimately dismissed, compensation and reimbursement of expenses for counsel appointed under Subsection (b-1) shall be provided as described by Section 2, 2A, or 3, including compensation for time previously spent and reimbursement of expenses previously incurred with respect to the subsequent application.

(c) The clerk of the convicting court shall:

(1) make an appropriate notation that a writ of habeas corpus was issued;

(2) assign to the case a file number that is ancillary to that of the conviction being challenged; and

(3) send a copy of the application by certified mail, return receipt requested, or by secure electronic mail to the attorney representing the state in that court.

(d) The clerk of the convicting court shall promptly deliver copies of documents submitted to the clerk under this article to the applicant and the attorney representing the state.

Sec. 7. ANSWER TO APPLICATION. (a) The state shall file an answer to the application for a writ of habeas corpus not later than the 120th day after the date the state receives notice of issuance of the writ. The state shall serve the answer on counsel for the applicant or, if the applicant is proceeding pro se, on the applicant. The state may request from the convicting court an extension of time in which to answer the application by showing particularized justifying circumstances for the extension, but in no event may the court permit the state to file an answer later than the 180th day after the date the state receives notice of issuance of the writ.

(b) Matters alleged in the application not admitted by the state are deemed denied.

Sec. 8. FINDINGS OF FACT WITHOUT EVIDENTIARY HEARING. (a) Not later than the 20th day after the last date the state answers the application, the convicting court shall determine whether controverted, previously unresolved factual issues

material to the legality of the applicant's confinement exist and shall issue a written order of the determination.

(b) If the convicting court determines the issues do not exist, the parties shall file proposed findings of fact and conclusions of law for the court to consider on or before a date set by the court that is not later than the 30th day after the date the order is issued.

(c) After argument of counsel, if requested by the court, the convicting court shall make appropriate written findings of fact and conclusions of law not later than the 15th day after the date the parties filed proposed findings or not later than the 45th day after the date the court's determination is made under Subsection (a), whichever occurs first.

(d) The clerk of the court shall immediately send to:

(1) the court of criminal appeals a copy of the:

(A) application;

(B) answer;

(C) orders entered by the convicting court;

(D) proposed findings of fact and conclusions of law; and

(E) findings of fact and conclusions of law entered by the court; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

Sec. 9. HEARING. (a) If the convicting court determines that controverted, previously unresolved factual issues material to the legality of the applicant's confinement exist, the court shall enter an order, not later than the 20th day after the last date the state answers the application, designating the issues of fact to be resolved and the manner in which the issues shall be resolved. To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

(b) The convicting court shall hold the evidentiary hearing not later than the 30th day after the date on which the court enters the order designating issues under Subsection (a). The convicting court may grant a motion to postpone the hearing, but not for more than 30 days, and only if the court states, on the record, good cause for delay.

(c) The presiding judge of the convicting court shall conduct a hearing held under this section unless another judge presided over the original capital felony trial, in which event that judge, if qualified for assignment under Section 74.054 or 74.055, Government Code, may preside over the hearing.

(d) The court reporter shall prepare a transcript of the hearing not later than the 30th day after the date the hearing ends and file the transcript with the clerk of the convicting court.

(e) The parties shall file proposed findings of fact and conclusions of law for the convicting court to consider on or before a date set by the court that is not later than the 30th day after the date the transcript is filed. If the court requests argument of counsel, after argument the court shall make written findings of fact that are necessary to resolve the previously unresolved facts and make conclusions of law not later than the 15th day after the date the parties file proposed findings or not later than the 45th day after the date the court reporter files the transcript, whichever occurs first.

(f) The clerk of the convicting court shall immediately transmit to:

(1) the court of criminal appeals a copy of:

(A) the application;

(B) the answers and motions filed;

(C) the court reporter's transcript;

(D) the documentary exhibits introduced into evidence;

(E) the proposed findings of fact and conclusions of law;

(F) the findings of fact and conclusions of law entered by the court;

(G) the sealed materials such as a confidential request for investigative expenses; and

(H) any other matters used by the convicting court in resolving issues of fact; and

(2) counsel for the applicant or, if the applicant is proceeding pro se, to the applicant, a copy of:

(A) orders entered by the convicting court;

(B) proposed findings of fact and conclusions of law; and

(C) findings of fact and conclusions of law entered by the court.

(g) The clerk of the convicting court shall forward an exhibit that is not documentary to the court of criminal appeals on request of the court.

Sec. 10. RULES OF EVIDENCE. The Texas Rules of Criminal Evidence apply to a hearing held under this article.

Sec. 11. REVIEW BY COURT OF CRIMINAL APPEALS. The court of criminal appeals shall expeditiously review all applications for a writ of habeas corpus submitted under this article. The court may set the cause for oral argument and may request further briefing of the issues by the applicant or the state. After reviewing the record, the court shall enter its judgment remanding the applicant to custody or ordering the applicant's release, as the law and facts may justify.

Added by Acts 1995, 74th Leg., ch. 319, Sec. 1, eff. Sept. 1, 1995. Sec. 4(a), (h) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 1, eff. Sept. 1, 1997; Sec. 5(a), (b) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 2, eff. Sept. 1, 1997; Sec. 7(a) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 3, eff. Sept. 1, 1997; Sec. 8 amended by Acts 1997, 75th Leg., ch. 1336, Sec. 4, eff. Sept. 1, 1997; Sec. 9(a), (e) amended by Acts 1997, 75th Leg., ch. 1336, Sec. 5, eff. Sept. 1, 1997; Sec. 2 amended by Acts 1999, 76th Leg., ch. 803, Sec. 1, eff. Sept. 1, 1999; Sec. 2A added by Acts 1999, 76th Leg., ch. 803, Sec. 2, eff. Sept. 1, 1999; Sec. 3(b), (d) amended by Acts 1999, 76th Leg., ch. 803, Sec. 3, eff. Sept. 1, 1999; Sec. 4

amended by Acts 1999, 76th Leg., ch. 803, Sec. 4, eff. Sept. 1, 1999; Sec. 4A added by Acts 1999, 76th Leg., ch. 803, Sec. 5, eff. Sept. 1, 1999; Sec. 5 heading amended by Acts 1999, 76th Leg., ch. 803, Sec. 7, eff. Sept. 1, 1999; Sec. 5(a), (b) amended by and Sec. 5(f) added by Acts 1999, 76th Leg., ch. 803, Sec. 6, eff. Sept. 1, 1999; Sec. 6(b) amended by Acts 1999, 76th Leg., ch. 803, Sec. 8, eff. Sept. 1, 1999; Sec. 7(a) amended by Acts 1999, 76th Leg., ch. 803, Sec. 9, eff. Sept. 1, 1999; Sec. 9(b) amended by Acts 1999, 76th Leg., ch. 803, Sec. 10, eff. Sept. 1, 1999; Sec. 2(f) amended by Acts 2003, 78th Leg., ch. 315, Sec. 1, eff. Sept. 1, 2003; Sec. 2A(d) added by Acts 2003, 78th Leg., ch. 315, Sec. 2, eff. Sept. 1, 2003; Sec. 3(d) amended by Acts 2003, 78th Leg., ch. 315, Sec. 3, eff. Sept. 1, 2003.

Amended by:

Acts 2005, 79th Leg., Ch. 787 (S.B. 60), Sec. 13, eff. September 1, 2005.

Acts 2005, 79th Leg., Ch. 965 (H.B. 1701), Sec. 5, eff. September 1, 2005.

Acts 2007, 80th Leg., R.S., Ch. 593 (H.B. 8), Sec. 3.06, eff. September 1, 2007.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 2, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 3, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 4, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 5, eff. September 1, 2009.

Acts 2009, 81st Leg., R.S., Ch. 781 (S.B. 1091), Sec. 11, eff. January 1, 2010.

Acts 2011, 82nd Leg., R.S., Ch. 1139 (H.B. 1646), Sec. 1, eff. September 1, 2011.

Acts 2013, 83rd Leg., R.S., Ch. 78 (S.B. 354), Sec. 2, eff. May 18, 2013.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 1, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 2, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 3, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 4, eff. September 1, 2015.

Acts 2015, 84th Leg., R.S., Ch. 1215 (S.B. 1743), Sec. 5, eff. September 1, 2015.

APPENDIX D

IN THE 240th JUDICIAL DISTRICT COURT
FORT BEND COUNTY, TEXAS

	)	**Trial Cause No.**
EX PARTE	)	**09-DCR-051034**
Terence Tremaine Andrus,	)	
APPLICANT	)	
	)	
	)	

MR. ANDRUS'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

OFFICE OF CAPITAL AND FORENSIC WRITS
Benjamin B. Wolff (No. 24091608)
Director, Office of Capital Writs
Gretchen S. Sween (No. 24041996)
Joanne Heisey (No. 24087704)
1700 N. Congress Avenue, Suite 460
Austin, Texas 78701
(512) 463-8600
(512) 463-8590 (fax)

Attorneys for Terence Andrus, Applicant

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IN THE 240th JUDICIAL DISTRICT COURT
FORT BEND COUNTY, TEXAS

EX PARTE **Terence Tremaine Andrus,** **APPLICANT**	)	**Trial Cause No.** **09-DCR-051034**

MR. ANDRUS'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Terence Andrus, through his attorneys, the Office of Capital and Forensic Writs (OCFW), files these Proposed Findings of Fact and Conclusions of Law (FFCL).

The Court, having considered Terence Andrus's Initial Application for Writ of Habeas Corpus filed under Article 11.071 of the Texas Code of Criminal Procedure (Initial Application), the State's Answer, and briefing and exhibits from both parties, and having heard evidence and argument offered by the parties at an evidentiary hearing, makes the following Findings of Fact and Conclusions of Law under Article 11.071, Section 9.

I.

FINDINGS OF FACT REGARDING PROCEDURAL HISTORY MATERIALS CONSIDERED AND CREDIBILITY DETERMINATIONS

1. Terence Tremaine Andrus is currently confined under a sentence of death pursuant to the judgment of the 240th District Court, Fort Bend County, Texas, cause number 09-DCR-051034. Judge Thomas Culver presided over the trial. CR at 304-13.1

2. Mr. Andrus was indicted for capital murder for intentionally and knowingly causing the death of more than one individual during the same criminal transaction. CR at 12. James "Sid" Crowley was appointed to represent Mr. Andrus in February 2009. CR at 65. Jerome Godinich was appointed as co-counsel over a year later, on May 19, 2010. CR at 61. Mr. Godinich filed a motion to withdraw as co-counsel on January 30, 2012, and the Court granted this motion on April 17, 2012. CR at 61-63. From January to June 2012, there was no second chair counsel. The mitigation specialist was never replaced. Diana Olvera was appointed as co-counsel on June 7, 2012, less than four months before voir dire began. CR at 64.

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1 "CR" refers to the Clerk's Record; "RR" refers to the Reporter's Record. "Pretrial RR [September 5, 2012]" refers to the Reporter's Record of a pretrial hearing held on that date. "EHR" refers to the transcript of the writ evidentiary hearing. The number before the citation refers to the volume number, and the number that follows refers to the page number or page range.

3. Voir dire commenced on October 1, 2012, and concluded on November 1, 2012. 2 RR at 7 to 37 RR at 59. The guilt-innocence phase of Mr. Andrus's trial began on November 1, 2012, with the State presenting its opening statement. 38 RR at 20-38. The defense declined to present an opening statement. 38 RR at 38. On November 5, 2012, the State rested. The defense rested immediately thereafter, without presenting any witnesses of its own. 43 RR at 43. The following day, both sides presented closing arguments. 45 RR at 7-26.

4. In his closing, defense counsel conceded Mr. Andrus's guilt, told the jury that the State had proven the elements of the offense, and stated that the defense case was going to rely entirely on the punishment phase. 45 RR at 15-18.

5. The case was submitted to the jury for deliberations, and on the same day, the jury returned a verdict finding Mr. Andrus guilty of capital murder. *Id.* at 28; CR at 294-302.

6. The punishment phase began on the same day as the verdict, November 6, 2012, with the State presenting an opening statement. The defense again declined to present an opening statement. 45 RR at 29-32. The State then presented its case for punishment, and rested on November 8, 2012. 46 RR at 8 - 49 RR at 42. The defense began its presentation without making an opening statement. 49 RR at 44. The defense presented two witnesses before resting. Judge Culver inquired if Mr. Crowley perhaps had other witnesses and gave the defense a few days. Upon

resuming, the defense called two more witness. Mr. Andrus then elected to testify on his own behalf. 49 RR at 44 - 51 RR at 76. Following Mr. Andrus's testimony on November 14, 2012, the defense rested, and the State did not present any rebuttal testimony. 51 RR at 76. Later that day, both sides presented closing arguments. 52 RR at 5-52. Jury deliberations commenced, and that same day, the jury returned with a verdict answering "Yes" to Special Issue One, and "No" to Special Issue Two. 53 RR at 5; CR at 304-12. Mr. Andrus was then formally sentenced to death. 53 RR at 5; CR at 304-13.

7. On December 14, 2012, this Court appointed Cary Faden to represent Mr. Andrus to file a direct appeal on Mr. Andrus's behalf. CR at 316. An appellate brief was filed with the Court of Criminal Appeals (CCA) on April 22, 2014. Thereafter, the CCA remanded the case to the trial court with an order that it prepare and file findings of fact and conclusions of law regarding the voluntariness of Mr. Andrus's confessions, which the court had not prepared after ruling on a motion to suppress that confession.2 After receiving findings of fact and conclusions of law from the trial court, the CCA affirmed Mr. Andrus's conviction and death sentence

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2 The first motion to suppress was filed by Mr. Andrus pro se on or around February 15, 2010, and was never ruled on. CR at 14-18. Mr. Crowley later filed a boilerplate motion that was heard and denied. *Id.* at 48-49; Pretrial RR [September 5, 2012] at 81.

on December 9, 2015. Mr. Andrus's motion for rehearing was filed on January 1, 2016, and was denied on March 23, 2016, at that time, the CCA withdrew its earlier opinion and substituted a new opinion, again affirming the conviction and sentence.

8. On November 19, 2012, this Court appointed the OCW3 to represent Mr. Andrus in his post-conviction habeas litigation pursuant to Article 11.071, section 2 of the Code of Criminal Procedure. CR at 315. The OCW (now the OCFW) filed Mr. Andrus's Initial Application on March 4, 2015, and the State filed its Answer on August 28, 2015. Judge Culver, having retired from the bench on June 30, 2015, the Presiding Judge of the Second Administrative Judicial Region assigned the Honorable James Shoemake to preside over Mr. Andrus's post-conviction proceedings in the 240th Judicial District Court.

9. Thereafter, this Court designated issues of fact regarding Mr. Andrus's trial representation that needed to be resolved by testimony at an evidentiary hearing. An evidentiary hearing was held on December 12, 13, 14, and 15, 2016, and on March 20, 21, and 29, 2017.

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3 On September 1, 2015, the Office of Capital Writs was renamed the Office of Capital and Forensic Writs. S.B. 1743, 84th Leg., Reg. Sess. (Tex. 2015).

10. The Court has considered the trial record, the writ pleadings, supplemental briefing, all exhibits admitted into evidence, testimony, and arguments of counsel.

11. The Court finds that the affidavits submitted by trial counsel in support of the State are not credible. *See* HC1, HC2.[4] Both were prepared without court supervision and thus in violation of the on-going duties of loyalty and confidentiality described in the Texas Disciplinary Rules and the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines) and the State Bar of Texas Guidelines and Standards for Texas Capital Counsel (Texas Guidelines). *See* DX52; DX54. The affidavits were also prepared in violation of ABA Formal Opinion 10-456, issued on July 14, 2010, which governs "Disclosure of Information to Prosecutor When Lawyer's Former Client Brings Ineffective Assistance of Counsel Claim."

12. Mr. Crowley conferred with the State in advance of signing his affidavit and again before testifying, absent any court order to do so. These communications began even before Mr. Andrus's writ application alleging ineffective assistance of trial counsel had been filed. 1 EHR147-61; DX62-64. Counsel for the State prepared

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4 "HC" refers to exhibits that the State offered and were admitted into evidence during the writ proceeding.

the first draft of Mr. Crowley's affidavit, making arguments to suggest possible trial "strategies" and leaving a few blanks for Mr. Crowley to fill in with minor details. DX62; 1 EHR at 166. In a subsequent draft, the State added an extensive section, providing Mr. Crowley with "facts," about which he could have had no personal knowledge, suggesting why the State might have exercised its peremptory strikes of minority venire members. DX63. In a subsequent draft, again prepared by the State, counsel for the State provided Mr. Crowley with suggestions about how he might try to justify his failure to present experts relevant to mitigation. DX64.

13. Mr. Crowley admitted that the State composed the material in his affidavit relevant to his failure to make a Batson challenge and that he had no personal knowledge of these "facts." 1 EHR at 161.

14. Mr. Crowley's affidavit and testimony regarding its preparation contain demonstrably incorrect statements of fact such as the assertion that the only mental health diagnosis Mr. Andrus had ever received was ADHD and that the records trial counsel had reflected no mental health issues. 1 EHR at 157-58. Mr. Crowley also incorrectly asserted as a "fact" that the writ application "conceded" that Mr. Andrus had no history of mental illness. 1 EHR at 161; HC1. Mr. Crowley further insists in his affidavit that a clinical psychologist, Dr. Jerome Brown, after assessing Mr. Andrus, had told Mr. Crowley that he had found nothing useful and that Mr. Andrus had no mental health issues other than mild depression. *See* HC1. Yet Mr. Crowley

also admitted that he did not contact Dr. Brown after he had evaluated Mr. Andrus, and Dr. Brown has stated in a sworn affidavit that he did not hear from anyone on the defense team after the evaluation even after he sent a draft report by email, fax, and regular mail. 2 EHR at 261; DX2. Dr. Brown's draft report describes his opinion that Mr. Andrus had serious mental health issues including, potentially, schizophrenia. Mr. Crowley's claim that he did not receive the draft report, dated October 1, 2012, until after trial in November 2012 is not credible.

15. In sum, Mr. Crowley's affidavit is not credible because of the way it was prepared in violation of the Texas Disciplinary Rules and prevailing professional norms outlined in the ABA Guidelines and Texas Guidelines and the multiple errors of fact it contains.

16. Ms. Olvera also conferred with counsel for the State absent a court order to do so. Counsel for the State prepared the first draft of her affidavit. 3 EHR at 6. Unlike Mr. Crowley, she directed the State to delete some of the material its counsel had drafted because it was beyond her personal knowledge. These deleted materials included the State's ex post facto justifications for striking minority venire members. *Compare* DX86 *with* HC2. She admitted that, during voir dire, the State was never asked to provide race-neutral reasons for striking minority venire members; therefore, there was no way for defense counsel to know what the State's reasons were. 3 EHR at 129-32.

17. Ms. Olvera did not have a copy of her files when she reviewed the affidavit drafted for her by counsel for the State; nor did she review the trial record before signing the affidavit. 3 EHR at 12.

18. Ms. Olvera testified that she was not a mitigation specialist and admitted that she "didn't do mitigation" for this case. 3 EHR at 21. Yet her affidavit states that she was in charge of handling mitigation. HC2.

19. Ms. Olvera's affidavit contains an inaccurate description of the contents of Mr. Andrus's juvenile records from the Texas Youth Commission (TYC) in stating that "there was in fact nothing in those records that gave a definitive mental health diagnosis that would have been sufficiently mitigating to risk the introduction of all of the negative portions of those records." HC2 at ¶6.

20. Ms. Olvera's affidavit also includes information about purported conversations with Mr. Andrus's youngest sibling (Trevion) that are inconsistent with the fact that he was only nine or ten years old at the time of the offense, and she admitted that she did not meet any family members or other potential defense witnesses in person before trial and may never have talked to this individual although her affidavit states that she did. 3 EHR at 23-26.

21. In sum, Ms. Olvera's affidavit is not credible because of the way it was prepared in violation of the Texas Disciplinary Rules, prevailing professional norms

outlined in the ABA Guidelines and Texas Guidelines, and the multiple errors of fact it contains.

22. Except as otherwise noted below, the Court has accepted all other exhibits presented in the pleadings and at the evidentiary hearing as substantive evidence and finds that evidence to be credible.

II.

OVERVIEW OF MR. ANDRUS'S CLAIMS

23. Mr. Andrus's Application contains three claims pled as follows:

- Mr. Andrus's Trial Counsel Provided Ineffective Assistance of Counsel in Violation of the Sixth Amendment of the U.S. Constitution (pled as Grounds 1, 3, 4, 6, 7);

- Mr. Andrus's Due Process Rights Were Infringed When The Jury Was Informed Mr. Andrus Was Wearing Physical Restraints During Trial (pled as Ground 2); and

- Mr. Andrus's Death Sentence Was Arbitrarily and Capriciously Assigned Based on the Jury's Answer to the Unconstitutionally Vague First Special Issue (pled as Ground 5).

See Initial Application.

24. The third claim identified above is a purely legal claim that did not raise disputed issues of material fact that had to be resolved before the claim could be adjudicated. Therefore, Article 11.071 § 8(b), "Findings of Fact Without Evidentiary Hearing," governs that claim. FFCL for this claim are found in Section V below.

25. As for the second claim identified above, the State conceded that there is no disputed fact as to whether the jury became aware that Mr. Andrus was wearing physical restraints at some point during the trial. Because shackling is "inherently prejudicial," where jurors become aware of such restraints, the State bears the burden of proving beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained. *Deck v. Missouri*, 544 U.S. 622, 635 (2005).

26. Such evidence must arise from the face of the trial record because juror testimony regarding "the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment" is inadmissible. *See* TEX. R. EVID. 606 (b). FFCL for this claim are found in Section IV below.

27. The first claim identified above, Ineffective Assistance of Trial Counsel (IAC), requires the resolution of numerous factual issues and the consideration of extra-record evidence. Therefore, Article 11.071 § 9 governs this claim. FFCL for this claim are found in Section III below.

III.

CLAIM:

INEFFECTIVE ASSISTANCE OF TRIAL COUNSEL

A. Findings of Fact

1. Facts Relevant to Assessing Deficient Performance Pre-Trial

28. Mr. Crowley was appointed lead counsel for Terence Andrus on February 17, 2009, about two weeks after Mr. Andrus was indicted. CR at 2; DX41 at 1; 1 EHR at 177. When Mr. Crowley accepted the appointment, he was already representing other defendants in capital murder cases in Fort Bend County and subsequently accepted additional capital appointments along with many other criminal appointments. DX65; 1 EHR at 181-84.

29. One of the other capital defendants whom Mr. Crowley was appointed to defend in Fort Bend County during the same timeframe was Richard Allen Howe. 1 EHR at 182. Mr. Crowley admitted repeatedly that he did no work on Mr. Andrus's case while Mr. Howe's case was pending. Mr. Crowley also acknowledged that when Jerome Godinich and Amy Martin were eventually appointed to Mr. Andrus's defense team, they too were busy with the Howe case. 1 EHR at 187, 215-16; 2 EHR at 6, 20, 146.

30. Mr. Howe's case went to trial for the first time in July 2011, but trial was halted during the voir dire because the court concluded that the defense team

was not ready. Mr. Howe's case went to trial a second time in January 2012, and a plea deal was ultimately worked out some time in February. 2 EHR at 9-21; DX27 at ¶¶12, 17-18; DX28 at ¶¶7-9. At the same time—in January 2012—Mr. Crowley agreed that Mr. Andrus's case could be set for trial, even as he admitted that no work yet had been done and despite the objections of the rest of the defense team, who withdrew as a result of conflicts with the trial setting. 2 EHR at 21; DX27; DX28.

31. Mr. Crowley represented Mr. Andrus for three years and nine months. During that time, he failed to undertake any independent investigation of the underlying offense, the circumstances of Mr. Andrus's confession, or the State's extraneous offense evidence. Likewise, Mr. Crowley failed to undertake or ensure that any meaningful mitigation investigation was undertaken into Mr. Andrus's bio-psycho-social history. DX31 at 1-9.

32. For the forty-five month representation, Mr. Crowley billed Fort Bend County for a total of 354 hours of work on Mr. Andrus's case, only 145 of which was for work outside of the courtroom. DX31 at 1-9. The majority of Mr. Crowley's pretrial work entailed court appearances, most of which involved resetting the case. The few hours he spent outside of court reviewing records consisted primarily of reviewing the State's discovery. *Id.*; CR at 2-3.

33. Fort Bend County jail visitation records show that Mr. Crowley visited Mr. Andrus only six times during the forty-five months that Mr. Crowley represented

him. DX40 at 1-3; 1 EHR at 189-90. Mr. Crowley visited Mr. Andrus for the first time on October 4, 2009, over eight months after he had been appointed. DX40 at 1. Mr. Crowley waited until Mr. Andrus was transferred from the Harris County jail to the Fort Bend County jail to visit him although Mr. Crowley had an office in Harris County during that time. 1 EHR at 188. Mr. Crowley acknowledged that he did not explain to Mr. Andrus that his conduct in jail could and would be used against him at trial because the State had to prove that he was a continuing threat to society or a "future danger" to obtain a death sentence. 1 EHR at 191-92, 199; *see also* 3 EHR at 154 (P. Wischkaemper explaining the consequences of the failure to visit the client and build rapport).

34. Mr. Crowley also admitted that he did not investigate what happened to his client while he was in the Harris County jail and did not know that he had attempted suicide. 1 EHR at 194. He incorrectly believed that the Harris County jail records only showed that Mr. Andrus was malingering when the records include diagnoses of schizophrenia, mood disorder, schizophrenia affective disorder, and bipolar disorder. 1 EHR at 196; 2 EHR at 264-65, 300; HC18. Mr. Crowley did not retain any mental health expert for several years and never asked the expert he obtained a few weeks before trial to assist the defense team with understanding Mr. Andrus's mental health issues in jail and how they may have affected his conduct. 1 EHR at 196.

35. As of February 2010, a year into the appointment, Mr. Crowley had not filed a single motion. Mr. Andrus, recognizing that no work had been done to get his case ready for trial, began filing his own handwritten motions, including a motion for exculpatory evidence and a motion to suppress his confession. These motions were filed on February 15, 2010 but were never ruled on. CR at 14-18.

36. Mr. Crowley's billing records do not indicate that he personally interviewed or spoke to a single potential lay witness before trial. DX31 at 1-9.

37. A second-chair counsel, Jerome Godinich, was finally appointed on May 19, 2010, a year into the representation. CR at 61. Only then was a mitigation specialist, Amy Martin, retained. DX34 at 2. Mr. Crowley has acknowledged that no mitigation investigation of any kind was undertaken before Ms. Martin joined the team. 1 EHR at 2092. Mr. Godinich and Ms. Martin attested that they were alarmed to see that no mitigation work had been done during the year before their appointment. DX28; DX27. Mr. Crowley denied that they shared their alarm with him; but his testimony on this matter is not credible. 1 EHR at 211-12.

38. When Mr. Godinich and Ms. Martin were appointed, Mr. Crowley told them that the State had not yet decided whether it would seek death—although the State had already given notice of its intent to seek the death penalty on May 17, 2010. CR at 19; DX28 at ¶¶4-5; DX27 at ¶23.

39. Mr. Crowley was the only member of the defense team who communicated with counsel for the State about Mr. Andrus's case. 1 EHR at 176.

40. Mr. Godinich's work prior to withdrawing mainly involved meeting with the client to discuss possible mitigation themes and the possibility of a plea deal. DX28 at ¶22.

41. Ms. Martin's work prior to withdrawing from the case was mostly aimed at developing a mitigation case that would persuade the State not to seek the death penalty; however, Mr. Crowley informed Ms. Martin that he did not want her to create a mitigation packet to give to the State. DX28 at ¶13. She ceased working on Mr. Andrus's case well before trial. Before withdrawing, her work was largely limited to record collection and trying to locate members of Mr. Andrus's immediate family. She also created a timeline based solely on digesting the records that she had obtained. DX27 at ¶23; DX28 at ¶13; DX18. A reasonable investigation starts, but does not end, with records collection. 1 EHR at 81-84.

42. Mr. Crowley admitted that Ms. Martin informed him that she was not making headway with Mr. Andrus's family members. 1 EHR at 214.

43. During the roughly twenty months of Mr. Godinich's and Ms. Martin's appointment, Mr. Crowley did not do any substantive work on Mr. Andrus's case. DX27 at ¶¶4, 22.

44. While representing Mr. Andrus, his defense team—Mr. Crowley, Mr. Godinich, and Ms. Martin—were all simultaneously representing another defendant in a death-penalty case, Richard Howe, in Fort Bend County. All three members of these two capital defense teams admitted that they did virtually no work on Mr. Andrus's case while Mr. Howe's case was pending. DX27; DX28; 1 EHR at 187, 215-16; 2 EHR at 6, 20, 146.

45. Because all members of the defense team appointed to represent Mr. Andrus were also appointed to represent Mr. Howe, and because all members of the overlapping teams have admitted that Mr. Howe's representation took precedence, facts regarding the representation of Mr. Howe are relevant to assessing whether Mr. Andrus received ineffective assistance of counsel.

46. Before Mr. Howe's trial was initially set to begin, Mr. Godinich, Ms. Martin, and other members of Mr. Howe's defense team expressed frustration that Mr. Crowley had done no substantive work to prepare. DX28; DX27 at ¶¶7, 8. When voir dire began in Mr. Howe's case, Mr. Crowley had not yet spoken to a single witness or consulted with a single expert or conferred with the mitigation specialist. DX27 at ¶8. Nona Dodson, an experienced jury consultant who had been appointed to the Howe case, also observed that Mr. Crowley had done little to no work on the case prior to the start of trial. DX26 at ¶11. Ms. Dodson would send Mr. Crowley pages of notes and questions to ask prospective jurors, identifying particular issues

that arose from the jurors' answers to the questionnaires, but Mr. Crowley failed to look at the notes or use the questions Ms. Dodson provided. *Id.* at ¶8; DX27 at ¶9. Ms. Dodson observed the voir dire and found that Mr. Crowley did not conduct an effective voir dire and that his method of questioning prospective jurors resulted in many jurors who could and should have been struck for cause being impaneled. DX26 at ¶¶9-10.

