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APPENDIX A

Order, *Ex parte Jenkins*, No. WR-86,569-01 (Tex. Crim. App. April 16, 2025)

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NOS. WR-86,569-01 & -02

EX PARTE WILLIE ROY JENKINS, Applicant

ON INITIAL AND SUBSEQUENT APPLICATIONS FOR POST-CONVICTION WRITS OF HABEAS CORPUS
CAUSE NOs. CR-10-1063-C-WHC1 AND CR-10-1063-C-WHC2 IN THE 274th JUDICIAL DISTRICT COURT
HAYS COUNTY

Per curiam.

O R D E R

Before the Court are Applicant Willie Roy Jenkins's initial and first subsequent applications for writs of habeas corpus, filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.[1]

In 2013, a jury convicted Applicant of murdering Sheryl Norris in November 1975

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

in the course of committing or attempting to commit aggravated rape.[2] *See* TEX. PENAL CODE ANN. § 19.03(a)(2). Among other things, the State presented evidence that Applicant's DNA was found in Norris's vagina as well as on the blouse she was wearing when she died. Based on the jury's answers to the special issues submitted pursuant to Article 37.0711, the trial court sentenced Applicant to death. This Court affirmed Applicant's conviction and death sentence on direct appeal. *Jenkins v. State*, 493 S.W.3d 583 (Tex. Crim. App. 2016).

Applicant filed his initial Article 11.071 habeas application (our -01) in the trial court on July 9, 2015. He raises nine claims for habeas relief:

- "[Applicant's] due process rights were violated when the State used false evidence to obtain a guilty verdict" (Initial Writ Claim 1);
- "Trial counsel provided ineffective assistance during the guilt/innocence phase of [Applicant's] trial" (Initial Writ Claim 2);
- "[Applicant's] due process rights were violated when the State obtained a death sentence through the use of false and misleading expert testimony" (Initial Writ Claim 3);
- "Trial counsel provided ineffective assistance during the punishment phase of [Applicant's] trial" (Initial Writ Claim 4);
- "Trial counsel were ineffective when they created a conflict of interest by representing [Applicant] after their qualifications were challenged" (Initial Writ Claim 5);
- "Trial counsel provided ineffective assistance during the jury selection phase of

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[2] The version of the capital murder statute in effect at the time of the offense used the term "rape." In 1983, the Legislature changed the term to "sexual assault." *See* Acts 1983, 68th Leg., p. 5317, ch. 977 (regarding Texas Penal Code Section 19.03(a)(2)).

[Applicant's] trial" (Initial Writ Claim 6);

- "[Applicant's] death sentence is unconstitutional because his ability to investigate and present evidence was impeded by excessive passage of time before his trial" (Initial Writ Claim 7);
- "[Applicant's] death sentence must be vacated because the punishment phase jury instruction restricted the evidence that the jury could determine was mitigating" (Initial Writ Claim 8); and
- "The cumulative impact of the preceding errors requires reversal" (Initial Writ Claim 9).

In May 2022, after holding a live evidentiary hearing on several of Applicant's initial writ claims, the trial court signed an order in which it: (1) adopted all of the State's proposed findings of fact and conclusions of law, save for numbers 74, 101, 127, 150, 171, 203 through 205, 232, 395, 485, 530, 556, 589 through 591, 748, 775 through 776, 797 through 799, 843, 915 through 916, 927 through 928, and 938 through 939; and (2) recommended that this Court deny habeas relief on all of Applicant's initial writ claims, either on procedural or substantive grounds, or both. The trial court then forwarded a partial habeas record to this Court.

Meanwhile, in 2017, pursuant to a request from the Hays County District Attorney's Office, the Texas Department of Public Safety (DPS) undertook a reinterpretation of the DNA evidence relied on by the State at Applicant's trial. DPS's DNA Section Supervisor, Allison Heard, spearheaded the lengthy reinterpretation process.

In July 2022, after the parties had submitted their proposed findings of fact and

conclusions of law regarding Applicant's initial writ claims, but while his initial application was still pending before this Court, Heard notified the parties of certain developments that had arisen during the reinterpretation process. In January 2023, while this Court was still awaiting a complete habeas record for the initial application, and before the complete DNA reinterpretation results were available, Applicant filed a "Motion to Stay Article 11.071 Proceedings" with us. Therein, Applicant referenced the developments noted by Heard and asked us to stay his initial writ proceedings so that he could review the information Heard provided, assess its significance, and if necessary, move to admit additional evidence into the habeas record. In light of this information, we remanded Applicant's case to the trial court, instructing it to consider the issues discussed in Applicant's motion, determine whether they affected his initial writ claims, and make additional or different findings of fact and conclusions of law should it be necessary. *Ex parte Jenkins*, No. WR-86,569-01 (Tex. Crim. App. Mar. 1, 2023) (not designated for publication).

In late 2023, DPS completed its reinterpretation of the DNA evidence in Applicant's case and reported the results. Most significantly, Heard reported that Applicant is linked even more strongly as the contributor to the DNA in Norris's vagina (by odds in the septillions versus the previous quadrillions). However, the DNA on Norris's blouse cannot now be interpreted due to newly detected low-level contamination associated with her previously known profile.

In December 2024, the trial court entered supplemental findings of fact and conclusions of law, which were forwarded to this Court. In these supplemental findings and conclusions, the trial court determined that: (1) the post-trial DNA developments are factually unrelated to and have no effect on any of Applicant's initial writ allegations; (2) any new factual allegations or claims predicated on the post-trial DNA developments would be untimely amendments to Applicant's initial writ application under Article 11.071, Section 5(f); and therefore, (3) any such claims would be subsequent and the trial court would have no jurisdiction over them unless and until this Court determined that the allegations met an exception under Section 5(a).

The circumstances that led this Court to remand Applicant's initial habeas application also prompted Applicant, on May 14, 2024, to file his first subsequent application in the trial court. Applicant raises four claims in his subsequent application, the majority of which concerns the results of the reinterpretation of the DNA evidence from his case:

- "[Applicant] is entitled to relief under Article 11.073 because new scientific evidence contradicts the State's DNA [evidence] at trial" (Sub-writ Claim 1);
- "Scientific evidence presented by the State at trial was false and misleading" (Sub-writ Claim 2);
- "[Applicant] is actually innocent of the capital murder for which he is death-sentenced" (Sub-writ Claim 3); and
- "[Applicant's] Sixth Amendment right to a public trial was violated when the courtroom doors were locked during his capital jury selection" (Sub-writ Claim 4).

