

APPENDIX

APPENDIX

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United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit

FILED

July 22, 2020

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No. 18-70011

ERICA YVONNE SHEPPARD,

Petitioner — Appellant,

versus

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

Respondent — Appellee.

Appeal from the United States District Court
for the Southern District of Texas
No. 4:14-CV-655

Before KING, SMITH, and HAYNES, *Circuit Judges.*

JERRY E. SMITH, *Circuit Judge:*

A jury found Erica Sheppard guilty of capital murder and sentenced her to death. She applied for a federal writ of habeas corpus, claiming that the state violated her rights under *Batson v. Kentucky*, 476 U.S. 79 (1986), and that her attorney rendered ineffective assistance of counsel in neglecting to

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object to certain comments by the trial judge and the prosecution and in failing to present sufficient mitigating evidence at the punishment phase. The district court denied her petition, concluding that the relitigation bar of the Anti-Terrorism and Effective Death Penalty Act of 1996 (“AEDPA”) foreclosed relief. We affirm.

I.

In 1993, Sheppard and James Dickerson noticed a parked vehicle belonging to Marilyn Meagher with its trunk open. Short on cash, they decided to enter the nearby apartment, “rob whoever was in[side] . . . , and steal the [vehicle].” Upon encountering Meagher, Sheppard tackled and restrained her as Dickerson held a knife to her throat. Although Meagher begged for her life—pleading that she had two children—Dickerson began to slash at her neck. When the blade proved too dull to cut, Sheppard retrieved a butcher’s knife from the kitchen and handed it to Dickerson. As Meagher continued to gasp for air, Sheppard held her in place while Dickerson repeatedly pummeled her with a statuette. Meagher’s daughter found her mother’s body later that evening in a pool of blood.

Sheppard confessed and was tried for capital murder. At trial, she objected that the prosecutor had used a peremptory challenge to strike venire member Ronnie Simpson because he was black. The prosecutor justified the strike because Simpson had indicated that he would have trouble giving the death penalty based solely on the facts of the crime and would consider, as a mitigating factor, whether a defendant had children. Moreover, the prosecutor explained that, as a victim of a false arrest, Simpson appeared sympathetic to Sheppard’s plight. In fact, Simpson “shifted over, looked at [Sheppard], and said hello” but did not extend the same cordiality to the prosecution.

Sheppard responded that the prosecution’s reasons were pretextual

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because it had accepted two similarly situated white jurors. Specifically, Larry Chambers acknowledged that “[i]t would be hard” to impose the death penalty on the facts of the crime alone, especially where the defendant did not personally murder the victim. Chambers also voiced concern about sentencing to death a young mother with children. David Herd stated that his son had been prosecuted for an incident with his girlfriend, which, in Herd’s view, did not warrant a felony charge and proved to be “quite an ordeal” for his family.

The trial court took judicial notice of the fact that two of the selected jurors were black and that the state had exercised only three of its nine peremptory challenges against black venire members. It therefore overruled Sheppard’s objection.

During voir dire, the judge instructed one venire panel that, under Texas’s law of parties, each party to an offense “should be equally responsible as to punishment.” Sheppard raised no objection. One of the members of the venire panel ultimately served as a juror, and another sat as an alternate.

The prosecutor remarked to three venire members during voir dire that Texas “do[es] not have life without parole” and that Sheppard would likely have to serve a minimum of thirty-five years before being eligible for parole. He noted, however, that a defendant previously had to serve only fifteen years to become eligible and that the Texas Legislature has since “changed those minimum requirements of years in the penitentiary.” Although the Legislature could “easily” change the requirements again, he reminded the jurors that “the parole law itself is not for [their] consideration” and that they “[we]re not permitted to consider[] what the [L]egislature might do in the future.” At no point did Sheppard object to those comments.

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Before a death penalty can be imposed, Texas law requires that the jury evaluate whether (1) “the defendant would commit criminal acts of violence” in the future; (2) “the defendant actually caused the death of the deceased or” simply “intended . . . or anticipated that a human life would be taken”; and (3) mitigating circumstances such as the defendant’s character, background, and moral culpability instead warrant a sentence of life imprisonment. TEX. CODE CRIM. PRO. ANN. art. 37.071, § 2(b)(1)–(2), (e)(1). At the punishment phase, the state introduced evidence that Sheppard had a poor reputation for being peaceful and law-abiding in her community. She had formerly “jacked” cars for profit and had participated in a drive-by shooting that resulted in the victim’s hospitalization. The night before the murder, Sheppard had been seen “dressed in dark clothing” and closely following “a lady who was . . . practically running across the parking lot.” And while in prison awaiting trial, Sheppard allegedly had bragged about the murder and threatened to harm one of the inmates. Meagher’s family also testified to the impact of her gruesome murder, which left them “depressed,” “fatigued[,] and . . . traumatized.”

In response, the defense called Patricia Birdwell, the director of the Matagorda County Women’s Crisis Center, who testified that her organization provided protection for abused women and that Sheppard had been admitted to the center. Birdwell introduced records showing that, at the time, Sheppard had been in “a lot of pain,” wanted a divorce, and was seeking legal assistance.

Next, Ronda Robinson, the records custodian for Covenant House, discussed that Sheppard had been admitted to the emergency shelter for run-away and homeless youth. As evidenced by the records, Sheppard came to Covenant House on two occasions, “looking for shelter for her and her baby.” She had a history of running away from home and alleged that her mother had physically abused her. By the age of seventeen, Sheppard was

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pregnant with her second child and had dropped out of the tenth grade.

The defense then called psychiatrist Priscilla Ray, who had reviewed Sheppard's prison medical records and conducted a two-hour psychiatric interview to evaluate her sanity, competence, and the influence of abusive men. Although Ray was not asked to perform a medical diagnosis, she was able to conclude that Sheppard suffered from chronic depression that was likely genetic and only partially treated. Ray testified that Sheppard had appeared sad throughout the interview and had cried when recounting the murder. Though recognizing that Sheppard tended to be "a follower," Ray predicted that she was unlikely to pose a continuing threat to society, especially in prison where she would be insulated from the influence of abusive men.

In addition to Ray's testimony, the defense introduced a five-page report of her clinical evaluation, which offered a somber glimpse into Sheppard's troubled past. As the report revealed, Sheppard's parents divorced when she was an infant, leaving her primarily in the care of her grandmother. Sheppard struggled to perform well in school and had to retake the fourth grade. Between the ages of three and five, her babysitter's boyfriend repeatedly molested her and forced her to perform oral sex. And as a teenager, she was raped at knifepoint while living on the streets. At age nineteen, Sheppard already had three children, each from a different father. Jerry Bryant, the father of her youngest child, was physically abusive and threatened to kill her if she ever left him. Perhaps unsurprisingly, Sheppard admitted to experiencing depression and mood swings and to hearing voices in her head. She also confided that she had helped murder Meaghan because Dickerson had "pulled a knife on her," saying that "he would kill her and her baby" if she did not comply. She allegedly "went into shock" and acted only under duress.

The defense then summoned family friend Patrice Green, who testi-

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fied that Sheppard had faithfully attended church her whole life. Finally, Sheppard's grandmother, Annie Smith, confirmed that Bryant had abused Sheppard. During closing arguments, defense counsel specifically pointed to Ray's report and directed the jury to consider Sheppard's "background, her record, [and] her emotional instability" as mitigating factors. Despite counsel's efforts to portray Sheppard favorably as a "young . . . female" with "kids" and "a background of abuse," the jury sentenced her to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Sheppard's conviction and sentence on direct appeal. The court rejected Sheppard's claim that the prosecutor had improperly struck Simpson because he was black, noting that "[t]he State's race-neutral apprehensions [we]re well established in the record." Sheppard applied for state habeas relief, renewing her *Batson* challenge and alleging, *inter alia*, that her attorney was ineffective in failing to (1) investigate and present sufficient mitigating evidence at the punishment phase; (2) object to the trial judge's erroneous instruction on the law of parties; and (3) object to the prosecutor's misleading statements regarding parole availability.

In support of her application, Sheppard submitted affidavits from a number of fact and expert witnesses whom defense counsel had failed to call. Collectively, the fact witnesses attested at length to Sheppard's academic struggles, teenage pregnancies, sexual exploitation, and physical abuse at the hands of her mother and Bryant. For instance, Sheppard's affidavit recounted how her mother would frequently whip her with a belt and even attempted to strangle her with a phone cord. When Sheppard first became pregnant at the age of thirteen, her mother "beat [her] half to death," leading her to abort the child. Although Ray's report mentioned only one instance of sexual assault as a teenager, Sheppard was also raped at a party as she "phased in and out of consciousness." Her relationship with Bryant fared little better: He claimed to "observe[] [her] every movement," often pointed

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guns or knives at her, and once beat her until she lost consciousness. Her family was fully aware of the abuse, as she occasionally fled to her brother or mother's houses to escape Bryant.

The expert witnesses contributed still greater detail to Sheppard's mental state. Upon conducting a twelve-hour clinical interview with Sheppard and a two-hour interview with her mother, psychiatrist Rebekah Bradley diagnosed Sheppard with severe depression, posttraumatic stress disorder, and dissociative disorder. Psychologist Myla Young likewise performed an eighteen-hour neuropsychological evaluation of Sheppard and concluded that she had the mental-age equivalence of a fourteen-year-old. Young also determined that, when confronted with stressful situations, Sheppard "would be vulnerable . . . to the influence of others" and would likely "respond[] in a non-thinking, automaton-like way rather than as a thinking and reasoning adult." Nevertheless, psychologist Mark Cunningham highlighted Sheppard's gender and continuing family relationships with her children, mother, and grandmother as significant factors that reduced the likelihood of a future offense.

After scheduling an evidentiary hearing, the habeas trial court held that defense counsel was ineffective in neglecting to develop adequate testimony as to Sheppard's character, background, and mental illnesses. Yet the court found no deficiency or resulting harm in counsel's failure to object to the statements of the trial judge and the prosecution during voir dire, given the judge's subsequent curative instructions. The court further refused to revisit the *Batson* claim on collateral review.

The TCCA summarily affirmed the lower court's recommendations except with regard to the failure to introduce mitigating evidence. As the TCCA reasoned, the evidence that "the trial court fault[ed] counsel for not developing . . . was actually before the jury through the testimony and report

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of Birdwell, Dr. Ray, and others.” *Ex Parte Sheppard*, No. WR-78,132-01, 2013 WL 5568434, at *2 (Tex. Crim. App. Oct. 9, 2013) (per curiam). Thus the court held that counsel was not ineffective in refusing “to present cumulative testimony.” *Id.*

Sheppard filed a habeas petition under 28 U.S.C. § 2254. Though the district court found that counsel was deficient in investigating and presenting mitigating evidence that may well have affected the outcome, it noted that “the TCCA’s contrary conclusion must be considered under the stringent and deferential standards” of AEDPA. Because “Sheppard d[id] not meet her heavy burden to show” that the TCCA’s ruling was unreasonable, the court denied habeas relief. The court granted a certificate of appealability on that claim, which we expanded to include the other issues.

II.

“As amended by AEDPA, § 2254(d) stops short of imposing a complete bar on federal-court relitigation of claims already rejected in state proceedings.” *Harrington v. Richter*, 562 U.S. 86, 102–03 (2011). Instead, “[§] 2254(d) reflects the view that habeas corpus is a guard against extreme malfunctions in the state criminal justice systems, not a substitute for ordinary error correction through appeal.” *Id.* at 102–03. As relevant here, AEDPA precludes habeas relief unless the state court’s adjudication of the claim resulted in a decision that (1) “involved an unreasonable application of[] clearly established Federal law, as determined by the Supreme Court of the United States,” or (2) “was based on an unreasonable determination of the facts in light of the evidence presented.” 28 U.S.C. § 2254(d).

A state court ruling involves an unreasonable application of federal law “if, and only if, it is so obvious that a clearly established rule applies to a given set of facts that there could be no fairminded disagreement on the question.” *White v. Woodall*, 572 U.S. 415, 427 (2014) (internal quotation

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marks and citation omitted). “A state court’s factual findings are presumed correct unless rebutted by clear and convincing evidence.” *Young v. Dretke*, 356 F.3d 616, 624, 629 (5th Cir. 2004).

Sheppard avers her counsel was ineffective in developing mitigating evidence and in failing to object to certain comments regarding the law of parties and parole eligibility. She further maintains that the state violated her rights under *Batson* in striking Simpson from the jury. The TCCA reasonably rejected each of those claims.

A.

The Sixth Amendment secures the right to effective assistance of counsel. Under *Strickland v. Washington*, 466 U.S. 668, 685–86 (1984), a defendant must establish that (1) her counsel’s representation was objectively deficient and (2) that she suffered prejudice as a result. See *Garza v. Idaho*, 139 S. Ct. 738, 744 (2019). An attorney’s performance is deficient where the proffered “representation fell below an objective standard of reasonableness” as assessed “under prevailing professional norms.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (internal quotation marks and citation omitted). And a defendant is prejudiced if “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding *would* have been different.”¹ To evaluate that probability, “we consider the totality of the available mitigation evidence—both that adduced at trial, and the evidence adduced in the habeas proceeding—and reweigh it against the evidence in aggravation.” *Porter v. McCollum*, 558 U.S. 30, 41 (2009) (per

¹ *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020) (per curiam) (emphasis added). That a different result *could* have been reached is not enough. See *Adekeye v. Davis*, 938 F.3d 678, 683 (5th Cir. 2019). Instead, “[t]he likelihood of a different result must be substantial, not just conceivable.” *Richter*, 562 U.S. at 112.

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curiam) (cleaned up) (citation omitted).

Where § 2254(d) applies, our review is “doubly deferential.” *Knowles v. Mirzayance*, 556 U.S. 111, 123 (2009). “We take a highly deferential look at counsel’s performance through the deferential lens of § 2254(d).” *Cullen v. Pinholster*, 563 U.S. 170, 190 (2011) (internal quotation marks and citations omitted).

1.

Sheppard challenges the appropriate standard of review under § 2254(d). Traditionally, we have focused our review “on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence.” *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc) (per curiam). We consider “not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it *could have* relied upon.”² Under that standard, so long as a plausible argument exists to support the ruling, we defer to the decision of a state court even if its actual rationale was unreasonable.

Sheppard asserts that *Neal* is no longer good law following *Wilson v. Sellers*, 138 S. Ct. 1188 (2018). *Wilson* principally addressed how to review a case in which a lower state court explained its reasoning but a higher state court did not.³ In resolving that question, the Court directed a federal habeas

² *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017) (emphasis added); *see also Neal*, 286 F.3d at 246 (“It seems clear to us that a federal habeas court is authorized by Section 2254(d) to review only a state court’s ‘decision,’ and not the written opinion explaining that decision.”).

³ *Wilson*, 138 S. Ct. at 1192. That issue was the subject of a circuit split between the Eleventh Circuit and every other court of appeals to have considered the matter. *See id.* at 1194.

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court to “‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale” and “presume that the unexplained decision adopted the same reasoning.” *Id.* at 1192. Moreover, a federal court should “train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner’s federal claims and . . . give appropriate deference to that decision.” *Id.* at 1191–92 (emphasis added) (internal quotation marks and citation omitted). Shepperd thus urges that we owe no additional deference under § 2254(d) where a state court’s actual reasoning is unjustifiable.⁴

This court has not assessed *Neal*’s continuing vitality in the wake of *Wilson*,⁵ and we need not do so today. Even assuming that *Wilson* permits us

⁴ See *Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018), *cert. denied*, 139 S. Ct. 1321 (2019) (noting that “[t]he continued viability of [*Neal*] . . . is uncertain” after *Wilson*).

⁵ “[W]e . . . only decide whether an issued Supreme Court decision has ‘un- equivocally’ overruled our precedent.” *United States v. Guerrero*, 768 F.3d 351, 361 (5th Cir. 2014). We observe, without deciding, that it is far from certain that *Wilson* overruled *sub silentio* the position—held by most of the courts of appeals—that a habeas court must defer to a state court’s ultimate *ruling* rather than to its specific *reasoning*. See *Neal*, 286 F.3d at 246; see also *Whatley v. Zatecky*, 833 F.3d 762, 775 (7th Cir. 2016) (holding that a petitioner is not entitled “to *de novo* review simply because the state court’s rationale is unsound”); *Holland v. Rivard*, 800 F.3d 224, 236 (6th Cir. 2015) (“[A] habeas petitioner must show that there was *no reasonable basis* for the state court to deny relief . . . *whether or not* the state court reveals [its reasoning].” (internal quotation marks and citation omitted)); *Bonney v. Wilson*, 754 F.3d 872, 884 (10th Cir. 2014) (considering “what arguments or theories supported or . . . could have supported, the state court’s decision” (citation omitted)); *Williams v. Roper*, 695 F.3d 825, 831 (8th Cir. 2012) (“[W]e examine the ultimate legal conclusion reached by the court, not merely the statement of reasons explaining the state court’s decision.” (citation omitted)); *Gill v. Mecusker*, 633 F.3d 1272, 1291 (11th Cir. 2011) (focusing on the “state court’s ultimate conclusion” instead of “the reasoning that led to th[at] result”); *Clements v. Clarke*, 592 F.3d 45, 55–56 (1st Cir. 2010) (“It is the result to which we owe deference, not the opinion expounding it.”); *Cruz v. Miller*, 255 F.3d 77, 86 (2d Cir. 2001) (noting that “deficient reasoning will not preclude AEDPA deference at least in the absence of an analysis so flawed as to undermine confidence that the constitutional claim has been fairly adjudicated” (citations omitted)).

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to afford deference to only the state court's proffered reasoning—instead of its result—deference is still due because the TCCA's decision was reasonable.

Sheppard claims that counsel's performance was deficient because he neglected to call her, her mother, or her brother, thereby preventing the jury from learning crucial details about her character and the struggles she had endured. Although Ray and Smith did testify, Sheppard faults counsel for failing to ask them about her grim upbringing or her family's history of mental illness. She further emphasizes that, despite being aware of her past, counsel merely requested that Ray evaluate Sheppard's sanity, competence, and the influence of abusive men. Notably, however, he never sought a comprehensive psychiatric diagnosis even though the trial court had authorized funds for a medical expert and Ray was fully capable of conducting such an evaluation.⁶

In denying relief, the TCCA observed that the evidence Sheppard chided counsel for not investigating and presenting “was actually before the jury through the testimony and report of Birdwell, Dr. Ray, and others.” *Sheppard*, 2013 WL 5568434, at *2. Hence, even assuming that counsel's performance was deficient, the TCCA reasonably found that Sheppard failed to establish prejudice. After all, the records from the two shelters made clear that Sheppard had experienced spousal and parental abuse, had run away from home, had dropped out of the tenth grade, and had had multiple teenage pregnancies. Likewise, Ray's report revealed that she had been repeatedly

⁶ In a footnote, Sheppard alleges that counsel erred in failing to summon a number of other fact witnesses. But she does not explain why that decision was deficient or prejudicial. Accordingly, those arguments are waived. *See United States v. Charles*, 469 F.3d 402, 408 (5th Cir. 2006) (“A single conclusory sentence in a footnote is insufficient to raise an issue for review.”).

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molested and forced to perform oral sex as a young child. It further described that she had been raped at knifepoint while living on the streets and that Bryant had beaten and threatened to kill her. Had Sheppard, her mother, or her brother testified at trial, their habeas affidavits show that they would have added few details to this already woeful story.

As counsel later admitted, however, the defense did a less-than-perfect job of eliciting live testimony of Sheppard's character and background from Ray or Smith. He asked Smith only whether Bryant had abused Sheppard and never even broached the topic of her past with Ray. Nevertheless, the jury already had access to such mitigating evidence via the shelter records and Ray's report. Equally importantly, counsel highlighted the report at closing argument and encouraged the jury to consider Sheppard's "background, her record, [and] her emotional instability." Under those circumstances, the TCCA reasonably concluded that any deficiency in presenting the testimony of Ray and Smith did not affect the outcome.

The same is true of the expert testimony that Sheppard adduced during the postconviction proceedings. Those findings established that Sheppard had the mental development of a fourteen-year-old and suffered from major depression, posttraumatic stress disorder, and dissociative disorder. Though Young determined that Sheppard was vulnerable to the influence of others, Cunningham predicted that her status as a female with close familial relationships decreased the risk that she would perpetuate future acts of violence. Once again, however, that same evidence was substantially before the jury. In fact, Ray observed that Sheppard experienced depression and mood swings and heard voices in her head. Ray also testified that, although susceptible to the influence of abusive men, Sheppard was unlikely to pose a continuing threat of violence in the structured confines of prison. Because Ray thus previewed the salient points of the subsequent expert findings, we cannot say that the TCCA "applied [*Washington*] to the facts of [t]his case in an objec-

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tively unreasonable manner.” *Bell v. Cone*, 535 U.S. 685, 699 (2002).

Nevertheless, Sheppard contends that, in declaring the additional mitigating evidence to be cumulative, the TCCA ignored the expert findings and narrowly focused on the testimony of Smith, Robinson, and another employee at the Women’s Crisis Center. Sheppard thus insists that the TCCA unreasonably applied clearly established federal law, which requires a court to assess prejudice under the totality of the evidence. *See Porter*, 558 U.S. at 41.

But we do not sit to grade the thoroughness of a state court’s opinion. To be sure, “we have no power to tell state courts how they must write their opinions,” nor will we “impose on state courts the responsibility for using particular language in every case in which a state prisoner presents a federal claim.” *Coleman v. Thompson*, 501 U.S. 722, 739 (1991). Rather, training our attention on the reason why the TCCA denied relief, we “give appropriate deference” to its finding that the additional mitigating evidence was cumulative.⁷

Moreover, even assuming *arguendo* that our review is *de novo*,⁸ Sheppard’s claim of prejudice would still fail. That is even more true considering that, when reviewing *de novo*, we must weigh Sheppard’s mitigation evidence against the aggravating evidence offered at trial. *See Porter*, 558 U.S. at 41.

⁷ *See Wilson*, 138 S. Ct. at 1191–92; *see also Meders v. Warden*, 911 F.3d 1335, 1349 (11th Cir. 2019) (“[The Court’s directive in *Wilson*] does not mean we are to flyspeck the state court order or grade it. What it means is we are to focus not merely on the bottom line ruling of the decision but on the reasons, if any, given for it.”).

⁸ Even if AEDPA deference did not apply, Sheppard “would not automatically be entitled to habeas relief. Instead, [s]he would still need to show—under a *de novo* review standard—that [s]he is in custody in violation of the Constitution . . . of the United States.” *Langley v. Prince*, 926 F.3d 145, 163 (5th Cir. 2019) (en banc) (internal quotation marks omitted), *cert. denied*, 206 L. Ed. 2d 826 (2020).

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And that aggravating evidence is damning. The jury was well aware of Sheppard's intent to "rob whoever was in[side]" Meagher's apartment and of her efforts to effectuate that purpose. Despite Meagher's pleas to spare her life for the sake of her two children, Sheppard helped restrain her and retrieved the butcher's knife that was used to hack at her throat. The state also introduced evidence that Sheppard had attempted a similar robbery the night before and had bragged about Meagher's murder while in prison. Given the weight of such aggravating evidence, Sheppard has not shown that, but for her counsel's failure to present cumulative mitigating evidence, "the result of the proceeding would have been different." *Andrus*, 140 S. Ct. at 1881.

2.

Sheppard maintains that counsel was ineffective in failing to object to the erroneous instruction regarding Texas's law of parties. Specifically, the judge stated that each party to an offense "should be equally responsible as to punishment." Sheppard urges that, in doing so, the court denied her right to due process and to an individualized sentencing under the Eighth and Fourteenth Amendments. The state does not contest that the instruction was inaccurate and that counsel should have objected. But it maintains that any deficiency was harmless.

We agree. The trial judge gave the erroneous instruction over a week before the start of the punishment phase to a single venire panel from which only one juror was ultimately selected. It therefore strains credulity to assume that one stray comment would affect the entire outcome of the jury's deliberations at sentencing. That is especially so given that the judge later instructed the jury to "consider all evidence submitted to [them] during the whole trial as to the defendant's background or character or the circumstances of the offense that militates for or mitigates against the imposition of the death penalty." What's more, the judge directed the jury "not [to]

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consider the instructions given [them] in the first phase of trial that relate to the law of parties and the responsibility of parties for the acts or others in the commission of offenses.” Instead, the jury was told to “consider only the conduct and state of mind of this defendant in determining what your answers to the special issues shall be.” Because jurors are presumed to follow their instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), Sheppard has failed to demonstrate prejudice.

Sheppard rejoins that “[s]ome comments . . . may be so prejudicial that even good instructions will not cure the error.” *United States v. Saenz*, 134 F.3d 697, 713 (5th Cir. 1998) (per curiam) (citation omitted). But that is not the case here. Unlike in *Saenz*, 134 F.3d at 712–13, the court did not “extensively question[] the two key witnesses . . . on matters at the heart of the case” in a brief “trial lasting only two days.”⁹ Nor did the judge express a damaging opinion on the credibility of a witness.¹⁰ Rather, the judge made one inadvertent remark over the course of a lengthy trial, and he took special pains to cure the error at sentencing. “[O]nly by specifically alerting the jurors to the particular statement at issue and then instructing them to disregard it could he have given a stronger curative charge.” *United States v. Lance*, 853 F.2d 1177, 1183 (5th Cir. 1988). The TCCA thus appropriately dismissed Sheppard’s claim.

3.

Similarly, Sheppard’s claim that counsel was ineffective in failing to

⁹ See also *United States v. Hoker*, 483 F.2d 359, 368 (5th Cir. 1973) (concluding that “[n]o amount of boiler plate instructions . . . could be expected to erase” the effect of the judge’s active questioning of various witnesses).

¹⁰ See *United States v. Cisneros*, 491 F.2d 1068, 1075 (5th Cir. 1974) (holding that “the cautionary instructions advising the jury of its role as fact-finder” failed to cure the judge’s subsequent comment that one of the witnesses was lying).

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object to the statements concerning parole availability is without merit. During voir dire, the prosecutor correctly remarked to three jurors that Sheppard would have to serve thirty-five years before being eligible for parole. He added, however, that previously a defendant was required to serve only fifteen years and that the legislature could change the requirement again. Sheppard maintains that the statement wrongly implied that she could be released from prison in as little as fifteen years and that counsel failed to correct that misconception.

Yet Sheppard ignores that the prosecution also reminded the jurors that “the parole law itself is not for [their] consideration” and that they “[we]re not permitted to consider[] what the [L]egislature might do in the future.” The prosecution’s comments were thus consistent with Texas law, which prohibits the consideration of parole in a capital murder prosecution. *See Rhoades v. State*, 934 S.W.2d 113, 119 (Tex. Crim. App. 1996). As a result, counsel was not deficient in failing to object.

Additionally, Sheppard has not established prejudice. At the punishment phase, the trial judge clarified “that a prisoner serving a life sentence for the offense of capital murder is not eligible for release on parole until the actual calendar time the prisoner has served, without consideration of good time, equals thirty-five (35) years.” Sheppard maintains that the instruction never corrected the prosecution’s corollary statement, which implied that thirty-five years was not guaranteed. Even if that were true, the judge further instructed the jury that it may “not . . . consider or discuss the possible action of the Board of [Pardons] and Paroles or the governor, nor how long a defendant would be required to serve on a sentence of life imprisonment, nor how the parole laws would be applied to this defendant.” Absent any evidence to the contrary, we presume that the jury followed those curative instructions and that any alleged deficiency was therefore harmless. *See Weeks*, 528 U.S. at 234.

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B.

The Equal Protection Clause of the Fourteenth Amendment proscribes the use of a peremptory challenge on the basis of race. *See Batson*, 476 U.S. at 89. To prevail on a *Batson* claim, a defendant must first make a *prima facie* showing that the prosecutor removed a juror on account of race. If the defendant does so, the burden shifts to the prosecution to propound a race-neutral explanation for the peremptory challenge. Lastly, the “court must determine whether the defendant has carried his burden of proving purposeful discrimination.” *United States v. Thompson*, 735 F.3d 291, 296 (5th Cir. 2013). Where, as here, the state volunteered an explanation for the strike, we need not consider the first step of the analysis. *Id.* at 297.

At trial, the prosecutor articulated four independent reasons for striking Simpson. First, Simpson appeared reluctant to impose the death penalty based solely on the facts of the crime. Second, he suggested that he would consider, as a mitigating factor, whether a defendant had children. Third, as a victim of a false arrest, Simpson may have empathized with Sheppard’s situation. Fourth, he displayed “affinity” toward Sheppard by greeting only her and not the prosecution. Because those reasons are facially neutral, we proceed to the final prong of the *Batson* analysis.

Sheppard invokes *Miller-El v. Dretke*, 545 U.S. 231 (2005), in asserting that the state’s explanation is disingenuous. There, the Court recognized that “[i]f a prosecutor’s proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination.” *Id.* at 241. That is true “even if the two jurors are dissimilar in other respects.”¹¹ Sheppard

¹¹ *Reed v. Quarterman*, 555 F.3d 364, 376 (5th Cir. 2009); *see also Miller-El*, 545 U.S. at 247 n.6 (“A *per se* rule that a defendant cannot win a *Batson* claim unless there is an exactly identical white juror would leave *Batson* inoperable; potential jurors are not

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persuasively posits that the prosecutor's first two reasons appear disingenuous, given Chambers's testimony on voir dire. As the state concedes on appeal, Chambers was likewise hesitant to give the death penalty based on the facts of the crime alone and admitted that he would consider a defendant's children when assessing punishment. But even though the first two reasons for striking Simpson applied equally to Chambers, the prosecutor removed only Simpson. The decision to do so therefore suggests that the explanation may have been a pretext for discrimination.

Nevertheless, a *Batson* claim will not succeed where the defendant fails to rebut each of the prosecutor's legitimate reasons.¹² There is no indication that the prosecutor's third reason was pretextual, because Sheppard has not identified a white juror who was the victim of a false arrest and yet was accepted by the State. Sheppard's attempt to portray Herd as a similarly situated juror is unavailing. Whereas Herd stated that his son had been lawfully prosecuted for an incident with his girlfriend, Simpson himself was falsely arrested. Furthermore, Sheppard does not dispute that Simpson acknowledged only her and not the prosecution. Instead, she merely insists that "the claimed 'affinity' between a young black woman and a young black man" is obviously pretextual. Such bald assertions of pretext are unconvincing, especially in light of the deference AEDPA affords to a state court's factual findings.¹³

products of a set of cookie cutters.").

¹² See, e.g., *Fields v. Thaler*, 588 F.3d 270, 277 (5th Cir. 2009) (dismissing a *Batson* challenge where the defendant did not dispute the prosecutor's "additional, race-neutral reasons" for the strike); *Stevens v. Epps*, 618 F.3d 489, 500 (5th Cir. 2010) (rejecting a *Batson* claim "where more than one reason [wa]s given for a strike, and the *Batson* challenger fail[ed] to rebut one of the reasons").

¹³ See *Stevens*, 618 F.3d at 499 (deferring under AEDPA "to the trial court's implicit factual finding that the prosecutor was credible when he stated that . . . he [had]

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Additionally, unlike in *Miller-El*, 545 U.S. at 263, there is no evidence that the district attorney's office had "a specific policy of systematically excluding blacks from juries," nor did the prosecution employ manipulative questioning or "jury shuffles" to remove African-Americans, *id.* at 254, 261. Moreover, insofar as statistical data is useful,¹⁴ the record suggests that the prosecution did not strike Simpson on account of race. Notably, two of the jurors selected were African-American, and the state exercised only three of its nine peremptory challenges against African-American venire members. Hence, the TCCA properly rejected Sheppard's *Batson* claim.

AFFIRMED.

struck [the prospective juror]" because of her demeanor).

¹⁴ See *Medellin v. Dretke*, 371 F.3d 270, 278–79 (5th Cir. 2004) (per curiam) ("For the statistical evidence to be relevant, data concerning the entire jury pool is necessary. The number of strikes used to excuse minority and male jury pool members is irrelevant on its own.").

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KING, *Circuit Judge*, dissenting:

Erica Sheppard was sentenced to death by a jury that did not know that she has brain damage and the cognitive ability of a fourteen-year-old. And the jury heard only isolated snippets of the extensive abuse and trauma that she suffered throughout her life. Unlike the majority, I cannot shrug off these important matters as mere cumulative evidence. I therefore agree with the state trial court and the district court below that Sheppard was prejudiced by her counsel's deficient performance. With respect, I dissent.

I.

The majority accurately restates the sad facts of this case, so I begin with the appropriate standard of review.

As the majority correctly states, under 28 U.S.C. § 2254(d), a habeas petitioner challenging a state-court ruling must demonstrate that the challenged decision either was “contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court,” or was “based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.” *Wilson v. Sellers*, 138 S. Ct. 1188, 1191 (2018). But the Supreme Court has recently explained that “[d]eciding whether a state court’s decision ‘involved’ an unreasonable application of federal law or ‘was based on’ an unreasonable determination of fact requires the federal habeas court to ‘train its attention on the *particular reasons*—both legal and factual—why state courts rejected a state prisoner’s federal claims.’” *Id.* at 1191-92 (emphasis added) (citation omitted). And the Court stated explicitly that, “when the last state court to decide a prisoner’s federal claim explains its decision on the merits in a reasoned opinion . . . , a federal habeas court simply reviews *the specific reasons* given by the state court and defers to *those reasons* if they are reasonable.” *Id.* at 1192 (emphases added). Aside from this deference to the state court’s reasoning, we review

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the district court’s conclusions of law de novo and its findings of fact for clear error. *See Lewis v. Thaler*, 701 F.3d 783, 787 (5th Cir. 2012).

By contrast, the majority notes that, “[t]raditionally, we have focused our review ‘on the ultimate legal conclusion that the state court reached.’” Maj. Op. 10 (quoting *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002) (en banc)). Under *Neal*, the majority says, it is enough that “a plausible argument exists to support the [state court’s] ruling, . . . even if its actual rationale was unreasonable.” *Id.*; accord *id.* (“We consider ‘not only the arguments and theories the state habeas court actually relied upon to reach its ultimate decision but also all the arguments and theories it *could have* relied upon.’” (quoting *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017))).

But that approach is now foreclosed by *Wilson*. In *Wilson*, the Supreme Court explained that the majority’s “‘could have supported’ framework” applies only when a “state court’s decision is unaccompanied by an explanation.” 138 S. Ct. at 1195 (quoting *Harrington v. Richter*, 562 U.S. 86, 98, 102 (2011)). It does not apply when state courts provide “a reasoned decision” that federal courts can review. *Id.*; see also *Thomas v. Vannoy*, 898 F.3d 561, 568 (5th Cir. 2018) (“The continued viability of this approach after the Supreme Court’s decision in *Wilson v. Sellers* is uncertain . . .”), *cert. denied*, 139 S. Ct. 1321 (2019). Indeed, *Wilson*’s central holding is that “when the relevant state-court decision on the merits” does not provide its “reasons,” a federal habeas court should “‘look through’ the unexplained decision to the last related state-court decision that does provide a relevant rationale.” 138 S. Ct. at 1192. The Court’s repeated emphasis on state-court *reasons* would be hard to understand if those reasons were irrelevant to the federal habeas court’s review.¹

¹ The majority expresses doubt that the Supreme Court overruled *Neal* and similar

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Accordingly, the first question we face is whether the actual rationale of the Texas Court of Criminal Appeals was reasonable.²

II.

A.

The TCCA stated its actual rationale clearly and concisely. It rejected the trial court’s conclusion that “counsel was ineffective in the presentation of mitigation evidence at trial” because, it ruled, “the testimony the trial court faults counsel for not developing” would have been “cumulative,” and “[a] decision not to present cumulative testimony does not constitute ineffective assistance.” This reasoning forms the entire basis for the TCCA’s rejection of Sheppard’s ineffective-assistance-of-counsel claim.

This reasoning is unreasonable. To be sure, Sheppard’s trial counsel did present some evidence of Sheppard’s horrific upbringing and the abuse that she had suffered in her life. *See* Maj. Op. 4-6. Accordingly, although trial counsel failed to call lay witnesses who could have testified about Sheppard’s upbringing and abuse in greater detail, the TCCA was not *unreasonable* in

decisions “*sub silentio*.” Maj. Op. 11 n.5. But there is nothing silent about the Court’s explicit language in *Wilson*. And in any event, we would not be the first court of appeals to recognize that *Wilson* means what it says. In *Gish v. Hepp*, 955 F.3d 597 (7th Cir. 2020), for example, the Seventh Circuit, following *Wilson*, rejected as unreasonable a state court’s “exact reasoning” before upholding, on de novo review, that state court’s ultimate conclusion. *Id.* at 601, 604, 607; *see also id.* at 603 (“Where, as here, the state court issued an explanatory opinion, we ‘review[] the specific reasons given by the state court and defer[] to those reasons if they are reasonable.’” (quoting *Wilson*, 138 S. Ct. at 1192)). Similarly, the Eleventh Circuit has explained that *Wilson* “means . . . that we are to focus not merely on the bottom line ruling of the decision but on the reasons, if any, given for it.” *Meders v. Warden, Ga. Diagnostic Prison*, 911 F.3d 1335, 1349 (11th Cir.), *cert. denied sub nom. Meders v. Ford*, 140 S. Ct. 394 (2019).

² The majority asserts that the foregoing is unnecessary to decide because, in this case, “the TCCA’s decision was reasonable.” Maj. Op. 11. For the reasons explained below, I disagree.

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concluding that *that* additional testimony would have been cumulative. But trial counsel's failure to present mitigation testimony went further.

Trial counsel also failed to call expert witnesses who could have testified that Sheppard had the cognitive ability of a fourteen-year-old and that she suffered from organic brain dysfunction, posttraumatic stress disorder, and dissociative disorder. And those expert witnesses could also have testified to the impact that those mental defects had on Sheppard's decision-making processes. For example, one such expert has opined that, "[i]n a confusing, emotional and/or complex situation, Ms. Sheppard would be vulnerable to responding in a non-thinking, automaton-like way rather than as a thinking or reasoning adult. Once action is initiated, Ms. Sheppard's ability to re-evaluate the situation, anticipate the consequences and change her actions would also be impaired." Because of trial counsel's deficient performance, the jury did not hear this testimony or anything like it. In other words, the evidence that trial counsel failed to develop would in no sense have been "cumulative."

B.

The majority disagrees, stating that the "same evidence was substantially before the jury." Maj. Op. 13. The majority recites that the jury heard that "Sheppard experienced depression and mood swings and heard voices in her head" and that "Sheppard was unlikely to pose a continuing threat of violence in the structured confines of prison." *Id.* Consequently, the majority concludes, the evidence presented at the punishment phase of Sheppard's trial "previewed the salient points of the subsequent expert findings," and thus the TCCA was not unreasonable in finding the proposed expert testimony cumulative. *Id.*

The majority's position is difficult to swallow. Evidence that Sheppard had brain dysfunction and the mental development of a child, not to

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mention PTSD and dissociative disorder—and that, as a result, she had significantly impaired ability to make independent decisions in stressful and emotional situations—cannot be dismissed as simply “cumulative” of the evidence that Sheppard “experienced depression and mood swings and heard voices in her head.” Among other things, the evidence of Sheppard’s diminished decision-making ability would have bolstered her story, which was presented to the jury, that she committed the murder while in a state of “shock” after her codefendant “pulled a knife on her” and threatened to kill her baby daughter. Sheppard’s trial counsel did not simply fail to elaborate on *depression and mood swings*; rather, counsel failed to present evidence that Sheppard had “‘significant’ mental and psychological impairments,” *Sears v. Upton*, 561 U.S. 945, 956 (2010). Accordingly, it was unreasonable for the TCCA to dismiss Sheppard’s proposed mitigation evidence as merely cumulative.

III.

Because I conclude that the TCCA’s opinion was unreasonable, I proceed to analyze Sheppard’s claim of ineffective assistance of counsel on the merits. For the following reasons, I agree with the district court and the state trial court that Sheppard has demonstrated that her constitutional rights were violated.³

A.

As part of determining whether counsel’s representation “fell below an objective standard of reasonableness,” *Strickland v. Washington*, 466 U.S. 668, 688 (1984), we examine whether counsel violated his “duty to investigate.” *Id.* at 690. “[C]ounsel has a duty to make reasonable investigations or

³ I concur with the majority’s disposition of Sheppard’s other claims. *See* Maj. Op. 15-20.

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to make a reasonable decision that makes particular investigations unnecessary.” *Id.* at 691. In the context of a capital case, this includes conducting an “adequate investigation in preparing for the sentencing phase . . . , when defense counsel’s job is to counter the State’s evidence of aggravated culpability with evidence in mitigation.” *Rompilla v. Beard*, 545 U.S. 374, 380-81 (2005). “In assessing the reasonableness of an attorney’s investigation,” we “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.” *Wiggins v. Smith*, 539 U.S. 510, 527 (2003).

In this case, Sheppard’s trial counsel, Charles Brown, unreasonably failed to investigate two different avenues of potential mitigation: first, as alluded to previously, he failed to obtain an expert evaluation of Sheppard’s mental condition, and second, he failed to sufficiently investigate Sheppard’s life history.

1.

From the investigation that was performed, Brown was aware that Sheppard had been repeatedly sexually and physically abused as a child, that she suffered from depression, and that she struggled in school. *See* Maj. Op. 5. In addition to these red flags, Brown knew, in his own words, that there were “things about Erica Sheppard that [he] thought only a . . . medical doctor[,] psychologist, or psychiatrist could talk about.” Despite this, however, Brown failed to consult with a neurologist, a neuropsychologist, an expert on the impact of trauma, or an expert on PTSD in preparation for the punishment phase of Sheppard’s trial. Instead, Brown asked Dr. Priscilla Ray, a psychiatrist, to do nothing more than “to evaluate Ms. Sheppard’s competency and sanity, as well as to evaluate whether Ms. Sheppard was likely to be influenced by men who were in a position to be abusive.” Brown did *not* ask Ray to conduct a “psychiatric diagnosis,” and so she did not. And although

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Brown has since testified that he “believe[d]” that evaluating the impact of Sheppard’s childhood abuse was part of Ray’s assignment, it was clear at the time that Ray did not in fact conduct any such evaluation.

Brown’s failure to obtain a more searching psychological evaluation of Sheppard was objectively unreasonable in light of then-prevailing professional norms. According to guidance from the American Bar Association, Brown should have made “efforts to discover all reasonably available mitigating evidence,” including by using “the assistance of experts where it is necessary or appropriate.” ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases 11.4.1 (1989). Although the ABA guidelines are not legally binding, the Supreme Court has “long . . . referred [to them] as ‘guides to determining what is reasonable,’” including this guideline specifically. *Wiggins*, 539 U.S. at 524 (quoting *Strickland*, 466 U.S. at 688). And the Supreme Court has confirmed that failing to obtain expert neuropsychological evaluation of a brain-damaged defendant can constitute constitutionally inadequate representation. *See, e.g., Sears*, 561 U.S. at 949-52; *see also Andrus v. Texas*, 140 S. Ct. 1875, 1882-83 (2020) (determining that counsel provided ineffective assistance where he failed to uncover evidence of trauma and PTSD despite knowing that defendant had a “seemingly serious mental health issue”).

Before the state habeas court, Brown presented no strategic justification for failing to obtain such an evaluation. Nevertheless, the state argues that Brown acted reasonably because the evidence that would have turned up would have been “double-edged.” Even if that were true, that would go toward the question of prejudice, not whether Brown acted reasonably. *See, e.g., Druery v. Thaler*, 647 F.3d 535, 541-42 (5th Cir. 2011); *cf. infra* Section III.B.1. Here, Brown disregarded his duty to make a “thorough investigation of law and facts relevant to plausible options.” *Mejia v. Davis*, 906 F.3d 307, 316 (5th Cir. 2018) (quoting *Rhoades v. Davis*, 852 F.3d 422, 434 (5th Cir.

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2017)), *cert. denied*, 139 S. Ct. 1229 (2019). Only *after* that duty is discharged may a defense attorney make “a tactical decision not to . . . present potentially mitigating evidence on the grounds that it is double-edged.” *Id.* (quoting *St. Aubin v. Quarterman*, 470 F.3d 1096, 1103 (5th Cir. 2006)). Brown’s failure to investigate here was in no sense a tactical decision.

2.

Brown delegated the task of investigating Sheppard’s life history to an investigator. The investigator interviewed Sheppard and discovered that Sheppard “was molested” as a five-year-old and that she “suffered physical abuse from” Jerry Bryant, the father of her third child. These vague accounts hinted at Sheppard’s traumatic life history, yet Brown never asked Sheppard for more details or for a fuller account of her life.

Brown also never interviewed Sheppard’s brother, Jonathan Sheppard. Brown acknowledged that Jonathan “could have helped Erica Sheppard,” but testified that he did not interview Jonathan because Jonathan “appeared” to be uninterested in assisting Sheppard’s defense.

The record, however, belies any such appearance. For one thing, Jonathan willingly met with the investigator, as Brown knew, and even accompanied the investigator as he searched for Bryant. The investigator did not ask Jonathan about Sheppard’s life history, however. Second, Brown’s impression of Jonathan’s unwillingness to assist was based on Jonathan’s failure to affirmatively “come forward” to help Brown when Brown attended the trial of Sheppard’s codefendant. But Brown acknowledged that he didn’t know whether Jonathan even knew who he was at that time. Brown has thus demonstrated no strategic reason for failing to interview Jonathan about Sheppard’s life history.

Brown did speak with Sheppard’s mother, Madelyn McNeil, but he did not interview her about Sheppard’s life history. Brown did not ask

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McNeil about the abuse Sheppard experienced as a child or about Sheppard's pregnancies and trouble in school. The only explanation that Brown offered for why he failed to interview McNeil on these topics is that speaking to her "wasn't very pleasant." That is plainly not a strategic rationale.

In sum, Brown knew, among other things, that Sheppard had had an abusive and traumatic upbringing, but he failed to pursue the details of her life history. *Cf. Wiggins*, 539 U.S. at 527-28 ("[C]ounsel chose to abandon their investigation at an unreasonable juncture, making a fully informed decision with respect to sentencing strategy impossible."). These facts are similar to those in *Andrus*, where the Supreme Court determined that counsel provided ineffective assistance when he "abandoned [his] investigation of [Andrus'] background after having acquired only rudimentary knowledge of his history from a narrow set of sources." 140 S. Ct. at 1882 (alterations in original) (citation omitted); *see also id.* ("Aside from Andrus' mother and biological father, counsel did not meet with any of Andrus' close family members, all of whom had disturbing stories about Andrus' upbringing."). In much the same way, Brown's representation at the sentencing phase of Sheppard's trial was constitutionally deficient. *See, e.g., Porter v. McCollum*, 558 U.S. 30, 40 (2009) (ruling counsel ineffective where he "ignored pertinent avenues for investigation of which he should have been aware").

B.

"In order for counsel's inadequate performance to constitute a Sixth Amendment violation, petitioner must show that counsel's failures prejudiced [her] defense." *Wiggins*, 539 U.S. at 534 (citing *Strickland*, 466 U.S. at 692). "Under *Strickland*, a defendant is prejudiced by [her] counsel's deficient performance if 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.'" *Porter*, 558 U.S. at 40 (quoting *Strickland*, 466 U.S. at 694). "Here,

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prejudice exists if there is a reasonable probability that, but for [her] counsel's ineffectiveness, the jury would have made a different judgment about whether [Sheppard] deserved the death penalty as opposed to a lesser sentence." *Andrus*, 140 S. Ct. at 1885-86. Because Texas law requires unanimity to impose the death penalty, Sheppard can demonstrate prejudice by showing a reasonable probability that even one juror would have changed his or her mind. *See id.* at 1886. Sheppard has met that burden.

1.

As already discussed, had Brown pursued a neuropsychological evaluation of Sheppard, he would have uncovered evidence that she had organic brain dysfunction, PTSD, dissociative disorder, and the cognitive ability of a fourteen-year-old. *See supra* Section II.A. And had he obtained this information, it would have been reasonable for him to present it to the jury, particularly in light of his avowed strategy of trying to convince the jury to "[t]ake mercy upon [Sheppard]."

This is precisely the sort of mitigation evidence that the Supreme Court has recognized might sway death-penalty jurors. In *Rompilla*, for instance, defense counsel unreasonably failed to uncover evidence that the defendant suffered from "organic brain damage" and had "a third grade level of cognition." 545 U.S. at 391-92 (citation omitted). Combining this with un-presented evidence of the defendant's abusive and traumatic childhood, *cf. infra* Section III.B.2, the Court determined that the defendant had "shown beyond any doubt that counsel's lapse was prejudicial." *Rompilla*, 545 U.S. at 390. Similarly here, Brown's failure to uncover and present this evidence prejudiced Sheppard.

The state asserts that evidence of Sheppard's mental condition would have been double-edged "because the jury may have seen the mental disorders as increasing Sheppard's future dangerousness." The state cites *Druery*

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for this proposition, but in *Druery* this court concluded that evidence of mental illness would have been double-edged only because it would have undermined the defense's theory that the defendant's erratic behavior was due to drug use. *See* 647 F.3d at 540-42. By contrast, evidence that Sheppard was intellectually disabled, with the mind of a child, would not have undermined any of Brown's penalty-phase argument.⁴

2.

Had Brown discussed Sheppard's life history with Jonathan, McNeil, or Sheppard herself, he would have discovered—and then presented to the jury—substantially more information about Sheppard's traumatic life. *Cf.* Maj. Op. 6-7. Sheppard, for instance, could have testified that, when she was as young as three, she was physically abused by her regular babysitter, who beat her with extension cords, belts, and “whatever else [she] could get her hands on.” This babysitter also forced Sheppard to walk to the store barefoot, causing her to burn her feet on the blacktop and cut her feet on broken glass. Sheppard could also have provided detailed testimony into her mother's physical abuse: She could have testified that her mother sometimes beat her so severely that her grandmother would physically intervene. And when she first became pregnant, at age thirteen, her mother “beat [her] half to death.” Sheppard could have testified that her mother took various lovers, some of whom also physically abused Sheppard and her brother. And she could have testified that she ultimately moved out of her mother's house after her mother strangled her with a telephone cord. Sheppard could have testified that, at around age sixteen, she was drugged and raped at a party. Sheppard could have provided detailed testimony about Bryant's abuse as well: For

⁴ As the majority notes, Brown's argument against future dangerousness was that, in prison, Sheppard would be “insulated from the influence of abusive men.” Maj. Op. 5.

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example, he once ran her car off the road while she was pregnant with his child. Later, after their child was born, the child became very sick and had to be hospitalized for weeks. Sheppard stayed with the child at the hospital, and Bryant came to the hospital, demanded that she come home so that he could have sex with her, and beat her until she lost consciousness. Bryant also repeatedly threatened Sheppard with knives and guns. Sheppard ultimately left Bryant after another beating, during which he dented her skull.

Sheppard's brother Jonathan also could have testified to her lifetime of abuse. He could have testified that their babysitter beat them, whipped them with electrical cords, and made them walk barefoot to the store. He could have testified that their grandmother beat them with a belt or with switches, and that their mother would beat them with "whatever she could find." And he could have testified about the time that Bryant attacked Sheppard at the hospital.

Finally, McNeil could also have testified to her daughter's traumatic life history. She could have testified that, from a young age, Sheppard witnessed physical fights between her father and McNeil. She could have testified that, at thirteen years old, Sheppard was sexually involved with a man in his twenties, and she could have corroborated that she whipped Sheppard when Sheppard first got pregnant. She also could have testified about the incident at the hospital and that Sheppard repeatedly fled to McNeil's home for fear of Bryant.

Because of Brown's failure to investigate, none of the foregoing information was presented to the jury. This case is thus similar to *Wiggins*, in which defense counsel unreasonably failed to uncover evidence that the defendant, who had a "diminished mental capacity," had "suffered physical torment, sexual molestation, and repeated rape" during his childhood. 539 U.S. at 535. In *Wiggins*, the Supreme Court found "a reasonable probability

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that a competent attorney, aware of this history, would have introduced it at sentencing in an admissible form.” *Id.* And the Court found that “had the jury been confronted with this considerable mitigating evidence, there is a reasonable probability that it would have returned with a different sentence.” *Id.* at 536. So too here.

The state argues that Sheppard was not prejudiced by Brown’s failure to present this additional mitigation evidence because there is “no reasonable probability” that the evidence “would have persuaded the jury that Sheppard would not be dangerous in the future.” But “[m]itigating evidence unrelated to dangerousness may alter the jury’s selection of penalty, even if it does not undermine or rebut the prosecution’s death-eligibility case.” *Williams v. Taylor*, 529 U.S. 362, 398 (2000). For instance, in a case where evidence showed that the defendant, convicted of murder, had also committed “two separate violent assaults on elderly victims” and had “set[] a fire in the jail while awaiting trial,” the Supreme Court observed that a “graphic description” of his “childhood[] filled with abuse and privation” might nevertheless change the jury’s mind as to his “moral culpability.” *Id.* at 368, 398.

Similarly, the majority asserts that “Sheppard has not shown that, but for her counsel’s failure . . . , ‘the result of the proceeding would have been different.’” Maj. Op. 15 (quoting *Andrus*, 140 S. Ct. at 1881). But Sheppard does not need to prove that Brown’s ineffective assistance “more likely than not altered the outcome in the case.” *Strickland*, 466 U.S. at 693. Rather, she is required to show only a “reasonable probability” that one juror, having heard about her immature mental state and grim history of abuse, would have changed his or her mind about condemning her to death. *See Andrus*, 140 S. Ct. at 1885-86. Like the state trial court and the district court below, I believe that Sheppard has made this showing.

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IV.

For the foregoing reasons, I would reverse the judgment of the district court.

ENTERED

March 29, 2017

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ERICA YVONNE SHEPPARD,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 4:14-0655
	§	
LORIE DAVIS, Director, Texas	§	
Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

**MEMORANDUM AND ORDER DENYING
PETITION FOR WRIT OF HABEAS CORPUS**

Petitioner Erica Yvonne Sheppard is a Texas death row inmate. This case is before the Court on Sheppard's Amended Petition for Writ of Habeas Corpus [Doc. # 28], and Respondent Lorie Davis' Motion for Summary Judgment [Doc. # 46] ("Motion"). Having carefully considered the Amended Petition, the Summary Judgment Motion, Sheppard's Reply to the Motion, all the arguments and authorities submitted by counsel, and the entire record, the Court is of the opinion that Davis' Motion must be **granted**, and Sheppard's Amended Petition for Writ of Habeas Corpus should be **denied**. The Court grants a certificate of appealability on certain aspects of Sheppard's ineffective assistance of counsel claim regarding the punishment phase of her trial.

I. BACKGROUND

Sheppard was convicted of capital murder and sentenced to death on March 3, 1995, for murdering Marilyn Sage Meagher during the course of robbing Meagher. On June 30, 1993, Meagher's daughter discovered her mother's body in a spare bedroom of an apartment she shared with her mother in Houston, Texas. 20 Tr. at 18-19, 39-42.¹ When law enforcement arrived at the scene, they found Meagher's body under a pile of bed linens, with

¹ "Tr." refers to the transcript of Sheppard's trial.

a plastic dry cleaning bag wrapped around her head. There were three knives and a broken statue nearby. *Id.* at 95-102. Police recovered a finger and palm print, subsequently matched to Sheppard's left hand, from the door leading to the spare bedroom. *Id.* at 197-206.

An autopsy revealed a number of stab wounds on Meagher's body, several of them very deep. 21 Tr. at 177-78, 185-87. Injuries to Meagher's head were consistent with a statue being slammed into her head with "a great deal of force." *Id.* at 187.

The day after the murder, Korey Jordan contacted the police. 20 Tr. at 114. Jordan was friends with Sheppard's brother, Jonathan. He was at Jonathan's apartment in the same complex as Meagher's the day before the murder. There, he heard Sheppard and James Dickerson talk about robbing or carjacking someone. 21 Tr. at 90-98.

Jordan testified that, when Dickerson complained that he needed money, Sheppard replied "let's go back to the old theme." *Id.* at 96. Dickerson stated: "If taking a life is what I have to do to get some money, then that's what I have to do." Sheppard responded that she'd "rather catch a . . . skinny white woman walking between her car and her apartment with no children." *Id.* at 98-99. Dickerson got two knives from Jonathan's kitchen, one of which looked like a knife recovered from the crime scene, and talked to Sheppard about the best clothes to wear for committing the crime. *Id.* at 99-101. They left Jonathan's apartment wearing dark clothes. *Id.* at 101-02.

The day after the murder, police found Meagher's vehicle in Bay City, Texas. 20 Tr. at 117. A witness testified that he saw both Sheppard and Dickerson use the vehicle on the same evening that Meagher's body was found. 21 Tr. at 12-17. Police recovered Dickerson's fingerprint from the vehicle. 20 Tr. at 177-78.

The following day, police arrested Sheppard and Dickerson in a motel room in Bay City. 21 Tr. at 39-42. They recovered a knife similar to one found near Meagher's body from a drawer containing women's clothing in the motel room. *Id.* at 46-47. Sheppard subsequently confessed to the murder. *Id.* at 142-43.