47. Mr. Crowley claims he did not know of the Howe defense team's frustration with him "until about two weeks into the voir dire." 2 EHR at 10. This testimony is not credible.

48. On September 16, 2011, Mr. Crowley filed a motion to withdraw from the Howe case complaining that he had "back pain." He testified at the evidentiary hearing in this writ proceeding that the representation he had made to the court regarding "back pain" was untrue. He testified that he misled the court because other members of the Howe defense team had threatened to "blackmail" him by promising to tell the judge that he had previously been found ineffective in another capital case and been forced to withdraw. 2 EHR at 11-12; DX44.5 Mr. Crowley only decided

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5 This finding was made in a pretrial hearing before the Honorable Craig Estlinbaum in Matagorda County in the capital murder case of Francisco Castellano. *See* DX44; DX30. Mr. Crowley admitted in this writ proceeding that the judge presiding over Mr. Castellano's case had found Mr. Crowley constitutionally ineffective and had ordered him removed. 2 EHR at 30. As explained below, the Court concludes that

to pull down his motion to withdraw with the false representations after a conversation with a member of the Fort Bend County District Attorney's Office, ADA Fred Felcman. 4 EHR at 21-22.

49. Thereafter, at a hearing in the Howe case, both Mr. Godinich and the jury consultant, Ms. Dodson, expressed to the court their concerns about Mr. Crowley's performance; but he was permitted to remain on the case. DX27 at ¶10; DX26 at ¶12. The court determined, however, that the defense team was not ready for trial and dismissed the seated jurors and the remaining venire panel. 2 EHR at 14.

50. During voir dire, the judge met with the defense team and proposed that Mr. Crowley be assigned specific tasks and have weekly meetings to monitor his progress. DX27 at ¶13. However, Mr. Crowley did not attend any of the defense team meetings or join any conferences with experts for either phase of trial. *Id.* at ¶14.

51. Before closing arguments at the guilt phase of Mr. Howe's second trial, Mr. Crowley informed Mr. Godinich that the State had offered a plea deal to Mr. Howe. DX27 at ¶¶15-17; DX28 at ¶9. Mr. Crowley asked Mr. Godinich if they

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Mr. Crowley was never qualified to represent Mr. Andrus or any other capital defendant in light of the court's finding in the Castellano case.

should tell Mr. Howe about the offer.6 DX27 at ¶17; DX28 at ¶9. Mr. Crowley then informed Mr. Godinich that this was not the first time the State had made an offer of a plea deal. DX27 at ¶17; DX28 at ¶9. Mr. Godinich, with the help of one of the defense experts, was ultimately able to persuade Mr. Howe to accept the plea agreement. DX27 at ¶¶15-18; DX28 at ¶9.

52. In this writ proceeding, Mr. Crowley testified that he was ready for Mr. Howe's trial on both occasions while admitting that his billing records show that virtually all of the time he had put in on the case was for the two voir dires and then a few days in trial. 2 EHR at 16-19; DX71.

53. While Mr. Howe's case was still being resolved, and without first consulting with the rest of the Andrus defense team, Mr. Crowley had met with Judge Culver in January 2012 and agreed to set Mr. Andrus's case for trial in mid-November 2012. DX27 at ¶19; DX28 at ¶11. Mr. Godinich later informed the trial court that he was appointed in another death penalty case in Harris County that

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6 The Texas Disciplinary Rules of Professional Conduct stipulate that "a lawyer is obligated to communicate any settlement offer to the client in a civil case; and a lawyer has a comparable responsibility with respect to a proposed plea bargain in a criminal case." TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 at cmt. 2; *see also* TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02 at cmt. 1 ("A lawyer who receives from opposing counsel…a proffered plea bargain in a criminal case should promptly inform the client of its substance.").

created a scheduling conflict for a trial setting of November 2012 in Mr. Andrus's case. CR at 61; DX27 at ¶¶19-20; DX28 at ¶11. Both Mr. Godinich and Ms. Martin had ceased working on Mr. Andrus's case by that time. DX27 at ¶21; DX28 at ¶11; DX33 at 5; DX34 at 4.

54. The trial court asked Mr. Crowley if he wanted more time, but Mr. Crowley said no. DX27 at ¶19; DX28 at ¶11.

55. Soon thereafter, on January 30, 2012, Mr. Godinich filed a motion to withdraw from Mr. Andrus's case. CR at 61-62; DX27 at ¶4. The motion to withdraw included a representation that Mr. Andrus was willing to accept a plea of life in prison without the possibility of parole. CR at 62.

56. Mr. Crowley testified in this writ proceeding that he did not know about his co-counsel's motion to withdraw despite its being part of the docket. 1 EHR at 207. The motion represented to the court that Mr. Crowley would seek a new second chair and a mitigation specialist. CR at 62. The latter never happened. A mitigation specialist is an essential part of the defense team in a death-penalty case. 1 EHR at 86.

57. Mr. Crowley testified in this writ proceeding that he did go to the State about a plea deal for Mr. Andrus. Yet Mr. Crowley admitted that, even if he did discuss the possibility of a plea deal with the State, he did not provide the State with a mitigation packet or any arguments as to why taking death off the table was

appropriate in this case. 1 EHR at 210-11, 218. ADA Felcman, the attorney for the State with whom Mr. Crowley primarily communicated, contradicts Mr. Crowley's testimony. ADA Felcman denied ever being told that Mr. Andrus would have accepted a plea deal involving life without the possibility of parole, and his testimony is more credible in this regard. 1 EHR at 210-12; 4 EHR at 25.

58. When Mr. Crowley agreed that Mr. Andrus's case could be placed on the trial docket for November 2012, with voir dire to begin on October 1, Mr. Crowley knew that he had no second chair, no mitigation specialist, no experts, had conducted no witness interviews, and had conducted no investigation of any kind. 1 EHR at 201, 217-18; 2 EHR at 24-25. He testified that he did not see a problem with trying to work up a capital defense case in a few months under these circumstances. 2 EHR at 37.

59. Mr. Crowley knew that there was no mitigation specialist on the case once Ms. Martin ceased working on the case, and he did not comply with the terms of his co-counsel's motion to withdraw, promising to replace both the second chair and the mitigation specialist. 2 EHR at 22.

60. Even after Mr. Howe's case was resolved and after Mr. Andrus's case had been placed on the trial docket, Mr. Crowley admitted that he did virtually no work on the case for another five months. 2 EHR at 38; *see also* DX31 at 1-9 (billing records showing only five hours of work during this time). There is no indication

that Mr. Crowley conducted any investigation or retained any investigator or mitigation specialist to do any investigation. DX27 at ¶26; DX28 at ¶15.

61. While Ms. Martin and Mr. Godinich had been on the case, they had observed through their brief interactions with the Andrus family that the family dynamic was dysfunctional and believed that there was compelling mitigation evidence to be discovered. DX27 at ¶26; DX28 at ¶17. However, they also believed that it would take several months of repeated interviews with family members to establish rapport and develop this evidence, and that it would be necessary to interview people outside of the immediate family for an accurate portrait of Mr. Andrus and his immediate family. DX27 at ¶26; DX28 at ¶17.

62. Through their visits with Mr. Andrus and by reviewing some of the records that they had obtained, Ms. Martin and Mr. Godinich were able to identify many important witnesses that needed to be interviewed to discover and develop mitigating evidence to be presented at a potential punishment phase. DX27 at ¶24; DX28 at ¶18. These witnesses included Mr. Andrus's siblings; his biological father, Michael Davis, along with his ex-wife and her family; family members of Mr. Andrus's mother's long-term partner, Senecca Booker; counselors who had treated Mr. Andrus while he was housed at TYC and the Fort Bend Juvenile Detention Center; and Mr. Andrus's former coworkers, employers, and teachers. DX27 at ¶24;

DX28 at ¶18. However, none of these witnesses were interviewed by the time Mr. Godinich and Ms. Martin left the case—or thereafter. DX27 at ¶26; DX28 at ¶15.

63. Before leaving the case, Mr. Godinich and Ms. Martin had also considered and discussed experts that might be hired for the preparation and presentation of evidence at a potential punishment phase, including a juvenile development expert and an expert on the TYC system. DX27 at ¶¶27-28; DX28 at ¶20. But when Mr. Godinich and Ms. Martin left the case, no experts had been retained or begun working on the case. DX27 at ¶28. No one on the defense team consulted with any experts until September 2012, a few weeks before trial began. 1 EHR at 196, 201.

64. When Mr. Godinich and Ms. Martin withdrew from the case, they believed that the case was not ready to go to trial. DX27 at ¶30; DX28 at ¶21. A significant amount of mitigation investigation was left to be done, including repeated interviews with immediate family members, locating and interviewing others who knew Mr. Andrus, and developing expert testimony. DX27 at ¶¶4, 30 ("[W]hen we left the case in early 2012, it was not prepared for trial and could not have been ready by the trial date that had been set."); DX28 at ¶21 ("Had the case gone to trial prematurely, with only the amount of investigation that had been done as of the time I withdrew, I would not have considered it to have met the standard of care for mitigation investigations in a capital case.").

65. Before withdrawing, Ms. Martin had conducted only one, brief, in-person mitigation interview (of Mr. Andrus's mother, Cynthia Andrus). This interview took place at a diner, which was the only place where Ms. Andrus was willing to meet and only on the condition that Ms. Martin buy breakfast. DX28 at ¶15. Ms. Andrus brought one of her daughters along to the meeting; therefore, Ms. Martin was unable to interview Ms. Andrus by herself, as is prevailing practice. *Id.*

66. During that interview, Cynthia Andrus stated, in front of her daughter, that she "had too many kids." DX28 at ¶16. She also mentioned that she had taken out a life insurance policy on her son before he had committed the crime and that she would be able to collect on the policy if he was executed. *Id.*

67. This single interview was not memorialized in an interview memo despite clear red flags indicating fruitful mitigation and prevailing norms requiring such memos. *See* HC18. No further in-person mitigation interviews were conducted with any family members or anyone else. *See id.*; DX31 at 1-9; DX32 at 1-10.

68. Mr. Crowley never met with Mr. Andrus to discuss the withdrawal of Mr. Godinich and Ms. Martin. But in June 2012, when Mr. Andrus learned that they had stopped working on his case, he filed another pro se motion, this time requesting that the court dismiss Mr. Crowley as appointed counsel. 2 EHR at 39; CR at 65-67; DX41. That same month, Mr. Andrus wrote a letter both to the trial judge and to the disciplinary counsel of the State Bar of Texas, explaining that Mr. Crowley had not

been visiting him or consulting with him about his defense. DX42 at 1; DX43 at 1. Mr. Andrus pleaded for "a new adequate council [sic] so I can at least have a chance in a fair trial." DX43 at 2; DX42 at 2. Mr. Crowley admitted that he did not meet with Mr. Andrus after these pro se motions were filed to discuss his client's concerns. 2 EHR at 40.

69. Mr. Crowley waited until June 2012 to acquire a new second chair and never replaced the mitigation specialist. Diana Olvera was finally appointed to replace Mr. Godinich as second chair counsel fewer than four months before the start of voir dire. CR at 64; 2 RR at 1. Ms. Olvera retrieved the State's discovery from Mr. Godinich upon her appointment to the case, though she did not speak with him about the case until close to the time of trial. DX27 at ¶29.

70. When Ms. Olvera agreed in June 2012 to help Mr. Crowley, she did not make seeking a continuance a condition of her agreement to serve as second chair. 3 EHR at 14. Nor does the record show that any continuance was sought by Mr. Crowley after the rest of his team withdrew or after Ms. Olvera agreed to help. 2 EHR at 24; 3 EHR at 15.

71. Ms. Olvera's role was circumscribed. She testified that she "didn't do mitigation," did not investigate the facts of the underlying offense, and did not investigate the State's extraneous offenses. 3 EHR at 22, 24, 38, 105. Although the nature of her working relationship with Mr. Crowley is unclear, Ms. Olvera's

testimony shows that she was not fully aware of what Mr. Crowley was or was not doing or had done when she joined the team. Her knowledge of the history of the case before she joined was also limited. For instance, she did not know that Mr. Andrus had filed pro se motions to suppress his confession a year and a half before Mr. Crowley filed a similar motion. 3 EHR at 117-18. She admitted that "of course" defense counsel in a capital case has a duty to undertake an independent investigation of the offense and the extraneous offenses that the State intended to introduce against the defendant. 3 EHR at 39. She described at length what one would do in the "normal course," which she admitted did not occur in this case. 3 EHR at 68-69.

72. Most of trial counsel's file consists of the State's discovery rather than any interpretation of that discovery. *See* HC18. Ms. Olvera acknowledged this fact, as well as the fact that the State's discovery does not necessarily represent the whole truth and should not be accepted by defense counsel at face value. 3 EHR at 118-21.

73. Notations in counsel's files indicate that, at most, someone on the defense team spoke briefly on the telephone with: Cynthia Andrus, Terence's younger sister Tafarrah, Michael Davis, Terence's maternal grandparents, an ex-girlfriend, and a counselor at the Fort Bend County jail. In contrast, never contacted important witnesses who had known Mr. Andrus well throughout his life, including his other siblings. These witnesses included Mr. Andrus's older brother (DX9 at ¶18 ("I was never interviewed by Terence's trial defense team.")); his other younger

sister (DX18 at ¶12 ("I was never contacted by anyone on Terence's defense team.")); his step-mother (DX12 at ¶18 ("I was never contacted or interviewed by Terence's trial defense team.")); his step-brother (DX16 at ¶12 ("I was never interviewed by Terence's trial defense team.")); and family members of his mother's long-term partner, Senecca Booker (DX10 at ¶16 ("I was never interviewed by Terence's trial defense team."); DX11 at ¶12 ("I was never interviewed by Terence's trial defense team."); DX17 at ¶12 ("I was never interviewed by anyone on Terence's defense team."); DX13 at ¶17 ("I was not contacted by anyone on Terence's trial team."); DX14 at ¶12 ("I was never contacted by anyone on Terence's defense team."); DX15 at ¶9 ("I was never interviewed or contacted by Terence's trial attorneys.")).

74. Although funds for a fact investigator were approved, this investigator, Ernest Humberson, billed for a total of only 42.5 hours from September to November 2012. DX35 at 2-8. He was utilized only to locate witnesses and serve trial subpoenas, not to interview witnesses. *Id.* at 3.

75. Mr. Crowley was responsible for finding and working with appropriate experts. 3 EHR at 30, 35. Although he had been appointed to the case for over three and a half years, Mr. Crowley did not contact a single expert witness until a few weeks before voir dire began. DX2 at ¶2; DX6 at ¶4; DX36 at 2.

76. Trial counsel did not consult with, retain, or present any experts regarding guilt-phase issues. Trial counsel retained three experts regarding punishment-phase issues, but none of them were adequately prepared, and only one testified.

77. The only defense expert who ended up testifying was Dr. John Roache, a psychiatrist and pharmacologist. He testified briefly in the punishment phase about drug addiction and drug abuse and how these could have impacted Mr. Andrus's cognitive ability and decision-making. 51 RR at 6-19; DX6 at ¶5. Dr. Roache submitted an affidavit in support of Mr. Andrus's Initial Application that the Court finds credible. DX6.

78. Mr. Crowley contacted Dr. Roache for the first time on August 23, 2012, just over a month before the start of voir dire. DX6 at ¶4. Dr. Roache was provided with limited life history records and the offense reports. *Id.* at ¶6. Dr. Roache has previously worked on several capital cases, all in Texas, and typically receives information about a defendant's life history from a mitigation specialist retained by the defense team, often in the form of a mitigation report. *Id.* at ¶7. Dr. Roache informed Mr. Crowley that social history and childhood development information would be valuable to inform his evaluation and testimony. *Id*. at ¶9. However, Dr. Roache was never put into contact with a mitigation specialist or given

a mitigation report or any documentation of interviews with family and friends (since none existed). *Id.* at ¶8; 2 EHR at 106.

79. Dr. Roache interviewed Mr. Andrus briefly at the Fort Bend County jail on September 28, 2012, three days before the start of voir dire. DX6 at ¶10. He debriefed with trial counsel later that same day and was "struck by the extent to which Mr. Crowley appeared unfamiliar or naïve with issues relating to brain development, drug addiction, and other such mitigation issues relative to other capital attorneys I have worked with." *Id.* at ¶11.

80. Instead of working with defense counsel, Dr. Roache was asked to speak with counsel for the State about his intended testimony. DX6 at ¶12 ("Mr. Crowley asked me to speak to the prosecution prior to my testimony. Mr. Crowley told me that the prosecutor wanted to know the factual basis of my intended testimony."). During the writ evidentiary hearing, Mr. Crowley testified that he did not recall asking Dr. Roache to talk to counsel for the State, but he did not see a problem with his doing so, nor was he surprised that such a conversation had taken place outside his presence with his retained expert. 2 EHR at 109-10. The Court finds Dr. Roache's description of his experience working on this case credible.

81. During the conversation with ADA Felcman, Dr. Roache was "very uncomfortable with the extent to which the prosecutor wanted to go broadly into the

subject of my testimony. Our conversation was certainly not limited merely to my own qualifications to testify." DX6 at ¶12.

82. Ms. Olvera testified that she did not check to see whether Mr. Crowley was looking for appropriate experts. 3 EHR at 30-31. She admitted that it was "not reasonable" for Mr. Crowley to have waited until right before voir dire to contact potential experts. 3 EHR at 35.

83. Two of the three experts whom Mr. Crowley contacted just before or during trial were not asked to testify.

84. One of these experts was a clinical psychologist, Dr. Jerome Brown. He has submitted an affidavit in support of Mr. Andrus's habeas application that the Court finds credible. *See* DX2. Dr. Brown was initially contacted by Mr. Crowley in September 2012 and retained to conduct a psychological evaluation. DX2 at ¶2. However, Dr. Brown was provided only limited life history documents. *Id.* at ¶3. The lone meeting he had with Mr. Andrus took place on September 20, 2012, eleven days before voir dire started. *Id.* Following the interview, Dr. Brown prepared a draft report and submitted it to Mr. Crowley by email, fax, and regular mail on or about October 12, 2012. DX2 at ¶4. After sending his report to Mr. Crowley, Dr. Brown never heard from Mr. Crowley or anyone else on the defense team. *Id.* at ¶5.

85. The third and final expert Mr. Crowley retained was S.O. Woods, a prison classification expert. Like Dr. Roache and Dr. Brown, Mr. Woods was not

contacted for the first time until the eve of trial, on August 31, 2012. DX36 at 2. Mr. Woods's billing records indicate that he did not begin reviewing records until October 31, 2012, the day before the presentation of evidence began. *Id.* As with Dr. Roache, Mr. Crowley permitted the prosecution to contact Mr. Woods before his potential testimony. *Id.* Mr. Woods ultimately did not testify at trial. In November 2012, he submitted his bill to Mr. Crowley for payment. DX37 at 1. Over the course of the following year, Mr. Woods attempted several times to contact Mr. Crowley by mail and telephone to request payment, but his letters and calls went unanswered. *Id.* Dr. Roache and Dr. Brown had similar experiences. DX2; DX6. Finally, in November 2013, Mr. Woods resorted to sending a letter to the trial court asking for help in getting paid for his work on the case. DX37.

86. Trial counsel were aware of their duty as capital counsel to conduct a thorough investigation into Mr. Andrus's case and life history. DX50 at 2 (materials discussing mitigation investigation found in trial counsel's files stating that counsel "is obligated to conduct an exhaustive and independent investigation of . . . every aspect of the client's character, history."). This was neither Mr. Crowley's nor Ms. Olvera's first capital case. 52 RR at 33 (Mr. Crowley telling the jury that he had tried 12 capital cases, 6 as defense counsel); 3 EHR at 41. Lead counsel Sid Crowley has been on the capital appointment list since 2004 and had handled other capital cases. DX46 at 1. He claimed that he had been deemed qualified to serve as defense counsel

in capital cases for about twenty years before Mr. Andrus's trial. 1 EHR at 169. Before becoming a criminal defense attorney, he was a prosecutor in Harris County and then Fort Bend County. 1 EHR at 174.

87. Ample mitigation evidence was available had counsel conducted a reasonable investigation. *See, e.g.*, DX1; DX3; DX4; DX9; DX10; DX11; DX12; DX13; DX14; DX15; DX16; DX17; DX18; DX118; DX119; DX120; DX121; DX122A; DX122B; DX122C.

88. Trial commenced without the defense having done a reasonable investigation or having made any reasonable plan for either the guilt- or punishment-phases of trial. *See* HC18.

2. Facts Relevant to Assessing Deficient Performance during Jury Selection

89. Trial commenced on October 1, 2012, with voir dire.

90. After individual voir dire, Mr. Crowley agreed on a process with counsel for the State for conducting the rest of voir dire, but no details regarding that agreement are preserved on the record. The result of the agreement was a panel of fifty-seven venire members whom both sides believed were "qualified." From this subset, the twelve jurors and two alternate jurors would ultimately be selected. CR at 287-99. Each side was permitted to eliminate sixteen potential jurors with peremptory strikes. Five of the qualified venire members were black, and six were Hispanic. CR at 287-99; 2 CR Supp. at 16-27.

91. The State used three peremptory strikes to remove black potential jurors from the pool, and intended to strike a fourth black juror if the full complement of jurors had not been selected by the time that venire person was reached. CR at 287-99; 2 CR Supp. at 16-27. Thus, the State was able to strike 75% of the qualified black potential jurors and intended to strike 80%. Similarly, the State used two peremptory strikes to remove Hispanic jurors from the pool of the five qualified Hispanic jurors on the panel. CR at 287-99; 2 CR Supp. at 16-27.

92. Several seated jurors remarked on the result of the State's peremptory strikes in eliminating minority jurors. Juror Grenier and Juror Patrick each noted the lack of diversity on the jury, finding it shocking given the general diversity of Fort Bend County. DX20 at ¶4; DX24 at ¶5. As the only black member of the jury, Juror Flakes found it noticeable and "odd." DX19 at ¶4.

93. After the jury was selected, Mr. Crowley started to make a Batson challenge; then, as soon as the jury was removed from the courtroom, he changed his mind and affirmatively told the court that no Batson challenge was going to be made. 37 RR at 41. In testifying in this proceeding, Mr. Crowley did not remember that he had started to make a Batson challenge and then immediately dropped the matter. 1 EHR at 165. The record, however, shows that this is what occurred but does not include any explanation of his motive for taking this course, contrary to his client's interest. 37 RR at 41.

94. Because Mr. Crowley made no Batson challenge, the State was not required to provide race-neutral reasons to explain the use of its peremptory strikes to eliminate five minority prospective jurors from the subset of qualified jurors.

3. Facts Relevant to Assessing Deficient Performance during the Guilt Phase

95. Mr. Crowley waived the right to give an opening statement. 38 RR at 38.

96. The State then opened and closed its case-in-chief with testimony from the spouses of the victims and elicited extensive victim-impact testimony from them about their relationships with the victims and the effect of their deaths. 38 RR at 38; 43 RR at 30.

97. The State's first witness was Norma "Patty" Diaz, wife of Avelino Diaz. Ms. Diaz testified that she and her husband were childhood sweethearts and that they had met in high school and were married for twelve years. 38 RR at 39. She told the jury the names and ages of her four children, testifying that at the time of her husband's death, they were all four years younger. *Id.* at 39-40. She also described the different jobs that her husband held at the time. *Id.* at 40. Trial counsel finally objected to the question about Mr. Diaz's jobs without making any reference to the fact that this testimony was improper victim-impact testimony. The court overruled the objection. *Id.* Ms. Diaz also testified that she had to decide whether to donate her husband's organs "to save other people," and that because his organs

were harvested, he was kept alive for three days. *Id.* at 61-62. Trial counsel did not object or request a running objection to the victim-impact testimony. *Id.*

98. The last witness that the State presented in the guilt phase was Steve Bui, husband of Kim Bui. Mr. Bui testified that he met his wife through her great-uncle, whom he knew from his church choir. 43 RR at 31. He explained that he and his wife were both born in Vietnam and had become naturalized citizens before they met. *Id.* at 30-31. He testified that his wife went to college in Oregon, and at the time of the crime, she was a nutrition assistant for Texas A&M University. *Id.* at 33. The State asked Mr. Bui what types of things his wife taught about nutrition, to which defense counsel finally objected, and the State withdrew the question. *Id.* But the State immediately went back to this irrelevant line of questioning. Mr. Bui then told the jury the names and birth dates of his three children, and defense counsel did not object. *Id.* at 34.

99. Mr. Bui also described the conversation that he had with his wife on the way to the Kroger grocery store where the capital offense occurred: "We have different interests, so we talked a lot about how we [are] doing in the church and how lucky we are that we have the children involved with the church, too, and, you know, talking about some—planning the future, like going on vacation or something." 43 RR at 38. Again, trial counsel failed to object. *Id.*

100. Next Mr. Bui described bringing his two younger boys to the hospital to say good-bye to their mother and how they were "motionless, couldn't say anything. And then I have to stay calm because I—you know, I have to support them and we have to say goodbye." *Id.* at 53-54. Trial counsel did not object to the relevance of the continued victim-impact testimony or request a running objection. The only objections trial counsel made during Mr. Bui's testimony were regarding State's counsel testifying (*id.* at 48), leading the witness (*id.* at 56), and inviting a narrative. *Id.* at 57.

101. The defense presented neither an opening statement nor any affirmative evidence in the guilt phase. Instead, defense counsel expressly conceded his client's guilt in his closing argument and told the jury that the State had proven the elements of the offense and that the defense would be "fighting" in the punishment phase. 45 RR at 15-18.

102. Mr. Crowley acknowledged under oath in this writ proceeding that he believed guilt was a foregone conclusion and the only purpose served by a guilt-phase trial was to preserve for appellate review the denial of the pre-trial motion to suppress Mr. Andrus's confession. 2 EHR at 60-61. This position is consistent with what he told the jury in conceding his client's guilt:

> One thing we did do -- you might ask, Why did you not just plead guilty?
>
> Well, under the law, certain pretrial matters were raised that if we plead guilty, then we can't preserve that error to later maybe take up on appeal.

45 RR at 16.

103. Additionally, Mr. Crowley has acknowledged under oath that he did not obtain Mr. Andrus's consent in advance of making the decision to concede his guilt before the matter was submitted to the jury. 2 EHR at 58-59; *id.* at 63-64.

4. Facts Relevant to Assessing Deficient Performance during Punishment Phase

104. Mr. Crowley again declined to give an opening statement in the punishment phase although he had represented to the jury that it was during the punishment phase that the defense would begin to put on a case. 45 RR at 16; 45 RR at 29-32.

a. <u>Facts relevant to assessing deficient performance with respect to the State's case in aggravation</u>

105. Throughout the State's case in aggravation (its "future dangerousness" presentation), the defense undertook virtually no cross-examination. Because no member of the defense team had conducted any independent investigation of the extraneous offenses, they had no basis for impeaching the State's witnesses. *See* 46 RR at 8-49 RR at 42; 2 EHR at 64-65.

106. The State presented numerous witnesses to testify regarding the future dangerousness special issue. *See* 46 RR at 8; 49 RR at 13.

107. First, the State presented evidence of prior extraneous offenses committed when Mr. Andrus was a teenager for which he was either convicted or suspected. These consisted of two aggravated robberies and a theft. 46 RR at 8, 21, 28, 47, 73. In addition, the State presented a Fort Bend County detective who testified about Mr. Andrus's tattoos and claimed some were gang related. 46 RR at 37.

108. Second, the State presented a TYC official who testified that Mr. Andrus had been placed in TYC custody as a youth and then transferred to the adult system for failing to advance in TYC's resocialization program. 48 RR at 60.

109. Third, the State presented evidence of Mr. Andrus's conduct while incarcerated for nearly four years awaiting trial. Seven members of the Harris County Sheriff's Office and eight members of the Fort Bend County Sheriff's Office testified about conduct in their respective jails, including multiple officers testifying about the same cell extraction. 46 RR at 79; 47 RR at 6, 30, 39, 54, 62, 76, 82, 89, 109; 48 RR at 6, 26, 37, 45, 50. Defense counsel did not object to the testimony as cumulative or as otherwise objectionable. *Id.*

110. Fourth, the State presented the testimony of the Texas Ranger who had arrested Mr. Andrus to discuss his confession. 48 RR at 77; 49 RR at 5. The defense

did not develop through cross-examination the expressions of remorse found in the confession. *Id.*

111. Defense counsel put on no evidence and conducted no cross-examination to establish why these incidents did not show that Mr. Andrus was going to be a continuing threat to society while incarcerated. Mr. Andrus's counsel failed to contest the State's case in aggravation, despite notice from the State that it sought to introduce evidence of Mr. Andrus's past convictions, unreported charges, and allegations reported against him. *See* CR at 69, 28.

112. During closing arguments, counsel then conceded the first special issue—the "future dangerousness" question—telling the jury:

> Let's go [to] the Question 1. It's that "future danger" question. Remember, we talked about it. Is [sic] there's a probability—do you find from the evidence beyond a reasonable doubt that there's a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?
>
> You've heard all kinds of evidence, based upon that, to help you—aid you in answering this question.
>
> You know, I told you all along, the guilt or innocence argument—I'm not going to try to snow the jury. You've heard evidence, even from some of our own witnesses, that Mr. Andrus was probably a violent kind of guy. Okay? That's kind of a double-edged sword to put on evidence. Hopefully, you know, our case, you have to take the good with the bad.
>
> You've heard all of this evidence, basically what happened in the jail and TYC. **There is probably a good probability that you're going to answer this question yes.**

52 RR at 35-36 (emphasis added). While counsel noted that Mr. Andrus's infractions while in jail had decreased leading up to trial, he had not demonstrated this fact through evidence or cross-examination. He concluded his brief discussion of the first special issue by again saying "[b]ut be that what it may, **you will probably answer this question, okay, in the affirmative, based on all you've heard**—TYC, his own statements—which brings us to this second question." 52 RR at 37 (emphasis added).

b. Facts relevant to assessing deficient performance with respect to the case in mitigation

113. The defense presented a total of five witnesses at the punishment phase of trial. For their presentation of Terence Andrus's life history, trial counsel relied entirely on two witnesses: one who had made it clear in advance that she would not tell the truth about the way she had raised Mr. Andrus (and who had told the defense team that she had a vested financial interest in his being executed) and another who had been in prison for most of Mr. Andrus's life. 49 RR at 44-51 RR at 75; DX8 at ¶9; DX28 at ¶16.