We turn first to Applicant's initial habeas application. We have reviewed the record regarding the nine allegations he has raised. Initial Writ Claims 1, 3, 5, 7, and 8 are procedurally barred from receiving a merits' review because they were raised and rejected on direct appeal, or they could have been raised on direct appeal, but were not. *See Ex parte Hood*, 304 S.W.3d 397, 402 n.21 (Tex. Crim. App. 2010); *Ex parte Nelson*, 137 S.W.3d 666, 667 (Tex. Crim. App. 2004). Alternatively, Applicant is not entitled to relief on the merits of these claims.

Applicant's allegations—that trial counsel rendered constitutionally ineffective assistance at various phases of his trial (Initial Writ Claims 2, 4, and 6)—likewise fail on the merits. Applicant has not met his burden under *Strickland v. Washington*, 46 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel's representation fell below an objective standard of reasonableness and that there as a reasonable probability that the results of the proceedings would have been different but for counsel's deficient performance. *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688). Applicant's claim of cumulative error (Initial Writ Claim 9) also fails on the merits because he presents no error to cumulate. *See Chamberlain v. State*, 998 S.W.2d 230 (Tex. Crim. App. 1999).

We adopt the trial court's original findings of fact and conclusions of law (except for numbers 226 and 227) as well as its supplemental findings and conclusions. Based on the trial court's findings and conclusions that we adopt and our own review, we deny

habeas relief as to all of the claims in Applicant's initial writ application.

Turning to Applicant's first subsequent application, we have reviewed his four allegations and conclude that he has failed to satisfy the requirements of Article 11.071, Section 5(a). Accordingly, we dismiss Applicant's subsequent application as an abuse of the writ without considering the merits of the claims.

IT IS SO ORDERED THIS 16th DAY OF APRIL, 2025.

Do Not Publish

APPENDIX B

State District Court's Findings of Fact and Conclusions of Law, May 12, 2022, with State's Proposed Findings of Fact and Conclusions of Law for reference

CR-10-1063-C-WHC1

EX PARTE	§	IN THE DISTRICT COURT
	§	274TH JUDICIAL DISTRICT
WILLIE JENKINS, Applicant	§	HAYS COUNTY, TEXAS

TRIAL COURT'S ORDER ADOPTING STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

On May 31, 2013, Applicant Willie Jenkins was found guilty of capital murder. On June 13, 2013, based on the jury's answers to special issues, he was sentenced to death.

Applicant's conviction and death sentence were affirmed on automatic direct appeal by the Court of Criminal Appeals on June 29, 2016 (AP-77,022). On direct appeal, the Court of Criminal Appeals held as follows:

1. The evidence was sufficient to support the jury's verdict that Applicant intentionally murdered the victim in the course of committing aggravated rape.

2. The trial court did not err by denying Applicant's motion to suppress the DNA evidence, the CODIS hit, and the inculpatory evidence that was obtained after Applicant was a suspect. The DNA evidence admitted at trial was sufficiently reliable to assist the jury.

3. The trial court did not abuse its discretion by excluding Applicant's plea offer evidence. If relevant, it was only minimally so, and the probative value, if any, was substantially outweighed by the danger of unfair prejudice and misleading the jury.

4. The trial court did not err in denying Applicant's motion for a mistrial based on juror misconduct. The trial court properly employed less drastic measures that effectively insulated the jury from outside influence and sufficiently cured the problem created by one juror's misconduct.

5. The trial court's jury instructions followed the required statutory language for a capital murder charge. There were no errors in the jury charge.

6. The Court of Criminal Appeals rejected Applicant's claims of Equal Protection violations and Eighth Amendment violations.

On July 9, 2015, Applicant's habeas counsel filed his application for post-conviction writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure, along with exhibits, affidavits, documentary evidence, and juror questionnaires. In his writ application, Applicant alleges nine grounds for relief:

1. Ground One: Applicant's due process rights were violated by the State's knowing use of false testimony during the guilt phase of Applicant's trial;

2. Ground Two: Applicant's trial counsel provided ineffective assistance at the guilt phase of Applicant's trial, including:

    a. Not being qualified to represent a capital defendant in a trial where the State was seeking the death penalty;

    b. Failing to present testimony from a DNA expert;

    c. Failing to correct false and misleading testimony presented by the State;

    d. Failing to object to the State's presentation of Dr. Charles Bell's conclusions to the jury;

    e. Failing to interview and present testimony from the original investigation; and

    f. Allowing DNA evidence to be presented prior to having a hearing on its admissibility;

3. Ground Three: Applicant's due process rights were violated by the State's knowing use of false testimony during the punishment phase of Applicant's trial;

4. Ground Four: Applicant's trial counsel provided ineffective assistance at the punishment phase of Applicant's trial, including:

    a. Failing to challenge or rebut Dr. Barry Hirsch's expert testimony with Dr. Brian Abbott or a similarly qualified expert;

    b. Failing to recall Dr. Joan Mayfield; and

    c. Failing to investigate and present an attachment expert in mitigation of punishment;

5. Ground Five: Applicant's trial counsel were ineffective when they created a conflict of interest by representing Applicant after their qualifications were challenged;

6. Ground Six: Applicant's trial counsel were ineffective during the voir dire of Applicant's trial, including:

    a. Failing to support their *Batson* motion with a comparative juror analysis; and
    b. Failing to properly preserve trial-court error when the court denied counsel's challenges for cause;

7. Ground Seven: Applicant's death sentence is unconstitutional because his ability to investigate and present evidence was impeded by the passage of time before his trial;

8. Ground Eight: Applicant's death sentence is unconstitutional because the jury instructions restricted the evidence that the jury could consider mitigating; and

9. Ground Nine: The cumulative impact of the preceding errors requires reversal.

The State filed an answer, accompanied by exhibits, transcripts of witness depositions played at trial, affidavits, and other documentary evidence.