During the penalty phase of Sheppard's trial, the State introduced evidence that Sheppard unsuccessfully attempted to "jack" another female victim the night before the Meagher murder, 25 Tr. at 7, 10, 19, 40-42, and that Sheppard also admitted to a friend that

she would “jack” cars and sell the parts, *id.* at 64-65. The state also presented evidence that Sheppard participated in a drive-by shooting with Jerry Bryant, Jr. (“Bryant”), the father of Sheppard’s youngest child, on November 17, 1991. *Id.* at 75-114. Sheppard drove the car. *Id.* at 78-79.

The State further presented evidence that Sheppard had a poor reputation for being peaceful and law abiding in her hometown. *Id.* at 124, 131. Two witnesses who were housed with Sheppard during her pretrial detention testified that Sheppard drew attention to news coverage of the Meagher murder “like she was bragging.” *Id.* at 137-38, 161. The State presented evidence that Sheppard spoke callously about the murder, *id.* at 138-39, threatened to harm a fellow inmate, and asked how she could fake her way into a section of the jail reserved for inmates with mental disorders, *id.* at 141-44.

Meagher’s family testified about the impact her death had on them. Her son testified that he felt like he was robbed of 20 or 30 years with his mother. He sought help from a psychologist to cope with his mother’s murder. *Id.* at 169-72. Meagher’s sister also testified about the impact of the murder on her and her children. *Id.* at 176-79.

In the defense case during the punishment phase, Sheppard presented documents and testimony from the Director of the Matagorda County Women’s Crisis Center, an organization that provides shelter for abused women and children, that she stayed at the Center. 26 Tr. at 31-33. The documents show that she went to the Center due to domestic abuse, and that Center staff referred her to a legal aid attorney for assistance in obtaining a protective order and a divorce. *Id.* at DX² 2-B. She presented similar evidence from Covenant House, an emergency shelter for runaway and homeless youth, that she spent time there. *Id.* at 35-37.

Sheppard first stayed at Covenant House when she was 16 years old. She had a young child at that time. The Houston Police Department referred her to Covenant House due to conflict between Sheppard and her mother. She stayed at Covenant House a second time when she was 17 years old. *Id.* at DX 3-B.

² “DX” refers to the Defendant’s trial exhibits.

Sheppard also called psychiatrist Priscilla Ray, M.D. Dr. Ray presented a clinical evaluation based on a two-hour interview of Sheppard. DX4-B, at 1. Defense counsel asked Dr. Ray to evaluate Sheppard for competency to stand trial, sanity, and her susceptibility to influence by men who were in a position to abuse her. Am. Pet., App. 24, at 2. Dr. Ray's clinical conclusions focused on Sheppard's competency to stand trial rather than development of mitigation evidence. DX 4-B. at 5. Dr. Ray testified that Sheppard suffered from depression, which was only partially treated. She opined that there was a genetic component to Sheppard's depression based on her family history. 26 Tr. at 41-42. Dr. Ray also testified that Sheppard seemed remorseful for the murder. *Id.* at 45. Based on Sheppard's mental status, her history, the nature of her crime, and general relevant statistics, Dr. Ray opined that Sheppard was unlikely to engage in future acts of violence, either in prison or in society. *Id.* at 43-46. Dr. Ray testified that Sheppard was more of a follower than a leader, and would be less likely to commit acts of violence if not in "a situation in which a man is likely to be abusive or possibly may be abusive and has some sway over her." *Id.* at 60-61.

Dr. Ray's expert report was also admitted into evidence. The report stated that Sheppard was raised by her maternal grandmother, that both her mother and her grandmother had significant health problems, that her parents divorced when she was young and her father was not a frequent presence in her life, and that she has a brother, a half brother, and a step brother. DX 4-B. Dr. Ray did not testify to these facts or elaborate. Dr. Ray's report revealed that Sheppard dropped out of school in tenth grade because she was pregnant. She eventually obtained a GED and attended school to become a medical assistant. She dropped out because Bryant, her boyfriend at the time, wanted her at home. *Id.* Sheppard reported being sexually abused as a child by a friend of her mother's. Sheppard reported the abuse to her mother, but her mother did not believe her. She also reported being raped by a stranger when she was a teenager, and being abused by Bryant, the father of her third child. *Id.* The abuse by Bryant included striking Sheppard and threatening to kill her. *Id.* Sheppard also told Dr. Ray her version of the events regarding Meagher's murder. She denied agreeing to harm anyone the day before the murder, and claimed that she told

Dickerson, who was Sheppard's brother's romantic partner, *see* 22 Tr. at 15, to get a job if he needed money. She further claimed that Dickerson threatened to kill her and her baby if she didn't help him with the robbery-murder, that she acted under duress, and that Dickerson planted the knife in her clothing drawer at the motel. DX 4-B.

Sheppard also called as a witness Patrice Green, a lifelong friend. Green testified that Sheppard attended church regularly, had three children, and worked for Green's husband, a Justice of the Peace. 26 Tr. at 70-73.

Sheppard's grandmother, Annie Smith, testified that she was Sheppard's primary caregiver during Sheppard's youth, and that Sheppard lived with Smith more than with her own mother. Smith testified that Sheppard lived with her for most of the first 20 years of her life. *Id.* at 75-77. She also testified briefly that Bryant abused Sheppard. Sheppard moved away from her grandmother to try to evade Bryant. *Id.*

The jury found that there was a probability that Sheppard would commit future acts of criminal violence posing a danger to society, that she caused, intended to cause, or intended for another to cause Meagher's death, and that the mitigating evidence was insufficient to warrant a life sentence. 28 Tr. at 5-7. Accordingly, the trial court sentenced Sheppard to death.

The Texas Court of Criminal Appeals ("TCCA") affirmed Sheppard's conviction and sentence. *Sheppard v. State*, No. AP-72,127 (Tex. Crim. App. June 18, 1997). Sheppard did not seek *certiorari* from the Supreme Court of the United States.

Sheppard filed a state application for a writ of habeas corpus raising 40 claims for relief, including numerous claims of ineffective assistance of counsel. *See* 1 SHCR at 3-10.³ The state habeas court held an evidentiary hearing on Sheppard's ineffective assistance of counsel claims, which included testimony and an affidavit by Hazel Bolden, Sheppard's second chair trial counsel, opining that lead counsel Charles A. Brown did a poor job

³ "SHCR" refers to the Clerk's Record from Sheppard's state habeas corpus proceeding.

representing Sheppard. 2 WH at 220-26.⁴ The trial court entered extensive written findings of fact and conclusions of law, *see* 5 SHCR at 1310-71, and recommended granting relief on Sheppard's claim that trial counsel rendered ineffective assistance

at the punishment phase of applicant's trial in failing to present or fully develop evidence regarding the applicant's background and failure to present testimony expert or otherwise that would allow the jury to understand the implications of the applicant's background including physical abuse sexual abuse or domestic violence for consideration in determining the answer to the special issues.

Id. at 1338.

The TCCA denied Sheppard's application for a writ of habeas corpus, rejecting the trial court's recommendation to grant relief on the ineffective assistance of counsel claim. *Ex Parte Sheppard*, No. WR-78132-01, 2013 WL 5568434 (Tex. Crim. App. Oct. 9, 2013) (*per curiam*). On May 19, 2014, the Supreme Court denied Sheppard's petition for a writ of *certiorari*. *Sheppard v. Texas*, 134 S. Ct. 2288 (2014).

Sheppard filed her initial federal petition for a writ of habeas corpus on March 18, 2014. She amended her petition on April 17, 2015. Before the Court is Respondent's Motion for Summary Judgment filed June 24, 2016, along with her Amended Answer to the Amended Petition. Sheppard responded to the Motion on September 7, 2016, and Respondent replied on November 7, 2016.

II. APPLICABLE LEGAL STANDARDS

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas corpus relief is governed by the applicable provisions of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"). *See Woodford v. Garceau*, 538 U.S. 202, 205-08 (2003); *Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable

⁴ "WH" refers to the transcript of Sheppard's state writ hearing.

determination of the facts in light of the evidence presented in the State court proceeding.” 28 U.S.C. § 2254(d); *Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision “was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent].” *See Kittelson v. Dretke*, 426 F.3d 306, 318 (5th Cir. 2005). Under the “contrary to” clause, this Court may afford habeas relief only if “the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.” *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Williams v. Taylor*, 529 U.S. 362, 406 (2000)).

The “unreasonable application” standard permits federal habeas relief only if a state court decision “identifies the correct governing legal rule from [the Supreme Court] cases but unreasonably applies it to the facts of the particular state prisoner’s case.” *Williams*, 529 U.S. at 406. “In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts.” *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court’s “focus on the ‘unreasonable application’ test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence.” *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff’d*, 286 F.3d 230 (5th Cir. 2002) (en banc); *see also Pape v. Thaler*, 645 F.3d 281, 292-93 (5th Cir. 2011). The focus for a federal court under the “unreasonable application” prong is “whether the state court’s determination is ‘at least minimally consistent with the facts and circumstances of the case.’” *Id.* (quoting *Neal*, 239 F.3d at 696, and *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) (“Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies

the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be ‘unreasonable.’”)

The AEDPA precludes federal habeas relief on factual issues unless the state court’s adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254(d)(2); *Martinez v. Caldwell*, 644 F.3d 238, 241-42 (5th Cir. 2011). The state court’s factual determinations are presumed correct unless rebutted by “clear and convincing evidence.” 28 U.S.C. § 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997).

This Court may only consider the factual record that was before the state court in determining the reasonableness of that court’s findings and conclusions. *Cullen v. Pinholster*, 563 U.S. 170 (2011). Review is “highly deferential,” *Woodford v. Visciotti*, 537 U.S. 19, 24 (2002) (*per curiam*), and the unreasonableness standard is “difficult [for a petitioner] to meet.” *Harrington v. Richter*, 562 U.S. 86, 102 (2011).

B. Summary Judgment Standard in Habeas Corpus Proceedings

In ordinary civil cases, a district court considering a motion for summary judgment is required to construe the facts of the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) (The “evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor”). “As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases.” *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir. 2000). This principle is limited, however; Rule 56 applies insofar as it is consistent with established habeas practice and procedure. *See Smith v. Cockrell*, 311 F.3d 661, 668 (5th Cir. 2002) (citing Rule 11 of the Rules Governing Section 2254 Cases). Therefore, § 2254(e)(1) – which mandates that findings of fact made by a state court are “presumed to be correct” – overrides the ordinary summary judgment rule that all disputed facts must be construed in the light most favorable to the nonmoving party. *See id.* Unless the petitioner can “rebut[] the presumption of correctness by clear and convincing evidence” regarding the state court’s findings of fact, those findings must be accepted as correct. *See id.* Thus, the Court may not construe the facts in the state petitioner’s favor

where the prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness in 28 U.S.C. § 2254(e)(1) should not apply. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997).

III. ANALYSIS

Sheppard's petition raises seven broad claims for relief with numerous subparts. Respondent groups the claims and identifies 19, including subclaims in the pending Amended Petition. This includes five broad claims of ineffective assistance of counsel. Sheppard responds that she intends to raise only one overriding claim of ineffective assistance of counsel at the punishment phase of her trial consisting of several instances in which counsel's conduct fell below prevailing professional norms, *see* Reply to Mot. for Sum. Jmt. [Doc. # 49], at 28, as well as several claims of ineffective assistance of counsel during the guilt-innocence phase and on appeal. The Court examines each specific instance raised by Sheppard, and considers whether counsel's acts and omissions, singly or in combination, amounted to constitutionally ineffective assistance of counsel. They are addressed in turn.

A. Ineffective Assistance of Counsel

Sheppard contends that she received ineffective assistance of counsel at both the guilt-innocence and punishment phases of her trial. To prevail on a claim for ineffective assistance of counsel, Petitioner "must show that . . . counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed by the Sixth Amendment," and "the deficient performance prejudiced the defense." *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To prove "prejudice" under the *Strickland* test, there must be a showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable. *Id.* at 687.

In order to prevail on the first prong of the *Strickland* test, the "deficient performance" prong, Petitioner must demonstrate that counsel's representation fell below an objective

standard of reasonableness. *Id.* at 687-88. Reasonableness is measured against prevailing professional norms, and must be viewed under the totality of the circumstances, avoiding the distorting effects of hindsight. In the context of a capital sentencing proceeding, “the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 465 U.S. at 695. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. As the Fifth Circuit succinctly framed this concept: “Is this additional mitigating evidence so compelling that there is a reasonable probability at least one juror could reasonably have determined that . . . death was not an appropriate sentence?” *Neal v. Puckett*, 239 F.3d 683, 692 (5th Cir. 2001). This requires a “substantial, not just conceivable, likelihood of a different result.” *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011)(quotation marks omitted).

Review of counsel’s performance is deferential, and counsel enjoy a strong presumption that their conduct is within the “wide range” of the bounds of professional norms. *Strickland*, 466 U.S. at 689; *Id.* at 688-90. A petitioner’s burden is to show “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland*, 466 U.S. at 687. To make this determination, a reviewing court must “consider *all* the relevant evidence that the jury would have had before it if [Sheppard] had pursued [a] different path—not just the mitigation evidence [Sheppard] could have presented, but also the . . . evidence that almost certainly would have come in with it.” *Wong v. Belmontes*, 558 U.S. 15, 20 (2009).

The Supreme Court has explained, in any event, that when a state court has adjudicated a claim of ineffective assistance of counsel on the merits, the petitioner bears an especially heavy burden.

Establishing that a state court's application of *Strickland* was unreasonable under § 2254(d) is all the more difficult. The standards created by *Strickland* and § 2254(d) are both “highly deferential,” [*Strickland*, 466 U.S.] at 689, 104 S. Ct. 2052; *Lindh v. Murphy*, 521 U.S. 320, 333, n.7, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997), and when the two apply in tandem, review is “doubly” so, *Knowles [v. Mirzayance]*, 556 U.S., at 123, 129 S. Ct. [1411], at 1420. The *Strickland* standard is a general one, so the range of reasonable applications is

substantial. 556 U.S., at 123, 129 S. Ct., at 1420. Federal habeas courts must guard against the danger of equating unreasonableness under *Strickland* with unreasonableness under § 2254(d). When § 2254(d) applies, the question is not whether counsel's actions were reasonable. The question is whether there is any reasonable argument that counsel satisfied *Strickland*'s deferential standard.

Harrington v. Richter, 562 U.S. 86, 105 (2011). As the Fifth Circuit has explained:

That a federal habeas court would reach a different conclusion is not enough, standing alone, to merit relief under AEDPA's high standard. *See [Williams v. Taylor*, 529 U.S. 362,] 411, 120 S. Ct. 1495 [(2000)]. As the Supreme Court recently reiterated, "even a strong case for relief does not mean the state court's contrary conclusion was unreasonable." *Richter*, [562 U.S. at 102].

Trottie v. Stephens, 720 F.3d 231, 240–41 (5th Cir. 2013). If the Court finds that counsel rendered deficient performance, the cumulative effect of any deficiencies may be sufficient to satisfy *Strickland*'s prejudice prong, even if no particular instance of deficient performance is enough, by itself, to constitute *Strickland* prejudice. *See, e.g., Moore v. Johnson*, 194 F3d 586, 619 (5th Cir. 1999).

1. Punishment Phase

Sheppard argues that trial counsel failed to investigate and to present adequate evidence on both the future dangerousness and the mitigation special issues.⁵ The Court has considered all Sheppard's contentions in connection with whether counsel's performance was deficient and whether any deficiencies caused prejudice in connection with each special issue. Sheppard's arguments on each special issue overlap substantially. The Court therefore focuses on arguments regarding mitigation first and addresses future dangerousness thereafter.

a. Mitigation Special Issue

⁵ The Texas capital sentencing scheme at the time of Sheppard's trial first required a jury to first answer two special issues: (1) whether the defendant posed a future danger to society; and (2) whether she actually caused, or intended to cause, or intended for another to cause, the death of the victim. SHCR at 1432-33. Only after answering these two questions in the affirmative did the jury proceed to the mitigation special issue. That special issue asks whether there is sufficient mitigating evidence to warrant a life sentence rather than a death sentence.

I. Performance Prong

Sheppard first argues that counsel rendered ineffective assistance under *Strickland* by failing to investigate and develop meaningful mitigation evidence and, accordingly, failing to make an adequate mitigation presentation to the jury. The Court concludes that it is a close question whether the TCCA was unreasonable in finding that counsel was not deficient and that there was no prejudice to Sheppard, but concludes that Sheppard has not met her heavy burden under the AEDPA.

Overview. Sheppard acknowledges that counsel retained an investigator, but contends that neither lead nor the other counsel followed up on useful information the investigator discovered. *E.g.*, Am. Pet. at 50. Sheppard asserts, with virtually uncontested evidentiary support, that her trial counsel was aware before trial that: she was physically and verbally threatened by Dickerson on the day of the murder; she had been sexually abused as a child, and that her mother did not believe her allegations of sexual abuse; she was physically abused by Bryant, the father of her third child; and she had a family history of depression, among other difficulties she faced. She complains that counsel was grossly ineffective because they failed to develop available evidence concerning the implications of her substantial childhood difficulties. Had counsel followed up with interviews of many family members, people with knowledge of her stays at the women's shelters, and experts to evaluate her to assess the impact of these experiences, these witnesses could have educated the jury about the effect of these numerous negative experiences on her, and thus enabled the jury to evaluate them for mitigation.

As Sheppard acknowledges, some information about these issues was presented through the expert report and testimony of Dr. Priscilla Ray, a psychiatrist. She argues, however, that the testimony was far too limited, in part because Dr. Ray's assignment from trial counsel Brown was merely to focus on competency and sanity, and to determine whether she was likely to be influenced by men who were in a position to abuse her, *see* Pet. Resp., at 76 *et seq.*, an unreasonably narrow assignment under the circumstances of this case. Sheppard contends that she and Dr. Ray talked for only two hours, and Dr. Ray's report was a mere five pages. Further, the report presented matters in "skeletal fashion."

Sheppard argues that counsel should have called as witnesses Sheppard herself, her mother, and/or her brother to present more detailed testimony on these matters. Lead trial counsel Brown also admitted at the state habeas hearing that he did not ask Dr. Ray or Sheppard's grandmother, Annie Smith, about Sheppard's history of abuse, pregnancies and abortions, or any personal or family history of mental illness. 2 WH at 160-62.

Sheppard further contends that counsel should have, but did not, retain a mitigation expert, a social worker, a neurologist, a neuropsychologist, and experts on child abuse, spousal abuse, trauma, and post-traumatic stress disorder ("PTSD"). She complains, as noted, that Brown failed to give the one expert he had retained, psychiatrist Dr. Ray, sufficiently broad instructions to enable her to address subjects pertinent to mitigation (and future dangerousness). *See* Pet. Resp., at 76-82. Sheppard now presents expert opinion evidence that, had Dr. Ray or other experts been retained prior to trial, they would have been able to testify to the jury that she has below average intelligence, which results in faulty social judgment and a compromised ability to exercise judgment in demanding, novel, or unclear situations. Sheppard also exhibits symptoms of organic brain dysfunction. Am. Pet., App. 25. She also presents expert opinion evidence that she suffers from PTSD, major depression, and dissociative disorder as a result of repeated instances of physical, emotional, and sexual abuse, Am. Pet., App. 26, and poses a low risk of committing future acts of violence, Am. Pet., App. 6.

Sheppard's arguments amount to a weighty failure to investigate claim. "[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v. Smith*, 539 U.S. 510, 521 (2003) (internal quotation marks and alteration omitted) (quoting *Strickland*, 466 U.S. at 690-91). When assessing the reasonableness of an attorney's investigation, 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." *Id.* at 527. To establish that an attorney was ineffective for failure to investigate, a petitioner must allege with specificity what the investigation would have revealed and how it would have changed the outcome of the trial. *See United States v. Green*, 882 F.2d 999,

1003 (5th Cir. 1989).

State Habeas Ruling on Ineffective Assistance of Counsel on Mitigation Issue. The state habeas trial court recommended granting relief on Sheppard's claim that counsel failed to investigate and develop mitigating evidence to present at the penalty phase, *Id.* at 1338. That court, while concluding that Brown provided effective counsel during the guilt-innocence phase, found that

trial counsel provided ineffective assistance at the punishment phase of [Sheppard]'s trial in failing to present or fully develop evidence regarding [Sheppard]'s background and failing to present testimony expert or otherwise that would allow the jury to understand the implications of [Sheppard]'s background including physical abuse, sexual abuse or domestic violence for consideration in determining the answer to the special issues. The Court finds that this failure resulted in a violation of [Sheppard]'s constitutional rights.

5 SHCR at 1337-38.

The TCCA disagreed and denied relief. *Ex Parte Sheppard*, 2013 WL 5568434 at *1. The TCCA held that counsel presented several witnesses who testified about Sheppard's background and presented records from the Matagorda Women's Crisis Center and Covenant House. The Court noted that defense counsel also presented Dr. Ray's testimony and expert report. Therefore, the TCCA held, the evidence Sheppard faults counsel for not presenting was cumulative of the evidence that was presented. *Id.* at **1-2. As explained hereafter, this Court disagrees with the TCCA's conclusion. However, under applicable Fifth Circuit authority, the Court concludes the Fifth Circuit would not find the TCCA was unreasonable.

Bar Association Guidelines. Sheppard cites numerous authorities and materials to argue that counsel had a well-established duty to investigate her life and mental health history, and develop and present mitigation evidence. *See* Am. Pet. at 28-49 (citing ABA and Texas State Guidelines, as well as CLE materials issued before Sheppard's trial, and other authorities discussing relevant standards). She contends that counsel's investigation did not comply with the relevant American Bar Association Guidelines, or the 1994 State Bar of Texas Guidelines for capital case representation. This is true. However, the Fifth Circuit has taken the position in an unpublished ruling that the ABA Guidelines are not controlling.

The ABA Guidelines do not control our assessment. The Supreme Court has

explained that “the Federal Constitution imposes one general requirement: that counsel make objectively reasonable choices.” *Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (quotation marks and citation omitted). “The question is whether an attorney’s representation amounted to incompetence under ‘prevailing professional norms,’ not whether it deviated from best practices or most common custom.” *Premo v. Moore*, 131 S. Ct. 733, 740 (2011) (quoting *Strickland*, 466 U.S. at 690). We look for guidance about the norms in the relevant state as they existed at the time of the trial. *See Wiggins v. Smith*, 539 U.S. 510, 524 (2003). . . . The Guidelines are helpful only if they “reflect prevailing norms of practice.” *Van Hook*, 130 S. Ct. at 17 n.1 (quotation marks and citation omitted). The Guidelines also “must not be so detailed that they would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.” *Id.* (quotation marks and citation omitted). Whether a counsel’s decisions are legitimate will depend on the circumstances. *Id.* at 16.

Ayestas v. Thaler, 462 F. App’x 474, 479 (5th Cir. 2012), *vacated on other grds.*, 133 S. Ct. 2764 (2013). It is assumed that the same conclusion would apply to the 1994 State Bar of Texas Guidelines. This is an issue for further appellate consideration.

During postconviction proceedings, Sheppard presented important evidence from witnesses who observed her suffer abuse at the hands of her mother and her boyfriend, people who knew Sheppard as a youth and could testify to her character, background, and difficult life circumstances. Sheppard identifies numerous such witnesses who could have testified on her behalf during the punishment phase, but who were never called. *See, e.g.*, Pet. Resp. at 32-33.

Analysis of Trial Counsel’s Performance. Based on the habeas and trial records, it appears that Brown engaged in not insubstantial preparation for Sheppard’s trial, but failed to do all that was appropriate. The TCCA rejected the state habeas court’s recommendation to grant Sheppard’s ineffective assistance of counsel claim in investigating and presenting evidence in mitigation at the punishment phase. *Ex Parte Sheppard*, 2013 WL 5568434 at **1-2. The TCCA’s conclusions are highly questionable in light of the trial and habeas records presented.

The state habeas record established that the state trial court held a live hearing at which Brown testified. He explained that, at the time of Sheppard’s trial, he had about 13 years experience as a criminal lawyer after graduation from Texas Southern University Law

School. Charles Brown Affidavit, Am. Pet., App. 1, ¶ 2. He perceived the case to be a “high profile one in which the prosecution and court were under an extraordinarily [sic] level of pressure to obtain a conviction and death sentence.” *Id.*, ¶ 11.⁶ While he had tried one capital murder case before Sheppard’s, he did so as second chair. *Id.*, ¶ 8. He testified at the state habeas hearing that he had tried between 10 and 20 murder cases, and “a lot” of first degree felony cases. 2 WH at 94-96.

At Brown’s request, the trial court appointed two other attorneys to assist him with Sheppard’s defense. *Id.* at 29-30. Brown, however, states he was dissatisfied with the second-chair attorney, Hazel Bolden, an eight year attorney, as too inexperienced to be of value and gave her little to do. *See* Brown Aff., ¶¶ 14-15, 17, 40-42; *see* Hazel Bolden Affidavit, Am. Pet., App. 2; 2 WH at 199-205. The third attorney appointed by the trial court was appointed 17 months after Brown, days after jury selection had begun and “did not begin participating in the defense until the day that trial began.” Brown Aff., ¶¶ 5, 15. Thus, there was uncontradicted evidence before the state habeas court that all the attorneys were inexperienced in capital defense and largely if not totally unprepared on many matters. Neither Bolden nor Woldy met with the investigator appointed by the court or any witnesses for Sheppard. *Id.*, ¶ 17; Bolden Aff., ¶¶ 7-40.⁷ Bolden states she was not aware of the Dickerson trial and did not attend it, did not interview any witnesses or potential witnesses, and was not aware of Brown doing so. Bolden Aff., ¶¶ 38. There is no evidence Brown gave these attorneys assignments to assist or work with the investigator. Brown essentially functioned as solo counsel for Sheppard in her capital trial.

Regarding Brown’s investigation and preparation for trial, Brown met with Sheppard 15 or 20 times before the trial began. 2 WH at 48. He spoke to Sheppard’s mother and

⁶ Brown attested that he understood that “the victim of the crime ... was very involved in local politics and that four members of the Harris County District Court bench attended her funeral.” Brown Aff., Am. Pet., App. 1, ¶ 11.

⁷ Bolden stated that she had been “advised by a veteran criminal defense attorney not to take any action or do anything in the case without the lead attorney’s direction because of the risk that doing so could compromise the case.” Bolden Aff., ¶ 6.

grandmother, to Bryant, and to a counselor at Covenant House. He also reviewed the 15-page report of interviews conducted by his investigator. Brown Aff., ¶ 16; 2 SHCR at 512-13. However, Brown did not interview any of the potential witnesses identified by his client or the investigator before the trial. Brown Aff., ¶¶ 19-39. He states he reviewed the state's file and attended Dickerson's capital murder trial, which was held before Sheppard's. 2 WH at 101-104. He also spoke to Dickerson's attorneys. 2 WH at 104.

During the state habeas proceedings, Brown gave some explanation for various trial decisions. He testified that he was aware of Sheppard's claim that Dickerson coerced her into participating in the robbery-murder, but also explained that he was aware of facts undermining this assertion. He noted that Sheppard did not mention duress to the police, that she went swimming with Dickerson at the motel after the murder, and that she spoke to Bryant outside of Dickerson's presence at the motel. *Id.* at 136-39. He also testified that he was aware of other issues mentioned in Dr. Ray's report. *Id.* at 44-45, 56-59.

Brown testified that, based on his personal observation, he did not believe that Sheppard's brother Jonathan wanted to help her at the time of the trial. *Id.* at 101-02. He did not mention why he reached this conclusion. *See* Affidavit of Jonathan Sheppard, Am. Pet., App. 16.

Brown noted that Sheppard's mother spoke to the media frequently and he was concerned that he would not be able to control her if she testified. *Id.* at 121. Brown subpoenaed Bryant, but Bryant did not want to testify after being told he could face criminal liability and should seek advice of counsel.⁸ He stated that other potential witnesses refused to talk to the defense team. *Id.* at 116-25.⁹

⁸ Sheppard also alleges that the prosecutor engaged in misconduct by threatening Bryant (although not in front of the jury) to prevent him from testifying. This claim is addressed *infra*. Brown did not report this to the trial court. Brown Aff., ¶ 52.

⁹ These potential witnesses included Paula Allen, a witness to the extraneous drive-by shooting, Waylon Griggs, the target of the drive-by shooting, Korey Jordan, who was in the apartment when Dickerson and Sheppard hatched their plan to commit a robbery, and Lawrence P. Gwin, an attorney who was counsel for Dickerson in his
(continued...)

Brown, in his affidavit executed in 1998, acknowledged errors in his trial strategy, such as not calling Sheppard to testify (in the guilt and punishment phases of the trial) to establish her state of mind concerning Dickerson's threats, and not calling other witnesses including her grandmother, Annie Smith, Sherry Brown, and Maybeline Fisher, if not Jerry Bryant, Jr., counselors of Covenant House and the Matagorda Women's Crisis Center, and experts witnesses to elaborate on the impact of child and spousal abuse. Brown Aff., ¶¶ 53, 54.

The state habeas court found that Brown consulted with Sheppard, reviewed the prosecution file, reviewed Sheppard's extraneous offenses, consulted with Dr. Ray to develop mitigation evidence, investigated potential defensive theories including duress, interviewed potential witnesses, obtained relevant records, observed Dickerson's trial, and consulted with Dickerson's counsel. SHCR at 1336-37. The state habeas trial court found that Brown's strategy was to portray Dickerson as the main actor and to seek mercy for Sheppard based on her gender and background. *Id.* at 1337. While the state court found that Brown had a coherent strategy, it did not address why Brown did not go further to find witnesses to support the defense and why he did not utilize his co-counsel, Bolden, to work with their investigator to meet with and obtain some potential additional witnesses for mitigation at trial.

As noted, Sheppard relies on criticisms lodged by second chair counsel Hazel Bolden's affidavit and testimony that she thought Brown did a poor job representing Sheppard. 2 WH at 220-26; Am. Pet., App. 2. The state habeas court acknowledged this affidavit, but found co-counsel Bolden's criticisms unpersuasive because they were based on "a hindsight evaluation of trial counsel's representation . . . ," and because Bolden never informed the trial court of any concerns over Brown's representation. SHCR at 1335-36.¹⁰

⁹ (...continued)
capital murder trial.

¹⁰ The state court did not credit Brown's affidavit, which acknowledged deficiencies in investigation of potential evidence and presentation of mitigation witnesses. The state
(continued...)

During the punishment phase, Brown presented evidence to the jury through Dr. Ray and four lay witnesses: Patricia Birdwell, who authenticated records from the Matagorda County Women's Center, explained the Center's services, and testified that Sheppard was admitted to the Center, 26 Tr. at 31-34; Ronda Robinson of Covenant House, who authenticated documents, explained Covenant House's services, and testified that Sheppard was admitted to Covenant House, *id.* at 35-37; Patrice Green, who testified that she knew Sheppard since Sheppard was a baby, and that Sheppard worked for Green's husband, *id.* at 70-74¹¹; and Annie L. Smith, Sheppard's grandmother, who testified that Sheppard lived with her for much of Sheppard's life, and that Sheppard was abused by Jerry Bryant, Jr., *id.* at 75-78. These witnesses presented the basic mitigating facts concerning Sheppard's life, namely, that Sheppard was the product of a broken marriage, had little contact with her father, and was largely raised by her grandmother. These witnesses mentioned also that Sheppard's mother was not supportive and did not believe her allegations of childhood sexual abuse, and that Sheppard ran away from home as a teenager and sought shelter at Covenant House. The jury learned that Sheppard later was in an abusive relationship with Bryant, the father of one of her children, and that she sought assistance from a Crisis Center for abused women. The jury knew that she had three children with three different men. They knew that she dropped out of school but eventually earned a GED, and held several jobs.

Brown presented some evidence through Dr. Ray that Sheppard suffered from depression, and had a family history of depression. *Id.* at 42. The defense presented her theory that Dickerson committed the murder, and that Dickerson threatened to harm Sheppard and her baby if she did not participate. There was no evidence that Sheppard was violent while in pretrial detention, and Dr. Ray stated that Sheppard was statistically unlikely to be violent if sentenced to life imprisonment. *See id.* at 43-46.

¹⁰ (...continued)
habeas court instead stated it relied on Brown's live testimony, which that court found credible and more probative.

¹¹ Counsel attempted to introduce evidence of Sheppard's reputation through Green, but was unable to formulate unobjectionable questions.

Sheppard contends that counsel could have presented much more first-hand available, detailed, descriptive evidence of her life history, *see, e.g.*, Am. Pet., at 29-32, which cumulatively was severely deficient performance (and also, especially considered cumulatively, establish *Strickland* prejudice, *see* pgs. 25-26, *infra*). Sheppard argues, for example, that Brown failed to interview her or her grandmother about her social history, *see id.* at 30, 32. She points out there was first-hand testimony of her childhood sexual and other physical abuse, her strained relationship with her mother and her largely absent father, her mother's abusive partners, her unstable childhood living arrangements, her pregnancies and abusive relationships, and other relevant facets of her life. *Id.* at 30-32, and Appendices, *passim*. Sheppard urges that counsel should have called as witnesses, at a minimum, Sheppard herself, her mother, her grandmother, and her brother, Jonathan. She relies primarily on her own affidavit, and affidavits by her mother and grandmother, for these points. *See* Am. Pet., Apps. 8, 9, 14.¹²

Respondent identifies strategic reasons for defense counsel's decision not to call these family witnesses. Defense counsel was concerned about his ability to control Sheppard's mother while testifying, in light of her comments to the media. The trial judge also had admonished Sheppard's mother to stop harassing witnesses. 22 Tr. at 5-7.

Defense counsel testified at the hearing that he made a strategic decision not to call Sheppard's brother, Jonathan, based on his observation of Jonathan during Dickerson's trial. There was no explanation, however, whether Brown considered whether Jonathan's testimony at the Dickerson trial were entirely different from those to be covered at the punishment phase of Sheppard's trial, such as matters regarding Sheppard's childhood.

¹² Sheppard's grandmother, Annie Smith, testified, but was asked only briefly about the fact that she largely raised Sheppard. She testified that Sheppard lived with her because Sheppard's parents separated and her mother had to work, but made no mention of the tension and abuse between Sheppard and her mother. *See* 22 Tr. at 75-78. However, as discussed elsewhere in this memorandum, counsel had valid reasons not to call Sheppard's mother, the perpetrator of much of the childhood abuse and rejection, as a witness. Further, the state habeas court found that Sheppard made her own decision not to testify.

Respondent contends that defense counsel's choice not to call Sheppard at the punishment phase was understandable because she personally faced potentially damaging cross-examination if she testified. The state court found this persuasive, although it is entirely unclear what testimony or evidence Brown or the state habeas court or TCCA thought would be elicited that the prosecution did not already intend to use against her.

Furthermore, there is no explanation why Brown did not interview Sheppard's grandmother, Annie Smith, in great detail. She was called to testify at trial but gave superficial testimony on Sheppard's childhood and other experiences.

In sum, because defense counsel articulated strategic, albeit superficial, reasons for not calling the family witnesses now identified by Sheppard, the TCCA's ruling that these decisions did not amount to deficient performance under *Strickland* has some foundation. Thus, under Fifth Circuit precedent, the conclusion is not sufficiently incorrect to be deemed legally unreasonable.

Sheppard argues also that counsel should have called as witnesses Aaron Green, a Justice of the Peace for Matagorda County, who was Sheppard's former employer and knew Sheppard's grandmother and Bryant. Sheppard contends that he could have testified to Sheppard's temperament and work ethic, to her susceptibility to being manipulated, and to Bryant's abusive personality and evidence that he abused Sheppard. Aaron Green Affidavit, Am. Pet., App. 18. Sheppard also argues that Kelly Garcia, a fellow inmate at the Harris County jail, could have testified that Sheppard participated in Bible study and was religious, and that she was concerned for her family. Garcia asserts that Sheppard claimed she was coerced into participating in the murder, and was remorseful. Am. Pet., App. 13. Emma Brooks, a family friend, could also have testified to Sheppard's faith and peaceful nature, Am. Pet., App. 19, as could have Tangela Price-Sells, a cousin of Sheppard's half-brother, Am. Pet., App. 20, and Lloyd Jackson, a deacon at Mother Zion Missionary Baptist Church in Bay City, Am. Pet., App. 21. Other potential witnesses include a Harris County jail chaplain, Am. Pet., App. 10, representatives of from Covenant House and the Matagorda County Women's Crisis Center, Am. Pet., App. 12, Bryant's ex-mother-in-law, Am. Pet., App. 17, and the Director of a Women's Crisis Center (who could have testified concerning

Sheppard's history of abuse), Am. Pet, App. 11. Sheppard contends that her brother, Jonathan, would have aided presentation of the mitigation evidence because he could have testified to physical and sexual abuse that he and Sheppard suffered as children, that their mother did not believe their claims of abuse by a babysitter, and to the emotional deprivation and turmoil they experienced due to their unstable family life. *See* Am. Pet, App. 16. Finally, Sheppard urges that Brown should have called Tommi Eanes, a longtime romantic partner of Sheppard's mother, who could have testified to Sheppard's difficult relationship with her mother, including verbal abuse, corporal punishment, and verbal threats of harm. She also could have testified to Sheppard's non-violent nature. Am. Pet, App. 23. Brown testified at the state writ hearing that he did not know who Aaron Green, Emma Brooks, Tangela Price-Sells, Lloyd Jackson, or Isabel Rodriguez (Jerry Bryant, Jr.'s ex-mother in law) were, nor did he attempt to interview any of them. 2 WH at 62-63; *see* Brown Aff., ¶¶ 19-39. The state habeas trial court found that Brown's failure to develop and present mitigating evidence was deficient. SHCR at 1348.

Sheppard also complains that counsel was ineffective for failing to call additional experts. While implicitly acknowledging that Dr. Ray's report contained information concerning her life history, Sheppard contends that Dr. Ray's evaluation was cursory. There is no dispute that Brown asked Dr. Ray only to evaluate Sheppard for sanity, competency to stand trial, and susceptibility to being influenced by men who were in a position to abuse her. Dr. Ray was not asked to offer a psychiatric diagnosis, particularly whether Sheppard suffers from PTSD. Sheppard contends that the limited scope of Dr. Ray's evaluation was unjustified. Sheppard also argues that additional expert testimony likely would have bolstered her case that she was susceptible to coercion or duress, and therefore less culpable. She elaborates that, even if there was a strategic reason not to rely on a duress defense in the guilt-innocence phase,¹³ there was no reason at the punishment phase not to emphasize her emotional weaknesses and the effects of her especially difficult childhood in the mitigation

¹³ Brown explained that there was significant evidence to counter Sheppard's assertions, and he was concerned that this defense would alienate the jury at the guilt-innocence phase.

context. She also contends that the experts would have supported other aspects of her mitigation arguments.

Specifically, Sheppard submits an extensive analysis by Dr. Mark Cunningham. Dr. Cunningham concludes that various factors in Sheppard's life "could have been of significant mitigating impact to the jury" and support a conclusion that Sheppard would not be a future danger. Cunningham Report, Am. Pet., App. 6, *passim*. These include her early life instability, observed domestic violence, sexual and physical abuse suffered as a child, learning disability, her attention deficit disorder, her sexual victimization by older males, her teenage pregnancies, PTSD, and the impact of her execution on her own children. *Id.* He further opines that the time spent by Dr. Ray interviewing and evaluating Sheppard was grossly inadequate for the purpose of assessing mitigation factors (or future dangerousness factors), and her testimony and report did not contain actuarial or group statistical evidence tending to show that Sheppard presents a low risk for future violence. *Id.*

Sheppard also submits a robust declaration by Dr. Myla Young, a clinical psychologist specializing in neuropsychology. Dr. Young states that Sheppard's intellectual functioning is in the low average range, which makes her vulnerable to emotional dependency. People in this range "often assume a passive role in interpersonal relationships . . ." and are easily swayed. Dr. Young also concluded that Sheppard suffers from brain dysfunction which impairs her judgment and decision-making ability, and makes her vulnerable to influence by others. Am. Pet., App. 25.

Sheppard submits an affidavit by Dr. Rebekah Bradley, an Assistant Professor of Psychiatry and Behavior Science at Emory University and the director of a Veteran's Administration, multi-disciplinary, outpatient, PTSD team for veterans. She evaluated Sheppard and concluded that Sheppard suffers from major depression, PTSD, and dissociative order. These are effects of childhood and adolescent trauma suffered by Sheppard, including her own sexual abuse, and witnessing violence between her parents. Sheppard's psychological conditions make it difficult for her to form relationships, and make her likely to acquiesce or cooperate rather than fighting back. Am. Pet., App. 26.

The state habeas trial court found that Brown's failure to present this expert testimony

constituted deficient performance, SHCR at 1348, but the TCCA rejected this finding and conclusion. Sheppard's assertion that Dickerson had threatened her and her baby was before the jury. The TCCA found that introducing additional expert psychological evidence was cumulative. *Ex Parte Sheppard*, No. WR-78.132-01 (Tex. Crim. App. Oct. 9, 2013), slip op. at 5. The TCCA's analysis suffers from two weaknesses. First, as raised by Dr. Ray in passing, once guilt was determined, Sheppard would be imprisoned for 35 years and away from male dominating influences. More importantly, as Sheppard argues, the jury must decide the mitigation question independent of the future dangerousness (as well as the second special issue). While the mitigating evidence might have some relevance to the first two special issues, the mitigation special issue stands independent of the other two, and the jury could find that the mitigating evidence justifies a life sentence, notwithstanding the answers to the other two special issues.¹⁴

This Court finds that trial counsel Brown rendered deficient performance in investigating and presenting evidence on mitigation on behalf of Sheppard because of, collectively, gross inadequacies of his own factual mitigation investigation, such as his failure to interview key witnesses (including Sheppard, her grandmother, and brother), his failure to follow up with other potential witnesses uncovered by his investigator and to more assertively pursue potential mitigation witnesses, his failure to utilize appointed co-counsel for these purposes, and his failure to adequately frame

¹⁴ Sheppard also argues that better development of her background and psychological evidence would have provided her with a better response to the extraneous offense evidence by strengthening her claim that she was pressured or manipulated into participating.

It is noted that many Fifth Circuit cases deem evidence of this nature to be "double-edged" because it permits the argument that Sheppard's susceptibility to manipulation or coercion suggests that she could be manipulated or coerced into committing violence in the future. However, Dr. Ray's testimony, which was crucial to the limited defense at the punishment phase, already opened this avenue of argument. Defense counsel, having raised the issue, had a duty to present convincing evidence in support of the theory, not merely superficial proof.

the scope of work for psychiatrist Dr. Ray or retain other necessary experts to assess Sheppard. This Court recognizes it is not permitted to second-guess trial counsel's reasoned strategic trial decisions. The Court questions, however, whether Brown's decisions were based on informed reasoning, given his flagrant lack of investigation and personal involvement in or follow up on his investigator's work. Indeed, to his credit, Brown acknowledges these matters in his affidavit submitted to the state habeas court. *See* Am. Pet., App. 2. Nevertheless, given the extreme deference due to the state court findings and conclusions, this Court is not permitted to find unreasonable the TCCA's conclusion that this evidence was cumulative, *see, e.g., Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007); *Parr v. Quarterman*, 472 F.3d 245, 257-58 (5th Cir. 2006); *Neal v. Puckett*, 286 F.3d 230, 243 (5th Cir. 2002); *Rodriguez v. Quarterman*, 204 F. App'x 489, 501 (5th Cir. 2006), and there was therefore a valid reason for trial counsel not to emphasize this evidence.

ii. Prejudice Prong

Sheppard submits numerous affidavits expanding upon the facts noted above. In assessing prejudice in a sentencing hearing, “the question is whether there is a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.” *Strickland*, 465 U.S. at 695. “A reasonable probability is a probability sufficient to undermine confidence in the outcome.” *Id.* at 694. To satisfy the *Strickland* prejudice prong, Sheppard must show that the “mitigating evidence, taken as a whole, ‘might well have influenced the jury's appraisal’ of [Sheppard's] culpability,” *Wiggins v. Smith*, 539 U.S., at 538 (quoting *Williams v. Taylor*, 529 U.S. 362, 398 (2000)). The jury's appraisal is so influenced if it is reasonably probable that the new mitigating evidence “would have affected the sentencing decision of at least one juror.” *Lewis v. Dretke*, 355 F.3d 364, 369 (5th Cir. 2003).

It is clear that presentation of such fact and expert evidence at trial through live witnesses—those with personal knowledge and one or more experts with educated, professional explanations—would have provided more detail, nuance, and understanding for the jury about, not only the hardships Sheppard suffered as a child and young adult, but their effect on her. This testimony could have provided important mitigating information.

However, the jury would have had to consider the entire factual picture, which included evidence presented by the State that Sheppard participated in a brutal robbery-murder. There was evidence that Sheppard had assisted in planning aspects of the crime. There also was evidence that Sheppard had engaged in prior crimes of violence, including possibly a drive-by shooting and carjackings. While this Court finds that it may well be that the additional evidence would have affected the sentencing decision of at least one juror, the TCCA's contrary conclusion must be considered under the stringent and deferential standards allowed in federal review. Sheppard does not meet her heavy burden to show the TCCA was unreasonable in finding that there was not a reasonable probability that such presentations would have changed the outcome" of the punishment phase. *See, e.g., Carson v. Collins*, 993 F.2d 461, 466 (5th Cir. 1993).

b. Future Dangerousness Special Issue

Sheppard also contends that counsel failed to present "any coherent theory to support a negative answer" on the question whether there was a probability that she would commit future acts of criminal violence constituting a threat to society. Am. Pet. at 55. The Court considers Sheppard's arguments on the mitigation issue here as well. Sheppard focuses on the absence of fact witnesses and expert testimony pertaining to the future dangerousness issue.

Sheppard argues specifically that counsel failed to present evidence of duress, and failed to call Bryant to testify about Sheppard's social history and the unadjudicated drive-by shooting. Sheppard submits no affidavits of Bryant or other witnesses who could have testified to facts supporting a duress defense. She further contends that counsel should have moved for a mistrial based on the prosecutor's statement to Bryant's counsel that Bryant faced possible criminal charges if he testified, and that counsel failed to adequately cross-examine the State's witnesses or present evidence to counter evidence of the extraneous drive-by shooting. Sheppard also points to counsel's failure to call numerous witnesses (described above) who, she contends, could have testified about her background, including her church attendance and good temperament and nature, failure to elicit such testimony from those he did call, failure to present evidence from the Matagorda County Women's Shelter

and Covenant House, and failure to present an adequate life history during the penalty phase.

Sheppard urges also that counsel failed to present any evidence on future dangerousness other than superficial, limited points in Dr. Ray's report and brief live testimony.¹⁵ Sheppard also contends that counsel failed to provide expert proof to emphasize the low statistical likelihood that Sheppard would be violent if sentenced to life imprisonment.

In response to these contentions and evidence, the state habeas court found that defense counsel cross-examined the State's witnesses to discredit the State's contention that Sheppard participated in other carjackings. 5 SHCR at 1342. The state habeas court also found that Dr. Ray testified to Sheppard's remorse over the murder, and testified that the chance of Sheppard committing future acts of violence posing a continuing threat to society was less than fifty percent. Dr. Ray further testified that Sheppard was even less likely to be a threat when in a situation, such as prison, in which a man would be unable to abuse or manipulate her. *Id.* Dr. Ray's report also noted that Sheppard acted under threats from Dickerson. *Id.*

Regarding Sheppard's contention that counsel failed to rebut the evidence of her participation in the drive-by shooting, the state habeas court found that her attorney from the drive-by shooting case was, contrary to her current assertion, unavailable to testify and refused to speak to Sheppard's counsel on several occasions. 2 WH at 119; 5 SHCR at 1288-89. The court further found that Sheppard's trial counsel cross-examined Paula Allen, the State's witness on this issue, and impeached her with her prior inconsistent statements and bias against Sheppard. 5 SHCR at 1353-54. The state habeas court also found unavailing Sheppard's claim that counsel should have called Bryant and Vincent Perry (the man Paula Allen claimed to have been with on the night of the shooting) to testify about the drive-by

¹⁵ As discussed in more detail, *supra*, Dr. Ray reported that Sheppard suffered from depression, which was only partially treated, and that she seemed remorseful for the murder. Dr. Ray opined that Sheppard was unlikely to engage in future acts of violence. Dr. Ray noted Sheppard's unstable family history, her history of pregnancies and sexual abuse, and her claim that she participated in the Meagher robbery-murder under duress. *See* 26 Tr. at 41-46, 60-61; DX 4-B.

shooting, because her assertions about their possible testimony were speculative, presumably because she presented no affidavits from these witnesses. *Id.* at 1355, 1369.

The Fifth Circuit has held that “complaints based upon uncalled witnesses [are] not favored because the presentation of witness testimony is essentially strategy and thus within the trial counsel's domain, and . . . speculations as to what these witnesses would have testified is too uncertain.” *Alexander v. McCotter*, 775 F.2d 595, 602 (5th Cir. 1985) (citing *United States v. Cockrell*, 720 F.2d 1423, 1427 (5th Cir. 1983), *cert. denied*, 467 U.S. 1251 (1984)). “In order for the appellant to demonstrate the requisite *Strickland* prejudice, the appellant must show not only that this testimony would have been favorable, but also that the witness would have testified at trial.” *Id.*

The state habeas court in this respect was not unreasonable, as defined by the Fifth Circuit, in concluding that the evidence cited by Sheppard was cumulative of evidence presented. *See, e.g., Coble*, 496 F.3d at 436 (“[T]hese witnesses would have presented testimony already provided by other witnesses. Counsel's decision not to present cumulative testimony does not constitute ineffective assistance.”). In addition to the evidence cited by the state habeas court, the record reflects that Sheppard presented some evidence of her history of abuse, including testimony by her grandmother that Bryant abused her. In fact, this testimony was conclusory, but the basic facts and Sheppard's personal history were presented to the jury. Further, also as noted by the state habeas court, Dr. Ray presented her conclusion that Sheppard had an abusive past and a history of abusive relationships with men, was easily manipulated, and was remorseful.

And, trial counsel articulated some valid reasons not to call certain specific witnesses now identified by Sheppard, such as Sheppard's mother and Bryant, as discussed above. Last, there is an argument that the evidence Sheppard argues should have been presented is somewhat cumulative of the evidence presented through Dr. Ray.¹⁶

¹⁶ Brown called four lay witnesses who testified concerning Sheppard's stays at the Crisis Center and Covenant House, 26 Tr. at 31-38, and about her church attendance, employment history, children, her parents' divorce, and her abuse at the hands of
(continued...)

The state court's finding that trial counsel was aware of the information now cited by Sheppard may be questionable, *see, e.g.*, 2 WH at 62-65, but that court's finding that counsel made strategic choices regarding presentation of evidence, *see* 5 SHCR at 1269-72, is a credibility determination with some support in the record and thus is not unreasonable, as defined by binding appellate authority. *See, e.g., Turner v. Epps*, 412 F. Appx. 696 (5th Cir. 2011) (counsel is not deficient for failing to introduce cumulative mitigating evidence). This Court is not at liberty to second-guess that reasonableness conclusion. *See Renico v. Lett*, 559 U.S. 766, 779 (2010) ("AEDPA prevents defendants—and federal courts—from using federal habeas corpus review as a vehicle to second-guess the decisions of state courts"). Accordingly, Sheppard does not meet her heavy burden to show the TCCA was unreasonable in finding that there was not a reasonable probability that the evidence Sheppard contends should have been presented on future dangerousness and duress "would have changed the outcome" of the punishment phase.

c. Failure to Object to Instruction on Law of Parties

In discussing the case with prospective jurors, the trial judge gave an example of a bank robbery, stating that both the actual robber and the driver of the getaway car would be guilty of robbery. *See, e.g.*, 4 Tr. at 11-13. This statement is a correct statement of Texas' law of parties. *See* TEX. PENAL CODE § 7.01. The trial judge, however, also stated that not only would the robber and driver both be guilty of robbery, but that each should receive the same punishment. *See Sheppard*, slip op. at 2, n.2. This is an incorrect statement of the law. *See, e.g., Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment does not "permit[] imposition of the death penalty on one. . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed"). Trial counsel did not object.

Sheppard challenged the trial court's statement on appeal. The TCCA agreed that the

¹⁶ (...continued)
Bryant, *id.* at 70-77.

judge's illustration was an incorrect statement of the law, but held that the claim was waived by trial counsel's failure to object. *Sheppard*, slip op. at 2. Sheppard argues that this waiver constituted ineffective assistance of counsel.

There can be no question that counsel rendered deficient performance by failing to object. The statement of law was incorrect, and there is no apparent strategic reason for counsel's failure to object. Sheppard, however, cannot demonstrate *Strickland* prejudice.

The evidence presented at trial does not support Sheppard's implicit contention that she was only a minor or peripheral participant in the Meagher murder. Rather, the evidence showed that she participated in the beating and stabbing that led to Meagher's death. Thus, the trial judge's incorrect statement of the law was not relevant because Sheppard had no plausible argument to make that she did not actually and actively participate in the murder. Indeed, in assessing punishment, the jury specifically found that Sheppard intended that Meagher be killed. 5 SHCR at 1433. Therefore, this claim is without merit.

d. Failure to Object to Prosecutor's Statements

During jury *voir dire*, the prosecutor stated, correctly, that Sheppard would be eligible for parole after serving 35 years if she was sentenced to life imprisonment. He added, however, that the Legislature has changed the amount of time a life sentenced inmate is required to serve before becoming eligible for parole, and implied that another such change could reduce the time Sheppard would have to serve to as little as 15 years. *See, e.g.*, 6 Tr. at 125; 9 Tr. at 24-25. Counsel did not object.

Sheppard points to various Texas state cases holding that parole eligibility is not a proper issue for jury consideration in a death penalty case. *See, e.g., Rhoades v. State*, 934 S.W.2d 113, 119 (Tex. Crim. App. 1997). She acknowledges, however, that it was her counsel who filed a motion requesting permission to discuss parole eligibility during jury *voir dire*. *See* Am. Pet. at 155. The state habeas court found that this was reasonable trial strategy based on counsel's stated intent to show that people become less dangerous as they age. *See* 1 SHCR at 72. Sheppard makes no showing that this conclusion was unreasonable. She argues, however, that it was ineffective assistance for counsel to allow the prosecutor to mislead the venire members as to how long she would have to serve.

Assuming that the prosecutor acted improperly, and that defense counsel should have objected, Sheppard cannot demonstrate *Strickland* prejudice on this point. During the sentencing phase of trial, the jury was specifically instructed that they were not to consider parole eligibility in passing sentence, and that, in any event, Sheppard would have to serve 35 years before being considered for parole. 1A CR at 220.¹⁷ Jurors are presumed to follow their instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); see *Galvan v. Cockrell*, 293 F.3d 760, 765-66 (5th Cir. 2002), and Sheppard makes no showing that her jury failed to do so. Because the jury was properly instructed on this issue before deliberating Sheppard's sentence, Sheppard cannot demonstrate prejudice.

e. Failure to Move for a Mistrial

Sheppard contends that the prosecutor threatened to indict Bryant if he testified at Sheppard's trial. She argues that this constituted prosecutorial misconduct, and that counsel should have moved for a mistrial.

Sheppard subpoenaed Bryant to testify on her behalf, but he did not testify. Prior to the beginning of the punishment phase, the prosecutor told the trial court that Bryant would need a lawyer if he testified, as he might wish to invoke his Fifth Amendment privilege. 25 Tr. at 5. Sheppard raised several claims concerning this exchange in her state habeas application.

Defense counsel submitted an affidavit in which he stated that he wanted to call Bryant to testify concerning the extraneous drive-by shooting, but that the prosecutor told defense counsel that he would indict Bryant for child endangerment if he testified. The prosecutor submitted an affidavit in which he denied having any recollection of such a conversation. Instead, the prosecutor stated, it was his practice to advise an attorney considering calling a witness who might incriminate himself that he (the prosecutor) would present any matter raised by the testimony to a grand jury. He explained that it was not his intent to threaten, but to alert counsel to the risks to the potential witness. SHCR at 522. At the evidentiary hearing conducted in connection with Sheppard's state habeas application,

¹⁷ "CR" refers to the Clerk's Record on appeal.

trial counsel similarly characterized the prosecutor's statement as informing counsel to advise the witness that he might need an attorney if he testified. 2 SH Tr. at 123-24.

The state habeas court found that Bryant did not want to testify, and that counsel decided not to call him because he believed he would not be a good witness. SHCR at 21. The habeas court also found that there was no prosecutorial misconduct. *Id.* at 1330, 1363. The state habeas court's findings and conclusion are not contrary to Fifth Circuit law. Even if defense counsel's plainly strategic decision were deemed deficient, a conclusion the state habeas court did not reach, that court's secondary conclusion that there was no prosecutorial misconduct was not an unreasonable conclusion.