114. The defense's first witness was Mr. Andrus's mother, Cynthia Andrus. 49 RR at 44. Ms. Andrus was not prepared for her direct examination let alone cross-examination. 3 EHR at 139; DX8. Mr. Crowley admitted that he did not speak to Ms. Andrus until she came to the courthouse during trial, involuntarily, in response to a subpoena. 2 EHR at 88. This occasion was also the first time that Ms. Olvera,

who had had difficulty talking with Cynthia Andrus on the phone, met with Ms. Andrus in person. 3 EHR at 16-17.

115. Mr. Crowley admitted that he knew Ms. Andrus would be a hostile witness. 2 EHR at 96. She had informed counsel before she was called to the stand that she would not testify to any of her own deficiencies as a parent or to anything that would portray herself in a negative light. DX8 at ¶9 ("I did make it clear to Terence's trial counsel that I was not going to tell them personal stories about myself. I told them that my life was not on trial.").

116. Ms. Andrus presented to the jury a far from candid portrait of herself as a mother. As the post-conviction investigation, discussed below, demonstrates, she lied about her son's access to drugs growing up and the fact that she had used and sold drugs out of their home. 49 RR at 67. She further misinformed the jury that, had she known that Terence was using drugs, she would have counseled him about it. *Id.* at 79. She described Terence as a child who had "behavior problems" and eventually started getting into trouble with the law, leaving the jury with the false impression that he came from a loving and supportive, albeit single-parent, household, but inexplicably entered onto a path of drug abuse and crime. *Id.* at 54, 57.

117. Mr. Crowley admitted that his client informed him while Ms. Andrus was testifying that she was not telling the truth. 2 EHR at 96. Mr. Crowley also admitted that, because he had not done any investigation, he did not know whether

she was telling the truth about her son's childhood. 2 EHR at 97. Because the defense had not done any investigation, Mr. Crowley did not know how she had supported herself in Houston's Third Ward as a teenage mother and whether she had used and sold drugs or engaged in prostitution. *Id.*

118. The defense's next witness was Mr. Andrus's biological father, Michael Davis. 50 RR at 4. Mr. Davis testified that it was the State, not defense counsel, that had given him a ride to the courthouse that day. *Id.* at 10. He further testified that he had not seen Mr. Andrus in about six years. *Id*. at 10. He stated that he did not learn that Mr. Andrus was his son until Mr. Andrus was three years old. *Id.* at 6. Mr. Davis then went to jail for drugs, first in 1989 and again from 1991 to 2000. *Id*. at 6-7. Mr. Davis testified that Mr. Andrus had come to live with Davis in 2003, but he was soon sent back to prison for another six years, and by the time he was released, Mr. Andrus was locked up. *Id.* at 8-9. Mr. Davis testified, absent personal knowledge, that even though he was not around, Mr. Andrus was being raised by good people. *Id.* at 14-15.

119. After presenting these two witnesses, Mr. Crowley rested for the defense. He was not at that time prepared to call any other witnesses, including any experts. DX78. Only after he was prompted by Judge Culver and given a few extra days did Mr. Crowley decide to call additional witnesses. 2 EHR at 91-94. The jury was released after an unrecorded bench conference, seemingly about whether Mr.

Crowley had any other witnesses to call that he had forgotten about after he had stated on the recorded that he did not think he needed to call anyone else. 2 EHR at 94 (after being asked if he had other witnesses, Mr. Crowley said he had someone but: "I don't think we're going to need him.").

120. After a recess of a few days, trial counsel presented their sole expert: Dr. John Roache, a psychiatrist and pharmacologist. Dr. Roache testified briefly about drug addiction and drug abuse and how these could have impacted Mr. Andrus's cognitive ability and decision-making at the time of the crime. 51 RR at 6-19; DX6 at ¶5.

121. While cross-examining Dr. Roache, the State mocked him: "So you drove three hours from San Antonio to tell the jury panel that, that people change their behavior when they use drugs?" 51 RR at 21. ADA Felcman, who conducted the cross-examination for the State, also offered his lay opinion that Mr. Andrus was a "sociopath," and Mr. Crowley did not object. 51 RR at 20-26; 2 EHR at 111; 4 EHR at 29. When ADA Felcman attempted to induce Dr. Roache to agree with this lay opinion, Mr. Crowley did not object although Dr. Roache had not conducted a psychological assessment of Mr. Andrus and thus was not qualified to offer any mental health diagnosis of him. 51 RR at 20-26; 2 EHR at 111-13.

122. After Dr. Roache's testimony, Mr. Crowley called a lay witness, James Martins, a jail counselor who had gotten to know Mr. Andrus while he was in jail

awaiting trial. 51 RR at 30. During his brief direct examination, Mr. Martins testified that Mr. Andrus's behavior had changed and that he had been showing remorse and making progress. 51 RR at 30-35. But because neither Mr. Crowley nor Mr. Martins was sufficiently prepared, the witness was exploited by the State on cross-examination. Mr. Martins volunteered an "expert" opinion about Mr. Andrus having anti-social personality disorder before he started to show remorse.7 When Mr. Martins tried to tell the jury that Mr. Andrus's hallucinations were starting to get under control, ADA Felcman cut him off. Mr. Crowley did not provide Mr. Martins with a chance during any re-direct to elaborate on the mental health issues that he had observed while working with Mr. Andrus in jail. 51 RR at 35-41.

123. After this scant mitigation presentation, Mr. Andrus himself took the stand and testified that he had first been exposed to drugs between the ages of six and eight through his mother who had sold drugs out of their home for a living. 51

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7 As Dr. Hammel explained, anti-social personality disorder is a controversial diagnosis. If ever appropriate, it should not be made based on the kind of limited exposure to the client and to his social history that Mr. Martins had because the diagnosis is supposed to reflect "a lifelong longstanding set of fixed personality characteristics." 6 EHR at 143. Also, personality disorders are reputedly immutable; yet Mr. Martins observed that he had seen considerable change in Mr. Andrus while counseling him, a fact inconsistent with a personality disorder diagnosis. 51 RR at 30-35. The Court finds that Mr. Martins was not, under the circumstances, qualified to make a personality disorder diagnosis.

RR at 48-49. He also testified that he and his siblings were often left alone for up to ten hours at a time while his mother was out in the streets or at work. *Id.* at 49. Mr. Andrus stated that he was left to raise his younger siblings while his mother was absent. *Id.* While the information he provided about his childhood is now corroborated by many witnesses uncovered in the post-conviction investigation, at trial his testimony directly contradicted that which his mother and father had just given.

124. Additionally, Mr. Crowley was not prepared to examine his client. Most of the time Mr. Andrus spent on the stand was devoted to cross-examination by ADA Felcman, who openly mocked Mr. Andrus's testimony regarding his desire to express remorse for the crime to the victims' families. 51 RR at 45-46; 51 RR at 62-75.

125. Mr. Crowley's brief closing argument for the defense began with a discussion about himself and a generic history of his experiences with capital cases. 52 RR at 33. When he finally mentioned Mr. Andrus, he emphasized that he would be punished: "At this stage Mr. Andrus is going to be punished. Okay? It's not like you are going to cut him a break or going to let him off the hook if you assess a life sentence. But he will be punished." 52 RR at 34. Mr. Crowley then conceded that the jury was probably going to find that Mr. Andrus was a future danger and thus answer the first special issue "yes." *Id.* at 35-37. Mr. Crowley then provided a

summary of the few facts about Mr. Andrus's life that had gotten into evidence. *Id.* at 40-42. He ended by suggesting that life in prison was punishment enough. *Id.* at 42-45.

126. Because the defense had presented virtually no mitigation evidence, the final closing argument for the State, presented by ADA Felcman, emphasized that "no mitigation exists" and "[t]here are [sic] no evidence that reduces his moral blameworthiness, not one." *Id.* at 48, 49. ADA Felcman then proceeded to argue that Mr. Andrus was "a sociopath," although there had been no expert testimony supporting that diagnosis. *Id.* at 50. The defense did not object to the State's improper name-calling or seek a mistrial. *Id.*

5. Facts Relevant to Assessing Prejudice from Deficient Performance throughout Trial

127. Trial counsel failed to preserve the record by permitting a large volume of off-the-record discussion, including ones that context clues suggest were substantive discussions that reflected potential errors that could not be appealed.

128. Before the start of trial, defense counsel had moved the court to record all pretrial and trial proceedings including, but not limited to, all communications between the court and counsel for the defense and prosecution at the bench and outside the jury's presence, the jury charge conference between the court and counsel, and all objections and rulings therein. CR at 32-33. The trial court granted the motion during the pretrial hearing, though at that same hearing, the court stated,

"I would like to talk about just some housekeeping matters today that don't need to be on the record . . . ." Defense counsel responded, "That's fine. I just meant for trial proceedings." Pretrial RR [September 5, 2012] at 87. Thus, in a pretrial hearing, a pattern began of permitting unrecorded discussions.

129. Context clues show that a number of these unrecorded discussions were not merely about "housekeeping matters." For example, during Farida Faheem's testimony in the punishment phase, the prosecutor showed the witness a document relating to an extraneous offense and stated that it "looks like he took [her] cash money and [her] purse." 46 RR at 30. After Ms. Faheem's testimony, the prosecutor asked to publish State's Exhibit No. 175B, the extraneous theft conviction from when Mr. Andrus was a teenager, which the witness had just described in a manner at odds with the original police report. At that point, another prosecutor asked to approach the bench. When the record resumes, there is no mention of why the State needed to approach the bench or whether the exhibit was published and, if not, why it was withdrawn. 46 RR at 35.

130. This failure to transcribe bench conferences also took place during voir dire, where the court reporter listed approximately fourteen off-the-record conferences. Defense counsel and the prosecutors appear to have discussed excusing multiple jurors based on answers in their juror questionnaires or during voir dire, though the content of these discussions is not entirely clear. *See* 3 RR at 8; 12 RR

at 17; 13 RR at 54; 18 RR at 58; 20 RR at 4-5; 31 RR at 101; 32 RR at 13; 33 RR at 182-83.

131. In another instance, at the close of the individual voir dire proceedings, the court wanted to discuss, in chambers, the procedure for the general voir dire "to make sure [they were] all on the same page with that." 35 RR at 61. The court even asked, "Do we need to get that on the record or?" *Id*. Defense counsel simply answered, "No, I don't think so." *Id.* When voir dire resumed three days later, the only mention of what the parties discussed was a comment that defense counsel and the State had decided on a procedure for exercising peremptory challenges, but what that agreement was was not put on the record. 37 RR at 4-5.

132. In another instance at trial, the court asked the attorneys to approach the bench after both sides rested. 51 RR at 76. Back on the record, the court told the jury that the charge was ready. In that instance, and at multiple other times, it is unclear why there was a need for an off-the-record conference and what rulings were not memorialized as a result. *See* 33 RR at 185; 34 RR at 6, 8; 42 RR at 120; 46 RR at 101, 108; 48 RR at 7, 58. Even when the jury was not present, the parties held at least one important off-the-record conference. *See* 52 RR at 4.

133. The significant gaps in the record reflect defense counsel's significant inattention at trial.

134. Jurors noticed the defense team's lack of preparation. Juror Patrick thought that trial counsel "seemed scattered—like they did not have a defense prepared. I remember being surprised because they had had several years to prepare the case from between the crime and trial." DX24 at ¶10. Juror Patrick found Mr. Crowley's presentation so abysmal that he believed "he was trying to see if he could get a retrial for Andrus by messing up and not presenting much of a defense." *Id.*; *see also id.* at ¶9 (describing Mr. Crowley as "unprepared".)

135. Several other jurors remarked on the defense's poor performance. Juror Moon found that the "defense attorneys' demeanor seemed sad and defeated the whole time during trial….[U]ltimately it did not seem like they had brought any defense case to present to us." DX23 at ¶9. Juror Grenier thought that "Andrus's defense attorneys did not do a good job at all. They were not very sharp and seemed outmatched by the prosecution….I found it odd that during closing argument at the guilt/innocence phase, the defense attorney made a reference to the sentencing phase….I took that to mean he thought his client was guilty. I would have expected the defense lawyer to still put on a defense." DX20 at ¶¶7-8. Juror Guilbeau was also unimpressed by the defense attorneys and "found it really strange when the defense attorney said Andrus was guilty." DX21 at ¶4.

136. Other facts relevant to assessing prejudice are outlined below in the Conclusions of Law.

B. Conclusions of Law

1. Mr. Crowley Was Not Qualified to Be Appointed to Represent Mr. Andrus

137. Mr. Crowley should never have been appointed to represent Mr. Andrus because, under Texas Law, he was not qualified to be on the capital appointment list.

138. Under Article 26.052 of the Texas Code of Criminal Procedure, Mr. Crowley was unqualified to sit as lead counsel in a capital case and should never have been appointed to represent Mr. Andrus. The Texas Code of Criminal Procedure stipulates that local selection committees within each administrative judicial region shall adopt standards for the qualification of attorneys to be appointed to represent indigent defendants in capital cases in which the death penalty is sought. TEX. CODE CRIM. PROC. art. 26.052 §§(c), (d)(1). These standards must require that an attorney appointed as lead counsel to a capital case have not been found by a federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case unless the selection committee determines that the conduct underlying the finding no longer accurately reflects the attorney's ability to provide effective representation. *Id.* at § (d)(2)(C).

139. For the years 2006 through 2012, Mr. Crowley, in his applications to the Second Administrative Judicial Region for approval as qualified counsel in death-penalty cases, checked the box indicating that he had "not been found by a

federal or state court to have rendered ineffective assistance of counsel during the trial or appeal of any criminal case." DX46 at 15, 23, 32, 40, 46, 53, 60.

140. Contrary to Mr. Crowley's representations, he had, in fact, been found by a Texas state court (the 130th District Court in Matagorda County) to have rendered ineffective assistance of counsel in a capital case. DX44 at 12-13. Moreover, in that same case, the court considered holding him in contempt "for substantially interfering with the administration of justice in the case." *Id.* In this writ proceeding, Mr. Crowley admitted under oath that he recalled the court making this finding. 2 EHR at 31. But he did not include this information on his application seeking capital appointments, nor were the courts that presided over Mr. Howe's or Mr. Andrus's capital trials informed on the record of this previous ineffectiveness finding. DX46 at 15, 23, 32, 40, 46, 53.

141. Although Mr. Crowley had not been forthcoming on his applications to the appointment list, this prior finding of ineffectiveness was brought to the attention of the Presiding Judge of the Second Administrative Judicial Region, who concluded that the judge's finding was not disqualifying because it occurred before trial began. DX47 at 2.

142. The statute and the Second Region's form application stipulate that after a finding of ineffectiveness, the selection committee may grant a waiver for good cause shown "except when the attorney has been found by a federal or state

court to have rendered ineffective assistance of counsel during the trial or appeal of any capital case." *Id.* Thus, the administrative judge's reading renders an absurd result. Hypothetically, an attorney on the capital appointment list could be found ineffective and removed as counsel repeatedly before trial, yet the attorney would never be removed from the list. Certainly, this is not what the legislature intended. Mr. Crowley thus remained on the capital appointment list in violation of Article 26.052 and should never have been appointed to represent Mr. Andrus.

143. The record shows that Mr. Crowley has a pattern and practice of performing deficiently in capital cases and has been publically reprimanded for violating the disciplinary rules in other criminal representations. *See* DX45. He should not have been appointed to represent Mr. Andrus. At the very least, Mr. Andrus's pro se motion seeking Mr. Crowley's removal should have been considered and then granted, and he should have received new counsel. CR at 65-67; DX41.

2. Trial Counsel's Performance Must Be Assessed Based on Prevailing Norms for Defense Counsel in Capital Cases at the Time of Trial, Which Is a National Standard

144. Apart from Mr. Crowley's being disqualified under the statute, Mr. Andrus was entitled to the effective assistance of counsel in accordance with established constitutional mandates and prevailing professional norms.

145. The Sixth Amendment to the U.S. Constitution entitles criminal defendants to the effective assistance of counsel, which "preserves the fairness, consistency, and reliability of criminal proceedings by ensuring that the process is an adversarial one." *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012). An ineffective assistance of counsel claim has two elements: (1) counsel's performance was deficient; and (2) the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Porter v. McCollum*, 558 U.S. 30, 38-39 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Virgil v. Dretke*, 446 F.3d 598, 608 (5th Cir. 2006); *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012).

146. Establishing deficiency requires that Mr. Andrus show that his counsel's representation fell below an objective standard of reasonableness. *Porter*, 558 U.S. at 38-39 (quoting *Strickland*, 466 U.S. at 688). This standard involves a "case-by-case approach to determining whether an attorney's performance was unconstitutionally deficient[.]" *Rompilla v. Beard*, 545 U.S. 374, 393-94 (2005) (O'Connor, J., concurring) (citing *Strickland*, 466 U.S. 668).

147. Deficient performance is performance that is "inconsistent with the standard of professional competence in capital cases that prevailed [at the time of the trial]." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011). At the time of Mr. Andrus's trial, his attorneys' obligations were governed by the "prevailing professional norms," even if those norms did not align with a less rigorous defense

based on "most common customs." *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011). The Supreme Court instructs courts to look at the "norms of practice as reflected in the American Bar Association and the like" and to consider "all the circumstances" of a case. *Strickland*, 466 U.S. at 688.

148. In a death penalty case, all attorneys and their agents on a defense team are bound by the prevailing professional norms specific to death penalty representation. The sources of these norms include the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) ("ABA Guidelines"), and the ABA *Standards for Criminal Justice* (3d ed. 1993) ("ABA Standards"). *See also* State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 TEX. B.J. 966 (2006) ("Texas Guidelines").8—ABA *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677 (2008) ("ABA Supplemental Guidelines"); State Bar of Tex., *Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Death Penalty Cases* (2015) ("Texas Supplemental Guidelines"); DX52-55.

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8 The Texas Guidelines "are a Texas-specific version of the American Bar Association's *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*[.]" *Texas Guidelines*, Intro. The ABA and Texas Guidelines reflect the same statewide and national standards.

149. Pursuant to prevailing norms for capital counsel, including the ABA Guidelines and Texas Guidelines, counsel are required to conduct "thorough and independent investigations relating to the issues of both guilt and penalty." *ABA Guidelines*, Guideline 10.7; *Texas Guidelines*, Guideline 11.1 (same); *Neal v. Puckett*, 286 F.3d 230, 236 (5th Cir. 2002) (per curiam) ("[I]n the context of a capital sentencing proceeding, defense counsel has the obligation to conduct a 'reasonably substantial, independent investigation' into potential mitigating circumstances."). Though they are guidelines and not strict requirements, the standards set forth in the ABA Guidelines provide counsel with a clear roadmap for undertaking such an investigation. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009) (noting that the ABA Guidelines "discuss the duty to investigate mitigating evidence in exhaustive detail, specifying what attorneys should look for, where to look, and when to begin.").

150. The ABA Guidelines and the Texas Guidelines make clear that an investigation must begin promptly after the representation commences: counsel "should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty." *ABA Standards*, Standard 4-4.1; *Texas Guidelines*, Guideline 11.1.

151. Counsel's decisions with regard to limiting their investigation and decisions regarding what to present at trial must be grounded in objective evaluations of potential evidence. *Baldwin v. Maggio*, 704 F.2d 1325, 1332–33 (5th Cir. 1983)

("That obligation to investigate, in the context of a capital sentencing proceeding, requires defense counsel to undertake a reasonably thorough pretrial inquiry into the defenses which might possibly be offered in mitigation of punishment, and to ground the selection among those potential defenses on an informed, professional evaluation of their relative prospects for success."). That is, a decision can only be deemed a "reasonable strategic decision" if made after a thorough investigation of law and facts relevant to plausible options. *Harrington*, 131 S. Ct. at 690-91.

152. Once capital trial counsel completes the necessary pretrial investigation, he must then formulate a defense theory "that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies." *ABA Guidelines*, Guideline 10.10.1. The CCA holds capital counsel to an even higher standard: "It is not sufficient to inquire generally and leave it up to the defendant to raise topics or respond to open-ended questions. Like a doctor, [capital] defense counsel must be armed with a comprehensive check-list of possibilities, and forcefully inquire about each topic." *Ex parte Gonzales*, 204 S.W.3d 391, 400-01 (Tex. Crim. App. 2006) (Cochran, J., concurring).

153. While trial counsel need not investigate "frivolous, implausible, or meritless defenses," *United States v. Carr*, 740 F.2d 339, 349 (5th Cir. 1984), counsel must engage in a reasonable amount of pretrial investigation and make an independent investigation of the facts and circumstances involved in the case.

Rummell v. Estelle, 590 F.2d 103, 104 (5th Cir. 1979); *Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994); *see also id.* at cmt. (noting the "importance of defense counsel's duty to take seriously the possibility of the client's innocence, to scrutinize carefully the quality of the state's case, and to investigate and re-investigate all possible defenses"). From the fruits of that investigation counsel must present all possible legal claims and defenses, and, in so doing, present them as forcefully as possible. *ABA Guidelines*, Guideline 10.8; *see also id.* at cmt. ("Because of the possibility that the client will be sentenced to death, counsel must be significantly more vigilant about litigating all potential issues at all levels in a capital case than in any other case").

154. In determining whether counsel has met the duty to reasonably investigate mitigation, a court must consider "not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Miller v. Dretke*, 420 F.3d 356, 361 (5th Cir. 2005); *Wiggins*, 539 U.S. at 521. When trial counsel is not aware of the relevant mitigating evidence, "the issue is not whether he was ineffective for failing to present [mitigating evidence], but rather whether he failed to conduct a reasonable investigation to uncover mitigating evidence." *Ex parte Gonzales*, 204 S.W.3d at 396.

155. Counsel cannot undertake a last minute investigation and then complain of the resulting barriers to uncovering mitigation evidence. Nor can counsel rely on a defendant's failure to facilitate the investigation and direct them toward mitigating evidence. The duty to investigate exists despite the accused's failure to mention potentially mitigating evidence or even the accused's affirmative denial that such evidence exists. *Rompilla*, 545 U.S. at 377; *Ex parte Gonzales*, 204 S.W.3d at 396.

156. Ultimately, counsel's failure to complete a thorough investigation that uncovers all available mitigation evidence is only justifiable under professional norms if counsel has made substantial efforts to conduct the investigation and only then come to the objective conclusion that further investigation is unwarranted. *Ex parte Woods*, 176 S.W.3d 224, 226 (Tex. Crim. App. 2005) ("[*Strickland*] does require attorneys to put forth enough investigative efforts to base their decision not to present a mitigating case on a thorough understanding of the available evidence.").

157. The Court accepted Philip Wischkaemper as an expert qualified to opine about the standard of care in death-penalty cases in Texas. 1 EHR at 55. Mr. Wischkaemper opined that a complete mitigation investigation entails a thorough investigation of the bio-psycho-social history of the client and his family. 1 EHR at 80-82; DX7 at ¶17. The development of this life history must be done in incremental fashion, beginning with interviews of the client and the collection and review of life history records, including school, medical, mental health, employment, jail, prison,

and juvenile detention records. *Id.* at ¶18. The next step is to identify and interview family members, friends, and others who knew the defendant throughout his life in order to discover, and expand the search for, mitigating evidence. *Id.*

158. The ABA Guidelines state that a mitigation investigation should encompass speaking, for instance, to the client's neighbors, acquaintances, teachers, clergy, doctors, and correctional officers. *ABA Guidelines*, Guideline 10.7 cmt. Additionally, a primary function of a mitigation specialist is to collect the client's life history records "from courts, government agencies, the military, employers, etc." because they "can contain a wealth of mitigating evidence, documenting or providing clues to childhood abuse, retardation, brain damage, and/or mental illness, and corroborating witnesses' recollections." *Id.* The defense team must establish the client's medical history, family and social history, educational history, employment and training history, and prior juvenile and adult correctional experience. *Id.*

159. It is not enough to simply gather the facts of a defendant's life story and then present it through lay witness testimony. An expert must also be retained to synthesize that information into a coherent bio-psycho-social narrative for presentation to the jury. *See ABA Guidelines*, Guideline 10.11 cmt. (noting the importance of presenting "the client's complete social history" at punishment); *see also ABA Mitigation Guidelines*, Guideline 10.11. Such an expert then uses their

particularized expertise relevant to the defendant to present the social history developed by a mitigation specialist in a cohesive narrative. John Blume, *Mental Health Issues in Criminal Cases: The Elements of a Competent and Reliable Mental Health Examination*, 17 THE ADVOCATE 4, 10 (Aug. 1995) ("[P]ersuasive expert testimony must . . . enable the jury to see the world from your client's perspective, *i.e.*, to appreciate his subjective experience.").

160. Standards for capital trial investigation require a multi-generational history of the client's family to be undertaken, as it is necessary for a full understanding of the client's complete social history from conception to the present. *See ABA Guidelines*, Guideline 10.11 cmt. Not having a mitigation specialist for at least half of the representation is deficient performance. 1 EHR at 137.

3. Trial Counsel's Performance Was Deficient throughout the Representation

161. Lead counsel's own admissions show a lack of understanding of the prevailing professional norms expected of capital defense counsel although he does not deny knowledge that such norms, in the form of the ABA Guidelines and Texas Guidelines, exist. 2 EHR at 85-86.

a. Deficient in pre-trial preparation

162. Mr. Crowley accepted this appointment when he already had more cases than he could handle and then continued to add to that load—most notably, by agreeing to represent Richard Howe in another death-penalty case in Fort Bend

County that he has admitted prevented him from doing any work on Mr. Andrus's case for years. The ABA Guidelines require that "Counsel representing clients in death penalty cases should limit their caseloads to the level needed to provide each client with high quality legal representation." *ABA Guidelines*, Guideline 10.3. Trial counsel's workload did not comply with the prevailing professional norms. *See id.*

163. The ABA Guidelines state that "immediately upon entry into the case," members of the defense team should meet with the client, Guideline 10.7, and at all stages of the case "should make every appropriate effort to establish a relationship of trust with the client, and should maintain close contact with the client," Guideline 10.5(A). Mr. Crowley failed to meet with his client at all for eight months after his appointment to his client's detriment.

164. The Guidelines explain that "[e]stablishing a relationship of trust with the client is essential both to overcome the client's natural resistance to disclosing the often personal and painful facts necessary to present an effective penalty phase defense, and to ensure that the client will listen to counsel's advice on important matters such as whether to testify and the advisability of a plea." *Id.* at Guideline 10.5 cmt. Contact must be "ongoing, and include sufficient time spent . . . to establish rapport between attorney and client." *Id.* Mr. Crowley failed to establish trust and, in essence, abandoned his client before trial, during voir dire, during the guilt phase of trial, and during most of the punishment phase.

165. As lead counsel in a death penalty case, Mr. Crowley was obligated to conduct an investigation into the qualifications, training, and skills of the defense team members to determine that they are competent; and to supervise and direct the work of all team members. *ABA Supplementary Guidelines*, Guideline 4.1(B). He was required to ensure on an ongoing basis that the work of his team was of a high professional quality. *Id.* The writ evidentiary hearing record reflects that he had little to no sense of what his team was doing at any time and then failed to replace vital team members after they withdrew from representing Mr. Andrus. 3 EHR at 154 (P. Wischkaemper noting Mr. Crowley's failure to assembly a team, particularly a mitigation specialist).

166. Mr. Crowley failed to communicate with members of his team, failed to ensure that essential tasks were being undertaken, and did not timely replace members of the defense team when they ceased working on the case and then withdrew. He testified that he did not see his co-counsel's motion to withdraw, which is part of the docket. 1 EHR at 207. This statement is not credible. Even if it were credible, Mr. Crowley's failure to review a filing in a case in which he served as lead counsel would not excuse his failure to conform to representations made to the court that he would seek a new second chair *and* a mitigation specialist. CR at 61.

167. When Mr. Crowley finally got a new second chair, his failure to seek a continuance was unreasonable. 3 EHR at 155.

168. Mr. Crowley admitted that defense counsel should have already completed most of the investigation before voir dire begins. 2 EHR at 45. Yet he undertook virtually no investigation before trial and did not ensure that such work was done by others. He was deficient in failing to investigate the circumstances of the offense itself, the extraneous offenses that the State intended to, and did, use against his client—particularly misconduct in jail during the years Mr. Andrus spent awaiting trial—and the complete failure to investigate Mr. Andrus's life history to develop a mitigation case. *See Williams v. Taylor*, 529 U.S. 362, 396 (2000) (holding counsel should have investigated juvenile record although that meant defendant had previously been committed to the juvenile system); *Rompilla*, 545 U.S. at 386 n.5 (holding counsel should have investigated prior crime even though defense strategy was predicated on keeping that prior crime out).

169. The Court further finds that trial counsel's entire approach to the critical task of identifying, retaining, and preparing qualified and relevant experts to offer reliable testimony was deficient and prejudiced his client.

170. Mr. Crowley testified that his billing records fairly and accurately reflect the time he puts into a case—including this one. 1 EHR at 171. His billing records alone show that his performance was deficient, as most of his time on the

case consisted of court appearances where he put on neither a defense nor a case in mitigation. *See* DX31.

171. The failure on the part of trial counsel to prepare for trial constituted deficient performance.

b. Deficient in voir dire, particularly in failing to make a Batson challenge based on a misconception of the relevant law

172. During trial Mr. Crowley performed deficiently in virtually every aspect of the representation, beginning in voir dire. Mr. Crowley demonstrated that he does not understand the prevailing norm in capital cases and does not understand the scope of what the law permits in asking potential jurors about whether they could consider specific kinds of mitigation evidence, which is distinct from asking impermissible "commitment questions." 1 EHR at 50; 2 EHR at 47-48. Also, he unreasonably relied on a jury questionnaire that was "the one we've always used" that had been "floating around here for years." 2 EHR at 176.