This court granted Applicant's request to expand the scope of the evidentiary writ

hearing to permit evidentiary development of the prejudice prong of the ineffective assistance of counsel claims.

The undersigned habeas judge, presiding by assignment, held an evidentiary hearing beginning on September 13, 2021, continuing through September 17, 2021, resuming again on December 1, 2021, and concluding on December 27, 2021. Because of the ongoing pandemic, four of the witnesses testified by video-teleconference.

This court has reviewed Applicant's Initial Application for Writ of Habeas Corpus, Applicant's Supplemental Information to Initial Application Claims One and Two, the State's answers, the parties' briefing, all exhibits, official court documents and records from the trial and direct appeal. This court heard testimony during the expanded, multi-day evidentiary hearing, received documentary evidence, and heard arguments presented by the parties, and has reviewed all records from the habeas proceedings.

This court has considered all of the above, and has reviewed both the State's Proposed Findings of Fact and Conclusions of Law, and the Applicant's Proposed Findings of Fact and Conclusions of Law.

This habeas court hereby agrees with and adopts the attached proposed Findings of Fact and Conclusions of Law filed by the State on March 24, 2022, and incorporates them herein by reference. More specifically,

- With regard to Ground One (False Testimony at Guilt Phase), this court agrees with and adopts the State's proposed findings and conclusions 25

through 73, 75 through 100, 102 through 126, 128 through 149, 151 through 170, and 172 through 202. This court recommends that Ground One be denied.

- With regard to Ground Two (Ineffective Assistance of Counsel at Guilt Phase), this court agrees with and adopts the State's proposed findings and conclusions 206 through 231, 233 through 394, 396 through 484, 486 through 529, and 531 through 555. This court recommends that Ground Two be denied.
- With regard to Ground Three (False Testimony at Punishment Phase), this court agrees with and adopts the State's proposed findings and conclusions 557 through 588. This court recommends that Ground Three be denied.
- With regard to Ground Four (Ineffective Assistance of Counsel at Punishment Phase), this court agrees with and adopts the State's proposed findings and conclusions 592 through 747, and 749 through 774. This court recommends that Ground Four be denied.
- With regard to Ground Five (Conflict of Interest), this court agrees with and adopts the State's proposed findings and conclusions 777 through 796. This court recommends that Ground Five be denied.
- With regard to Ground Six (Ineffective Assistance of Counsel at Voir

Dire), this court agrees with and adopts the State's proposed findings and conclusions 800 through 842, and 844 through 914. This court recommends that Ground Six be denied.

- With regard to Ground Seven (Passage of Time), this court agrees with and adopts the State's proposed findings and conclusions 917 through 926. This court recommends that Ground Seven be denied.
- With regard to Ground Eight (Mitigation Jury Instruction), this court agrees with and adopts the State's proposed findings and conclusions 929 through 937. This court recommends that Ground Eight be denied.
- With regard to Ground Nine (Cumulative Error), this court agrees with and adopts the State's proposed findings and conclusions 940 through 943. This court recommends that Ground Nine be denied.

This court recommends that Applicant's Application for Writ of Habeas Corpus be DENIED.

The District Clerk of Hays County, Texas, is ordered to prepare a copy of this document, together with any attachments and forward the same to the following persons by mail or the most practical means:

a. **The Court of Criminal Appeals**
Austin, Texas 78711

b. **Gwendolyn S. Vindell**
Attorney for the State
Assistant Attorney General/Assistant District Attorney
Hays County, Texas
P.O. Box 12548, Capitol Station
Austin, Texas 78711

c. **Benjamin Wolff**
Tara Lynn Witt
Attorneys for Applicant
Office of Capital & Forensic Writs
1700 Congress, Suite 460
Austin, TX 78701

SIGNED, ORDERED, and DECREED ON May 12, 2022.

JUDGE SID HARLE
Judge Presiding By Assignment
274th District Court
Hays County, Texas

Writ Cause No. CR-10-1063-C-WHC1

	§	IN THE 274TH DISTRICT COURT
Ex parte	§	
WILLIE ROY JENKINS	§	OF
Applicant.	§	
	§	HAYS COUNTY, TEXAS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After considering: 1) the initial application for writ of habeas corpus; 2) the State's Answer; 3) exhibits attached to the application, State's answer, and Applicant's motion to expand the evidentiary hearing; 4) official court documents and records from the trial, direct appeal, and these writ proceedings; 5) evidence presented at the evidentiary hearing conducted September 13–17, December 1, and December 27, 2021; 6) arguments presented by the parties; and 7) the Court's own experience and knowledge, the Court enters the following findings of fact and conclusions of law regarding Applicant's claims and recommends that relief be denied:

BACKGROUND FACTS

Evidence at Guilt

On November 24, 1975, only days before the Thanksgiving holiday, twenty-year-old Sheryl Ann Norris asked her boss, Fred Stansbury, if she could have the afternoon off so she could pack for her trip home. 37 RR 110–15. Norris left work around noon that day, and when she did not return to work after lunch, Stansbury was not concerned. 37 Reporter's Record (RR) 111–15.

Knowing Norris would be home for lunch, her live-in boyfriend Charles Wayne Andrus called the apartment several times around 12:50 p.m., but Norris did not pick up. 37 RR 137–38. Andrus had left their apartment around 9:30 a.m. to drop laundry off and leave his car at the tire shop before heading to the Texas State University campus to study for exams. 37 RR 136–37. After finishing an exam on campus, Andrus picked his car up at the mechanic's around 5:00 p.m. and drove home. 37 RR 136, 138–39.

Andrus arrived at the apartment to find the front door ajar. 37 RR 140. Andrus found Norris in the bathroom lying face up, bent backwards over the bathtub, with her pants down. 37 RR 144. Thinking she maybe had slipped or had an accident, Andrus reached down and grabbed Norris's arm. 37 RR 144. Her arm was stiff, and Andrus immediately knew she was dead. 37 RR 144–45. Realizing the assailant might still be in the apartment, Andrus ran to the unit next door, told his neighbor what he had found, and called the police. 37 RR 145.