Threats of retaliation against witnesses by the government violate a criminal defendant's right to due process. *Washington v. Texas*, 388 U.S. 14, 19 (1967). To demonstrate a due process violation, a defendant must show substantial government interference. A defendant accomplishes this by showing "a causal connection between the governmental action and the witness' decision not to testify." *United States v. Anderson*, 755 F.3d 782, 792 (5th Cir. 2014).

The Fifth Circuit, however, has held that it is not prosecutorial misconduct for a prosecutor to inform a witness that his testimony might expose him to criminal charges. *United States v. Viera*, 839 F.2d 1113, 1115 (5th Cir. 1988). Indeed, in *Viera*, the Fifth Circuit specifically stated that "[b]y adding that he would move promptly to present any violation to the Grand Jury, the prosecutor cannot be charged with harassment, particularly when the statement was made to defense counsel rather than to a prospective lay witness." *Id.*

The facts of the case at bar are substantially similar to those in *Viera*, where the Fifth Circuit found no prosecutorial misconduct. As in *Viera*, the prosecutor communicated with counsel, not the witness. As in *Viera*, the prosecutor merely advised counsel that the witness could face charges if he made incriminating statements. This does not amount to misconduct. There was therefore no basis for counsel to move for a mistrial or otherwise object, and thus no ineffective assistance with regard to Bryant.

2. Guilt-Innocence Phase

Sheppard raises several claims of ineffective assistance of counsel during the guilt-innocence phase of trial.

a. Lesser Included Offense Instructions

Sheppard complains that counsel erred by failing to request a lesser included offense instruction on the non-capital charges of robbery or murder, failed to object to the absence of such instruction, and failed to complain on appeal about the absence of such instruction. Due process requires a jury charge “on a lesser included offense if the evidence would permit a jury rationally to find [the defendant] guilty of the lesser offense and acquit him of the greater,” *i.e.*, “when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense – but leaves some doubt with respect to an element that would justify conviction of a capital offense” *Beck v. Alabama*, 447 U.S. 625, 635, 637 (1980) (citing *Keeble v. United States*, 412 U.S. 205, 208 (1973)). Under these circumstances, “the failure to give the jury the . . . option of convicting on a lesser included offense would seem inevitably to enhance the risk of an unwarranted conviction. Such a risk cannot be tolerated in a case in which the defendant’s life is at stake.” *Beck*, 447 U.S. at 637. A lesser included offense charge is required under these circumstances to avoid presenting the jury with a false dichotomy: Either convict a defendant who is guilty of a serious non-capital crime (but not a capital crime) on the capital charge, or acquit her so as to avoid convicting her of the more serious offense. *See, e.g., Hopper v. Evans*, 456 U.S. 605, 611 (1982). “[I]f the unavailability of a lesser included offense instruction enhances the risk of an unwarranted conviction, [Texas] is constitutionally prohibited from withdrawing that option from the jury in a capital case.” *Beck*, 447 U.S. at 638.

Sheppard argues that the evidence left some doubt as to whether she had a sufficiently culpable mental state to be guilty of capital murder. However, the evidence of record at trial supported the finding that she was a full participant in the violent acts of robbery and murder, resulting in the victim’s death. The record makes clear that Sheppard intended to participate in a robbery. Regarding proof on the murder, Sheppard confessed to knocking Meagher to the ground, handing Dickerson a knife, retrieving a larger knife for Dickerson to use to slash Meagher’s throat, and holding Meagher down while Dickerson placed a plastic bag over

Meagher's head and smashed a statue into her head. *See* Sheppard's confession, 21 Tr. at 168-70, State's Exh. 38-B. Murder committed during the course of a robbery is capital murder. *See* TEX. PENAL CODE § 19.03 (a)(2); *see also* SHCR at 1431 (indictment). In light of the evidence that Sheppard was a willing participant in the robbery and murder, there was no reasonable basis for a finding that Sheppard was guilty of robbery or murder, but not capital murder. Because there was no evidence to support a finding of guilt on a lesser included offense, Sheppard was not entitled to a lesser included offense instruction. *See Cordova v. Lynaugh*, 838 F.2d 764, 767 (5th Cir. 1988) ("The federal standard is that a lesser included offense instruction should be given if the evidence would permit a jury rationally to find [a defendant] guilty of the lesser offense and acquit him of the greater") (internal quotation marks and citation omitted), *overruling on other grounds recognized by Vanderbilt v. Collins*, 994 F.2d 189, 195 (5th Cir. 1993). Therefore, counsel was not deficient for failing to seek such an instruction, failing to object to the absence of the instruction, or failing to raise the issue on appeal.

b. Refusal to Allow Sheppard to Testify

Sheppard states that she wished to testify at trial, but that her counsel prevented her from doing so. A criminal defendant has a Fifth Amendment right to testify. *Rock v. Arkansas*, 483 U.S. 44, 49-52 (1987). The state habeas court, however, found that the only evidence supporting Sheppard's claim that she was prevented from testifying was her own self-serving statement to that effect. Her trial counsel testified during Sheppard's state habeas hearing that he advised Sheppard of her right to testify and advised her against testifying, but that the decision was hers. 2 WH at 128-29, 188. The state habeas court found counsel's statement more credible than Sheppard's. 5 SHCR at 1343. Sheppard makes no showing that this finding was unreasonable.

c. Failure to Present a Defense of Duress

Sheppard next contends that counsel was ineffective by failing to present evidence and obtain a jury instruction on the defense of duress. She contends that she told her trial counsel that she participated in the robbery and murder only because Dickerson threatened to harm Sheppard and her baby if she did not. *See* Brown Affidavit, Am. Pet., App. 1; Bolden

Affidavit, Am. Pet., App. 2. Her statement to the police, however, does not state that she was coerced or indicate duress. *See* SX 38A.¹⁸

I. Allegedly Available Evidence on Duress

Sheppard argues that counsel failed to elicit any testimony from Sheppard, Dickerson, or any of several other people with information that would have supported a duress defense. She further contends that counsel failed to elicit any testimony that Sheppard was particularly susceptible to duress, from either lay witnesses with knowledge of her social history, or expert witnesses. Sheppard argues that the following people could have testified.

Sheppard. As noted above, counsel did not call Sheppard to testify, despite her claim that she acted under duress. She notes that she and Dickerson were the only witnesses to Dickerson's alleged threats.

Bryant. Sheppard contends that Bryant could have testified to Sheppard's demeanor and fear of Dickerson.

Sherry Brown. Sherry Brown was called as a witness by the State, and was recalled by defense counsel. She saw Sheppard and Dickerson between the time of the crime and their arrest. Sheppard contends that Brown could have testified that Dickerson kept close watch over Sheppard, and that Sheppard appeared nervous and upset, but was unwilling to explain why. These assertions are based on statements in the mitigation investigator's report. *See* Brown Aff., Exh. A. Defense counsel did not elicit testimony from Brown regarding her observations of Sheppard and Dickerson.

Annie Smith. Annie Smith is Sheppard's grandmother. Sheppard asserts, again based on statements in her investigator's report, that Smith saw Sheppard and Dickerson between the time of the crime and the time of arrest. Sheppard contends that Smith could also have testified that Dickerson maintained close watch over Sheppard and that Sheppard appeared nervous and upset, but was unwilling to explain why.

Other Evidence of Sheppard's Social History. Sheppard also cites to the same evidence of her social history discussed above in connection with the punishment phase. She

¹⁸ "SX" refers to the State's trial exhibits.

argues that this evidence would have shown her susceptibility to manipulation and coercion. She also claims counsel was ineffective for failing to call an expert witness to testify as to her susceptibility to manipulation and coercion.

Failure to Obtain a Duress Jury Instruction. Finally, Sheppard contends that counsel was ineffective by failing to obtain a jury instruction on duress.

ii. Analysis of Trial Counsel's Performance Regarding Duress Defense

Respondent notes that counsel did, in fact, request an instruction on duress. *See* 1A CR at 198. The trial court refused the instruction because the evidence did not support a duress instruction. 22 Tr. at 50-51. Respondent also notes that parts of Sheppard's statement to the police, Dickerson's statement, and the trial testimony of Korey Jordan contradict Sheppard's claim that she acted under duress.

Respondent argues that there is evidence that counsel was aware of Sheppard's claim of duress, and made a strategic decision not to emphasize this defense. During Sheppard's state writ hearing, trial counsel noted evidence that Sheppard tried to rob someone else the day before the murder. 2 WH at 132. And there was evidence that Sheppard prepared for the robbery of Meagher by putting on dark clothes and bringing a knife from Jonathan's apartment, *id.* at 132-35. Counsel also noted that there was evidence that Sheppard was not afraid of Dickerson. Moreover, she did not mention being threatened by Dickerson in her statement to the police. *Id.* at 139.

The state habeas court specifically noted that Sheppard told the police that she and Dickerson attempted to rob someone the day before the murder, and that they entered Meagher's apartment because they decided to rob whoever was there and steal that person's car. That court found that Sheppard fully participated in the robbery-murder, bringing a knife to the crime scene, handing Dickerson a knife while he held Meagher on the ground, demanding that Meagher give Sheppard the keys to her car, retrieving and handing Dickerson a butcher knife from Meagher's kitchen, and holding Meagher down while Dickerson put a plastic bag over Meagher's face. 5 SHCR at 1349.

Korey Jordan testified at trial that he heard a conversation between Dickerson and

Sheppard the day before the murder where they discussed committing a robbery and, possibly, murder. Jordan testified that, when Dickerson said that they needed money, Sheppard suggested that they “go back to the old theme.” 21 Tr. at 95. Dickerson responded that “[i]f taking a life is what I have to do to get some money, then that’s what I have to do,” to which Sheppard responded that she would rather catch “a skinny white woman walking between her car and her apartment with no children.” 21 Tr. at 95-99. Jordan further testified that Sheppard told Dickerson that some knives Dickerson brought in from the kitchen were too small to kill anyone and that she did not want Dickerson to stab anyone in the car, because they would get blood on themselves and the car. *Id.* at 99-101. Respondent further points to evidence that, contrary to Sheppard’s description of events after the murder, her counsel was aware that Sheppard was left alone for extended periods of time, that Sheppard and Bryant went swimming together without Dickerson, and that Sheppard never told Bryant that Dickerson was threatening her. 2 WH at 135-39. The state habeas court noted the substantial evidence cutting against a defense of duress. *See* SHCR at 1349-51.

The state habeas court found that counsel’s decision not to pursue a duress defense was sound trial strategy. *Id.* at 1351. In light of the significant evidence undermining this defense, this Court cannot say that the state habeas court’s conclusion is unreasonable. Unsuccessfully arguing duress would have harmed Sheppard’s, and defense counsel’s, credibility before the jury. Defense counsel could have had understandable concerns that pursuing a weak duress defense at the guilt-innocence stage would have been harmful to their penalty phase case. Sheppard fails to demonstrate that counsel rendered deficient performance by not presenting a duress defense.

In addition, Sheppard and Dickerson were the only two witnesses with first-hand knowledge of what occurred prior to and during the crime. While Sheppard now argues that she wanted to testify, the state habeas court found that it was her decision not to do so. Sheppard fails to show that the state habeas court’s finding is an unreasonable application of the facts. As discussed above, counsel made a reasoned decision not to call Dickerson after observing him at his own trial and performing other due diligence.

Without testimony from participants in the crime, the other potential evidence on

duress that Sheppard cites is of little value. Evidence that she might have been susceptible to coercion is not particularly helpful in the absence of evidence that she was coerced. Evidence that she was upset after committing a murder does not necessarily indicate that she acted under coercion; she might have been upset because she had committed a serious crime. Sheppard thus fails to demonstrate deficient performance by trial counsel Brown in this regard.

B. Trial Court Errors

1. Trial Court's Erroneous Comments on Law of Parties

Sheppard contends that she was denied due process by the trial court's erroneous comments on punishment under the law of parties, an issue discussed above. *See* Section III.A.1.c, *supra*. As noted, the claim was dismissed by the TCCA on Sheppard's direct appeal as waived by trial counsel's failure to object. Respondent also argues that the claim lacks merit.

a. Procedural Default

The procedural default doctrine may bar federal review of a claim. "When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has ruled that:

In all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

To be “adequate” to support the judgment, the state law ground must be both “firmly established and regularly followed.” *Ford v. Georgia*, 498 U.S. 411, 424 (1991). If the state law ground is not firmly established and regularly followed, there is no bar to federal review and a federal habeas court may consider the merits of the claim. *Barr v. Columbia*, 378 U.S. 146, 149 (1964). An important consideration in determining whether an “adequate” state law ground exists is the application of the state law ground to identical or similar claims. *Amos v. Scott*, 61 F.3d 333, 340-41 (5th Cir. 1995).

The adequacy of a state law ground to preclude federal court review of federal constitutional claims is a federal question. *Howlett v. Rose*, 496 U.S. 356, 366 (1990). If the state court decision rests on federal law, then there is no bar to federal habeas corpus review.

Sheppard raised the claim of erroneous comment on the law of parties on direct appeal. The TCCA rejected the claim as waived under Texas law because Sheppard did not contemporaneously object to the statements.

To preserve a claim for federal review, a defendant must make a specific and timely objection at the time of the allegedly objectionable conduct. *Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999). “Texas applies its contemporaneous objection rule ‘strictly and regularly’ and . . . it is an ‘independent and adequate state-law procedural ground sufficient to bar federal court habeas review of federal claims.’” *Id.* (quoting *Amos v. Scott*, 61 F.3d 333, 345 (5th Cir. 1995)), *cert. denied*, 528 U.S. 1145 (2000)). Failure to object constitutes a procedural default under Texas law, which bars federal habeas review unless the petitioner shows cause for the default and actual prejudice flowing from the alleged constitutional violation, *or* a miscarriage of justice. *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977).

“Cause” for a procedural default requires a showing that some objective factor external to the defense impeded counsel’s efforts to comply with the state procedural rule. *McCleskey v. Zant*, 499 U.S. 467, 493 (1991). Prejudice to overcome a procedural default is shown where there is a reasonable probability that the defaulted claim, if properly raised, would have changed the outcome of the proceeding. *See, e.g. Sawyer v. Whitley*, 505 U.S. 333, 345 (1992) (citing *United States v. Bagley*, 473 U.S. 667, 682 (1985), and *Strickland*, 466 U.S. at 694).

The fundamental-miscarriage-of-justice exception is limited to the following circumstances: (1) where the petitioner can show that “a constitutional violation has ‘probably resulted’ in the conviction of one who is ‘actually innocent’ of the substantive offense,” *Dretke v. Haley*, 541 U.S. 386, 393 (2004) (quotation omitted); or (2) in the capital sentencing context, where the petitioner can show “‘by clear and convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law.’” *Id.* (quoting *Sawyer*, 505 U.S. at 336). Importantly, the fundamental-miscarriage-of-justice exception applies only where a petitioner supplements a constitutional claim with a colorable showing of factual, as opposed to legal, innocence. *See McCleskey v. Zant*, 499 U.S. at 495 (quoting *Kuhlman v. Wilson*, 477 U.S. 436, 454 (1986)); *accord Schlup v. Delo*, 513 U.S. 298, 327 (1995).

Sheppard does not contend that she is factually innocent of capital murder, or that she is legally ineligible for the death penalty. She accordingly fails to demonstrate a miscarriage of justice. Nor does Sheppard assert any “cause” for her default. Further, she does not show sufficient prejudice to demonstrate a reasonable probability that the outcome of her trial would have been different had a timely objection been raised. As discussed above, the evidence establishes that Sheppard was an active, not merely peripheral, participant in the robbery and murder. Therefore, the trial court’s erroneous statement as to punishment on the law of parties was not relevant to Sheppard. Because Sheppard fails to demonstrate cause or prejudice, or a fundamental miscarriage of justice, this claim is procedurally defaulted and this Court cannot grant relief.

b. Due Process – Merits

Procedural default notwithstanding, this claim lacks merit. Errors in jury instructions do not state a claim for relief unless the error resulted in “prejudice of constitutional magnitude.” *Sullivan v. Blackburn*, 804 F.2d 885, 887 (5th Cir. 1986). The habeas petitioner must demonstrate that the error “had a substantial and injurious effect or influence on the determination of the jury’s verdict.” *Mayabb v. Johnson*, 168 F.3d 863, 868 (5th Cir. 1999). In a habeas proceeding, the burden of demonstrating that an erroneous jury instruction violates the petitioner’s Due Process rights is “greater than the showing required to establish

plain error on direct appeal.” *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

As discussed above, the trial court’s comments to the jurors during *voir dire* was incorrect as a matter of law. The jury instructions given immediately prior to sentencing deliberations, however, were correct. Moreover, the evidence does not support a finding that Sheppard was merely a minor participant who did not have reason to believe that deadly force would be used. Rather, the evidence supports a finding that Sheppard was an active participant in the events leading to Meagher’s death. For these reasons, Sheppard cannot demonstrate that the erroneous comments, later corrected by the jury instructions, had a substantial and injurious effect on the jury’s verdict. She is not entitled to relief on this claim.

2. Batson Claim Regarding Ronnie Simpson

Sheppard is African-American. The prosecutor used three of his peremptory challenges to strike African-Americans from the jury.¹⁹ Sheppard challenged one of these strikes, arguing that they were based on the prospective jurors’ race. The prosecutor offered race-neutral explanations for the strikes, and the trial court overruled Sheppard’s challenges.

In *Batson v. Kentucky*, 476 U.S. 79, (1986), the Supreme Court held that the use of peremptory strikes to remove jurors on the basis of race violates the equal protection clause. When a defendant makes a *prima facie* showing that a peremptory challenge was based on race the prosecutor must offer a race-neutral explanation for the strike. If the prosecutor does so, it then falls to the defendant to demonstrate that the offered explanation is pretextual. *See, e.g., Purkett v. Elem*, 514 U.S. 765, 767-68 (1995). Sheppard fails to demonstrate that the offered race-neutral explanation was pretextual.

Ronnie Simpson was the first African-American juror struck by the State. In response to a *Batson* challenge, the prosecutor stated that he had concerns, based on Simpson’s answers to *voir dire* questions, that Simpson was predisposed to answering “yes” on the mitigation special issue because Sheppard has children. The State also noted that Simpson said that he had been wrongly arrested and spent some time in jail based on a misidentification, causing concerns about bias against law enforcement. Simpson also

¹⁹ Two people who served on the jury are African-American. Am. Pet. at 166.

expressed reservations about his ability to answer “yes” on future dangerousness based on the facts of the crime, though he eventually stated that he could do so. The prosecutor said that this caused concern that Simpson would be predisposed to answer the special issues in Sheppard’s favor. Finally, the prosecutor noted that Simpson said hello to Sheppard at the beginning of his *voir dire*, causing the prosecution to worry about an affinity between Simpson and Sheppard. 5 Tr. at 84-86. While defense counsel argued that Simpson could be fair and impartial, he did not rebut the State’s race neutral explanations. *Id.* at 87-88.

Sheppard later renewed the challenge, claiming that two white jurors who were accepted by the State gave substantially similar answers. 6 Tr. at 109. The trial court again overruled the objection. *Id.*

Sheppard raised the objection again at the conclusion of *voir dire*. At this point, the prosecutor pointed out that two of the jurors selected were African-American, and that only three of nine peremptory challenges used by the State were used to strike African-Americans. Defense counsel acknowledged that these assertions were true. 19 Tr. at 186-87. The trial court again denied the challenge.

Sheppard raised this claim in her direct appeal. The TCCA identified the correct legal standard of review, and concluded that there was no basis for overturning the trial court’s conclusion that the challenged peremptory strikes were not racially motivated. *Sheppard v. State*, slip op. at 4.

Respondent points out that the white jurors who Sheppard asserts gave substantially similar answer were not, in fact, similarly situated. She notes that the white jurors in question, Paul Herd and Larry Raymond Chambers, answered questions in ways materially different from Simpson. For example, Herd stated that his son was prosecuted for an incident with his girlfriend. 6 Tr. at 67. Herd stated that he did not think his son’s conduct warranted a felony charge but, unlike Simpson, did not say that his son was the victim of a false arrest or prosecution. 6 Tr. at 76.

Respondent acknowledges that Chambers, like Simpson, stated that he would consider the fact that Sheppard had children to be mitigating and could not vote to impose a death sentence solely on the facts of the crime. 5 Tr. at 117, 126. Respondent points out, however, that these are the only similarities. Chambers expressed no hostility toward law enforcement

or any affinity with Sheppard. While the State's acceptance of juror Chambers raises some questions, it does not so clearly demonstrate that the State's answers were pretextual as to support a finding that the trial court's ruling, based not only on the explanations, but also on the court's observation of the proceedings and determinations of the participants' credibility, was wrong. Nor can this Court conclude that the TCCA's rejection of the claim on appeal was unreasonable under the facts presented. Accordingly, Sheppard is not entitled to relief on this claim.

3. Sheppard's Challenge for Cause to Edith Greer Smith

On a juror questionnaire, Edith Greer Smith expressed her agreement with the statement that "any man, woman, child or any person young or old, man or woman, if found guilty of capital murder should pay for it with their own life." 13 Tr. at 91. Defense counsel questioned her about this answer, and Smith affirmed that she felt that anyone convicted of capital murder should be sentenced to death. Sheppard challenged her for cause, and the trial court denied the challenge. *Id.* at 91-93.

Following questioning by the prosecution, defense counsel again asked Smith if she could "envision a set of circumstances" where she still could answer "yes" to the mitigation special issue. Smith replied that she could. *Id.* at 100-101. Sheppard then used a peremptory challenge to remove Smith from the jury panel. *Id.* at 103. Sheppard eventually used all of her peremptory challenges.

Sheppard raised the denial of her challenge for cause on direct appeal. The TCCA, in denying the claim, noted that the law was not explained to Smith, and when defense counsel asked her if she would consider the full range of punishment, she replied that she would.

In *Wainwright v. Witt*, 469 U.S. 412, 424 (1985), the Supreme Court held that the standard for removing a juror based on his or her views on the death penalty "is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." Smith stated that she could follow the law and consider the full range of punishment. The trial court was in the best position to determine the credibility of her statements. Based on the record and controlling law, the TCCA's conclusion that the trial court did not abuse its discretion in denying Sheppard's

challenge for cause was reasonable, and is entitled to deference.

4. Removal of Juror David Paul Herd

David Paul Herd was accepted as a juror by both parties on February 8, 1995. Prior to his selection, Herd told the trial court that he was receiving treatment for a prostate condition, but that medication had his condition under control. Two days later, Herd said he had a flare up and was concerned that he would need frequent bathroom breaks. Sheppard notes that Herd originally stated that he could follow the law but, upon his reappearance in court, stated that he could not vote to impose a death sentence. She contends that it was an attack of nerves, not a prostate flare up, that caused Herd's withdrawal. Sheppard, citing no evidence, offers the medical conclusion that "[t]he medical issue, by itself, did not reach the level of requiring the removal of Mr. Herd." Am. Pet. at 177.

Sheppard raised this issue on appeal, and the TCCA found no abuse of discretion "in dismissing a venireman whose medical condition might necessitate frequent interruptions of trial" 5 SHCR at 1382. The claim was also rejected on state habeas. *Id.* at 1314, 1359.

The trial court's removal of Herd for medical reasons does not raise a viable constitutional issue. While Sheppard attempts to dismiss the medical reason and turn this into an effort by the State to remove a juror who was favorable to Sheppard, she presents no evidence that demonstrates that Herd was lying about his medical condition. Crediting Herd's expressed concerns was a sufficient basis for his removal. The state court's denial of relief was reasonable.

5. Refusal of Lesser Included Offense Instruction

Sheppard contends that she was denied due process when the trial court failed to instruct the jury that it could convict Sheppard of the lesser included offenses of robbery and murder. As discussed in connection with Sheppard's claim that counsel was ineffective for failing to request such a lesser included offense instruction, the evidence did not support a finding that she was guilty of either of these lesser included offenses but not of capital murder. Therefore, for the same reasons discussed above, she was not entitled to a lesser included offense instruction under *Beck v. Alabama*, 447 U.S. 625, 635 (1980). The trial court's failure to give such an instruction did not deny her due process.

6. Exclusion of Mitigating Evidence During Punishment Phase

Sheppard argues that the trial court erred in excluding mitigating evidence during the punishment phase.

a. Lay Opinion Testimony

The court excluded testimony by Sheppard's grandmother, Annie Smith, offering an opinion that Sheppard would not pose a future threat to society if sentenced to life imprisonment. 26 Tr. at 77. When Smith was asked her opinion, the State objected based on *Fuller v. State*, 829 S.W.2d 412 (Tex. Crim. App. 1993). The state took the position that *Fuller* bars lay opinion testimony. Sheppard disagrees.

Sheppard raised this issue on direct appeal. The TCCA noted that, under Texas law, "a properly qualified lay witness can testify to an opinion concerning the probable continuing threat to society posed by a capital murder defendant." *Sheppard*, slip op. at 15. The TCCA concluded, however, that Sheppard defaulted the claim by failing to make a proffer on the record at trial. *Id.*

Sheppard raised the claim in her state habeas application. The state habeas court also found that the claim was defaulted because Sheppard failed to preserve it at trial. In the alternative, the state habeas court found that Sheppard failed to demonstrate that she was harmed by the ruling because Smith was biased toward Sheppard, Dr. Ray testified that Sheppard would not be a future danger, and the State presented strong evidence that Sheppard would be a danger in the future. 5 SHCR at 1318-19, 1360.

I. Procedural Default

The Texas Rules of Evidence require that, to preserve error, a defendant must make a proffer on the record to allow a reviewing court to assess the harm caused by an erroneous refusal to allow evidence. *See* TEX. R. EVID. 103(a)(2).²⁰ As discussed above, failure to comply with a state procedural requirement constitutes a procedural default that bars federal review unless the petitioner can demonstrate either cause for the default and prejudice caused by the default, *or* can demonstrate that the federal court's failure to review the claim will result in a fundamental miscarriage of justice. Sheppard identifies no cause, *i.e.*, a factor

²⁰ At the time of Sheppard's trial, this rule was codified as Rule 103(a)(2) of the Texas Rules of Criminal Evidence.

external to the defense that prevented her compliance with the state procedural rule. Neither does she show that this Court's refusal to address the merits of the claim will result in a fundamental miscarriage of justice.

To show a fundamental miscarriage of justice relevant to this claim, Sheppard must show that she is "actually innocent" of the death penalty. *Sawyer v. Whitley*, 505 U.S. 333, 335 (1992); *see* text generally at pgs. 40-42, *supra*. The Supreme Court has explained that "[t]he phrase 'innocent of [the] death [penalty],' " however, "is not a natural usage of those words[.]" *Id.* at 340. "A prototypical example of 'actual innocence' in a colloquial sense is the case where the State has convicted the wrong person of a crime." *Id.* It is not easy to apply this doctrine in the capital sentencing scheme. "Sensible meaning is given to the term 'innocent of the death penalty' by allowing a showing in addition to the innocence of the capital crime itself a showing that there was no aggravating circumstance or that some other condition of eligibility had not been met." *Id.* at 345.

Thus, as the Supreme Court has emphasized, a determination on whether a petitioner is actually innocent of the death penalty "must focus on those elements which render a defendant eligible for the death penalty, and not on additional mitigating evidence that was prevented from being introduced as a result of a claimed constitutional error." *Id.* at 347; *accord Schlup v. Delo*, 513 U.S. 298, 323 (1992). In this context, the Fifth Circuit has held that evidence of a purported mitigating circumstance that does not show that the petitioner was actually innocent "of a death-eligible offense" is insufficient to establish actual innocence of the death penalty and does not overcome the procedural bar. *See Haynes v. Quarterman*, 526 F.3d 189, 195-96 (5th Cir. 2008) (involving a case where it was undisputed that the petitioner murdered a police officer); *see also Carty v. Quarterman*, 345 F. App'x 897, 911 (5th Cir. 2009) (repeating in a death penalty case that "[m]itigation evidence cannot be the basis of a claim of a fundamental miscarriage of justice.") (citing *Sawyer*, 505 U.S. at 347). Because Sheppard's claim relates only to excluded mitigation evidence, she cannot prevail under the fundamental miscarriage of justice exception to the procedural default rule.

ii. Merits of the Constitutional Claim

Sheppard cites Texas state law to argue that the trial court's ruling was incorrect.

Violations of state law are not generally cognizable on habeas review unless the error renders the trial as a whole fundamentally unfair. *See Fuller v. Johnson*, 158 F.3d 903, 908 (5th Cir. 1998) (citing *Engle v. Isaac*, 456 U.S. 107, 135 (1982)). “[I]t is not the province of a federal habeas court to reexamine state-court determinations on state-law questions. In conducting habeas review, a federal court is limited to deciding whether the conviction violated the Constitution, laws, or treaties of the United States.” *Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991).

The state habeas court’s alternative merits ruling, concluding that Sheppard suffered no harm as a result of the evidentiary ruling excluding Sheppard’s grandmother Annie Smith’s testimony regarding future dangerousness, may be subject to dispute but does not meet the unreasonableness standard in this Circuit. All of the matters cited by the habeas court are accurate: Smith is Sheppard’s grandmother and she had a close relationship with Sheppard, creating a natural bias in Sheppard’s favor. Dr. Ray, Sheppard’s expert, who has the credentials to offer a substantiated opinion on future dangerousness, opined (albeit superficially) that Sheppard would likely not pose a future threat. The State presented substantial evidence that Sheppard had a violent history, lacked remorse, and therefore posed a future danger to society. Because these findings and the related conclusion are not unreasonable, they are entitled to deference under the AEDPA. Sheppard thus fails to demonstrate that the trial court’s ruling denied her a fair trial, and thus fails to demonstrate a constitutional violation.

b. Crisis Center Records

Sheppard attempted to introduce records from the Matagorda County Women’s Crisis Center and Covenant House. The State objected “essentially to everything presented that had come directly from Ms. Sheppard” Am. Pet. at 190. Among the information excluded were Sheppard’s statements about why she was seeking assistance from these organizations. Sheppard argues that these documents were admissible as business records under Rule 803(6) of the Texas Rules of Evidence. The State objected that they were hearsay within hearsay.

On appeal, the TCCA agreed that Sheppard’s statements contained within the documents were inadmissible hearsay, even though the documents themselves might be

admissible business records. Sheppard tries to avoid this ruling by arguing that she was not offering the records for the truth of her statements contained therein. This contention rings hollow as there is little other reason for her to have sought their admission. The fact and broad outlines of the reasons Sheppard went to the Matagorda County Women's Crisis Center and Covenant House were established through other evidence. The only new information in the excluded portions was contained in Sheppard's statements. It thus appears that the evidentiary ruling was not incorrect under Texas law.

In any event, as noted above, if there was a violation of state law, it is not cognizable on habeas review unless the error renders the trial as a whole fundamentally unfair. *Fuller*, 158 F.3d at 908. Because, as discussed above, Sheppard fails to demonstrate that the exclusion of this evidence deprived her of a fair trial, she fails to raise a viable constitutional issue, and is not entitled to relief.

c. Patrice Green

Sheppard called Patrice Green, a lifelong friend, to testify. The trial court did not allow Green to answer questions about her knowledge of whether Sheppard had any prior arrests, her opinion of Sheppard's reputation and character, and Sheppard's reputation in her hometown of Bay City. The state appellate and habeas courts rejected the claim because Sheppard failed to make a bill of exception, thereby preventing the reviewing courts from determining whether Green's testimony would have been mitigating.

While Sheppard correctly notes that the Eighth Amendment requires that a capital sentencing jury be able to consider relevant mitigating evidence, *see, e.g., Woodson v. North Carolina*, 428 U.S. 280, 303-04 (1976), Sheppard presents no affidavit and provides no proof that Green's testimony would have been mitigating. She therefore fails to demonstrate that her Eighth Amendment rights were violated by the trial court's evidentiary rulings.

d. Texas Rules of Criminal Evidence

Citing *Green v. Georgia*, 442 U.S. 95 (1979), Sheppard argues that "the application of state rules of evidence to exclude testimony relevant to an issue in the punishment phase of a capital trial violates due process" Am. Pet. at 194. Sheppard reads *Green* far too broadly.

Green held that the Eighth Amendment *might* require admission of otherwise inadmissible evidence if that evidence is necessary to the defense and carries with it sufficient indicia of reliability. In that case, Green's co-defendant, Moore, admitted to a friend that he, and not Green, killed the victim.²¹ The trial court excluded testimony about Moore's confession. The Supreme Court held:

Moore made his statement spontaneously to a close friend. The evidence corroborating the confession was ample, and indeed sufficient to procure a conviction of Moore and a capital sentence. The statement was against interest, and there was no reason to believe that Moore had any ulterior motive in making it. Perhaps most important, the State considered the testimony sufficiently reliable to use it against Moore, and to base a sentence of death upon it.

Green, 442 U.S. at 97.

In *Chambers v. Mississippi*, 410 U.S. 284 (1973), the Court stated:

Few rights are more fundamental than that of an accused to present witnesses in his own defense. *E.g.*, *Webb v. Texas*, 409 U.S. 95, 93 S. Ct. 351, 34 L. Ed. 2d 330 (1972); *Washington v. Texas*, 388 U.S. 14, 19, 87 S. Ct. 1920, 18 L. Ed. 2d 1019 (1967); *In re Oliver*, 333 U.S. 257, 68 S. Ct. 499, 92 L. Ed. 682 (1948). In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.

Chambers, 442 U.S. at 302.

Thus, the Supreme Court in *Green* and *Chambers* made clear that rules of evidence are applicable, and do not necessarily require the admission of otherwise inadmissible

²¹ At the time, Georgia did not recognize a hearsay exception for statements against penal interest. *See Green*, 442 U.S. at 97 n.3.

evidence unless that evidence is both necessary to the defense and carries sufficient independent indicia of reliability. In this case, the record establishes that the evidence excluded by the trial court had material mitigating value. However, the Fifth Circuit typically deems such evidence cumulative and/or “double-edged.” *See Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002) (failure to present double-edged evidence did not prejudice the defendant). Moreover, Sheppard points to no independent indicia of reliability as to any of the excluded evidence that would bring it within the ambit of *Green*. She therefore fails to demonstrate any constitutional violation in the exclusion of the evidence.

e. Bryant

Again citing *Green* for the proposition that she was entitled to present any information that might have mitigating value, Sheppard argues that it was error for the trial court not to compel Bryant to appear and invoke his Fifth Amendment rights. Again, Sheppard reads too much into *Green*, and fails to demonstrate how Bryant’s repeated invocation of his Fifth Amendment rights would have been in any way mitigating.

7. Prosecutorial Misconduct

Sheppard raises several claims of prosecutorial misconduct during the punishment phase. “To constitute a due process violation, the prosecutorial misconduct must be “of sufficient significance to result in the denial of the defendant’s right to a fair trial.” *Greer v. Miller*, 483 U.S. 756, 765 (1987) (quoting *United States v. Bagley*, 473 U.S. 667, 676 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 108 (1976)). “A trial is fundamentally unfair if there is a reasonable probability that the verdict might have been different had the trial been properly conducted.” *Barrientes v. Johnson*, 221 F.3d 741, 753 (5th Cir. 2000) (quoting *Foy v. Donnelly*, 959 F.2d 1307, 1317 (5th Cir. 1992)), *cert. dismiss’d*, 531 U.S. 1134 (2001). The Fifth Circuit has observed that a “prosecutor’s improper [conduct] will, in itself, exceed constitutional limitations in only the most egregious cases.” *Menzies v. Procunier*, 743 F.2d 281, 288-89 (5th Cir. 1984).

a. Closing Argument on Mitigation Evidence

During his closing argument in the punishment phase, the prosecutor stated that “[m]itigation should be something that is out of the ordinary . . . and I submit to you, it

should be something that bears some relationship to the crime, that explains the crime in some way.” 27 Tr. at 6. Sheppard raised a contemporaneous objection, which was overruled. She now argues that this was a misstatement of the law, and violated her rights under the Eighth and Fourteenth Amendments.

In *Lockett v. Ohio*, 438 U.S. 586, 608 (1978), a plurality of the Supreme Court held “that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record . . . as a basis for a sentence less than death.” 438 U.S. at 604 (emphasis in original). This holding is based on the plurality’s conclusion that death “is so profoundly different from all other penalties” as to render “an individualized decision . . . essential in capital cases.” *Id.* at 605. In *Penry v. Johnson*, 532 U.S. 782 (2001), the Supreme Court clarified that a capital sentencing jury must “be able to consider and *give effect to* a defendant’s mitigating evidence in imposing sentence.” *Id.* at 797 (internal quotation marks, citation and brackets omitted).

On direct appeal, the TCCA held that the prosecutor was “not suggesting to the jurors that they were precluded from considering certain types of evidence . . . [but] was making an argument urging jurors to conduct their deliberation in a manner favorable to the State’s position rather than giving the jurors a definition of mitigating evidence.” *Sheppard v. State*, slip op. at 19. The TCCA further noted that the prosecutor told the jury to look at the definition of mitigating evidence in the jury charge, and that the charge accurately stated the law. *Id.*

Under Fifth Circuit law, this court must apply a two-step analysis in reviewing claims of prosecutorial misconduct. *See United States v. Wise*, 221 F.3d 140, 152 (5th Cir. 2000), *cert. denied*, 532 U.S. 959 (2001); *United States v. Lankford*, 196 F.3d 563, 574 (5th Cir. 1999), *cert. denied*, 529 U.S. 1119 (2000). First, the Court must determine whether the prosecutor made an improper remark. *Wise*, 221 F.3d at 152. “If an improper remark was made, the second step is to evaluate whether the remark affected the substantial rights of the defendant.” *Id.*

Regardless of whether the prosecutor’s statement was incorrect, there is no dispute that the jury charge correctly defined mitigating evidence. As discussed above, jurors are

presumed to follow the court's instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000), and Sheppard makes no showing to overcome that presumption. She therefore fails to demonstrate that the prosecutor's comments affected her substantial rights, and is not entitled to relief.

b. Argument About Evidence of Physical Abuse

The prosecutor argued that Sheppard presented "hints," but no proof, that she had a history of being physically abused by men. 27 Tr. at 9. Sheppard tried to introduce documents from the Matagorda County Women's Crisis Center and Covenant House reflecting her claims of abuse. The State objected to these documents, and portions of them were excluded as hearsay. Sheppard now argues that it was improper for the prosecutor to "take actions . . . to deny the admission of evidence and then argue . . . that conclusions should be drawn because of the absence of that same evidence." Am. Pet. at 199.

Sheppard's argument relies entirely on state law. She therefore fails to identify a federal Constitutional claim on which relief can be granted.

Moreover, Sheppard's argument relies on state cases that are inapposite. Sheppard cites *Sifford v. State*, 505 S.W.2d 866 (Tex. Crim. App. 1974), and *Lopez v. State*, 810 S.W.2d 401 (Tex. Crim. App. 1991), for the proposition that a prosecutor cannot argue that a defendant failed to prove a point after the prosecutor sought to exclude evidence relevant to that point. In *Sifford*, the TCCA held that a prosecutor *did not* act improperly when arguing that a defendant failed to prove the results of a breathalyzer test when it was the *defendant* who moved to exclude the evidence. This case is not on point. In *Lopez*, the prosecutor commented on the defendant's decision not to testify at his own trial. The TCCA found that this comment violated both the Texas Constitution and the Fifth Amendment to the United States Constitution. *Lopez* thus does not assist Sheppard.

As discussed above, Sheppard's statements contained in the records from the Crisis Center and Covenant House were inadmissible hearsay. Sheppard points to no admissible evidence that was excluded on this point, and to no state or federal case that is on point. She therefore fails to demonstrate any prosecutorial misconduct with regard to the comments on her failure to prove abuse.

c. Burden of Proof

The prosecutor argued that “[y]ou can’t allow Erica Sheppard to escape the death penalty because she may have been abused at some point in her life.” 27 Tr. at 10. Sheppard objected, arguing that this comment shifted the burden to Sheppard to prove that she should not be sentenced to death. The trial court and the TCCA rejected this claim.

The Texas courts’ rejection of the claim is reasonable. The Texas capital sentencing scheme at the time of Sheppard’s trial first required a jury to answer the first two special issues: (1) whether the defendant posed a future danger to society; and (2) whether she actually caused, or intended to cause, or intended for another to cause, the death of the victim. SHCR at 1432-33. Only after answering these two questions in the affirmative did the jury proceed to the mitigation special issue. That special issue asks whether there is sufficient mitigating evidence to warrant a life sentence rather than a death sentence. It is, in effect, asking whether the defendant, who the jury already decided meets the requirements for a death sentence, should “escape the death penalty” based on the mitigating evidence. The state courts’ decision that the prosecutor did not suggest that Sheppard bore any burden to present mitigating evidence was not unreasonable. Sheppard is not entitled to relief on this basis.

d. Argument that Sheppard Hit the Victim with a Statue

Sheppard next contends that the prosecutor argued that Sheppard hit the victim in the head with a statue, despite the absence of any evidence of this fact. Under Texas law, a prosecutor may present argument to the jury on four types of issues: (1) summation of the evidence; (2) reasonable deductions from the evidence; (3) responses to opposing counsel’s argument; and (4) pleas for law enforcement. *Moody v. State*, 827 S.W.2d 875, 894 (Tex. Crim. App.), *cert. denied sub nom. Moody v Texas*, 506 U.S. 839 (1992). The TCCA held that this argument was a reasonable deduction from the evidence. This conclusion is not unreasonable. It is therefore entitled to deference.

Even if the prosecutor’s argument was improper, it did not render the trial unfair. Sheppard, in her statement to the police, said that she held the victim – who, by this time had her throat slashed and a plastic bag placed over her head – down while Dickerson hit her with the statue. SX 38A. Thus, even if the prosecutor’s statement was incorrect, Sheppard’s own

statement showed her active role in the beating. There is no reasonable probability that the sentence would have been different had the prosecutor not made this statement.

e. Bryant

Sheppard once again contends that the prosecutor threatened Bryant with prosecution if he testified, and argues that this was prosecutorial misconduct. As discussed above, the record shows that the prosecutor warned Bryant's counsel that Bryant could face possible prosecution if he made incriminating statements while testifying.

While threats of retaliation against witnesses by the government violate a criminal defendant's right to due process, *Washington v. Texas*, 388 U.S. 14, 19 (1967), it is not prosecutorial misconduct for a prosecutor to inform a witness that his testimony might expose him to criminal charges. *United States v. Viera*, 839 F.2d 1113, 1115 (5th Cir. 1988). Indeed, in *Viera*, the Fifth Circuit specifically stated that "[b]y adding that he would move promptly to present any violation to the Grand Jury, the prosecutor cannot be charged with harassment, particularly when the statement was made to defense counsel rather than to a prospective lay witness." *Id.* Thus, this claim does not demonstrate any prosecutorial misconduct.

8. Extraneous Offense Evidence

The State introduced evidence of an unadjudicated extraneous offense by Sheppard in this capital case. Sheppard notes that, under Texas law, the use of an unadjudicated offense would not be permitted if she was charged with a noncapital crime. She argues that this dichotomy violates her Fourteenth Amendment right to equal protection of the law.

The Fifth Circuit has held that "there is no constitutional prohibition on the introduction at a trial's punishment phase of evidence showing that the defendant has engaged in extraneous, unadjudicated, criminal conduct." *Brown v. Dretke*, 419 F.3d 365, 376 (5th Cir. 2005); *see also Williams v. Lynaugh*, 814 F.2d 205, 208 (5th Cir. 1987) ("the admission of unadjudicated offenses in the sentencing phase of a capital trial does not violate the eight and fourteenth amendments"). Sheppard's argument, however, is not that the admission of the offense itself violates her rights, but that the difference in the admissibility of such offenses between a capital trial and a non-capital trial violates the equal protection

clause. She cites no case holding that this disparity violates equal protection.

In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court held that, except in very limited circumstances, a federal habeas court cannot retroactively apply a new rule of criminal procedure. The Court explained that:

a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (emphasis in original). The AEDPA effectively codified the *Teague* non-retroactivity rule “such that federal habeas courts must deny relief that is contingent upon a rule of law not clearly established at the time the conviction becomes final.” *Peterson v. Cain*, 302 F.3d 508, 511 (5th Cir. 2002) (citing *Terry Williams v. Taylor*, 529 U.S. 362, 380-81 (2000)), *cert. denied*, 537 U.S. 1118 (2003).

Because no court has announced the rule that Sheppard now urges, such rule was not clearly established at the time her conviction became final. Therefore, this Court cannot grant relief on this claim. It is noted that this issue may well be one that deserves attention in the proper case.

IV. CERTIFICATE OF APPEALABILITY

Petitioner has not requested a certificate of appealability (“COA”), but this court may determine whether she is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) (“It is perfectly lawful for district court’s [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.”). A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner’s request for a COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1998); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) (“[T]he district court should continue to review COA requests before the court of appeals does.”). “A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone.” *Lackey v. Johnson*,

116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner “makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further.” *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has stated:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong. The issue becomes somewhat more complicated where . . . the district court dismisses the petition based on procedural grounds. We hold as follows: When the district court denies a habeas petition on procedural grounds without reaching the prisoner’s underlying constitutional claim, a COA should issue when the prisoner shows, at least, that jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right and that jurists of reason would find it debatable whether the district court was correct in its procedural ruling.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). “[T]he determination of whether a COA should issue must be made by viewing the petitioner’s arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d).” *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000).

This Court has carefully and exhaustively considered each of Petitioner’s claims. While the issues Petitioner raises are clearly important and deserving of the closest scrutiny, this Court finds that all but one of Sheppard’s claims is foreclosed by clear, binding precedent.

The exception is Sheppard’s claim that she received ineffective assistance of counsel regarding the development and presentation of mitigation evidence in the punishment phase of her trial. The Court concludes that jurists of reason could disagree with the Court’s ultimate rejection of Sheppard’s claim of ineffective assistance in the development and presentation of mitigating evidence. The Court concludes this claim raises issues that

deserve encouragement to proceed further. In particular, there is serious question whether the TCCA was reasonable in concluding that counsel's performance on the mitigation issue was not deficient under *Strickland* even though it is clear that counsel failed to use available resources, such as his second-chair attorney and additional investigator services, and failed to personally undertake detailed interviews of key sources of information, such as school, crisis center, friends, family, and third-party witnesses. Counsel could be said to have failed fully to investigate significant background facts, to adequately prepare lay and expert witnesses for trial, *and* to present live, fulsome testimony about Sheppard's personal history, numerous instances of childhood abuse and other travails, and her persisting emotional and mental issues. These witnesses, properly interviewed and prepared, could have explained the true scope of Sheppard's traumatic childhood events and their impact on her decision-making abilities. They could have given sympathetic testimony about the emotional effect of the repeated abuse, the potential for maturation and insights she would gain during a long incarceration, and other mitigating information. *See, e.g.*, potential witnesses referenced in Cunningham Report, Am. Pet., App. 6; Bradley Aff., Am. Pet., App. 26; Young Decl., Am. Pet., App. 25; Jonathan Sheppard, Am. Pet., App. 16. The superficial, limited testimony of the punishment phase live witnesses, the limited scope of Dr. Ray's testimony, the heavy reliance for Sheppard's personal history on Dr. Ray's brief written report and redacted crisis center records left the jury with only a truncated and sparse sense of Sheppard as a person. This dry record was substantially less persuasive and comprehensible to a jury than testimony from numerous people, properly prepared to testify, who knew Sheppard and experts who could have meaningfully evaluated and studied her background. In this Court's view, counsel's preparation on the mitigation issue fell materially short of longstanding ABA and State Bar of Texas recommended standards for capital cases. The Respondent's contention that the unpresented evidence was merely cumulative or double-edged is not realistic in light of the volume and type of evidence that the jury did not hear.

With regard to the other claims, this Court concludes that, under controlling precedent, Petitioner has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). Regarding those claims that have been dismissed on procedural

grounds, this Court concludes that jurists of reason would not find it debatable whether the petition states valid grounds for relief and would not find it debatable whether this court is correct in its procedural determinations. This Court concludes that, with the exception of the punishment phase ineffective assistance of counsel claim, Petitioner is not entitled to a certificate of appealability.

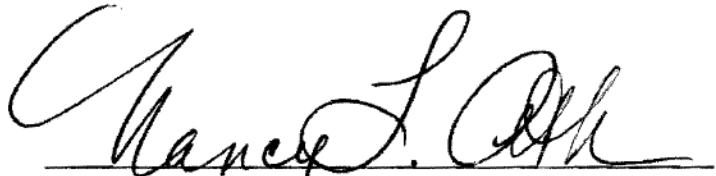
V. CONCLUSION AND ORDER

For the foregoing reasons, it is **ORDERED** as follows:

1. Respondent Lorie Davis' Motion for Summary Judgment [Doc. # 46] is **GRANTED**;
2. Petitioner Erica Yvonne Sheppard's Amended Petition for Writ of Habeas Corpus [Doc. # 28] is **DENIED** in all respects and is **DISMISSED WITH PREJUDICE**; and
3. A **certificate of appealability shall issue** only on Sheppard's claim that counsel rendered ineffective assistance in the investigation, development and presentation of

The Clerk shall no
Memorandum and Order.

A separate final judg
SIGNED at Houston



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED

March 29, 2017

David J. Bradley, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

ERICA YVONNE SHEPPARD,
Petitioner,

v.

LORIE DAVIS, Director, Texas
Department of Criminal Justice,
Department of Criminal Justice,
Respondent.

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CIVIL ACTION NO. 4:14-0655

FINAL JUDGMENT

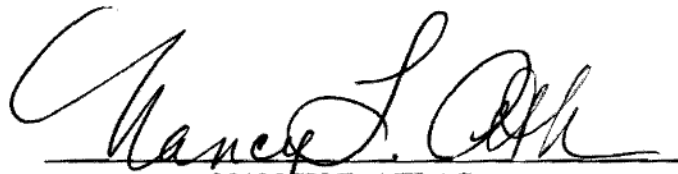
For the reasons set forth in the Memorandum and Order Denying Petition for Writ of Habeas Corpus, it is hereby

ORDERED that Respondent Lorie Davis' Motion for Summary Judgment [Doc. # 46] is **GRANTED**. It is further

ORDERED that Petitioner Erica Yvonne Sheppard's Amended Petition for a Writ of Habeas Corpus [Doc. # 28] is **DISMISSED WITH PREJUDICE**. It is further

ORDERED that a (claim that she received i
development, and present;
her trial.

SIGNED at Housto


NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE

ENTERED

February 26, 2018

David J. Bradley, Clerk

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION**

ERICA YVONNE SHEPPARD,	§	
Petitioner,	§	
	§	
v.	§	CIVIL ACTION NO. 4:14-0655
	§	
LORIE DAVIS, Director, Texas	§	
Department of Criminal Justice,	§	
Correctional Institutions Division,	§	
Respondent.	§	

**MEMORANDUM AND ORDER DENYING
PETITIONER'S MOTION TO ALTER OR AMEND JUDGMENT**

Petitioner Erica Yvonne Sheppard is a Texas death row inmate. This Court denied Sheppard's Amended Petition for Writ of Habeas Corpus, but granted a certificate of appealability on her claim that she received ineffective assistance of counsel in the development and presentation of mitigating evidence during the punishment phase of her trial. Sheppard has filed a Motion to Alter or Amend Judgment [Doc. # 57] under Rule 59(e) of the Federal Rules of Civil Procedure.

I. BACKGROUND

The facts of this case are set out in detail in this Court's memorandum and Order denying Sheppard's Amended Petition for a Writ of Habeas Corpus [Doc. # 55]. Sheppard was convicted of capital murder and sentenced to death on March 3, 1995, for murdering Marilyn Sage Meagher during the course of robbing Meagher. Her federal habeas corpus petition raised claims that she received ineffective assistance of counsel, that she was denied a fair trial as a result of errors by the trial court and the prosecutor, and that the State

improperly struck African-American jurors on the basis of their race. This Court examined Sheppard's claims in a 60 page opinion, concluding that she was not entitled to habeas corpus relief, but granting a Certificate of Appealability on one of Sheppard's ineffective assistance of counsel claims.

II. THE APPLICABLE LEGAL STANDARD

A motion to alter or amend under Fed. R. Civ. P. 59(e) "must clearly establish either a manifest error of law or fact or must present newly discovered evidence." *Schiller v. Physicians Resource Group Inc.*, 342 F.3d 563, 567 (5th Cir. 2003) (internal quotation marks omitted). "Relief under Rule 59(e) is also appropriate when there has been an intervening change in the controlling law." *Id.* Sheppard fails to demonstrate grounds for relief.

III. ANALYSIS

Sheppard cites no new evidence or change in controlling law. Instead, she largely rehashes the arguments rejected by this Court, and does so in the context of claiming that the Court committed manifest error by: (1) failing to examine an unreasonable decision by the Texas Court of Criminal Appeals; (2) imposing an improper burden of proof on Sheppard in connection with her *Batson* claim; (3) concluding that she suffered no prejudice from the trial court's erroneous statement of the law of parties; and (4) concluding that she suffered no prejudice from the prosecutor's erroneous statement concerning the possibility that she would be paroled if sentenced to life imprisonment. Petitioner's Motion to Alter or Amend Judgment [Doc. # 57]. Sheppard's arguments rest on fundamental misunderstandings and/or mischaracterizations of this Court's analysis.

A. Statutory Deference

Sheppard first contends that this Court erroneously deferred to unreasonable mistakes and facts of law in the Texas Court of Criminal Appeals' decision denying Sheppard's application for postconviction relief. Specifically, she contends that the Court of Criminal Appeals unreasonably concluded: (1) that mitigation evidence that counsel did not present at trial was cumulative of evidence that was presented; and (2) that trial counsel was not deficient in failing to object to improper statements by the prosecutor and the trial court. Sheppard is mistaken.

This Court clearly identified the correct legal standard allowing relief on a claim adjudicated on the merits by the state courts only if the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Doc. # 55 at 6-7 (quoting 28 U.S.C. § 2254(d) and citing *Early v. Packer*, 537 U.S. 3, 7-8 (2002); *Cobb v. Thaler*, 682 F.3d 364, 372-73 (5th Cir. 2012)); *see generally* Doc. # 55 at 6-8. Sheppard argues, based on the record in this case, that the Court of Criminal Appeals' decision was unreasonable and was not entitled to deference by this Court. That is a legitimate argument to make, but it is one that this Court rejected in expressly finding that the Court of Criminal Appeals was not unreasonable within the meaning of 28 U.S.C. § 2254(d). *See, e.g.*, Doc. # 55 at 12-14. Thus, Sheppard's argument is not, as she tries to frame it, that this Court committed an error of law, but that she disagrees with this Court's

conclusion that the Texas Court of Criminal Appeals was not unreasonable. Mere disagreement with the Court's conclusion does not demonstrate manifest error, and Sheppard is not entitled to relief on this theory.

B. Batson

Sheppard raised a claim that the prosecution used a peremptory strike to remove an African-American juror from the panel on the basis of his race, and in violation of Sheppard's rights under the Fourteenth Amendment. She now contends that this Court erroneously required her "to find a similarly situated white juror in order to prevail on a *Batson* claim." Doc. # 57 at 14. Sheppard mischaracterizes the Court's analysis.

This Court plainly and clearly laid out the three-step analysis set out by the Supreme Court in *Batson*:

When a defendant makes a *prima facie* showing that a peremptory challenge was based on race the prosecutor must offer a race-neutral explanation for the strike. If the prosecutor does so, it then falls to the defendant to demonstrate that the offered explanation is pretextual. *See, e.g., Purkett v. Elem*, 514 U.S. 765, 767-68 (1995).

Doc. # 55 at 41. There is no dispute that the State struck an African-American juror and offered a race neutral explanation for the strike. In an effort to meet her burden of showing that the offered race-neutral explanation was pretextual, Sheppard identified two white jurors who, she claimed, gave answers to *voir dire* questions that were similar to those given as the reason for striking the African-American juror. *See* Amended Petition [Doc. # 28] at 168-69. This Court addressed Sheppard's argument, noting that there were differences between the jurors, and that Sheppard failed to prove the explanation was pretextual. This Court never

said, implied, or suggested that Sheppard was required to identify a similarly situated white juror in order to prevail; the Court merely addressed *Sheppard's* argument.

Other than mischaracterizing this Court's analysis, Sheppard merely rehashes the argument rejected by this Court to argue that this Court was wrong. Once again, however, Sheppard's disagreement with this Court's application of the correct governing legal standard to the facts of this case is just that – a disagreement; it does not identify or demonstrate manifest error by this Court. Sheppard is not entitled to relief on this claim.

C. Trial Court Error

In discussing the case with prospective jurors, the trial judge gave an example of a bank robbery, stating that both the actual robber and the driver of the getaway car would be guilty of robbery. This statement is a correct statement of Texas' law of parties. The trial judge, however, also stated that not only would the robber and driver both be guilty of robbery, but that each should receive the same punishment. This is an incorrect statement of the law. *See, e.g., Enmund v. Florida*, 458 U.S. 782, 797 (1982) (holding that the Eighth Amendment does not “permit[] imposition of the death penalty on one. . . who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed”). Trial counsel did not object. This Court rejected Sheppard's ineffective assistance of counsel claim, finding that the evidence did not support a theory that Sheppard was not an active participant in the murder, and therefore concluding that Sheppard was not prejudiced by the error.