173. Evidence adduced during the writ proceeding indicates that Mr. Crowley has a pattern of deficient performance in conducting voir dire in death penalty cases. *See, e.g.*, DX27 at ¶9 ("Before voir dire [in Mr. Howe's death-penalty case], Mr. Crowley assented to the state's desire to preserve the 20 year old juror questionnaire which was unhelpful for a meaningful jury selection for the defense. After being provide [sic] a jury consultant, who had reviewed the juror questionnaires in detail Sid would not even listen to her suggestions."); DX26 at ¶¶8-

10, 13 ("Mr. Crowley [in Mr. Howe's case] refused to even look at most of the notes I provided him or to use any of the questions I had developed. He appeared completely disinterested in, and indifferent to, receiving assistance from me or anyone else on the defense team. It was painfully obvious that Mr. Crowley had not done any preparation before coming into court each day to conduct the voir dire . . . . Mr. Crowley's questions seemed to be pandering to the prosecution. It is, and was at that time, my opinion that Mr. Crowley did not conduct an effective voir dire. I believe many of the jurors who were impaneled could have and should have been eliminated as cause jurors by the defense during voir dire.").

174. Mr. Crowley's failure to make a Batson challenge once the State used its preemptory strikes to eliminate three qualified black jurors and two qualified Hispanic jurors was objectively unreasonable. His excuse for failing to do so was based on his erroneous belief that because one African-American juror had been seated, he could not make a prima facie case that the State had used its strikes to remove minorities from the jury in a way that constituted racial discrimination. 2 EHR at 191-93; 285-86.

175. The Fourteenth Amendment of the United States Constitution and the Texas Code of Criminal Procedure bar the use of peremptory challenges to exclude potential jurors on account of the juror's race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *accord Rice v. Collins*, 546 U.S. 333, 338 (2006); *Johnson v. California*, 545

U.S. 162, 168 (2005); TEX. CODE CRIM. PROC. art. 35.261(a). Excluding jurors because of their race is particularly egregious because it "undermine[s] public confidence in the fairness of our system of justice." *Batson*, 476 U.S. at 87. Excluding even one juror on the basis of his or her race violates these core provisions of the law and entitles a defendant to a new trial. *See Linscomb v. State*, 829 S.W.2d 164, 166 (Tex. Crim. App. 1992). The "Constitution forbids striking even a single prospective juror for a discriminatory purpose." *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008) (relying on *Batson*).

176. A Batson challenge follows a three-step analytical process. *Hernandez v. New York*, 500 U.S. 352, 358-59 (1991); *Jones v. State*, 431 S.W.3d 149 (Tex. App.—Houston [14th Dist.] 2013). First, the defendant must make a prima facie case that the State engaged in intentional discrimination. *Batson*, 476 U.S. at 93-94. A prima facie case is established by demonstrating that "the totality of the relevant facts gives rise to an inference of discriminatory purpose." *Id.* at 94. Second, the State must provide race-neutral reasons for using a peremptory challenge on the juror(s) in question. *Id.* at 94, 97. Third, the court must determine whether the defendant has established purposeful discrimination. *Id.* at 98; *see also Snyder*, 552 U.S. at 477; *Miller-El v. Dretke*, 545 U.S. 231, 239-40 (2005); *Hernandez*, 500 U.S. at 363; *Nieto v. State*, 365 S.W.3d 673, 676 (Tex. Crim. App. 2012).

177. The State's pattern of striking 75% of qualified black potential jurors, as well as its two strikes of qualified Hispanic potential jurors, establishes a prima facie case of racial discrimination. *See Batson*, 476 U.S. at 93-94. Defense counsel's failure to preserve Batson challenges as to these five qualified potential jurors violated counsel's ethical duty to "act with competence, commitment and dedication to the interest of the client and with zeal in advocacy on the client's behalf." TEX. R. PROF. COND. 1.01 (Comment 6).

178. Defense counsel neglected their duty to preserve an important legal claim for Mr. Andrus's direct appeal that affected the integrity of the entire trial. Rather than make the appropriate Batson challenge to the State's peremptory strikes of five qualified minority potential jurors, defense counsel undermined their client's rights to a constitutionally selected jury and potential claims on appeal.

179. Mr. Crowley's testimony during the evidentiary hearing makes clear that his reason for failing to take action was based on a misapprehension of *Batson* and its progeny. A decision cannot be a reasonable trial "strategy" if it is based on a misapprehension of the relevant law. *Cf. Harrington*, 131 S. Ct. at 690-91 (explaining that a decision can only be deemed a "reasonable strategic decision" if made after a thorough investigation of law and facts relevant to plausible options); *Baldwin*, 704 F.2d at 1332 ("Essential to the rendition of constitutionally adequate

assistance in either phase is a reasonably substantial, independent investigation into the circumstances and the law from which potential defenses may be derived.").

180. The failure on the part of trial counsel to preserve the Batson challenge constituted deficient performance.

181. At the end of the voir dire, after the State had used its preemptory strikes to eliminate five qualified minority venire members, Mr. Crowley did not require the State to provide non-pretextual, non-discriminatory reasons for doing so. The State's ex post facto reasons proffered for its strikes do not create a rebuttable presumption that Mr. Andrus was not prejudiced, especially since the testimony of ADA Felcman, who made the preemptory strikes on the State's behalf, shows that several strikes were indeed based on race. During this writ proceeding, ADA Felcman expressed anger about being the subject of a Batson challenge. 4 EHR at 44-46. However, his own testimony regarding the State's purported race-neutral reasons for striking several jurors was decidedly *not* race-neutral.

182. ADA Felcman testified about notes he made during the individual voir dire of an African-American woman that include several references to her race. HC36. ADA Felcman's explanation is that he was recording what the potential juror said, and he found her pride in her own race a basis for striking her. That she admitted to admiring Barack Obama as "the first African-American president" was a problem from the State's perspective. 4 EHR at 53. Likewise, that this potential juror had

written that she saw Oprah Winfrey, as a "well respected African-American woman that is a success" was a problem from the State's perspective. *Id.* As ADA Felcman stated, his reputedly constitutional basis for striking this particular juror was the fact that being "African-American was important to her." *Id.* A race-specific reason is not a race-neutral reason.

183. Additionally, the State's purportedly race-neutral reason for striking another African-American potential juror was facially unreasonable. ADA Felcman testified during this writ proceeding that the State used a strike against another African-American potential juror because she stated that she would give Mr. Andrus "a fair trial." 4 EHR at 55. The State's suggestion that a promise to give the defendant a fair trial is a "race-neutral" basis to suspect them is facially unreasonable and thus does not overcome the presumption that the strike was fueled by an unconstitutional motive.

184. With yet another African-American potential juror, ADA Felcman testified that the purported "race-neutral" basis for striking her was a statement on her juror questionnaire that it "[s]eems like more African-American men receive the death penalty." 4 EHR at 56. The position that a potential juror's view about racial disparities in the application of the death penalty is a "race-neutral" basis to suspect that potential juror is facially unreasonable and thus does not overcome the presumption that the strike was fueled by an unconstitutional motive.

185. ADA Felcman's testimony that the defense was "privy" to the State's thought-process during voir dire is not credible. The defense did not have access to the notes made by the State's counsel during the voir dire, let alone any access to what was inside the minds of counsel for the State as they made judgments about various members of the venire panel, which ADA Felcman purported to describe several years after the fact. 4 EHR at 61-68, 72.

186. In sum, the testimony from ADA Felcman, elicited by the State, shows that, the State did not have credible, race-neutral reasons for striking at least three African-American potential jurors. Therefore, had Mr. Andrus's trial counsel made a prima facie Batson challenge, that challenge would have succeeded. *See Foster v. Chatman*, 136 S. Ct. 1737 (2016) (reaffirming that a showing that one strike was based on a potential juror's race is enough to require reversal); *see also ABA Guidelines*, Guideline 10.8 at cmt. ("One of the most fundamental duties of an attorney defending a capital case at trial is the preservation of any and all conceivable errors for each stage of appellate and post-conviction review." (internal quotations omitted)). A record showing the reasonable likelihood of a successful Batson challenge establishes that Mr. Andrus's was prejudiced by his trial counsel's failure to make such a challenge. Counsel's unreasonable failure to make such a challenge injected error into the proceeding.

187. Had defense counsel raised Batson challenges to the State's decision to strike five qualified minority prospective jurors, the State would have had to issue race-neutral reasons explaining these peremptory strikes at the time of trial. Evidence adduced in this post-conviction proceeding indicates that the State's strikes were improperly motivated by race, in violation of Mr. Andrus's state and federal constitutional rights.

188. There is a reasonable probability that the result of Mr. Andrus's appeals would have be different but for defense counsel's deficient performance. Mr. Andrus suffered prejudice and is entitled to a new trial. *See Robbins*, 528 U.S. at 285; *Strickland*, 466 U.S. at 694; *Ex parte Ellis*, 233 S.W.3d 324, 329-30 (Tex. Crim. App. 2007).

c. Deficient in failing to object to victim-impact evidence offered in guilt phase

189. Mr. Crowley admitted that he did not see the testimony of the victims' spouses during the guilt phase of the trial as objectionable because he did not recognize it as victim-impact testimony. 2 EHR at 55-57. Because their testimony did include multiple instances of victim-impact testimony, failing to object was unreasonable.

190. "Victim impact" evidence is testimony "about the victim and the impact of the murder on the victim's family." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). In *Payne*, the Supreme Court lifted the per se bar against victim-impact evidence

under the Eighth Amendment and delegated the decision to the states as to whether to admit such evidence at sentencing. *Id.* Since then, victim-impact evidence has been found to be generally admissible during the sentencing phase of a trial because evidence of the specific harm caused by the defendant may assist the jury in assessing the defendant's moral culpability and blameworthiness. *Ford v. State*, 919 S.W.2d 107, 114 (Tex. Crim. App. 1996) (en banc) (citing *Payne*, 501 U.S. at 825).

191. Victim-impact evidence is not, however, admissible during the guilt phase of a criminal trial because it is not relevant under the evidentiary rules. Victim-impact evidence does not have "any tendency to make more or less probable the existence of any fact of consequence at the guilt stage of trial." *Miller-El v. State*, 782 S.W.2d 892, 895 (Tex. Crim. App. 1990) (citing TEX. R. CRIM. EVID. 401 for the finding that victim-impact evidence is irrelevant at the guilt phase). As noted in *Mosely v. State*, victim-impact evidence is relevant only insofar as it relates to the mitigation special issue at punishment because that particular issue greatly broadens the scope of relevant evidence. 983 S.W.2d 249, 263 (Tex. Crim. App. 1998). Under Texas law, victim-impact evidence is "patently irrelevant" to other issues at trial, even including the future dangerousness issue at punishment. *Id.*

192. The Supreme Court recently reaffirmed that its decision in *Payne* did not overrule *Booth v. Maryland*, 482 U.S. 496 (1987), which holds that the Eighth Amendment prohibits a capital sentencing jury from considering victim-impact

evidence that does not "directly relate to the circumstances of the crime." *Bosse v. Oklahoma*, 580 U.S. ___ at *1 (2016) (citing *Booth*, 482 U.S. at 501-502, 507, n.10).

193. Although Mr. Andrus's counsel ultimately objected once to the relevance of the clearly irrelevant victim-impact evidence during Ms. Diaz's and Mr. Bui's extensive testimony, counsel objected only after substantial victim-impact testimony had already been presented and failed to object to the continued victim-impact testimony. As Patty Diaz described how she met her husband, the children they had together, the different jobs he held (38 RR at 39-40), and the decision she had to make to donate her husband's organs (*id.* at 61-62), trial counsel objected only once during her entire testimony. *Id.* at 40. Ms. Diaz's testimony provided the jury with information about her relationship with her husband, his character, and the impact of his death on her family.

194. Similarly, Steve Bui's description of his wife's immigration from Vietnam, her education and work background, and the experience of bringing his sons to the hospital to say good-bye to their mother served only to tell the jury of the impact his wife's death had on him and his family. 43 RR at 30-33, 53-54.

195. Trial counsel failed to preserve the issue by failing to properly object to the irrelevant testimony. This testimony had no "tendency to make more or less probable the existence of any fact of consequence at the guilt stage of trial," namely whether Mr. Andrus was guilty of capital murder. *Miller-El*, 782 S.W.2d at 895.

196. The failure on the part of trial counsel to keep out victim-impact evidence and preserve objections to the admission of that evidence constituted deficient performance.

197. There is a reasonable probability that if trial counsel had properly objected to the victim-impact evidence at the guilt phase of Mr. Andrus's trial the outcome would have been different. Patty Diaz's memorable description of her relationship with her husband and the children they had together, along with the decision whether to donate his organs, likely impacted the jury's decision at a time when such evidence was irrelevant and inadmissible. Likewise, Steve Bui's description of bringing his young children to the hospital to say good-bye to their mother provided the jury with inappropriate bases on which to render a guilty verdict.

198. Controlling precedent does not contemplate allowing such victim-impact evidence to be presented during the guilt phase of trial. As such, trial counsel's failure to properly object to the admissibility of the victim-impact evidence, thereby failing to preserve the issue for appeal, constituted deficient performance, which prejudiced Mr. Andrus.

d. Deficient in failing to have a plan for the guilt phase and then conceding guilt in closing argument without the client's consent based on an incorrect understanding of appellate law

199. Mr. Crowley admitted what the record shows: that he conceded his client's guilt at the end of the guilt phase of trial. He also admitted that he made this concession without first seeking or obtaining the client's consent. 2 EHR at 63.

200. It was improper for Mr. Crowley to make the unilateral decision to concede Mr. Andrus's guilt to the jury in closing argument of the guilt phase. Trial counsel may not properly confess the client's guilt without the client's permission. TEX. DISCIPLINARY R. PROF'L CONDUCT 1.02(a) ("[A] lawyer shall abide by a client's decisions: 1) concerning the objectives and general methods of representation; 2) whether to accept an offer of settlement of a matter, except as otherwise authorized by law; 3) in a criminal case, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial, and whether the client will testify.").

201. Confessing the client's guilt to the jury during closing argument without his permission is patently improper. *See Barbee v. Davis*, 660 Fed. App'x 293, 328 (5th Cir. Nov. 11, 2016) (per curiam) (granting further review of claim for "ineffective assistance of counsel for confessing guilt during closing argument"). The Fifth Circuit's *Barbee* decision rests on clearly established federal constitutional law. *See, e.g.*, *Yarborough v. Gentry*, 540 U.S. 1 (2003) (noting that "[t]he right to

effective assistance extends to closing arguments"). More specifically, this particular situation—where counsel confesses his client's guilt to a jury without his client's acquiescence—is considered so harmful that it constitutes structural error. *See United States v. Swanson*, 943 F.2d 1070, 1074 (9th Cir. 1991). As *Swanson* explains, by doing so trial counsel "utterly fail[s] to 'subject the prosecution's case to meaningful adversarial testing.'" *Id.* (quoting *United States v. Cronic*, 466 U.S. 648, 659 (1984)); *see also Florida v. Nixon*, 543 U.S. 175 (2004) (finding presumption of prejudice is not in order if based solely on a defendant's failure to provide express consent but only where "counsel has adequately disclosed to and discussed with the defendant" the strategy).

202. Mr. Crowley's conceding his client's guilt in closing arguments without discussing the proposed strategy with his client was improper. Doing so injected error into the proceedings. This failure alone entitles Mr. Andrus to a new trial.

203. Additionally, Mr. Crowley's justification for doing no more than going through the motions of a guilt-phase trial was based on an entirely incorrect legal premise. He believed that Mr. Andrus was guilty but could not plead guilty without automatically waiving the right to appeal the issues raised in the pre-trial motion to suppress his confession. This is not correct.

204. Since 1977, the Texas legislature has provided for a conditional plea of guilty and for good public policy reasons:

> By recognizing that even plea-bargaining defendants could appeal rulings on written, pre-trial motions after a plea of guilty, the proviso to Article 44.04 also had the purposes of encouraging guilty pleas and discouraging the trial of cases for the mere reason of preserving an issue for appeal.

Young v. State, 8 S.W.3d 656, 666 (Tex. Crim. App. 2000) (citing *Lyon v. State*, 872 S.W.2d 732, 735 (Tex. Crim. App. 1994) (noting amendment was made "in order 'to conserve judicial resources by encouraging guilty pleas' and to prevent 'windy' appeals")). The Texas Rules of Appellate Procedure also make clear that a defendant who pleads guilty "may appeal … those matters that were raised by a written motion filed and ruled on before trial, or after getting the trial court's permission to appeal." TEX. R. APP. P. 25.2. In other words, there was no bar, as Mr. Crowley believed, to appealing the denial of a motion to suppress if Mr. Andrus had elected to plead guilty. But Mr. Andrus was not advised of this option—because Mr. Crowley was laboring under a misconception of the governing law.

205. Since at least 2000, the CCA has recognized that, in non-plea bargain cases, a plea of guilty forfeits the right to claim error only if the plea and conviction are independent of the claimed error. If the record shows that the defendant pled guilty because of a ruling denying a motion to suppress, the plea and judgment are not independent of the error in the ruling and the plea therefore does not waive the right to appeal that ruling. *See Young*, 8 S.W.3d 656 (rejecting what had been known as the *Helms* rule, finding that the judgment of guilt was not independent of the trial

court's ruling on motion to suppress the evidence of the offense and that the judgment would not be supported without that evidence and reversing and remanding).

206. Mr. Andrus's motion to suppress the confession was (1) raised in a written motion and (2) filed and ruled on before trial. Therefore, he could have pled guilty and still have appealed the denial of his motion to suppress the confession. *See, by contrast*, *Monreal v. State*, 99 S.W.3d 615 (Tex. Crim. App. 2003) (finding that, where defendant pled guilty and then voluntarily signed a waiver of his right to appeal, that valid, non-negotiated waiver of appeal prevented him from appealing any issue without the consent of the trial court).

207. Mr. Crowley's deficient performance throughout the guilt phase of trial cannot be excused by his suggestion that he was only going through the motions, as he told the jury, as a means to preserve an issue for appeal. 45 RR at 15-16. Additionally, Mr. Crowley's purported reason for conceding Mr. Andrus's guilt was based on a misapprehension of appellate law. *See* 2 EHR at 59-62. It cannot be a reasonable trial strategy to take an action that is based on an incorrect understanding of the law. *Harrington*, 131 S. Ct. at 690-91; *Baldwin*, 704 F.2d at 1332-33.

208. The failure on the part of trial counsel to develop a guilt-phase theory and the unreasonable decision to concede the client's guilt without the client's prior

knowledge or consent based on an erroneous understanding of appellate law constituted deficient performance.

e. Deficient in conceding the first special issue after failing to subject the State's evidence to adversarial testing

209. Mr. Crowley conceded the first special issue.

210. The first special issue is part of Texas's unique sentencing scheme, which requires the jury to predict "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. art. 37.071 § 2(b)(1). In most other states, jurors weigh aggravating and mitigating circumstances to determine whether a sentence of death is appropriate; in Texas, by contrast, juries must unanimously find a probability that a defendant will commit future acts of violence before reaching the question of mitigation. *Id.* at § 2(b)-(e). The sentencing structure consequently places the first special issue of future dangerousness "at the center of the jury's punishment decision." *See Jurek v. Texas*, 428 U.S. 262, 274-75 (1976) (reviewing Texas's first special issue).

211. Because of the importance of the first special issue, it is incumbent upon trial counsel to present a rebuttal to the State's case. Yet Mr. Andrus's counsel not only failed to present affirmative evidence to show that Mr. Andrus would not constitute a continuing threat of criminal violence, counsel conceded the issue in closing argument at the end of the punishment phase of trial. Because no reasonable

strategic grounds existed for conceding one of the two special issues the jury would answer to determine whether a death sentence would be imposed, this constituted deficient performance.

212. There can be no reasonable strategic value in conceding one of the only questions remaining for the jury to decide whether the defendant will receive a life or death sentence.

213. Failing to rebut the State's case on the first special issue, and then actively conceding it to the jury, constitutes deficient performance of professional norms for capital counsel.

214. The determination of the first special issue likely framed and influenced the jury's consideration of the second mitigation issue. Jurors in Mr. Andrus's case had to decide beyond a reasonable doubt that he would be a future danger before they could even consider the sparse mitigating evidence presented by defense counsel. *See Tennard*, 542 U.S. at 278 ("It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing the sentence.").

215. Defense counsel "failed to make reasonable efforts" to review and rebut the impact of Mr. Andrus's prior convictions, arrests, and other charged offenses. *See Rompilla*, 545 U.S. at 389; CR at 69-78, 284-86. Had counsel sufficiently investigated Mr. Andrus's life history, including his upbringing, life experiences,

and the specific circumstances of the State's alleged extraneous offenses, a reasonable probability exists that the jury would have had a greater understanding of his condition the night of the crime. This testimony likely would have convinced at least one member of the jury that, with proper intervention and structure, Mr. Andrus would not be likely to commit violence in the future.

216. For example, the testimony of Will Harrell, former Chief Independent Ombudsman and Director of Special Projects for the Texas Youth Commission (TYC), would have aided the jury's determination of the first special issue, explaining that Mr. Andrus's disciplinary record at TYC was highly deceptive and not indicative of an especially violent person but more reflective of a failed system. DX4 at ¶¶7-8; 4 EHR at 103-247.

217. Mr. Crowley admitted that he did not object to the State's presentation of extraneous offenses while also admitting that he did not do any investigation of his own or otherwise test the veracity of the State's discovery. 2 EHR at 64-65. More specifically, he admitted that he did not object to the admission of an assault and robbery at a dry cleaners attributed to Mr. Andrus even though defense counsel had not investigated the incident, interviewed the complaining witness, tested the State's assumptions, or studied the photo array that was used to obtain a witness identification even though Mr. Andrus had consistently denied having perpetrated this crime. 2 EHR at 282.

218. Had the defense team conducted an independent investigation of the underlying offense or the State's case in aggravation, they would have uncovered impeachment evidence and other evidence showing that the State could not prove all of the extraneous offenses beyond a reasonable doubt. For instance, the post-conviction investigation established the unreliability of the lone witness who had led law enforcement to suspect Mr. Andrus of a robbery-assault at a dry cleaners, his ex-girlfriend Charaya Williams. 7 EHR at 63. That unreliable witness prompted law enforcement to construct a photo array, fraught with reliability problems that trial counsel did not explore. 7 RR at 24-25, 28-36. That photo array was then shown to the owner of the dry cleaners and was admitted into evidence at trial without any exploration of the reliability of this process or whether the State could have proven that Mr. Andrus commitment this extraneous offense. 46 RR at 65-66; 7 EHR at 39.

219. Similarly, Mr. Crowley failed to recognize that the complainant of the offense that had gotten Mr. Andrus sent to TYC substantially embellished Mr. Andrus's role in the incident. 46 RR at 8-18. Thus Mr. Crowley failed to impeach her testimony with the police reports in his possession about the offense that had occurred or otherwise challenged her memory of an event that had occurred over eight years before trial. 2 EHR at 279-81. This failure was objectively unreasonable.

220. Likewise, Mr. Crowley admitted that he did not object to the State's presentation of numerous witnesses to testify about the same cell extraction incident. 2 EHR at 76-77. This failure was unreasonable.

221. Notwithstanding counsel's inexcusable failure to investigate available means to attack the State's future dangerousness case, counsel had no justification for conceding the special issue during closing argument and thus taking the issue away from the jury. Mr. Crowley's insistence that his comments to the jury were not a "concession" is not credible; he expressly told the jury that he was relying entirely on convincing the jury to find mitigating circumstances. 2 EHR at 83-84, 85, 175. His decision to rely entirely on getting a "yes" answer to the second special issue regarding mitigating evidence was unreasonable when he had conducted no mitigation investigation and put on virtually no mitigation evidence.

222. Trial counsel performed deficiently when he conceded the first special issue.

223. Defense counsel's duty at punishment includes the duty to continually discuss with the client the "strategy for meeting the prosecution's case in aggravation," to consider witnesses who "would rebut or explain evidence presented by the prosecutors," and to "determine at the earliest possible time what aggravating factors the prosecution will rely upon in seeking the death penalty and what evidence will be offered in support thereof." *Texas Guidelines*, Guideline 11.7.

224. It is especially incumbent upon capital trial counsel to vigilantly oppose the State's case in aggravation and argue on behalf of their client against a finding that he will be a continuing threat of criminal violence. Failure to sufficiently fulfill this duty constitutes deficient performance amounting to a structural error.

225. Alternatively, defense counsel's unreasonable decision to concede that the jury would likely find for the State on the first special issue added to the cumulative prejudice at trial in the punishment phase.

f. Deficient in failing to investigate and present a case in mitigation

226. Mr. Crowley's failure with respect to developing and presenting a mitigation case was abject.

227. Mr. Crowley admitted that capital defense attorneys have an obligation, under prevailing professional norms at the time of Mr. Andrus's trial, to conduct a searching mitigation investigation well in advance of trial. 2 EHR at 85-87. It was unreasonable for Mr. Crowley to think that he and Ms. Olvera could do the requisite investigation in the time remaining after she joined the team. 2 EHR at 87. Under the prevailing guidelines "lead counsel bears overall responsibility for the performance of the defense team." *Texas Guidelines*, Guideline 10.1.

228. Mr. Crowley admitted that he made no effort to front-load the defense mitigation themes during the guilt phase. He expressed confusion as to what that

concept means, although the practice is a prevailing norm expected of capital defense counsel. 1 EHR at 79; 2 EHR at 63, 115.

229. Mr. Crowley could not have front-loaded the defense's mitigation themes because he neither investigated nor presented a reasonable mitigation case despite the availability of considerable mitigation evidence. 6 EHR at 101 (the Court referencing "the tidal wave of information that has come through here with regard to mitigation" at the writ evidentiary hearing).

230. Mr. Crowley's sworn affidavit states that Mr. Andrus had no mental health issues at the time of the offense although even the records in Mr. Crowley's possession before trial show that was demonstrably false. 2 EHR at 69, 71; DX59 (showing, for instance, that Medicaid records indicated that Mr. Andrus had been diagnosed with "affective psychosis" at age eleven). Additionally, the jail records found in Mr. Crowley's file contain multiple psychiatric diagnoses reflecting the possibility that Mr. Andrus had a long history of serious mental health issues. His Harris County jail records include diagnoses of schizophrenia, mood disorder, schizophrenia affective disorder, and bipolar disorder. His Fort Bend County jail records include diagnoses of bipolar disorder and post-traumatic stress disorder (PTSD). 2 EHR at 264-65, 300; HC18.

231. Mr. Crowley admitted that he did not know how to interpret psychiatric records in his possession (summarized in DX59) and did not seek guidance from an

expert who could have provided him with this relevant information. 2 EHR at 288. For instance, he admitted that he does not know anything about psychotropic medication, including Seroquel, which had been repeatedly prescribed to Mr. Andrus as a teenager and young adult. 2 EHR at 73, 129. He further admitted that he had no special training in psychology or psychiatry and unreasonably failed to consult with someone who had such expertise. 2 EHR at 228-29, 291.

232. During the writ evidentiary hearing, the State endeavored to have Mr. Crowley interpret Mr. Andrus's mental health jail records that were in Mr. Crowley's file. Mr. Crowley admitted that these records contained what to him was only "a lot of psychological gobbledygook." 2 EHR at 240. He also admitted that he failed to note or recall the numerous serious mental health diagnoses that are found in the records, references to Mr. Andrus being prescribed psychotropic medications, and reference to hallucinations going back to when he was a teenager up until shortly before trial. 2 EHR at 264-70. These admissions underscore that it was unreasonable of Mr. Crowley to fail to consult with a qualified mental health expert as part of a mitigation investigation. 3 EHR at 157-59 (P. Wischkaemper explaining that the Guidelines require consulting with experts where the attorney lacks expertise regarding psychiatric issues).

233. Mr. Crowley admitted that he did not investigate what problems Mr. Andrus might have experienced in his home as a child, including those suggested by

juvenile probation records in Mr. Crowley's possession. Likewise, he admitted that he did not consider the significance of Mr. Andrus's mother's reluctance to testify on his behalf at trial or any traumatic experiences he may have had. 2 EHR at 74-75, 89, 123, 139. Mr. Crowley further admitted that he did not investigate why Mr. Andrus had started using drugs as a child, how he got access to those drugs, why his drug use escalated after he left TYC custody, or the nature of the neighborhood in which he grew up. He further admitted that he did not conduct any independent investigation into the circumstances that led to Mr. Andrus being placed in TYC custody or consult with any expert about TYC itself. 2 EHR at 115-17, 124-26.

234. Mr. Crowley admitted that he did not inquire why his client was placed in a padded cell while incarcerated in the Fort Bend County jail awaiting trial or investigate why he had been prescribed Thorazine and Seroquel by mental health care providers at the jail; nor did he consider how these circumstances might have suggested mitigating evidence. 2 EHR at 77-78.

235. Mr. Crowley incorrectly stated that the mental health expert he hired two weeks before voir dire "didn't find" any mental illness, an assertion that directly contradicts both Dr. Brown's draft report found in Mr. Crowley's files and Dr. Brown's sworn affidavit. 2 EHR at 79; HC32; DX2. Mr. Crowley did, however, confirm Dr. Brown's statements that he had been given no records or information

about Mr. Andrus's life history other than incarceration records before Dr. Brown purported to do a psychological assessment of Mr. Andrus. 2 EHR at 133, 272-73.

236. Mr. Crowley did not contact Dr. Brown until September 2012—shortly before voir dire began. DX2 at ¶2. Considering that Mr. Crowley had been appointed to represent Mr. Andrus in 2008, it was unreasonable for him to wait until the eve of trial to retain experts. Mr. Crowley's decision to refrain from presenting Dr. Brown—or some more qualified mental health expert—to the jury cannot be deemed a reasonable trial strategy because Mr. Crowley himself created the circumstances that rendered this mental health expert woefully unprepared.