San Marcos Police Department Officer Albert Bethea was dispatched to the scene. 37 RR 172, 174. In the parking lot, Officer Bethea encountered a visibly upset Andrus who reported he had found his girlfriend dead in their apartment. 37 RR 175–76. Officer Bethea went into the apartment and found Norris's dead body in the bathroom. 37 RR 176–77. Officer Bethea called for assistance. 37 RR 177. San Marcos Police Department Detective Guadalupe Picasio, Sergeant John East, Lieutenant Jim O'Connell, and Police Chief Rodney Nelson all arrived at the scene, as did Texas Ranger Wallace Spiller. 37 RR 177–79. At the request of Ranger Spiller, the Texas Department of Public Safety (DPS) sent a crime scene unit to assist in the collection and preservation of evidence. 37 RR 179–80, 207, 210–11, 213.

Norris's body was lying face up, bent backwards over the water-filled bathtub, with arms extended and shoulders and head submerged under water. 37 RR 177, 186, 262–64. Norris was wearing only a white blouse, a bra, and a pair of knee-high boots, and two scarves were knotted around her neck. 37 RR 214, 258, 262–64. Norris's pants and underwear were off, and one of the pant legs, turned inside out, was caught on the heel of her boots. 37 RR 214, 216–17, 260–61, 268.

The DPS Crime Lab team took photographs and fingerprints, and Criminalist Joe Ronald (Ron) Urbanovsky collected hair from the bathtub and vanity door, loose hair from Norris's body, apparent blood stains from three locations on the bathroom door, a stain from inside the open edge of the front door, various items of bedding, a pair of underwear from the bedroom floor, Norris's boots, and the trousers underneath her body. 37 RR 204, 213, 216–17, 259–60. Norris's boss, Stansbury, arrived at the scene and identified the body. 37 RR 116–17. Stansbury spoke with the Texas Ranger about Norris's whereabouts that day. 37 RR 117.

About three hours into the investigation, Norris's body was taken to the Pennington Funeral Home in San Marcos. 37 RR 213, 217. Dr. Charles Bell conducted the autopsy at the funeral home. 37 RR 219. During the autopsy, Dr. Bell collected evidence and specimens, including a swabbing of Norris's vagina that was preserved on a slide. 37 RR 219–20, 222–25, 274–76. Microscopic examination of the vaginal smear slide revealed the presence of spermatozoa. 37 RR 222–23, 275–76. After the autopsy concluded, Criminalist Urbanovsky submitted the evidence collected from the crime scene and at the autopsy to the Austin DPS Crime Lab. 37 RR 220, 222, 224. The microscopic slide was placed in a glass specimen jar and submitted as Item #14 "Vaginal smear from victim." 49 RR at SX 22. Texas Ranger Joe Davis additionally submitted evidence to the DPS Crime Lab: a sample of textured material from a hole in the sheetrock wall of the apartment, a sample of carpet, and the white blouse Norris was wearing at the time of her death. 37 RR 272.

From evidence at the crime scene, investigators believed Norris struggled with her attacker before her murder. 37 RR 270. A folded dollar bill and several coins were found scattered on the floor, which was out of place in the otherwise tidy apartment. 37 RR 181, 184, 251–52, 253–54, 255–56. A pair of underwear was found in the middle of the floor in the bedroom. 37 RR 216–17, 258. In the living room, investigators

discovered a hole in the sheetrock wall up near a light switch. 37 RR 224. A white powdery substance was recovered from the toe of Norris's boot, the upper area of her left boot, and the bottom portion of her pants. 37 RR 225–27, 261, 264–65. Through microscopic comparison and x-ray diffraction, the DPS Crime Lab concluded the substance was consistent with the material recovered from the hole in the sheetrock wall of the apartment. 37 RR 226–27, 242, 261, 264–65, 269. Investigators concluded the presence of the white powdery substance on Norris's boot and clothing meant she had been in contact with the wall and, given the hole near the light switch, had likely kicked the wall during the apparent struggle. 37 RR 269–70.

Further evidence suggested Norris had been raped shortly before her murder. 37 RR 214, 218, 222, 223–34, 265. Norris had been found wearing no pants or underwear, and microscopic examination of the vaginal smear slide at autopsy revealed the presence of sperm. 37 RR 216–17, 222–23, 258, 275–76. Investigators discovered fecal matter in the middle of the bed, the edge of a sheet, the floor of the bathroom by Norris's foot, and underneath her body. 37 RR 256–57, 260–61. Blood and fecal matter were also found on Norris's buttocks and genital area. 37 RR 218, 264–65. Two scarves were knotted tightly around Norris's neck, and she had marks and abrasions that appeared to be indicative of strangulation. 37 RR 214, 220–21, 264. A watch on Norris's wrist, submerged under water, had stopped at 12:31 p.m., suggesting the possible time at or near her death. 37 RR 263. Investigators believed they were looking at a combined rape/murder, 37 RR 214, 218, 222, 223–24, 265, and with information regarding Norris's leaving work by noon that day, 37 RR 117, that the crimes occurred in a very short time period. At trial, Dr. Jeffrey Barnard, Chief Medical Examiner for Dallas County and Director of the Southwestern Institute of Forensic Science (SWIFS), testified that Norris's death was a homicide caused by strangulation and drowning. 38 RR 91, 99–100.

Results obtained through forensic testing of the vaginal smear collected by Dr. Bell at the autopsy in 1975 ultimately led to the identification of Willie Roy Jenkins in 2010. 49 RR at SX 83. However, it took thirty-five years for science to advance enough to make that identification possible. 49 RR at SX 83. Forensic analysis available in the mid-1970s did not lead investigators to a suspect. 37 RR 221–22, 224–25. On February 12, 1976, DPS reported that comparisons of hair collected from bedding and in the bathroom were similar to hair from Andrus; other hairs were not similar to Andrus or to a former roommate of Andrus's, Joe Sewell; and hair recovered from under a fingernail on Norris's right hand was not similar to any known suspect. 37 RR 230–31. DPS reported that human blood was detected in three samples from the door in the bathroom, but each one was Type B blood group which was same blood type as Norris's. 49 RR at SX 22. No blood was detected on the samples from the front door or on carpet from the apartment. 49 RR at SX 22.