Sheppard now argues that the trial court's error deprived her of the individualized sentencing consideration to which a capital defendant is entitled. *See, e.g., Lockett v. Ohio*, 438 U.S. 586 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976). Sheppard did not make this argument in her amended petition. *See* Amended Petition at 151-52, 161-66. Her failure to do so precludes relief. *See, e.g., Simon v. United States*, 891 F.2d 1154, 1159 (5th Cir. 1990)(holding that a legal theory cannot be raised for the first time in a Rule 59 motion).

To the extent that this claim was present in her broad assertion that she was denied due process by the erroneous statement, the claim nonetheless fails. Respondent points out, and Sheppard does not dispute, that the jury was properly instructed prior to deliberations. Jurors are presumed to follow their instructions, *Weeks v. Angelone*, 528 U.S. 225, 234 (2000); *see Galvan v. Cockrell*, 293 F.3d 760, 765-66 (5th Cir. 2002), and Sheppard makes no showing that her jury failed to do so. Because the jury was properly instructed on this issue before deliberating Sheppard's sentence, Sheppard cannot demonstrate prejudice.

D. Prosecutor's Statement

During jury *voir dire*, the prosecutor stated, correctly, that Sheppard would be eligible for parole after serving 35 years if she was sentenced to life imprisonment. He added, however, that the Legislature has changed the amount of time a life sentenced inmate is required to serve before becoming eligible for parole, and implied that another such change could reduce the time Sheppard would have to serve to as little as 15 years. *See, e.g.,* 6 Tr. at 125; 9 Tr. at 24-25. Counsel did not object. This Court found that Sheppard failed to

demonstrate *Strickland* prejudice because the jury was specifically instructed that they were not to consider parole eligibility in passing sentence, and that Sheppard would have to serve 35 years before being considered for parole. The Court noted that jurors are presumed to follow their instructions, and that Sheppard makes no showing that her jury failed to do so.

Sheppard now argues, also for the first time, that the prosecutorial misstatement “prevent[ed] the jury from giving a reasoned moral response to the petitioner’s mitigating evidence” Rule 59(e) Motion at 26; *compare* Amended Petition at 152-56. As noted above, a new legal theory for relief cannot be presented for the first time in a Rule 59(e) motion.

To the extent that this argument was implied by Sheppard’s broad citations to the Constitution, it is nonetheless unavailing. Sheppard does not contend that this Court identified the wrong legal standard controlling this issue. Rather, she contends that the Court applied the correct principles to the facts of this case in a manner that she believes reached the wrong result. As noted above, Sheppard’s disagreement with this Court’s conclusion is not a basis for post-judgment relief.

E. Request for Stay

Sheppard also asks the Court to stay the case pending the Supreme Court’s decision in *Wilson v. Sellers*. The question presented in *Wilson* is:

Did this Court’s decision in *Harrington v. Richter*, 562 U.S. 86 (2011), silently abrogate the presumption set forth in *Ylst v. Nunnemaker*, 501 U.S. 797 (1991) - that a federal court sitting in habeas proceedings should “look through” a summary state court ruling to review the last reasoned decision - as a slim majority of the *en banc* Eleventh Circuit held in this case, despite the

agreement of both parties that the *Ylst* presumption should continue to apply?

Brief of Petitioner, *Wilson v. Sellers*, No. 16-6855, 2017 WL 2472080 (U.S. 2017); *see also* *Wilson v. Warden, Ga. Diagnostic Prison*, 842 F.3d 1155, 1156 (11th Cir. 2016) (“We concluded that when reviewing a state prisoner’s petition for a writ of habeas corpus, federal courts need not “look through” a summary decision on the merits to review the reasoning of the state trial court. . . . We also held that the summary denial of a certificate of probable cause to appeal by the Supreme Court of Georgia was an adjudication on the merits for purposes of our review”).

Ylst set the standard for a federal habeas court to use in reviewing a summary decision, *i.e.*, a decision that announces a judgment without offering any reasoning or analysis, from the last state court to review a petitioner’s case. *See Ylst v. Nunnemaker*, 501 U.S. 797, 801 (1991) (“We consider, therefore, whether the California Supreme Court’s unexplained order denying his second habeas petition to that court . . . constituted a ‘decision on the merits’ of that claim sufficient to lift the procedural bar imposed on direct appeal”). In this case, the Texas Court of Criminal Appeals issued a reasoned decision denying Sheppard’s habeas corpus application. Therefore, *Ylst* is inapplicable to this case, and it is highly unlikely that the Supreme Court’s decision in *Wilson* will have any bearing on this case. Sheppard’s request for a stay is denied.

IV. CERTIFICATE OF APPEALABILITY

A Certificate of Appealability (“COA”) may issue only if the petitioner has made a “substantial showing of the denial of a constitutional right.” 28 U.S.C. § 2253(c)(2); *see also*

United States v. Kimler, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner “makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further.” *Hernandez v. Johnson*, 213 F.3d 243, 248 (5th Cir. 2000). The Supreme Court has stated:

Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). The Court finds that reasonable jurists would not find debatable this Court’s conclusion that Sheppard fails to demonstrate manifest error in the resolution of her Amended Petition. Therefore, Sheppard is not entitled to a COA regarding this Order. The Court has already granted a COA with regard to Sheppard’s claim that she received ineffective assistance of counsel in the development and presentation of mitigating evidence during the punishment phase of her trial.

V. CONCLUSION AND ORDER

For the foregoing reasons, it is **ORDERED** as follows:

1. Petitioner Erica Yvonne Sheppard's Motion to Alter or Amend Judgment [Doc. # 57] is **DENIED**; and

2. No certificate of

The Clerk shall notif

Memorandum and Order.

SIGNED at Houston, T



NANCY F. ATLAS
SENIOR UNITED STATES DISTRICT JUDGE



**IN THE COURT OF CRIMINAL APPEALS
OF TEXAS**

NO. WR-78,132-01

EX PARTE ERICA YVONNE SHEPPARD

**ON APPLICATION FOR WRIT OF HABEAS CORPUS IN CAUSE
NO. 668505-A IN THE 185th JUDICIAL DISTRICT COURT
HARRIS COUNTY**

Per Curiam.

ORDER

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

On March 3, 1995, a jury convicted applicant of the offense of capital murder. The jury answered the special issues submitted pursuant to Texas Code of Criminal Procedure article 37.071, and the trial court, accordingly, set punishment at death. This Court affirmed applicant's conviction and sentence on direct appeal. *Sheppard v. State*, No. AP-72,127 (Tex. Crim. App. June 18, 1997) (not designated for publication).

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Applicant presents forty allegations in her application in which she challenges the validity of her conviction and resulting sentence. The trial court held an evidentiary hearing, and the trial judge subsequently entered findings of fact and conclusions of law. The trial court recommended that relief be granted with regard to Allegation 14 and that relief be denied with regard to all other allegations.

This Court has reviewed the record with respect to the allegations made by applicant. We disagree with the trial court's recommendation to grant relief with regard to Allegation 14, and reject Findings 137 through 152 and Conclusion 43. In Allegation 14, applicant alleges that by failing to conduct a reasonable investigation regarding her history of sexual abuse, physical abuse, neglect, and domestic violence and not presenting mitigating evidence even though considerable evidence existed, trial counsel provided ineffective assistance of counsel.

The trial court found that counsel did not develop the testimony from Rhonda Robinson of Covenant House or Annie Smith and did not call Glenda Davenport of the Matagorda County Women's Crisis Center ("the Crisis Center"). The trial court found that counsel did not develop Robinson's testimony regarding applicant's character, background or stays at Covenant House. The trial court also found that counsel did not elicit testimony from Smith (applicant's grandmother) regarding applicant's background, character, physical or sexual abuse, and education. Additionally, the trial court found that had Davenport been

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called to testify, she could have testified regarding applicant's character, background, and the effects of domestic abuse.

During punishment, counsel presented several witnesses who testified regarding applicant's background. Redacted copies of applicant's records from the Crisis Center and Covenant House were before the jury, as well as the testimony of Patricia Birdwell, Robinson, family friend Patrice Green, and Smith. Birdwell, the Director of the Crisis Center testified rather than Davenport. She testified that applicant was admitted to the Crisis Center, a facility that provided protection and services for abused women and children. Applicant's 1993 records from the center were admitted into evidence and contained notations that (1) applicant's daughter was sick and running a high temperature; (2) applicant wanted a divorce; (3) applicant was concerned about her grandmother's health; (4) applicant refused to return home; and (5) applicant had been abused by her husband.

Robinson testified as custodian of records for Covenant House, a facility that was an emergency shelter for runaway and homeless youth to which applicant was admitted.

Applicant's 1990 Covenant House records contained notations that:

- applicant was referred to Covenant House when she was sixteen years old because she was not getting along with her mother;
- applicant's mother abused her;
- applicant had contacted the police because of the abuse, which her mother denied;
- applicant had a history of being a runaway;

SHEPPARD - 4

- applicant lacked educational skills and worked at Astroworld;
- applicant dropped out of school in the tenth grade; and
- applicant had an eleven month old child and had been pregnant at fourteen. Green, a registered nurse testified that she had known applicant since infancy, that applicant had attended church all her life, that applicant had three children, and that applicant had worked for Green's husband, a justice of the peace.

Smith, applicant's grandmother, testified that applicant's husband had abused her and that applicant had moved to Covenant House until her husband moved away.

Additionally, defense counsel presented Dr. Priscilla Ray's testimony and written report that addressed applicant's potential for future danger, lack of psychosis, depression and family history of depression, social background, educational history, and history of abuse.

The trial court found that "counsel did not fully present the mitigating evidence," but the record shows that the testimony the trial court faults counsel for not developing through Robinson, Davenport, and Smith was actually before the jury through the testimony and report of Birdwell, Dr. Ray, and others. A decision not to present cumulative testimony does not constitute ineffective assistance. *See Coble v. Quarterman*, 496 F.3d 430, 437 (5th Cir. 2007) (refusing to find *Strickland* error when counsel presented similar mitigating evidence at trial, even if only in outline form).

We adopt the trial judge's findings and conclusions with regard to all other allegations. Also, with regard to Allegations 3, 10, 21, 23, 31, 35, 37, and 38, we make the additional finding that claims that should have been raised on direct appeal cannot be

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reviewed on habeas. *See Ex parte Banks*, 769 S.W.2d 539 (Tex. Crim. App. 1998). Relief is denied.

IT IS SO ORDERED THIS THE 9TH DAY OF OCTOBER, 2013.

Do Not Publish

Cause No. 668505-A

EX PARTE	§	IN THE 185TH DISTRICT COURT
	§	OF
ERICA YVONNE SHEPPARD, Applicant	§	HARRIS COUNTY, TEXAS

COURT'S FINDINGS OF FACT,
CONCLUSIONS OF LAW AND ORDER

Having reviewed the applicant's application for writ of habeas corpus; Respondent's Original Answer; the trial and appellate records; evidence elicited during the writ evidentiary hearing; and, the affidavits and exhibits filed by the parties, the Court makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. Erica Yvonne Sheppard, the applicant, was convicted by a jury for the felony offense of capital murder in the 185th District Court of Harris County, Texas, cause number 668505. After the jury answered the special issues, the trial court assessed punishment at death by lethal injection.
2. The applicant committed the instant offense along with co-defendant James Dickerson whose trial was conducted prior to the applicant's trial and resulted in a death sentence for Dickerson.
3. Charles Brown, Hazel Bolden and Kristine Woldy represented the applicant at the trial level. Craig Goodhart and Julian Ramirez prosecuted the instant case.
4. On June 18, 1997, the Court of Criminal Appeals affirmed the applicant's conviction in an unpublished opinion. *Sheppard v. State*, No. 72, 127 (Tex. Crim. App. June 18, 1997)(not published).
5. On September 2 and 3, 2008, the trial court conducted an evidentiary hearing on the allegations contained in the applicant's initial state habeas writ, cause no. 668505-A.

APP. 27

FIRST GROUND FOR RELIEF – LAW OF PARTIES VOIR DIRE

6. In her first ground for relief, the applicant urges error based on a statement by the trial judge regarding the law of parties to a panel of prospective jurors during voir dire. *Applicant's writ at 13.*

7. During the trial judge's complained-of voir dire, the court stated, without objection from the applicant, that the getaway driver in a bank robbery "should be equally responsible as to punishment" as the armed co-defendant who actually robbed the bank (S.F. XIX at 15-6).

8. During the remainder of the trial judge's complained-of voir dire, the judge also informed the jury panel, on at least two instances, that a party to an offense could be equally guilty as his co-defendant and receive the same punishment (XIX S.F. at 16-18).

9. Included in the group of prospective jurors who heard the complained-of statement regarding the law of parties was Joseph Edward Curry, who was accepted as a juror, and David William Fisher, an alternate juror who was excused from the jury after guilt/innocence argument (XIX S.F. at 100-1, 184; XXIII S.F. at 46).

10. In its punishment charge to the jury, the trial court instructed the jury not to consider the instructions given at guilt/innocence relating to the law of parties and the responsibility of parties for the acts of others; that the jury "shall consider only the conduct and state of mind of this defendant" in answering the special issues; and, that, if the jury found that there were mitigating circumstances, the jury must decide the weight, if any, they deserved and give "effect and consideration to them in assessing the defendant's personal culpability" (IA Tr. at 218-9).

11. The jury was required to answer the following special issues at punishment:

Is there a probability that the defendant, Erica Yvonne Sheppard, would commit criminal acts of violence that would constitute a continuing threat to society?

Do you find from the evidence beyond a reasonable doubt that Erica Yvonne Sheppard, the defendant herself, actually caused the death of Marilyn Sage Meagher, the deceased, on the occasion in question, or if she did not actually cause Marilyn Sage Meagher's death, that she intended to kill Marilyn Sage Meagher or another, or that she anticipated that a human life would be taken?

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, do you find that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

(IA Tr. at 223-5).

12. The Court finds, based on the trial record, that the punishment charge and special issues submitted to the jury focused solely on the conduct and state of mind of the applicant; that the applicant does not establish that the jury was confused in answering the special issues; and, that the applicant does not allege other improper comments by the trial court or a party to the proceeding regarding the law of parties and the assessment of punishment.

13. The Court finds, based on the totality of the trial court judge's voir dire regarding the law of parties and the court's instructions to the jury, that it is reasonable to infer that the trial judge inadvertently substituted "should" when the intended, evident meaning was that a party to an offense "could" receive the same punishment as a co-defendant; that any alleged misstatement by the trial court to prospective jurors during voir dire was sufficiently attenuated by the punishment charge; and, that the applicant fails to demonstrate harm based on the trial judge's complained-of voir dire statement. See *Eldridge v. State*, 940 S.W.2d 646, 650 (Tex. Crim. App. 1996)(trial court's error in informing venire of the effect of their failure to agree on a special issue attenuated by

jury charge); *Sattiewhite v. State*, 786 S.W.2d 271, 278-9 (Tex. Crim. App. 1989)(reviewing court assumes that jury conducted itself as directed by the trial court).

FOURTH GROUND – EXCUSAL OF VENIREMEN

14. In her fourth ground for relief, the applicant alleges that the trial court erred in denying the applicant's motion that only the trial judge rather than the jury room judge grant excuses to potential jurors. *Applicant's writ at 23*.

15. The Court finds that the applicant urged the instant claim as her second point of error on direct appeal. The Court of Criminal Appeals held the applicant's claim meritless, stating that it was appropriate for the central jury judge or that court's designee to determine the validity of the exemptions of potential jurors and the applicant failed to demonstrate harm. *Sheppard*, slip op. at 3-4.

FIFTH GROUND - BATSON

16. In her fifth ground for relief, the applicant contends that the trial court erred in denying the applicant's *Batson v. Kentucky*, 476 U.S. 79 (1986), objection to the State striking venireperson Ronnie Simpson. *Applicant's writ at 25*.

17. The Court finds that the applicant urged the instant claim as her third point of error on direct appeal, and the Court of Criminal Appeals held the applicant's claim meritless based on the State's race-neutral explanations for exercising a peremptory strike on venireperson Simpson. *Sheppard*, slip op. at 4.

SIXTH GROUND – VENIREPERSON EDITH GREER SMITH

18. The applicant contends that the trial court erred in denying the applicant's challenge for cause to venireperson Edith Greer Smith. *Applicant's writ at 31*.

19. The Court finds that the applicant urged the instant claim as her fourth point of error on direct appeal. The Court of Criminal Appeals held the applicant's claim meritless and stated that the trial court did not abuse its discretion in denying the applicant's challenge for cause to venireperson Smith. *Sheppard*, slip op. at 5.

SEVENTH GROUND – VENIREPERSON DAVID PAUL HERD

20. In her seventh ground for relief, the applicant alleges that the trial court erred in allowing juror David Paul Herd to “chicken out” after being interviewed and accepted by both parties as a juror. *Applicant’s writ at 35.*

21. The Court finds that the applicant urged the instant claim as her fifth point of error on direct appeal. The Court of Criminal Appeals held that the applicant’s claim was meritless, and the trial court did not abuse its discretion in dismissing venireperson Herd. Additionally, the Court of Criminal Appeals rejected the applicant’s argument that it would have been preferable to replace Herd with an alternate juror if his medical condition actually caused problems. *Sheppard, slip op. at 6.*

EIGHTH GROUND – EXCUSAL OF VENIREPERSON SKORUPINSKI

22. In her eighth ground for relief, the applicant alleges that the trial court erred in permitting venireperson Skorupinski a child-care exception from jury duty. *Applicant’s writ at 39.*

23. The trial court excused venireperson Skorupinski pursuant to Section 62.106 of the Texas Government Code, without objection from the defense, after Skorupinski explained to the court that she kept grandchildren; that her daughter went to school two nights a week and Skorupinski took care of her children; that Skorupinski picked up a seven-year-old child at 5:00 p.m.; that a month-and-a-half aged grandchild lived with Skorupinski full time, and she took care of a seven-year-old child every evening; that Skorupinski worked and had a baby-sitter that cared for the baby until 4:00 p.m.; and, that serving on the applicant’s jury would be a hardship for Skorupinski (VIII S.F. at 67-9).

24. The Court finds that the applicant urged the instant claim as her sixth point of error on direct appeal, and the Court of Criminal Appeals held that the applicant failed to preserve error at the trial level. *Sheppard, slip op. at 6.*

25. Article 35.03 of the Texas Code of Criminal Procedure provides that "the court shall hear and determine excuses offered for not serving as a juror, and if the court deems the excuse sufficient, the court shall discharge the juror or postpone the juror's service to a date specified by the court." The Court finds that the Court of Criminal Appeals has repeatedly held that a trial court has broad discretion to excuse prospective jurors for good reason under Article 35.03. *Wright v. State*, 28 S.W.3d 526, 533 (Tex. Crim. App. 2000)(citing *Butler v. State*, 830 S.W.2d 125 (Tex. Crim. App. 1992)); *Black v. State*, 26 S.W.3d 895, 899 (Tex. Crim. App. 2000).

26. The Court further finds that the only statutory restriction on prospective juror excuses is that an excuse cannot be given for "an economic reason" without the presence and approval of both parties. TEX. GOV'T. CODE § 62.110.

27. The Court finds that the Court of Criminal Appeals in *Rousseau v. State*, 855 S.W.2d 666, 676 (Tex. Crim. App. 1993), held that the trial court did not abuse its discretion in excusing, on its own motion, an otherwise qualified venireperson who established that she was the mother of three minor children, ages three, nine, and eleven, and had to be home at a certain time or would run the risk of leaving her children inadequately supervised.

28. The Court further finds, based on the trial and habeas record, that the applicant fails to demonstrate harm based on the trial court's alleged improper excusal of venireperson Skorupinski.

TENTH GROUND – LESSER-INCLUDED OFFENSES

29. In her tenth ground for relief, the applicant contends that the trial court erred in failing to instruct the jury on the lesser-included offenses of robbery and murder. *Applicant's writ at 44.*

30. The applicant was charged with causing the death of the complainant while in the course of robbery (I Tr. at 12).

31. The applicant did not object to the court's guilt/innocence charge regarding the absence of instructions on the lesser-included offenses of robbery or murder and did not request instructions on those offenses (I Tr. at 205).

32. The applicant's request that an instruction regarding the lesser-included offense of conspiracy to commit capital murder was denied (XXII S.F. at 51-2).

33. At guilt/innocence, Korey Jordan testified for the State regarding a conversation between Dickerson and the applicant that took place prior to the instant offense where the applicant and Dickerson discussed the manner and proper venue for killing the complainant (XXI S.F. at 95-101).

34. According to the applicant's redacted statement, which was admitted into evidence at guilt/innocence, the applicant and co-defendant James Dickerson entered the complainant's apartment because they decided to rob the complainant and steal her car; the applicant gave Dickerson a knife and demanded that the complainant surrender her car keys after Dickerson knocked the complainant to the ground; the applicant handed Dickerson a butcher knife from the complainant's kitchen when he was unsuccessful in his initial attempt to slit the complainant's throat; the applicant held the complainant down, with blood gushing from the complainant's throat, while Dickerson put a plastic bag over the complainant's face to suffocate her; Dickerson put a bed sheet over the complainant's face when the complainant continued breathing; Dickerson walked out of the bedroom stating that he needed something heavy to knock the complainant unconscious; Dickerson grabbed a statue from a table next to the front door and hit the complainant on the head; Dickerson covered the complainant with a blanket from the bed and put the statue under the blanket; the applicant rummaged through the complainant's purse; and, the applicant and Dickerson took the complainant's car and drove to Bay City, Texas (XXI S.F. at 164, *State's Ex. 38-B*).

35. The Court finds, based on the trial record, that there was no evidence at trial that, if the applicant was guilty, she was only guilty of the lesser-included offenses of murder and/or robbery; rather, the evidence elicited at trial established that the applicant acted with the sole intent to kill the complainant while in the course of committing robbery. *Rousseau v. State*, 855 S.W.2d 666, 672-5 (Tex. Crim. App. 1993)(to be entitled to charge on lesser-included offense, there must be some evidence in record that, if guilty, the defendant is guilty only of the lesser offense).

TWENTY-FIRST GROUND – ANNIE SMITH’S PUNISHMENT TESTIMONY

36. In her twenty-first ground for relief, the applicant contends that the trial court erred in excluding punishment testimony from the applicant’s grandmother, Annie Smith, regarding her opinion of whether the applicant would be a threat to society if sentenced to life imprisonment. *Applicant’s writ at 110*.

37. Annie Smith, the applicant’s grandmother, testified for the defense at the guilt/innocence and punishment phases of trial. At guilt/innocence, Smith testified that she “practically raised” the applicant; that Jerry Bryant called her on July 2, 1993, to inform her that the applicant was in trouble; that Smith went to the Econo Lodge to pick up the applicant’s baby; and, that the police were not at the Econo Lodge when Smith was there (R. XXII – 41-3). At punishment, Smith testified that the applicant lived with Smith almost all her life because the applicant’s parents separated and her mother worked; that Bryant abused the applicant; and, that the applicant left Smith to go to Covenant House until Bryant moved away (XXVI S.F. at 75-7).

38. During Smith’s direct examination testimony on punishment, the trial court sustained the State’s objection to trial counsel’s question asking Smith whether she thought that the applicant would be a threat to society if she was sentenced to life imprisonment, and Smith was then excused as a witness (XXVI S.F. at 77).

39. The applicant made no proffer of Smith's prospective testimony regarding her opinion of the applicant's future dangerousness.

40. Psychiatrist Priscilla Ray testified for the defense at punishment, in pertinent part, that the applicant suffered from depression; that the applicant cried and was sad when discussing the instant case; that the applicant was not psychotic; that there was less than a fifty percent probability that the applicant would be a continuing threat to society if imprisoned; and, that the applicant was more of a follower and easily led by men (XXVI S.F. at 41-6, 60).

41. The Court finds that the applicant urged the instant ground for relief as her nineteenth point of error on direct appeal, and the Court of Criminal Appeals held that it could not determine whether the trial court erred in sustaining the State's objection to Smith's testimony because the applicant failed to make a proffer on the record of the excluded testimony. *Sheppard*, slip op. at 15.

42. According to Smith's 1998 habeas affidavit, absent the State's sustained objection, Smith would have testified that the applicant was a non-violent and peaceful person who would not be a threat to anyone in prison or the outside world. *Applicant's Exhibit, 1998 affidavit of Annie Smith*.

43. The Court finds, based on the trial and habeas records, that any alleged benefit to the applicant from Smith's potential testimony concerning the applicant's future dangerousness was negligible given Smith's obvious bias in favor of the applicant, the evidence before the jury of the applicant's role in the instant offense and the applicant's extraneous offenses, and the State's potential cross-examination of Smith testing the validity of her opinion on the applicant's future dangerousness.

44. The Court finds, based on the trial and habeas records, that the applicant was not harmed by the trial court's exclusion of Smith's alleged testimony because the jury

had for its consideration the favorable defense testimony by Dr. Ray concerning the applicant's future dangerousness (XXVI S.F. at 45-6).

TWENTY-THIRD GROUND – MATAGORDA AND COVENANT HOUSE RECORDS

45. In her twenty-third ground for relief, the applicant alleges that the trial court erred in excluding evidence introduced at punishment consisting of the applicant's records from Matagorda County Women's Crisis Center ("Matagorda") and Covenant House. *Applicant's writ at 112.*

46. At punishment, redacted copies of the applicant's Matagorda and Covenant House records were admitted into evidence after the trial court sustained the State's objection to hearsay portions of the records (XXVII S.F. at 11-29, 32, 36; *Defendant's Ex. 2-B and 3-B*).

47. The Matagorda records that were admitted into evidence contained notations regarding the following: that the applicant's daughter was sick and running a high temperature; that the applicant wanted a divorce; that the applicant was concerned about her grandmother's health; that the applicant refused to return home and was in a lot of pain; that the applicant attended her uncle's funeral; and, that the applicant's husband abused her (*Defendant's Ex. 2-B*).

48. The excluded portions of the Matagorda records consisted of a Registration for Services form, progress reports, a written warning, counseling notes, and miscellaneous written notes from 1993 containing statements made by the applicant to individuals regarding the following: that the applicant sustained physical, sexual, and psychological abuse and called the police and filed charges in response to violence or threats in a relationship; that a day care called to say that the applicant's baby was sick; that the applicant's husband attacked the applicant, jerked her hair, and hit her; that the applicant was out all night without permission; that the applicant's head hurt where she was hit by her husband; that the applicant discussed abuse by her husband and mother; that the

applicant discussed her sick child and staying with the child in the hospital; and, that the applicant discussed how upset she would be if anything happened to her children (*Defendant's Ex. 2-C*).

49. The portions of the Covenant House records that were admitted into evidence at punishment contained the following information: that the applicant and her baby were referred to Covenant House because the applicant did not get along with her mother; that the applicant lacked educational skills; that the applicant worked at Astroworld; that the applicant alleged that her mother abused her, and the applicant would not return home; that the applicant contacted the police regarding abuse; that the applicant's mother denied that she abused the applicant during a family conference; that the applicant had an eleven-month-old child when the applicant was fourteen years old; that the applicant had a history of running away from home; and, that the applicant dropped out of school in the tenth grade (*Defendant's Ex. 3-B*).

50. The excluded portions of the Covenant House records consisted of an assessment report, an intake report, and progress notes from 1990 containing statements made by the applicant to other individuals regarding the following: that the applicant first ran away when she was thirteen years old; that the applicant was pregnant and considering an abortion; that the applicant worked at Astroworld; that the applicant and her mother were having problems; that the applicant did not want to return home because she feared for her child's safety and did not want to give her mother another chance to hurt her; that the applicant's mother stated that she would file a runaway report when the applicant refused to return home; and, that the applicant's mother physically and verbally abused the applicant (*Defendant's Ex. 3-C*).

51. Ronda Robinson, the custodian of records for Covenant House, testified for the defense at punishment that the applicant was admitted to Covenant House which was an emergency shelter for runaway and homeless youths (XXVI S.F. at 37).

52. Patricia Birdwell testified for the defense at punishment that the applicant was admitted to the services of the Matagorda County Women's Crisis Center, a facility that provided protection for abused women and children (XXVI S.F. at 31-3).

53. Annie Smith, the applicant's grandmother, testified for the defense at punishment that the applicant lived with Smith "practically all her life;" that the applicant's parents were separated, and the applicant's mother worked; that the applicant's husband (Jerry Bryant) abused the applicant; and, that the applicant moved to Covenant House until the applicant's husband moved away (XXVI S.F. at 76-7).

54. Psychiatrist Priscilla Ray testified for the defense at punishment that the applicant suffered from depression; that the applicant cried and was sad when discussing the instant case; that the applicant was not psychotic; that there was less than a fifty percent probability that the applicant would be a continuing threat to society if imprisoned; and, that the applicant was more of a follower and easily led by men (XXVI S.F. at 41-6, 60)

55. In addition to testifying for the defense at punishment, the report of psychiatrist Priscilla Ray was admitted into evidence, and it contained the following information: that the applicant was raised by her grandmother who suffered from colon cancer; that the applicant's mother was unemployed and had heart problems; that the applicant's parents divorced when the applicant was a baby and the applicant seldom saw her father; that the applicant failed the fourth grade and left school in the tenth grade because she was pregnant; that the applicant wanted to be a nurse and attended the National Education Center; that the applicant did not get into fights in school and was never suspended or expelled; that the applicant was reared in the Baptist religion and adhered to that religion; that the applicant wet her bed until she was thirteen or fourteen; that the applicant was sexually abused as a child; that the applicant's mother "put her out" when the applicant was sixteen or seventeen years old because they did not get along; that

the applicant was raped by a man with a knife and attended a rape support group; that the applicant had three children, each with different fathers; that the applicant was at the Matagorda County Women's Crisis Center and Covenant House; that the applicant's husband abused the applicant; and, that there was a family history of depression (*Defendant's Ex. 4-B*).

56. The applicant urged the instant ground for relief as her twentieth point of error on direct appeal, and the Court of Criminal Appeals held that the trial court did not err in excluding the hearsay portions of the records from admission into evidence because the applicant offered no exception or exemption under which the redacted statements were admissible. *Sheppard*, slip op. at 16.

57. Based on the habeas record, the Court finds unpersuasive the applicant's argument that the excluded portions of the Matagorda and Covenant House records were not offered into evidence at trial for the truth of the matter asserted in light of the applicant's habeas assertions that the excluded portions of the records carried "heavy" mitigation potential. *Applicant's writ* at 114.

58. The Court finds, based on the habeas proceedings, that the applicant fails to establish that the excluded portions of the Matagorda and Covenant House records were admissible into evidence at trial under the Texas Rules of Evidence. *See Renteria v. State*, 206 S.W.3d 689, 697 (2006)(United States Constitution does not require admission of mitigating evidence when it is inadmissible under state law).

59. Additionally, the applicant fails to demonstrate that she was harmed as a result of the trial court's exclusion from evidence of the hearsay portions of the Matagorda and Covenant House records based on the presentation of such evidence through the following sources at punishment: the redacted Matagorda and Covenant House records that were admitted into evidence; the punishment testimony of Patricia Birdwell, Ronda Robinson, Annie Smith, and psychiatrist Priscilla Ray; and, the written report of Dr. Ray.

TWENTY-FIFTH AND TWENTY-SIXTH GROUNDS – PATRICE GREEN TESTIMONY

60. In her twenty-fifth and twenty-sixth grounds for relief, the applicant contends that the trial court erred in refusing to permit defense witness Patrice Green to testify at punishment regarding the applicant's reputation and character and that the Court of Criminal Appeals' application of the Texas Rules of Criminal Evidence to exclude Green's testimony violated the applicant's constitutional rights. *Applicant's writ at 115 and 117.*

61. The trial court sustained the State's objection to the following four questions that trial counsel posed to Green at punishment:

- During the course of [the applicant's] life, do you know of any other things she had been arrested for?
- During the time you have known her, how would you describe her reputation in Bay City?
- Do you have an opinion as to [the applicant's] reputation as far as you know it in Bay City?
- What is your personal opinion of [the applicant's] character and reputation?

Sheppard, slip op. at 16, n. 7.

62. The applicant did not make a bill of exception or offer of proof at the trial level regarding Green's potential responses to trial counsel's questions regarding the applicant's reputation and character.

63. The applicant challenged the trial court's exclusion of Green's punishment testimony on direct appeal. The Court of Criminal Appeals held that there was no trial court error; that the applicant was not entitled to ask Green any question simply because it would have produced mitigating evidence; and, that the rules of evidence were in force and applicable at the punishment phase of a capital trial. *Sheppard*, slip op. at 17.

TWENTY-EIGHTH GROUND – EXPERT'S EVALUATION OF APPLICANT

64. In her twenty-eighth ground for relief, the applicant contends that the failure of defense expert, Priscilla Ray, M.D., to perform a reasonably competent examination of

the applicant resulted in a violation of the applicant's constitutional rights. *Applicant's writ at 118.*

65. The Court finds, based on evidence elicited during habeas proceedings, that Dr. Ray enjoyed a good professional reputation when trial counsel retained her to assist with the applicant's case (II W.H. at 116, 187).

66. The Court finds, based on a review of the punishment testimony elicited from Dr. Ray, as well as her report which was admitted into evidence, that Dr. Ray presented much of the same evidence proffered by habeas counsel's retained expert, Mark Cunningham, Ph.D., including the following evidence regarding the applicant's mental health, remorse, propensity for future dangerousness, background, educational history, abuse, and the primary offense:

- that the applicant suffered from depression; that the cause of the depression was genetic and from psychological stress sources in the applicant's life from childhood until the time of trial; that the applicant was not psychotic; and, that the applicant was more of a follower and easily led by men;
- that the applicant cried and was sad when discussing the primary offense;
- that there was less than a fifty percent probability that the applicant would be a continuing threat to society if imprisoned;
- regarding the applicant's background, evidence was presented that the applicant was largely reared by her grandmother; that the applicant's parents divorced when the applicant was young, and the applicant had little contact with her father; that the applicant's mother was unemployed and in poor health; that the applicant was reared in the Baptist religion and adhered to that religion; that the applicant had three children by three different men; and, that the applicant lived on the streets when she was sixteen years old after her mother put her out of the house;
- regarding the applicant's educational history, evidence was presented that the applicant failed the fourth grade; that the applicant left school in the tenth grade because she was pregnant; that the applicant later obtained her GED; that the applicant attended school to be a medical assistant but quit because Jerry Bryant wanted her at home; and, that the applicant was not a discipline problem in school;
- regarding abuse, evidence was presented that a babysitter's boyfriend sexually abused the applicant when the applicant was young; that the applicant was later raped at knifepoint; that Jerry Bryant abused the

applicant; and, that the applicant contacted the police, filed charges, and then went to a crisis center after one of Bryant's abusive episodes; and,

- regarding the primary offense, evidence was presented that immediately before entering the complainant's apartment, the applicant's co-defendant pulled a knife on the applicant, stating that he would kill her and her baby if she did not go with him; that the applicant was in shock and her co-defendant continued to threaten the applicant during the instant offense; and, that the applicant was afraid of her co-defendant after the offense.

(XXVI S.F. at 41-60; *Defendant's Ex. 4-B*; *Applicant's Exhibit, affidavit of Mark D. Cunningham, Ph.D.*

67. The Court finds that the Fourth, Seventh, and Ninth Circuits have explicitly rejected a constitutional right to effective assistance of an expert witness, except to the extent such claim implicates effective assistance of counsel in hiring and preparing a witness. *Wilson v. Greene*, 155 F.3d 396, 401 (4th Cir. 1998); *Harris v. Vasquez*, 949 F.2d 1497, 1520 (9th Cir. 1990); *Silagy v. Peters*, 905 F.2d 989, 1013 (7th Cir. 1990).

TWENTY-NINTH GROUND – NEWLY DISCOVERED EXPERT FINDINGS

68. In her twenty-ninth ground for relief, the applicant alleges that, if it should be determined that the findings of habeas expert, Dr. Cunningham, were not reasonably available prior to the applicant's 1995 trial, then such findings constitute newly discovered evidence. *Applicant's writ at 121; Applicant's Exhibit, affidavit of Mark D. Cunningham, Ph.D.*

69. The Court finds, based on the habeas record, that, aside from the speculative assertions contained in Dr. Cunningham's affidavit, much of the information contained in the affidavit of Dr. Cunningham was available or based on available evidence at the time that the instant case was set for trial. See *Ex parte Briggs*, 187 S.W.3d 458, 465 (Tex. Crim. App. 2005)(defendant did not prevail on actual innocence claim based on newly discovered evidence because amended autopsy report conclusions regarding complainant's manner and cause of death as well as expert opinions on complainant's

cause of death were predicated on physical evidence and records existing at time of defendant's guilty plea).

70. The Court further finds, based on the trial and habeas records, including evidence of the primary offense and the State's punishment evidence, that the applicant fails to demonstrate that no reasonable juror would have convicted her in light of the alleged newly discovered evidence, including Dr. Cunningham's affidavit and the applicant's alleged PTSD, advanced during habeas proceedings. See *Ex parte Elizondo*, 947 S.W.2d 202, 205 (Tex. Crim. App. 1996)(defendant bears burden of showing that newly discovered evidence establishes his innocence).

THIRTIETH GROUND – PUNISHMENT ARGUMENT ON MITIGATION

71. In her thirtieth ground for relief, the applicant claims error based on the prosecutor's alleged attempt to limit the definition of "mitigation" during punishment argument, citing the following:

[State]: Let me talk for a moment about the third special issue, the one that asks you if there is sufficient mitigating evidence that suggests the punishment in the case should be life.

And let me give you a couple of guidelines on what we think you should be looking for in the way of mitigation.

Mitigation should not be just anything. Now, if you have a bad hair day or something like that, you don't like the way somebody looks, that's not mitigation.

Mitigation should be something that is out of the ordinary, something that is out of the ordinary and I submit to you, it should be something that bears some relationship to the crime, that explains the crime in some way.

Maybe it causes it. Maybe it is some sort of moral justification for the crime.

[Defense]: Your Honor, I object to that. That's not what the law is. That's not what the case scenario has been as to what constitutes mitigation.

And I object to them being limited to those opportunities.

The Court: Overruled.

[State: The law on mitigation is in the Charge for you. These remarks I will make and Mr. Goodhart will make are geared towards helping you answer these questions and considering the evidence in the way they should be considered.

(XXVII S.F. at 6-7); *Applicant's writ* at 123.

72. The applicant urged the instant ground for relief as a point of error on direct appeal, and the Court of Criminal Appeals found the claim meritless, stating that the

prosecutor was not suggesting to jurors that they were precluded from considering certain evidence as mitigating; that the prosecutor was urging jurors to conduct deliberations in a manner favorable to the State's position; that the State admonished the jury to examine the definition of mitigating evidence in the trial court's charge; and, that the jury was charged in compliance with Article 37.071 of the Texas Code of Criminal Procedure. *Sheppard*, slip op. at 19.

THIRTY-FIRST GROUND – PUNISHMENT ARGUMENT REGARDING ABUSE

73. In her thirty-first ground for relief, the applicant contends that the prosecutor improperly argued in punishment, without objection, that there was no evidence that the applicant was abused, citing the following:

There have been some hints about physical abuse. There have been suggestions that in the past the defendant was physically abused by men in her life.

Okay? Hints is all you have been given.

I submit to you there has been no proof of that. There have been no eyewitnesses who have come forward, no abuser who has given a tearful confession in court to abuse of Ms. Sheppard; but you can assume that it occurred if you like. I submit to you that it doesn't make any difference.

(XXVII S.F. at 9); *Applicant's writ* at 125.

74. The Court finds, based on the trial record, that the State's argument regarding a lack of abuse evidence constituted a reasonable deduction and summary of the evidence elicited at trial. *See Alejandro v. State*, 493 S.W.2d 230, 231 (Tex. Crim. App. 1973)(proper jury argument falls into four specific categories: summation of the evidence, reasonable deduction from the evidence, answer to argument by opposing counsel, and plea for law enforcement).

75. The Court further finds, based on the trial record, that the complained-of argument was not so inflammatory that its prejudicial effect could not have been alleviated by an instruction to disregard. *McGinn v. State*, 961 S.W.2d 161, 165 (Tex. Crim. App. 1998).

THIRTY-THIRD GROUND – BURDEN OF PROOF PUNISHMENT ARGUMENT

76. In her thirty-third ground for relief, the applicant alleges that the trial court erred in allowing the prosecutor to shift the burden of proof to the defense regarding the death penalty, citing the following punishment argument by the State:

[State]: She was not physically abused; but even if she was, what kind of excuse is that?

It's unfortunate that some people in our world are abused, but it doesn't excuse criminal acts, and it certainly doesn't excuse capital murder.

No one has it easy in life. Everybody has their problems. You can't allow Erica Sheppard to escape the death penalty because she may have been abused at some point in her life.

(XXVII S.F. at 9-10); *Applicant's writ* at 127.

77. The trial court overruled the defense's objection to the complained-of argument by the State (XXVII S.F. at 9-10). *See Finding of Fact 77.*

78. The applicant urged the instant ground for relief as her twenty-sixth point of error on direct appeal, and the Court of Criminal Appeals held the applicant's claim meritless. The Court stated that the prosecutor's argument could not be reasonably understood to place a burden of proof on the applicant, and the prosecutor's argument "did not suggest that [the applicant] was required to put on evidence or should have put on more evidence in order to support the jury's affirmative answer to the mitigation special issue." *Sheppard*, slip op. at 19-20.

THIRTY-FOURTH GROUND – PUNISHMENT ARGUMENT REGARDING APPLICANT HITTING COMPLAINANT WITH STATUE

79. In her thirty-fourth ground for relief, the applicant contends that the trial court erred in allowing the State to argue that the applicant hit the complainant with a statute, citing the following:

The statue. Who hit the lady in the head with the statute? Big mystery. Couldn't figure it out.

If you read her confession, it says [the co-defendant] went down the hallway to get the statute. The lady is not dead yet. Somebody has got to hold her down. So, Erica said it was down on the glass table in the hallway.

How the hell does she know? You know how she knows? She moved through the building first.

The glass table is here. The statute is here. Where is the kitchen? Where is the butcher knife? Where is the glass table?

She knew where the statue was. She doesn't tell you that in her confession. But guess what?

She told the doctor something a little bit different when she talked about the crime.

Read the doctor's report, the psychological update. There she changes her story. She says: I went down the hallway and got the statue off the glass table.

She took it off the table, and she brought it back and gave it to James to swing it. No way. No way.

James is still sitting on the lady who is got the paper wrapped around her face, who is dying and suffocating and screaming and begging for her life.

She takes the statue by the base, holds it with both hands, and swings it so hard it smashes against her head and it snaps in half.

(XXVII S.F. at 45-6); *Applicant's writ* at 129.

80. The applicant urged the instant ground for relief as her twenty-seventh point of error on direct appeal, and the Court of Criminal Appeals found the applicant's claim meritless. The Court held that the State was merely describing for the jury its theory of the case derived from reasonable deductions from the evidence, and the State's theory was supported by evidence presented at trial. *Sheppard*, slip op. at 20-21.

THIRTY-FIFTH GROUND – THREATS TO DEFENSE WITNESS

81. The applicant alleges that the State improperly threatened defense witness Jerry Bryant, Jr., with prosecution if Bryant testified for the defense. *Applicant's writ* at 130.

82. Before the punishment phase of trial began, prosecutor Goodhart and trial counsel Brown consulted with the judge as follows:

[State]: Judge, Mr. Brown and I have already spoken about this. They could have a witness that potentially could testify – Jerry Bryant – which I have informed the Court that if he does he will need a lawyer, he will probably want to invoke his Fifth Amendment right not to testify – just so everybody understands and that we have to have a hearing.

(XXV S.F. at 5).

83. The Court finds, based on the record and the credible assertions of trial counsel Brown during habeas proceedings, that the defense subpoenaed Bryant as a witness for the applicant's trial, and Bryant was present during the applicant's trial; that prosecutor Goodhart advised trial counsel of Bryant's potential criminal liability and the necessity for legal representation if Bryant testified, and trial counsel then discussed those issues with Bryant; that trial counsel did not consider prosecutor Goodhart's comments regarding Bryant's possible criminal liability and potential need for legal representation improper or a threat; that Bryant decided that he did not want to testify at the applicant's trial; and, that trial counsel then elected not to call Bryant as a witness because he did not then consider Bryant a good witness for the defense (II W.H. at 72-6, 123-6); *Applicant's Exhibit, affidavit of trial counsel Charles Brown.*

84. The Court finds, based on the habeas record and the credible testimony of trial counsel Brown and prosecutor Goodhart, that Goodhart did not talk to Bryant regarding his possible criminal liability or potential need for legal representation (II W.H. at 123; III W.H. at 101).

85. The Court finds, based on the habeas record and the credible testimony of trial counsel Brown and prosecutor Goodhart, that Goodhart's comment to trial counsel regarding Bryant's possible criminal liability and potential need for legal representation was not improper and did not constitute a threat.

86. The Court finds, based on the habeas record, that trial counsel's decision not to present Bryant as a witness during the applicant's trial was a reasonable trial strategy decision. See *Gonzalez v. United State*, 553 U.S. 242, 349 (2008) ("Numerous choices affecting the conduct of the trial, including the objections to make, the witnesses to call, and the arguments to advance, depend not only upon what is permissible under the rules of evidence and procedure but also upon tactical considerations of the moment and the larger strategic plan for the trial").

87. The Court finds, based on the trial and habeas records, that the applicant's assertions regarding the substance of Bryant's alleged testimony at the applicant's trial are speculative and not substantiated by evidence developed at trial or during habeas proceedings. Additionally, the applicant fails to demonstrate that Bryant's testimony would have benefitted the defense. See *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) (defendant complaining about trial counsel's failure to call witnesses must show proof that witnesses were available and that their testimony would have benefited the defense).

88. The Court finds, based on the trial and habeas records, that the applicant was not harmed as a result of Bryant not testifying at trial because the substance of Bryant's alleged beneficial testimony was elicited at trial through other sources: Paula Allen testified at punishment that she gave inconsistent statements regarding the extraneous offense involving Wayland Griggs and the motivation for her inconsistent statements; evidence was introduced reflecting that the charge against the applicant regarding the Griggs offense was dismissed for insufficient evidence; and, evidence regarding the applicant's background and alleged abuse by her mother and Bryant was elicited at punishment through the Matagorda and Covenant House records, the testimony and report of Dr. Ray, and the testimony of Patrice Green and Annie Smith (XXV S.F. at 84, 89, 101; XXVI S.F. at 33, 37, 71, 73, 76-7; *State's Ex. 2-B, 3-B and 4-B*).

THIRTY-SEVENTH GROUND – JERRY BRYANT, JR., TESTIMONY

89. The applicant contends that the exclusion of the testimony of Jerry Bryant, Jr., on Fifth Amendment grounds deprived the applicant of a fair trial and violated her rights pursuant to U.S. CONST. amend. XIV and corresponding state law provisions. *Applicant's writ at 134.*

90. The Court finds, based on the trial record, that Bryant did not testify during the applicant's trial. Aside from the exchange between the parties and the trial court judge set forth in *Finding of Fact 83*, there was no discussion on the record regarding the possibility of Bryant testifying or whether he intended to invoke his Fifth Amendment rights.

91. As set forth in *Findings of Fact 84 and 87*, the Court finds, based on the trial and habeas records, that trial counsel elected not to call Bryant as a witness at trial for strategic reasons; that counsel's strategy decision was reasonable; that counsel elicited Bryant's beneficial testimony through other sources at trial; and, that the applicant fails to demonstrate harm due to Bryant not testifying at trial.

THIRTY-EIGHTH GROUND – ADMISSION OF UNADJUDICATED OFFENSES

92. The applicant claims that the admission of prior unadjudicated offenses at punishment violated her constitutional rights. *Applicant's writ at 135.*

93. During the State's presentation of punishment evidence, the applicant's entire statement was admitted into evidence which included details regarding the applicant's attempted robbery of Anna Allen the night before the primary offense (XXV S.F. at 9-10; *State's Ex. 38-A*).

94. Additionally, the State presented evidence at punishment regarding the applicant's extraneous and bad acts and reputation in the community:

- Korey Jordan testified that, on the evening of June 29, 1993, after Jordan overheard the applicant and Dickerson discussing their plans to rob someone,

Jordan saw the applicant chasing a scared-looking woman across the apartment complex parking lot;

- Anna Allen testified regarding the applicant's attempt to rob her on the evening of June 29, 1993;
- Sherry Brown testified regarding the applicant stealing and selling car parts;
- Mary Matocha, Bay City Police Department, testified that the applicant had a bad reputation in the community;
- Maurice Ashcraft, Matagorda County Sheriff's Department, testified that the applicant had a bad reputation in the community;
- Paula Allen and Wayland Griggs testified regarding the applicant's role in Griggs' shooting;
- Mary Ross testified that, while she was an inmate at the Harris County Jail with the applicant, the applicant drew attention to a news broadcast regarding the primary offense in a bragging manner and remarked, "that bitch is dead and she in jail and there ain't nothing they can do to bring her back"; the applicant threatened to "whip" another inmate's ass; and, the applicant asked an inmate how she could get moved to a floor for people with mental problems; and,
- Sharon Harvey testified that, while she was housed at the Harris County Jail with the applicant, the applicant did not show any remorse when news of the primary offense was broadcast on television, and Harvey and other inmates requested that the applicant be moved to another area of the jail.

(XXV S.F. at 16-25, 33-44, 64-5, 73-84, 106-114, 134-143, 158-164).

95. The Court finds that the Court of Criminal Appeals has held that unadjudicated offenses are admissible during the punishment phase of a capital murder trial, and the admission of extraneous unadjudicated offenses does not violate an accused's constitutional rights to due process and equal protection. TEX. CODE CRIM. PROC. art. 37.071; *see also Kemp v. State*, 846 S.W.2d 289, 307 (Tex. Crim. App. 1992); *Williams v. State*, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981).

THIRTY-NINTH GROUND – SUFFICIENCY OF FUTURE DANGEROUSNESS EVIDENCE

96. The applicant contends that the evidence was insufficient to support a finding of future dangerousness. *Applicant's writ at 136-7.*

97. The applicant urged her ground for relief as her twenty-ninth point of error on direct appeal, and the Court of Criminal Appeals held that the claim was meritless

because the evidence was sufficient to support the jury's finding that the applicant posed a danger to society. *Sheppard*, slip op. at 22-3.

FORTIETH GROUND – VIOLATIONS OF CONSTITUTIONAL RIGHTS

98. The applicant alleges that her constitutional rights have been violated in ways not yet discovered. *Applicant's writ* at 138.

99. The Court finds, based on the trial and habeas records, that the applicant's instant ground for habeas relief is speculative, and the applicant fails to allege and prove facts that would entitle her to relief. *See Ex parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985)(in post-conviction collateral attack applicant must allege error and how the error harmed him).

SECOND, THIRD, NINTH, ELEVENTH THROUGH TWENTIETH, TWENTY-SECOND, TWENTY-FOURTH, TWENTY-SEVENTH, THIRTY-SECOND, AND THIRTY-SIXTH GROUNDS FOR RELIEF – EFFECTIVENESS OF COUNSEL

100. In multiple grounds for relief, the applicant alleges that she was denied the effective assistance of counsel at trial and on direct appeal.

-representation in general

101. The Court finds, based on the trial and habeas records, that Charles Brown was appointed lead counsel to represent the applicant at trial; that the trial court appointed Hazel Bolden as second chair trial counsel when the State announced that it would seek the death penalty; that, at the time of the applicant's trial, it was the custom in Harris County, Texas, that second chair counsel was not appointed until the State announced that it intended to seek the death penalty in a case; and, that Kristine Woldy was appointed to represent the applicant after jury selection for purposes of protecting the record for appeal (II W.H. at 30-5, 152, 172-3).

102. The Court finds, based on the trial and habeas records, that the applicant's defense team included investigator John Castillo, who assisted counsel with gathering

information and witnesses regarding the applicant's social and family history, the instant offense, and the applicant's extraneous offenses (II W.H. at 35-6).

103. The Court finds, based on the trial and habeas records, that trial counsel retained forensic psychiatrist Priscilla Ray, M.D., to assist the defense by evaluating the applicant and investigating and gathering mitigation evidence (II W.H. at 36).

104. The Court finds, based on the habeas record, that trial counsel Brown had previously represented a capital murder defendant as co-counsel and was lead counsel in numerous serious felony cases at the time of his appointment in the applicant's case; that Brown had practiced law for thirteen years with ninety percent of his practice devoted to criminal law; that Bolden had tried more than twenty felony cases; and, that Woldy was board certified in criminal law (II W.H. at 27-34, 88, 94-6, 170-3, 189-190, 196).

105. The Court finds, based on the habeas record, that lead trial counsel Brown investigated, prepared, and tried the instant case as if he was the sole attorney representing the applicant because he considered himself ultimately responsible for the applicant's defense; that Brown made the strategic decisions in the applicant's case; that Brown relied on second chair counsel to help with mitigation and punishment in other cases, but Bolden's role in the applicant's case was very limited because she was less experienced; that Brown did not assign Bolden specific tasks, including the responsibility of developing mitigation evidence or interviewing witnesses; and, that counsel Woldy was not responsible for interviewing witnesses or presenting evidence at trial (II W.H. at 36-7, 47, 68-70, 89, 94-8, 107, 110, 182-4).

106. The Court finds, based on the habeas record, that the 1998 habeas affidavit of second chair counsel Hazel Bolden is unpersuasive and has no dispositive value regarding the quality of the legal representation afforded the applicant at trial because the affidavit constitutes a hindsight evaluation of trial counsel's representation, and

Bolden had not refreshed her memory regarding the trial proceedings when she signed her 1998 affidavit (II W.H. at 227, 230-3; III W.H. at 23). See *Ingham v. State*, 679 S.W.2d 503, 509 (Tex. Crim. App. 1984)(reviewing courts “must be highly deferential to trial counsel and avoid the deleterious effects of hindsight”).

107. The Court finds, based on the trial and habeas records, that Bolden never informed the judge who presided over the applicant’s trial of any alleged concerns that she had regarding the quality of the trial representation afforded the applicant even though this was something that Bolden would have done if the situation merited such action (III W.H. at 23).

108. The Court finds, based on the trial and habeas records, that lead counsel Brown’s memory of the trial proceedings was limited and he had not refreshed his memory of the instant trial proceedings when he signed his 1998 affidavit; accordingly, Brown’s writ hearing testimony is more persuasive than his 1998 affidavit on the issue of the quality of the representation afforded the applicant at trial (II W.H. at 146-7).

109. The Court finds, based on the trial and habeas records, that Brown’s preparation for the applicant’s trial included but was not limited to the following: consulting with the applicant on numerous occasions; reviewing the prosecution file; reviewing and investigating the applicant’s extraneous offenses; consulting with mental health expert, Dr. Priscilla Ray, to develop mitigating evidence; investigating and developing potential defensive theories for the guilt/innocence phase of trial, including but not limited to the theory of duress; interviewing numerous potential witnesses for both phases of trial; securing the applicant’s records from school, a Matagorda County crisis center, and Covenant House; attending a substantial portion of the capital murder trial of the applicant’s co-defendant, James Dickerson, which was conducted prior to the applicant’s trial; and consulting with Dickerson’s trial counsel (II W.H. at 48-73, 84-8, 90-2, 99-106,

113-120, 131-3, 139-141, 155-164, 166-7); *Applicant's Exhibit, affidavit of Charles Brown, exhibits A and B (investigator report)*.

110. The Court finds, based on the credible testimony of trial counsel Brown during habeas proceedings, that the defense's strategy at guilt/innocence was to demonstrate that co-defendant Dickerson was the main actor in the instant offense, and the punishment strategy was to persuade the jury to have mercy on the applicant because of her gender and background (II W.H. at 142-4).

111. The Court finds, based on the trial and habeas records, that trial counsel did not file a motion to change venue in the instant case; that counsel felt that it was unlikely that the motion for change of venue would be granted; and, that there was a strategic downside to filing a motion for change of venue in that the applicant's trial could have been relocated to a less favorable venue (II W.H. at 127, 223-4; III W.H. at 11-12).

112. The Court finds, based on a review of the trial and habeas proceedings, that the totality of the representation afforded the applicant at the guilt innocence phase of trial was competent under prevailing professional norms; that the applicant fails to demonstrate that trial counsel was deficient in the representation of the applicant at the guilt innocence phase of trial; and, that the applicant fails to establish that the applicant was harmed on the basis of any alleged deficiency in trial counsel's representation at guilt innocence. See *Wiggins v. Smith*, 539 U.S. 510, 521 (2003)(for ineffective assistance of counsel claims, a defendant must meet the standard established in *Strickland* by showing that "counsel's performance was deficient and that the deficiency prejudiced the defense").

113. Further, the applicant does not demonstrate that, but for appellate counsel's alleged errors, the results of the instant proceeding would have been different. See *Ex parte Butler*, 884 S.W.2d 782, 783 (Tex. Crim. App. 1994)(holding *Strickland* standard applies to appellate counsel as well as trial counsel).