237. That Dr. Brown was unprepared is also evident from the face of the report he put together after a single interview with Mr. Andrus and without any collateral-source interviews. Although his report refers generally to having reviewed records, those specific records are not identified. He simply states: "Records from the Texas Youth Council [sic] and jail medical staff" were reviewed. 6 EHR at 135. The "Texas Youth Council" is what the "Texas Youth Commission" was called many years before Terence Andrus was placed in TYC custody. *Id.* The TYC records available regarding Mr. Andrus did not contain the old name. *See generally* DX113. Dr. Brown's report does not include any summary of the TYC records he purportedly reviewed. 6 EHR at 136.

238. Another reason to question the reliability of Dr. Brown's report was the amount of time he billed for his services plus those of an assisting psychologist who signed his report. He charged a flat fee of $1600. Assuming a modest hourly rate of $200, that would mean that a total of eight hours was spent investigating and preparing the report. 6 EHR at 136-37. It is difficult to see how an individual could have done more than review some of the relevant records in that amount of time, let alone conducted a fair assessment and prepared a responsible report. *Id.*

239. A credible clinical psychologist retained on Mr. Andrus's behalf for this post-conviction proceeding, Dr. Scott Hammel, said of Dr. Brown's report that "it misses the mark" and "there are a number of problems with it." 6 EHR at 63. Dr. Hammel explained that the testing that Dr. Brown did did not appear to be sufficient to reach the conclusions that he had reached. 6 EHR at 64. For instance, Dr. Brown had concluded that his data suggested a diagnosis of schizophrenia, which Dr. Hammel did not find accurate based on the sources reputedly relied upon and Dr. Hammel's own independent assessment of Terence Andrus's life history. *Id.* Other conclusions Dr. Brown reached "were somewhat suspect because [Dr. Brown] himself says the MMPI" that he had given to Mr. Andrus "doesn't look valid," yet Dr. Brown then proceeded to interpret the results and make conclusions based on an invalid test. *Id.* Using an invalid test to support a diagnostic conclusion is not a sound practice. *Id.* at 65.

240. Also concerning was that, while Dr. Brown found Mr. Andrus to be credible, Dr. Brown's report also states that he suspects gross over-reporting; Dr. Brown then rushed to reach a diagnosis based on unreliable data. As Dr. Hammel explained, in such circumstances, "the evaluator really did have the responsibility to dig in and answer that question in a more comprehensive and responsible and thorough way, rather than using a test that wasn't valid to support his and/or her conclusions." 6 EHR at 138-39.

241. Further, Dr. Hammel explained that Dr. Brown's report is suspect because of internal inconsistencies and a lack of corroboration. Dr. Hammel concluded that Dr. Brown's hasty report does not reflect the standards for what an ethical forensic assessment should entail. 6 EHR at 135, 140-41.

242. Additionally, Dr. Hammel found that Dr. Brown's willingness to diagnose Mr. Andrus with a personality disorder based on one jail interview was not appropriate. 6 EHR at 143. Aside from the impropriety of such a diagnosis under these circumstances, Dr. Hammel acknowledged long-standing concerns within the mental health profession about the diagnosis of antisocial personality disorder generally because of its over-representation among minority and socially disadvantaged communities arising from bias within the correctional mental health profession. 6 EHR at 144-45.

243. The Court concludes that Dr. Brown's report is not credible. However, the fact that the report is not reliable is largely attributable to trial counsel who selected this expert, retained him just before trial, and failed to prepare him in a reasonable fashion.

244. Even though the report that Dr. Brown produced was not reliable, the fact that it states that Dr. Brown believed that Mr. Andrus had schizophrenia should have indicated to trial counsel that further investigation into Mr. Andrus's mental health was necessary to prepare to make a reasonable mitigation presentation at trial. 6 EHR at 140.

245. Mr. Crowley claims he did not receive Dr. Brown's report until after trial, although the report, found in his files, is dated October 12, 2012. 2 EHR at 133-35; DX2 at ¶4. Dr. Brown, by contrast, states that he sent the report on or about October 12, 2012, by three different means. He then never heard from Mr. Crowley or anyone else on the defense team thereafter. DX2 at ¶5. The Court does not find Mr. Crowley's testimony on this issue credible, as Dr. Brown stated in his affidavit

that he sent the report by email, fax, and regular mail. DX2.9 The Court finds that Mr. Crowley did not see the report until after trial because of his own negligence.

246. Moreover, Mr. Crowley admitted that he did not contact Dr. Brown after asking him to assess Mr. Andrus. 2 EHR at 135. It was objectively unreasonable for Mr. Crowley to fail to follow up with Dr. Brown, whether or not the defense team had received Dr. Brown's draft report.

247. In his sworn statement filed in support of the State's answer, Mr. Crowley states, incorrectly, that Mr. Andrus had only been diagnosed with ADHD. HC1; 6 EHR at 31. It was unreasonable for Mr. Crowley, who does not have mental health expertise, to fail to consult with a qualified expert who could have educated him about mitigating evidence in his client's history, including the records in Mr. Crowley's possession reflecting his client's long history of mental illness. For instance, records available to trial counsel include numerous red flags indicating that Mr. Andrus had a long history of serious psychiatric illness, including a mood disorder diagnosed when he was eleven but not consistently treated. 6 EHR at 44-45; DX18.

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9 Mr. Crowley denied that he had trouble getting back to the experts he had retained, but documentary evidence to the contrary makes Mr. Crowley's testimony on this subject not credible. *See* DX2; DX37.

248. Trial counsel in death penalty cases should have sufficient training to spot these red flags because serious mental illness is common among capital defendants, whose illnesses often have never been treated and instead tend to self-medicate with street drugs. 1 EHR at 82-83; 3 EHR at 157.

249. Mr. Crowley also failed to recognize that TYC had diagnosed Mr. Andrus with a substance abuse disorder, that TYC had drug abuse programs available when Mr. Andrus was in TYC custody in 2005, and that he was never placed in one of those programs. 6 EHR at 35.

250. That Mr. Crowley, appointed in 2008, waited until September 2012 to retain a mental health expert who conducted a hasty, unreliable mental health assessment was patently deficient, and this deficiency prejudiced Mr. Andrus.

251. Mr. Crowley admitted that his lone testifying expert, Dr. Roache, had not been authorized to conduct a psychological assessment of Mr. Andrus and had been provided with no context to conduct a credible psychological evaluation of any kind. Yet Mr. Crowley did not object when the prosecution opined during Dr. Roache's testimony that Mr. Andrus was a "sociopath" and urged Dr. Roache to agree with that baseless lay diagnosis. 2 EHR at 111-14.

252. Trial counsel's mitigation investigation fell well short of the prevailing standards of professional norms for capital trial counsel in Texas. The Court agrees with Mr. Wischkaemper that trial counsel's investigation and presentation of

mitigating evidence constituted "an absolute failure to adequately investigate the life history of Mr. Andrus" and resulted in a lack of a persuasive narrative at the punishment phase of trial. DX7 at ¶¶6, 19; 3 EHR at 153-66.

253. The ABA Guidelines and Texas Guidelines make clear that a mitigation specialist is an "indispensable part" of a capital defense team. DX7 at ¶17; *ABA Standards*, Guideline 4.1 Commentary ("A mitigation specialist is also an indispensable member of the defense team throughout all capital proceedings."); *Texas Guidelines*, Guideline 3.1 (A)(1) ("The defense team should consist of no fewer than two attorneys qualified in accordance with Guideline 4.1, an investigator, and a mitigation specialist."). Yet trial counsel was without a mitigation specialist for over half the duration of the representation. DX7 at ¶19.

254. While Ms. Martin was able to interview Mr. Andrus and retrieve and review some records during her time on the case, this is essentially where her work stopped. DX7 at ¶20. While it is standard practice to document mitigation interviews with a detailed memo, trial counsel's files are devoid of any memos documenting interviews with any family members, collateral witnesses, or the client. *Id.* at ¶23. This lack of documentation indicates the lack of a thorough mitigation investigation with which to make strategic decisions about themes and theories for trial. *Id.* at ¶25.

255. As Mr. Wischkaemper explained, the thorough development of a mitigation case for the punishment phase of a capital trial is a complex and

immensely time-consuming process, typically requiring hundreds of hours spent over the course of many months. DX7 at ¶26; 1 EHR at 92. Yet Ms. Martin had billed for only ninety-four hours of work during her limited time on the case. DX7 at ¶27. The evident lack of preparation on the part of the defense team is in stark contrast to the requirements of the ABA Guidelines and the Texas Guidelines and the prevailing norms for capital representation in Texas. DX52-55. The lack of preparation and time spent developing a mitigation case is reflected in the lack of a persuasive theme and theory at the punishment phase of Mr. Andrus's trial. DX7 at ¶29.

256. The mitigation presentation at trial consisted of three largely unhelpful lay witnesses (Cynthia Andrus, Michael Davis, and an unprepared jail counselor), an unprepared expert (Dr. Roache), and then Terence Andrus himself.

257. A defendant who testifies in a criminal case, especially in a capital case, often does so at his own peril. By taking the stand the defendant opens himself up to harsh and relentless cross-examination in front of a jury—which is precisely what occurred here. Yet when a defendant takes the stand in a criminal case, "it is often the defendant, above all others, who is the most influential witness to a jury." *Rayborn v. United States*, 489 Fed. App'x 871, 882 (6th Cir. 2012) (unpublished); *see also Ferguson v. Georgia*, 365 U.S. 570, 582 (1961). Because a defendant's testimony typically becomes the most influential testimony heard by a jury, "[n]o

conceivable, tactical justification can undo the harm inflicted by improperly conducting the testimony of *the* key witness in the case." *Rayborn*, 489 Fed. App'x at 882 (internal quotations omitted) (emphasis in original) (citing *Higgins v. Renico*, 470 F.3d 624, 633-35 (6th Cir. 2006)). Mr. Crowley, who did not think Mr. Andrus should testify, did nothing to prepare him for cross-examination. But the grossly inadequate mitigation presentation had left his client feeling he had no choice but to at least try to correct his mother's untrue testimony. 51 RR at 48, 54.

258. The prejudice arising from the failure to investigate and present readily available mitigation evidence is described at length in section 5, below.

g. Deficient in failing to preserve the record for appeal

259. Mr. Crowley failed to take steps to preserve the integrity of the record for appeal. Over twenty discussions too place off the record, some of which were evidently substantive because of what transpired afterwards. *See* 3 RR at 8; 12 RR at 17; 13 RR at 54; 18 RR at 58; 20 RR at 4-5; 31 RR at 101; 32 RR at 13; 33 RR at 182-83; 33 RR at 185; 34 RR at 6, 8; 35 RR at 61; 42 RR at 120; 46 RR at 35, 101, 108; 48 RR at 7, 58; 51 RR at 76; 52 RR at 4.

260. Where a defendant requests that bench conferences be recorded and that request is granted, it is "incumbent upon him to object if the bench conferences [are] not recorded." *Valle v. State*, 109 S.W.3d 500, 508 (Tex. Crim. App. 2003). Yet during Mr. Andrus's trial, the court repeatedly held substantive discussions off the

record, and counsel failed to go back on the record to re-create what was said or ordered by the court. *See id*. at 508-09 (holding that defense counsel must object to each individual unrecorded bench conference at trial to preserve error in spite of grant of pretrial motion to record bench conferences).

261. Mr. Crowley admitted during the writ evidentiary hearing that Mr. Andrus, in a post-conviction proceeding, has no means to prove whether substantive discussions took place in each off-the-record discussion because he was not privy to those discussions. 2 EHR at 52. Mr. Crowley also testified that he has no specific recollection of any of the off-the-record discussions. 2 EHR at 53. He acknowledged that both the ABA Guidelines and the Texas Guidelines require that defense counsel in a capital case preserve any and all errors for appellate review. 2 EHR at 54-55.

262. In the absence of a clear and complete record, it is difficult to determine much of what took place during trial. Recognizing this difficulty, the Fifth Circuit has held that specific prejudice need not be shown if: (1) a "substantial and crucial portion" of the trial transcript is missing and (2) the defendant is represented on appeal by counsel other than his trial lawyer. *United States v. Selva*, 559 F.2d 1303 (5th Cir. 1977). The court reasoned that, under those circumstances, "counsel cannot reasonably be expected to show specific prejudice" because "even the most careful consideration of the available transcript will not permit us to discern whether

reversible error occurred while the proceedings were not being recorded." *Id.* at 1306.

263. In Mr. Andrus's case, there are few contextual clues for determining the subject matter of each unrecorded bench discussion. Defense counsel's deficient performance in failing to preserve a complete record insulted many errors from meaningful appellate review. The end result amounts to a structural error.

264. Alternatively, this deficiency added to the cumulative prejudice that requires a new trial.

h. Deficient in overall failure to understand the defense function and the requirement to serve as a zealous advocate for the client

265. It was unreasonable that Mr. Crowley, during his nearly four-year stint as lead counsel, put in fewer hours on Mr. Andrus's case than his second chair, Ms. Olvera, who worked on the case for less than five months. That Mr. Crowley found this disparity unsurprising underscores his lack of understanding of prevailing norms. 2 EHR at 141. Even Ms. Olvera, his second chair, was surprised by this disparity, and agreed that it was not reasonable how little time Mr. Crowley had spent on Mr. Andrus's case. 3 EHR at 39.

266. Mr. Crowley's overall conduct in this case also reflects a lack of appreciation for the adversarial process and, in particular, the defense function in a criminal, not to mention capital, case in which constitutional mandates are at stake. There was a complete abdication of the responsibility to try to understand the client

so as to present to the jury the story of a human being; there was no directive given to any expert who could have helped illuminate the mental health issues but a mere "document dump" of records related to incarceration; and the decision to permit the prosecution to confer with defense experts outside of the presence of defense counsel is unheard of. 3 EHR at 158-60. Likewise, dedicating part of the defense closing to complimenting the prosecution on a job well done was not appropriate. 3 EHR at 164.10

267. While there is nothing unethical about Mr. Crowley having a collegial relationship with various members of the Fort Bend County District Attorney's Office, such friendship does not justify abdicating primary responsibility to his client. Mr. Crowley's friendship with ADA Felcman seems to have blinded Mr. Crowley to his obligations to protect client confidences, including the work product of retained experts.11 1 EHR at 175; 4 EHR at 31. Additionally, discussing their

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10 Mr. Crowley's lack of understanding of his role was further underscored by his insistence that he should be compensated by the county for the time he spent testifying in this writ proceeding regarding his performance at Mr. Andrus's trial. 2 EHR at 259.

11 Similarly, ADA Felcman's open expression of anger during this writ proceeding about the fact of Mr. Andrus seeking habeas relief is unprofessional and indicates confusion about the zealous representation expected of defense counsel. *See* 4 EHR at 16-17 (Court reprimanding ADA Felcman for failing to act like an officer of the court and striking his extended, non-responsive outburst).

friendship before the jury and Mr. Crowley complimenting the State on its trial presentation was inappropriate and likely confused the jury, as was conceding guilt and the first special issue. 3 EHR at 164.

268. As a *Strickland* expert, Philip Wischkaemper, testified, "If Mr. Crowley had tried, I'm not sure he could have done any more to set up an ineffective assistance of counsel claim." 3 EHR at 165. His performance was akin to wholesale abandonment of his client. 3 EHR at 165-66.

4. Trial Counsel's Deficient Performance throughout the Representation Created Structural Errors Requiring a New Trial; Alternatively, the Cumulative Effect of Counsel's Deficiencies Prejudiced Mr. Andrus in the Guilt and Punishment Phases

269. Because of structural errors arising from trial counsel's deficient performance, the integrity of the entire proceeding cannot be trusted. The Supreme Court has held that, in the case of an ineffective assistance of counsel allegation, prejudice is to be presumed where counsel's performance was "so likely to prejudice the accused that the cost of litigating their effect in a particular case is unjustified." *United States v. Cronic*, 466 U.S. 648, 658 (1984). Specifically, the defendant's right to counsel is violated if counsel "entirely fails to subject the prosecution's case to meaningful adversarial testing." *Id.* at 659.

270. Mr. Andrus has established that Mr. Crowley "entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing" throughout all

phases of the representation. *Id.*; 3 EHR at 165-66. Thus, prejudice is presumed, and Mr. Andrus is entitled to a new trial.12

271. Alternatively, Mr. Andrus has shown prejudice under *Strickland* based on the cumulative errors and omissions in both the guilt and punishment phases of trial.13

272. In assessing prejudice under *Strickland*, courts must consider the "totality" of evidence adduced at both trial and in the habeas proceeding regarding counsel's deficient performance to determine if there is a "reasonable probability" that at least one juror might have voted differently as to one of the two special issues that are a necessary requisite for imposing a death sentence. *Strickland*, 466 U.S. at 695.

273 In *Strickland*, the Supreme Court explained that, in assessing prejudice, courts should keep in mind that "[t]he result of a proceeding can be rendered unreliable, and hence the proceeding itself unfair, even if the errors of counsel cannot

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12 Further, a Batson violation constitutes structural error not subject to harmless error review. *See U.S. v. Broussard*, 987 F.2d 215 (5th Cir.1993) (declining to apply harmless error analysis to trial court's misapplication of *Batson* test), abrogated on other grounds, *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994). Thus, Mr. Andrus is not required to show prejudice and is entitled to a new trial.

13 Conclusions regarding the prejudice to Mr. Andrus based on counsel's deficient performance in the punishment phase is discussed separately below.

be shown by a preponderance of the evidence to have determined the outcome." *Strickland*, 466 U.S. at 693-94. Under clearly established federal law, the "reasonable probability" standard—a probability sufficient to undermine confidence in the outcome—is less onerous than even the preponderance of evidence burden of proof. *See Bouchillon v. Collins*, 907 F.2d 589, 595 (5th Cir. 1990) (explaining that the prejudice prong imposes "a lower burden of proof than the preponderance standard" and that even when "the evidence arguably supports a different result under a preponderance standard," a reviewing court still can be "confident that it meets the 'reasonable probability' standard."); *Buckner v. Polk*, 453 F.3d 195, 203 (4th Cir. 2006) (noting *Strickland* prejudice standard of "reasonable probability" is "less than a preponderance of the evidence"); *Hodge v. Hurley*, 426 F.3d 368, 376 n.18 (6th Cir. 2005) (reminding that *Strickland* standard "is a lesser standard than preponderance of the evidence").

274. Additionally, even though *Strickland* involves a two-pronged analysis of ineffective assistance of counsel, the facts and evidence that a habeas applicant adduces are often relevant to both prongs: "In our analysis we do not attempt to place the events of trial into two separate airtight containers of the first and second prongs of *Strickland*. The facts that demonstrate a reasonable probability of a different outcome but for counsel's decisions can cast light on their reasonableness." *Draughon v. Dretke*, 427 F.3d 286, 293 (5th Cir. 2005).

275. Prejudice is assessed after considering the totality of evidence relevant to counsel's performance. *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000) (finding the state's highest court's prejudice determination "unreasonable insofar as it failed to evaluate the totality of the available . . . evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding").14

276. Courts are "'not required to condone unreasonable decisions parading under the umbrella of strategy, or to fabricate tactical decisions on behalf of counsel when it appears on the face of the record that counsel made no strategic decision at all.'" *Richards v. Quarterman*, 566 F.3d 553, 564 (5th Cir. 2009) (quoting *Moore v. Johnson*, 194 F.3d 586, 604 (5th Cir. 1999)) ("Based on our review of the record

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14 *See also Rodriguez v. Hoke*, 928 F.2d 534, 538 (2d Cir. 1991) ("Even if Rodriguez's claims, evaluated individually, might not amount to a due process violation sufficient to require habeas relief, nevertheless, given the number of questionable circumstances in this case . . . the [] court should be given an opportunity to carefully review all of Rodriguez's claims together."); *Williams v. Washington*, 59 F.3d 673, 682 (7th Cir. 1995) (In assessing prejudice, "a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was substantial enough to meet *Strickland*'s test."); *Harris ex rel. Ramseyer v. Wood*, 64 F.3d 1432, 1438 (9th Cir. 1995) (finding for purposes of ineffective assistance of counsel claim, defense may be prejudiced as a result of cumulative impact of multiple deficiencies in defense counsel's performance); *United States ex rel. Sullivan v. Cuyler*, 631 F.2d 14, 17 (3d Cir. 1980) (analyzing the cumulative effect of the ineffective assistance claims); *Goodman v. Bertrand*, 467 F.3d 1022, 1030 (6th Cir. 2006) ("Rather than evaluating each error in isolation, . . . the pattern of counsel's deficiencies must be considered in their totality.").

and considering the cumulative effect of Davis's inadequate performance, we think it is extremely likely that, but for Davis's objectively unreasonable representation of Richards, the jury would have concluded that the later assault led to Baker's death, and would have convicted Richards of, at most, aggravated assault."). When assessing counsel's performance, courts "look at what might have been, not to judge performance of trial counsel by failures of strategic decisions reasonable when made, but to meaningfully examine whether counsels' failure" "was based on a 'reasonable decision'" that made the failure to act "unnecessary." *Draughon*, 427 F.3d at 296.

277. The CCA has been "hesitant to designate any error as per se ineffective assistance of counsel as a matter of law" but has also recognized that "it is possible that a single egregious error of omission or commission by appellant's counsel constitutes ineffective assistance." *Thompson v. State*, 9 S.W.3d 808, 813 (Tex. Crim. App. 1999) (internal quotations omitted). That is, rarely does a single error or omission on the part of trial counsel support a finding that counsel was sufficiently ineffective that that conduct alone prejudiced the client. However, just recently, the Supreme Court identified such an example in *Buck v. Davis*, 580 U.S. __ (2017). *Buck* shows that a single bad decision can be sufficiently unreasonable and prejudicial to support a finding of ineffective assistance of counsel. *See id.* (explaining that the impact of a defense expert's two references to race in discussing the question of the defendant's future dangerousness "cannot be measured simply

by how much air time it received at trial or how many pages it occupies in the record."). As the Supreme Court noted, "[s]ome toxins can be deadly in small doses." *Id.*

278. Mr. Andrus did not rely on a single unreasonable decision on the part of his trial counsel. He alleged that counsel's errors and omissions were legion. The Court has considered those errors and omissions cumulatively in determining that Mr. Andrus was prejudiced—and thus is entitled to relief in the form of a new trial because the cumulative effect is weighty enough that it conceivably could have swayed at least one juror's vote. *See Moore v. Johnson*, 194 F.3d 586, 619 (5th Cir. 1999) (holding courts should examine cumulative effect of errors committed by counsel across both trial and sentencing).

279. It is clearly established that even defendants who committed exceptionally aggravated crimes can be prejudiced by ineffective counsel. *See, e.g.*, *Williams*, 529 U.S. at 368 (granting IAC relief to petitioner who had "brutally assaulted an elderly woman" before killing her); *Rompilla*, 545 U.S. at 397 (Kennedy, J., dissenting) (granting IAC relief to petitioner who had committed a "brutal crime"; victim was stabbed 16 times, beaten with a blunt object, gashed in the face with beer bottle shards, and set on fire); *Wiggins*, 539 U.S. at 553 n.4 (Scalia, J., dissenting) (granting IAC relief to petitioner who had committed a "bizarre crime" in which 77-year-old woman was found drowned in her bathtub, missing her

underwear, and sprayed with insecticide); *Silva v. Woodford*, 279 F.3d 825 (9th Cir. 2002) (granting IAC relief to petitioner who had kidnapped, raped, tortured, and mutilated two victims and left human remains in a trash can); *Mason v. Mitchell*, 320 F.3d 604 (6th Cir. 2003) (granting IAC relief to petitioner who had sexually assault a nineteen-year-old, beaten her to death with a piece of wood with nails sticking out of it, then left her half-naked in abandoned building); *Jermyn v. Horn*, 266 F.3d 257 (3d Cir. 2001) (granting IAC relief to petitioner who had beaten his mother until she was unconscious, placed her on the bed, and then set the bed on fire because she had cut him out of her will); *Hooks v. Workman*, 689 F.3d 1148 (10th Cir. 2012) (granting IAC relief to petitioner who had beaten his pregnant girlfriend to death in front of their one-year-old daughter and the beating was such that the fetus suffered a ruptured liver and severe injuries to its head and chest and died in utero).

280. Mr. Andrus, whose capital offense was committed during a car-jacking that went tragically awry, has been prejudiced by his trial counsel's objectively unreasonable approach to mitigation.

5. Counsel's Failure to Investigate and Present Terence Andrus's Life and Family History in Accordance with Prevailing Professional Norms Prejudiced Him in the Punishment Phase

281. Among counsel's glaring deficiencies are his dereliction of the duty to investigate and present a mitigation case. Since at least *Lockett v. Ohio*, defense

attorneys in capital cases have known the necessity of performing a wide-ranging investigation into their client's life history. 438 U.S. 586 (1978). Since well before trial, the prevailing professional norm for capital defense attorneys is to retain mitigation specialists as part of the defense team, who review records and meet with witnesses, gathering and weaving the bare facts of the client's life into a compelling narrative. *ABA Guidelines*, Guideline 10.7 at cmt. (noting that a "penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history"); *ABA Supplementary Guidelines*, Guideline 10.4(A) ("It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy.").

282. Mitigating evidence is not developed to provide a defense to the crime or to challenge evidence of guilt; nor is it intended to "excuse" a crime. Instead, mitigation presents an individual's life experiences in a way that inspires compassion, empathy, mercy, and/or understanding. Mitigating evidence is *any* evidence that "might serve 'as a basis for a sentence less than death.'" *Tennard*, 542 U.S. at 287 (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)) (emphasis added).

283. Mitigating evidence that will explain a defendant's background and history to the jury is critical to enabling the jury to gain an understanding of the defendant as a person. Professional norms require that counsel's investigation include the thorough interviewing and preparation of witnesses such as family members, friends, neighbors, coworkers, teachers, correctional officers, and acquaintances. *ABA Guidelines*, Guideline 10.7 cmt. ("penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history"); *Texas Guidelines*, Guideline 11.1(A)(3)(b)(i) ("The investigation for the punishment phase of the trial should generally encompass . . . [d]evelopment of character witnesses and family background evidence."). These standards require that trial counsel make an informed decision to implement an effective defense strategy. *ABA Guidelines*, Guideline 10.7 cmt. ("penalty phase preparation requires extensive and generally unparalleled investigation into personal and family history."); *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 HOFSTRA L. REV. 677, 688 (2008) ("It is the duty of counsel to lead the team in conducting an exhaustive investigation into the life history of the client. It is therefore incumbent upon the defense to interview all relevant persons and obtain all relevant records and documents that enable the defense to develop and implement an effective defense strategy.").

284. Prejudice is assessed by considering the difference between what was actually presented at trial and what competent counsel could have presented. *Rompilla*, 545 U.S. at 393.

285. Had counsel conducted a sufficient investigation and presentation of Mr. Andrus's life history, they would have been able to retain the services of an expert witness, such as Dr. Scott Hammel, to serve as a social historian. DX116. If Dr. Hammel, or someone with similar expertise, had been consulted and presented at trial, he could have explained to the jury how the social, cultural, and economic factors in Mr. Andrus's background influenced both his mental health and his life trajectory.

286. Dr. Hammel, in conjunction with lay witness testimony, documentary evidence, and other relevant expert opinion, could have presented a compelling social history narrative that would have rebutted the State's caricature of Mr. Andrus as a violent, drug-addicted "sociopath." That social history would have included the numerous risks to which he was exposed throughout his unstable childhood that seriously impaired his mental health, inclined him to abuse substances, and hindered his ability to develop into an adult poised to achieve stability.

287. In this writ proceeding, multiple witnesses presented credible, unimpeached evidence regarding mitigating events in Mr. Andrus's life that trial counsel could have presented to the jury had counsel performed the constitutionally

required investigation. By presenting these witnesses, relying on the voluminous supporting documentation developed during the post-conviction investigation, the jury would have heard and been able to give meaningful effect to the following narrative, and at least one juror would likely have voted to spare Mr. Andrus's life.

a. Terence Andrus was prejudiced by trial counsel's failure to tell his story.

288. Terence Andrus was born in Houston's Third Ward, a predominantly African-American neighborhood since its inception. He was born in "Jefferson Davis Hospital," a name that, although it had legally changed long before, still appears on his birth certificate. DX122A at 3986; 3 EHR at 230-31.

289. Terence was born in 1988 during the height of the crack epidemic. Houston's Third Ward was an epicenter of that epidemic. 3 EHR at 229-31. Understanding how the neighborhood came to be plagued by widespread vice that disproportionately affected its African-American residents, including multiple generations of Terence's family who lived there, requires tracing the neighborhood's history from its origin—an investigation that his trial counsel did not even consider, let alone undertake. *See* DX129.

i. <u>The neighborhood of Terence's childhood was shaped by a legacy of racial segregation and urban blight.</u>

290. Before the Civil War, counties like Fort Bend, Brazoria, and Matagorda that surround Houston were known as the "Texas Sugar Bowl" because of the rich,

fertile land surrounding the area, which was very good for growing crops like sugar cane and cotton. Because of the region's fertility, it experienced a rapid expansion based on a plantation economy, which also led to the importation of black slaves. By the 1850s and the decade leading up to the Civil War, much of the Sugar Bowl had a black slave majority population. 3 EHR at 209-10.

291. When Houston was formed in 1836 following the Battle of San Jacinto, six "wards" or geopolitical entities were created in the area surrounding downtown. Each ward had its own political representation. Because of the size and the structure of the wards, each ward felt like its own small town with its own business and entertainment districts. The wards ceased to exist as official political entities around the turn of the Twentieth Century, but they continued to exist as discernible neighborhoods around Houston for decades thereafter. 3 EHR at 210-11; DX93.

292. During World War I, Houston's economy expanded very rapidly because the expansion of the ship channel permitted ocean-going vessels to enter the Port of Houston. A major rise in the exportation of cotton and oil meant the availability of more jobs, attracting diverse people to the city. The African Americans moving into the area mostly settled in the Third, Fourth, and Fifth Wards, as these were historically black neighborhoods. 3 EHR at 212-13.

293. Third Ward's history as a black community goes back to the Reconstruction Era. Third Ward is the site of the first public property purchased by

African Americans in Houston: Emancipation Park. But Third Ward did not have its own schools initially; all African-American children in the city had to go to school in Fourth Ward, the old Freedmen's Town. 3 EHR at 216.