The DPS Crime Lab conducted serology analysis of the evidence, but testing of that sort was fairly limited and did not reveal much beyond a person's blood group substance. 37 RR 227. DPS reported that analysis of known blood specimens showed

Norris was a Type B secretor, Andrus a Type O secretor, and Sewell a Type A secretor. 37 RR 228–29. ABO blood group testing of the vaginal smear revealed blood group factors "B" and "H." 37 RR 229. This information did not help narrow the field of known suspects or generate any new suspects. 37 RR 227–30.

In April 1996, Terry Norris Ehart, Norris's older sister, called the San Marcos Police Department to inquire about the status of her sister's murder case. 37 RR 96–98; 38 RR 132. The call was fielded by Detective Penny Dunn in the Criminal Investigations Division. 38 RR 132–33. After locating the file, Detective Dunn and another officer, Detective Fred Wisener, began working on the case and re-started the investigation. 38 RR 134–35.

On October 1, 1997, Detective Dunn met with Javier Flores, a Criminalist at the DPS Crime Lab, to determine what physical evidence should be re-submitted for analysis using polymerase chain reaction (PCR) DNA testing. 37 RR 237; 38 RR 138–41. Based on this review, Detective Dunn re-submitted eleven categories of evidence including specimens recovered from the Norris's body at the autopsy, Norris's clothing, reference samples, items of bedding, and apparent blood stains. 37 RR 237; 38 RR 140–41; 39 RR 65. Flores viewed the microscopic slide identified as "Lab #2 (original sub #14) - vaginal smear slide in 5ml glass bottle," and found sperm which prompted him to collect a sample from the slide using two sterile swabs. 39 RR 71–72. The swabs were dried and frozen, then one swab was used by Flores in DNA testing. 39 RR 72–73, 81. Flores additionally observed spermatozoa on a stain recovered on a green blanket from the victim's bedroom. 39 RR 86–89.

Flores reported the results of PCR DNA testing in April 1998. 49 RR at SX-73. DNA isolated from the samples was analyzed by Flores using the DQ-Alpha and D1S80 amplification and typing kits. 49 RR at SX 73. Flores reported that the DQ-Alpha allele was detected in the sperm cell fraction of the green blanket and was consistent with Andrus; however, the DQ-Alpha allele in the sperm cell fraction of the vaginal smear slide (renamed "Item #14-b" by Flores) was foreign to Andrus, thus eliminating him as a contributor. 39 RR 102–05, 109. Testing of other samples did not respond to DQ typing attempts, presumptive tests for the presence of blood or semen were negative, and no other significant trace evidence was recovered from the remaining items. 39 RR 96–97.

In September 1999, the vaginal smear Item #14-b was analyzed using Short Tandem Repeat (STR) DNA analysis. 39 RR 148, 151–53. DPS Criminalist Cassie Carradine reported that a partial DNA profile from an unknown male contributor was identified. 39 RR 154, 167–68, 170. Unfortunately, the profile contained only 4 loci, which was an insufficient number of DNA markers to allow DPS to run the profile through the Combined DNA Index System (CODIS). 39 RR 170–72. Nevertheless, the DNA profile could be used for making one-to-one comparisons to known DNA profiles. 39 RR 172. Carradine compared Andrus's DNA profile to the profile identified in the sperm fraction of the vaginal swab and reported that Andrus could be excluded as the contributor. 39 RR 195. Detective Dunn continued to submit

known DNA samples of other potential suspects for comparison. 38 RR 144–47; 39 RR 172–74. Carradine would issue reports, but they all excluded suspects. 39 RR 177.

In 2008, DNA technology advanced with the advent of Minifiler, which amplifies DNA profiles contained in degraded samples. 38 RR 150; 39 RR 60–63, 222. Detective Dunn requested that DPS re-analyze the evidence in Norris's case. 38 RR 149–50. By 2010, forensic scientists with the DPS Crime Lab had sufficient training and experience to utilize Minifiler. 38 RR 149–50.

On July 22, 2010, DPS Forensic Scientist Negin Kuhlmann reported that she analyzed the extract of the sperm cell fraction of vaginal smear in Item #14-b using Minifiler and obtained a partial DNA profile consistent with a mixture. 38 RR 150; 39 RR 222. The DNA profile of the major contributor to the mixture was entered into CODIS. 39 RR 228. On August 5, 2010, Kuhlmann advised Detective Dunn there was a "hit" in the CODIS database, meaning the DNA profile of an offender in the national database matched the DNA profile from the sperm cell fraction of the vaginal smear. 38 RR 151; 39 RR 160. On August 9, 2010, the offender was verified by the CODIS database as being "Willie Roy Jenkins (B/M, DOB: 07/30/1953)." 38 RR 152.

At the time, Applicant was living in California. 38 RR 152. Detective Dunn and Corporal Scott Johnson went to California to get a DNA specimen from Applicant for direct comparison. 38 RR 158. Pursuant to a search warrant, the officers obtained two saliva samples from Applicant on buccal swabs. 38 RR 158. They also interviewed Applicant about the rape/murder, but he denied knowing the victim and denied having any knowledge of the crime. 38 RR 159.

On September 2, 2010, the officers submitted the buccal swabs to DPS for analysis. 39 RR 236–37. Less than two weeks later, Kuhlmann reported that she extracted DNA from a portion of Applicant's saliva swabs and obtained a full DNA profile of 16 loci using STR analysis. 39 RR 237. She then compared Applicant's DNA profile to the partial profile from the sperm cell fraction of the vaginal smear and reported that Applicant could not be excluded as a contributor at 14 locations. 39 RR 237–38, 244–45. At those loci, the probability of selecting an unrelated person at random who could be a contributor to the same DNA profile is approximately 1 in 365.6 quadrillion Caucasians, 1 in 5.705 quadrillion African Americans, and 1 in 20.37 quintillion Hispanics. 39 RR 245.