114. The Court finds trial counsel provided ineffective assistance at the punishment phase of applicant's trial in failing to present or fully develop evidence regarding the applicant's background and failure to present testimony expert or otherwise that would allow the jury to understand the implications of the applicant's background including physical abuse, sexual abuse or domestic violence for consideration in determining the answer to the special issues. The Court finds this failure resulted in a violation of the applicant's constitutional rights.

Second ground – voir dire on law of parties

115. In her second ground for relief, the applicant alleges that trial counsel was ineffective for failing to object to the trial judge's statement on voir dire regarding punishment and the law of parties. *Applicant's writ at 18.*

116. As established with respect to the applicant's first ground for relief, the Court finds that any alleged error in the trial court's voir dire explanation of the law of parties and punishment was inadvertent; that trial counsel's representation was not deficient for failing to object to the trial judge's alleged improper voir dire comment; and, that the applicant was not harmed on the basis of any alleged error. *See Findings of Fact 7 to 13.*

Third Ground – prosecutor's statements regarding parole

117. In her third ground for relief, the applicant urges error based on trial counsel's failure to object to the prosecutor's voir dire comments regarding parole to venirepersons Robert Earl Williams, Doreice Petty Otto and Denise Lanell Rayk, who were accepted as jurors in the instant trial. *Applicant's writ at 19.*

118. The Court finds that the applicant committed the instant offense prior to September 1, 1999; accordingly, the applicant was not entitled to the parole law instruction mandated by Section 2(e)(2)(B) of the TEX. CODE CRIM. PROC. art. 37.071.

119. The Court finds that, as a matter of reasonable trial strategy, the defense filed a *Motion to Permit Voir Dire on Parole Eligibility and a Jury Instruction on the Application of Parole Laws* which the trial court granted (I Tr. at 71-90).

120. The prosecutor made the following statements, without objection from the defense, during the voir dire of juror Williams:

In the State of Texas, we are not like several states in the United States, we do not have life without parole. Meaning if you get a life sentence you stay there for the rest of your natural life and die.

We don't have that in Texas. You are eligible for parole at certain significant points in time. For this particular case because of its time frame, it's what we call life 35. Meaning that if the defendant was given a life sentence that they would stay in the penitentiary for 35 years as a minimum before eligibility for parole.

Now in Texas that has shifted over the years. At one time it was what we call a life 15 state, life 20, life 35 and now a life 40 state. As you can see the legislature has changed those minimum requirements of years in the penitentiary, they have moved it up *and they can as easily move it back*, it just depends on what they want to do. And so you understand it's a life 35 is what we are talking about in this type of case.¹

(XI S.F. at 106-7)(emphasis added).

121. During voir dire, trial counsel informed Williams that the applicant would have to serve thirty-five years before she was eligible for parole if she was convicted and assessed a life sentence (XI S.F. at 138).

122. The prosecutor made the following statements, without objection from the defense, during the voir dire of juror Otto:

Now, the State of Texas is not a state of life without parole. You may have read about that or heard about it. People can parole out on a life sentence. In this particular case, we're governed by a rule that says: Life means that an individual would serve a minimum of 35 years before being eligible for parole. They may or may not receive parole at the end of that 35 years.

Historically, it used to be a minimum of 15 years, then 20 and then 35 and now, it's 40. So, you can see *the legislature has changed it anyway they want*. So, *there is no telling that it may change or not change at any point in time*

¹ The applicant specifically objects to the italicized portions of the prosecutor's voir dire.

but that's something you are not permitted to consider, what the legislature might do in the future.

(VI S.F. at 125)(emphasis added).

123. The prosecutor made the following statements, without objection from the defense, during the voir dire of juror Ray:

Before we get there, there is another issue that may come up, it's called parole. You probably heard about that, you read enough about it in the papers and it talks about the fact that people getting out early release or whatever. A lot of people don't like that.

In this particular case there is only two alternatives life or death and a life sentence in the State of Texas, however, we are not a life without parole state. You can get parole on a life sentence in this state.

In this particular case, the governing law which we would anticipate that the Judge would tell you would be life 35. Meaning that the defendant would be subjected to 35 years in the penitentiary before they're eligible for probation – I'm sorry – parole comes up.

Now historically in the past we have been a life 15 state, a life 20, life 35, life 40. *So you can see the legislature has changed those minimums. So they can change any direction however we the people decide to do that. So there is no set thing but you do need to understand there is no such thing as life without parole.*

(IX S.F. at 24-5)(emphasis added).

124. In its punishment charge, the trial court included the following instruction regarding parole:

You are instructed that a prisoner serving a life sentence for the offense of capital murder is not eligible for release on parole until the actual calendar time the prisoner has served, without consideration of good time, equals thirty-five (35) years. During your deliberations, you are not to consider or discuss the possible action of the Board of Pardon and Paroles or the governor, nor how long a defendant would be required to serve on a sentence of life imprisonment, nor how the parole laws would be applied to this defendant.

(IA Tr. at 220).

125. The Court finds, based on the totality of complained-of voir dire proceedings, that the prosecution's comments regarding parole were consistent with the trial court's punishment charge instruction.

126. The Court finds, based on the habeas record, that the applicant's instant ground for relief is speculative as the applicant alleges that jurors "possibly" believed that the applicant could be eligible for parole in a few years because the legislature could change

the parole law. See *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex. Crim. App. 2004)(ineffective assistance claims are not built on retrospective speculation).

127. The Court finds, based on the trial and habeas records, that the applicant fails to demonstrate that trial counsel's representation was deficient or that the applicant was harmed on the basis urged in the applicant's third ground for relief.

Ninth ground – venireperson Skorupinski

128. In her ninth ground for relief, the applicant alleges that trial counsel erred in failing to object to the trial court granting venireperson Skorupinski a childcare exemption from jury duty and question Skorupinski appropriately regarding the alleged exemption. *Applicant's writ at 43.*

129. In her eighth ground for relief the applicant urges error based on the trial court's excusal of venireperson Skorupinski. The Court finds, based on the statutory and controlling case law addressing the excusal of prospective jurors set forth in response to the applicant's eighth ground for relief, that the applicant fails to establish that trial counsel's representation was deficient or that the applicant was harmed in relation to the trial court's excusal of venireperson Skorupinski. See *Findings of Fact 23 to 28.*

Eleventh Ground – lesser-included offenses

130. In the applicant's eleventh ground for relief, applicant alleges that trial counsel was ineffective in the following areas: failure to request jury instructions on the lesser-included offenses of robbery and murder; failure to object to the absence in the charge of instructions on the lesser included offenses of robbery and murder; and, failure to complain on appeal regarding the absence of these instructions. *Applicant's writ at 46.*

131. In her tenth ground for relief, the applicant urges error based on the trial court's failure to charge the jury on the lesser-included offenses of robbery and murder. The Court finds, for reasons set forth in response to the applicant's tenth ground for relief, that the applicant fails to establish that trial or appellate counsel's representation was

deficient or that the applicant was harmed as the result of counsel's alleged ineffectiveness. *See Findings of Fact 30 to 35.*

Twelfth Ground – first special issue

132. In her twelfth ground for relief, the applicant contends that trial counsel were ineffective with respect to a presentation of the future dangerousness special issue at punishment. *Applicant's writ at 49.*

133. The Court finds, based on the trial and habeas records, that trial counsel investigated and developed evidence to benefit the applicant on the issue of future dangerousness, and counsel elicited the following evidence on cross-examination of the State's punishment witnesses and during presentation of the defense's punishment case:

- on cross-examination of Sherry Brown, who testified that the applicant discussed how she tried to "jack" cars, trial counsel elicited testimony that Brown did not know of any particular cases that the applicant was talking about;
- on cross-examination of Paula Allen, who testified regarding the attempted murder of Wayland Griggs, trial counsel elicited testimony that Allen was upset and mad at the applicant and Jerry Bryant at the time of the Griggs offense, and Allen gave inconsistent statements regarding the Griggs offense;
- trial counsel presented documentary evidence which was admitted into evidence that the charge against the applicant stemming from the Griggs offense was dismissed due to insufficient evidence;
- trial counsel presented the punishment testimony of psychiatrist Priscilla Ray who testified, *inter alia*, that the applicant displayed sadness and cried when discussing the instant case; that there was less than a fifty percent probability that the applicant would continue to commit future acts of violence or be a continuing threat to society in prison; and, that the applicant was less likely to be a threat to society once she was removed from a situation in which a man was likely to be abusive or have some "sway" over the applicant; and,
- trial counsel presented Dr. Ray's report, which was admitted into evidence at punishment, stating that co-defendant Dickerson threatened the applicant and her child if she did not cooperate with Dickerson in committing the instant offense and that, because of her background, the applicant was susceptible to threats from men who were in a position to be abusive and was easily influenced in such situations.

(XXV S.F. at 64-6, 86-7, 90, XXVI – 45-6, 61; *Defendant's Ex. 1 and 4-B*).

Thirteenth Ground – applicant's right to testify

134. In her thirteenth ground for relief, the applicant contends that trial counsel failed to advise the applicant of her right to testify, and trial counsel refused to allow the applicant to testify at trial. *Applicant's writ at 51.*

135. The Court finds, based on the trial and habeas records and the credible assertions of trial counsel Brown and Woldy during the writ evidentiary hearing, that trial counsel consulted with the applicant regarding the issue of her testifying during the instant capital trial; that trial counsel advised the applicant of her right to testify and the advantages and disadvantages of testifying; that trial counsel Brown did not consider it advantageous for the applicant to testify at trial because of appellate concerns and the State's potentially damaging cross-examination of the applicant; that trial counsel Brown advised the applicant of his opinion regarding the applicant testifying, but counsel never told the applicant that she could not testify; and, that the applicant made the decision not to testify at trial (II W.H. at 39, 128-9, 188-9).

136. Based on the trial and habeas records, the Court finds not credible the self-serving statements of the applicant that she wanted to testify at trial and that trial counsel made the decision, against the applicant's wishes, that the applicant would not testify. *Applicant's Exhibit, Applicant's Affidavit.*

Fourteenth Ground – mitigating evidence

137. In her fourteenth ground for relief, the applicant contends that trial counsel was ineffective for failing to conduct a reasonable investigation and present mitigating evidence regarding the applicant's alleged sexual abuse, physical abuse, neglect, and domestic violence. *Applicant's writ at 52.*

138. Trial counsel subpoenaed the following witnesses for trial: Rev. K. Griggs, Annie Smith, Rev. Newels, Rev. T. William, Sr., Madelyn McNeil, Jerry Bryant, Jr., Robert

Brown, Sherrie Brown, Dr. Walter Quijano and Dr. Priscilla Ray. *Respondent's Exhibit B, Defense Subpoena.*

139. Trial counsel presented the following mitigation evidence at punishment:

- Patricia Birdwell, Director of the Matagorda County Women's Crisis Center where Glenda Davenport also worked, testified that the applicant was admitted into the services of the crisis center, a facility that provided protection for abused women and children;
- the applicant's 1993 Matagorda County Women's Crisis Center records that were admitted into evidence contained notations that the applicant's daughter was sick and running a high temperature; that the applicant wanted a divorce; that the applicant was concerned about her grandmother's health; that the applicant refused to return home and was in a lot of pain; and, that the applicant's husband abused her;
- Rhonda Robinson, custodian of records for Covenant House, testified that the facility was an emergency shelter for runaway and homeless youths and that the applicant was admitted to the facility;
- the applicant's 1990 Covenant House records that were admitted into evidence contained notations that the applicant was referred to the facility when she was sixteen years old because she did not get along with her mother; that the applicant's mother abused the applicant; that the applicant contacted the police regarding the abuse which her mother denied; that the applicant had a history of running away from home; that the applicant lacked educational skills and worked at Astroworld; that the applicant dropped out of school in the tenth grade; and, that the applicant had an eleven month old child when the applicant was fourteen years old;
- Patrice Green, a registered nurse, testified at punishment that she had known the applicant since infancy; that the applicant attended church all her life; that the applicant had three children; and, that the applicant had worked for Green's husband, a justice of the peace; and,
- Annie Smith, the applicant's grandmother, testified that the applicant's husband abused her, and the applicant moved to Covenant House until the applicant's husband moved away.

(XXVI S.F. at 33, 37, 71-7; *Defendant's Ex. 2-B and 3-B*).

140. Trial counsel presented psychiatrist Priscilla Ray at punishment for mitigation purposes, and the following evidence was before the jury through Dr. Ray's testimony and her report which was admitted into evidence:

- that the applicant displayed sadness and cried when discussing the instant case; that there was less than a fifty percent probability that the applicant would continue to commit future acts of violence or be a continuing threat to society in prison; and, that the applicant was less likely to be a threat to

society once she was removed from a situation in which a man was likely to be abusive or have some "sway" over the applicant;

- regarding the applicant's background, evidence was presented that the applicant was primarily reared by her grandmother; that the applicant's parents divorced when the applicant was young, and the applicant seldom had contact with her father; that the applicant's mother was unemployed and in poor health; that the applicant was reared in the Baptist religion and adhered to that religion; that the applicant had three children by three different men; that the applicant lived on the streets when she was sixteen years old after her mother put her out; that there was a family history of depression; and, that the applicant was treated for depression;
- regarding the applicant's educational history, evidence was presented that the applicant failed the fourth grade; that the applicant left school in the tenth grade because she was pregnant and subsequently obtained her GED; that the applicant attended school to be a medical assistant but quit because Jerry Bryant wanted her at home; and, that the applicant was not a discipline problem in school;
- regarding the applicant's history of abuse, evidence was presented that a babysitter's boyfriend sexually abused the applicant when the applicant was young; that the applicant was later raped at knifepoint; that Jerry Bryant abused the applicant; and, that the applicant contacted the police, filed charges, and then went to a crisis center after one of Bryant's abusive episodes; and,
- regarding the instant offense, evidence was presented that, immediately before entering the complainant's apartment, the applicant's co-defendant pulled a knife on the applicant stating that he would kill her and her baby if she did not go with him; that the applicant was in shock during the instant offense; that her co-defendant continued to threaten the applicant during the offense; and, that the applicant was afraid of her co-defendant.

(XXVI S.F. at 39-69; *Defendant's Ex. 4-B*).

141. The Court finds, based on the trial and habeas records, that trial counsel was aware of the applicant's mitigating evidence and took the following steps to investigate potential mitigating evidence for the applicant's trial: that counsel reviewed the State's file and documents relating to the applicant's extraneous offenses; that counsel discussed with the applicant the facts of the instant case and the applicant's history, including the applicant's alleged abusive relationship with Jerry Bryant, the applicant's educational history, the places where the applicant lived during her life, the allegations of sexual abuse by a babysitter's boyfriend, and the applicant's relationship with her mother; that counsel discussed potential character witnesses with the applicant; that

counsel obtained the names and phone numbers of potential witnesses; that counsel obtained the names of the fathers of the applicant's children; and, that counsel subpoenaed the applicant's school records, medical records, jail records, Matagorda Women's Crisis Center records and Covenant House records (II W.H. at 48-73, 84-8, 90-2, 99-106, 113-120, 131-3, 139-141, 155-164, 166-7); *Applicant's Exhibit, affidavit of Charles Brown*.

142. The Court finds, based on the trial and habeas records, that trial counsel retained an investigator who investigated and obtained evidence relating to mitigation, including information regarding the instant offense. Further, in his investigation of mitigation evidence, the defense investigator reviewed the State's file and interviewed the applicant; contacted the applicant's brother, Jonathan Sheppard, and attempted to contact the applicant's mother, Madelyn McNeal; researched the extraneous offense involving Wayland Griggs; interviewed Annie Smith, Maybeline Fisher and Sherry Brown; and, attempted to contact Reverend K.J. Griggs, Jerry Bryant and Lawrence P. Gwin, Jr. *Applicant's Exhibit, affidavit of Charles Brown, exhibits A and B (investigator report)*.

143. The Court finds, based on the trial and habeas records, that trial counsel retained a mental health expert, Priscilla Ray, to assist with the development and presentation of mitigating evidence at trial; that trial counsel did not seek the assistance of a neuropsychiatrist; and, that Dr. Ray never suggested to counsel that he retain additional experts for the applicant's trial (II W.H. at 90, 139-140).

144. The Court finds that trial counsel did not develop testimony from Rhonda Robinson of the Covenant House regarding Ms. Sheppard's character, her background or her stays at the Covenant House. Robinson Affidavit.

145. The Court finds that although Glenda Davenport of the Matagorda County Women's Crisis Center was available to testify that trial counsel did not call her as a witness.

146. The Court finds that had Ms. Davenport been called to testify she could have testified regarding Ms. Sheppard's character, background and the effects of domestic abuse. Davenport Affidavit.

147. The Court finds that although Annie Smith the applicant's grandmother was called to testify trial counsel did not elicit testimony from Mrs. Smith regarding the applicant's background, character, physical abuse, sexual abuse and education. Smith Affidavit.

148. The Court finds, based on the trial and habeas records, that trial counsel made reasonable trial strategy decisions in his presentation of mitigating witnesses and evidence at trial, concerning the following witnesses, that trial counsel elected not to present the applicant's mother, Madelyn McNeil as a witness at punishment because the trial court had admonished McNeil for harassing a State's witness, counsel considered McNeil difficult to control, and counsel's conversations with McNeil were unpleasant; that counsel elected not to present Jerry Bryant as a witness because counsel determined that Bryant would not be a good witness for the defense; and, that counsel elected not to present Jonathan Sheppard as a witness because he was uncooperative and avoided assisting with the applicant's case (XXII S.F. at 4-6; II W.H. at 45, 74-6, 101-2, 120-1, 157); *Applicant's Exhibit, affidavit of Charles Brown, exhibits A and B (investigator report)*.

149. The Court finds, based on the trial and habeas records that although trial counsel diligently investigated and was aware of potential mitigating evidence in the applicant's case; that trial counsel did not fully present the mitigating evidence for consideration by

the jury during the punishment phase in violation of her constitutional rights under the Sixth Amendment to the Constitution and similar provisions under Texas law.

150. The Court finds, based on the habeas record, that the hearsay affidavit of mitigation investigator Alma Lagarda regarding her alleged interviews with Jonathan Sheppard are suspect and unpersuasive. *See Dowthitt v. Johnson*, 230 F.3d 733, 742 (5th Cir. 2000)(holding that hearsay affidavits supporting defendant's actual innocence claim were suspect and did not raise substantial doubt as to defendant's guilt); *Goodwin v. Johnson*, 132 F.3d 162, 186 (5th Cir. 1997)(habeas petitioner's hearsay affidavits failed to provide factual basis warranting evidentiary hearing).

151. The Court finds that the Fifth Circuit Court of Appeals has refused to find trial counsel ineffective where the defendant's proposed mitigation evidence in cases where counsel did not call witnesses to testify regarding a defendant's good character or credibility because the defendant failed to supply counsel with the proposed witnesses' names. *See Pape v. Thaler*, No. 11-10008 (5th Cir. June 23, 2011)(defense counsel not ineffective for failure to call witnesses to testify regarding the defendant's good character or alleged credibility because defendant failed to supply counsel with witnesses' names).

152. The Court finds, based on the trial and habeas records, that the applicant demonstrated that trial counsel was deficient in the representation of the applicant at punishment, in failing to call or fully develop the testimony of Annie Smith, Patrice Green, Rhonda Robinson, Glenda Davenport, and any expert witnesses as to the effect of the applicant's character, background, physical abuse, domestic abuse or the applicant's alleged evidence of PTSD or alleged evidence of brain dysfunction and how this would relate to the issues of mitigation.

Fifteenth through Seventeenth Grounds – duress

153. In her fifteenth through seventeenth grounds for relief, the applicant alleges that trial counsel was ineffective for failing to obtain a jury instruction on duress at the guilt-

innocence phase of trial and present evidence of duress at both phases of trial. *Applicant's writ at 98-99, 105.*

154. The Court finds, based on the trial and habeas records, that the applicant's statement to police regarding the instant offense was admitted into evidence at guilt/innocence, and the applicant did not assert in her statement that she acted under duress from Dickerson when she committed the instant offense. The following details in the applicant's statement did not support the applicant's theory of duress: that the applicant and co-defendant Dickerson attempted to rob someone the day before the instant offense; that the applicant and Dickerson entered the complainant's apartment because they had decided to rob whoever was in the apartment and steal the car; that the applicant carried a small kitchen knife from her brother's apartment; that the applicant handed Dickerson a knife while Dickerson held the complainant to the ground; that the applicant demanded that the complainant hand over her car keys; that the applicant handed Dickerson a butcher knife from the complainant's kitchen when Dickerson was unable to cut the complainant's throat with the small knife; and, that the applicant held the complainant down while Dickerson put a plastic clothes bag over the complainant's face to suffocate her (XXI S.F. at 164, *State's Ex. 38B*); see also *Respondent's Exhibit A, July 3, 1993 Statement of Erica Sheppard*.

155. During guilt/innocence, trial counsel elicited testimony favorable to the applicant on the issue of duress through witness Sherry Brown who testified that co-defendant Dickerson had most of the care and control of the applicant's baby; that Brown thought something was amiss or not right when she was with the applicant and Dickerson after the instant offense; and, that Brown asked the applicant why she was acting strange (XXII S.F. at 31-4).

156. At the close of guilt-innocence, the trial court denied the defense's motion to include the following instruction on duress in the court's charge:

A defense set up by the defendant in this case is what is known as duress. It is an affirmative defense to prosecution for any offense that the person charged engaged in the proscribed conduct because she was compelled to do so by the threat of imminent death or serious bodily injury to herself or another. Such compulsion exists only if the threat of force is such as would render a person of reasonable firmness incapable of resisting the pressure.

The burden of proof of the affirmative defense of duress rests upon the defendant, and to establish such defense, the defendant must prove it by a preponderance of the evidence. By the term 'preponderance of the evidence' is meant the greater weight and degree of the credible evidence in the case.

Now, therefore, if you find from the evidence beyond a reasonable doubt that Erica Sheppard did commit the offense of capital murder, as alleged in the indictment and hereinbefore defined in this charge, but you further find by a preponderance of the evidence that James Dickerson or another had threatened to kill Erica Sheppard or another if she did not participate in said capital murder, and that his threats were such threats of force as would render a person of reasonable firmness incapable of resisting the pressure, and that Erica Sheppard was in fear of imminent loss of her life or that of another or serious bodily injury at the hands of James Dickerson or another if she did not participate in the robbery and that so believing, she did participate therein, then you will acquit the defendant and say by your verdict "not guilty."

If, however, after viewing the facts from the defendant's standpoint at the time, you do not find by a preponderance of the evidence that Erica Sheppard's participation in the offense, if any, was compelled by such threat of imminent death or serious bodily injury at the hands of James Dickerson or another as would render a person of reasonable firmness incapable of resisting the pressure thereof, then you will find against Erica Sheppard on her defense of duress.

(T. IA – 198; R. XXII - 51).

157. During punishment, trial counsel presented evidence favorable to the applicant on the issue of duress through Dr. Ray's psychiatric report stating that co-defendant Dickerson pulled a knife on the applicant and told her he would kill her and her baby if she did not go with him; that Dickerson directed the commission of the instant offense; and, that the applicant continued to fear for her child's safety after the offense (*Defendant's Ex. 4-B*).

158. Additionally, Dr. Ray testified, in pertinent part at punishment, that the applicant was more of a follower and easily led by men (XXVI S.F. at 60).

159. The Court finds, based on the trial and habeas records, that the only people who had knowledge of what occurred during the instant offense were the applicant and her co-defendant James Dickerson.

160. The Court finds, based on the trial and habeas records, that the statement of co-defendant Dickerson did not support the applicant's theory of duress, indicating the following: that the applicant took an active role in the planning and commission of the instant offense; that the twosome first attempted to rob a woman the night before the instant offense; that the applicant entered the complainant's apartment wearing gloves and carrying a knife that she had obtained from her brother's apartment; that the applicant grabbed the complainant and held her down; that the applicant put a knife to the complainant's throat to show her that the applicant and co-defendant Dickerson meant business; that, when the complainant told her assailants that they could have everything in the apartment except her car, the applicant said, "I want your fucking car"; that the applicant tried to cut the complainant's throat with the small knife that she carried to the apartment; that the applicant then grabbed a butcher knife from the complainant's kitchen and tried to cut the complainant's throat; that the applicant and Dickerson pushed the butcher knife into the complainant's throat; that the applicant rummaged through the complainant's apartment while Dickerson pulled the complainant's body into a bedroom; and, that the applicant hit the complainant with a statue. *Respondent's Exhibit C, July 3, 1993 Statement of James Dickerson.*

161. The Court finds, based on the habeas record, that trial counsel was aware of and investigated the applicant's claim that she was under duress and in fear for her and her child's life while she was with co-defendant James Dickerson before and after the instant offense (II W.H. at 53, 56-9, 133-9); *Applicant's Exhibit, affidavit of Charles Brown.*

162. The Court finds, based on the habeas record, that trial counsel made reasonable trial strategy decisions regarding the presentation of the applicant's theory of duress. Trial counsel investigated the possibility of introducing evidence of duress at guilt/innocence but decided, as a matter of reasonable trial strategy, not to pursue the defensive theory at guilt/innocence in the manner urged by habeas counsel for the

following reasons: that Sherry Brown told the defense investigator that the applicant never indicated that she was scared of Dickerson even though the applicant had ample opportunity to say something to Brown; that trial counsel was aware of Korey Jordan's potential trial testimony regarding the applicant and co-defendant Dickerson planning the instant offense; that the applicant never alleged that she acted under duress in her statement to police; that the applicant failed to take advantage of opportunities after the offense to tell Jerry Bryant that she was acting under duress from Dickerson; that evidence established that the applicant and Dickerson planned the instant offense by wearing gloves and bringing knives to the scene; and, that, based on his investigation, trial counsel ultimately believed that the applicant might have been the driving force behind the complainant's murder (II W.H. at 133-9).

163. The Court finds, based on the habeas record, that trial counsel made the reasonable trial strategy decision not to call Jerry Bryant as a witness at trial. See *Findings of Fact 84 and 87*.

164. The Court finds, based on the trial and habeas records, that trial counsel made the reasonable trial strategy decision not to call co-defendant James Dickerson as a witness during the applicant's trial because Dickerson's potential testimony, as reflected in his statement to the police, was contrary to and did not support defensive theories in the applicant's case, including the defense's case on mitigation presented through Dr. Ray (II W.H. at 142-3); *Respondent's Exhibit C, July 3, 1993 Statement of James Dickerson*.

Eighteenth, Nineteenth and Thirty-sixth Grounds – Jerry Bryant, Jr.

165. In her eighteenth, nineteenth, and thirty-sixth grounds for relief, the applicant alleges that trial counsel was ineffective for failing to call Jerry Bryant, Jr., as a witness at trial and move for a mistrial or complain at the trial level regarding the prosecutor's alleged threats against Bryant. *Applicant's writ at 106-107, 133*.

166. In her thirty-fifth ground for relief, the applicant urges error based on the prosecutor's alleged threats to Bryant. The Court finds, for reasons set forth in response to the applicant's thirty-fifth ground for relief, that the applicant fails to establish that trial counsel's representation was deficient or that the applicant was harmed as the result of counsel's alleged ineffectiveness relating to witness Bryant. *See Findings of Fact 84 to 89.*

Twentieth Ground – Wayland Griggs extraneous

167. In her twentieth ground for relief, the applicant alleges that trial counsel were ineffective for failing to investigate, adequately cross-examine State's witnesses, or present evidence regarding the unadjudicated extraneous offense involving Wayland Griggs. *Applicant's writ at 108.*

168. Paula Allen testified for the State at punishment that Jerry Bryant, Jr., was her common law husband, and he was the father of five of her six children; that Allen witnessed a fight between Bryant and Wayland Griggs on November 16, 1991; that, on November 17, 1991, the applicant called Allen and asked her to accompany her to the home of Bryant's mother; that, when the applicant and Allen arrived, Bryant got into the car, and the applicant drove them to Griggs' house; that Bryant got into the back seat of the car at Griggs' house, and Allen lay on the floor of the car's front seat; that the applicant then exited the car with the motor running, knocked on Griggs' door, returned to the car, and commented that Griggs was coming; that Bryant told the applicant to drive up slowly, and Allen then heard five or six gun shots; that Allen heard someone moan, and the applicant quickly drove away; and, that the applicant asked Bryant how many times he shot and whether Bryant got "him" in the head (XXV S.F. at 69-83).

169. On cross-examination of Paula Allen, trial counsel elicited testimony that Allen was upset and mad at the applicant and Jerry Bryant at the time of the Griggs shooting; that Allen tried to burn down the applicant's grandmother's house while the applicant

was inside before the extraneous attempted murder; that Allen gave inconsistent statements regarding the Griggs offense; and, that the charge against the applicant relating to the Griggs case was dismissed based on insufficient evidence (XXV S.F. at 86-7, 90; *Defendant's Ex. 1*).

170. The defense admitted into evidence the *Motion to Set Aside Indictment* reflecting that the indictment charging the applicant with the attempted murder of Wayland Griggs was dismissed on the basis of insufficient evidence (R. XXV – *Defendant's Ex. 1*).

171. Wayland Griggs testified for the State at punishment that he got into a fight with Bryant because Paula Allen accused Bryant of choking her; that, when Griggs answered his door on the evening of November 17, 1991, the applicant asked Griggs to come outside to see Paula Allen who was crying because Jerry Bryant had beat her; that Griggs saw the applicant driving a blue Cadillac when he stepped outside his house; and, that Griggs was shot three times as he walked towards the car (XXV S.F. at 106-112).

172. The Court finds, based on the habeas record, that Lawrence Gwin, Jr., the attorney who represented the applicant on the Griggs offense, refused to speak with trial counsel Brown and/or a member of the defense team when they attempted to contact him prior to trial (II W.H. at 119); *Applicant's Exhibit, affidavit of Charles Brown, exhibit A and B (investigator report)*.

173. The Court finds, based on the trial and habeas records, that trial counsel investigated the Griggs offense and elicited through documentary evidence or cross-examination at trial, the evidence favorable to the applicant contained in Gwin's habeas affidavit and the attached undated affidavit of Paula Allen (II W.H. at 119); *Applicant's Exhibit, affidavit of Lawrence Gwin, Jr., exhibit A. Motley v. Collins*, 18 F.3d 1223, 1228 (5th Cir. 1994)(refusing to find deficient performance where proposed mitigating evidence is cumulative of other testimony presented at trial).

174. The Court finds, for the reasons set forth in response to the applicant's thirty-fifth ground for relief, that trial counsel Brown made the reasonable trial strategy decision not to call Bryant as a witness during the applicant's trial because he did not believe that Bryant would benefit the defense. *See Finding of Fact 84 and 87.*

175. The Court finds, based on the habeas record, that the applicant's assertions regarding the substance of Bryant's alleged testimony at the applicant's trial are speculative and not substantiated by evidence developed at the trial level or during habeas proceedings, and the applicant fails to demonstrate that Bryant's testimony would have benefitted the defense. *See Maldonado*, 688 S.W.2d at 116 (burden is on applicant to allege and prove facts which, if true, entitle him to relief); *King*, 649 S.W.2d at 44 ("counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony"); *see also Sayre v. Anderson*, 238 F.3d 631, 635-6 (5th Cir. 2001).

176. The Court finds, based on the trial and habeas records, that the applicant fails to demonstrate harm based on trial counsel's alleged failure to investigate the potential testimony of Vincent Perry. Further, the applicant fails to demonstrate that Perry was available to testify at the applicant's trial or that Perry's testimony would have benefitted the applicant.

Twenty-second Ground – Annie Smith testimony

177. In her twenty-second ground for relief, the applicant contends that defense counsel was ineffective for failing to admit the testimony of the applicant's grandmother, Annie Smith, regarding her opinion of the applicant's future dangerousness or to preserve the trial court's exclusion of Smith's testimony for appellate review. *Applicant's writ at 112.*

178. In her twenty-first ground for relief, the applicant urges error based on the trial court's exclusion of Smith's testimony regarding the applicant's future dangerousness. The Court finds, for reasons set forth in response to the applicant's twenty-first ground for relief, that the applicant fails to establish that trial counsel's representation was deficient or that the applicant was harmed on the basis now urged. *See Findings of Fact 37 to 44.*

Twenty-fourth Ground – documentary evidence

179. In her twenty-fourth ground for relief, the applicant alleges that trial counsel was ineffective at punishment for failing to admit into evidence portions of documents relating to the applicant's admittance to the Matagorda County Women's Crisis Center and Covenant House. *Applicant's writ at 114.*

180. The applicant urged the instant ground for relief as her twentieth point of error on direct appeal, and the Court of Criminal Appeals held that the trial court did not err in excluding hearsay portions of the records from evidence. *Sheppard*, slip op. at 16.

181. In her twenty-third ground for relief, the applicant urged error based on the trial court's exclusion of hearsay portions of the Matagorda and Covenant House records. The Court finds, for reasons set forth in response to the applicant's twenty-third ground for relief, that the applicant fails to establish that trial counsel's representation was deficient or that the applicant was harmed on the basis now urged. *See Findings of Fact 46 to 59.*

Twenty-seventh Ground – Patrice Green testimony

182. In her twenty-seventh ground for relief, the applicant contends that defense counsel was ineffective for failing to admit the testimony of Patrice Green at punishment. *Applicant's writ at 117.* The applicant further alleges that counsel was ineffective for failing to make a bill of exception or offer of proof regarding Green's testimony.

184. The applicant challenged the trial court's exclusion of Green's punishment testimony on direct appeal. The Court of Criminal Appeals held that there was no trial court error; that the applicant was not entitled to ask Green any question simply because it would have produced mitigating evidence; and, that the rules of evidence were in force and applicable at the punishment phase of a capital trial. *Sheppard*, slip op. at 17.

Thirty-second Ground – state's punishment argument

185. In her thirty-second ground for relief, the applicant contends that trial counsel was ineffective for failing to object to the State's punishment argument regarding the applicant's alleged physical abuse. *Applicant's writ at 126.*

187. In her thirty-first ground for relief, the applicant urged error based on the State's punishment argument regarding the applicant's alleged abuse. The Court finds, for reasons set forth in response to the applicant's thirty-first ground for relief, that the applicant fails to establish that trial counsel's representation was deficient or that the applicant was harmed as the result of counsel's alleged ineffectiveness. *See Findings of Fact 75 to 76.*

CONCLUSIONS OF LAW

FIRST GROUND FOR RELIEF – LAW OF PARTIES VOIR DIRE

1. The applicant lodged no objection at the trial level to the trial judge's allegedly improper statements during voir dire regarding the law of parties and the assessment of punishment; accordingly, the applicant's first ground for relief is procedurally barred.

Hodge v. State, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978).

2. Alternatively, error, if any, was harmless in light of the totality of the trial court's voir dire regarding the law of parties and the correct instructions given in the court's punishment charge. See *Eldridge*, 940 S.W.2d at 650 (trial court's error in informing venire of the effect of their failure to agree on a special issue attenuated by jury charge); *Sattiewhite*, 786 S.W.2d at 278-9 (reviewing court assumes that jury conducted itself as directed by the trial court).

FOURTH GROUND – EXCUSAL OF VENIREMEN

3. Because the Court of Criminal Appeals held meritless the applicant's instant ground for relief urging error based on the trial court's denial of the applicant's motion regarding jury selection procedure, the applicant's claim need not be reconsidered in this or any subsequent habeas proceeding. See *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984)(claims raised and rejected on direct appeal are not cognizable on habeas corpus).

FIFTH GROUND - BATSON

4. Because the Court of Criminal Appeals considered and held meritless the applicant's instant ground for relief alleging that the trial court erred in denying the applicant's objection to the State's use of a peremptory strike on venireperson Ronnie Simpson, the applicant's claim need not be reconsidered in this or any subsequent

proceeding. *Acosta*, 672 S.W.2d at 472; *Ex parte Schuessler*, 846 S.W.2d 850, 852, n. 6 (Tex. Crim. App. 1993).

SIXTH GROUND – VENIREPERSON EDITH GREER SMITH

5. Because the Court of Criminal Appeals considered and held meritless the applicant's instant ground for relief alleging that the trial court erred in denying the applicant's challenge for cause to venireperson Smith, the applicant's claim need not be reconsidered in this or any subsequent proceeding. *Acosta*, 672 S.W.2d at 472; *Schuessler*, 846 S.W.2d at 852, n. 6.

SEVENTH GROUND – JUROR DAVID PAUL HERD

6. Because the Court of Criminal Appeals considered and rejected on direct appeal the applicant's seventh ground for relief urging error based on the trial court's dismissal of venireperson Herd, the applicant's claim need not be reconsidered. *Acosta*, 672 S.W.2d at 472; *Schuessler*, 846 S.W.2d at 852, n. 6.

EIGHTH GROUND – EXCUSAL OF VENIREPERSON SKORUPINSKI

7. The applicant lodged no objection at the trial level to the trial court's excusal of venireperson Skorupinski; accordingly, the applicant's eighth ground for relief is procedurally barred. *Hodge*, 631 S.W.2d at 757.

8. Alternatively, because the trial court has broad discretion to excuse prospective jurors, the court did not abuse its discretion in excusing venireperson Skorupinski. See *Rousseau*, 855 S.W.2d at 676 (trial court did not abuse discretion in excusing an otherwise qualified venireperson who established that she was the mother of three minor children and had to be at home at a certain time or risk leaving her children inadequately supervised); *Jasper v. State*, 61 S.W.3d 413, 424 (Tex. Crim. App. 2001)(trial court's excusals of one prospective juror because she was a "caretaker" and another because she was expected to give birth within six weeks, were within trial court's discretion).

TENTH GROUND – LESSER-INCLUDED OFFENSES

9. The applicant neither objected to the court's guilt/innocence charge nor requested instructions on the lesser-included offenses of robbery and murder; accordingly, the applicant's ground for relief is procedurally barred. *Hodge*, 631 S.W.2d at 757.

10. Alternatively, the applicant's ground for relief is without merit because the evidence presented at trial established that the applicant acted with the sole intent of killing the complainant while in the course of committing robbery. See *Rousseau*, 855 S.W.2d at 672 (defendant must satisfy both prongs of two-pronged test in order to be entitled to a charge on a lesser-included offense).

TWENTY-FIRST GROUND – ANNIE SMITH'S PUNISHMENT TESTIMONY

11. The applicant failed to preserve error with respect to her ground for relief regarding the excluded punishment testimony of Annie Smith; accordingly, the applicant's ground for relief is procedurally barred. *Hodge*, 631 S.W.2d at 757.

12. Alternatively, the applicant fails to demonstrate harm, based on the trial court's exclusion of Smith's alleged testimony regarding the applicant's future dangerousness, in light of Dr. Ray's beneficial testimony and evidence on the issue. See *Maldonado*, 688 S.W.2d at 116 (burden is on applicant to allege and prove facts which, if true, entitle him to relief).

TWENTY-THIRD GROUND – MATAGORDA AND COVENANT HOUSE RECORDS

13. The Court of Criminal Appeals considered and rejected on direct appeal the applicant's twenty-third ground for relief urging error based on the trial court's exclusion at punishment of hearsay portions of the Matagorda and Covenant House records; accordingly, the instant claim need not be considered in the instant writ proceeding or subsequent proceedings. *Acosta*, 672 S.W.2d at 472; see also *Schuessler*, 846 S.W.2d at 852 n. 6.

14. Additionally, the applicant fails to establish that the excluded portions of the Matagorda and Covenant House records were admissible under the Texas Rules of Evidence.

15. Because the excluded evidence was before the jury through other sources, the applicant fails to demonstrate harm as a result of the trial court's exclusion of portions of the Matagorda and Covenant House records.

TWENTY-FIFTH AND TWENTY-SIXTH GROUNDS – PATRICE GREEN TESTIMONY

16. Because the Court of Criminal Appeals considered and rejected on direct appeal the applicant's twenty-fifth ground for relief urging error based on the trial court's ruling concerning Patrice Green's punishment testimony, the instant claim need not be considered in the instant writ proceeding or subsequent proceedings. *Acosta*, 672 S.W.2d at 472; *Schuessler*, 846 S.W.2d at 852 n. 6.

17. The applicant's twenty-sixth ground for relief constitutes an attempt to relitigate the applicant's previously disposed direct appeal point of error concerning the trial court's refusal to permit Green to testify at sentencing regarding the applicant's reputation and character; accordingly, the applicant's twenty-sixth ground for relief is meritless and should be denied.

TWENTY-EIGHTH GROUND – EXPERT'S EVALUATION OF APPLICANT

18. The applicant fails to establish that defense expert Priscilla Ray, M.D., did not perform a reasonably competent examination of the applicant at the trial level. Additionally, the Fourth, Seventh and Ninth Circuit Courts of Appeals do not recognize a defendant's constitutional right to effective assistance of an expert witness. *Wilson*, 155 F.3d at 401; *Harris*, 949 F.2d at 1520; *Silagy*, 905 F.2d at 1013.

TWENTY-NINTH GROUND – NEWLY DISCOVERED EXPERT FINDINGS

19. The applicant's alleged newly discovered evidence was available or based on evidence that was available at the time of the applicant's trial. The applicant fails to

demonstrate that no reasonable juror would have convicted her in light of the applicant's alleged newly discovered evidence; accordingly, the applicant's twenty-ninth ground for relief is meritless. See *Briggs*, 187 S.W.3d at 465 (defendant did not prevail on actual innocence claim based on newly discovered evidence because amended autopsy report conclusions regarding complainant's manner and cause of death as well as expert opinions on complainant's cause of death were predicated on physical evidence and records existing at time of defendant's guilty plea); *Keeter v. State*, 74 S.W.3d 36-7 (Tex. Crim. App. 2002)(defendant seeking new trial based on newly discovered evidence must demonstrate that new evidence was unknown or unavailable at time of trial, and failure to discover the new evidence was not due to defendant's lack of diligence).

20. The applicant does not unquestionably establish her innocence of the instant offense in light of alleged newly discovered expert opinions advanced on habeas; therefore, the applicant is not entitled to relief on her actual innocence claim. See *Elizondo*, 947 S.W.2d 202 at 209 (defendant bears burden of showing that newly discovered evidence establishes his innocence).

THIRTIETH GROUND – PUNISHMENT ARGUMENT ON MITIGATION

21. Because the Court of Criminal Appeals considered and rejected on direct appeal the applicant's thirtieth ground for relief urging relief based on the State's punishment argument regarding mitigation, the instant claim need not be reconsidered. *Acosta*, 672 S.W.2d at 472; *Schuessler*, 846 S.W.2d at 852 n. 6.

THIRTY-FIRST GROUND – PUNISHMENT ARGUMENT REGARDING ABUSE

22. The applicant failed to preserve error with respect to her ground for relief regarding the State's punishment argument that there was no proof that the applicant was physically abused by men in her life; accordingly, the applicant's ground for relief, as it pertains to this argument, is procedurally barred. *Hodge*, 631 S.W.2d at 757.

23. Alternatively, because the State's punishment argument concerning the applicant's alleged abuse was proper as a reasonable deduction and summary of the evidence presented at trial, the applicant's ground for relief is meritless. See *Alejandro*, 493 S.W.2d at 231 (proper jury argument falls into four specific categories: summation of the evidence, reasonable deduction from the evidence, answer to argument by opposing counsel, and plea for law enforcement).

THIRTY-THIRD GROUND – BURDEN OF PROOF PUNISHMENT ARGUMENT

24. Because the Court of Criminal Appeals considered and rejected on direct appeal the applicant's thirty-third ground for relief alleging that the complained-of portion of the State's punishment argument placed the burden of proof on the applicant to support the jury's affirmative answer to the mitigation special issue, the instant claim need not be reconsidered. *Acosta*, 672 S.W.2d at 472; *Schuessler*, 846 S.W.2d at 852 n. 6.

THIRTY-FOURTH GROUND – PUNISHMENT ARGUMENT REGARDING APPLICANT HITTING COMPLAINANT WITH STATUTE

25. Because the Court of Criminal Appeals considered and rejected on direct appeal the applicant's thirty-fourth ground for relief complaining of the State's punishment argument regarding the applicant hitting the complainant with a statute during the instant offense, the instant claim need not be reconsidered. *Acosta*, 672 S.W.2d at 472; see also *Schuessler*, 846 S.W.2d at 852 n. 6.

THIRTY-FIFTH GROUND – THREATS TO DEFENSE WITNESS

26. The applicant fails to demonstrate that the prosecution threatened defense witness Bryant; accordingly, the applicant's thirty-fifth ground for relief is meritless. See *Ex parte Slaton*, 484 S.W.2d 102, 104 (Tex. Crim. App. 1972)(burden of proof is on applicant in post-conviction habeas corpus proceeding).

THIRTY-SEVENTH GROUND – JERRY BRYANT, JR., TESTIMONY

27. The applicant fails to demonstrate that Jerry Bryant, Jr., intended to invoke his Fifth Amendment rights during the applicant's trial or that his testimony was excluded on Fifth Amendment grounds; accordingly, the applicant's ground for relief fails. See *Ex Maldonado*, 688 S.W.2d at 116 (defendant has burden on habeas).

THIRTY-EIGHTH GROUND – ADMISSION OF UNADJUDICATED OFFENSES

28. The applicant's thirty-eighth ground for relief is without merit. Unadjudicated offenses are admissible during the punishment phase of a capital murder trial. TEX. CODE CRIM. PROC. art. 37.071; *Kemp*, 846 S.W.2d at 307; *Smith v. State*, 676 S.W.2d 379, 390 (Tex. Crim. App. 1984). Additionally, the admission of extraneous unadjudicated offenses does not violate an accused's constitutional rights to due process and equal protection. *Kemp*, 846 S.W.2d at 307; *Williams v. State*, 622 S.W.2d 116, 120 (Tex. Crim. App. 1981).

THIRTY-NINTH GROUND – SUFFICIENCY OF FUTURE DANGEROUSNESS EVIDENCE

29. Because the Court of Criminal Appeals considered and rejected the applicant's thirty-ninth ground for relief on direct appeal, holding that the evidence was sufficient to support the jury's finding that the applicant posed a danger to society, the instant claim need not be reconsidered. *Acosta*, 672 S.W.2d at 472; *Schuessler*, 846 S.W.2d at 852 n. 6.

FORTIETH GROUND – VIOLATIONS OF CONSTITUTIONAL RIGHTS

30. The applicant fails to show that her constitutional rights were violated, based on alleged errors at trial and on appeal. *Ex parte Barber*, 879 S.W.2d 889 (Tex. Crim. App. 1994) (holding that applicant must show that complained-of error affected fact or length of confinement in order to be cognizable on habeas).

SECOND, THIRD, NINTH, ELEVENTH THROUGH TWENTIETH, TWENTY-SECOND, TWENTY-FOURTH, TWENTY-SEVENTH, THIRTY-SECOND, AND THIRTY-SIXTH GROUNDS FOR RELIEF – EFFECTIVENESS OF COUNSEL

31. The applicant has demonstrated deficient performance, and harm, based on deficiencies in trial counsel's representation at the punishment phase of trial.

32. Based on the totality of the representation afforded the applicant at trial, as demonstrated by counsel's vigorous defense of the applicant, the applicant's claim that she was denied effective representation at the guilt innocence phase of the trial is without merit. See *Wilkerson v. State*, 726 S.W.2d 542, 548 (Tex. Crim. App. 1986)(analysis for ineffective assistance of counsel claim is undertaken in light of the "totality of the representation" rather than by examining isolated acts or omissions of trial counsel).

33. The applicant fails to show ineffective assistance of appellate counsel. See *Butler*, 884 S.W.2d at 783.(holding *Strickland* standard applies to appellate counsel as well as trial counsel). Appellate counsel is not obligated to raise every possible claim on direct appeal; rather, appellate counsel need only raise the claims that he believes have the best chance of success. See *Smith v. Robbins*, 528 U.S. at 285-8, 120 S. Ct. at 764-5 (noting appellate counsel not obligated to raise every possible claim on direct appeal; appellate counsel need only raise claims he believes have best chance of success).

Second Ground – voir dire on law of parties

34. Based on the totality of the trial court's voir dire regarding the law of parties and the court's instructions to the jury, trial counsel was not ineffective for failing to object to the trial court's alleged voir dire error.

35. Additionally, the applicant fails to demonstrate prejudice under *Strickland*, because any error in the trial court's complained-of voir dire statement was harmless in light of the totality of the trial court's voir dire and the punishment charge. See *Eldridge*,

940 S.W.2d at 650 (trial court's error in informing venire of the effect of their failure to agree on a special issue attenuated by jury charge); Sattiewhite, 786 S.W.2d at 278-9 (reviewing court assumes that jury conducted itself as directed by the trial court).

Third Ground – prosecutor's statements regarding parole

36. The applicant fails to demonstrate that trial counsel was ineffective for failing to object to the prosecutor's comments regarding Texas parole law during voir dire because the trial court granted the applicant's motion for voir dire and a jury instruction on parole eligibility; the defense voir dired on parole; and, the prosecution's comments regarding parole were consistent with the trial court's parole charge.

37. Additionally, the applicant's allegations of harm are purely speculative and not a basis for habeas relief. *Scheanette*, 144 S.W.3d at 510 (ineffective assistance claims are not built on retrospective speculation).

Ninth Ground – venireperson Skorupinski

38. Venireperson Skorupinski's excusal was proper under Article 35.03 of the Texas Code of Criminal Procedure and did not constitute an abuse of discretion; therefore, trial counsel was not ineffective for failing to object. See *Koch v. Puckett*, 907 F.2d 524, 527 (5th Cir. 1990)(counsel not ineffective for failing to make futile motions or objections).

Eleventh Ground – lesser-included offenses

39. The applicant was not entitled to instructions on the lesser included offenses of robbery or murder; accordingly, trial counsel was not ineffective for failing to request that the jury be instructed on robbery and/or murder or object to the omission of such instructions in the court's guilt/innocence charge. See *Kinnamon v. State*, 791 S.W.2d 84, 97 (Tex. Crim. App. 1990)(holding counsel not ineffective for failing to request jury charge on lesser-included of murder when the evidence did not support such charge).

40. Additionally, appellate counsel's failure to urge a meritless point of error on appeal regarding the absence of lesser-included offense instructions for robbery and murder did not constitute ineffective assistance. See *Jones v. Barnes*, 463 U.S. 745, 103 S. Ct. 3308 (1983)(holding that appellate counsel not ineffective for choosing not to advance meritless claim and has no constitutional duty to raise every non-frivolous issue); *Fuentes v. State*, 991 S.W.2d 267, 272-3 (Tex. Crim. App. 1999)(counsel in capital murder trial not ineffective for failing to request lesser-included offense of felony-murder instruction because "there is no evidence upon which a jury could rationally have found that appellant did not intend to kill when he shot the deceased.").

Twelfth Ground – first special issue

41. The applicant fails to demonstrate deficient performance, much less harm, relating to trial counsel's presentation of evidence relating to the future dangerousness special issue. See *Strickland*, 466 U.S. at 689 (holding that defendant must overcome strong presumption that counsel's conduct falls within wide range of reasonable assistance by probability sufficient to undermine confidence in outcome; that, but for counsel's unprofessional errors, results of proceeding would have been different; and, that competency of representation not to be judged by hindsight); *Bridge v. State*, 726 S.W.2d 558, 571 (Tex. Crim. App. 1986)(holding that standard for effective assistance of counsel does not ensure errorless or perfect counsel).

Thirteenth Ground – applicant's right to testify

42. Because trial counsel properly advised the applicant of her right to testify at trial, the instant ineffective claim fails on its merits. See *Sonnier v. State*, 913 S.W.2d 511, 522-3 (Tex. Crim. App. 1995)(counsel cannot be held ineffective for their client's decisions); *Duncan v. State*, 717 S.W.2d 345, 348 (Tex. Crim. App. 1986)(noting

importance of part that defendant plays in determining the trial strategy to be pursued in examining ineffective assistance of counsel claim).

Fourteenth Ground – mitigating evidence

43. The applicant demonstrated that trial counsel was ineffective in the presentation of mitigating evidence at trial. Counsel was aware of the facts regarding the applicant's background and made some informed strategic decisions regarding the presentation of mitigation evidence. Trial counsel was ineffective for failing to present evidence that would aid the jury in understanding the connection between evidence of the applicant's background and character and issue of mitigation.

Fifteenth through Seventeenth Grounds – duress

44. Trial counsel was not ineffective for failing to obtain a jury instruction on duress at guilt/innocence because the evidence did not support such instruction; accordingly, the applicant fails to establish counsel's ineffectiveness on such basis.

45. Trial counsel was aware of and investigated the applicant's theory of duress and made reasonable trial strategy decisions for both phases of trial regarding the presentation of duress evidence; therefore, the applicant does not establish that counsel was ineffective on the basis now urged.

46. Trial counsel was not ineffective for failing to present co-defendant James Dickerson at trial because his testimony was not helpful to the defense and contrary to the punishment testimony of Dr. Ray. See *King v. State*, 649 S.W.2d 42, 44 (Tex. Crim. App. 1983) ("counsel's failure to call witnesses at the guilt-innocence and punishment stages is irrelevant absent a showing that such witnesses were available and appellant would benefit from their testimony"). Additionally, trial counsel advised the applicant of her right to testify at trial, and the applicant made an informed decision not to testify at trial. See *Sonnier v. State*, 913 S.W.2d 511, 522-3 (Tex. Crim. App. 1995) (counsel cannot be held ineffective for their client's decisions).

Eighteenth, Nineteenth and Thirty-sixth Grounds – Jerry Bryant, Jr.

47. Trial counsel was not ineffective for failing to move for a mistrial or complain at the trial level regarding the prosecutor's alleged threats against Jerry Bryant, Jr., because the prosecutor did not threaten Bryant.

48. Trial counsel made the reasonable strategic decision not to call Bryant as a witness at trial. *Blott v. State*, 588 S.W.2d 588, 592 (Tex. Crim. App. 1979)(reviewing courts will not second-guess through hindsight the strategy of counsel at trial). The applicant has not established that Bryant's testimony would have benefitted the defense; accordingly, the applicant's ineffective claim is meritless. *King*, 649 S.W.2d at 44 (defendant complaining of counsel's failure to call witnesses must show proof that witnesses' testimony would have benefited the defense).

49. The applicant fails to demonstrate harm based on counsel's failure to present Bryant as a witness at trial because Bryant's alleged beneficial testimony regarding Paula Allen's inconsistent statements, the applicant's social history, and the demeanor of the applicant and co-defendant Dickerson after the instant offense, was elicited through other sources at trial. *See Strickland*, 466 U.S. at 689 (holding that defendant must show outcome of proceeding would have been different but for deficient performance).

Twentieth Ground – Wayland Griggs extraneous

50. The applicant's ineffective claim relating to the Griggs extraneous offense is meritless. The alleged beneficial testimony of Lawrence Gwin, Jr., was elicited through witness Paula Allen and trial counsel's admission into evidence of the dismissal of the attempted murder charge against the applicant.

51. Moreover, the applicant's speculative assertions regarding the benefits of presenting Jerry Bryant, Jr., and Vincent Perry as witnesses at trial are not sufficient to demonstrate counsel's ineffectiveness. *Scheanette v. State*, 144 S.W.3d 503, 510 (Tex.

Crim. App. 2004)(ineffective assistance claims are not built on retrospective speculation).

Twenty-second Ground – Annie Smith testimony

52. Trial counsel was not ineffective for failing to admit Annie Smith's testimony regarding the applicant's future dangerousness because favorable testimony regarding the applicant's future dangerousness was elicited from Dr. Priscilla Ray.

53. Additionally, the applicant does not demonstrate how she was harmed by counsel's failure to preserve the trial court's exclusion of Smith's testimony for appellate review. See *Johnson v. State*, 629 S.W.2d 731 (Tex. Crim. App. 1981)(holding isolated instances of failing to object does not render counsel ineffective).

Twenty-fourth Ground – documentary evidence

54. On direct appeal of the instant cause, the Court of Criminal Appeals held that the trial court did not err in excluding the hearsay portions of the Matagorda and Covenant House records from admission into evidence; therefore, trial counsel was not ineffective for failing to admit into evidence the inadmissible hearsay portions of the records. *Sheppard*, slip op. at 16. See *Koch*, 907 F.2d at 527 ("[C]ounsel is not required to make futile motions or objections").

Twenty-seventh Ground – Patrice Green testimony

55. On direct appeal of the instant cause, the Court of Criminal Appeals held that the trial court did not err in excluding portions of Green's punishment testimony; The Court finds trial counsel was ineffective in failing to ask questions in compliance with the Texas Rules of Evidence and in failing to make an offer of proof, thus failing to preserve this error for consideration on appeal.

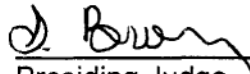
Thirty-second Ground – state's punishment argument

56. Trial counsel was not ineffective for failing to object to the State's proper jury argument at punishment. *Harris v. State*, 784 S.W.2d 5, 12 (Tex. Crim. App.

1989)(counsel can properly summarize the evidence, make reasonable inferences from the evidence, answer argument of opposing counsel, and make a plea for law enforcement during jury argument).