294. Segregated schools were part of the legacy of the Jim Crow era that began right after the Civil War. Because the school board tended to allot more money to white schools, Houston's black schools were always underfunded. The all-black schools located in Third Ward were Frederick Douglass Elementary, Ryan Middle School, and Jack Yates High School. These schools were still almost exclusively black when Terence Andrus attended them over a hundred years after Jim Crow came to Houston. 3 EHR at 219-21; DX118 at 71-72.

295. In addition to segregated schools, Houston's railroads, street cars, and other public spaces and businesses were also segregated by the 1890s. By 1910, the segregation of Houston was nearly complete, further compelling the concentration of African Americans in the wards. 3 EHR at 219.

296. The racial hierarchy created by legal segregation was buttressed through violent coercion. In some cases, mob violence communicated the message of racial inequality. There was also a thriving and highly organized Ku Klux Klan in Houston right after World War I, reflecting a Klan revival across the United States. The mayor of Houston at the time publicly joined the Ku Klux Klan. Members of the police department were in the Klan. Rice University had a student

Klan organization in the 1920s. Additionally, police brutality was common in black communities. Most of the police officers who patrolled Houston were white. There was no black police officer in Houston until around World War II, but he was not allowed to arrest white people or carry weapons. 3 EHR at 223-24.

297. Ironically, before the push for integration began after World War II, Third Ward had thriving black businesses and institutions—more vibrant than other southern cities, like New Orleans, Memphis, or Atlanta. 3 EHR at 225. But with the construction of interstate highways in the late 1950s—particularly I-45 that cut through Third Ward—the neighborhood started to decline. DX132. The interstate also cut Third Ward off from other parts of the city and made mobility without a car very difficult. This development in turn led businesses to close down. Those who could, began to move out—particularly members of the black middle class. 3 EHR at 226. What happened to Houston's Third and Fifth Wards was similar to what happened in other urban communities: highways were constructed in working-class neighborhoods with the least amount of political representation. 3 EHR at 229.

298. After World War II and, increasingly, in the 1960s and 1970s, Houston's Wards became centers of vice, particularly drugs and prostitution. When official red-light districts closed, vice tended to spread to neighborhoods comprised of a more transient population, as Third Ward was then becoming. As a result, people came into the neighborhood looking for drugs and prostitution. Before the 1980s,

the primary drug was heroin; then the neighborhood became the epicenter for the crack cocaine epidemic. 3 EHR at 229-31.

ii. Drug epidemics devastated Houston's Third Ward.

299. Houston, being a port city, was actually one of the first places hit by crack cocaine. By 1984, it was a serious concern in terms of addiction and the rising crime rate that the drug epidemic spawned. The inexpensive nature of crack allowed it to take root in working class communities. One could purchase a crack rock for $5. But the resulting high only lasted for about 15 minutes, and it induced an urge for more, keeping addicts coming back. When people ran out of money, they turned to robbery and shoplifting to get the funds to purchase more. 3 EHR at 231-32.

300. During this same timeframe, there was a rise in codeine abuse in Houston. Codeine was a prescription drug that people tended to mix with liquids—such as beer or soda. The concoction was colloquially referred to as "lean," "sizzurp," or "drank." 3 EHR at 233-34; 5 EHR at 35.

301. The epidemic involving these drugs continued into the 1990s when Terence was growing up there. By then, Third Ward, as a center of drug use and distribution, had primarily an underground economy, centered almost entirely around forms of vice. Kids grew up with illegal conduct all around them—people selling and doing drugs, engaging in prostitution, robbing, and killing. *Id.*; DX118; DX122A; 5 EHR at 65, 72-73.

302. The rising crime rate caused further depopulation of Third Ward. A process that had begun slowly after World War II as other black communities had become available accelerated in response to rising crime. The rise in crime propelled the more affluent members of Third Ward to leave for newer neighborhoods in the old Sugar Bowl, places like Missouri City or Sugar Land. As a result, Third Ward, which had formerly had class if not racial diversity, became populated exclusively by those who could not afford to leave. This process affected the tax base and thus school funding. As the neighborhood got poorer and less desirable, businesses shuttered. Those left behind, if they did not own a car, had difficulty finding employment. They had to leave the neighborhood to find a job. And although public transportation was an option, it was very difficult, especially in a city the size of Houston. 3 EHR at 236-38.

iii. Terence's unwed, teenage mother was not equipped to provide the stability her children needed.

303. By the time Terence was born—the second child of an unwed teenage mother—Third Ward was characterized entirely by poverty and vice. Terence's mother, Cynthia Denise Andrus, was sixteen when her first child, Torad, was born, and seventeen when Terence was born. She was then living in Third Ward in an apartment with her parents and her younger brother, Joseph. No father's name appears on the birth certificates of either of Cynthia's children, but the family's understanding is that Torad's father was Roderick Davis and Terence's father was

Roderick's half-brother Michael Davis, both of whom started dealing drugs in Third Ward as teenagers. Cynthia claims that Terence was born as a result of a one-night stand. After his birth, she finished high school at an alternative community school for pregnant teens. DX122A at 3986, 3988, 4153-58; DX122B at 6174-98; DX122C at 3874-3939; DX8 at ¶6; DX9 at ¶11; DX18 at ¶8.

304. When Torad and Terence were quite young, Cynthia moved out of her parents' apartment and moved in with Michael Davis's mother, LaRuth Davis, who was then addicted to crack and had long-standing emotional problems from experiencing her father murder her mother. Cynthia supported the household by selling drugs and engaging in prostitution. This was her only source of income (aside from Torad's disability checks) for all of the years that Terence lived with her. LaRuth's son Michael, Terence's biological father, was sent to prison for the first time when Terence was one year old and Michael was nineteen. At that time, he did not know that Terence was his son. Michael himself never knew who his own father was. Later, when he was temporarily out of prison, Cynthia told Michael that Terence was his son. But Michael ultimately spent most of Terence's childhood in prison. 49 RR at 47; 50 RR at 6-9; DX122C at 2894-59; 5 EHR at 37-38, 85-86, 197-98.

iv. All of the fathers of Terence and his siblings had criminal histories.

305. In addition to Torad, Terence has two sisters, Tafarrah and NormaRaye, and another brother, Cynthia's youngest child, Trevion. None of the five children have the same biological father. None of these men ever lived with the family as a father figure. All of these men have criminal histories. *See* DX122A at 3989-4158; DX122B at 5733-6213; DX122C at 2808-3670; 5 EHR at 81-82.

306. Tafarrah's father was Danyel Sims, who was six years younger than Cynthia and only sixteen when Tafarrah was born. Soon after her birth, he was arrested for possession of crack cocaine. He has been arrested for sexual assault, assault family violence, and murder and has spent much of his adult life in prison. He raped Tafarrah when she was a young child and otherwise abused her, which led to Tafarrah being removed from Cynthia's home and placed by CPS with Cynthia's parents. DX8 at ¶4; DX122C at 3602-3964; DX122A at 4008; DX122B at 5892-5917, 5931-34; DX122B at 6214-33; DX122B at 6214-6233.

307. NormaRaye's father was Norman Ray Williams. He too has a criminal record, with convictions for possession of cocaine and multiple arrests for assault of a family member. DX122A at 4139; DX122B at 6138-45.

308. Trevion's father, who was seven years younger than Cynthia, was Orentherus "Sean" Norman. He was a twenty-one year-old drug dealer when Trevion was born. He had previously been arrested for dealing crack cocaine. Before

Trevion was a year old, Sean was shot and killed in a drug-related incident. DX122C at 3680-3802; DX122A at 3980; 5 EHR at 40.

309. In short, all of the fathers of Cynthia's children did drugs and sold them, which inevitably led to stints in prison or their early deaths through drug-related violence. 5 EHR at 39-40.

v. <u>Terence, as a young child, was thrust into the parent role vis-à-vis his siblings.</u>

310. Although Terence was the second child, from a very young age, he took on the role of caretaker for Cynthia's other children, including his older brother Torad, who was seen as "slow." Terence was expected to cook, clean, and get the children ready for school. When his mother was not at home and there was no food in the house, he was the one who tried to figure out how to keep the kids fed. Friends of the family who observed him growing up saw him as a happy, loving child who was very protective of his siblings. DX10 at ¶¶4-5; DX11 at ¶¶6-7; DX13 at ¶5.

311. Because Cynthia was often absent, Terence shouldered a lot of responsibility at a young age, protecting and supporting his siblings in the dangerous neighborhoods in which they lived. DX9 at ¶¶1-2; DX18 at ¶¶1-5; DX17 at ¶2; DX13 at ¶4; 5 EHR at 41-42.

312. Until he was about twelve or thirteen, Terence lived in Third Ward. This once vibrant neighborhood had degraded into a hotbed of vice and violence by that time. Terence's siblings remember the area as "horrible," filled with

"crackheads, smokers, prostitutes, and drug dealers." Drug sales were an open and obvious fact of everyday life, with multiple crack dealers living around them. Police were often present in the neighborhood busting up crack houses or arresting people in undercover drug busts. The atmosphere was "every man for themselves." Selling drugs was seen as normal—just what people in the neighborhood did to make money and survive. It seemed like easy money, and most of the adult figures around Terence participated in this economy—including his mother. DX9 at ¶¶3, 7; DX10 at ¶¶10-11; DX17 at ¶8; DX13 at ¶¶8, 10; DX14 at ¶3; 5 EHR at 24.

313. Cynthia was largely an absent parent, although she did beat the children when she got frustrated, often using a board wrapped in duct tape. 6 EHR at 127. But, from her perspective, she "did what she needed to do to feed her five kids," including selling crack and "drank" out of the family's apartment. Drug addicts would come to her apartment and go into the back room with her, where she would chop up crack rocks or mix "drank." These crack addicts were so numerous in the neighborhood that it was not unusual for people's houses to be broken into by a crack addict looking for something to steal to then trade for crack. These drug addicts would even steal from the apartment while buying their drugs. All kinds of items—electronics, clothes, jewelry, food stamps—were stolen to trade for yet more drugs. DX9 at ¶¶3,7; DX10 at ¶12; DX13 at ¶8. A crack addict once broke into Cynthia's house in Third Ward on McIlhenny Street looking for something to steal; the broken

window remained boarded up most of the time Terence's family lived there. 5 EHR at 22.

314. After becoming adept at identifying corrupt clinic doctors who were willing to sell prescriptions for $100, which she then repackaged and sold for a significant return on the investment, Cynthia sold Xanax and other pharmaceuticals. Terence first experimented with hard drugs at home—taking some Xanax that his mother had around the house as a result of filling illegal prescriptions. 5 EHR at 35-37; 6 EHR at 27; DX118.

315. Cynthia taught others how to engage in this practice, including Sean Gilbow, who met Terence when he was about ten years old while Sean was temporarily out of prison. Sean too had grown up in Third Ward and had started dealing crack at age eighteen. An incident that he observed on his first day selling crack instilled sufficient fear in Sean that he never used this drug. A woman approached a group of dealers trying to sell a baby for some crack. Although Sean was shaken by this incident, he continued to sell crack and took other drugs throughout the time he was around Terence because that is what was then seen as a normal way to make money in the neighborhood. 5 EHR at 26, 33.

316. Sean cared deeply for Terence and the rest of Cynthia's family. Sean, who always knew Cynthia as "Pam," was close to her in part because the one love of her life was Sean's younger half-brother, Senecca Booker, also of Third Ward.

Senecca was seven years younger than Cynthia. Senecca and Cynthia likely met around 1996, when Senecca was nineteen, although he was soon thereafter arrested for possession of cocaine. He was a local drug dealer, who hustled on the street, selling weed and crack. Senecca was, however, well liked in the neighborhood. He earned the nickname "cookie monster" because he would use some of his drug money to buy cookies for kids and distribute them in Emancipation Park, which, by then, had become a haven for drug deals and prostitution. Terence and his siblings knew about the drug dealing. But because Senecca provided for them and showed them love, Terence and his siblings looked up to him. Cynthia was not nurturing with her kids. Senecca, by contrast, celebrated their birthdays, found them charity Christmas presents, and showed them love and support. The drug dealing was simply "the norm of the community." But Senecca's drug-dealing also meant that he was ultimately an unstable figure—in and out of Terence's life because of frequent stints in jail. DX10 at ¶¶9, 11, 13 ; DX9 at ¶5; DX18 at ¶6; DX11 at ¶¶2-4; DX17 at ¶10; DX13 at ¶11; DX122C at 3807-3978; 3 EHR at 235.

317. Cynthia and Senecca were together off and on for several years, with Senecca living at her place with the kids when he was not in prison. They liked to go to clubs or stay out in the streets in the evenings. But when he was around, Senecca was kind to her kids and refused to hold them down when Cynthia would beat them, as her other boyfriends did. Terence would beg Senecca and his older

brother Sean to stay in—offering to bake them cakes and calling them "Dad." Both men were touched by these gestures and Terence's eagerness for a father figure. But the way they made their money was by being out in the streets hustling at night. DX9 at ¶¶5-6; DX10 at ¶¶7-8; DX13 at ¶9; DX14 at ¶2; 5 EHR at 42-43.

318. The relationship between Cynthia and Senecca ended when Senecca was shot and killed in the neighborhood in a drive-by shooting on August 23, 2000. Senecca was then only twenty-three years-old. Cynthia was called to the scene even before an ambulance. She went to Senecca and held him as he bled to death in her arms. She then went home, where Terence saw her covered in blood. Terence was just twelve years-old at the time. DX8 at ¶5; DX9 at ¶4; DX11 at ¶¶1, 9; DX13 at ¶¶7, 12; DX18 at 7; DX122A at 3982; 5 EHR at 44, 194-95.

vi. <u>Senecca's violent death robbed Terence of a father figure.</u>

319. Losing Senecca devastated Terence. Cynthia also fell apart, as did the little stability that existed in the home. Cynthia went into a deep depression and started binging on drugs. She would disappear for a week or more at a time, holing up in a motel room to binge on "drank," weed, cocaine, and alcohol. Even after she returned home, she continued to use drugs heavily. During this time, responsibility for ensuring that his siblings ate and went to school fell to Terence. DX11 at ¶¶9-10; DX9 at ¶8; DX13 at ¶¶11-12; DX18 at ¶7; 5 EHR at 45.

320. After Senecca's death, Terence started getting into trouble at school. He was transferred to an alternative "community" school during seventh grade. DX118 at 72; DX140.

321. Meanwhile, he continued to shoulder responsibility for taking care of his siblings. While Cynthia was "working" or out "partying" or binging, Terence and his siblings were left to fend for themselves. Their apartment was usually dirty and smelled of smoke and drugs. Terence would at least make sure his siblings had breakfast in the morning when they woke up. They would sit and eat together and talk about how things were going at school. Terence tried to inject some joy into their lives. Without having any money or support, he would find creative ways to entertain his siblings, using an old crate to make a basketball goal and an abandoned grocery cart as a race cart. One year he got an "easy-bake" oven for Christmas and taught his siblings how to make cakes. DX9 at ¶¶2, 9; DX18 at ¶¶2, 4-5; DX17 at ¶¶3, 5, 9.

322. Often, there was little to eat. Terence and his siblings survived on noodles, hotdogs, or butter sandwiches. They would walk together to a local convenience store to get food. Sometimes Cynthia would come home at night and make something to eat, but that was rare and often not a full meal. More often, Cynthia would come home high on something or bring strange men to the house. DX9 at ¶9; DX17 at ¶¶4, 6, 9.

323. Sometimes Terence and the others would walk to Emancipation Park, where there were people using drugs. At least there was some sense of community there. Terence knew all the people hanging out at the park, and they knew him. As a friend recalls, "[w]e did not think of them as bad influences in the neighborhood. They were the normal influences in the neighborhood. That's just what people did back then—they would do drugs at the park and around the community." DX17 at ¶11.

324. When Terence was around fourteen, the family moved out of Third Ward to southwest Houston by using Section 8 housing vouchers. Their new neighborhood proved to be even worse. In addition to drugs and crime, Terence and his siblings encountered street gangs and witnessed shootings and other violence on a routine basis. The younger kids often remained locked up in the apartment to avoid getting hurt; Terence remained their primary caregiver—making sure they ate breakfast and made it to school. DX9 at ¶11; DX18 at ¶8; 49 RR at 51; 5 EHR at 46, 83-84, 87.

vii. Cynthia's choice of partners brought more violence into the home, prompting Terence to look for a way out.

325. Around this time, Cynthia began a relationship with Damon Sias. He had numerous arrests for drug-related and assaultive offenses, as well as convictions for family violence, injury to a child, and indecency with a child by the time he took up with Cynthia and started hanging around her kids. He and Cynthia often fought—

physically as well as verbally—and the police were involved on several occasions. Both were arrested for family violence. DX122A at 3989-4002; DX122B at 5794-5890; DX122C at 2808-23, 2983-2997, 2999-3049.

326. Sias was especially aggressive, paranoid, and unstable when he was high on PCP. He and Cynthia used drugs frequently, often in front of the children. 5 EHR at 87-94.

327. When Terence was fourteen, Terence's biological father, Michael Davis, whom Terence barely knew, got out of prison. He and his wife, Rosalind Cummings, began to pick up Terence for visits on the weekends. When Rosalind would come to Cynthia's apartment to pick up Terence, she would often find that Cynthia was absent, having left the children on their own. If she was around, she was high on weed, syrup, or pills. The apartment was dirty and run down. Terence would ask to wash his clothes as soon as they got to Michael and Rosalind's house. Terence would be hungry because there was no food at Cynthia's house. Sometimes, even on days when she was not planning to pick him up, Terence would call Rosalind because he was hungry. Terence was reluctant to go back home after these weekends. DX12 at ¶¶3-6.

328. In eighth grade, after being caught selling Cynthia's Xanax at school, Terence was transferred to another alternative school. Then, as he was about to start high school at Hastings on the Southwest side of Houston where his mother was still

living, Rosalind Cummings suggested that he come live with her and his father Michael. This opportunity seemed like a chance for a safe place to land at last. Terence was able to enroll in Yates High School back in Third Ward, the same school that Rosalind and Michael had attended. During that time, Rosalind noticed a difference in Terence's demeanor. He was happier and more talkative. He signed up to play football at Yates, and Rosalind, Michael, and their kids attended Terence's games. Terence was a loving step-brother to Rosalind's son Jamontrell and his newborn half-sister Myquelle. The family would do things together, such as go to the movies, out to eat, to the park, or to family parties at friends' houses—experiences that Terence had not had with his mother. DX118 at 50, 72; 50 RR at 9; DX12 at ¶¶2, 7-8; DX16 at ¶¶3-4.

329. At Rosalind's house, Terrence also had regular chores like mowing the lawn, cleaning his room, or washing the car. He played with his stepbrother Jamontrell, helping him with his homework or babysitting for Rosalind. When his half-sister Myquelle was born, he volunteered to help with diapers and feeding her. He was a calm, loving, and helpful member of the family. DX12 at ¶¶9-10; DX16 at ¶¶5-6.

330. Rosalind saw how Terence liked the stability of her house—how she would take the kids to school, buy groceries, and cook dinners regularly. He recognized that life at his mother's house was not a positive environment, with the

way she would do drugs around them and leave the children alone at home. DX12 at ¶11.

331. This oasis did not, however, last long. After a few months, Michael Davis was again sent back to prison for selling drugs. He was given a twenty-five year sentence. Rosalind could tell that having Michael back in prison and out of Terence's life after briefly resurfacing bothered Terence. He started getting involved in a bad crowd and abusing drugs. Rosalind had her own struggles as a single mother of two, so she sent Terence back to live with his mother. He did not receive any credit for the time he had spent at Yates High School. DX12 at ¶¶13-15; DX16 at ¶¶6-7; DX118 at 72; DX122C at 3893.

viii. <u>Terence was thrust back into a world characterized almost exclusively by crime and violence.</u>

332. Beginning in 2004, when Terence was back at his mother's place and enrolled in a different high school, he was continually written up for "insubordination," but not violent conduct. At home, the job of caring for his siblings fell again to Terence, as Cynthia careened from one bad relationship to another with abusive drug users. Occasionally, Cynthia would leave and stay at a friend's house to avoid these violent boyfriends. She did not, however, bring the children with her. DX118 at 57-60; 72; DX9 at ¶¶10, 12; DX13 at ¶13; DX14 at ¶¶4-5.

333. With no structure or guidance, Terence and Torad turned to the streets. They began using drugs regularly. Rather than counseling her son against using

drugs, as Cynthia claimed at trial, her attitude was that whatever Terence did outside the house was his own business. Terence became seriously addicted to drugs. He and Torad supported their habits by engaging in petty robberies or thefts. DX6; DX9 at ¶12; DX18 at ¶9; 6 EHR at 26-29.

334. In 2004, when Terence was sixteen, he was involved as a lookout in a purse-snatching incident. He was swiftly arrested and sent to a juvenile detention center in Fort Bend County. He was there for months awaiting resolution of a charge of conspiracy to commit aggravated robbery. While there, he was written up for misbehavior such as cursing at staff, failing to follow staff instructions, banging on his cell door, and "horseplay." DX119 at 191-256; DX120 at 2073-85.

ix. Terence was put in TYC custody where he spent much of his time isolated in a dark, dirty cell and medicated with psychotropic drugs.15

335. The robbery charge ultimately resulted in Terence's being placed in the custody of the Texas Youth Commission (TYC). A TYC screening application filled out by his probation officer noted that, although his mother claimed to have a "good" relationship with Terence and to have reported no problems at home, she did not visit him at all while he was in detention, even though the judge had allowed for a

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15 Material in the subsections describing conditions and practices at TYC is supported by the expert testimony of TYC Ombudsman Will Harrell whom the Court accepted as both qualified and credible. 4 EHR at 118.

family visit around Christmas. The probation officer also noted that, although Terence had acted out a lot in detention, he was likable and always respectful toward her; she felt that it was surprising he did not act out more considering the lack of family support. DX120 at 2073-85; DX4 at ¶¶ 17, 19, 23, 5; DX119 at 682-721; DX9 at ¶12; DX18 at ¶9.

336. When Terence was arrested—and eventually transferred into TYC custody—his siblings keenly felt his absence. His confinement commenced on January 25, 2005, two months before Terence turned seventeen. He was given a three-year determinant sentence, meaning that he could be transferred to the adult system to finish his time and then end up with an adult criminal record. DX9 at ¶13; DX18 at ¶10; 4 EHR at 141.

337. On February 3, 2005, Terence was admitted to TYC's Marlin Unit, a clearinghouse facility near Waco that was supposed to do orientation and mental health and educational assessment. The Marlin Unit was overcrowded, had only "a semi-retired medical director," and placed heavy reliance on "medical restraints." At Marlin, the psychological screening process was superficial and relied largely on self-reporting during an in-take interview. As a result of that superficial interview undertaken by an unlicensed intern, Terence was given a default diagnosis of "conduct disorder," which was given to virtually everyone in the TYC system at that time. He was also diagnosed with a cannabis abuse disorder, but was never referred

to substance abuse treatment, although such treatment programs were then available at TYC. DX4 at ¶¶19, 22-24; 4 EHR at 141, 153, 158, 209-12; 6 EHR at 33-35.

338. While at Marlin, Terence was placed almost immediately in the Marlin "security" unit as a result of a "self-referral." Such referrals were not uncommon because of how chaotic the dorms were. The security unit provided isolation—but was consistently full and very loud. Kids would bang on the steel doors as guards blasted classical music to drown them out and otherwise ignored them. The unit was dark and windowless with no natural light. Each cell had a steel door that opened only from the outside. A bean slot was used to pass in food trays. The cell itself consisted of no more than concrete walls, a cement block with a pad for sleeping, and a toilet. 4 EHR at 154-56.

339. After a couple of months at Marlin, on April 12, 2005, Terence was sent to TYC's Crockett State School, which was for kids with mental health issues and low IQs. He was placed in a psychiatric or "ED" dorm. According to TYC's former ombudsman, the Crockett School had "one of the worst reputations of any TYC facility." Crockett had difficulty attracting and retaining qualified staff. Staff were known to have gang involvement and used incident reports, known as "225s," inconsistently and abusively to wield power over the youth incarcerated there. 4 EHR at 160-61.

340. At that time, Crockett utilized the subsequently disavowed "resocialization program." In principle, this program was supposed to be incentive-based, but in practice it was a generic punitive program. As motivation, it relied almost exclusively on the threat of 225s. Much of the program consisted of memorization and repetition of certain terms, called "thinking errors." If a youth could memorize and regurgitate back these words, they could advance, whereas youth with mental health issues or lower IQs, like Terence, struggled. These struggles led to frustration and were not necessarily reflective of behavior problems. DX4 at ¶¶ 20, 21; 4 EHR at 142-44, 149, 160-61.

x. <u>Terence was never properly diagnosed or treated for his mental health issues; instead TYC made him worse.</u>

341. Throughout the rest of his time at TYC's Crockett facility, Terence was prescribed various medications and experienced sleep disruption. He was given a psychotropic medication, Seroquel, "to help with sleep." By November, he was also prescribed Prozac. TYC medical personnel acknowledged confusion as to why he was given Seroquel since he was never given a diagnosis that warranted the use of this drug. DX113 at 9-10, 115, 118.

342. Throughout his time at TYC, Terence's mental health diagnoses fluctuated, his medications were often adjusted, and those medications generally did not match up with the diagnoses he was given. He was diagnosed with conduct disorder, ADHD, and poly-substance abuse. He was also prescribed multiple

psychotropic medications, including Seroquel, Clonidine, Concerta, Strattera, Prozac, and Adderall. DX113 at 45-85; DX1; 5 EHR at 158-60.

343. TYC made little effort to see the correlation between Terence's mental health issues and perceived behavioral problems. Twice Terence was placed in a "behavioral management program," which was punishment in the form of long-term isolation in the Crockett security unit. His TYC records show that he was sent almost immediately to the security unit upon arriving at Crockett. He went multiple times as a result of self-referrals, and then spent months in isolation because of the behavioral management program for non-violent behavior called "chronic disruption of program." He spent one 90-day period in isolation. He was even written up for "disruption of program" for being *in* the security unit—where there was no "program." 4 EHR at 166-69.

344. Terence was written up for "disruption of program" for many trivial incidents—such as talking out of turn, throwing a paperclip, shooting a rubber band, talking while standing in line, eating a cookie in class, asking to borrow a calculator, throwing a milk carton, cursing at staff, and "horseplay." The staff had complete discretion in issuing these 225s, and this power was abused because youth had no meaningful means to appeal them. The individuals issuing the 225s were "JCOs" with minimal qualifications; they merely had to be eighteen and have a high school degree or GED and were not sufficiently trained. 4 EHR at 147-49, 174-76, 187-88.

345. While at TYC, Terence was issued about 300 225s, a number that was average or even "pretty low" relative to others at TYC. These 225s were issued even when he would self-refer to security as a means to get away from the chaos in the dorms. Kids would also self-refer when they were depressed or had received bad news from home to avoid showing vulnerability in front of peers. For instance, Terence once asked to be sent to security at 5:13 a.m. because he was feeling depressed, and another time after learning about Hurricane Rita, which had impacted Houston where his family lived. The response of TYC to these requests to get off the dorm was to put him in an isolation cell. 4 EHR at 177-81.

xi. <u>Extended isolation in "security" caused further mental health issues.</u>

346. During these extended stays in isolation in a dark, damp room with no communication, Terence started decompensating. Instead of helping him, staff wrote him up for engaging in self-harm while in isolation. 4 EHR at 170, 174.

347. TYC did not investigate Terence's mental health history. Yet he had first been diagnosed with a mental health disorder, affective psychosis, at age eleven. DX122A at 4581-84. Indeed, the records of Terence's time in TYC are replete with red flags of mental health issues that were not treated. *See generally* DX113. For instance, Terence's TYC records note multiple instances of self-injury and threats of self-harm and suicide. *See, e.g.,* DX113 at 265-66, 363-64, 455-56, 739-40, 773-74.

348. On April 15, 2005, Terence wrote a letter to the vice principal at TYC reporting that he was hearing voices and needed help. DX113 at 739. Instead of helping him, TYC sent him yet again to an isolation cell in the security unit. 4 EHR at 183-84.

349. After less than a year in TYC custody, Crockett personnel attempted to have Terence transferred early to TDCJ, the adult system. But the central administration found that Crockett was not doing enough to treat him and directed staff to do their job by getting to the bottom of his mental health issues. 6 EHR at 81, 83, 85.

350. But TYC personnel made no demonstrable efforts to assess or treat Terence's mental illness. Instead, Terence spent his last three months at TYC in the security unit and was issued his last 225s there as his conduct became more bizarre and uncharacteristic. 4 EHR at 237-40.

351. On June 28, 2006, after only eighteen months, Terence was discharged from TYC's Crockett facility and sent to Huntsville/TDCJ to serve the remainder of his sentence. The decision was based entirely on a file review—which consisted mostly of his 225s. He was not approved to return to his mother's home. EHR at 190, 237; DX119 at 229-30, 876-85, 897; DX121 at 2086.

352. The punitive transfer to TDCJ for the last month of his sentence meant that Terence's juvenile record turned into a permanent adult criminal record. A

Certificate of Mandatory Supervision was issued to Terence by the TDCJ Pardons and Parole Division on July 27, 2007. He was then released on August 4. DX113 at 897.