In April 2011, Applicant's DNA was additionally identified through Minifiler analysis in a handprint on the back left shoulder of the white blouse that Norris was wearing at the time of her death. 38 RR 162–65; 39 RR 248–50, 255–58. DNA testing of a cutting from the shirt revealed a partial DNA profile consistent with a mixture and Applicant could not be excluded as a contributor to the profile at 15 locations. 39 RR 255–58. The probability of selecting an unrelated person at random who could be a contributor to the DNA profile at those loci was reported to be 1 in 44.68 trillion African Americans. 39 RR 259.

The State now had definitive evidence linking Applicant to the murder and rape of Norris. Further evidence placed Applicant in Texas at the time of the crime. Military records showed in 1975, Applicant was enlisted in the United States Marine Corps and stationed at Twenty-nine Palms, California. 38 RR 187. Applicant was granted emergency leave from the base for thirteen days beginning November 23, 1975, the day before Norris was murdered. 38 RR 192–93. Based on testimony provided at trial, Applicant could have left the Marine Corps base as early as November 22nd provided he was off duty and had his leave papers. 38 RR 179–89, 194. During the time Applicant was on emergency leave, he drove to Texas to visit his wife, Merle Jenkins, who was then hospitalized in San Antonio. 39 RR 30–32, 36–38. He stayed at the home of his wife's father in Marion, Texas, 39 RR 38, which is about 30 miles from San Marcos, where Norris was murdered. Applicant was familiar with the area: he grew up in Marion and attended one semester at Texas State University on a football scholarship before quitting to join the Marines. 38 RR 153; 39 RR 24-25.

The defense presented no evidence in Applicant's defense during the guilt phase of trial.

State's Case-In-Chief Punishment Evidence

The State presented numerous prior criminal convictions. On August 18, 1975, Applicant kidnapped and raped Robin Marie Fox née Davenport by grabbing her off her bicycle, forcing her into his vehicle, threatening to kill her, and forcing her to have sexual intercourse. 41 RR 114, 122–29. Fox was taken to a hospital for examination, gave a full statement to police, identified Applicant from a photo lineup, and later testified against him. 41 RR 133–35. Fox stated as a result of Applicant's rape, her husband divorced her because she had been "violated," she sleeps with a knife under her bed, and she has had numerous nervous breakdowns because of her fear of Applicant and Black men in general. 41 RR 135–138. On November 20, 1975, just four days before he murdered Norris, Applicant pleaded guilty to rape by threat in the Superior Court of California, County of San Bernardino. 41 RR 94; 49 RR at SX 90. On February 27, 1976, Applicant was sentenced to 180 days in jail and three years' probation. 41 RR 96; 49 RR at SX 90.

On May 2, 1977, Applicant beat, strangled, and raped Cheryl Ireland in San Antonio, Texas. 41 RR 99–103; 49 RR at SX 91, SX 92. Ireland was not available to testify at Applicant's capital murder trial because she had passed away. 41 RR 101. However, Willie Wood testified that he was working at an HEB grocery when a woman (later identified as Ireland) suddenly appeared and was nude from the waist down, her hair all messed up, and a bruise across her forehead. 42 RR 98, 100. Ireland was "hysterical" and was "shaking and nervous and she was crying a lot." 42 RR 100. Wood testified that Ireland said "she was raped and her head had been banged against the ground a lot of times." 42 RR 101. Ireland identified Applicant in a photo lineup, and Applicant was arrested. 42 RR 89–90, 96. On November 16, 1977, Applicant was convicted of Aggravated Rape, in the 187th Judicial District Court of

Bexar County, Texas, and sentenced to seven years in prison. 41 RR 102; 49 RR at SX 92. Still on probation for the rape of Davenport at the time of his commission of the new offense, Applicant was returned to California after serving his Texas prison term, imprisoned for the parole violation, and released in February 1983. 41 RR 97–99; 49 RR at SX 90.

Six months later, on August 20, 1983, Applicant forcibly raped Carol Vela née Park in Kern County, California, after picking her up hitchhiking and then driving her into the desert. 43 RR 14–15, 20–23. Afterwards, Vela cleaned herself with some napkins out of the glove box of Applicant's car and left them by the side of the road. 43 RR 23–24. Applicant dropped Vela off at a bar after she promised not to tell anyone what happened. 43 RR 24–25. As soon as Applicant left, the police were called. 43 RR 25. Vela went to a hospital for examination and accompanied officers to the scene where they found the napkins she had left behind. 43 RR 25–26. Applicant was arrested. 43 RR 26–27. For many years after Applicant's rape, Vela was afraid to be around Black people in general. 43 RR 27–28. On November 10, 1983, Applicant was convicted of Forcible Rape in the Superior Court of California, County of Kern, and sentenced to eight years in prison. 41 RR 105–06; 49 RR at SX 94.

On June 16, 1991, Applicant raped Mylissa Foutch née Rein in Ridgecrest, California, after offering her a ride to run errands. 41 RR 108–10; 44 RR 12, 14. Foutch consented, but did so because she was afraid of him. 44 RR 20–21. Foutch did not report the rape immediately out of embarrassment and fear that her fiancé might leave her, but she eventually called police. 44 RR 22. She assisted officers in locating Applicant's vehicle and later identified him in a photo lineup. 44 RR 22–23. Foutch testified that she and her fiancé had been trying to expand their family, but within days of Applicant's rape, Foutch learned she was pregnant. 44 RR 25. The next nine months were "the worst nine months" of Foutch's life fearing the pregnancy came from the rape. 44 RR 25. The couple did not know until the day Foutch gave birth that their baby girl was not fathered by Applicant. 44 RR 27. As a result of the rape, Foutch is in therapy, takes medications, and suffers from night terrors in which she viciously attacks her husband on a regular basis in her sleep. 44 RR 27–28. She is also fearful of any Black man that looks at her. 44 RR 28. On October 13, 1991, Applicant was convicted of Rape by Force in Kern County, California, and sentenced to ten years in prison—eight years for the crime and two years for enhancement because of his prior offense history. 41 RR 108–09; 44 RR 24; 49 RR at SX 96.

The State also presented evidence of several unadjudicated offenses. Applicant's youngest stepdaughter, Karen Woods née Billings, testified that in 1970, Applicant drove her to Seguin to deliver food to her mother, Merle Jenkins, at work. 42 RR 38, 42–43. On the way there, Applicant touched Woods's breasts and genitals, partly reaching beneath her clothes, terrifying her. 42 RR 43. She was eight years old at the time. 42 RR 43–44.