57. The applicant has demonstrated that her sentence was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be granted and that a new punishment hearing be ordered.

SIGNED this 24 day of August, 2012



Presiding Judge
185th District Court

Cause No. 668505-A

EX PARTE	§	IN THE 185TH DISTRICT COURT
	§	OF
ERICA YVONNE SHEPPARD, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause number 668505-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. All of the applicant's pleadings filed in cause number 668505-A, including any exhibits and affidavits;
2. All of the Respondent's pleadings filed in cause number 668505-A, including exhibits and affidavits;
3. The court reporter's record from the writ evidentiary hearing conducted in cause number 668505-A;
4. This court's findings of fact, conclusions of law and order denying relief in cause number 668505-A;
5. The Proposed Findings of Fact and Conclusions of Law submitted by Respondent in cause number 668505-A;
6. Any Proposed Findings of Fact and Conclusions of Law submitted by the applicant in cause number 668505-A; and
7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number 668505, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to applicant's counsel: Wm. Alan Wright; Haynes and Boone, L.L.P.; 2323 Victory Avenue, Suite 700; Dallas, TX 75219-7673; and to Respondent: Lynn Hardaway; Harris County District Attorney's Office; 1201 Franklin; Suite 600; Houston, Texas 77002-1901.

SIGNED this 24 day of August, 2013



Presiding Judge
185th District Court

STATE OF TEXAS
COUNTY OF HARRIS

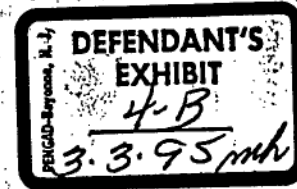
I, Chris Daniel, District Clerk of Harris County, Texas, certify that this is a true and correct copy of the original record filed and or recorded in my office, electronically or hard copy, as it appears on this date. Witness my official hand and seal of office this

CHRIS DANIEL, DISTRICT CLERK
HARRIS COUNTY, TEXAS

Deputy

PRISCILLA RAY, M.D.
ST. LUKE'S MEDICAL TOWER
6624 FANNIN, SUITE 2120
HOUSTON, TEXAS 77030

TELEPHONE 713-797-0112



CLINICAL EVALUATION

PATIENT: MS. ERICA YVONNE SHEPPARD

DATE: NOVEMBER 30, 1994

Dear Judge Harper:

Pursuant to your court order 668505, an independent medical examination was performed on Erica Sheppard. This examination consisted of a review of medical records from her treatment at the Harris County jail, as well as a clinical psychiatric interview performed at the Harris County Jail, 1301 Franklin, on November 30, 1994, lasting two hours.

The defendant provides the following information:

BACKGROUND:

She was born on September 1, 1973 and is twenty-one years of age. She was born in Bay City, Texas and reared in Markham, Texas. She was reared by her maternal grandmother, who is now eighty-five and has cancer of the colon. Her maternal grandmother has seen Ms. Sheppard three times since she is in jail because of difficulty with transportation. Ms. Sheppard's mother is forty-one-years-old, unemployed and lives in Houston. She has had three heart attacks as her heart "skips beats". Her mother has visited her five or six times in the seventeen months Ms. Sheppard has been in jail. Her parents divorced when she was a baby and she has seen her father fairly infrequently, the last time being about four years ago. Her father lives in Missouri City, Texas. She has one full biological brother, age twenty-three, named Jonathan. She sees him a few times a year and she does not know whether he works or, if so, where. She has a paternal half-brother who is twenty-three years old, Alexander Sheppard, III (Trey) who is in school. A paternal step-brother, Cedric Moseley, is in his late twenties and she does not see him. She is closest, of her family members, to her maternal grandmother.

EDUCATION:

She attended school into the tenth grade but left because she was pregnant. She had failed the fourth grade but obtained a GED because she "wanted my education". She had wanted to be a nurse and was attending the National Education Center to become a medical assistant from November 1992 until March 1993. She left at that

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time because Jerry Bryant, her baby's father, did not want her to go to school and wanted her at home. During her schooling she did not get into fights, was never suspended or expelled nor truant from school. She was reared in the Baptist religion and adheres to this religion. Her hobbies as a child were reading books, especially mysteries and Christian books and horror movies, for example, Stephen King. She recalled problems with bed wetting intermittently until age thirteen or fourteen. There was no prolonged thumb sucking or sleep walking and she denies torturing animals or fire setting. She still has nightmares at times. When asked specifically about sexual or physical abuse or neglect, she indicates that she was going to a rape support group. She had been to the Women's Crisis Center in Matagorda County. At three to five year of age, her mother left her with a friend, Cookie. Cookie's boy friend would touch her between her legs and make her suck his "dick" and hit her if she didn't do it. She told her mother about this but her mother did not believe her. She told her grandmother, who believed her and, at that time, she went to live with her grandmother. At the age of sixteen or seventeen her mother and she did not get along and her mother put her out. She lived on the streets and was raped by a man with a knife. He said no one would believe her. She tried to block it out and still has nightmares but she "keeps it inside". While she was out on the street, she went to Covenant House for a short time.

MILITARY:

She has never served in the military.

LEGAL:

In 1991 or 92 she had a charge of attempted murder dismissed. She has never had other legal charges.

SOCIAL:

She has three children, each of them has a different father. She has not seen the fathers of the first two children after she became pregnant with each one of them. The father of her daughter, the youngest child, Jerry Bryant, Jr. abused her and hit her. She went to the Crisis Center and they tried to get her to go the hospital. However, Jerry had told her that if she left, he would find her and kill her and she is thankful that she is now locked up. On May 24 or 25 of 1993, he jumped on her. She called the police but they did not do anything. She filed charges and they did nothing; that's when she went to the Crisis Center.

Her children include a five-year-old male, Haybert, born November 28, 1989 and named for her maternal grandfather. She has a three-year-old son, born June 22, 1991, Manchie, named after her maternal great-grandfather. She has a two-year-old daughter, born August 3,

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1992, Audria.

MEDICAL:

She denies unusual childhood illnesses. She had a laparoscopy six to seven years ago when a cyst on her ovary was removed. She has had kidney and bladder infections frequently since childhood. She denies significant illnesses as an adult. In the jail, first she was on Prozac but it "didn't do anything". She was then changed to Norpramine 150 mg. p.o. q.h.s. prescribed by Dr. "Rabloski" (sic). She denies past or current use of alcohol or street drugs. She does have a history in the past of head trauma but denies loss of consciousness. She has had migraine headaches. She is a Gravidia 5 Para 3 AB 2.

FAMILY PSYCHIATRIC HISTORY:

There is a family history of depression in her mother, who sees a psychiatrist. There is no other family psychiatric treatment. When asked about previous psychiatric treatment herself, she indicates that she had tried to see a psychiatrist but they "charge too much" and many do not take Medicaid. She got depressed, "was to myself", was having mood swings from depression to anger. She had a decrease in appetite, a weight loss of ten pounds, occasional sleeping difficulty, decreased energy and interest, increased depression, irritability and edginess. She denied convulsions and seizures. She hears voices now but did not in the past. The voices told her that she would die but these have decreased on her medications. She denies mood swings now and feels more stable.

CURRENT INCIDENT:

She indicates that she was charged with capital murder from an event on June 30, 1993. Her attorney is Charles Brown, whose job it is to "represent me" and who she believes is "doing O.K.". The district attorney is "to make me look bad". The judge's job is "to sentence me" and the jury to "see if I am guilty or innocent".

When asked to describe the incident, she indicates that her brother's boy friend, James Dickerson, his friend, Cory and she were sitting in an apartment. James and Cory were playing cards and James got hungry. She asked James why he had not asked (her brother) Jonathan for money before he left and James said, "He didn't know". She and James peeled some potatoes and made and ate french fries. James said that he should go back to his gangster lifestyle (he had been in a gang in Galveston). She said that he needed a job and where he could go for help. James was hot and they went for a walk. Cory said he would keep the baby (this is the day before the alleged incident). Cory's baby had died. His mother had had his brother killed for being gay; Cory didn't know if he should tell his mother he was gay. On the day of the event,

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she and James were walking again and James pulled a knife on her and said that if she didn't go with him, he would kill her and her baby (she and James were walking with the baby on this day). She was shocked. She had just been telling James where he could get help. She "went into shock". She went with him into the house of a woman. He told the woman that if she didn't hush, he would cut her throat. She screamed and he cut her throat a little. She asked what he wanted and he said money and her keys. She said "My keys; you're crazy". Ms. Sheppard indicates that she crouched on the floor. James told her to go "get a butcher knife". She did not move because she was in shock; he yelled at her again and threatened her. She brought two knives. He said to get her keys and find her money and then yelled at her again when she didn't move. She went into the bedroom, went through the woman's purse and she had less than \$50. He called her back in there and she went back. It was "like a fountain of blood shooting out of her neck". She was afraid of that and for herself and her baby. She knew what she herself had been through and knew what a man could do to her. The three of them went back to the apartment and packed up her baby's clothes and went to Bay City and picked up her friend, Sherry, from work. Sherry knew that something was wrong. Sherry and she were in the front seat and James and her baby were in the back seat. She did not know what James was doing to her baby (there she becomes tearful). When they got to a motel, he slept on the floor with her baby and she (Ms. Sheppard) slept in the bed with Sherry. The next morning Sherry said that Jerry Bryant (the baby's father) was looking for her and had found her there. They left and went to the Econolodge. Jerry found her there and Jerry had a broken leg. In order to try to clue Jerry into what was going on, she kept saying "your baby needs some diapers..." She indicates that she was trying to make sure that he would come back and that something was out of the ordinary. He went and got some diapers and came back and then left and came back with her grandmother, Sherry's mother and had a state trooper follow him up there. She gave her daughter to her grandmother. Jerry Bryant left and her grandmother left. Jerry said the cops are on the way. Ms. Sheppard was "glad". James took her back to the motel and she tried to think how she could get away from him. The pastor of her church called at the motel. James kept saying, "Tell him good bye; get off the phone". There was a knock on the door; she looked out and told him that two policemen were there. She sat on the bed; the police came in and arrested them. The judge came with papers for her to sign. James had put his knife underneath Ms. Sheppard's clothes in a drawer and they found the knife in her things. This was the knife that she had used to peel potatoes.

James went to trial in June and was given the death penalty. He said that she hit the woman over the head with a statue, which was not true. He told Ms. Sheppard to bring him the statue, which she did and he hit her with it. She was already dead; there was blood everywhere. While they were there, he gave her the glove which she

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left there.

Since being in jail, she has "gotten along O.K.". At times people have started things but she tries to stay out of it although she acknowledges that she is irritable. The girls in the tank said that she was bragging and felt no remorse. The next day she went to lock-down for about 3 months. She was on the third floor for a while on the medical unit and while there she saw things, "a woman covered with blood saying, 'why did he do that'?"

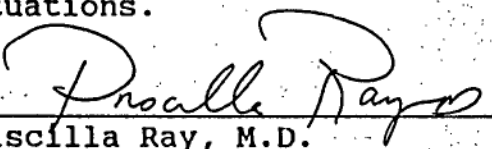
MENTAL STATUS EXAMINATION:

She is a black female dressed in the usual prison garb, her hair is parted in the middle and combed. Posture is upright, expression later neutral, attitude cooperative. Gait is slow but adequate. Her motor behavior is mildly and diffusely decreased but there are no bizarre or unusual movements in the interview. Her speech is clear somewhat slow without pressure, dysarthria, slurring, idiosyncracies or neologisms noted. Her affect is depressed, mildly constricted. She is tearful on two occasions when discussing her grandmother and when she indicated she did not know what James Bryant would do to her baby. Thought processes reveal some circumstantiality but there is no tangentiality, looseness of associations, flight of ideas, blocking, perseveration or verbiage. Content is without delusions, self referential thinking, grandiosity. There are no noted hallucinations or illusions observed in the interview.

On the Modified Mini Mental Status Examination she scores 93 out of a 100 with deficits in abstraction and copying two pentagons without intersections.

IMPRESSIONS:

- 1) Ms. Sheppard demonstrates a rational as well as factual understanding of the charges and proceedings against her; therefore, she should be considered competent to stand trial.
- 2) Ms. Sheppard, in my opinion, was not suffering from a mental disease or defect which prevented her from knowing that the behavior charged was wrong or from conforming her behavior to the requirements of the law she allegedly violated; therefore, she should be considered sane at the time of the alleged offense.
- 3) Ms. Sheppard is, in my opinion, likely, because of her background, to be more susceptible to threats by men who are in a position to be abusive and to be more easily influenced in such situations.


Priscilla Ray, M.D.

PR/lb

FILED

Loren Jackson
District Clerk

JAN 02 2009

IN THE TEXAS COURT OF CRIMINAL APPEALS
AND THE 185th JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Time: _____
By: _____
Harris County, Texas
Deputy

Ex Parte ERICA YVONNE SHEPPARD, §
§
§
Applicant. §

C.C.A. No. 72,127
Harris County No. 668505-A

APPLICANT'S NOTICE OF FILING OF EXPERT REPORT OF MYLA H. YOUNG

PLEASE TAKE NOTICE that Applicant, Erica Yvonne Sheppard, hereby submits the expert report of Myla H. Young, Ph.D. Dr. Young's report is attached hereto as Exhibit "1" and incorporated herein by reference.

Respectfully submitted,



Wm. Alan Wright
State Bar No. 22062700
HAYNES AND BOONE, LLP
2323 Victory Avenue, Suite 700
Dallas, Texas 75219
214-651-5000 Telephone
214-651-5190 Facsimile

ATTORNEYS FOR APPLICANT

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on Mark E. Donnelly, Assistant District Attorney, Harris County District Attorney's Office, 1201 Franklin, Suite 600, Houston, Texas 77002 by First Class U.S. mail and email on the 24th day of December, 2008.

A handwritten signature in black ink, appearing to read "Wm. Alan Wright", is written above a horizontal line.

Wm. Alan Wright

D-1707059_1.DOC

DECLARATION OF MYLA H. YOUNG, Ph.D., ABN

I, Myla H. Young, declare as follows:

1. I am a clinical psychologist licensed to practice in the State of California, specializing in neuropsychology and neuropsychological assessments. I am Board Certified in Neuropsychology by the American Board of Professional Neuropsychology (ABN/). I am a member in good standing of the American Psychological Association and its subspecialty divisions in Clinical Neuropsychology and Forensic Psychology; the National Academy of Neuropsychology; the International Neuropsychological Society; and the Society of Personality Assessment.
2. I am currently in private practice and conduct neuropsychological evaluations of criminal offenders, medical patients, psychiatric patients, and medical-legal patients. I conduct neuropsychological evaluations of children, adolescents, and adults. I am an instructor of continuing education courses in the Neuropsychological Evaluation of Criminal Offenders and Introduction to Neuropsychology at the University of California, Berkeley, and at Alliant University.
3. I hold a doctorate in Clinical Psychology from the California School of Professional Psychology in Berkeley, California (Alliant University, San Francisco, California). I received my Masters Degree in Experimental Psychology from Towson State University in Baltimore, Maryland, in 1977. I earned my Bachelor of Arts Degree in 1975 with a major in Psychology from the University of Guam.
4. From 1984 to 1985, I completed a Pre-Doctoral Internship at Garfield Geropsychiatric Hospital in Oakland, California. During this internship, I performed neuropsychological and psychological evaluations of geriatric patients who were hospitalized for medical, neurological, or psychiatric disorders.

5. I completed a Pre-Doctoral Internship at the McAuley Neuropsychiatric Institute at St. Mary's Hospital in San Francisco, California, from 1985 to 1987. While at St. Mary's I conducted neuropsychological and psychological evaluations of children, adolescents, and adults who were hospitalized for psychiatric treatment, and provided treatment to these same individuals. I also conducted neuropsychological evaluations of adults who were hospitalized for medical treatment or who were recovering from neurological and other medical disorders.

6. In 1989, I completed a Post-Doctoral Fellowship in Neuropsychology at San Francisco General Hospital/University of California, San Francisco. During this time I conducted neuropsychological and psychological evaluations of patients hospitalized for medical, neurological, and psychiatric disorders. I conducted neuropsychological and psychological evaluations of children and adolescents who had been referred to the Child and Adolescent Sexual Abuse Resource Center. In addition, I participated in research that evaluated the neuropsychological, neurophysiological (Evoked Potential), and psychological functioning of men and women who tested positive and negative for the human immunodeficiency virus (HIV).

7. From 1990 to 2005, I was employed by the California Department of Mental Health at the Correctional Medical Facility – Vacaville, California. During this period I served as a staff psychologist, providing neuropsychological and personality assessments of individuals who had been admitted for acute and sub-acute psychiatric treatment while confined in the California Department of Corrections. I was part of an Interdisciplinary Treatment Team and served as the Clinical Coordinator responsible for the development, implementation, and evaluation of a Behavioral Milieu Treatment Program. I provided staff training in neuropsychological assessment and behavioral treatment and psycho-diagnostic evaluation, and supervised pre-licensed Ph.D. candidates. I also trained and supervised pre-doctoral psychology interns and conducted seminars in neuropsychological and personality assessment of children at Oakes Children's Center in San Francisco, California. I trained and supervised pre- and post-doctoral psychology interns and conducted seminars in neuropsychological and personality assessment of

children, adolescents and adults at the McAuley Institute of St. Mary's Hospital in San Francisco, California.

8. From 1995 to 2000, I served as a Program Consultant for Psychology for the California Department of Mental Health facility located within the Correctional Medical Facility at Vacaville, California, and served from 2000 to 2005 as a Senior Supervising Psychologist in the same prison's psychiatric treatment program. In these positions, I was the psychology consultant to the Executive Director, Medical Director, and Program Directors, was responsible for research and program evaluation, provided clinical supervision and consultation, and provided direct inmate/patient care. I was also the principal investigator for research, program evaluation, and treatment outcome measurement. I developed, accomplished accreditation of, and served as Director for an American Psychological Association Accredited Psychology Intern Training Program, provided seminars in neuropsychological assessment, and provided individual and group supervision to Psychology Pre-Doctoral Interns and Post-Doctoral Fellows.

9. From January 1990 to June 2004, I served on the Adjunct Faculty at Alliant International University/California School of Professional Psychology in Berkeley/Alameda where I taught courses on Neuropsychological Assessment. I was the Dissertation Chairperson for several doctoral students and served on the dissertation committees of numerous other doctoral students. The students pursued varied and wide-ranging areas of investigation involving both children and adults, psychotic and non-psychotic individuals, and persons confined in penal institutions as well as persons not so confined. I am the primary author of several studies which have appeared in peer-reviewed publications involving the prison population and the secondary author of several additional peer-reviewed publications.

10. I have been the principal presenter at several professional conferences including: Asilomar Forensic Mental Health Conference; Patton State Hospital Forensic Mental Health Conference; California Psychological Association; American Correctional Mental Health Services Association; Behavioral Health Institute Conference; and the International Organization

of Psychophysiology. I have been qualified as an expert witness in criminal cases in state and federal criminal courts in California, Nevada, and Washington, and in civil cases in California state courts. I have also completed neuropsychological evaluation of criminal offenders in Texas, Louisiana, New Mexico, Nevada, Idaho, Georgia and Washington.

11. I have been asked by the current post-conviction attorneys for Erica Sheppard to perform a neuropsychological evaluation of Ms. Sheppard, determine the presence (if any) and severity of organic deficits, and render an opinion whether and how such impairments would have affected her cognitive functioning throughout his lifetime up to the time of the offense. I was further asked to determine whether Ms. Sheppard's deficits would have been measurable with neuropsychological testing available at the time of her arrest and trial.

A. Introduction: Brain Functioning and Neuropsychological Assessment

12. The science of clinical neuropsychology studies the relationship between the brain and behavior. Because the brain is the human organ that drives behavior, any injury—whether that injury occurred prior to or after birth, and whether that injury would be considered to be mild or severe—has the potential to affect a person's perceptions and behaviors throughout her life. Information about the individual's prenatal, birth, childhood, adolescence and adult environments and experiences are all relevant to understanding brain functioning and consequent perceptions and actions.

13. As will be described, Ms. Sheppard's history provides several reasons to suspect the existence of organic dysfunction or brain damage, and indicates the need for a comprehensive neuropsychological evaluation. "Brain damage" refers to the effects of either impaired development or injury or both on the physical tissue making up the human brain. A comprehensive battery of neuropsychological tests measures aspects of brain functioning, including intelligence, sensory and motor functions, attention and concentration, verbal and visual memory and learning, expressive and receptive language, academic achievement, and

executive functioning (inhibition of impulses, mental or cognitive flexibility, abstract reasoning and problem-solving, self-monitoring, planning and initiating activity). The instruments used in this neuropsychological evaluation of Ms. Sheppard were selected to identify potential cognitive and psychological events in her life that could have resulted in brain dysfunction, and consequences of that disrupted brain function.

14. An understanding of the phylogenetic development or evolutionary relatedness among parts of the brain assists in understanding relationships among brain functioning, thinking, and actions. One such developmental understanding was proposed by Yakovlev in 1967 and is supported by contemporary neuroscientists. Yakovlev described the brain as organized in three separate but related systems, with three primary connective systems. There is a primitive nuclear core of the brain, the allocortex, which includes the reticular activating system and cranial nerves, and functions to maintain consciousness, metabolism, respiration, and circulation and to filter stimuli received from the environment. The middle system, the neocortex, includes the hypothalamus, hippocampus, thalamus, basal ganglia, amygdala and limbic system and serves primary functions of motivation, memory, arousal, emotion and mood. The outer layer, the isocortex, includes the sensory and motor cortexes, corpus callosum, and cerebrum (occipital, parietal, temporal, and frontal lobes). Orbitofrontal-paralimbic, hippocampal-paralimbic and subcortical-limbic connection circuits provide a “flow” of information throughout the brain.

15. Consistent with developmental understanding proposed by Yakovlev, neuroscientists have also known for many years that the normal brain develops in predictable stages, with the mesocortex frontal cortex, temporal cortex and extended limbic system maturing last. The frontal brain region is responsible for a group of actions referred to as “executive functioning.” Executive functioning is the ability to think, reason, problem solve, initiate actions, monitor actions, change actions as needed based on information from the environment, and the ability to inhibit impulses and actions. The temporal cortex is the brain region primarily responsible for the ability to learn, process, and understand language and the ability to recall new information.

The limbic system is the brain region primarily responsible for receiving, and responding to emotion (amygdala) and receiving new information to permit memory and learning (hippocampus).

16. Immature brain development particularly affecting maturation of the frontal and temporal cortices and the limbic system is known to be associated with multiple causes such as prenatal teratogenic effects of alcohol, tobacco, or prescribed/non-prescribed medication use/abuse, persisting emotional stress, some medical disorders and illnesses experienced during prenatal development of the fetus, inadequate medical treatment of maternal illness, inadequate medical or pre-natal care, and maternal psychiatric disorder and treatment, to identify a few causes. Childhood experiences such as abuse, neglect, unsafe environment, inadequate parenting, and some childhood illness are also known to be associated with immature development of these mesocortex brain regions. Damage to the brain is also associated with adolescent drug, alcohol or inhalant use, and with toxic exposures, to identify a few. Childhood head trauma, with or without loss of consciousness, also is known to have significant negative impact on brain maturation, and several researchers have indicated that childhood head trauma may cause even greater brain damage than the same severity of head trauma experienced as an adult. Although a single head trauma can, and often does, result in significant brain damage, more than one head trauma is known to have even greater negative impact than a single head trauma. In selecting and administering neuropsychological tests to Ms. Sheppard, I was guided by this understanding of brain functioning.

B. Nature and Circumstances of the Neuropsychological Evaluation

17. I conducted approximately 18 hours of neuropsychological evaluation of Ms. Sheppard over the course of 3 days on November 19, 2008, November 20, 2008, and November 21, 2008. Ms. Sheppard is a 35-year-old Black woman. The evaluation was conducted in a private room at the Texas prison system Mountain View Unit, Gatesville, Texas. The room was quiet, with

minimum distraction, reasonably good ventilation and reasonable comfort. Ms. Sheppard was not physically restrained during the evaluation and the evaluation proceeded uninterrupted.

18. From the results of all testing measures and from my own observations, Ms. Sheppard fully cooperated with the evaluation, gave her best effort on all tests, and made no attempt to manipulate, fake or exaggerate her abilities on neuropsychological testing. Specific evaluation of Ms. Sheppard's attitude and effort on neuropsychological testing was assessed through administration of tests specifically developed to assess effort on testing, the 15 Item Test, the Test of Malingered Memory (TOMM), Green Word Memory Test (WMT) and the Forced Choice Subtest of the California Verbal Learning Test (CVLT-II Forced Choice). Ms. Sheppard's abilities on all of these tests indicated that she was expending her best efforts in this evaluation and was not attempting to feign or malingering her performance. Information obtained in this evaluation is, therefore, a valid and reliable assessment of Ms. Sheppard's brain functioning.

19. In addition to these validity testing measures, my own clinical observations of Ms. Sheppard confirmed that she was not only cooperating, but was performing all measures with exceptional effort. In fact, on some tests, Ms. Sheppard put forth more effort than most individuals I have observed. Ms. Sheppard attempted all tasks that were requested of her and persisted until tasks were completed. She was intent on completing the tasks asked of her and on trying to figure out tasks that were difficult for her. On some tests, she requested more time than was allotted by the test, indicating that she thought she could do better if she had more time to work, and on several tests she requested to repeat the test the following day. There was no task for which Ms. Sheppard was reluctant or unwilling to attempt. These observations were consistent indications that Ms. Sheppard was putting forth her best effort to do well.

20. At the time of testing, Ms. Sheppard was prescribed and was taking antibiotic medication, medication to treat hypothyroidism, hypertension, and aspirin for treatment of a mild headache. Ms. Sheppard was prescribed Nortriptyline (25 mg) and Verapamil (240 mg) for hypertension

beginning on 3/14/2003, and Levothyroxine (0.05 mg) for hyperthyroidism beginning on 12/4/2001, according to TDCJ Health Services Division Individual Treatment Plans dated 3/14/03 and 12/4/01. A Mental Health Assessment dated 9/18/2008 shows Hyperthyroidism and Hypertension as "Active." (Correctional Managed Care Outpatient Mental Health Services report dated 9/18/2008). Ms. Sheppard wears glasses, which were available during testing. (See TDCJ Optometry Record dated 2/1/07: OD Sphere -1.25, Cylinder -0.75, Axis 164; OS Sphere -1.75, Cylinder -0.25, Axis 180; Vision Corrected: OD 20/20; OS 20/20). There was no indication that her vision, hearing, tactile-sensory or motor abilities were impaired or inadequate for testing. She did not report sleep patterns unusual for a prison environment and she did not report atypical sleep problems prior to testing sessions. Ms. Sheppard has a history of chronic headaches, which have been diagnosed as migraine headaches. Ms. Sheppard had been prescribed Propranolol (20mg) and Naproxen (250 mg) for migraines on 5/4/01 (See TDCJ Health Services Division Nurse's Chain Review dated 5/4/01) and Amitriptyline (10 mg) "for chronic migraine headaches" (see TDCJ Clinic Notes dated 7/3/01). She reports a history of chronic back pain for which she has had surgery in the past. A Nursing Outpatient Discharge Summary from UTMB Galveston shows that Ms. Sheppard underwent Epidural Steroid Injection (ESI) surgery on August 28, 2008 for her back pain. Other than aspirin, Ms. Sheppard was not taking prescribed medication for headache or back pain or discomfort at the time of evaluation, and she indicated that she was not experiencing unusual pain at the time of evaluation.

21. Ms. Sheppard reports experiencing depression for many years. She indicated that she had not been treated for depression prior to prison but that she has been prescribed antidepressant medication (Prozac) while in prison, with positive response. This is confirmed in the Harris County Jail Forensic Screening Form dated 8/11/93 which shows that Ms. Sheppard was prescribed Prozac (20 mg) for depression. In 1995, Ms. Sheppard was prescribed Zoloft (100 mg) and Desyrel (50 mg) for her depression (see Discharge Summary from MHMR Harris County dated 5/1/95); and, in 2001, she was prescribed Elavil (50 mg) (see TDCJ Clinic Notes

dated 9/4/01. Ms. Sheppard was not, however, prescribed psychotropic medication at the time of evaluation. She indicated that she had been “in a funk but I’m ok now.” Ms. Sheppard reported that she had previously experienced suicidal ideation but that she was not experiencing suicidal ideation at the time of or just prior to evaluation and she was not feeling suicidal at the time of evaluation. At the time of evaluation, Ms. Sheppard’s presentation was mildly hypomanic. Her speech was rapid, she was at times mildly agitated, and changed topics rapidly. Ms. Sheppard was, however, easily re-directed, and was able to sit at the testing table throughout the six-hour evaluation each day. Breaks in testing were frequently taken, but breaks were initiated by me, and not requested by Ms. Sheppard.

22. I assessed Ms. Sheppard’s neuropsychological functioning by administering two neuropsychological batteries. I administered tests from the Halstead-Reitan Neuropsychological Battery which has been well-established since 1985, continues to be widely accepted in the scientific neuropsychological community, and now has normative standards specific to the Black population (Heaton, Miller, Taylor and Grant, 2004). I also administered a neuropsychological testing battery consisting of a series of independently selected, contemporary neuropsychological tests. Ms. Sheppard’s neuropsychological abilities were evaluated using gender, age and education adjusted normative standards. All tests have documented and published reliability and validity, were appropriately standardized, are available to all qualified neuropsychologists, and are generally accepted in the scientific neuropsychology community. Independent tests administered, or an earlier version of the test, were available at the time of Ms. Sheppard’s arrest and trial.

23. The neuropsychological tests administered to Ms. Sheppard included the following instruments, all of which have been professionally reviewed, have published documentation of acceptable reliability and validity, can be purchased by qualified neuropsychologists and are generally accepted within the neuropsychological community: Tests included 15 Item Test; Test of Malinger Memory (TOMM); Wechsler Adult Intelligence Scale (WAIS-IV); Test of

Nonverbal Intelligence (TONI 3); Wechsler Individual Achievement Test (WIAT-II); Smell Identification Test (SIT); Grooved Pegboard Test (GPT); Conners' Continuous Performance Test (CPT); California Verbal Learning Test (CVLT-II), including the Forced Choice subset; Wechsler Memory Scale (WMS-III); Rey Complex Figure Test; Executive Functioning Test (EFT); and Wisconsin Card Sorting Test (WCST). Halstead-Reitan Neuropsychological Battery tests administered included Reitan-Klove Sensory-Perceptual Examination; Finger Tapping Test; Trail Making Test A; Trail Making Test B; Seashore Rhythm Test; Speech Sounds Perception Test; and Tactual Performance Test including Memory and Location Trials; Category Test. Tests also included Detailed Assessment of Posttraumatic Stress (DAPS). All of these tests – or their predecessor editions – the methodology, and the research on which I based my conclusions were available, accepted in the professional community, and valid at the time of Ms. Sheppard's arrest in 1993 and trial in 1995.

Results of Testing

24. Intellectual Functioning: Ms. Sheppard's intellectual functioning was evaluated using the Wechsler Adult Intelligence Scale-IV (2008) which consists of ten basic subtests and four optional subtests. Basic subtests include measures of verbal abilities that require reasoning, comprehension and conceptualization (Verbal Comprehension Index - VCI), measures of nonverbal reasoning and perceptual organization (Perceptual Reasoning Index - PRI), measures of simultaneous and sequential processing, and attention and concentration (Working Memory Index - WMI) and measures of speed of mental and graphomotor processing - PSI).

25. Intellectual functioning is conceptualized as a measure of general mental ability to reason, problem solve, think abstractly, plan, learn from experience and adapt to the demands of society. Intellectual functioning includes classifications of Extremely Low (Full Scale <69, 2.2%), Borderline (Full Scale = 70 – 79, 6.7%), Low Average (Full Scale = 80 – 89, 16.1%), Average (Full Scale = 90 – 109, 50.0%), High Average (Full Scale = 110 – 119, 16.1%), Superior (Full Scale = 120 – 129, 6.7%) and Very Superior (Full Scale = $\geq$ 130, 2.2%).

26. Ms. Sheppard's intellectual functioning is in the Low Average Range (Full Scale = 81, 10th %ile rank) with 95% confidence that her intellectual functioning is in the Borderline to Low Average Range (Full Scale = 77 – 85). Her general mental ability, therefore, is lower than 90% of others her same age. Individuals with general mental ability at this level are typically able to function in society, but are at a disadvantage cognitively, psychologically and socially/interpersonally. Cognitively their abilities to reason, plan, solve problems, think, comprehend, learn, comprehend complex situations, learn from experience and use good judgment are generally adequate, but limited. Psychologically, they are vulnerable to emotional dependency and they often assume a passive role in interpersonal relationships, avoid emotional decision-making, have limited coping abilities, are easily disorganized, and are vulnerable to "psychological overload." Socially, individuals at this level of mental ability are typically immature and somewhat incompetent. They are easily swayed by peer influences, tend to misunderstand the nature and/or depth of a relationship, tend to use faulty social judgments, have a strong need to look "okay" even when they are not "okay," often do not know that they need help, and when they recognize the need for help often are reluctant to ask for that help.

27. Under typical circumstances individuals with this general mental ability are able to assume everyday, normative, expected adult activities of work, family, and interpersonal relationships. Under typical circumstances they are generally able to deal adequately with conflict and conflicting situations, and deal reasonable adequately with stress and emotional demands at work, home, and within interpersonal relationships. Even under typical circumstances, however, they also episodically need help from others.

28. When circumstances are atypical, are particularly complex, unclear, have multiple choices of ways to respond, have multiple choices of ways to change actions once those actions are started, and/or are highly stressful or emotional, however, individuals with this general mental ability are often unable to function adequately. They tend to mis-interpret the situation, make ineffective plans, make poor decisions, use poor judgment, and are unable to change or

make changes in their responses to accommodate changes in the situation when change is indicated and needed.

29. The Wechsler Adult Intelligence Scales are, and have been, the most frequently used measures of intellectual functioning (Buros, 2008). The most current edition (WAIS-IV, 2008) was standardized based on a large stratified sample of 2,200 examinees aged 16 – 91, as well as additional samples of individuals from 13 special groups. The standardization sample included a wide range of ethnic identifications (White, Black, Latino, Asian, Other), was based on ethnic proportions of individuals in society as identified through the October 2005 U. S. Bureau of Census, and represented four major geographic regions (Northeast, Midwest, South, West). Despite the balance of this standardization sample, there is some concern within some groups that the most frequently used intellectual tests, including the Wechsler Adult Intelligence Scales, may place individuals from different ethnic groups, different cultures, different socio-economic circumstances or primary language other than English at a disadvantage. Ms. Sheppard is Black. In order to accommodate any possible bias, her intellectual functioning was also evaluated using the Test of Nonverbal Intelligence (TONI 3). This test was specifically developed to address the needs of special groups and is accepted for use with all ethnic identities. The TONI 3 is administered completely in pantomime and is considered an alternate form of measuring general cognitive ability that is considered particularly sensitive to individuals who are of ethnic, cultural, or language minority.

30. On the TONI 3, Ms. Sheppard's overall intellectual abilities were remarkably similar to her abilities on the WAIS-IV. On The TONI 3, her overall intellectual quotient was in the Low Average Range (Full Quotient = 84), and at the 14th %ile, with 86% of individuals able to complete this test at a higher level. Her mental age equivalent on this test is 14.9 years of age.

31. Sensory and Motor Functioning: Ms. Sheppard's olfactory sensory perception was evaluated using the Smell Identification Test (SIT). Her auditory, visual, and tactile sensory-perceptions were evaluated using the Reitan-Klove Sensory-Perceptual Examination (SPE). Ms.

Sheppard's olfactory sensory perception (SIT) was in the normal range. Her simultaneous sensory perception (SPE) was within the normal range. Ms. Sheppard, however, revealed significant bi-lateral impairment of Tactile Form Recognition Time (NDS = 3, Severe Impairment; T = 12, Severe Impairment). Although this does not suggest overall sensory-perceptual abnormality, it does suggest possible posterior brain (parietal) weakness.

32. Evaluation of Ms. Sheppard's motor function was complicated by her reported history of bi-lateral, untreated carpal tunnel syndrome. She was, however, able to perceive all hand sensory stimuli and was able to engage in both right and left finger coordination task without discomfort. Her motor coordination was evaluated using the Finger Tapping Test (FTT) and the Grooved Pegboard Test (GPT). On the GPT, Ms. Sheppard's motor coordination was within the normal range, but she experienced significant bilateral impairment with FTT, indicating bilateral posterior frontal cortex and motor strip abnormality.

33. Attention and Concentration: Ms. Sheppard's attention and concentration were evaluated using the Conners' Continuous Performance Test (CPT), Seashore Rhythm, and Speech Sounds Perception Tests. The Conners' Continuous Performance Test (CPT) requires the individual to press the computer space bar when a letter of the alphabet appears in the middle of the screen. Any letter of the alphabet (target) requires a response, except the letter "X" (non-target). The individual is required to respond when the target letter appears and to withhold his response when the non-target letter appears on the computer screen. Letters are presented at different intervals, from rapidly (1 second interval) to slower (2 seconds, 4 seconds) and the test requires the individual to sustain their attention over an approximate 15 minute time period.

34. Validity markers built into the CPT indicate that Ms. Sheppard was cooperating with testing and that her abilities as measured on this test are valid. Of particular note, Ms. Sheppard's reaction times were significantly faster than those of individuals who do not experience attention disability (non-clinical group), indicating impulsivity. Additionally, the consistency of her accurate responding over time became increasingly inconsistent, indicating

impaired vigilance to the task. Ms. Sheppard's ability to complete the less demanding Seashore Rhythm and Speech Sounds Perception tests was within the expected range of ability. Attention and concentration is mediated by the prefrontal cortex, subcortical reticular activating system, and communication between these two brain regions through the frontal-subcortical connecting system, again indicating generalized frontal cortex dysfunction.

35. Memory and Learning: Multiple aspects of Ms. Sheppard's memory and learning were evaluated, assessing her ability to learn and recall information that was presented both verbally and visually, and assessing her immediate, delayed, free recall, interference, recognition and forced choice recall of information. Her verbal memory was evaluated using the California Verbal Learning Test (CVLT-II) and her visual memory was evaluated using the Rey Complex Figure Test Memory Trials (Rey). The Wechsler Memory Scale (WMS-III) is another test of memory and learning, and also was administered to Ms. Sheppard. This test evaluated both verbal and visual memory and learning. Her episodic memory (recall of information that has been experienced) was evaluated using the TPT Memory and TPT Location trials.

36. On the CVLT-II test of verbal memory, Ms. Sheppard demonstrated some level of impairment on measures of immediate recall, recall of information after interference of information different from information first learned, learning with repetition, immediate free recall, delayed free recall and recognition. On the Rey Complex Figure memory trials her recognition of this information presented visually was within the normal range. Her immediate and delayed recall was, however, impaired. On the Wechsler Memory Scale (WMS II) Ms. Sheppard's immediate and delayed recall of information presented visually was in the normal range. Her abilities on all other measures of memory were significantly impaired. Of particular note, she had a significant number of errors in her memory, suggesting both perseveration (inability to flexibly shift her thinking) and confabulation (unknowingly "filling in the gaps" of her impaired memory with details that are inaccurate and/or unrelated). Impairment ranged from mild to moderate. Ms. Sheppard's episodic memory as measured by the TPT Location trial was

mildly impaired. Extended limbic system (hippocampus) and prefrontal cortex (primarily dorsolateral) dysfunction are indicated.

37. Academic Achievement and Secondary Language: Ms. Sheppard's secondary language was evaluated using Wechsler Individual Achievement Test (WIAT-II) reading and arithmetic subtests. Her reading was in the expected range (Composite Reading = 32nd %ile). Her math reasoning, however, was significantly below expectation (Math Reasoning = 3rd %ile). This indicates particular impairment of the brain angular gyrus region located between the temporal and parietal brain cortices.

38. Executive Functioning: Executive functioning is an umbrella construct which encompasses abilities to think, reason, problem solve, anticipate consequences of actions, and modify actions and behaviors based on information received from the environment. Executive functioning also is the ability to initiate, shift, inhibit, and monitor actions, and is required for goal-directed actions, planning, insight, foresight, impulse control and self-regulation. Intact executive functioning is required for managing a wide range of basic daily activities, including the ability to live and function independently, and to sustain social and interpersonal relationships and friendships. Executive functioning is also the ability to problem solve, find alternate solutions to problems, anticipate consequences of each of those potential solutions, and change actions based on changing circumstances of the situation.

39. Of particular concern for Ms. Sheppard is her impairment on executive functioning tasks, especially her impairment on executive functioning tasks that primarily required cognitive flexibility and inhibition. Cognitive flexibility, or the ability to shift thinking and act reasonably based on the demands of the situation, is a particularly important executive function that is required for successfully completing a multitude of actions. Cognitive flexibility is required any time a situation requires the individual to plan, solve a problem, accurately interpret the situation both cognitively and emotionally, and change their thinking and acting based on the demands of the situation. For successful cognitive flexibility, the individual has to accurately interpret the

situation, consider all of the various aspects of the situation, interpret and respond to feedback concerning the potential effect(s) of each part of the action taken, and consider how the new information affects subsequent behaviors or choices, or requires modifying their actions (and thinking) changing a course of action. The process is dynamic in that it requires continuous evaluation and incorporation of new information as that information is presented, and requires the ability to change actions based on that information.

40. Ms. Sheppard's executive functioning was evaluated using tests included in the Executive Functioning Test (EFT) (Trail Making Tests, Verbal Fluency Tests, Design Fluency Tests, Color-Word Interference Tests, Sorting Tests, Twenty Questions, and Tower Test), and the Wisconsin Card Sorting Test (WCST). The overall integrity of Ms. Sheppard's brain functioning, which is required for successful executive functioning, was also evaluated using the Tactual Performance Test (TPT Total Time).

41. On the EFT, Ms. Sheppard's abilities on some tests or aspects of the individual tests were in the normal range. Her ability to complete the predominance of tests, however, was significantly impaired, with impairment ranging from mild to severe. A distinct pattern in the nature of Ms. Sheppard's impairment on EFT measures was apparent. Those EFT measures which primarily required planning, cognitive flexibility, and inhibition of thinking and acting were especially difficult for her. Ms. Sheppard's ability to approach a problem, develop a plan to solve the problem, carry out that plan in a systematic way, and change that plan when what she was doing was not working was significantly impaired. She demonstrated multiple instances of cognitive rigidity and perseveration. Once Ms. Sheppard started responding in a particular way, regardless of the demand of the task or the cues she was given, she continued to respond in the same way. Ms. Sheppard also demonstrated multiple instances of impaired ability to withhold her response. On some tasks she verbalized the correct action, but she was not able to successfully carry out her expressed intention. This indicates generalized dysfunction of the

prefrontal cortex, but with the greatest impairment occurring in the orbitofrontal and dorsolateral regions of the frontal cortex.

42. The Wisconsin Card Sorting Test (WCST) is one of the most established and researched tests of executive functioning available to neuropsychologists, and has been available for several decades (Buros, 2008). This test requires the individual to place cards with different symbols, numbers of symbols printed in various colors under four key cards according to a pattern that the individual must deduce from the examiner's feedback as to "right" or "wrong" to the individual's placement of the cards. Although the entire frontal cortex is involved in successfully completing this test, current neuroimaging research demonstrates particular involvement of the dorsolateral frontal region (Nagahama, Okina, Suzuki, Nabatome & Matsuda, 2008). Ms. Sheppard's ability to complete the WCST was consistently in the impaired range. This suggests diffuse, generalized prefrontal cortex impairment, and diffuse, generalized impairment in her ability to plan, assess the plan, and change her responding based on information she was—or should have been getting—from the situation.

43. Halstead-Reitan Neuropsychological Battery: As previously indicated, Ms. Sheppard's neuropsychological functioning was also evaluated using tests from the Halstead-Reitan Neuropsychological Battery (HRNB). One purpose in administering this neuropsychological testing battery was because of the current availability of normative standards specific to the Black ethnic group (Heaton, Miller, Taylor & Grant, 2004). There were no differences in interpretation of Ms. Sheppard's brain functioning using these specific standards. It is reasonable to conclude, therefore, that interpretation of Ms. Sheppard's brain functioning and abilities on neuropsychological information gained from all tests in this evaluation is a valid representation of her brain functioning.

44. Ms. Sheppard was also administered the Detailed Assessment of Posttraumatic Stress (DAPS). Posttraumatic Stress Disorder (PTSD) is a mental disorder characterized by severe anxiety symptoms following exposure to an extreme traumatic stressor. DAPS is a standardized

evaluation of possible PTSD which provides a reliable and valid description of symptoms associated with PTSD, and provides a description of the severity of those symptoms, if they exist. Intent of administering the DAPS was not because this test is a specific neuropsychological measure of brain functioning, but is because there is a large and growing body of research describing brain function and dysfunction associated with Posttraumatic Stress Disorder. The DAPS was administered, therefore, to address those brain functioning issues. Ms. Sheppard's responses to the DAPS do not suggest that she was attempting to appear either overly positive or overly negative. Conclusions established from her responses to this test, therefore, are considered a valid assessment of Ms. Sheppard psychological functioning that may be associated with Posttraumatic Stress Disorder (PTSD).

45. Ms. Sheppard acknowledged several life experiences that are known to be associated with PTSD, including child physical abuse, and threats of physical abuse as a child, child sexual abuse, spousal abuse, sexual assault as an adult and being involved in a moving vehicle accident(s), all of which can be associated with traumatic brain injury (TBI). Her description of her response to these events indicates that Ms. Sheppard is significantly likely to satisfy diagnostic criteria for Posttraumatic Stress Disorder, severe. Further clinical evaluation to confirm PTSD is recommended.

C. Etiology of Brain Dysfunction

46. There are several likely etiologies of Ms. Sheppard's brain dysfunction. Any one of these factors alone or, more likely, some combination of factors known about Ms. Sheppard's life are likely the causes of limitations in her general mental ability and in her brain dysfunction. These potential etiologies include her mother's experiences of chronic severe emotional stress throughout her pregnancy with Ms. Sheppard, her mother's history of psychiatric disorder, Ms. Sheppard's childhood sexual and physical abuse as well as the brain consequences of living in persistent fear she experienced throughout her childhood, and repeated traumatic brain injuries

caused by beatings and moving vehicle accidents both as a child and as an adult. There is strong research support indicating that any of these events alone can result in lasting brain dysfunction. There also is strong research support indicating that the combined consequence of more than one of these single brain assaults results in even greater probability of brain damage. Once an individual has experienced a brain assault as either a child or as an adult, any subsequent brain assault has an even greater consequence of brain damage, irrespective of the severity of those assaults (DeFord et al, 2004; Kolb & Wishaw, 2003; Silver & Yudofsky, 2005).

47. Influence of maternal stress on fetal neurodevelopment and neurobehavioral development: It is reported that life for Ms. Sheppard's mother, Madelyn Sheppard, throughout her pregnancy with Ms. Sheppard was characterized by persisting emotional stress and spousal abuse. Substantial research identifying the damaging effects of persistent emotional stress on the developing fetus has been, and continues to be, prevalent in the literature. Persisting emotional stress for the pregnant woman results in abnormal dopamine, adrenalin, glucocorticoids and ACTH production for the mother and this abnormality is transported across the placenta. These direct changes in the endocrinology of the mother result in indirect changes in uteroplacental blood flow, consequent reduced blood flow and has been demonstrated to be associated with subsequent psychopathology in the fetus, including cognitive deficit, memory impairment, depression and anxiety (Huizink, Mulder, & Buitelaar, 2004). Similar findings of relationships between reduced arterial blood flow across the placenta and subsequent neurobehavioral effects are reported (DiPietro, Hawkins, Hilton & Costigan, 2002).

48. Influence of psychiatric disorder on fetal neurodevelopment and neurobehavioral development: A history of psychiatric disturbance characterized by depression and mood swings for Madelyn Sheppard is reported, and she required psychiatric hospitalization on at least one known occasion. There is existing and growing research which identifies the impact of psychiatric disorder for the mother on the developing fetus (DeBellis, et al, (1999); Kolb & Wishaw, 2003; Silver & Yudofsky, 2005).

49. Ms. Sheppard's general mental ability is in the Low Average Range (Full Scale = 81, 10th %ile rank) with 95% confidence that her intellectual functioning is from the Borderline to Low Average range (Full Scale = 77 – 85), and lower than 90% of others her same age. Her low general mental ability could be the result of any number of genetic and environmental factors. It is reasonable to conclude, however, that one contributing factor may be the life long effects on the fetus of abnormal emotional stress and/or psychiatric disorder for her mother.

50. Influence of childhood physical and/or sexual abuse on neurodevelopment and neurobehavioral development: Ms. Sheppard's childhood environment is characterized by both physical and sexual abuse. In my interviews with Ms. Sheppard (11/19/08; 11/20/08; 11/21/08) she describes this childhood physical abuse in similar ways as is described in the Affidavit of Jonathan Sheppard (8/27/08) ("My mother also used physical discipline to punish us. She would give us pretty bad spankings with whatever she could find.")

51. Ms. Sheppard's childhood is also characterized by childhood sexual abuse. It is reported in the Affidavit by Jonathan Sheppard (08/27/08) as well as in Ms. Sheppard's interviews with me (11/19/08; 11/20/08; 11/21/08) that at around three to five years of age, she was forced to perform oral sex on her babysitter's boyfriend on more than one occasion. Ms. Sheppard reports that, in one incident, she "bit him and he backhanded me." She believes that she lost consciousness when he banged her head against a wall. In her affidavit dated 6/28/98, Ms. Sheppard describes the babysitter's boyfriend as making her lay on the bed and penetrating her with an unknown object. Ms. Sheppard describes likely brief loss of consciousness as a consequence of this assault, reporting that "when I woke up he was gone." She further indicates that, when she woke up, she recalled seeing blood on the bed clothing, which she cleaned up for fear that she would get in trouble with her babysitter. This individual reportedly threatened to kill Ms. Sheppard's mother if she told her mother about the assault. Despite this threat, Ms. Sheppard reported that she told her mother about the assault, but that her mother did not believe her. She indicated that she then reported the sexual assault to her grandmother (Annie Smith),

who did believe her. According to Erica Sheppard and collateral sources, she was subjected to multiple sexual assaults during childhood and adolescence.

52. There is substantial research identifying the life-long effects on the developing brain of the child whose childhood environment is characterized by abuse—physical or sexual—and the impact of living in a fearful environment. Chronic exposure to fearful stimuli results in over stimulation of the noradrenergic system with increased enzyme induction, increased dopamine and increased epinephrine and norepinephrine within the developing brain. In adults who were abused as children, EEG abnormalities have been identified in the left frontal/temporal cortices (Teicher, 1993; 1997; 2000; 2002). Smaller hippocampus has also been identified in adults who were abused as children (Teicher et al, 1997; Drissen, 2001). Abnormalities of orbitofrontal and dorsolateral regions of the prefrontal cortex, as well abnormalities in the limbic system (primarily hippocampus and amygdala) have also been identified in adult brains of adults who were abused as children (Ito et al, 1993; Van der Kolk, 1994; 1996; 2006).

53. Ms. Sheppard's adolescence continued to be tumultuous and punctuated by physical assaults. Erica fled her home in early adolescence in an effort to escape physical maltreatment from her mother. Records from Covenant House, a facility for runaway youth, indicate that in August 1990, when her first son was approximately eight months old, Ms. Sheppard sought shelter after reporting that her mother tried to strangle her with a phone cord (Covenant House records, August 1990). A few months later, she entered Covenant House for a second time and reported that her mother "had put her out of the house." (Covenant House records, November 1990).

54. Ms. Sheppard's fearful childhood environment, chronic exposure to life threatening events, and her tumultuous adolescence are relevant to understanding her adult brain functioning because of the importance of normal brain development, specifically maturation of the brain's frontal cortex. As has been previously described the brain continues to mature in a predictable way throughout childhood and into adolescence and young adulthood. The prefrontal cortex

develops last, with rapid maturation beginning at approximately 12 years of age, with the most rapid development occurring during adolescence. There is an understanding of the relationship between brain development and brain damage, referred to as the “vulnerability hypothesis.” The brain region that is undergoing the greatest maturation is the brain region that is most vulnerable to damage. Ms. Sheppard’s history of persisting fear throughout childhood and adolescence provides further understanding of her predominant frontal and temporal brain dysfunction.

55. Influence of traumatic brain injury (TBI) on brain functioning: Ms. Sheppard reports several incidences of incidents as a child, adolescent, and adult which are known to be associated with TBI. As reported above, when she was approximately three to five years old, Ms. Sheppard had her head banged against a wall by her babysitter’s boyfriend. This incident of TBI possibly resulted in at least brief loss of consciousness for Ms. Sheppard.

56. Ms. Sheppard is also described as experiencing several incidents of TBI as an adolescent and young adult. The affidavit of Isabel Rodriguez (09/03/08) describes an incident when Ms. Sheppard was 18-19 years old and Jerry Bryant, Jr. rammed his truck into the automobile that Ms. Sheppard was driving, causing the auto to go off the road and into a ditch. Jerry Bryant, Jr. reportedly pulled Ms. Sheppard out of the automobile and severely beat her.

57. In addition to childhood and adolescent TBI, Ms. Sheppard describes several instances of likely closed head trauma resulting from spousal abuse by Jerry Bryant, Jr. Ms. Sheppard describes an incident of spousal abuse in September 1992 when she was leaving the Texas Children’s Hospital in Houston where their daughter, Audria Bryant, was hospitalized (Texas Children’s Hospital records, September 1992). She describes Jerry Bryant, Jr. as attacking her in the parking lot, and hitting her in the face and head. Loss of consciousness likely occurred as a result of this incident, with Ms. Sheppard describing “waking up” with her head in Jerry Bryant’s lap.

58. Another incident of spousal abuse by Jerry Bryant is reported on May 25, 1993. According to a police report filed by Ms. Sheppard with the Bay City Police Department on

5/25/93, Ms. Sheppard was assaulted by Jerry Bryant, Jr. According to the police report, this assault was precipitated “when her husband got mad because she had gotten an address from an old friend, had attacked her, had jerked her hair and had hit her in the eye.” Jerry Bryant, Jr. is described as wrapping Ms. Sheppard’s hair around his hand and beating her with his other hand. Charges against Jerry Bryant were reportedly filed, but Jerry Bryant was not arrested for this assault. Ms. Sheppard was referred by police to a local battered women’s shelter, which she entered the following day on 5/26/93 (Matagorda County Women’s Crisis Center, Matagorda County, Texas records: 5/26/93 – 6/3/93). Records of Matagorda County Women’s Crisis Center describe Ms. Sheppard seeking shelter for herself, her son Haybert (3 years old) and her daughter Audria (<1 year old). Ms. Sheppard attended support groups for battered women. Ms. Sheppard and her children remained in the shelter for several days, and when she left the shelter, records dated 06/03/93 indicate a protective order against Jerry Bryant, Jr. had been filed.

D. Summary of Findings and Conclusions

59. Ms. Sheppard’s general intellectual ability is in the Borderline to Low Average Range, and lower than 90% of individuals of her same her age and education. Her mental age equivalence is 14.0 years of age. In simple situations, and with episodic help from others, Ms. Sheppard would be expected to be able to function adequately—living independently, enjoying some social, interpersonal, and family relationships, and employed in a job if that job is consistent with her abilities. In simple situations Ms. Sheppard’s ability to comprehend and use reasonably good judgment would typically be adequate. In situations which are novel, demanding, unclear, require simultaneous consideration of several pieces of information in making decisions and require good judgment, however, Ms. Sheppard would be seriously compromised and would be vulnerable to making bad decisions and using bad judgment, unable to change her actions when the situation demanded a change.

60. In emotional situations which are not threatening, not complex, and do not require a great deal of emotional independence, individuals who have this level of general mental ability are generally able to maintain adequate interpersonal and social relationships. In reasonably simple relationships and situations, Ms. Sheppard's psychological functioning could be adequate. In emotional relationships and situations which are complex or demanding, however, Ms. Sheppard would not be expected to function adequately. She would tend to be more emotionally dependent on others, and to seek out another to make emotional decisions for her. In situations which are emotionally complex, or in situations which threaten loss of her emotional support, Ms. Sheppard would be seriously compromised, and would tend to make unreasonable decisions that are not in her best interest, tend to use poor judgment, and tend to be unable to use the good judgment to move to another relationship.

61. The brain dysfunction that Ms. Sheppard experiences, however, is greater than can be accounted for by her limited general mental ability alone. Ms. Sheppard experiences impaired motor coordination, attention and concentration, memory and learning, visual-perceptual-motor, secondary language (arithmetic), and executive functioning. Her abilities on neuropsychological testing indicate brain dysfunction for Ms. Sheppard that affects all brain regions, but with the most severe dysfunction in the prefrontal cortex, temporal cortex, adjacent extended limbic system structures (amygdala hippocampus, thalamus), and connections among these systems (orbitofrontal, frontal-subcortical, hippocampal connection systems). The prefrontal cortex mediates reasoning, simultaneously considering several pieces of information, problem-solving, planning, assessing the circumstances of the situation, making considered decisions, anticipating consequences of actions, flexibly changing thinking and actions, inhibiting actions as needed, and regulating emotional experiences and responses. The temporal cortex, adjacent limbic system structures and connections among these systems primarily mediate emotional arousal, the ability to accurately interpret an emotional or stressful situation,

memory and the ability to use memories of prior experiences to evaluate the current emotional or stressful situation.