353. That winter after Terence was released from TYC, a Texas Ranger's investigation exposed "serious, long standing, and widespread state-on-youth sexual contact" and failure of local law enforcement and prosecution with respect to widespread abuses in the TYC system. DX4 at ¶9; 4 EHR at 199. This report proved to be the tip of the iceberg. TYC was ultimately placed under a conservatorship and then rebranded entirely as the unconstitutional practices that had been routine in these facilities came under scrutiny. *See generally* DX4; 4 EHR at 128-40.

xii. <u>After he turned eighteen, Terence was released back into the free world where he had little support for turning his life around.</u>

354. When Terence was released from TDCJ, he was eighteen years old. His mother, who was then trying to turn her own life around, refused to take him in. Instead, he moved in briefly with Sean Gilbow, Senecca Booker's older half-brother, and Sean's partner, Phyllis Garner. Terence had looked up to Sean, as he had Senecca. When Sean had come around when Terence was a young teenager, Sean would take Terence to the mall or play video games with him. At this point in Terence's life, Sean and Phyllis wanted to help Terence get back on his feet. During the few months he lived with them, Terence was a helpful houseguest, cooking and

cleaning up. Phyllis found Terence to be respectful and kind, following the house rules and being home by curfew. Terence got along with Phyllis's teenage daughter Sade, who remembers Terence doing well in the structured environment of their household. Terence would eat with the family at mealtime, hang out with Sean, and do his chores. DX13 at ¶¶5-6, 16; DX15 at ¶¶2-7; DX14 at ¶¶6-9; 5 EHR at 96.

355. While living with Sean, Terence was also focused on finding steady employment. At first, Terence worked with Sean on an oil rig near Houston's ship channel. But Sean, it turns out, was still selling drugs. After Sean was arrested and sent back to prison, Terence lost his transportation to the job he had found. Thereafter, he would occasionally find work through a temp agency. Phyllis tried to get him a job with the company where she had long been employed, but his criminal history proved to be a barrier. Repeatedly, Terence failed in his attempts to get a legitimate job because of the adult record resulting from TYC's decision to transfer him to TDCJ to serve out the end of his sentence. DX14 at ¶¶8-9; 5 EHR at 48-49, 98.

356. After getting fired from one job for fighting with a supervisor who was drunk and had hurled a racial epithet at him, Terence went back to living with his mother and later a girlfriend, in the same Southwest neighborhood plagued by drugs, gangs, and crime. Around this time, Terence's brother Torad was shot in a drive-by shooting while the two brothers were walking down the street together. Torad was

taken to Memorial Hermann Hospital. Terence took care of Torad after his release. The two then drifted into an existence of just surviving day to day, numbing themselves with heavy drugs. DX14 at ¶10; DX9 at ¶¶12, 16; DX122B at 6234-6578; DX140L; 5 EHR at 47.

357. On October 15, 2008, while high on PCP and marijuana, Terence went to a Kroger parking lot planning to steal a car. He had a gun with him. He approached a car, which turned out to be driven by Avelino Diaz. When Terence saw the car had a stick shift, which he could not drive, he started to leave. But Mr. Diaz, who was also armed, pulled out his gun. Terence panicked, shot toward the car, and ran. He then saw a second car driving in his direction. Thinking it was trying to run him over, he shot toward it, unwittingly hitting the passenger, Kim Bui. Before knowing what had happened, Terence fled, buried the gun, and ran home. Later, after his name and picture appeared on the news as a person of interest in this crime, he fled to New Orleans. State's trial exhibit 2; 38 RR at 95-96.

xiii. Terence was condemned to death after receiving ineffective legal representation that reflected no meaningful investigation into his life history.

358. On November 7, 2008, Terence was arrested in New Orleans, purportedly for a robbery/assault on the owner of a dry cleaners in Harris County. During the drive back to Houston with law enforcement, Terence confessed to the

capital murder offense and denied that he had committed the assault at the dry cleaners. State's trial exhibit 2; DX14 at ¶10; DX15 at ¶7; DX9 at ¶¶14, 15.

359. While in jail in Harris County, Terence became emotionally unhinged as he struggled with his situation and the crimes he had committed while coming off several years of chronic drug abuse. 6 EHR at 41. Terence's Harris County jail records are replete with red flags of serious mental health issues. *See generally* DX122A at 4196-4570. These records include diagnoses of schizoaffective disorder, bipolar disorder, and mood disorder not otherwise specified. DX122A at 4223, 4227, 4253. During his incarceration at the Harris County jail, Terence was prescribed various psychotropic medications, including lithium, clonidine, Depakote, Buspar, Elavil, Celexa, Klonopin, and Trazodone. DX122A at 4299-4357.

360. Terence attempted suicide during his incarceration at Harris County jail on May 18, 2009, by cutting his wrists and writing words on his cell wall in blood. DX122A at 4404, 4539-40.

361. After he was transferred to the Fort Bend County jail awaiting trial for capital murder, his records are replete with red flags of serious mental health issues. *See generally* DX122A at 5198-5730. During his time in the Fort Bend County jail, Terence was also prescribed various psychotropic medications, including Risperidone, Wellbutrin, Remeron, Thorazine, Prozac, Celexa, lithium, and Seroquel. DX122A at 5245-5417. Terence's Fort Bend County jail records indicate

preliminary diagnoses of schizophrenia, bipolar disorder, ADHD, and PTSD. DX122A at 5213, 5237, 5468-69, 5496.

362. Terence's long untreated mental illness also likely has a genetic component. 6 EHR at 14-15. For instance, Terence's younger sister, Tafarrah, has a history of chronic mental illness, suicide attempts, homelessness, psychotic decompensation, and was diagnosed with PTSD at age 19. DX122B at 6214-6233. Terence's mother, Cynthia, was diagnosed with depressive disorder in 2000. DX122A at 4615-16.

363. Mental illness in the family also likely reflected the traumatic environment in which Terence and his siblings had been raised, with the adult males their mother brought home frequently entangled with the criminal justice system. *See, e.g.*, DX122A at 3989-4002; DX122B at 5794-5890; DX122C at 2808-23, 2983-2997, 2999-3049 (Damon Sias's numerous arrests for drug-related and assaultive offenses, as well as convictions for family violence, injury to a child, and indecency with a child); DX122B at 5856-59 (Damon Sias and Cynthia Andrus both arrested for assault family violence on March 22, 2006); DX122A at 4008; DX122B at 5892-5917, 5931-34; DX122C at 3602-3964 (Danyel Sims arrested for sexual assault, assault family violence, and various convictions for drug-related and violent offenses); DX122A at 4139; DX122B at 6138-45 (Norman Ray Williams, convicted of possession of cocaine and multiple arrests for assault of a family member);

DX122C at 3680-3802 (Orentherus Lee (Sean) Norman's multiple convictions for drug-related offenses); DX122A at 4153-58; DX122B at 6174-98 (Roderick Davis's several drug-related arrests); DX122C at 3874-3939 (Michael Davis's multiple drug-related convictions); DX122C at 3807-3978 (Senecca Booker's multiple convictions for drug-related offenses).

364. Instead of developing any of this history and presenting a qualified mental health professional to testify about it at trial, Terence's trial counsel asked Michael Davis, Terence's biological father, who barely knew Terence, to testify. Davis had been released from prison in 2009, but had had no contact with Terence because Terence was incarcerated by then and Davis did not visit him. Davis only saw Terence at the trial when agents of the State drove Davis to the courthouse to testify—absent any preparation. Davis was one of only two family members called by his attorneys. 50 RR at 4-10; 2 EHR at 97-100.

365. The only other family member called to testify on Terence's behalf—in response to a subpoena—was his mother Cynthia. Only one member of the trial team met with her in person before trial: the court-appointed mitigation specialist, Amy Martin, who had ceased working on the case back in December of 2011 and was never replaced. That one pre-trial meeting with Cynthia occurred after Ms. Martin had agreed to buy Cynthia breakfast. During the short meeting, Cynthia complained, in front of one of her daughters, that she "had too many kids" and noted

that at least she had a $10,000 life insurance policy on Terence that she would be able to collect on if he was executed. She also made it clear that her "life was not on trial." DX28 at ¶¶15-16; DX8.

366. While in jail, Terence had told his second-chair counsel, Jerome Godinich, that he was willing to accept a sentence of life without the possibility of parole as punishment for the crimes he had been charged with committing. That fact was memorialized in Mr. Godinich's motion to withdraw from the case, filed on January 30, 2012 (a motion that was finally granted in April 2012). CR at 61-63. However, Terence's lead counsel, Sid Crowley, did not tell the lead prosecutor, Fred Felcman, that Terence was willing to accept a life-without-parole sentence. 4 EHR at 25.

367. While awaiting trial in Fort Bend County, in response to his mental health issues, Terence was placed in a padded cell for 62 days. A counselor working for the county jail visited him and tried to give him some guidance. Finally, about two months before trial, Terence was released from the padded cell. DX122A at 5554-5631.

368. On October 1, 2012, four years after the shooting deaths of Avelino Diaz and Kim Bui, voir dire began in Terence's capital murder trial. He was represented at trial by Sid Crowley, who had met with him in jail a total of six times

during four years, and second chair, Diana Olvera, who had just been appointed four months before trial began. 2 RR at 1; CR at 64; DX40.

369. On November 14, 2012, at age twenty-four, Terence was sentenced to death. 53 RR at 5; CR at 304-13.

370. The failure to investigate and present the social history recounted above prejudiced Terence Andrus. Had trial counsel thoroughly investigated, interviewed, and properly prepared witnesses with knowledge of Mr. Andrus's social history, these witnesses could have presented compelling mitigating evidence. There is a reasonable probability that this evidence would have caused at least one juror to sentence Mr. Andrus to life instead of death. *Wiggins*, 539 U.S. at 536. Further, had trial counsel investigated and properly presented this mitigating evidence, the defense could have hired an expert to testify as to how these events affected Mr. Andrus's life trajectory.

371. Trial counsel's inadequate investigation left the jury without the opportunity to consider Mr. Andrus's compelling social history. The type of information trial counsel could have uncovered about Mr. Andrus's life is the kind of information courts have ruled is relevant to assessing a defendant's moral culpability. *Wiggins*, 539 U.S. at 535. Some aspect of that story could have been the one fact that caused a single juror to decide that Mr. Andrus's life should be spared.

372. The decision not to present this evidence was not a strategic decision but was instead based on an unreasonable investigation. *Sears v. Upton*, 130 S. Ct. 3259, 3265 (2010) ("[T]hat a theory might be reasonable, in the abstract, does not obviate the need to analyze whether counsel's failure to conduct an adequate mitigation investigation before arriving at this particular theory prejudice [the defendant]."); *Wiggins*, 539 U.S. at 523 ("Rather, we focus on whether the investigation supporting counsel's decision not to introduce mitigating evidence . . . *was itself reasonable*.") (emphasis retained). Trial counsel did no mitigation investigation and relied solely on the limited records collection undertaken by Ms. Martin during the short time she worked on the case. This approach was unreasonable. 1 EHR at 88-91 (P. Wischkaemper explaining that prevailing norms require more than collecting and digesting records but acting on them).

6. Counsel's Failure to Identify, Retain, and Prepare Appropriate Experts Prejudiced Terence Andrus

373. Mr. Andrus's social history, summarized above, is largely absent from the trial record. Yet this information was readily available to trial counsel had he or other members of the defense team conducted a reasonable investigation into their client's bio-psycho-social history. Ms. Martin's work on the mitigation case was limited to creating a timeline from a preliminary collection of records, consisting mostly of Mr. Andrus's TYC records. Trial counsel did not make use of that preliminary timeline to identify mitigation themes and witnesses and conducted no

in-person interviews of any potential lay witnesses before trial. *See* DX59. This failure was unreasonable and prejudiced the client.

374. Although a few facts about Mr. Andrus's life were presented through lay witness testimony, expert testimony was vital to explain how the jury should understand and interpret those facts. *See Walbey v. Quarterman*, 309 Fed. App'x 795, 802 (5th Cir. 2009) (unpublished) ("This standard clearly contemplates that even when *some* mitigating evidence is presented at trial, prejudice is still possible if that evidence is substantially incomplete."). Expert witness testimony is one of the most powerful tools at an attorney's disposal to present a compelling claim. *Coble v. State*, 330 S.W.3d 253, 281 (Tex. Crim. App. 2010). Had such an expert been presented, there is a reasonable probability that at least one juror would have voted to spare Mr. Andrus's life. *Strickland*, 466 U.S. at 694; *Ex parte Ellis*, 233 S.W.3d 324, 329-30 (Tex. Crim. App. 2007); *Ex parte Chandler*, 182 S.W.3d 350, 353 (Tex. Crim. App. 2005).

a. Readily available, qualified experts, retained by post-conviction counsel, further demonstrate how Mr. Andrus was prejudiced by trial counsel's deficient performance.

375. Some of the readily available evidence to counter the State's narrative that Mr. Andrus was an inherently dangerous "sociopath" is described in the social history recounted above. But trial counsel also could and should have developed and presented other expert testimony relevant to providing crucial context to explain Mr.

Andrus's life history and why he was worthy of mercy. *See* 1 EHR at 85 (P. Wischkaemper explaining that prevailing norms require doing the bio-psycho-social history first to then determine what kinds of experts are needed for the case).

376. As demonstrated by the post-conviction investigation and presentation, such experts could have educated trial counsel, as well as the jury, about: (1) the complex history underlying the vice-ridden Third Ward neighborhood in which Terence Andrus grew up; (2) his extensive history of childhood trauma and how such trauma had long-term adverse effects on his development; (3) the history of failure and abuse in the TYC juvenile justice system generally and, more specifically, in the particular TYC facilities in which Terence was incarcerated as he transitioned from adolescence to adulthood.

377. The absence of relevant mitigating evidence provided by qualified, properly prepared experts prejudiced Mr. Andrus at trial.

i. A qualified historian, such as Dr. Tyina Steptoe, could have provided essential perspective on the Third Ward neighborhood in which Mr. Andrus was raised.

378. Professor Tyina Steptoe is a professor of history at the University of Arizona. She received her Ph.D. from the University of Wisconsin in 2008. Her doctoral dissertation is on the history of migration to Houston and how that affected patterns of race and culture in the city. She specializes in the history of the United States since the Civil War with a particular focus on race and gender and social and

cultural history. The University of California Press published her book *Houston Bound: Culture and Color in a Jim Crow City* in 2015. It is a history of Houston from around World War I through the Civil Rights Movement. The book explains how different groups of migrants who came to Houston affected notions of race and culture within the city. 3 EHR at 201-04.

379. Professor Steptoe was also born and raised in Houston. Her family has lived in the city since shortly after World War I. While her family is primarily from Houston's Fifth Ward, another of Houston's historic African-American neighborhoods, her scholarly research and personal experience encompass Third Ward, where Terence Andrus and his family are from. *Id.* at 204.

380. The Court accepted Professor Steptoe as an expert qualified to opine about the history of black Houston and Third Ward specifically. 3 EHR at 205-09. The Court also finds that she was a credible witness.

381. The expert testimony that Professor Tyina Steptoe, as an historian of Houston's Third Ward, could have provided at trial would have contributed significantly to an understanding of Terence's social history. Relevant information, described in the social history summarized above, would likely have prompted greater understanding among the jury of his childhood circumstances, which increased the risk that he would engage in destructive behavior.

382. Third Ward, where Terence Andrus was born, is the same neighborhood where his mother, his biological father, and the male authority figures in his life grew up. This neighborhood was an epicenter of the crack epidemic in the 1980s and 1990s when Terence was born and growing up there. Drug use, distribution, and other forms of vice were a way of life in this community shaped by larger social forces of economic neglect and racial discrimination. 5 EHR at 24; 3 EHR at 229-38.

383. This information was available to trial counsel in developing a mitigation presentation had they conducted a reasonable investigation. Mr. Andrus was prejudiced by counsel's failure to provide the jury with this critical information about a fundamental component of his bio-psycho-social history through a qualified expert like Professor Steptoe.

ii. <u>A qualified mental health expert, such as Dr. Scott Hammel, could have provided essential perspective on the extensive childhood trauma Terence had experienced and how that adversely affected his development.</u>

384. As demonstrated by the social history recounted above, Terence Andrus was exposed to extensive trauma, starting in his earliest childhood. A clinical psychologist with an expertise in childhood trauma, such as Dr. Scott Hammel, could have provided trial counsel and the jury with an assessment of the scope and intensity of the adverse childhood events considered clinically "traumatic" that Mr. Andrus

sustained and explained the various effects of his exposure on his development and subsequent behavior. *See* 5 EHR at 118-178; 6 EHR at 5-160.

385. Dr. Hammel is a licensed psychologist who is employed in a private practice focused on clinical psychology and neuropsychology and some forensic psychology. He specializes in the assessment and treatment of the impact of traumatic life experiences on childhood development. 5 EHR at 118-20, 128.

386. Dr. Hammel was employed by TYC in the 1990s through 2001 as a psychologist. He worked primarily in the Giddings State School for violent youth offenders at a time when the facility obtained a national reputation for its treatment program that resulted in recidivism rates well below the national average. Dr. Hammel could have testified at trial that the facilities in which Mr. Andrus was placed as a teenager had no similar program. 5 EHR at 123-25.

387. Dr. Hammel was no longer employed by TYC when Mr. Andrus was in its custody starting in 2005. Had Dr. Hammel been retained by trial counsel, he could have testified about his knowledge of events presaging the scandals that would ultimately envelop TYC, which compelled Dr. Hammel to leave the agency. The problems he observed included understaffing, riots, and superintendents fired for misconduct. 5 EHR at 126. Dr. Hammel, who has extensive experience with the provision of mental health services at TYC and how to read its mental health records, could have opined that nothing in Mr. Andrus's TYC records justified the decision

to send him to TDCJ when that decision was made. 6 EHR at 35. He also could have pointed out that TYC's own records show that personnel in the central administration did not believe that staff at Crockett, where Mr. Andrus was placed, were doing their job with respect to assessing and treating him. 6 EHR at 81-85. Dr. Hammel could also have explained how it was common for the kids in TYC to feel the need to conceal any weakness and underreport mental health problems as a means to avoid further victimization while at TYC. 6 EHR at 146.

388. The Court accepted Dr. Hammel as an expert qualified to opine about child psychology, particularly childhood trauma, and Mr. Andrus's bio-psycho-social history. 5 EHR at 163-64. The Court also finds that Dr. Hammel was a credible witness.

389. Had Dr. Hammel or a similarly qualified expert been retained by Mr. Andrus's trial counsel, that expert could have served as a social historian, to assess Mr. Andrus's individual and family history from the perspective of a trained psychologist. As Dr. Hammel could have explained, a mental health professional serving in this capacity gathers information about a person's biological, social, emotional, and psychological history as a way to better understand that individual and, in the non-forensic context, to assess and treat that individual. 5 EHR at 128-29. Such an assessment could have been particularly illuminating to the jury.

390. In undertaking an investigation of Mr. Andrus's social history, Dr. Hammel reviewed voluminous records relevant to Mr. Andrus's life history, including records reflecting his familial and other environmental influences. He also conducted multiple in-person interviews with Mr. Andrus and several family members, reviewed testimony from individuals who had known Mr. Andrus as a child, and visited his childhood home in Third Ward. DX117; 5 EHR at 132-51, 156-57. As a result, Dr. Hammel was able to create a timeline of Terence Andrus's social history that would have greatly assisted the jury in understanding who he was and why he was worthy of mercy. 5 EHR at 196-225; 6 EHR at 10, 32, 35; DX122A at 4187-4194.

391. Dr. Hammel's investigation supported the conclusion that Mr. Andrus had been exposed to clinically significant adverse childhood experiences or "ACEs." Dr. Hammel could have explained to the jury that ACEs are typically defined as abuse, neglect, or household dysfunction. These experiences are significant because they are predictive of long-term problems in terms of psychological, physical, or emotional development, because there is a demonstrated correlation between the number or intensity of ACEs to which a person has been exposed and risks for mental illness, social problems, and involvement with the legal system. Because of the strong correlation, ACEs have been widely studied to identify the risks and

protective factors associated with social problems and the attendant financial, legal, and emotional costs. 5 EHR at 152-53.

392. An expert like Dr. Hammel could have explained that, in addition to studying the risks associated with ACEs, the mental health profession has identified "resiliencies," characteristics that some individuals might have that enable them to better withstand adverse childhood experiences. 5 EHR at 154. He could have illuminated how "resilience includes factors that may be intrinsic to the person or may be factors that were gleaned from supportive individuals in that person's life." 5 EHR at 191.

393. Dr. Hammel was able to identify scholarly articles and public documents about ACEs research that were readily available well before Mr. Andrus was arrested in 2008. 5 EHR at 153-55; *see also* DX123, DX124, DX125, DX126, DX127, DX128.

394. Dr. Hammel reviewed the conclusions reached by psychiatrist Dr. Julie Alonso-Katzowitz regarding TYC's misuse of psychotropic medications and the likely adverse consequences for Mr. Andrus of these medications. *See* DX1. Dr. Hammel was able to confirm that Dr. Alonso-Katzowitz's conclusions accurately reflect TYC records showing that Mr. Andrus was given various psychotropic medications, including Seroquel, that did not correspond to any of the diagnoses he received. Seroquel is an antipsychotic mood stabilizer that can be prescribed to treat

bipolar disorder—but Mr. Andrus had not been diagnosed with bipolar disorder. And if he did have bipolar disorder, then the doctor should not have been prescribing Prozac, because that could have an adverse effect of inducing mania, aggression, and psychosis. Moreover, his medications were frequently changed in a way that could itself have had numerous adverse consequences relevant to understanding his behavior while at TYC. Dr. Hammel noted that even TYC's central administration recognized that there were problems with the mental health treatment that Mr. Andrus was receiving while in TYC custody and issued a directive to do a better job of assessing, diagnosing, and treating him. *See* DX1; 5 EHR at 158-63.

395. Dr. Hammel could have explained to trial counsel and the jury that "trauma" is a clinically significant term defined in the DSM-V (the Diagnostic and Statistical Manual for assessing mental disorders used by mental health professionals). As Dr. Hammel explained, a person experiences trauma when he or she has "an experience that is outside the normal limits of human functions and in which the person generally feels that their life has been threatened or their wellbeing has been seriously threatened." Trauma can be a single event or, as is more often the case, the result of long-term exposure to abuse or neglect. 5 EHR at 165-66.

396. Dr. Hammel could have explained that, even if someone does not fit the full DSM diagnosis for PTSD, having numerous symptoms of trauma, as Mr. Andrus does, affects neurological, emotional, and social development. 6 EHR at 45.

Exposure to violence and early trauma impedes emotional development, making it more challenging for the individual to learn "to self-soothe and modulate their own emotions" in response to stressful circumstances. 6 EHR at 25.

397. Dr. Hammel could have explained that traumatic events induce hyper-vigilance and hyper-arousal in the form of a physiological "fight-or-flight" reaction. The body produces an excessive amount of adrenaline, "heightening reactions, and shifting cognition from the high order parts of the brain to the survival part of the brain or the lowers portion of the brain." This neurological response in turn affects the capacity to reason. 5 EHR at 166-67; 6 EHR at 25. Traumatized children "often act inwardly on themselves when they feel overwhelmed and/or they act outwardly." 6 EHR at 26. It is common for trauma survivors to seek ways to self-soothe, for instance, by abusing substances that dampen the nervous system—such as marijuana, alcohol, Xanax, and promethazine. 6 EHR at 27. This kind of self-medication is only a short-term solution; as soon as the drugs wear off, the person feels worse—a cycle that further affects brain chemistry, perception, and judgment. 6 EHR at 28-29, 97.

398. Dr. Hammel was able to identify clinically significant trauma that Mr. Andrus had experience—including emotional neglect, exposure to violence, and the trauma of being thrust at a young age into the parental role, caring for siblings absent a parent's guidance. With the latter, the individual adopts "a stance of excessive self

sufficiency," feeling that survival depends on accepting that one cannot trust anyone else. 5 EHR at 168. As Dr. Hammel opined, "[y]oung children are not emotionally equipped to meet the emotional needs of their younger siblings. And so while they're trying their best to make everyone happy and do the right thing, they are necessarily going to fail in their efforts." 5 EHR at 183.

399. Dr. Hammel also noted that Mr. Andrus had been exposed to parental substance abuse, the incarceration of parental figures, domestic violence, homicides, a single-parent household, and the mental illness of a caregiver—all of which are risk factors and typically traumatic. Based on his social history investigation, Dr. Hammel observed that Mr. Andrus's extended family was rampant with risk factors. 5 EHR at 168-69, 171-75, 177; DX129; DX122A at 4187-4194.

400. Had he been retained to assist counsel during the years the case was pending before trial, Dr. Hammel could have done an even more extensive assessment. 5 EHR at 177. He then could have identified meaningful patterns for the jury that would have illuminated the traumatic exposures that likely affected Mr. Andrus's mental condition at the time of the crime and other mitigating factors, including exposure to homicide, long-standing substance abuse and drug dealing among his parental figures, poverty, involvement in the legal system, and severe emotional neglect from a mother who started having children when she herself was still a child. 5 EHR at 178-83, 186-89, 208.

401. In particular, Dr. Hammel could have explained how Mr. Andrus's mother's conduct and her choice of partners normalized the drug trade as an option for him and how the criminal history of her partners showed how unstable the home was throughout his childhood. 5 EHR at 211, 221-24.

402. Dr. Hammel could have explained to counsel and then to the jury that the sexual abuse that Mr. Andrus's sister experienced at a very young age at the hands of her biological father damaged him even if he was not aware of the details of the abuse when it occurred. 5 EHR at 187-89, 217-18. Researching her history of serious mental illness, including diagnoses of PTSD and bipolar disorder, was also helpful to understanding Mr. Andrus's own mental health issues, as they grew up together and he too had been diagnosed with a serious mental illness as young as eleven. DX140I; 6 EHR at 16-24. Dr. Hammel could have traced the history of attempts to assess Mr. Andrus's mental health issues and how he was never properly treated. 5 EHR at 215-20.

403. Dr. Hammel could have explained how this kind of analysis of risk factors is not about making excuses or arguing for biological or cultural destiny, but explaining how exposure to certain kinds of traumatic events in childhood increases the probability that an individual will engage in more destructive behaviors including substance abuse as a means to self-medicate. 5 EHR at 193. Also, as Dr. Hammel clarified, when the process of self-medicating through substance abuse

suddenly ceases, it can take up to a year for a person's neurobiology to normalize. In the interim, they can experience psychotic breaks or serious depression. 6 EHR at 29.

404. Dr. Hammel could have educated the jury about how Mr. Andrus's behavior while incarcerated awaiting trial may have resulted from a sudden withdrawal following long-term substance abuse, a common response to long-term trauma, and a problem that TYC recognized but did not treat. That abrupt withdrawal left him completely overwhelmed by emotions that he had long tried to manage by abusing mood-altering substances. 6 EHR at 28-30.

405. Additionally, an expert like Dr. Hammel could have rebutted testimony from the prosecutor himself, who characterized Mr. Andrus as a "sociopath." 51 RR at 20, 27; 52 RR at 50. As Dr. Hammel explained, the lay term "sociopath" is, in the relevant scientific community, understood as a synonym for a person with "psychopathy," which is quite distinct from someone who is the victim of childhood trauma. 6 EHR at 36-40. Trauma victims have delays in their neurological, emotional, and social development that "affects their ability to manage their emotions and make decisions and cope in a world." 6 EHR at 39. By contrast, "individuals with psychopathy don't necessarily have a history of trauma and tend to exhibit sadism, pleasure harming others, in additional to criminal behaviors." *Id.* Moreover, psychopaths "don't tend to experience emotion at all." *Id.* at 40.

406. Dr. Hammel, or a similar expert, could have informed counsel and the jury that Mr. Andrus seemed to have a long-standing, untreated mood disorder, affecting his ability to self-regulate his emotions. Terence was first diagnosed with this serious mental health condition at age eleven. 6 EHR at 71-72. Dr. Hammel explained that the DSM defines a mood disorder as "a biological disruption in mood functions that results in clinical levels of depression or anxiety [] and/or mania." 6 EHR at 71. Bipolar disorder and clinical depression are types of mood disorders. *Id.* To be diagnosed with a mood disorder, a person must have clinically significant levels of anxiety and/or depression that are causing substantial impairment in functioning. *Id.* at 72.

407. Mr. Andrus was prejudiced by counsel's failure to provide the jury with critical information about his traumatic social history presented by a qualified mental health professional like Dr. Hammel with the ability to assess and explain how his traumatic childhood experiences adversely impacted his mental health and his ability to make rational judgments both before and after the crime.

iii. A qualified expert, such as Will Harrell, knowledgeable about the history of TYC's systemic failures during the time Terence Andrus was in TYC custody, could have provided essential perspective on how TYC adversely impacted Mr. Andrus's development.

408. Had Mr. Andrus's trial counsel conferred with an expert knowledgeable about the history of TYC, they would have learned and been able to convey to a jury

critical mitigating information to explain what happened to him there and why his transfer to the TDCJ system was grossly unfair.

409. One such expert is Will Harrell. Mr. Harrell was appointed by Governor Rick Perry to be the first chief independent ombudsman over TYC, a position he served in for two years from 2007-2009. 4 EHR at 111-17. Mr. Harrell then became the special assistant to the TYC commissioner in 2010. *Id.* at 117. These positions were part of an historic intervention, with Governor Perry exercising his constitutional authority to bring TYC under a conservator to investigate the root causes of TYC's massive failure. Hundreds of people were fired in the process, ultimately culminating in the unanimous passage of a reform bill. Thereafter, the agency was called before a joint oversight body to report on a weekly basis. *Id.* at 132.

410. These reforms all occurred after Mr. Andrus was discharged from TYC in 2006 but addressed abuses and failures that had been occurring while he was in TYC custody. 4 EHR at 140. Reform came only after an avalanche of bad media coverage began around 2006. 4 EHR at 121. Initial stories about sexual exploitation of staff prompted investigation into a wide range of concerns about TYC—including the "resocialization program" that was later scrapped. *Id.* at 130.

411. As ombudsman, Mr. Harrell had full access, twenty-four hours a day, to any TYC facility in the state, and he could not be denied access to records. 4 EHR

at 117. His responsibilities included interviewing youth, making routine site visits to each TYC facility, monitoring the conditions of confinement, evaluating individual claims of youth abuse, assessing the delivery of services and programs, and making broad recommendations for reform. *Id.* at 112, 135-56.

412. Mr. Harrell reviewed thousands of pages of documents related specifically to Mr. Andrus's confinement and applied his knowledge of national standards of juvenile conditions of confinement and treatment to assess Mr. Andrus's experience in the TYC system. *Id.* at 115.