Woods also testified that after Applicant was transferred to Camp Lejeune, North Carolina, she and her mother moved there with him. 42 RR 47, 52. While there,

she started barricading herself in her bedroom by pushing a heavy dresser against the door to prevent Applicant from entering her room at night. 42 RR 54–58.

Woods further testified that between 1976 and 1977, Applicant sexually assaulted her on three separate occasions when she was fourteen years old. 42 RR 59, 63–66, 70–74. The first sexual assault happened after Applicant promised her that if she had sexual intercourse with him, he would stop coming into her bedroom at night and "busting" into the bathroom to watch her bathe. 42 RR 61–63. She agreed and had sex with Applicant, even though she did not want to. 42 RR 63. The second sexual assault occurred when he was giving her a ride home. 42 RR 64. Applicant pulled his car into a ditch on the side of the road, prevented her from leaving, and raped her. 42 RR 64–66. Charges were filed and Applicant was arrested, but the charges were dropped. 42 RR 66–68. The third sexual assault happened later that same year when Applicant was again driving her home, but then turned down a gravel road and raped her. 42 RR 73. She stated this rape was "much worse" than the one before and Applicant forcefully slammed her against the car door and window. 42 RR 74.

Applicant's older step-daughter, Brenda Flynn née Billings, testified that around 1971—when she was thirteen or fourteen years old—there were two different occasions where she saw Applicant's reflection in a broken piece of mirror that he slid underneath the bathroom door to watch her while she bathed and changed clothes. 41 RR 147–49. She also awoke one night to find Applicant touching her genitals underneath her panties. 41 RR 148–50. She pushed Applicant's hand away, and he left her bedroom. 41 RR 149. After Applicant touched her again in the same way, she told her mother about it. 41 RR 149–50. But her mother refused to believe her and accused her of lying. 41 RR 150. She was able to escape the continued sexual abuse by Applicant when he and her mother left her and two older siblings in Texas when they moved to California. 41 RR 147, 151.

In 1977, Applicant also committed the unadjudicated rape of Barbara Meyer née Hunt in San Antonio, Texas. Applicant found Meyer working alone in a used furniture store and raped her against her will. 42 RR 15–18. After Applicant left the store, Meyer ran outside and wrote down the license plate of Applicant's car as he drove away. 42 RR 18. Meyer did not call the police initially, but did so after Applicant returned to the store at a later time. 42 RR 19. Meyer reported the rape, gave the authorities the license plate number, and identified Applicant in a line up. 42 RR 19. Meyer was not aware of the outcome of the investigation. 42 RR 20–21.

Further, the State presented evidence regarding Applicant's behavior while institutionalized. On September 20, 2001, Applicant was found to be a Sexually Violent Predator (SVP) under California law and ordered to be committed at Atascadero State Hospital for a period of two years. 49 RR at SX 98. Applicant's commitment was continuously extended, until it was determined he would be committed for an indefinite term. 49 RR at SX 98; 50 RR at SX 209. At the time of Applicant's arrest for the rape and murder of Norris, Applicant was residing at

Coalinga State Hospital under re-commitment as an SVP. 49 RR at SX 98; 50 RR at SX 209.

The State's evidence showed that, during all these commitments, Applicant assaulted at least six fellow patients by hitting them, biting them, or attempting to gouge their eyes out. *See* 41 RR 165 (assault of Atoa Atauleyao); 41 RR 167 (assault of Patrick Hernandez); 42 RR 22 (assault of Lavell Stallworth); 42 RR 25 (assault of Reginald Smith); 42 RR 104–05 (assault of Gene Ornelas); 42 RR 48–51, 65–66 (assault of Dennis McDaniel). At least one patient was hospitalized as a result of Applicant's assault of him. 43 RR 65–66 (McDaniel spent ten days in an off-site hospital as a result of injuries incurred during fight with Applicant). Another patient was taken to the hospital after Applicant knocked him unconscious during a fight. State's Hearing Exhibit (SHX) [1] 162; SHX 163; SHX 165.

The testimony also revealed Applicant assaulted staff members. On October 9, 2010, Applicant assaulted Rebecca Vanderwerff, a psych tech at Coalinga State Hospital. SHX 161. Vanderwerff testified that she had not had any problems with Applicant prior to that day, but as she was leaving the unit, Applicant came over and grabbed the shoulder strap of her lunch box and pulled down hard three or four times which pulled her lanyard and her hair and scratched her neck. SHX 161, at 9–10. In a loud voice, Vanderwerff told Applicant several times to let her go. *Id*. at 12. As she pulled away, Applicant yelled "Fuck you, I hope you die…" and "I've got nothing to lose[.]" *Id*. at 13. She reported the incident, and officers did a full investigation of the assault. *Id*.; 50 RR at SX 169; 43 RR 87.

Finally, the jury heard testimony from Norris's younger sister, JoDan Norris Gilleland, about Norris's life and how her death impacted their family. 44 RR 29. Gilleland described the family's close upbringing and how Norris was outgoing, "kind of a jokester," and "a real people person." 44 RR 30–35.

Defense's Punishment Evidence

The defense presented several lay witnesses in mitigation of Applicant's punishment. Cynthia Elliot, Applicant's half-sister, testified that their mother was verbally abusive and would hit her to the point where Elliot had to leave the home. 45 RR 81–82. Elliot did say, however, that she never lived in the same household as Applicant. 45 RR 80. She also did not meet Applicant until she was between the ages of thirteen and fifteen. 45 RR 82. Elliot did not remember Applicant visiting their mother before this visit and did not remember seeing Applicant after the visit. 45 RR 83–84.

[1] At Applicant's trial, the parties introduced numerous depositions, which were played for the jury but not transcribed. With its answer, the State proffered transcripts of the depositions played at trial, which this Court admitted at the evidentiary hearing. The Court cites to the State's Hearing Exhibits here.