62. Also of importance in understanding Ms. Sheppard's thinking and actions are the functional relationships among these brain structures. As example, the primary functions of the temporal cortex and adjacent limbic system are to receive information that is potentially emotionally laden, to interpret and initiate response to this information ("fight or flight"), and to send messages to other brain regions that control actions in response to that emotion. One primary function of the frontal cortex is to receive emotional information from the temporal cortex and adjacent limbic structures, to organize, interpret and evaluate the meaning of that emotion, and to send information to other brain structures to either inhibit or excite (stimulate or set in motion) action. In other words, the temporal-limbic system is the metaphoric energy producing "ignition" of the brain, the thalamus is the metaphoric "engine" of the brain, and the frontal cortex is the metaphoric "steering" and "brake" of the brain. Ms. Sheppard's abilities across neuropsychological testing indicate that she experiences significant dysfunction of all of these brain systems (temporal, limbic and frontal). When presented with a complex, confusing, highly emotional and/or highly stressful situation, Ms. Sheppard would be vulnerable to confusion and misinterpretation, and vulnerable to the influence of others. She would be vulnerable to impaired abilities to assess a situation, reason, develop and evaluate a plan, anticipate consequences of the plan, simultaneously consider several pieces of information, assess and re-assess the situation, change the plan that she developed or refuse to carry out a plan that was developed by another individual when information from the situation should tell her that refusal was needed. In a confusing, emotional and/or complex situation, Ms. Sheppard would be vulnerable to responding in a non-thinking, automaton-like way rather than as a thinking and reasoning adult. Once action is initiated, Ms. Sheppard's ability to re-evaluate the situation, anticipate the consequences and change her actions would also be impaired.

63. The brain dysfunction that Ms. Sheppard experiences is, unfortunately, consistent with her life history. Without help from others, Ms. Sheppard would not be able to function independently or adequately.

64. Ms. Sheppard's brain impairments would be known by any competent neuropsychologist who evaluated her offense and Ms. Sheppard at the time of her trial. Neuropsychological testing procedures that would have adequately detected Ms. Sheppard's brain dysfunction were available at the time of her offense and of her trial.

65. I hold each one of the observations, findings, and conclusions I have reached above to a reasonable degree of scientific certainty and would have advised trial counsel of these impairments.

The foregoing is true and correct and executed under penalty of perjury under the laws of the United States and the State of California on December 23, 2008.

Myla H. Young, Ph.D.

Myla H. Young, Ph.D., ABN

Subscribed and sworn to before me this 23 day of December, 2008. *by Myla H. Young*
Proved to me on the basis of satisfactory evidence
to be the person who appeared before me

[Signature]
Notary Public, State of California

My commission expires: 6.10.2011



Appendix A

Resume – Myla H. Young, Ph.D. ABN

Attached

MYLA H. YOUNG, Ph.D., ABPN

Diplomate - American Board of Professional Neuropsychology
PSY 11916

RESUME

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LICENSE-Psychology

California August, 1990 PSY 11916

CERTIFICATION

Board Certification in Neuropsychology - American Board of
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Certification in Hare Psychopathy Checklist-#99-20
Robert Hare, Ph.D.

EDUCATION

Ph.D. Alliant International University
(Formerly California School of Professional
Psychology)
San Francisco, California
Doctor of Philosophy/Clinical Psychology
January, 1988

M.A. Towson State University
Baltimore, Maryland
Master of Arts/Experimental Psychology
June, 1977

B.A. University of Guam
Agana, Guam
Bachelor of Arts/Psychology
June, 1975

POST-DOCTORAL FELLOWSHIP

University of California/San Francisco General Hospital
San Francisco, California

January 1988 - January 1990

PRE-DOCTORAL INTERNSHIPS

McAuley Neuropsychiatric Institute of St. Mary's Hospital
San Francisco, California

July 1985 - July 1987

Garfield Geropsychiatric Hospital
Oakland, California

October 1984 - July 1985

PROFESSIONAL WORK EXPERIENCE - Current

Private Neuropsychological Assessment
Practice Child, Adolescent and Adult
Forensic, Medical, Psychiatric, Medico-
Legal, Educational

March 1992 - Present

Continuing Alliant International University
Education Neuropsychological Evaluation of Criminal
Faculty Offenders

2000 - Present

Continuing University of California-Berkeley
Education Neuropsychological Evaluation of Criminal
Faculty Offenders
Introduction to Neuropsychological
Assessment

2005 - Present

PROFESSIONAL WORK EXPERIENCE - Prior

Senior California Department of Mental Health
Supervising Correctional Medical Facility
Psychologist Vacaville, California

Psychology Consultant to Executive Director,
Medical Director and Program Directors
Principal Investigator for Research Project
Program Evaluation, Program Development,
Treatment Outcome Measurement
Director-American Psychological Association
(APA) Psychology Intern Training Program
Director-Psychology Fellowship Training
Program
Standards of Practice/Quality Assurance
-Psychology Service
Staff Selection/Evaluation - Psychology
Service
Clinical Supervision and Consultation -
Psychology Service

Staff Psychologist - January 1990 - June 1995
Program Consultant - June 1995 - January 2000
Senior Psychologist - January 2000 - July 2005

Adjunct Alliant University - Berkeley/Alameda
Faculty Instructor: Neuropsychological Assessment
Cognitive Bases of Behavior

Dissertation Chairperson:

- Neuropsychological Assessment of
Psychotic and Non-Psychotic
Inmate/Patients
- Neuropsychiatric Description of
Children in Day Treatment
- HIV/AIDS-Affected Children: A
Study Utilizing the Rorschach To
Identify Depression
- Self Mutilation: Analysis of
a Psychiatric Forensic
Population
- Relationships of Rorschach and
MMPI2 to the PCL-R among
Mentally Ill Felons

Dissertation Committee:

- Development of Special Aggression Content Scales for Rorschach Test Administration within a Prison Population
- Neuropsychological and Cognitive Correlates of Academic Achievement in a Child Psychiatric Sample
- Emotional Descriptors of Adolescents Who Have Committed Homicide
- Rorschach Responses/Piagetian Cognitive Development in Eight to Twelve Year Old Children
- Understanding Malingering: Theory and Treatment

1990 - 2005

Training,
Assessment,
Consultation

Oaks Children's Center
San Francisco, California
Training and Supervision of Pre-Doctoral
Psychology Intern
Seminars in Neuropsychological and
Personality Assessment of Children
1992 - 1995

Training,
Assessment,
Consultation

McAuley Institute of St. Mary's Hospital
San Francisco, California
Training and Supervision of Pre/Post-
Doctoral Psychology Interns/Fellows
Seminars in Neuropsychological Assessment
Of Children, Adolescents, Adults

1992 - 1995

Research
Training

University of California-San Francisco
NIDA Research Grant: Longitudinal
Study of HIV Related Cognitive
Impairment in Groups of Gay Men and IV
Drug Users

1988 - 1990

Child & Family Counselor	Florida United Methodist Children's Home Enterprise, Florida Child & Family Counselor at a Residential Treatment Facility for Children/Adolescents Individual and Group Counseling Parent Education Court Liaison Consultation to Residential Group Home Consultation to Children in Foster Care
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1978 - 1980

Adjunct Faculty	University of Central Florida Valencia Community College Seminole Community College Lake-Sumter Community College Orlando, Florida General Psychology Developmental Psychology Child & Adolescent Psychology Research Methods Learning Theory and Animal Behavioral Training Laboratory
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1980 - 1984

RESEARCH EXPERIENCE

Principal Investigator	California Department of Mental Health Correctional Medical Facility-Vacaville Prospective description of demographic, neuropsychological and emotional functioning in psychiatrically hospitalized males
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1994 - 2005 (Project Completed)

Principal Investigator	California Department of Mental Health Correctional Medical Facility-Vacaville Multimethod description of inmates referred for psychiatric treatment from Pelican Bay State Prison
---------------------------	--

1994 - 1997 (Project Completed)

Principal Investigator	California Department of Mental Health Correctional Medical Facility-Vacaville Development and Evaluation of a Behavioral Milieu Program in a Forensic Psychiatric Treatment Program 1990 - 1993 (Project Completed)
Participant	Spine Institute of San Francisco - Medtronic Spinal Cord Stimulator Project Principal Investigator: J. Schofferman, M.D. 1996 - 1998 (Project Completed)
Post Doctoral Research Assistant	University of California-San Francisco Psychiatric Aspects of AIDS Dementia in Gay Men and IV Drug Abusers Principal Investigators: Alicia Boccellari, Ph.D. J. Dilley, M.D. 1988 - 1990 (Project Completed)
Post Doctoral Research Assistant	McAuley Neuropsychiatric Institute of St. Mary's Hospital Longitudinal Study of Infant Attachment Principal Investigators: H. Massey, M.D. J. Afterman, M.D. 1988 -1990 (Project Completed)
Doctoral Dissertation	Neuropsychological and Piagetian Cognitive Development: A comparison of children's responses to the Luria-Nebraska Neuropsychological Battery-Children's Revision, Piagetian Tasks, and the WISC-R
Master's Thesis	Piagetian Moral Development: A comparison of children's responses to Piagetian Moral Intentionally stories presented in both verbal and videotaped versions
Graduate Research Assistant	Towson State University Piagetian Cognitive Development Behavioral Treatment

PROFESSIONAL PRESENTATIONS

Contra Costa Department of Defense Seminar Martinez,
California. *When juvenile offenders become adult
offenders: A prospective look* (July, 2006)

California Psychological Association Conference San Jose,
California. *The sexual offender in prison psychiatric
treatment: A multimethod description* (April, 2003)

Forensic Mental Health Association of California Conference
Asilomar, California. *The sexual offender in prison
psychiatric treatment: A multimethod description*
(March, 2003)

International Organization of Psychophysiology Montreal,
Canada *Profiles of Violent Mentally Ill Incarcerated
Males: Neuropsychology and Psychophysiology* (August,
2002)

California Psychological Association Conference Pasadena,
California *Research in Prison Psychiatric Treatment*
(May, 2002)

American Correctional Health Services Association
Conference Costa Mesa, California *Profiles in Violence*
(September, 2001)

Forensic Mental Health Association of California Conference
Asilomar, California *Profiles in Violence* (March,
2001)

Behavioral Health Institute Conference - Los Angeles, CA.
Latinos in Forensic Psychiatric Treatment (September,
2000)

Forensic Social Work Conference - Palm Springs, California
The Violent Psychopath in Treatment (May, 2000)

Forensic Mental Health Association of California Conference
Asilomar, California *Danger to Self and Danger to
Others: A description of Inmates Who Harm Themselves
or Harm Others* (March, 2000)

California Psychological Association Conference, San Jose,
California
*Neuropsychological and Psychological Evaluations in
A Forensic Psychiatric Setting* (March, 2000)

Forensic Mental Health Association of California Conference
Asilomar, California *The Violent Psychopath in
Psychiatric Treatment* (March, 1999)

Patton State Hospital Mental Health Conference, Patton,
California *The Violent Psychopath in Psychiatric
Treatment* (September, 1999)

Patton State Hospital Mental Health Conference, Patton,
California *Psychopathy in a Forensic Psychiatric
Population*(September, 1998)

Forensic Mental Health Association of California Conference
Asilomar, California *A Multimethod Approach to
Understanding Psychopathy* (March, 1998)

Patton State Hospital Mental Health Conference, Patton,
California *Violence in the Community and Assault in
Prison: A Multimethod Approach*(September, 1997)

Forensic Mental Health Association of California Conference
Asilomar, California *Patterns of Violence:
Demographic, neurocognitive, diagnostic, and emotional
descriptions of inmates with high and low violence
histories.* (April, 1997)

California Department of Corrections-Pelican Bay-Pelican
Bay, California *Description of Inmate/Patient
Populations Demographic, Cognitive,
Neuropsychological, and Psychological Correlates with
Violence* (July, 1996)

California Department of Corrections-Preston School for
Boys - Ione, California *Demographic, Cognitive,
Neuropsychological, and Psychological Correlates with
Age of Offense* (July, 1996)

California Department of Corrections-Director's Cabinet
Meeting - Sacramento, California *Description of
Inmate/Patient Population* (July, 1996)

California Department of Corrections-Northern Regional
Warden's Meeting - Folsom State Prison *Description of
Inmate/Patient Population* (July, 1996)

California Department of Corrections-Warden's Meeting - CMF
Vacaville, California *Description of Inmate/Patient
Population* (June, 1996)

Patton State Hospital Forensic Mental Health Conference.
*Development of a Forensic Psychiatric Treatment
Program Based on Empirical Description of the
Population* (October, 1995)

Patton State Hospital Forensic Mental Health Conference.
*Opening Address - The Changing Face of Forensic Mental
Health: The Challenge Described* (October, 1994)

PUBLICATIONS

Young, M. H., Justice, J., & Erdberg, P. (2008). *The
Rorschach Test in a prison population.* (Manuscript in
press).

Young, M. H., Justice, J., & Erdberg P. (2008). *Sex
offenders in prison psychiatric treatment: A
biopsychosocial description.* *International Journal of
Offender Therapy and Comparative Criminology.* (in
press).

Young, M. H., Justice J., & Erdberg, P. (2007). *A
comparison of rape and molest offenders in prison
psychiatric treatment.* (Manuscript in review).

Schofferman, J. & Young, M. H. (2007). *Previously
unrecognized cognitive and psychological disorders in
patients with chronic neck pain due to whiplash and
other forms of cervical trauma.* *Pain Medicine,*
(Manuscript in revision).

Young, M. H., Justice, J., & Erdberg, P. (2006). *Risk of
harm: Inmates who harm themselves while in prison
psychiatric treatment.* *Journal of Forensic Sciences,*
51(1), 154-162.

Young, M. H., & Justice, J. (2003). *Risk Factors for
assault while in Prison Psychiatric Treatment.* *Journal
of Forensic Sciences,* 49(1), 141-149.

Justice, J. & Young, M. H. (2002). *Managing violence in a
Supermax facility: A discussion of research findings
and their application to reducing violence in supermax*

institutions and beyond. In D. Neal (ed.) *Supermax Prisons* (pp. 99 - 118). Lanham, MD. American Correctional Association.

Young, M. H., Siemsen, R., & Roman, T. (2000). Neuro-psychological and personality assessment in a forensic psychiatric setting. *California Psychological Association Convention Abstracts*.

Young, M.H., Justice, J., & Erdberg, P. (2000). A multi-method description of psychopathy among forensic psychiatric inmates. In C. Gacono(Ed.) *The Clinical Forensic Assessment of Psychopathy: A Practitioner's Guide* (pp. 313-332). Mahwah, New Jersey, Erlbaum.

Young, M.H., Justice, J., & Erdberg, P. (1999). Risk factors for violence among incarcerated male psychiatric patients: A multimethod approach. *Assessment*, 6, 243-258.

Young, M. H. & Justice, J. (1997). Neuropsychological functioning of inmates referred for psychiatric treatment. *Archives of Clinical Neuropsychology*, 13, 303 - 318.

Dilley, J., Boccellari, A., Davis, A., Young, M., & Bacchetti, P. (1989). Relationships between neuropsychological and immune variables in HIV positive asymptomatic men. *IV International Conference on AIDS, Montreal, Canada*.

Dilley, J., Boccellari, A., Davis, A., Young, M. & Bacchetti, P. (1989). Relationships between neuropsychological and immune variables in HIV positive asymptomatic men. Abstract and oral presentation. *American Psychiatric Association, May 11, 1989. San Francisco, CA*.

Young, M.H. (1977). Visual Modality as a Preferred Mode presentation for Piagetian Moral Intentionally. *Monographs of Lida Lee Tall Learning Research Center. Towson State University*

PROFESSIONAL AWARDS

University of Guam	Graduation - Magna Cum Laude June, 1975
Towson State University	Graduation - Magna Cum Laude June, 1978
California School of Professional Psychology	Superior Accomplishment Award Dissertation June, 1988
State of California	Superior Accomplishment Award
Department of Mental Health Correctional Medical Facility	Exceptional Job Performance April, 1993
State of California Department of Mental Health Correctional Medical	Superior Accomplishment Award Exceptional Job Performance April, 1995
State of California Award	Outstanding Accomplishment
Department of Mental Health Correctional Medical Facility	Exceptional Job Performance September, 1999

PROFESSIONAL ASSOCIATIONS

- American Board of Professional Neuropsychology (ABPN)
- American Psychological Association (APA)
 - Division 40: Clinical Neuropsychology
 - Division 42: Forensic Psychology
- California Psychological Association (CPA)
- National Academy of Neuropsychology (NAN)
- International Neuropsychological Society (INS)
- Society for Personality Assessment (SPA)

April, 2008

Appendix B

References

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- DeBellis, M. D., Keshavan, M. S., Clark, D. B., Casey, G. J., Giedd, J. N., Boring, A. M., Frustaic, K., & Ryan, N. D. (1999). Developmental traumatology. *Biological Psychiatry*, 45(10), 1271 – 1284.
- DeFord, S. M., Wilson, M. S., Rice, A. C., Clausen, T., Rice, L.K., Barabnva, A., Bullock, R., & Hamm, R. J. (2004). *Repeated mild brain injuries result in cognitive impairment in B6C3F mice*. National Library of Medicine, PubMed.
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- Teicher, M. H. (2002). Scars that won't heal: The neurobiology of child abuse. *Scientific American*, March 68 – 74.
- Teicher, M. H., Andersen, S. L., Dumont, N. L., Ito, Y., Glod, C. A., Vaituzis, C., & Geidd, J. N. (2000). Childhood neglect attenuates development of the corpus callosum. *Social Neuroscience*, 26 – 49.
- Teicher, M. H., Anderson, S., Polcari, A. (2002). Developmental neurobiology of childhood stress and trauma. *Clinical Psychiatry*, 25, 397 – 426.
- Teicher, M., H., Glod, C. A., Surrey, J., & Swett, C. (1993). Early childhood abuse and limbic system ratings in adult psychiatric outpatients. *Journal of Neuropsychiatry Neuroscience*, 5(3), 301 – 306.

Teicher, M. H., Ito, Y., Glod, C. A., Andersen, S. L., Dumnt, N., Ackerman, E. (1997).

Preliminary evidence for abnormal cortical development in physically and sexually abused children using EEG coherence and MRI. *New York Academy of Science*, (821), 160 – 175.

Teicher, M. H., Anderson, S., Polcari, A. (2002). Developmental neurobiology of childhood stress and trauma. *Clinical Psychiatry*, 25: 397 – 426.

Van der Kolk, B. (2006). Developmental trauma: A new rational diagnosis for children with complex trauma histories. *Psychiatric Annals*, (5), 2 – 8.

Van der Kolk, B., Fisler, R. E. (1994). Childhood abuse, neglect and loss of self-regulation. *Bulletin of Menninger Clinics*, 58(2), 145 – 168.

Van der Kolk, B., McFarlane, A., & Weisaeth, L. (1996). *Traumatic stress: The effects of overwhelming experience on mind, body and society*. NY:Guilford Press.

Yakovlev, P. (1964/1967). *Regional development of the brain in early life*. Philadelphia, PA:Davis Company.

Appendix C

Documents Reviewed

State of Texas v. Erica Yvonne Sheppard, Punishment Proceeding Transcripts, March, 1995

Erica Sheppard Application for Post-Conviction Writ of Habeas Corpus with Exhibits, filed
7/28/98

Case Formulation, Forensic Psychiatric Services, Harris County Jail, dated 9/6/93

Harris County Jail Medical Records, 1993

Texas Department of Criminal Justice, Institution Division, Prison Health Records 1993-2008

Erica Yvonne Sheppard Childhood Photos

Evaluation for Competency to Waive Appeals by Ramon A. Laval, Ph.D, dated 1/5/98

Affidavit of Isabel Rodriquez, dated 8/28/08

Affidavit of Jonathan Sheppard, dated 8/27/08

Affidavit of Aaron C. Green, dated 8/27/08

Affidavit of Erica Yvonne Sheppard, dated 6/28/08

Statement of Erica Yvonne Sheppard, dated 7/3/93

Matagorda County General Hospital, Medical Records of Erica Yvonne Sheppard

(Partial Records) 1991, 1992

Bay City Police Department, Offense Report dated 5/25/93

Matagorda County Women's Crisis Center, Matagorda County, Texas

Records (5/26/93 to 6/3/93)

Academic Records (Partial)

Grade Reports, Grades 1, 2, 3, 4, 6, 7, 8, 9, 10

Transcripts of Nursing Assistant Training Program 11/92 – 3/93

GED Certificate

Achievement Testing Records, Grades 1, 2, 3, 4, 7

Bay City Police Department Offense Report, Attempted Murder of Wayland Ray Griggs,

11/17/91

Appendix D

Appendix D

Neuropsychological Test Data

Effort on Testing

<u>Test</u>	<u>Score</u>	<u>Qualitative Description</u>
15 Item Test	15/15	Valid effort
Test of Malingering Memory (TOMM)	48/49	Valid effort
CVLT II Forced Choice	100%	Valid effort
Green Word Memory	92.5/97.5/95.0	Valid effort

Wechsler Adult Scale of Intelligence (WAIS IV)

<u>Scale</u>	<u>Sum of SS</u>	<u>Composite Score</u>	<u>95% Confidence</u>	<u>%ile</u>	<u>Qualitative Description</u>
Verbal Comprehension	24	89	84-95	23	Low average
Perceptual Reasoning	18	77	72-84	6	Borderline
Working Memory	17	92	86-99	30	Average
Processing Speed	14	84	77-94	14	Low Average
Full Scale	73	81	77-85	10	Low Average

Verbal Comprehension Subtests Summary

<u>Verbal Subtests</u>	<u>Raw Score</u>	<u>Scaled Score</u>	<u>Percentile</u>
Similarities	19	7	16
Vocabulary	31	8	25
Information	12	9	37

Perceptual Reasoning Subtests Summary

<u>Verbal Subtests</u>	<u>Raw Score</u>	<u>Scaled Score</u>	<u>Percentile</u>
Block Design	24	6	9
Matrix Reasoning	11	6	9
Visual Puzzles	8	6	9

Working Memory Subtests Summary

<u>Performance Subtest</u>	<u>Raw Score</u>	<u>Age SS</u>	<u>Percentile</u>
Digit Span	31	11	63
Arithmetic	9	6	9

Processing Speed Subtests Summary

Symbol Search	25	7	16
Coding	51	7	16

Wechsler Individual Achievement Test (WIAT-II)

<u>Subtest</u>	<u>Standard Score</u>	<u>Composite Standard Score</u>	<u>Confidence Interval 95%</u>	<u>Percentile</u>
Reading				
Word Reading	94		87-101	34
Reading Comprehension	98		91-105	45
Pseudoword Decoding	97		90-104	42
Composite Score	289	93	88-98	32
Mathematics				
Numerical Operations	95		89-101	37
Math Reasoning	71		63-79	3
Composite Score	166	83	78-88	13

Test of Non-Verbal Intelligence (TONI 3)

<u>Raw Score</u>	<u>Quotient</u>	<u>%ile</u>	<u>Qualitative Description</u>
21	84	14	Low average
School Age Equivalent – 14 yrs 9 mos			

Smell Identification Test

<u>Errors</u>	<u>Raw Score</u>	<u>%ile</u>	<u>Qualitative Description</u>
1	39	82	Normosia

Grooved Pegboard Test

<u>Measure</u>	<u>Raw Score</u>	<u>Mean/SD – Comparison Group</u>	<u>Standard Score</u>	<u>Qualitative Description</u>
Dominant	1' 07"	62.8/8.9	0	Normal range
Non-Dominant	1' 11"	66.8/10.7	0	Normal range

Finger Tapping Test

<u>Measure</u>	<u>Raw Score</u>	<u>Mean/SD – Comparison Group</u>	<u>Standard Score</u>	<u>Qualitative Description</u>
Dominant	X = 40.8	X = 49.0/4.1	-2	Moderate impairment
Non-Dominant	X = 43.8	X = 44.6/4.6	-1	Mild impairment

Conners' Continuous Performance Test (CPT)**Inattention**

<u>Measure</u>	<u>T Score</u>	<u>Qualitative Description</u>
Omissions	42.82	Inattention
Commissions	47.31	
Hit RT	35.57	
Hit RT Std. Error	34.11	
Variability	35.42	
Detectability	55.36	
Hit RT ISI Change	39.09	
Hit SE ISI Change	52.20	

Impulsivity

<u>Measure</u>	<u>T Score</u>	<u>Qualitative Description</u>
Commissions	47.31	Impulsivity
Hit RT	35.57	
Perseverations	45.91	

Vigilance

<u>Measure</u>	<u>T Score</u>	<u>Qualitative Description</u>
Hit RT Block Change	48.31	Poor vigilance
Hit SE Block Change	61.12	

California Verbal Learning Test (CVLT-II)

<u>Subtest</u>	<u>Raw Score</u>	<u>Standard Score</u>	<u>Qualitative Description</u>
Trial 1	4	-2	Moderate impairment
Trail 5	12	-0.5	Mild impairment
Trial B	6	-0.5	Mild impairment
Short Delay-Free	11.0	-0.5	Mild impairment
Short Delay-Cued	11.0	-1	Mild impairment
Long Delay-Free	11.0	-1	Mild impairment
Long Delay-Cued	14.0	0	
Long Delay Retention	<u>Percent</u> <u>Change</u> 0%	<u>Z-Score</u> <u>Difference</u> -0.5	Mild impairment
Total Recall Discriminability	<u>Raw Score</u> 1.5	<u>Standard Score</u> -2	Moderate impairment
Recognition	15.0	-0.5	Mild impairment
Long Delay/Short Delay	0%	-0.5	Mild impairment
Total Recall/Intrusions	1.5	-2	Moderate impairment
Forced Choice	100%		Valid effort

Wechsler Memory Scale (WMS-III)

Index	Sum of SS	Index Score	95% Conf Interval	%ile	Qualitative Description
Auditory Immediate	12	77	71-86	6	Borderline
Visual Immediate	28	124	110-130	95	Above average
Immediate Memory	40	100	92-108	50	Average
Auditory Delayed	14	83	76-94	13	Low average
Visual Delayed	21	103	92-113	58	Average
Auditory Recog. Delayed	6	80	74-96	9	Low average
General Memory	41	87	80-96	19	Low average

Rey Complex Figure Test

<u>Measure</u>	<u>Raw Score</u>	<u>T Score</u>	<u>%ile</u>	<u>Qualitative Description</u>
Copy	30		≤1	Severe impairment
Immediate Recall	14	31	3	Moderate impairment
Delayed Recall	14	30	2	Moderate impairment
Recognition	22	55	69	Normal range
True Positive	12		>16	Normal range
False Positive	2		11-16	Mild impairment
True Negative	10		11-16	Mild impairment
False Negative	0		>16	Normal range
Time to Copy	5'15"		<1	Severely slow

Executive Functioning Test (EFT)

<u>Measure</u>	<u>Qualitative Description</u>
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Trail Making Tests

Primary Measures: Completion Times	<u>Raw Score</u>	<u>Scaled Score</u>	
Visual Scanning	31	6	Mild impairment
Number Sequencing	35	9	
Letter Sequencing	20	13	
Number-Letter Switching	95	8	Borderline impairment
Motor Speed	22	12	
Primary Contrast Measures: Completion Times	<u>Scaled Score</u>	<u>Contrast Scaled Score</u>	
Switching: Letter	-5	5	Mild-moderate impairment
Switching: Number + Letter	-4	6	Mild impairment
Switching: Speed	-4	6	Mild impairment

Executive Functioning Test (Con't)

Error Analysis	<u>Raw Score</u>	<u>Cum %ile Rank</u>	
Switch Sequencing Errors	1	31	Borderline impairment
Switch Set-Loss Errors	1	20	Borderline impairment

Verbal Fluency Test

Primary Measures	<u>Raw Score</u>	<u>Scaled Score</u>	
Letter Fluency	45	12	
Category Fluency	40	10	
Category Switching	9	4	Moderate impairment
Category Switching Accuracy	3	1	Severe impairment
Error Analysis	<u>Percent Raw Score</u>	<u>Scaled Score</u>	
Category Switching: Percent Switching Accuracy	36	1	Severe impairment

Design Fluency Test

Primary Measures	<u>Raw Score</u>	<u>Scaled Score</u>	
Filled	9	9	
Empty	7	7	Mild impairment
Switching	6	8	Borderline impairment
Error Analysis	<u>Percent Raw Score</u>	<u>Scaled Score</u>	
Percent Design Accuracy	76	7	Mild impairment

Color-Word Interference

Primary Measures	<u>Raw Score</u>	<u>Scaled Score</u>	
Color	25	11	
Word	22	10	
Inhibition	58	9	
Inhibition-Switching	80	5	Mild-moderate impairment
Contrast Measures: Completion Times	<u>Scaled Score Difference</u>	<u>Contrast Scaled Score</u>	
Inhibition/Switching vs Color Naming	-6	4	Moderate impairment
Inhibition/Switching vs Word Reading	-5	5	Mild-moderate impairment

Optional Measures: Error Analysis	<u>Total Raw Score</u>	<u>Total Scaled Score</u>	
Inhibition Switching	5	7	Mild impairment

Executive Functioning Test (Con't)**Sorting Test****Primary Measures**

Confirmed Sorts	7	7	Mild impairment
Description	23	6	Mild impairment
Recognition	16	3	Mod-Severe impairment

Combined Conditions 1&2

	<u>Sum of</u> <u>Scaled</u> <u>Scores</u>	<u>Composite</u> <u>Scaled</u> <u>Scores</u>	
Combined Description Score	9	4	Moderate impairment

Twenty Questions

	<u>Total Raw</u> <u>Score</u>	<u>Scaled</u> <u>Score</u>	
Abstraction	27	9	
Questions Asked	17	15	
Achievement	13	9	

Tower Test**Primary Measures**

	<u>Total Raw</u> <u>Score</u>	<u>Scaled</u> <u>Score</u>	
Achievement	10	5	Mild-moderate range

	<u>Ratio Score</u>	<u>Scaled</u> <u>Score</u>	
Mean First-Move Time	5.8	9	
Time-Per-Move-Ratio	4.9	7	Mild impairment
Move Accuracy Ratio	2	8	Borderline impairment
Rule-Violations-Per-Item Ratio	0.3	9	

Wisconsin Card Sorting Test

<u>Measure</u>	<u>Raw Score</u>	<u>T Score</u>	<u>%ile</u>	<u>Qualitative Description</u>
Total Correct	48			
Total Errors	16	44	27	Borderline impairment
Perseverative Responses	8	45	30	Borderline impairment
Perseverative Errors	7	45	30	Borderline impairment
Nonperseverative Errors	9	41	19	Borderline impairment
Conceptual Level	43	43	25	Borderline impairment
Categories Completed	2		11-16	Mild impairment
Trials to Complete	18		11-16	Mild impairment
Failure to Maintain Set	2			
Learning to Learn	-55.56		>16	

HALSTEAD-REITAN NEUROPSYCHOLOGICAL DEFICIT SCALE

Measure	Raw Score	NDS Score ¹	Classification
Impairment Index	0.4	1	Borderline/mild impairment
Category Test	52	2	Moderate impairment
Tactual Performance Test – Total Time	22 min	2	Moderate impairment
- Memory	8	0	
-Location	6	1	Borderline/mild impairment
Seashore Rhythm	30	0	
Speech Sounds Perception	5	0	
Finger Tapping-Dominant (Right)	X = 40.8	2	Severe impairment
-Non-Dominant	X = 43.8	1	Borderline/mild impairment
Trail Making Test A	30"	1	Moderate impairment
Trail Making Test B	70"	1	Borderline/mild impairment
Bilateral Tactile Stimulation Errors	0	0	
Bilateral Auditory Stimulation Errors	0	0	
Bilateral Visual Stimulation Errors	0	0	
Tactile Finger Recognition Errors	0	0	
Finger Tip Number Writing Errors	0	0	
Tactile Form Recognition Time	79"	3	Severe impairment

¹Halstead-Reitan Neurodeficit Score

0 = Normal

1 = Borderline/Mild Impairment

2 = Moderate Impairment

3 = Severe Impairment

IN THE TEXAS COURT OF CRIMINAL APPEALS
AND THE 185th JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Ex Parte ERICA YVONNE SHEPPARD, §

Applicant. §

§
§
§
C.C.A. No. 72,127
Harris County No. 668505-A

**APPLICANT'S NOTICE OF FILING OF EXPERT REPORT
OF REBEKAH G. BRADLEY**

PLEASE TAKE NOTICE that Applicant, Erica Yvonne Sheppard, hereby submits the expert report of Rebekah G. Bradley, Ph.D. Dr. Bradley's report is attached hereto as Exhibit "1" and incorporated herein by reference.

Respectfully submitted,



Wm. Alan Wright
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ATTORNEYS FOR APPLICANT

ORIGINAL RECEIVED IN
DISTRICT CLERK'S OFFICE

FEB 13 2009

DATE

DEPUTY

APP. 26

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following attorneys in the manner indicated on the 12th day of February, 2009.

Mark E. Donnelly ***Via Federal Express***
Assistant District Attorney
Harris County District Attorney's Office
1201 Franklin, Suite 600
Houston, Texas 77002

Denise M. Nichols ***Via Federal Express***
Assistant District Attorney
Harris County District Attorney's Office
1201 Franklin, Suite 600
Houston, Texas 77002

A handwritten signature in black ink that reads "Wm. Alan Wright". The signature is written in a cursive style with a horizontal line underneath it.

Wm. Alan Wright

D-1724084_1.DOC

Exhibit 1

AFFIDAVIT OF REBEKAH G. BRADLEY, Ph.D.

STATE OF GEORGIA §
 §
COUNTY OF DEKALB §

1. My name is Rebekah G. Bradley, Ph.D. I am an Assistant Professor in the Department of Psychiatry and Behavior Science at Emory University, where I conduct research on the impact of exposure to childhood abuse and other early adverse life events, the impact of trauma exposure across the life span and genetic and environmental predictors of posttraumatic stress disorder, depression and other mental and physical outcomes of trauma exposure. I am also the director of a Veteran's Administration, multidisciplinary, outpatient, posttraumatic stress disorder (PTSD) treatment team. This treatment team is responsible for providing assessment and treatment to veterans exposed to traumatic events while in military service. I graduated with a doctorate in Clinical-Community Psychology from the University of South Carolina and completed an internship in Clinical Psychology at Cambridge Hospital which is affiliated with Harvard Medical School. My curriculum vita is attached. I am over twenty one (21) years of age, have never been convicted of a felony or other crime involving moral turpitude, and I do not suffer from any mental or physical disability that would render me incompetent to make this Affidavit. I am able to swear, as I hereby do swear, that the facts stated in this Affidavit are true, correct, and based on my personal knowledge.

Referral Question

2. I was contacted by attorneys for Ms. Erica Sheppard and asked to evaluate her with respect to her family, developmental and social background. In particular I was asked to evaluate her with respect to a history of childhood abuse and exposure to other adverse and traumatic events in childhood and adolescence. I was asked to evaluate the potential impact of these factors on Ms. Sheppard in terms of her psychological and behavioral functioning with a particular focus on Posttraumatic Stress Disorder and associated symptoms. I was asked to assess these factors with respect to her psychological and behavioral functioning across her lifetime.

Assessments Conducted and Materials Reviewed

3. I conducted a clinical interview with Ms. Erica Sheppard (D.O.B. 09/01/1973) on December 11, 2008 and December 12, 2008. The total time spent evaluating Ms. Sheppard in person was approximately 12 hours. I conducted the clinical interview in Gatesville, Texas at the Mountain View unit of the Texas prison system.

4. In addition to the clinical interview of Ms. Sheppard I also conducted an interview with Ms. Sheppard's mother, Ms. Madelyn Johnson, on December 13, 2008. This interview was conducted in Ms. Johnson's home and lasted approximately 2 hours.

5. I have also reviewed the following materials provided to me by Ms. Sheppard's defense team:

- a. *State of Texas v. Erica Yvonne Sheppard* - Punishment phase transcript with exhibits.

- b. Interviews with Erica Sheppard and family members (Dr. Mark Cunningham, 2008).
- c. January 5, 1998 Evaluation for Competency to Waive Appeals - Ramon A. Laval, Ph. D.
- d. Michael Graczyk, "Jesse Jackson visits woman on death row," Dallas Morning News, April 9, 1998.
- e. Erica Sheppard school records (6th - 10th grades & National Education Center - Nursing Assisting Program).
- f. Matagorda General Hospital records (1991 - 1992).
- g. Harris County Jail - medical records (1993 - 1995).
- h. Harris County Sheriff's Department - offense/incident reports (1993 - 1995).
- i. Harris County Sheriff's Department - referral for psychiatric screening (1993).
- j. Letter from Erica Yvonne Sheppard to Charles Brown (trial counsel) prior to 1995 trial.
- k. Houston Police Department - Investigative Report, Capital Murder of Marilyn Sage Meagher, June 30, 1993.
- l. Statement of Erica Yvonne Sheppard - July 3, 1993.
- m. Bay City Police Department - Offense Report, Attempted Murder of Wayland Ray Griggs, November 17, 1991.
- n. Affidavits (6) presented at evidentiary hearing on September 2, 2008.

Affidavit of Jonathan Sheppard (Erica Sheppard's brother)

Affidavit of Aaron Green (former employer of Erica Sheppard who also worked at the Matagorda County Sheriff's office for 10 years)

Affidavit of Isabel Rodriguez (former wife of Jerry Bryant Sr. (father of Jerry Bryant Jr.))

Affidavit of Emma Brooks (family friend and community member who knew Erica Sheppard as a child)

Affidavit of Lloyd Jackson

Affidavit of Tangela Sells-Price

- o. School Records: Markham Elementary School.
- p. School Records: GED Certificate.
- q. Mental Health Records: MHMRA Evaluation at Harris County Jail (9-3-93).
- r. Mental Health Records: UTMB Health Records (incarceration).
- s. Manchie Sheppard (son) special education records.
- t. Madelyn Johnson (mother) mental health records (2003).
- u. Audria Bryant (daughter) mental health records (2004).
- v. CD of Erica Sheppard childhood photographs.
- w. Affidavit of Tommi Eanes (former partner of Ms. Madelyn Johnson who knew Ms. Erica Sheppard and Ms. Sheppard's mother).
- x. September 3, 2008 habeas corpus hearing testimony of Ms. Madelyn Johnson (Ms. Sheppard's mother).
- y. Records from Covenant House Shelter for Adolescents.
- z. Records from Matagorda County Women's Shelter.
- aa. Report from Neuropsychological Evaluation of Ms. Erica Sheppard prepared Dr. Myla Young.
- bb. Harris County Forensic Psychiatric Services evaluation of Ms. Erica Sheppard.
- cc. Affidavit of Mark D. Cunningham, PhD. written in respect to Ms. Erica Sheppard.
- dd. Psychiatric Evaluation of Ms. Erica Sheppard by Dr. Priscilla Ray.

Clinical Interview with Ms. Sheppard

6. At the time of the clinical interview, Mr. Sheppard was dressed in prison issued clothing. I informed Ms. Sheppard that I had been asked to evaluate her by her defense team. She was aware that for this reason information gained in my evaluation would not be confidential. She agreed to the assessment. Ms. Sheppard appeared alert and actively responded to all of my questions over the course of the two day evaluation. At times she became emotionally distressed (e.g., crying, reporting nausea) when discussing past events in her life. At other times when discussing past experiences, she appeared to be disconnected from her emotions and to be restricted and blunted in her emotional response. This type of presentation, with both high levels of emotional engagement and expression and numbing of emotional response, is common in people with the type of complex history of trauma and abuse with which Ms. Sheppard presents.

In addition, this change between over engagement with and avoidance of emotion in response to discussing past traumatic events is consistent with a diagnosis of posttraumatic stress disorder.

7. Based on my interviews with Ms. Sheppard, as well as with her mother, and my review the records provided, it is clear that across the course of Ms. Sheppard's childhood and adolescence she experienced repeated physical and emotional abuse as well as sexual abuse/assaults. During critical developmental phases, she lived in an atmosphere of terror and fear that prevented her from experiencing and learning from healthy childhood experiences. In addition, while still an adolescent, at age 17, Ms. Sheppard experienced severe and repeated psychical and verbal intimate partner violence. In addition to these multiple abusive and traumatic experiences, her early environment included a number of other adverse experiences and stressful circumstances. Due to their occurrence over the course of her neurobiological and psychological development, these events negatively impacted Ms. Sheppard's thoughts, beliefs, emotions and behaviors across the course of her lifespan.

Childhood Sexual Abuse/Sexual Assault/Rape

8. Ms. Sheppard has a history of multiple incidents of sexual abuse/sexual assault/rape in childhood and adolescence with multiple perpetrators.

9. The first instance of childhood sexual abuse occurred when Ms. Sheppard was approximately 5 years old. The person who perpetrated this abuse was a boyfriend of Ms. Sheppard's babysitter. Ms. Sheppard recalls that he told her to perform oral sex on him and she remembers a feeling of gagging related to the oral sex. She also recalls being sexually assaulted and penetrated by him. Specifically she remembers being on the floor of the bathroom and she recalls a "feeling of pressure" and a "sharp pain down there." She reports a loss of memory of this point stating, "I left." Her next memory from this time is of seeing blood. She describes it as "a little blood not a lot." She recalls thinking to herself that she needed to clean up the blood or "I'll get in trouble" and then attempting to clean up the blood with a towel and then trying to shove the towel under the sink so that no one would find out about the event.

10. Ms. Sheppard's memory of this experience of sexual abuse is supported a statement from her brother, Jonathan Sheppard:

"Cookie had a boyfriend whose name I do not recall. Cookie would make my sister perform oral sex on this man. Erica was only about 5 years old. Cookie would make me sit there and watch. It happened several times that summer" [Affidavit of Jonathan Sheppard].

11. Ms. Sheppard reports that her babysitter and her babysitter's boyfriend told her that if she talked about the abuse they would harm her family.

12. Based on the report of Jonathan Sheppard (Ms. Sheppard's brother) and Madelyn Johnson (Ms. Sheppard's mother), the abuse was reported by her brother Jonathan Sheppard to their grandmother. Both Erica Sheppard and her brother Jonathan Sheppard remember that her mother and her grandmother had a fight because her mother did not believe that she had been abused. She recalls hearing her mother say that she was "lying." Ms. Sheppard's mother, Ms Madelyn Johnson, also confirmed this

account in my interview with her and in her September 3, 2008 habeas corpus hearing testimony.

13. Ms. Sheppard notes that her mother not believing her regarding the abuse impacted her in a long-lasting and negative manner. In particular this experience in combination with other factors in her relationship with her mother (e.g., verbal and physical abuse by her mother) led to her not trusting that she could talk with her mother or tell her about negative experiences. Mr. Jonathan Sheppard also reports that their mother's refusal to believe the report of the abuse had negative impact:

"It was one thing for Erica and me to have been physically and sexually abused. But it is another thing when the person who is supposed to love you and care for you does not believe you. It made it even worse. This is how I felt when my mother did not believe that Erica and I were being abused. My mother never asked me or Erica whether Cookie was abusing us. In fact it was my grandmother who removed us from Cookie's care."
[Affidavit of Jonathan Sheppard].

14. Ms. Erica Sheppard was orally raped at the age of 16 years old. She recalls that at the time she was not living at home but instead staying with a "friend." At "7 or 8 at night" she was walking along the road to a restaurant to get some food. Per her report, a car pulled up next to her and slowed down and eventually stopped. A man jumped out of the car, grabbed her and put her in the passenger seat of the car. This man did not get back into the car and the car drove off with her in it. She reports that the man driving the car "pulled out a knife." She does not know what type of knife it was but that it was not a switch blade because, "it didn't make one of those clicking sounds." She recalls that the man driving the car was wearing "tan pants and a muscle shirt." He told her, "you're gonna suck my cock." She recalls being afraid but also remembering "cops from school telling us not to fight back and not to show fear." As she began re-telling this experience Ms. Sheppard became visibly distressed. As she processed the memory, she said, "this is disgusting" and became nauseous and felt as though she was going to vomit. Recalling the incident she stated, "he was hard" and "I unzipped his pants and he just came out" (referring to the man's penis) and "I was going down on him." At this point in the interview, she hid her eyes and again stated, "this is disgusting." She was visibly demonstrating a gag reflex, stating "I'm gonna throw up." She then remembered, "I felt his stuff in my mouth and he tells me, 'you better not spit it out'." At this point in recalling the event, Ms. Sheppard hid her eyes with her hands again and reported more nausea and then recalled, "I managed to swallow." She reported that after this, she sat up and he continued to drive the car around. He then told her, "Since you didn't give me any problems" he would let her go.

15. Ms. Sheppard reports that after this incident she returned to the apartment complex she was living in at the time and that she told her friend who saw that she was upset. She reported that she wanted to tell the police about the event but that her friend told her she could not tell others because, "they'll turn it around on you." She reports that she again told her friend that she wanted to tell and her friend told her, "you're gonna have to learn you can't tell."

16. Ms Sheppard reports an additional sexual assault that occurred when she was 16 years old. She reports that she went to a party with some friends. She states that she had a wine cooler to drink (her "first ever wine cooler"). She remembers that she

began to feel sick and that she told her friends that she needed to go to the bathroom. She reports that when she walked to a "back room," she began to feel "funny" and then "somebody grabbed me." She recalls remembering a feeling of "going down backwards." The next thing that she remembers is coming to awareness was screaming "no, no." However, she also told me that, "I'm not sure if I was really screaming or if I was screaming in my head." She also remembers hearing someone say, "man you better ... you some of this." She then reports that she "blacked out again."

17. Ms. Sheppard reports that the next day she told her aunt about this event. Ms. Sheppard reports that after this event she did not want to go to school any longer. She reports feeling ashamed about this assault in particular because the people who assaulted her, "those were people who I thought were my friends."

18. Ms. Sheppard reports that she did not tell her mother or her grandmother about this or her other experience of sexual assault at age 16 because she thought that they would not believe her. She also reports that she did not want to tell others about these assaults because she felt ashamed and because she had learned "you stuff it and you move on."

19. In addition to these experiences of sexual assault, several of Ms. Sheppard's sexual experiences as an adolescent, while superficially consensual, contained significant coercive elements. Her first sexual experience at age 13 took place with a man who was at least 18 years old. In describing her first experience of sexual intercourse with this man, she recalls that she thought that they were going to a movie and to have pizza and instead they went to his house. In describing this experience of sexual intercourse she recalls pain and thinking, "I didn't know it was supposed to hurt this much." She became pregnant as result of sexual intercourse with this man and was taken by her mother to have an abortion. She also recalls that, "we never did make it to pizza and a movie." Ms Sheppard reports that at age 15 she was brought home from school by a male friend. She reports that he came in to her house and asked her what she was "going to do" for him since he had brought her home from school. She states that he began kissing her and that, "I don't really recall what happened" and "I went away" (referring to her mental state and awareness of her experiences). She states that she felt scared and she "gave him what he wanted."

Childhood Physical Abuse

20. Ms. Sheppard was physically abused by her mother across the course of her childhood and adolescence. She stated, "Mom beat us all the time, that was just our household." She recalls that her mother would beat her without her clothes on and that her mother would hit her with a variety of objects including a belt, a switch, and extension cord and a board. She stated that her mother used "whatever she could get her hands on." She states that her mother would "start on your lower body but she could hit you anywhere." She states that the beatings would leave marks on her body. She states that if the beating would leave marks on her arms she would, "wear long sleeves to school." When asked to recall one specific incident of being beaten by her mother, Ms. Sheppard described an incident when she was ten years old and had snuck out of the house to swim at the pool. She recalls that she was wet and that "she stripped me down." She recalls that after this beating, "I was bleeding on my legs." Ms. Sheppard states that it was not uncommon that she would be bleeding after the beatings from her mother. She states that after the beatings she would treat herself with rubbing alcohol noting that, "it

ould sting."

21. Ms. Sheppard's brother, Jonathan, confirms Ms. Sheppard's account of the physical punishment of them by their mother, Madelyn Johnson. He states, "My mother also used physical discipline to punish us. She gave us pretty bad spankings with whatever she could find, whether it was a belt or a wooden board." Ms. Sheppard's mother also acknowledges that her physical punishment of Ms. Sheppard was at times more severe than necessary, though she also attempted to minimize the severity by comparing it to the punishments she received as a child. She did, however, note that she has since learned a good deal about parenting and she is attempting to take a different approach to disciplining her grandchildren whom she is raising.

22. Ms. Sheppard's mother, Ms. Madelyn Johnson, understands her physical punishment of Erica Sheppard as part of a multigenerational pattern of physical abuse in her family. She noted her mother (who also raised Erica) used harsh, repeated physical punishment of her across the course of her childhood and adolescence. In her September 3, 2008 habeas corpus hearing testimony, she describes this abuse:

"my mother was the heavy-handed one, you know, and I got spankings from her or whippings from her all the time and my mother would know, she was old school. So, whatever her hand held. If it held a stick, it was a stick. If it was, you know, a pan, it was a pan. If it was a belt or a switch, whatever it was that was closest to her at the time, that's what you got it with."

In her testimony and in her interview with me she also acknowledged that her mother was likely severely physically punished as a child. She describes the women in her mother's extended family, "Those women would put a hurt on you."

23. Physical abuse of Ms. Sheppard by her mother continued into her adolescence. She reports that when she first became pregnant at age 13, "my mom beat the crap out of me" and that she "beat me with a board and belt." Ms. Sheppard's mother also acknowledged that she physically punished Erica Sheppard. In her September 3, 2008 habeas corpus hearing testimony she states, "So, I was very angry with her ... I mean, you know, it's going to ruin her life. So, I was upset with her. She probably got a beat-down, too."

24. Another incident of abuse during Erica's teenage years involved Erica's mother choking her with a phone cord and hitting her at the same time. This incident is noted in the records of the Covenant House, where Erica Sheppard went following this incident. The records note, "Youth came in alleging physical abuse of a beating and strangling with a phone cord by her mother." The record also stated that the agency contacted child protective services (CPS) and that, "Erica stated that she did not want to return home – she did not want to give her mother another chance to hurt her."

25. In addition to physical abuse by her mother, Ms. Sheppard reports ongoing, physical punishment by her grandmother (who reared her and her brother during much of her childhood). This report is consistent with statements by her brother, Jonathan Sheppard as well with descriptions by Madelyn Johnson of her mother's punishment of her as a child.

26. One particular pattern of punishment by her grandmother stood out in Ms.

Sheppard's descriptions. She reports that that her grandmother "would hit me in my face" on a regular basis. She reports that when her grandmother would do this her nose would bleed. When asked how often this would occur, Ms. Sheppard reports that it happened approximately one time per week and that it usually happened when she and her grandmother were getting ready for church on Sundays stating, "that was just normal in my house."

27. Ms. Sheppard reports that as a child she frequently "wet the bed." She stated that, "I used to get a beating from my mother and my grandmother. My mother thought I was too lazy to get out of the bed but that wasn't the case. I just couldn't wake up." She reports that "eventually" her grandmother took her to the doctor who provided her with some medicine that "made it better."

28. During her childhood, Ms. Sheppard also experienced physical abuse at the hands of her mother's partners. She recalls one partner, Shawn, as particularly physically abusive to her. She recalls that one day after Shawn's "goldfish died ... she beat the crap out of the lot of us" (referring to herself, her brother and Shawn's children). She reports that Shawn would beat her with a belt. When I asked her where she would be hit with the belt, she stated, "wherever the belt landed." Describing being beat by Shawn, Ms. Sheppard stated, "When Shawn would beat us, Oh God, we would have welts all over us" and "When she got through with you, you couldn't move you would think, just let me die, just please let me die."

29. Ms. Sheppard also recalls physical abuse from another of her mother's partners, Sheila. She states that she remembers that Sheila would come into her room during the night while she was asleep and begin beating her with a belt while she was still asleep.

30. Ms. Sheppard reports physical abuse from her babysitter, "Cookie" whose boyfriend has also sexually assaulted Ms. Sheppard. Specifically she reports that Cookie beat her and her brother with objects and forced her and her brother to walk on hot, freshly laid pavement and "tar" with no shoes. She reported that this occurred over the course of the summer that this babysitter cared for her and her brother. Her brother, Jonathan Sheppard, confirms this account of the physical abuse by the babysitter:

"Cookie was physically abusive towards me and Erica. She would constantly hit us with her hands or whip us with electrical cords. She would do other things like make us walk to the store without any shoes. It was during the summer and we would burn our feet on the hot pavement. The abuse happened almost every day" [Affidavit of Jonathan Sheppard].

Witnessing Violence between Parents:

31. When Ms. Sheppard was young (prior to age 4) she lived with her mother and her father. During this time she witnessed verbal and physical violence between them. She recalls that she would hear her parents "hollering, screaming and cussing." She recalls that her father would use words such as "bitch" and "whore" to describe her mother and the he would say, "I don't give a fuck about you." This abuse is also described by her mother Madelyn Johnson.

32. In addition to witnessing violence between her mother and father, Ms.

Sheppard also witnessed violence between her mother and several of the women with whom her mother had relationships when she was a child. She remembers that one of the women, Shawn, "had a real bad temper, drank, smoked weed." She also recalls that, "Shawn would knock my mom across the face in a minute." She recalls one time when Shawn and her mother were visiting her grandmother's house that Shawn hit her mother so hard that her mother went through a "panel in the wall." Ms. Sheppard's mother, Madelyn Johnson, also reports this incident of abuse from Shawn.

33. Ms. Sheppard also recalls verbal and physical aggression between her mother and grandmother. She stated that her grandmother did not approve of her mother's relationships with women and would say to her mother, "If I ever come home and catch you in bed with I'm gonna blow your brains out." Ms. Sheppard's brother describes the verbal aggression between his mother and grandmother stating, "My mother and grandmother would constantly scream and argue in front of me and Erica about who was going to take care of us." Erica Sheppard's mother, Madelyn Johnson describes her relationship with her mother, "I was scared of my mother 'til the day she died."

Emotional Neglect and Abuse and Unsafe and Chaotic Living Arrangements

34. Ms. Sheppard reports verbal and emotional abuse from her mother. She states that her mother would call her names including "bitch", "whore" and "slut" and would make statements to her such as, "get out of my face I don't want to look at you."

35. Ms. Sheppard reports significant feelings of sadness and loneliness as a child. She recalls feeling, "alone, like you didn't have anybody." She describes this feeling of sadness as a "tightness in your cheek like you're going to cry but you're not going to let yourself cry so you shove it down and move on." When I asked her if she would go to her mother or her grandmother if she felt afraid or scared she states, "No way, I learned that. Mom would beat our behinds if we cried."

36. During the course of her childhood Ms. Sheppard moved frequently from one house to the next. She was frequently separated from her mother. She reports that until the 4th grade she primarily stayed with her grandmother, but that at times such as during summers she would move and live with her mother. She recalls that she and her brother would visit her mother when they were living with her grandmother and that her mother would also come to live with them or to visit them when she was living with her grandmother. She recalls that when her mother would leave she would be "sad." She stated that she didn't understand why her mother was leaving and would feel like "she didn't want me".

37. In addition although her grandmother lived in one location during the course of her childhood and adolescence, her mother moved frequently. This instability is noted in the statement of Ms. Emma Brooks, who knew Erica Sheppard as child, "Erica's mother Madelyn lived in Houston. I remember once telling Madelyn that she needed to move back to Markham and help Mrs. Smith raise those kids. I felt that those children needed their mother." In addition, Ms. Sheppard's mother and grandmother would often fight in front of the children regarding who should care for them and where they should live. Her brother Jonathan describes this:

"I recall one occasion when my mother wanted to take me and Erica to

Houston to stay with her. Erica and I were in elementary school. My mother and grandmother were having one of their yelling matches and my grandmother threatened to call the police. My mother took me and Erica kicking and screaming back to Houston that day."

38. Ms. Sheppard reports that when she was in the 9th grade, her mother took her to her father's house and, "mom just dumped me off on his porch –she was sick of me." She recalls that this took place in the "middle of the night." She recalls her mother saying, "Here's your child" and then "driving off."

39. In general, when living with her mother, Erica was raised in an unstable and chaotic environment marked by multiple types of abuse and verbal aggression. She would not be able to predict stability in her environment from day to day.

40. Once she became an adolescent, Erica attempted to find safety from her mother's attacks by going to the homes of friends or by staying away from her mother's house. She reports that she left home for the first time at age 13. Records from the Covenant House shelter for adolescents indicate that she sought their services twice, once in 1990 (when Ms. Sheppard was 16 and 17 years old). These records indicate that she had run away from home "10+" times.

Mental Illness and Alcohol and Drug Use in Ms. Sheppard's Family

41. Ms. Sheppard's father abused alcohol. She does not remember him drinking when she was young. However, she lived with him when she was in the 9th grade and she recalls that he was drinking, "twenty-four, seven."