413. Mr. Harrell was distinctly qualified to serve as an expert regarding this aspect of Mr. Andrus's life history. He was also available at the time of trial and had even been recommended to trial counsel.16 In addition to his position as ombudsman, Mr. Harrell has been involved in efforts to reform TYC since 2000 and juvenile justice reform generally ever since. *Id.* at 117. The Court accepted him as a

16 The record shows that Ms. Olvera, who had heard about the scandals surrounding TYC, sought guidance from a consultant about a potential TYC expert and was given Will Harrell's name. 3 EHR at 31-32. But no one on the trial team followed up with Mr. Harrell. Ms. Olvera admitted that understanding the TYC records required assistance from informed experts and that a reasonable investigation into the TYC scandals would have required going beyond the face of the TYC records themselves. 3 EHR at 29, 32-34.

qualified expert. 4 EHR at 118. The Court further finds that he was a credible witness.

414. Mr. Harrell could have identified for the jury the systemic problems at TYC while Terence Andrus was in custody, which included:

- twice the rate of violent interactions in TYC as the national average, 4 EHR at 120;
- failure to provide adequate education, *id.* at 138;
- inadequate gang intervention and prevention programs, *id.*;
- overuse of pepper spray, *id.*;
- serious concerns about suicide prevention, *id.*
- grossly inadequate staff-to-youth ratios, *id.*
- overuse of the "security unit," which was "like a prison within a prison" where youth were "locked [in] cells" in isolation in circumstances that, according to Mr. Harrell, "would horrify most current professionals in our justice field today," *id.* at 137-38, 169.

415. Additionally, youth were frequently transferred, not just from dorm to dorm but facility to facility, making it virtually impossible to form any kind of therapeutic relationship with staff. *Id.* at 146. Meanwhile, most staff had only a half-day training in mental health issues. And the case workers who had proper training were overwhelmed by the sheer size of their case loads. *Id.* at 147-49.

416. Some of Mr. Harrell's specific assessment of Mr. Andrus's experiences while in TYC custody were incorporated into the social history outlined above, none of which was presented to the jury.

417. Mr. Harrell would also have explained to the jury that the two facilities where Mr. Andrus was sent as a teenager—Marlin and Crockett—were among the first facilities to be closed. *Id.* at 140. Mental health care provided at Crockett while Mr. Andrus was there was, in Mr. Harrell's opinion, "grossly unconstitutional." *Id.* at 161. Crockett did not have trained mental health professionals on site and relied on a culture of "medical restraints," such that psychotropic medicine was misused. Mr. Harrell identified Mr. Andrus as a victim of that practice. 4 EHR at 162, 163.

418. Mr. Harrell could have further aided the jury in understanding how the use of "225" incident reports was abused and thus an unreliable barometer of Mr. Andrus's capacity to conform his behavior to social norms. Understanding the 225s that Mr. Andrus received required putting them in a larger context. 4 EHR at 164. Mr. Harrell concluded that the quantity of 225s that any given individual received did not really convey anything—yet that is how "progress" at TYC was measured during that time. *Id.* at 173. At most, Mr. Andrus's disciplinary record, with what seemed, in a vacuum, like a large number of 225s, reflected to Mr. Harrell that he was more "a pain in the rear" than a danger, and Mr. Harrell, who has reviewed hundreds of such records, opined that Mr. Andrus's record pales in comparison to

other youth. *Id.* at 134, 230. For instance, there was no indication in the record that he was a "gang leader," and the write-up he received for "throwing up gang signs" could easily reflect the lack of training and excessive discretion that was found during the conservatorship. Mr. Harrell could have explained to the jury how he knew of a youth who was written up for "gang activity" because he was overheard speaking to his Chinese grandmother on the phone in Mandarin. 4 EHR at 235-36.

419. One of the most acute problems that Mr. Harrell observed throughout the TYC system was the overuse of the "security unit." *Id.* at 136. But the "savage environment" in the dorms explained why many kids, like Mr. Andrus, would self-refer to the security unit, to avoid an atmosphere that Mr. Harrell described as a "'Lord of the Flies' scenario." 4 EHR at 189.

420. Mr. Harrell could have explained to the jury how kids, like Mr. Andrus, who were struggling with mental health issues were made worse by extended stays isolated in "security" cells. For instance, Mr. Harrell did not find it surprising that, during the three months Mr. Andrus spent in isolation at the end of his time at TYC, he started to engage in bizarre behavior, reflecting that he was coming unhinged. The last place where someone with his mental health issues should have been was in long-term solitary confinement. 4 EHR at 240-41.

421. Mr. Harrell could have offered his expert conclusions as to the multiple ways TYC had failed Terence Andrus. "Mr. Andrus was a kid … who was troubled,

who needed help and support and intervention that the Texas Youth Commission was not at that time capable of providing." *Id.* at 121. Mr. Harrell further concluded that it is "unfair that he was held accountable for his inability to succeed in a behavior program that has since been discredited and scrapped by the State. [Yet] [f]or that reason he was sent to the Texas Department of Criminal Justice [TDCJ]." *Id.* at 121.

422. As the TYC records show, the reasons given for transferring Mr. Andrus to TDCJ were (1) his failure in the "resocialization program" that was subsequently abandoned by the State due to a legislative mandate; and (2) the amount of time he spent in "security"—reflecting the agency's then misguided notion that Mr. Andrus's rehabilitative needs could be met by "putting him in isolation, solitary confinement, for up to 90 days on some occasions"—when this approach just made him palpably worse. *Id.* at 122. Mr. Harrell could have explained that the decision to transfer Mr. Andrus to TDCJ was made based on no more than a file review and amounted to punishing Mr. Andrus "for failing in a failed system." *Id.* at 122, 191, 194, 200.

423. Mr. Harrell could also have explained why the resocialization program was ultimately deemed a failure. It had a simplistic cookie-cutter design, involving goals that could not be accomplished, thus it extended stays unnecessarily. At one point, "over 90 percent of kids were serving well over their minimum length of stay." *Id.* at 130. There was no consistency in terms of who advanced. *Id.* at 150. The

program was also demonstrably ineffective in light of TYC's recidivism rate during this period, which was over 60%, far above the national average. *Id.* at 151. The program was abandoned in 2007 after Mr. Andrus's departure, and the creator of this failed program was fired soon after TYC was placed under a conservatorship. *Id.* at 147.

424. In short, when Terence Andrus was in TYC custody, the agency was plagued by systemic failure and rampant abuse. His time there only made him worse by further traumatizing him. *Id.* at 246.

425. Mr. Andrus was prejudiced by counsel's failure to provide the jury with critical information about the systemic failures at TYC and the specific failures with respect to Mr. Andrus's treatment through a qualified expert like Will Harrell.

426. Mr. Crowley's purported reason for failing to investigate the history of TYC or consult with an appropriate expert so as to keep out the details regarding Mr. Andrus's time in TYC custody is unreasonable. 2 EHR at 127. His own co-counsel admitted that such an expert was needed who could have placed those records in the appropriate context. 3 EHR at 31-34. Keeping out the TYC history to keep out evidence of his misconduct while incarcerated there makes little sense in the context of a capital murder case. 3 EHR at 156 (P. Wischkaemper explaining that it is unreasonable to hide from the client's "bad acts" as the goal is to look for "why" these things occurred). Mr. Crowley's stated justification for failing to

investigate the myriad issues at TYC is also specious. Mr. Crowley provided Mr. Andrus's TYC records to his one testifying expert, Dr. Roache, for review, and opened the door to these records by asking Dr. Roach on direct examination about Mr. Andrus's time in TYC although he had done no investigation to mitigate the bare fact of Mr. Andrus's incarceration as a teenager. 51 RR at 9-10, 25-26.

427. A decision regarding certain evidence cannot be deemed reasonable when the decision was made absent any investigation or consultation with a qualified expert. *Harrington*, 131 S. Ct. at 690-91. Mr. Crowley admitted that he did no investigation of TYC even though scandals related to TYC had been filling the newspapers. Nor did he consult with any qualified expert so as to understand the context of the incident reports he claims he wanted to keep out. 2 EHR at 212. His reading of the TYC records does not reflect understanding even of the face of the records, as he testified that he did not see anything in those records showing that Mr. Andrus had mental health problems. 2 EHR at 224.

428. The cumulative failures to conduct a reasonable investigation or to present a mitigation case prejudiced Mr. Andrus, who had a right to an individualized sentencing hearing under the Eighth Amendment. *See Lockett v. Ohio*, 438 U.S. 586, 606 (1978). Trial counsel's inadequate investigation and presentation failed to fulfill that guarantee. The Supreme Court of the United States has not hesitated to summarily reverse in capital cases tainted by egregious constitutional error,

particularly where an attorney has rendered constitutionally deficient performance. *Hinton v. Alabama*, 571 U.S. __ (2014) (per curiam); *Sears v. Upton*, 561 U.S. 945 (2010) (per curiam); *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam).

429. The Court concludes that Mr. Andrus was deprived of the effective assistance of counsel required by the Sixth Amendment to the U.S. Constitution.

430. The Court, therefore, recommends that Mr. Andrus's conviction and sentence be overturned and his case remanded for a new trial as a result of structural errors throughout the trial or, alternatively, a showing of prejudice in both the guilt and punishment phases of trial.

IV.

CLAIM:

DUE PROCESS VIOLATION WHEN THE JURY WAS INFORMED THAT MR. ANDRUS WAS WEARING PHYSCIAL RESTRAINTS DURING TRIAL

A. Findings of Fact

431. At some point during Mr. Andrus's trial, some, if not all, of the jurors became aware that he was wearing some form of physical restraints. DX22 at ¶7 ("The bailiff told us that we were safe because he had a taser button that he could push to tase Andrus."); DX24 at ¶12 ("[T]he bailiff told us about a taser button on his holster. He told us that if Andrus did anything, all he would have to do was push the button and Terence would drop to the ground."); DX19 at ¶7 ("[T]he bailiff told the jurors that he had a button he could push to tase Andrus if he needed to."); DX23 at ¶8 ("I remember the bailiff told us not to worry and that Andrus was wearing a taser. The bailiff told us that he had a button that he could push if Andrus did anything and Andrus would be tased."); DX21 at ¶5 ("I remember the bailiff at some point making a comment about Andrus wearing a taser.").

432. The State did not controvert the fact that jurors were aware that Mr. Andrus was wearing physical restraints. *See* State's Answer at 53 ("[B]oth Applicant's and the State's investigation revealed that the jury became aware of some form of restraint on Applicant at some point during the trial."); HC4 at ¶1

("Yes, I was aware the defendant was in restraints. I know that it was early on in the guilt/innocence phase of the trial, I noticed the shackles when the defendant stood up, but I cannot recall any more specific a date than that."); HC6 at ¶1 ("I was not aware of the defendant being in restraints during the guilt/innocence phase, I did not become aware of them until the defendant testified during the punishment phase."); HC8 at ¶1 ("I saw the defendant walk in with restraints, handcuffs, but I thought they removed them after he was seated."); HC9 at ¶1 ("I believe I was aware of restraints on the defendant but I am not positive. I am also unsure when I became aware of the restraints."); HC12 at ¶1 ("Yes, I was aware the defendant was in restraints. I recall restraints on his ankles but nothing more specific than that.").

433. The presiding judge at trial made no finding on the record of a necessity that Mr. Andrus be placed in visible restraints. Instead, the opposite is true. The presiding judge expressly found that visible restraints were not required. *See* Pretrial RR [September 5, 2012] at 86 ("The Court: …Mr. Andrus has behaved like a gentleman in here today. I understand that he has restrictions on him today plus an electronic device if he misbehaves, but as far as any visible restraints, at this time I will allow that, in front of the jury, he will not have any visible restraints.").

434. Trial counsel did not know, and had no reason to know, that the jurors had become aware of Mr. Andrus's restraints during the trial. HC2 at ¶16. Thus, counsel had no basis to lodge a contemporaneous objection. The fact that the jurors

became aware of Mr. Andrus's restraints during the trial was discovered only through post-conviction investigation. Therefore, this issue is not waived and was properly raised in post-conviction.

B. Conclusions of Law

435. Courts have long recognized a defendant's right to avoid appearing before a jury in visible restraints. *See, e.g., Deck v. Missouri*, 544 U.S. 622, 631-32 (2005); *Bell v. State*, 415 S.W.3d 278, 281-83 (Tex. Crim. App. 2013). The Supreme Court has held that "the Fifth and Fourteenth Amendments prohibit the use of physical restraints visible to the jury absent a trial court determination . . . that they are justified by a state interest specific to a particular trial." *Deck*, 544 U.S. at 629. The CCA has adopted *Deck* and agreed that physically restraining a defendant in the jury's presence creates an error of constitutional dimension. *Bell*, 415 S.W.3d at 281.

436. The error of having the jury made aware of a defendant's physical restraints is the implicit injury to a bedrock principle of the justice system—the presumption of innocence. *Deck*, 544 U.S. at 630; *see also Bell*, 415 S.W.3d at 282. This extends to the punishment phase of trial as "[v]isible shackling undermines the presumption of innocence and the related fairness of the factfinding process." *Deck*, 544 U.S. at 630. Specifically, visible shackles or restraints "suggest[] to the jury that the justice system itself sees a 'need to separate a defendant from the community at large.'" *Id.* (quoting *Holbrook v. Flynn*, 475 U.S. 560, 569 (1986)).

437. A defendant's appearance in restraints before a jury "almost inevitably implies to a jury, as a matter of common sense, that court authorities consider the offender a danger to the community—often a statutory aggravator and nearly always a relevant factor in jury decisionmaking." *Id.* at 633; *Marquez v. Collins*, 11 F.3d 1241, 1243 (5th Cir. 1994) ("Shackling carries the message that the state and the judge think the defendant is dangerous, even in the courtroom."). Thus, the use of visible shackles is one of "last resort." *See Illinois v. Allen*, 397 U.S. 337, 344 (1970) ("[N]o person should be tried while shackled and gagged except as a last resort."); *United States v. Durham*, 287 F.3d 1297, 1306 (11th Cir. 2002) (noting "stun belts plainly pose many of the same constitutional concerns as do other physical restraints, though in somewhat different ways").

438. To use visible restraints, a trial court must identify specific reasons on the record supporting its decision to restrain a defendant. *See Cooks v. State*, 844 S.W.2d 697, 722 (Tex. Crim. App. 1992). The decision to use restraints may not be based on a general concern for safety or the severity of the charged offense. *Long v. State*, 823 S.W.2d 259, 282 (Tex. Crim. App. 1991) ("[T]he record must clearly and affirmatively reflect the trial judge's reasons therefor."). Use of restraints is only permitted when "justified by an essential state interest specific to each trial." *Holbrook v. Flynn*, 475 U.S. 560, 568-69 (1986).

439. Because of the severity of this error, a defendant must prove only that there is "a reasonable probability that the jury was aware of the defendant's shackles." *Bell*, 415 S.W.3d at 283. The CCA has stated "[w]e do not intend to suggest that reasonable probability in this context means more probable than not; it simply requires a substantial basis supporting a conclusion that the jury perceived the defendant's restraints." *Id.* (emphasis added). Mr. Andrus has plainly met this burden.

440. The law is well established that shackling is "inherently prejudicial" and that where jurors become aware of a defendants restraints, the State then bears the burden of proving "beyond a reasonable doubt that the shackling error complained of did not contribute to the verdict obtained." *Deck*, 544 U.S. at 635.

441. When jurors have seen a defendant physically restrained during trial, harm is inherent in the viewing of the restraints absent a clear showing by the prosecution of harmlessness. *See Boone v. State*, 230 S.W.3d 907 (Tex. App.—Houston [14th Dist.] 2007) (finding the State had not sufficiently proved no impact from visible restraints); *Wiseman v. State*, 223 S.W.3d 45 (Tex. App.—Houston [1st Dist.] 2006) (finding reversible error where court repeatedly restrained criminal defendant without individual assessments); *Mendoza v. State*, S.W.3d 829 (Tex. App.—Corpus Christi 1999) (finding prejudice from visible restraints; State did not prove harmless); *Shaw v. State*, 846 S.W.2d 482 (Tex. App.—Houston [14th Dist.]

1993) (finding State did not prove harmless in punishment phase error where jury gave defendant the maximum sentence); *Penn v. State*, 628 S.W.2d 179 (Tex. App.—Corpus Christi 1982) (finding State did not prove harmless even where jurors testified visible restraints had no impact on their verdict).

442. The State has argued that Mr. Andrus was not prejudiced by the jurors' awareness of his restraints; however, the State has not cited a single case in which any court, in any jurisdiction, has found that the State proved beyond a reasonable doubt that jurors' awareness of a defendant's restraints did not contribute to the sentencing verdict in a capital case. Nor has the State met this high burden in this case.

443. The State made several arguments as to why the jurors' awareness of the physical restraints should be deemed harmless. Each of these arguments is unavailing.

444. First, the State argued that the jurors' awareness of Mr. Andrus's restraints was harmless because the State had presented evidence in aggravation in the punishment phase of trial. This argument does not comport with well-established law on the inherent harmfulness of restraints. *See, e.g., Deck*, 544 U.S. at 635, 637; *id.* at 648 (Thomas, J., dissenting) (finding that even where the defendant was a repeat offender; had killed two people to avoid arrest, to which he had confessed; and had aided prisoners in an escape attempt, the State had not proved that the use

of visible shackles was harmless beyond a reasonable doubt at the punishment phase of trial). Moreover, at least one juror attested to an awareness of the physical restraints even before the punishment phase. *See* HC4.

445. Second, the State argued that the jurors' awareness of Mr. Andrus's restraints was harmless beyond a reasonable doubt because "only a portion of the jurors were aware of the restraints during the trial." State's Answer at 60. This argument is similarly unavailing. Since a conviction and death sentence require a unanimous verdict under the Texas capital sentencing scheme, *see* TEX. CODE CRIM. PROC. art. 37.071, § 2(d)(2), (f)(2), the number of jurors who were aware of Mr. Andrus's restraints is irrelevant to the harm analysis. Because each of the twelve jurors must join in the verdict, even one juror's awareness of Mr. Andrus's restraints requires reversal absent a showing by the State that the error was harmless beyond a reasonable doubt, a showing that was not made.

446. Third, the State argued that ex post facto statements in juror affidavits procured by the State can be considered as evidence that the jurors' awareness of the restraints had no effect on their verdict. Such statements are expressly inadmissible under Texas law and, therefore, have not been considered by this Court. *See* TEX. R. EVID. 606 (b) ("[A] juror may not testify as to…the effect of anything on any juror's mind or emotions or mental processes, as influencing any juror's assent to or dissent from the verdict or indictment. Nor may a juror's affidavit or any statement

by a juror concerning any matter about which the juror would be precluded from testifying be admitted in evidence for any of these purposes.").

447. "Rule 606(b) 'attempt[s] to strike an appropriate balance between ... the desire to rectify verdicts tainted by irregularities in the deliberative process ... [and] the desire to protect jurors and promote the finality of judgments.'" *Hicks v. State*, 15 S.W.3d 626, 630–31 (Tex. Crim. App. 2000) (citing 1 Steven Goode, Olin Guy Wellborn III, & M. Michael Sharlot, *Texas Practice: Guide to the Texas Rules of Evidence: Civil and Criminal* § 606.2, at 535 (2d ed. 1993 & Supp. 2000)). In striking this balance, the rule makes inadmissible material in post-trial juror affidavits regarding matters and statements that occurred during deliberations and their effect on the jurors' mind and emotions. *Id.* (affirming trial court's conclusion that juror's affidavit describing discussions among jurors and how that affected her decision to agree to the verdict was inadmissible).

448. Texas Rule of Evidence 606(b) is modeled on Federal Rule of Evidence 606(b). "Federal Rule of Evidence 606(b) generally prohibits a juror from testifying about her or other jurors' mental processes during jury deliberations." *United States v. Burns*, 495 F.3d 873 (8th Cir. 2007). That prohibition "extends to testimony about what those mental processes would have been had the evidence at trial been different." *Id.* (citing *Capps v. Sullivan*, 921 F.2d 260, 262–63 (10th Cir. 1990)). The question—for the habeas court itself to decide—of "whether different evidence

would have produced a different result must be answered by asking what a reasonable jury would likely have done with that evidence before it, not what some particular juror or jurors would have done." *Id.* at 876 (declining to consider juror affidavit about how a certain kind of evidence, had it been admitted, would have affected the juror's vote).

449. Considering any jurors' statements about what they, years later, feel may or may not have affected their verdict had it been admitted into evidence at trial would violate Rule 606(b)(1). *See Ex parte Knight*, 401 S.W.3d 60, 64 (Tex. Crim. App. 2013) ("[T]he rules of evidence prohibit evidence from jurors about their deliberative process."); *Thomas v. State*, No. AP–75218, 2008 WL 4531976 at *20 (Tex. Crim. App. Oct. 8, 2008) (mem. op., not designated for publication) (noting Rule 606(b) "prohibits juror testimony on matters concerning jury deliberations or affecting a juror's decision making.").

450. Similarly, courts applying this rule of evidence have been clear that jurors cannot testify about whether specific mitigation evidence, not presented at trial, would have affected their verdict. *See, e.g.*, *Williams v. Collins*, 16 F.3d 626, 636 (5th Cir. 1994) (finding post-verdict inquiry of jury members, as live witnesses or by affidavit, about what may have made a difference to their verdict "inappropriate and precluded by Federal Rules of Evidence 606(b)" and citing numerous cases).

451. The Court, therefore, strikes the following inadmissible statements from the State's juror affidavits and does not rely on them:

- HC4 at ¶4 ("No, I would have rendered the same verdict and sentence. I do not believe that being aware of the restraints influenced my decisions in any way.");

- HC6 at ¶4 ("No, I would have rendered the same verdict and sentence, restraints and any comments about restraints did not influence my decision in any way.");

- HC8 at ¶4 ("No, I absolutely would have returned the same verdict and punishment. I do not believe being aware of the restraints influenced my decision on the verdict or punishment in any way.");

- HC9 at ¶ 4 ("No, I do not believe this comment impacted my decision in either deliberations or sentencing. I would still have returned the same verdict and sentence.");

- HC12 at ¶ 4 ("I absolutely do not believe being aware of the restraints on the defendant impacted my deliberations, verdict or sentence in any way.").

452. Because there was no finding by the trial court supporting the use of visible restraints, and because the State has failed to prove beyond a reasonable doubt that the jurors' awareness of Mr. Andrus's restraints did not contribute to the verdict obtained, Mr. Andrus is entitled to relief on these grounds.

453. For all of these reasons, the Court concludes that Mr. Andrus was deprived of his due process right to a fair trial under the U.S. Constitution.

454. The Court, therefore, recommends that his conviction and sentence be overturned and his case remanded for a new trial.

V.

CLAIM:

THE CONSTITUTIONALITY OF THE FUTURE DANGEROUSNESS SPECIAL ISSUE

A. Findings of Fact

455. At the punishment phase of trial, Mr. Andrus's jury was instructed to answer the following special issue: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" 53 RR at 5-6; CR at 306; *see also* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).17

456. The terms "probability," "criminal acts of violence," and "society" are not defined in the statute, nor were they defined in Mr. Andrus's jury charge. *See* CR at 304-07.

B. Conclusions of Law

457. Jurors are ill-suited to predict the probability of someone committing criminal acts of violence in the future. *See Barefoot v. Estelle*, 463 U.S. 880, 930

17 If jurors answer this question, referred to as Special Issue One, with a "Yes," jurors are asked to answer another Special Issue. If the jurors answer "No" to the question posed in Special Issue One, the defendant is automatically sentenced to a term of life without the possibility of parole.

(1983) (Blackmun, J., dissenting) (agreeing with the ABA amicus brief for the claim that jurors are not well-suited to predict the probability of a defendant committing criminal acts of violence in the future).

458. In 2013, the ABA released The Texas Capital Punishment Assessment Report, which called on Texas to "abandon altogether the use of the 'future dangerousness' special issue" as it and other aspects of the Texas sentencing scheme "place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death." ABA Death Penalty Due Process Review Project, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Texas Capital Punishment Assessment Report*, at viii, xxxix (September 2013) ("ABA Texas Assessment Report"). Among the ABA's concerns with the Texas scheme is that the key terms of the first special issue are undefined. *See* ABA Texas Assessment Report at 308. Additionally, the ABA notes that juries must unanimously find a probability that a defendant will commit future acts of violence before reaching the question of mitigation, thus placing the first special issue "at the center of the jury's punishment decision." ABA Texas Assessment Report at 307.

459. While the first special issue is not presented to the jury until the punishment phase of trial, it must be found beyond a reasonable doubt before mitigating evidence may be considered. TEX. CODE CRIM. PROC. art. 37.071, § 2(b)-(e). Accordingly, it acts as a de facto determinant of death-eligibility and therefore

must meaningfully narrow the class of death-eligible defendants. As drafted, it does not do so.

460. The terms in the first special issue are left to be interpreted according to their ordinary meaning. *See Druery v. State*, 225 S.W.3d 491, 509 (Tex. Crim. App. 2007). Absent a statutory definition to the contrary, the term "probability" is reasonably understood to mean some "likelihood of the occurrence of any particular form of an event." *Granviel v. State*, 552 S.W.2d 107, 117 n.6 (Tex. Crim. App. 1976); *see also Jurek v. State*, 522 S.W.2d 934, 945 (Tex. Crim. App. 1975) (Odom, J., dissenting) *aff'd sub nom. Jurek v. Texas*, 428 U.S. 262 (1976) ("The statute does not require a particular degree of probability but only directs that some probability need be found.").

461. Neither is the degree of violence specified. "Criminal acts of violence" could reasonably range from capital murder all the way down to simple assault. *See* Christopher Slobogin, *Capital Punishment and Dangerousness*, *in* MENTAL DISORDER AND CRIMINAL LAW: RESPONSIBILITY AND COMPETENCE 119, 121, 125 (Robert F. Schopp, et al., eds., 2009) (questioning what qualifies as "dangerousness" and "criminal acts of violence"). Essentially, the jury charged with determining Mr. Andrus's fate was asked to determine whether there is any likelihood that Mr. Andrus might commit *any* act of violence in the future that poses a continuing threat to society.

462. Psychiatrists, however, are unable to rule out the possibility of *any* person committing future acts of violence. *See* Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845, 849 (1989-1990) ("Predictions of violent behavior are difficult because the probabilities considered in the prediction are conditional. That is, each of us, given certain circumstances, might engage in violent behavior in the future; thus, each of us has a non-zero probability of killing another."). Even when predictions are based on actuarial data, which are now considered to be slightly more accurate than clinical determinations, a defendant's risk of committing future acts of criminal violence is phrased in terms of non-zero probabilities. *See, e.g.*, Laura S. Guy, *et al.*, *Assessing Risk of Violence Using Structured Professional Judgment Guidelines*, 12 J. FORENSIC PSYCHOL. PRAC. 270 (2012), at 272 ("[Mental Health Professionals] are encouraged to communicate level of risk using categorical levels of low, moderate, and high.").

463. The fact that every person has a non-zero probability of committing future acts of violence shows that the first special issue fails to narrow the class of death-eligible defendants. Moreover, the fact that any capital defendant is found *not* to be a future danger is evidence that the determination is based on caprice rather than reason.

464. The concerns raised by the ABA are consistent with violations of Mr. Andrus's Eighth and Fourteenth Amendment rights as articulated in Supreme Court doctrine. The first special issue is unconstitutionally vague, fails to narrow the class of death-eligible defendants, leads to the arbitrary and capricious imposition of the death penalty, and limits the jury's ability to give full consideration to evidence that may serve as a basis for a sentence less than death.

465. Article 37.071, section 2(b)(1) of the Texas Code of Criminal Procedure is unconstitutionally vague in that it fails to define any of the key terms in the first special issue. The Supreme Court has long held that juror discretion must be channeled in capital cases. *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam) ("Where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.")). In *Godfrey v. Georgia*, the Court held that a state's aggravating factors must not be defined in such a way that people of ordinary sensibilities could find that nearly every murder met the stated criteria. 446 U.S. 420, 428-29 (1980). In order to avoid the arbitrary and capricious imposition of the death penalty struck down in *Furman*, states must narrow the class of death-eligible defendants "by providing specific and detailed guidance to the sentencer." *McCleskey v. Kemp*, 481 U.S. 279, 303 (1987) (internal

citations and quotation omitted); *see also Maynard v. Cartwright*, 486 U.S. 356, 362 (1988) ("Since *Furman*, our cases have insisted that the channeling and limiting of the sentencer's discretion in imposing the death penalty is a fundamental constitutional requirement for sufficiently minimizing the risk of wholly arbitrary and capricious action.").

466. In Mr. Andrus's case, the fact that this determination had to be made beyond a reasonable doubt before the jury was presented with the mitigation special issue limited the jury's ability to give full consideration to evidence that might serve as a basis for a sentence less than death. *See Tennard v. Dretke*, 542 U.S. 274, 278 (2004) ("It is not enough simply to allow the defendant to present mitigating evidence to the sentencer. The sentencer must also be able to consider and give effect to that evidence in imposing the sentence.").

467. For all of these reasons, the Court concludes that Mr. Andrus's death sentence was a product of the unconstitutional future dangerousness special issue.

468. The Court, therefore, recommends vacating Mr. Andrus's sentence and remanding his case for a new sentencing trial.

VI.

CONCLUSION

The Court has found sufficient facts to support granting relief in accordance with the United States Constitution and clearly established federal and state case law interpreting the Constitution. The Court therefore recommends that Mr. Andrus's conviction and sentence be vacated and that the case be remanded for a new trial.

CERTIFICATE OF SERVICE

I, the undersigned, declare and certify that I have served the foregoing Mr. Andrus's Proposed Findings of Fact and Conclusions of Law upon:

Fort Bend County District Clerk
301 Jackson Street
Richmond, Texas 77469
(Efiled)

Fort Bend County Crim. Dist. Att'y
Attn: Jason Bennyhoff
(One copy via email)

Judge James Shoemake
(Two courtesy copies via email and hand-delivery)

This certification is executed on July 17, 2017, at Austin, Texas.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

/s/ Gretchen S. Sween
Gretchen S. Sween