42. Ms. Sheppard's mother also lived with several partners who abused alcohol and drugs when Ms. Sheppard was a child and adolescent, including "Shawn" and "Tommy."

43. Ms. Sheppard's mother has a history of mental illness including depressed mood and suicidal ideation. She has been psychiatrically hospitalized, treated with psychiatric medication and received psychotherapy.

44. Ms. Sheppard's brother Jonathan reports that he has received psychiatric care related to his experience of being abused and for being "clinically depressed." This is described in his affidavit, "I would not have been able to deal with the abuse without counseling, but even today it is something that I struggle with. It was through counseling that I learned I was clinically depressed."

45. Ms. Sheppard's son, Manchie, has been diagnosed with ADHD and Ms. Sheppard's daughter, Audria, has been psychiatrically hospitalized related to depression.

Neighborhood/School Violence during childhood and adolescence

46. Ms. Sheppard reports several instances of witnessing violence in her neighborhoods and schools during her childhood and adolescence. She mentioned two events in particular that she recalls. The first is a shooting during high school. She recalls that this happened after a football game and that "everybody just scattered, stunned ... and [then] went home." She also recalls an event that occurred during "7th

grade." She reports that a friend, "Quincy," was in a fight that she watched. She stated that a "guy was beating his head against the wall. I just saw all this blood. Nobody was helping, just watching, blood was smeared down the wall."

Domestic Violence and Intimate Partner Violence Experienced by Ms. Sheppard.

47. Ms. Sheppard experienced severe, ongoing intimate partner violence in a relationship with Mr. Jerry Bryant, Jr. that began when she was 17. She reports that when they began dating he was nice to her and that he brought things to her children and helped out around her grandmother's house. She states that after she became pregnant with her daughter, Audria, his attitude and behaviors towards her changed. She stated, "after I got pregnant, I felt like I belonged to him. I couldn't go anywhere without my grandmother." She reports that from this point forward he was focused on the idea that she was being unfaithful to him and that he was controlling and isolated her. She describes that he was not only watching her closely but that he also talked with others in the community about her behavior and whereabouts. She stated that she "always felt like somebody was watching me and reporting about things I was doing."

48. She reports that Mr. Bryant was verbally abusive towards her using phrases such as, "Bitch, you better not be cheating on me"; "If you ever leave me I will hunt you down and kill you" and "if I can't have you nobody can have you."

49. Ms. Sheppard reports that Mr. Bryant was physically abusive towards her across the course of their relationship. She described one incident that occurred when her daughter, Audria was sick and in the hospital. Jerry wanted her to come home from the hospital to have sex with him and that while in the parking lot of the hospital, she told him that she was not going to have sex with him, he came from behind her and hit her on the head so hard that she passed out. She reports that when she "came to" she was on the ground and he was holding her saying the phrase, "please don't let her die." Her reaction at that point was to become, "scared and still." After this event he was nice to her for a short period of time. She describes another incident that occurred at her uncle's house. While staying with her uncle she wanted to leave and that her uncle told that she could not leave because Jerry had called and told him not to allow her to leave. She states, "I knew I was going to get beat." When Jerry came to the house he was yelling at her and accusing her of having sex with other men. She recalls that he grabbed her foot and pulled her off of the couch and that her back hit the floor. He grabbed her by the hair and, "beat me on the top of my head." In addition to these two incidents, she reports regular ongoing physical violence over the course of the relationship. As part of this abuse, Jerry would regularly hit her on her arms and back and that he would slam her against the wall. She reports that he hit her in these locations because the bruises would not be visible to others. He would physically harm her in this way on an almost "daily" basis.

50. In addition to this physical violence, Jerry continually made statements threatening to kill Ms. Sheppard over the course of their relationship. He combined these statements with threats, using guns and knives. She reports that, "He thought he could kill me and get away with it." She reports that he would say to her, "don't think I can't kill you and bury you out here. There's already bodies out here." She described that at times she would wake up from her sleep and see him with a gun pointed at her or a knife held to her throat. She reports that he threatened her in this manner more than one hundred times.

51. Ms. Sheppard describes that although these threats occurred regularly they were also unpredictable and unprovoked. She stated, "I would never know what would bring his anger on." As an illustration of this she describes,

"One time I was in the den watching TV. When he came by I thought that he was going to keep walking. He wrapped his arm around my throat, took his knife out. He pushed his jagged hunting knife against my throat. He said, "Do you realize I can kill you right now?"

52. Ms. Sheppard stated that at some point these threats became so overwhelming to her that, "One time I told him I wished he would just do it and get it over with already."

53. Ms. Sheppard reports that Jerry repeatedly forced her to have sex when she did not want to. She described,

"In the middle of the night he would roll me over and I would say, 'no'. I would try to fight. He would hold my hands both wrists above my head. He would get what he wanted. I learned how to relax and not be fighting back. [I] just made it work. I would go limp and go away. My mind would go somewhere else."

54. The abuse from Mr. Bryant towards Ms. Sheppard is documented and described by multiple sources. These include statements made by Jonathan Sheppard (Erica Sheppard's brother), Madelyn Johnson (Erica Sheppard's mother), Ms. Isabel Rodriguez (former wife of Jerry Bryant Sr., father of Jerry Bryant Jr.), Mr. Aaron Green (former employer of Erica Sheppard who also worked at the Matagorda County Sheriff's office for 10 years), and records from the Matagorda County Women's Shelter. In his statement, Mr. Green reports that, "When Erica was with Jerry, I often saw her with black eyes and bruises on her face." In her statement, Ms. Rodriguez describes many elements of the abuse experienced by Ms. Sheppard,

"Jerry Jr. was abusive towards Erica. I witnessed him abuse Erica on more than one occasion. The incident I remember most vividly is when I was riding in car with Erica and Jerry Jr. ran us off of the road and into a ditch. ... I saw Jerry Jr. jump out of his car. He came over to my car, opened the driver's side of the vehicle where Erica was, yanked Erica to the ground and started beating her violently. He was hitting her with his fist and slapping her around. At one point he had Erica by the throat while he brandished his gun at her and yelled, "Bitch, I'll kill you."

55. The records from the Matagorda County Battered women's shelter are consistent with the account of events provided to this clinician by Ms. Sheppard and include the abuse by Jerry Bryant Jr., and her fear that he would look for her and find her. They note at the time that she leaves the shelter after 9 days, "Erica came by to pick up her things. She says she won't go back home. She still wants a divorce. She is in a lot of pain. I wished her luck."

Impact of Childhood Abuse and Exposure to other Adverse and Traumatic Events in Childhood and Adolescence.

56. It is clear that Ms. Sheppard's exposure to repeated, severe and chronic stressors, trauma, abuse and neglect over the course of her lifespan impacted her significantly across multiple domains. In order to evaluate the impact of these events on Ms. Sheppard, compressive psycho-social background evaluation in combination with a comprehensive, psychological evaluation is necessary. It is also critical that a psychological evaluation of the impact of exposure to trauma and abuse include gathering detailed accounts of these experiences. The details in the descriptions of the abuse are often important in understanding later reactions and behaviors. For example, in the case of Ms. Sheppard, knowing that she was a victim of physical, emotional and sexual abuse, sexual assault and domestic violence in her childhood and adolescence is necessary but not sufficient information in understanding her psychological and behavioral functioning. Trauma and abuse need to be evaluated with respect to multiple factors including age at which they occurred, psychological and biological development processes related to the age(s) of occurrence, frequency of occurrence, severity level, chronicity, relationship to people who are agents of the trauma and abuse, reaction of other caregivers, internal resources (e.g., intellectual and mental abilities) of the person experiencing the trauma and abuse, and external resources (community, school, etc) available to person experiencing the trauma and abuse. It is also necessary to identify factors and themes that are common across these experiences. Examples of such factors in the case of Ms. Sheppard include use of weapons (e.g., knives), and also threats to Ms. Sheppard related to her telling others or attempting to escape. In order to gather this information extended interviews are usually necessary.

57. A comprehensive psychosocial history involves, when possible, the gathering collateral information from multiple sources including (but not limited to) interviewing or reviewing statements of family members and other people important in the life of the person being evaluated, reviewing any prior psychiatric records, reviewing records from other institutions with which the person being evaluated has been involved including schools records and in the case of Ms. Sheppard records from the battered women's shelter and records from the shelter for adolescents where she received services. In addition, in the case of an evaluation that includes involvement with the criminal justice system, records related to the events at issue are important to the investigation.

58. These data are important for multiple reasons. One of the reasons is to provide collateral support for symptoms and experiences being reported by the person being evaluated. Another reason, particularly in the case where trauma exposure and exposure to child abuse and neglect are involved, is that one of the impacts of traumatization and exposure to abuse and neglect is a tendency to avoid talking about or reporting full accounts or important details of their experiences on trauma abuse and neglect. There are a number of possible reasons for this. One of these is that people often feel shame about their experience of trauma and abuse or about specific details of these experiences. For example, in the case of Ms. Sheppard she clearly experienced shame with respect to aspects of the verbal and emotional abuse by her mother as well as with respect to aspects of her sexual assault at age 16. Another is that remembering certain aspects of experiences of trauma or abuse can lead to increased physiological and psychological distress. This was also case with Ms. Sheppard, who became visibly physically and psychologically distressed when my evaluation of her focused on some aspects of her past experiences of trauma and abuse. This avoidance of thoughts and other reminders of such experiences is a symptom of posttraumatic stress disorder. A third reason is that people often have difficulty remembering full details of traumatic

experiences or even when they do have memory of details, these memories can be disorganized and difficult to relay to others. In my evaluation of Ms. Sheppard a number of her accounts of abuse reflected this type of disorganization. A fourth reason, that is common in cases when a person has been exposed to child abuse or to other forms of ongoing interpersonal violence in the home, is that they do not know which parts of their experiences to report to others. For example, in cases of ongoing physical violence within families people will give a negative response to the question, "were you physically abused as a child" but when asked about specific experiences that constitute abuse they report them. The reason for this discrepancy is not that they are lying when asked about their history of childhood physical abuse but that they do not recognize that the experiences they had constituted abuse. In addition people are often less willing to spontaneously or fully report abuse or sexual assault that occurred at the hands of a family member (particularly a parental figure). This was the case with Ms. Sheppard who appeared in my evaluation of her to minimize the extent, frequency and impact of the physical, verbal and emotional abuse she experienced at the hands of her mother and grandmother. Not only was the extent of this abuse more apparent after reviewing the collateral records in the case, but I was also able to use the collateral records to get Ms. Sheppard to provide me with more comprehensive accounting of her experiences. Likewise, although Ms. Sheppard did describe in some detail her experiences of abuse by Jerry Bryant, Jr. during my evaluation of her, the extent of this abuse was more apparent when reviewing collateral records. In addition, as with the child abuse, I was able to gather more comprehensive and detailed narrative from Ms. Sheppard of her abuse by Jerry Bryant, Jr. by using the collateral records provided to me.

59. Another reason that a comprehensive psychosocial background evaluation is important is that results of such an evaluation can indicate types of assessment and evaluation that are needed. For example in the case of Ms. Sheppard, knowing that she had a history of problems in school, beginning in elementary school, and knowing that her mother reports that she had some learning problems as a child, indicates that a comprehensive neuropsychological evaluation was indicated. It was important to conduct such an evaluation prior to completing an evaluation of the impact of exposure to trauma and abuse because the way in which a person is impacted by trauma and abuse is affected by underlying problems that may be identified in neuropsychological assessment. In addition, when a person experiences trauma and abuse in childhood and adolescence it is possible that exposure to these events will compromise their neuropsychological functioning. Thus in the case of Ms. Sheppard two factors (her history of school and learning problems and her history of trauma and abuse in childhood and adolescence) identified in the psychosocial background information provided prior to my evaluation of her pointed to the importance of conducting a comprehensive neuropsychological evaluation.

60. Not all children and adolescents who experience abuse and trauma develop later problems. While the reasons for variations in reaction to trauma exposure are not fully understood, a number of factors that contribute to risk for later problems have been identified. Ms. Sheppard is vulnerable with an unusually high number of these risk factors.

61. One risk factor present in the case of Ms. Sheppard is multi-generational history of abuse and trauma exposure in her family. Understanding this context is important because children of parents who are exposed to abuse and trauma or of parents with symptoms of posttraumatic stress disorder secondary to this abuse, violence

and trauma are at greater risk for the development of PTSD than children who, although exposed to abuse, violence or trauma themselves, do not have parents with these types of experiences.

62. A second risk factor present in the case of Ms. Sheppard is the young age of onset of the abuse and neglect, and continued, chronic abuse across the course of her childhood and adolescent biological and psychological development.

63. One reason that younger onset of childhood abuse as well as continued chronic abuse over the course of development are related to increase risk for later cognitive (thought), emotional (feeling) and behavioral problems is that this trauma occurs at the same times as the brain is maturing. Over the course of childhood and adolescence our neurobiological and psychological development progresses in predictable stages. Over the course of these stages we develop important capabilities and skills related to our thoughts, emotions and behaviors. These abilities include (but are not limited to):

1. Increased capacity for logical and cause and effect thinking
2. The development of more mature and effective problem solving skills
3. Increased capacity for abstract reasoning
4. Improved ability to monitor and interpret information in the world around us
5. Improved ability to learn from and adapt to the information we gather from the world around us
6. Increased ability to more accurately identify our own emotions and the emotions of others
7. Increased ability to appropriately and effectively regulate the strength and intensity of our emotional responses
8. Increased ability to effectively and appropriately respond to the emotions of others
9. Improved ability to plan and initiate goal oriented actions
10. Improved ability to inhibit impulses.

Childhood abuse and other traumatic and stressful life events that take place during the process of this development disrupt the formation of these key abilities and skills. As a result, children such as Ms. Sheppard exposed to trauma and abuse during the course of their development are more likely to have problems in these areas.

64. A third risk factor present in the case of Ms. Sheppard is impaired/limited intellectual/mental abilities. Based on the comprehensive neuropsychological assessment of Ms. Sheppard conducted by Dr. Myla Young, Ms Sheppard has a level of

intellectual functioning in the low average range with a level of mental abilities below that of 90% of others her age. It is impossible to know if this level of intellectual functioning was present prior to her repeated exposure to adverse experiences including abuse and neglect across the course of her childhood and adolescence. However, it is most likely that she was born with some level of reduced intellectual mental functioning. This would have been a result of both genetic (inherited) limitations and as well as adverse or teratogenic pre-natal exposures as noted by Dr. Young and consistent with my evaluation of Ms. Sheppard and Ms. Sheppard's mother.

65. In addition to impairment in overall intellectual/mental capacities, Dr. Young also noted that Ms. Sheppard has a number of more focal cognitive deficits. These include significant impairment in executive functioning across multiple types of neuropsychological tests. As noted by Dr. Young, impaired executive functioning is also associated with deficits noted above (63. 1-10). As with overall mental abilities, impairments in executive functioning are consistent with the history of abuse and trauma experienced by Ms. Sheppard. These deficits are likely to have been present to some degree prior to the exposure to repeated and chronic trauma, abuse and neglect across the course of childhood and adolescence (secondary in part to genetic (inherited) factors and the impact of pre-natal factors). In addition, the exposure to the abuse would have likely worsened these deficits.

66. In the case of Ms. Sheppard it is likely that limited mental/intellectual abilities including impairments in executive functioning would have interacted in a negative cycle with exposure to trauma, abuse and neglect with the combination resulting in significantly increased overall vulnerability.

67. A fourth risk factor present in the case of Ms. Sheppard is that she has family members who have been diagnosed with mental illness and who abuse substances. Understanding this family history is important because having family members with mental illnesses and substance use related problems increases an individual's risk for developing these types of problems. This occurs through increased genetic risk and through increased risk related to being raised by and exposed to family members with these types of problems.

68. A fifth risk factor present in the case of Ms. Sheppard is that she experienced abuse at the hands of her primary caregivers along with the fact that she was raised in a chaotic and unstable environment marked by multiple moves and unpredictable care giving. Relationships with parents or other caregivers as well as the predictability and stability of our early environments is the foundation from which people develop their core beliefs about themselves, others and relationships. Strong and secure attachment relationships and stable early environments are the foundation for the development of later abilities to control emotions and emotional responses particularly in the face of threat or danger. As a result, a lack of secure attachment to her mother as a young child would have placed Ms. Sheppard at increased vulnerability to negative outcomes when faced with later traumatic and stressful events.

69. A sixth risk factor present in the case of Ms. Sheppard is that she was exposed over the course of her childhood and adolescence to an extremely high "dose" of trauma/adversity in terms of number of types of adverse/traumatic events, the frequency of the events and persistence over time of these adverse/traumatic experiences. This is related to risk because a dose-response relationship exists between

level of abusive/adverse/traumatic experiences in childhood and increased risk of negative outcomes.

70. A seventh risk factor present in the case of Ms. Sheppard is that a dose-response relationship also exists between the number of risk factors present and the likelihood of developing psychiatric and behavioral problems. More simply put, as the number of risk factors present increases, the risk for later problems also increases. It is clear that Ms. Sheppard's experiences of abuse and trauma occurred in the context of a high number of risk factors.

Diagnostic Impressions of Ms. Sheppard

Overview of Psychiatric Impressions of Ms. Sheppard

71. Based on my assessment of Ms. Sheppard, as well as my review of the materials provided with me, I diagnosed Ms. Sheppard with three psychiatric disorders:

1. Major Depression, recurrent, severe with psychotic features, in partial remission.
2. Posttraumatic Stress Disorder (PTSD), Prolonged
3. Dissociative Disorder, Not Otherwise Specified

Symptoms of Major Depression

72. My evaluation of Ms. Sheppard indicates that she experienced symptoms of depressed mood both at the time when I evaluated her and for many years, likely beginning in childhood and adolescence. These symptoms of depression include sadness, anhedonia, difficulty in concentration, problems related to sleeping marked by a tendency to sleep excessively in the day, feelings of low energy and exhaustion, feelings of hopelessness, periods of increased or decreased appetite, thoughts of suicide and self harm. In describing her thoughts of suicide and self harm, Ms. Sheppard notes that when she has the thoughts such as, "I'm in so much pain that the only way to get rid of the pain is to kill [my]self." She has been placed on multiple antidepressant medications including Prozac and Zoloft and notes that she feels less depressed when taking these medications. She reported that she was not taking any psychiatric medications at the time of my interview with her.

73. It also seems that at times Ms. Sheppard's depressed mood is marked by psychotic symptoms. Specifically she reports experiencing auditory hallucinations. She reports that these symptoms began at the time shortly after the offense in question. She reports that at that time the voices were "laughing" and telling her "you gonna die." She notes that they stopped and then returned again sometime in 2003 or 2004. She describes that at that point the voices were different in that they "stayed all day." She reports that the voices she heard were "screaming and yelling my name." She reports that she would ask others around her if they were calling her name. She reports that these types of symptoms are present currently and occur approximately "one or two times a month."

74. Ms. Sheppard notes that the way in which she expresses her depressed

mood is often through expressing irritability and anger, noting “angry is my most comfortable feeling.” Of note, excessive irritability and anger are also symptoms of posttraumatic disorder (PTSD), a psychiatric disorder that has also afflicted Ms. Sheppard (see below).

75. Symptoms of depressed mood have been noted in other psychiatric evaluations of Ms. Sheppard including those of Dr. Priscilla Ray, Harris County Forensic Psychiatric Services and Dr. Myla Young.

Symptoms of Posttraumatic Stress Disorder (PTSD)

76. The development of Posttraumatic Stress Disorder (PTSD) requires exposure to a traumatic/stressful event often involving threat to the life or physical integrity of oneself or of others. As noted above, Ms Sheppard was exposed to multiple experiences meeting these criteria, beginning in early childhood and persisting across the course of her childhood and adolescence.

77. A diagnosis of PTSD also requires the presence of three types of trauma-related symptoms: 1) Intrusive thoughts, memories or re-experiencing of past traumatic events, 2) avoidance of reminders of the past traumatic events, and 3) hyper-arousal/hyper-vigilance symptoms. At the time of the assessment, as well as at other times across the course of her life beginning in late childhood/early adolescence, Ms. Sheppard reports a clinically significant level of all three of these types of symptoms required for a diagnosis of PTSD. This is detailed below.

78. Ms. Sheppard describes a number of intrusive/re-experiencing symptoms of PTSD both at the time of the interview and over the course of her life. She reports intrusive memories related to being forced to perform oral sex at age 16, being threatened, hit and sexual assaulted by Jerry Bryant Jr. and memories of physical abuse in childhood/adolescence. Ms. Sheppard also reports (and demonstrated during my evaluation of her) distress and physiological reactivity when encountering reminders of the past traumatic events. Among these symptoms, Ms. Sheppard reports waking during the night in response to dreams she cannot recall and being startled awake and physiologically aroused (sweating, heart racing). She reports nightmares over the course of her life beginning in childhood. She describes that as a child she experienced nightmares about, “being hurt, being left somewhere.” She also describes frightening dreams about snakes and being bitten by snakes. It should be noted that in children and adolescents PTSD symptoms include, in addition to direct memories of traumatic events, nightmares or bad dreams that are not directly related to the traumatic events.

79. Ms. Sheppard describes avoidance and numbing symptoms of PTSD. These include being emotionally numb and not experiencing her emotions (positive or negative). She reports that she is this way a significant amount of the time when she is not being threatened or feeling afraid and also that she becomes emotionally numb when she becomes overwhelmed by threat and fear. She reports that this numbness began at an early age stating, “I think it started by the time my mother started beating me. The more that happened the number I got.” She also reports that she avoids conversations with others about interpersonal violence or sex with men or other topics related to past traumatic events.

80. Ms. Sheppard describes experiencing symptoms of PTSD that involve

hyperarousal and hyperreactivity. These include feelings of “jumpiness.” She states that “I’m very jumpy, I don’t like people making sudden movements” and “I don’t like people touching me out of the blue.” Ms. Sheppard also reports symptoms of irritability and becoming easily angered that are associated with PTSD. Another symptom of PTSD is disrupted sleep. Ms. Sheppard reports problems related to sleeping. She is often unable sleep through the night without waking up. She describes her sleep problems as related to a need to monitor her environment for danger stating, “you know how your body can be asleep but your mind is not asleep because you are looking out.”

81. It is clear that some symptoms of PTSD have been present across the course of Ms. Sheppard’s life beginning in early childhood. She describes symptoms of emotional numbing as well as nightmares and difficulty sleeping during childhood and early adolescence. She reports that her difficulty sleeping became worse following the time period during which her mother’s girlfriend would come in to her room while she was asleep and begin beating her. However, these symptoms appear to have become significantly worse in the context of her relationship to Jerry during which she experienced the repeated and ongoing trauma of physical violence and threats. She describes the way in which her symptoms worsened in this time, “Before Jerry I was jumpy and touchy but not near as much as I was after him.”

82. My diagnosis of PTSD in Ms. Sheppard, as well as my conclusion that these symptoms have been present across the course of her life, are supported by other, independent psychiatric evaluations of Ms. Sheppard in including those conducted by Dr. Mark Cunningham and Dr. Myla Young.

83. Some PTSD symptoms are thought to be associated to the activation of the stress/threat response system. When faced with threat and dangers, protective responses are activated. These instinctive survival responses are sometimes referred to as “fight, flight or freeze” reactions. This name reflects three basic possible protective responses to perceived danger: 1) fighting back against the danger, 2) moving quickly away from the danger, 3) making efforts to avoid detection, attention or further attack (e.g., a mouse going limp or a bird becoming stiff when caught by a cat). These responses are adaptive in the face of an actual threat. In addition, when “working properly” they should abate in the absence of threat. However, in the case of PTSD activation of the threat responses system appears to be chronically activated or activated outside of any apparent actual threat to safety.

84. One process through which this chronic activation of the threat response system characteristic of PTSD may develop is associative learning. This occurs because even non-inherently dangerous aspects of threatening or traumatic experiences/environments can become “connected” to the actual danger and threat. As a result, the stress response system “learns” to become active when these “reminders” of the threatening environment are encountered. In addition to this, over time, additional elements of the environment that are associated with these learned threat cues can, themselves, become connected to the original threat/trauma. As a basic example of this, if someone is attacked by a shark while in the ocean, walking into the ocean even when there are no sharks present may activate a threat-response reaction. This reaction may also develop in response to reminders/cues even less directly associated aspect of the shark attack such as the beach or even water and sand in locations other than the ocean and beach. In the case of PTSD, these reminders of traumatic experiences are sometimes referred to as “triggers” or “cues” that can lead to

the activation of PTSD symptoms (e.g., flashbacks or intrusive memories) or other PTSD and trauma related symptoms (e.g., dissociation). Ms. Sheppard reports a number of these triggers or cues associated with her multiple traumatic experiences. These include nighttime or darkness, blood, guns and knives and engaging or talking or thinking about some sexual activities.

85. My evaluation of Ms. Sheppard indicates a number of instances in which these "triggers" or cues of past traumatic experiences have led to significantly increased emotional and mental distress. As noted above one such instance occurred during my evaluation of Ms. Sheppard related to her memories of past sexual assaults. She also described these reactions as occurring at other times in her life including at the time of the 1993 crime at issue.

86. Symptoms of PTSD tend to be exacerbated in the face of increased levels of stress. In addition, if someone has developed PTSD symptoms in response to one trauma they are likely to be more vulnerable to the development of PTSD in the face of exposure to later traumatic events. Ms. Sheppard was confronted with numerous stressful or traumatic experiences in the several weeks prior to the 1993 crime. These included being severely beaten by Jerry Bryant Jr., leaving her home to stay in a women's shelter and having an abortion. They also included leaving her home for Houston and moving with her young children into a new and temporary residence with her brother and her brothers' friends.

87. Many of the psychological and behavioral symptoms and problems associated with exposure to trauma and abuse reflect reactions that were adaptive in the context of exposure to the traumatic event. In addition when exposure to trauma and abuse begins in early childhood, occurs in the home environments, and is chronic (all of which were the case with Ms. Sheppard), these psychological and behavioral reactions are often experienced by the person suffering as "normal" rather than as psychological symptoms. Related to these two factors, as well as other factors such as shame and avoidance of distressing emotional reactions, people who are experiencing psychological symptoms and behavioral problems associated with trauma and abuse often do not spontaneously report these symptoms. In addition, they may not fully report their symptoms even in the context of a general psychological evaluation. In order to fully assess symptoms associated with abuse and trauma exposure, it is often necessary to conduct an interview that systematically evaluates trauma and abuse associated symptoms. In order to do this (as noted above in 56-59) it is necessary to have a comprehensive history of trauma exposure. This may be the reason that symptoms of PTSD and associated symptoms (e.g., dissociation) were not diagnosed in several psychiatric evaluations that were conducted during time frames when Ms. Sheppard was very likely to have been experiencing such symptoms.

Dissociative Symptoms:

88. Along with PTSD, another type of symptom that can develop in relation to exposure to trauma and abuse are symptoms of "dissociation." Dissociation is a breakdown or disruption in the ability to integrate information and/or experiences in a normally expectable fashion. When dissociation occurs, psychological processes and behaviors that would normally be connected are disconnected. This can include a disruption of memory or dissociative amnesia which involves an inability to remember past experiences. Dissociative amnesia often develops in the context of traumatic or very

stressful experiences, and it can include amnesia for extreme behaviors such as suicidal behavior or violent outbursts. Dissociation can also involve an alteration in perception of oneself or one's environment such as feeling detached and like an outside observer of one's own body or thoughts. This may also include sensory anesthesia, a lack of emotional response and a sense of lacking control of one's actions. Similar to dissociative amnesia this type of dissociation also often occurs in response to actual or perceived stress or threat.

89. My evaluation of Ms. Sheppard indicates that she developed dissociative symptoms in childhood and that these dissociative symptoms continued to occur over the course of her life including at the time I evaluated her. In describing her dissociative experiences she states, "Have you ever seen your body outside of your body? Things are brighter, sounds are clearer, you don't feel any pain." She also stated, "You can be in your body and a part of you shuts down and separates." "You are watching yourself with different eyes ... it's like you have to go into survival mode." Ms Sheppard does not develop dissociative symptoms in every instance in which she feels threatened or in danger, however, she does describe multiple instances where dissociative reactions did occur in the face of her perception of threat and danger. The first time that Ms. Sheppard reports dissociative symptoms is at an early age when she was sexually assaulted by her babysitters' boyfriend.

90. My evaluation of Ms. Sheppard indicates that Ms. Sheppard experienced symptoms of dissociation at the time of the crime at issue. Specifically she states, "One minute you are there one minute you are not. You leave your body. After that point I was not longer in my body, I was looking at myself." She also reports that at the time of the crime at issue "[I] felt like a zombie on autopilot" and that "[my] body is in the room but you don't feel nothing." In describing her experience of dissociation at the time of the crime at issue she said, "it never dawned on me to ask if I am looking at myself, where am I?". These types of experiences are reflective of dissociative symptoms.

91. As noted above (in 56-59) even when people are experiencing symptoms associated with trauma exposure, including symptoms of PTSD, they are not likely to spontaneously report such symptoms. This may be one reason that Ms. Sheppard did not report the above dissociative symptoms when interviewed in the time frame following crime at issue and prior to her trial in 1995.

Other Psychological and Behavioral Problems

92. When children and adolescents are exposed to abuse, chaos and instability in their homes and to other traumatic events, they develop patterns of thinking, behaving and feeling (coping strategies) in response to these environments. Although these patterns of thought, behavior and emotional response often buffer them against the abuse, trauma and stress, they are not necessarily the most effective ways of coping and responding in the world at large. This often leads to the development of later psychological and behavioral difficulties and problems.

93. One of these strategies developed by Ms. Sheppard in the context of her childhood and adolescent environment was to hide her emotions from others. As an example of this, when asked how she reacted to the physical abuse by her mother, she stated that she "tried to be hard" and "not to show [my] reaction." She described this method as "survival mode." She reported that as a result of this response style other

people including her mother saw her was "cold." She stated, "My mom thought I was cold for how I responded to her." She states that this is not the case but that, "I was doing what I had to do to protect myself."

94. This adaptive style, while potentially protecting Ms. Sheppard in her home environment, likely led to difficulty in forming relationships with others who might look at the way she responded to them and believe that she was cold or uncaring.

95. As noted above Ms. Sheppard comes from a family with multi-generational abuse and violence. She describes that in the face of this the family, she developed an approach to abuse that that involved managing emotional reactions by "pushing" emotions "down" and moving on. Abuse and violence were considered standard and expectable elements of relationships and the women in the family learned to accept it and "go on." She describes that her grandmother would tell her, "Whatever it is you just go on."

96. When children and adolescents are faced with physical threat from parental figures or other adults, they often lack the capacity or ability to fight back in any way that will effectively challenge or stop the person harming them. This is also often the case in situations where domestic violence is present in adult relationships. In many of these situations, attempts to fight back or even attempts to leave the situation lead to retaliation or escalation of the attack or threat and increase the actual or the perceived danger in the situations. The best coping response under the circumstances may be to acquiesce or cooperate with rather than fight back. In cases of domestic violence, the perpetrator of the violence often directly threatens the victim with further or worse violence if they fight back or attempt to leave. Jerry Bryant Jr. clearly and repeatedly threatened Ms. Erica Sheppard with death if she attempted to leave him. In fact, women with violent male partners are at increased risk for violence and death during the time frame when abusers become aware that the women are planning to leave or in the time frame immediately after the woman leaves the relationship.

97. It is clear that across the course of her childhood and adolescence, and in the context of multiple violent relationships, Ms. Sheppard learned that leaving or fighting back in the context of threat would not only be ineffective but might also lead to increased risk. When telling the story of her experience of being forced to perform oral sex at knife point at the age of 16, Ms. Sheppard believes that the fact that she did not fight back and instead cooperated with her assailant is the reason he released her rather than killing her. In her description of observing Erica Sheppard being abused by Jerry Bryant Jr., Isabel Rodriguez describes this reaction by Erica in response to the violence:

"Erica's reaction was not to fight back. She was not the type to fight back because she was not confrontational. But more than anything I think that Erica was deathly afraid of Jerry Junior. I felt that she wanted to avoid escalating the situation." [Affidavit of Ms. Isabel Rodriguez]

In my interview with Erica Sheppard, she also described other experiences which demonstrate that cooperation rather refusal was her habitual coping response in response to perceived threat or danger. For example in her description of her response at age 15 to being asked for sex by a friend who brought her home from school was that she felt scared and she "gave him what he wanted." This pattern of response to threat or danger was also apparent in Ms. Sheppard's description of her experiences and

behaviors at the time of the crime at issue in that she describes believing that if she did not cooperate with James Dickerson or if she tried to leave or run away from him it would increase the danger and risk to herself and to her baby.

98. In addition, the type of unpredictable and chaotic environment in which Ms. Sheppard was raised has the potential to lead to a response or coping pattern referred to as, "learned helplessness." The theory of learned helplessness developed from research on both animals and humans demonstrating when an animal is exposed to circumstances/ environments in which they have no power or ability to escape from or change distressing, painful or harmful experiences (in other words they are helpless), they often will not attempt to protect themselves or change their circumstances even when they are now in a new environment in which they do have the opportunity, power or ability to escape from or change their circumstances. This pattern of learned helplessness is often used to understand the development of mental illnesses such as major depression as well as to understand why it is difficult for people to leave abusive relationships even when they have the opportunity. The unpredictable/uncontrollable but violent and threatening environment in which Erica Sheppard was raised as well as her later experiences of sexual assault and intimate partner violence are the types of environments that lead to the later development of learned helplessness.

99. Ms. Sheppard's description of her thoughts, emotions and behaviors at the time of the crime at issue reflects a style of learned helplessness. Her narrative of the event reflected an inability to generate alternate solutions or behaviors and inability to act directly to protect herself or her infant at the time of the crime at issue.

100. This persistent exposure to violence and abuse led to a damaged sense of self in which Ms. Sheppard began to believe that she had qualities that would lead others to hurt her. She states, "I started to think, 'what's wrong with me that people do this and feel the need to do this to me and think it's OK.'" She reports that by the time she was abused by Jerry Bryant Jr. this belief was in place and it was, in part, how she understood his violence and threats towards her. She also describes these beliefs associated with her behaviors and emotions during and after the crime at issue. In particular this belief appears to have led her to believe that she and her daughter were at increased risk for harm at the hands of James Dickerson during and after the crime at issue.

101. Similarly her persistent exposure to interpersonal violence and abuse appears to have impacted Ms. Sheppard's perceptions of and beliefs about other people. Specifically, Ms. Sheppard seems to have developed the belief that not only is other people untrustworthy, they are also likely to be dangerous to her and to attempt to hurt her. In association with this she appears to have developed the belief, also grounded in her experiences, that talking with and seeking assistance from others when faced with a danger or threat is not only unlikely likely to be helpful but also has the potential to exacerbate or worsen danger and harm.

102. This belief was reflected in her descriptions of multiple experiences in her life. In particular it is reflected in her response to the violence and abuse by Jerry Bryant Junior and in her description of some her thoughts, emotion and reactions during and after the crime at issue.

103. These defensive styles that developed in the context of the abuse would have interacted with one another and compounded one another. As an example, her

sense of herself as damaged interacted with her tendency to become emotionally numb. She describes this process as, "I think don't nobody give a shit about me so I should just go away and not feel things." The combination and interaction of these coping patterns appears to have occurred at the time of and after the crime at issue. For example she appears to have combined the tendency to believe that others are likely to hurt her and her estimation of threat towards her by James Dickerson with a response reflecting learned helplessness and an overall belief that the best way to remain safe in the face of threat and danger is to cooperate and "go along."

104. Ms. Sheppard's mental/intellectual limitations, particularly the deficits in her executive functioning, are likely to have exacerbated the tendency to rely on these coping styles and reactions. Although these deficits appear to have impacted her day to day functioning to some extent, they became even more notable when she was faced with complex problems or increased stress or threat. In these circumstances, she is significantly more vulnerable to behaving in an unplanned and impulsive manner. Likewise, in the face of increased emotions or severe stress, she is less likely to be able solve problems or organize her behaviors in a logical or rational manner. She is also less likely to generate and follow thought out and effective plans of action. These problems of ineffective responding in the face of stress, a tendency to rely on longstanding but problematic coping responses, and poor ability to control impulses or act thoughtfully under stress, appear to have been present at least dating from late childhood and adolescence and to have been present prior to and at the time of the crime at issue.

105. In 1995, the above points were well known to mental health professionals and well documented in available social and behavioral literature including (but not limited to) the following:

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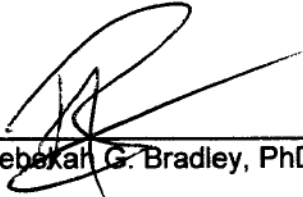
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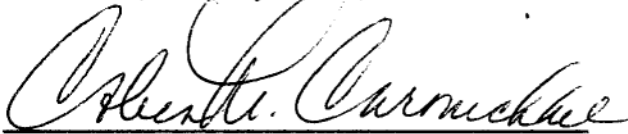
106. The above statements represent results of my evaluation of Ms. Sheppard that I would have provided to a trial counsel in the case of Ms. Sheppard at the time of her trial.



Rebekah G. Bradley, PhD.

02-10-09
Date

SUBSCRIBED AND SWORN TO BEFORE ME, a Notary Public, on this
day of February, 2009.



Notary Public, State of Georgia

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August 2002-Present

PUBLICATIONS

Powers, A., Ressler, K. and **Bradley, R.** (in press)The Protective Role of Friendship on the effects of Childhood Abuse and Depression. *Depression and Anxiety*.

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Evces, M., Castleberry, J., Graham, A., Ressler, K.J. and **Bradley, R.G. (2007.) Posttraumatic Stress Symptoms as a Mediator Between Child Abuse and Violent Behavior.** International Society of Traumatic Stress Studies, Baltimore, MD.

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Burke, P. & Bradley, R. (2003). **Language Use in Dialogue and Narrative Disclosures of Trauma**. American Psychological Association, Toronto. Canada.

Bradley, R. & O'Connell, M. (2002). Race, SES, & Interpersonal Violence: A Critical Review of the Literature. International Society of Traumatic Stress Studies, New Orleans, LA.

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STATE OF MARYLAND)
)
)
COUNTY OF WASHINGTON)

AFFIDAVIT OF JONATHAN SHEPPARD

JONATHAN SHEPPARD, being first duly sworn, appeared before the undersigned authority duly designated to administer oaths and states as follows:

1. My name is Jonathan Sheppard. I am over 18 years of age and otherwise competent to give this affidavit. My sister, Erica Yvonne Sheppard, was convicted of capital murder and sentenced to death in 1995 in Harris County, Texas.
2. I was born in Bay City, Texas. I am approximately two years older than Erica. Below are some photos of Erica and myself that truly and accurately depict how we looked at that time. Erica is about two years old in these photos and I am about four years old.



3. For most of our childhood, Erica and I were raised by our maternal grandmother, Annie Lee Smith, in Markham, Texas. At right is a photograph of my grandmother in her home in Markham. Below is another photograph of my grandmother in her kitchen with Erica and my grandfather, Robert Smith. My grandfather passed away in 1977 when I was five and Erica was three years old. Erica would have been about three years old in the photograph. Both photographs truly and accurately depict my grandmother, her home, Erica, and our grandparents, Mr. and Mrs. Smith.



4. My mother, Madelyn Smith Johnson, lived in Houston. She would visit us in Markham on the weekends or during the summers. Erica and I often went back and forth between Markham and Houston, which was almost a two-hour drive. At right is a map of southeast Texas which truly and accurately depicts the relative location of Houston and Markham.



5. When Erica and I were young, we were physically and sexually abused by a babysitter and her boyfriend. I later came to learn that the babysitter's name was Lonnie Marie Spann, but Erica and I only knew this woman as "Cookie." Cookie was a friend of my mother's from the neighborhood. I was about seven and Erica was about five years old. The abuse happened over the course of a summer. I believe that it was the summer just before my second grade year. It would have been the summer before Erica entered Kindergarten. It was the worst summer of my life.
6. My mother had come from Houston to live with us, and she had moved us into a small apartment in Bay City. Bay City is about eight miles from where my grandmother lived in Markham. Because school was out for the summer and my mother was working during the day, we were left in the care of the neighbor we knew as Cookie.
7. Cookie was physically abusive towards me and Erica. She would constantly hit us with her hands or whip us with electrical cords. She would do other things like make us walk to store without any shoes. It was during the summer and we would burn our feet on the hot pavement. The abuse happened almost every day.
8. One day, I accidentally spilled a Kool-Aid drink on the kitchen floor. Cookie became angry and made me get on my hands and knees and lick it up off the floor. I remember being very scared and crying. I felt very humiliated when she made me do this. I knew I had to do what Cookie said or she would beat me. For some reason I recall this incident very distinctly, and it still makes me emotional to think about it.
9. Cookie had a boyfriend whose name I do not recall. Cookie would make my sister perform oral sex on this man. Erica was only about five years old. Cookie would make me sit there and watch. It happened several times that summer. I do not know what other sexual acts Erica was made to perform on this man. But I recall feeling very bad at having to watch my little sister go through this.
10. Sometime during that summer, I finally told my grandmother about the abuse. I told my grandmother that I did not want to go back with Cookie anymore. I recall overhearing my grandmother and my mother arguing about it. My mother told my grandmother that we were lying and, as a result, my mother never reported the abuse to the authorities. This is when my grandmother took us to live with her again in Markham. My mother moved back to Houston.
11. It was one thing for Erica and me to have been physically and sexually abused. But it is another thing when the person who is supposed to love you and care for you does not believe you. It made it even worse. This is how I felt when my mother did not believe that Erica and I were being abused. My mother never asked me or Erica whether Cookie



was abusing us. In fact, it was my grandmother who finally removed us from Cookie's care.

12. Even though my grandmother did believe us, she never reported the abuse to the authorities, either. In those days, abuse was not talked about the way it is today. Now, if someone mentions abuse, everyone is involved: teachers, authorities, and the courts. Back then, I don't think that abuse, sexual or otherwise, was met with the same severity that it is today.
13. Erica and I never talked to each other about what we experienced. Growing up, we were never close the way brothers and sisters are close. As a teenager, I probably would have said that Erica and I were not close because we were just different. Now, I realize that I distanced myself from Erica as a way to cope with my feelings. I felt very guilty for not being able to protect her, but I was only six years old. I grew up feeling like I was a terrible brother to her. And when Erica started getting pregnant at an early age, I knew that it had something to do with us being abused. But I distanced myself even further. I just did not want to get involved.
14. As a teenager, my mother never understood why I did not like to be touched. There are some normal ways that people touch each other, such as on the arm or on the shoulder. I never felt and still do not feel comfortable with these kinds of touch. If my mother came toward me to touch me, I would flinch. She couldn't understand why I was like this until I finally told her how bad the abuse had affected me.
15. It was after I had this talk with my mother that I sought counseling. I was 18 years old, maybe even older. My mother attended one or two sessions with me. She finally acknowledged the abuse and apologized for not believing us as children. This is the only time I remember my mother talking to me about the abuse. Since then, I have received counseling for the abuse at least two other times in my adult life. I would not have been able to deal with the abuse without counseling, but even today it is something that I struggle with. It was through counseling that I learned I was clinically depressed.
16. I have so much hate for this woman, Cookie. So much in my life has been affected by what Cookie did to me and my sister. As an adult, dealing with the abuse has been slow and painstaking. It is like putting together pieces of a puzzle. There are times in my life where I connect the abuse with something that is happening in my life. I go back into therapy so that I can deal with it. For many years, the way I dealt with the abuse was to not deal with it.
17. Seeing how the abuse affected my sister has also affected me. Erica never received counseling the way I did. Being able to turn to someone for help is critical, and Erica never had that. She did not have it with me because I was dealing with the same thing. She did not have it with my mother because, for many years, my mother did not even believe us. Knowing how this has affected me, I can say that Erica did not have it easy.
18. Erica was not what you would call "street smart." She would meet people and make friends too easily. The bad thing about growing up in Markham is that you do not learn

how to defend yourself the way you would learn in a big city. I do not think Erica ever really learned to defend herself.

19. Growing up, I eventually came to prefer staying with my grandmother instead of my mother. My mother and grandmother would constantly scream and argue in front of me and Erica about who was going to take care of us. My grandmother would demand that we stay with her in Markham, and my mother would scream back that these were "her children," when, in fact, my grandmother was the one raising us.
20. I recall one occasion when my mother wanted to take me and Erica to Houston to stay with her. Erica and I were in elementary school. My mother and grandmother were having one of their yelling matches, and my grandmother threatened to call the police. My mother took me and Erica kicking and screaming back to Houston that day.
21. Erica and I did not really have a father growing up. My mother and father divorced when I was about six and Erica was about four years old. I do not remember my father much as a child because he lived in Houston with my mother. When my mother would stay with us in Markham, my father usually remained in Houston.
22. When I was a teenager, I was not close to my father at all. Even though he and my mother were not married, I occasionally saw him. My father was an alcoholic and whenever I saw him, he would be drunk. I recall that he once told my mother that he "would not have a faggot for a son," referring to me. I never talked to my father after that day. He passed away in 2003.
23. After my parents divorced, my mother started dating women. My grandmother did not approve of homosexuality. This is another reason my grandmother would have us stay with her, because she did not want us around my mother's lesbian relationships. My grandmother and mother constantly fought about this issue, and my grandmother would call my mother derogatory names in front of us, such as "bulldagger." "Bulldagger" is slang for an African American lesbian who has a masculine appearance.
24. My mother showed preferential treatment towards me growing up. Erica would often say that she felt as if our mother loved me more. My mother would say things like, "Why can't you get grades like your brother?" Erica had difficulties in school, and I often got better grades than her. Erica failed the fourth grade.
25. My grandmother was at church almost every other day. She played the organ and even had her own set of keys to her church, which was Mother Zion Missionary Baptist Church in Bay City, Texas. The picture to the right shows my grandmother in church and it truly and accurately depicts how she looked at that time. Erica and I also attended Mother Zion Missionary Baptist Church while we were growing up. Erica and I attended Sunday school and sang in the church choir.



The photograph below shows the three of us – Erica, myself and our grandmother – at church and it also truly and accurately depicts how we looked at this time.

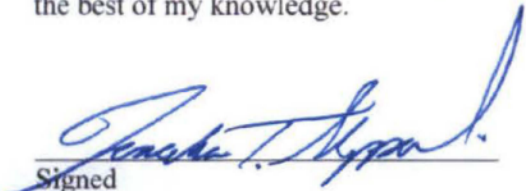


26. My grandmother's discipline was based on very traditional Baptist values. She was extremely strict and overly protective of me and Erica. Erica and I were not allowed to have sleepovers or go over to friends' houses, for example. My grandmother referred to it as "running in the streets." In elementary school, I was not allowed to join the Boy Scouts or attend summer camps. Erica and I did not have much social interaction with other children outside of church. In this way, Erica and I grew up sheltered in Markham.
27. My grandmother's attitude toward discipline was "spare the rod, spoil the child." She would constantly spank us with a belt or with switches if we misbehaved. The way I saw it, if it didn't kill me, then it probably made me a better person. The difference between the physical discipline given by my grandmother and by Cookie was that I felt that my grandmother loved me.
28. My mother also used physical discipline to punish us. She would give us pretty bad spankings with whatever she could find, whether it was a belt or a wooden board. My mother would say that if we ever raised a hand to her, that's exactly how our hand would remain as we lay in a casket.
29. When Erica gave birth to her second child Manchie at age 17, I drove her to the hospital. I was with her when she gave birth. No one else was there for her, not even Manchie's father.
30. I do not know how Erica got involved with Jerry Bryant, Jr., who is the father of Erica's third child, Audria. Jerry was abusive towards Erica.
31. After Audria was born, Erica was living with our mother in Houston. Audria had been hospitalized at the Texas Children's Medical Center in Houston, and Erica had been back and forth between the hospital and my mother's house. Erica came to my mother's house

one night with a bloody face and a busted lip. I was present when Erica told my mother that Jerry had tracked her down at the hospital and had beaten her up in the parking lot. Erica eventually moved back to Bay City with Jerry.

32. Erica came to Houston in June 1993, a little less than one month before the crime occurred. She took a bus from Bay City to Houston, and she had Audria with her. When she arrived at the bus station, Erica called me from a pay phone and asked if she could stay with me. I told her that she could, but I was at a friend's barbecue and unable to pick her up. Erica took a cab from the bus station to my apartment.
33. I later came to understand that Erica was trying to get away from Jerry Bryant, Jr. Erica did not talk openly about Jerry at first, but she later told me that she feared that Jerry might track her down at my mother's house. It was for this reason that Erica asked to stay with me and not my mother. Erica did not even tell my mother that she was in Houston.
34. I did not testify at the punishment phase of Erica's trial. Prior to Erica's trial, an investigator from Erica's defense team asked for my help in locating Jerry Bryant, Jr. I do not recall this investigator's name. I personally drove with this investigator from Houston to Bay City to attempt to locate Jerry. We knocked on several doors, but I do not believe we ever located him.
35. Neither this investigator nor Erica's attorneys ever interviewed me about my and Erica's lives. Had anyone interviewed me, I would have told them everything I have stated in this affidavit and I would have willingly testified to these facts at her trial.

I swear under pain of penalty and perjury that the foregoing paragraphs are true and correct to the best of my knowledge.


Signed

8-27-08
Date

SUBSCRIBED TO AND SWORN before me this 27th day of August, 2008.



Notary Public, State of Maryland

My commission expires: 12-1-2010

IN THE TEXAS COURT OF CRIMINAL APPEALS
AND THE 185th JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Ex Parte ERICA YVONNE SHEPPARD, §

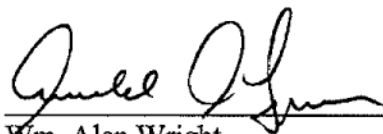
Applicant. §

C.C.A. No. 72,127
Harris County No. 668505-A

**APPLICANT'S NOTICE OF FILING OF
AFFIDAVIT OF PRISCILLA RAY, M.D., P.A.**

PLEASE TAKE NOTICE that Applicant, Erica Yvonne Sheppard, hereby submits the affidavit of Priscilla Ray, M.D., P.A. Dr. Ray's affidavit is attached hereto as Exhibit "1" and incorporated herein by reference.

Respectfully submitted,



Wm. Alan Wright
State Bar No. 22062700
Arnold A. Spencer
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214-651-5000 Telephone
214-651-5190 Facsimile

ATTORNEYS FOR APPLICANT

**APPLICANT'S NOTICE OF FILING OF
AFFIDAVIT OF PRISCILLA RAY, M.D., P.A.**

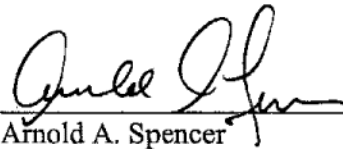
PAGE 1

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing has been served on the following attorneys in the manner indicated on the 4th day of October, 2011.

Inger M. Hampton (*Via Email [Hampton_Inger@dao.hctx.net] and First Class U.S. Mail*)
Assistant District Attorney
Harris County District Attorney's Office
1201 Franklin, Suite 600
Houston, Texas 77002

Lynn P. Hardaway (*Via Email [Hardaway_Lynn@dao.hctx.net] and First Class U.S. Mail*)
Assistant District Attorney
Harris County District Attorney's Office
1201 Franklin, Suite 600
Houston, Texas 77002



Arnold A. Spencer

IN THE TEXAS COURT OF CRIMINAL APPEALS
AND THE 185th JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

Ex Parte ERICA YVONNE SHEPPARD, §
§ C.C.A. No. 72,127
§ Harris County No. 668505-A
Applicant. §

AFFIDAVIT OF PRISCILLA RAY, M.D., P.A.

STATE OF TEXAS §
§
COUNTY OF HARRIS §

Before me, the undersigned notary public, on this day personally appeared Priscilla Ray, M.D., P.A., who, after being by me duly sworn on her oath, deposed and stated as follows:

1. My name is Priscilla Ray. I am over twenty-one years of age. I have never been convicted of any felony or of any crime involving moral turpitude, and I am otherwise fully competent to testify to the matters stated in this affidavit. I have personal knowledge of the facts and statements contained in this affidavit and each one of them is true and correct.

2. I received degrees from Vassar College in New York and Baylor College of Medicine in Texas. I have been in the private practice of Psychiatry and on the clinical faculty of Baylor; I am now an Associate Professor in the Department of Psychiatry. Currently, I serve as the the Director of Psychiatry for Methodist Hospital. In the past, I have held the following positions: President of the Harris County Medical Society, President of the Texas Society of Psychiatric Physicians, Secretary-Treasurer of the Texas Medical Association and Chairman of the Council on Ethical and Judicial Affairs. I am affiliated with Baylor College of Medicine, the Methodist Hospital, and St. Luke's Hospital. My Medical Affiliations include the American Medical Association, the Texas Medical Association, the Harris County Medical Society, the

AFFIDAVIT OF PRISCILLA RAY, M.D., P.A.



PAGE 1

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American College of Psychiatrists, the American Psychiatric Association, the Texas Society of Psychiatric Physicians, and the Houston Psychiatric Society.

3. From approximately 1978 until 1985, I served as a consulting psychiatrist for the Harris County Jail. In that role, I was frequently appointed by the Harris County Courts as an expert witness to evaluate the competency and sanity of criminal defendants who had been charged with crimes.

4. In 1994, I was contacted by Mr. Charles Brown to conduct a psychiatric evaluation of Erica Yvonne Sheppard. Specifically, Mr. Brown asked me as a psychiatrist to evaluate Ms. Sheppard's competency and sanity, as well as to evaluate whether Ms. Sheppard was likely to be influenced by men who were in a position to be abusive. Mr. Brown did not request that I evaluate Ms. Sheppard with any psychiatric diagnosis. Therefore, I limited the scope of my evaluation to those three impressions: sanity, competence and influence of potentially abusive men. I recorded my impressions in my Clinical Evaluation report of Ms. Erica Yvonne Sheppard dated November 30, 1994. I performed a clinical evaluation of Ms. Sheppard for two hours.

5. The clinical evaluation of Ms. Sheppard was not intended as a medically diagnostic interview, and I did not engage in clinical, diagnostic inquiries as I would typically perform for a medically diagnostic evaluation. My focus was on competency and sanity, which is a different referral question and medical evaluation than one focused on diagnosing psychiatric conditions. If Mr. Brown had requested that I perform a medical diagnosis for Ms. Sheppard, I was qualified and capable of doing so at that time. As a licensed psychiatrist with an active private practice, I have regularly ascertained medical, psychiatric diagnoses of my patients since 1985.

6. Specifically, Mr. Brown did not ask me to provide a diagnosis regarding whether Ms. Sheppard suffered from post traumatic stress disorder (“PTSD”) or any other trauma-related psychoses. One of the impressions that I did form, that Ms. Sheppard was more susceptible to threats by men who were in positions to be abusive, is not inconsistent with a PTSD diagnosis. In order to diagnose a patient with PTSD with clinical certainty, I would have to evaluate specific criteria as detailed in DSM-IV.

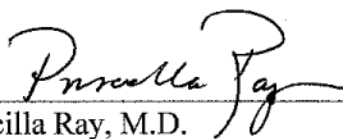
7. If I had been asked to diagnose whether Ms. Sheppard suffered from PTSD or other trauma related psychosis, I was qualified and able to do so at the time I conducted my clinical evaluation in 1994. The criteria by which PTSD could be clinically diagnosed was published in 1980 by the American Psychiatric Association in the third edition of its Diagnostic and Statistical Manual of Mental Disorders (DSM-III) nosologic classification system (Davison & Neale, 1998), and revised in the DSM-III-R in 1987. In 1992, the World Health Organization classified a substantially similar syndrome in the tenth edition of the International Statistical Classification of Diseases, Injuries, and Causes of Death (ICD-10, 1992). I was familiar at that time with the DSM-III and DSM-III-R and the related professional literature.

8. As documented in my Report, my examination consisted of a review of the medical records from Ms. Sheppard’s treatment at the Harris County Jail as well as a clinical psychiatric interview lasting two hours. Because the scope of my assignment was limited, I determined it unnecessary to conduct any additional interviews or review any other records. I did not interview any family members, social workers, or other doctors who had provided previous medical attention. I did not review and was not provided access to any of the following:

- Investigative Report of Investigator Charles Castillo

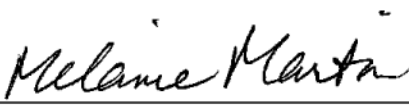
- Medical Records
- School Records
- Offense and Incident Reports
- Affidavits or Statements from any individuals
- Records from any Social Services organization, such as women's shelters

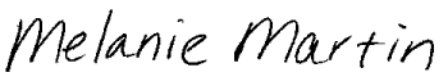
FURTHER AFFIANT SAYETH NAUGHT.


Priscilla Ray, M.D.

SWORN AND SUBSCRIBED to before me, the undersigned notary public on this 5th day of October, 2011, in witness whereof have I set my hand and official seal.




Notary Public in and for the State of Texas


Notary's Printed Name