Applicant's sister, Pamela Jenkins, testified that Applicant moved into her household when she was young. 45 RR 91. Nine people lived in the two-bedroom house. 45 RR 92–93. She testified that while Applicant lived there, their home did not have a full bathroom or a full kitchen, and he slept on the floor. 45 RR 94–95. Pamela testified that their biological father, Idamoore "I.D." Jenkins, was an authoritative figure who yelled a lot and was difficult to get along with. She saw no abuse in the home. 45 RR 95–96. Pamela stated she had not seen her brother since the 1980s. 45 RR 97. She acknowledged that none of her other siblings had any major problems with the law, although one brother had been arrested and gone to jail previously. 45 RR 104–05.

Applicant's step-mother, Susie Mae Jenkins, testified that an eight-year-old Applicant and his sister, Willie Jewel, came to live with her and their father, I.D. Jenkins. 45 RR 110. She recalled one night, she awoke and noticed the light on in Willie Jewel's room. 45 RR 111. Susie Mae found her husband, I.D., sitting at the foot of Willie Jewel's bed wearing just his undershorts. 45 RR 112. She said she later told I.D. that such behavior was improper. 45 RR 112. She stated when I.D. was drinking, he sometimes would strike her, but he never did so in front of the children. 45 RR 112. Susie Mae acknowledged that Willie Jewel later had a baby but she was uncertain whether her husband, I.D., was the father. 45 RR 116.

Essie McIntyre testified that she met Applicant while he was a senior in high school through his father, I.D., who helped out at the cafe she ran. 46 RR 10–11. She said Applicant referred to her as his "second mom," he sent her a picture of himself in his Marine uniform, and he sent a card every holiday. 46 RR 11. She also stated Applicant treated her and her husband with respect and she considered him a son. 46 RR 14.

One of Applicant's former schoolmates, Byron Albrecht, testified that Applicant was the best athlete at their high school, and they spent a lot of time together participating in sports at school. 46 RR 17. He and Applicant also shared a fairly large graduation party at the end of high school. 46 RR 18. When he learned Applicant married Merle and dropped out of school, Albrecht was disappointed because he felt Applicant had a good opportunity to earn his degree; however, he understood Applicant needed to support his family. 46 RR 20–21.

Tom DeKunder, Applicant's high school sports coach, said Applicant excelled in every sport and in football played every down of every game for both the offense and defense. 46 RR 151–57. DeKunder helped Applicant get his football scholarship. 46 RR 158. Applicant was the only Marion athlete at that time to receive a full athletic scholarship to attend college. 46 RR 158.

Kris Peugh, a sergeant with the Coalinga State Hospital Police Department, testified that in 2010 Applicant was involved in an assault on Rodney Short, but he could not really say much about Applicant's conduct because the officer's attention

was focused on keeping another patent from interfering with the investigation. SHX 168.

Eight patients at Coalinga State Hospital testified that they were friends or close friends with Applicant and had positive things to say about him: 1) Laquain Scott, SHX 169; 2) Eric Dannenburg, SHX 170; 3) Hernan Orozco, SHX 171; 4) Frank Pollard, SHX 172; 5) Ronnie Hunter, SHX 173; 6) Steven Burkhart, Jr., SHX 174; 7) James Glenn, SHX 175; and 8) Lawrence Lowe, SHX 176. One witness, Lawrence Lowe, testified that he once smarted off to Applicant verbally, that Applicant responded by punching him in the head and "slamming" him into a wall, but claimed the incident had been Lowe's own fault. SHX 176.

Audrey Patricia Watson, a "psych tech instructor" at Coalinga State Hospital, gave testimony that Applicant was a loner who mostly kept to himself, that Applicant had been involved in an assault but she had no first-hand knowledge of the facts, and that she showed Applicant a little respect and basically had no trouble dealing with him. SHX 177.

The defense also presented five expert witnesses. Frank AuBuchon, former chief of classification for the Texas prison system, testified about the inmate classification system. 45 RR 119. AuBuchon testified that an individual in Applicant's circumstance would likely be placed in a maximum-security unit with inmates serving similar sentences. 45 RR 126–29. Aubuchon stated that although the units have rooms where inmates may watch television, the rooms are highly controlled and altercations are rare. 45 RR 131. He said procedures are in place to prevent misbehavior and personnel are authorized to use force, if necessary, to halt disruptive behavior. 45 RR 132–133. AuBuchon testified that the prison system tries to house older inmates together, that such inmates often want to be left alone and are less likely to start trouble. 45 RR 124–25, 135.

Dr. Matthew Mendel, a clinical psychologist, interviewed Applicant and testified largely regarding Applicant's childhood. 45 RR 202–04. He reported that Applicant had an unstable upbringing, Applicant's life was "one of constant moves, constant disruption," and Applicant lacked a parental figure. 45 RR 202–05. Dr. Mendel thought Applicant's childhood was "about the most perfect setup that [he] could imagine for somebody growing up unable to form attachments to other human beings." 45 RR 205. Dr. Mendel described attachment theory in response to defense counsel's questioning. 45 RR 216–19. Applicant self-reported to Dr. Mendel that his childhood was violent and many of his female relatives carried knives. 45 RR 208. Dr. Mendel said Applicant told him of one occasion when Applicant's aunt was stabbed and had crawled into Applicant's bed, covering it in blood. 45 RR 208. Dr. Mendel further testified that when Applicant was five or six years old, Applicant accidentally shot his mother while he was playing with a firearm. 45 RR 208. Dr. Mendel testified that Applicant's sister, Willie Jewel, had been impregnated by their father, I.D. 45 RR 210. By Dr. Mendel's account, Applicant had no supervision and was treated poorly by his step-mother, Susie Mae. 45 RR 210–11. Dr. Mendel additionally testified

that Applicant's romantic relationship with Merle, who was fifteen years older than Applicant and began while Applicant was in high school, was a form of sexual abuse. (45 RR 221–22).

Dr. Donna Vandiver, a college professor who specialized in studying female sex offenders, testified that Applicant's relationship with Merle was indeed a form of sexual abuse, albeit a rare form. 46 RR 28–29, 31, 39. Dr. Vandiver described Merle as a "groomer" or a "nurturer," meaning she was the type of a sex offender who acts as a caregiver to pursue a romantic relationship with a susceptible teenager. 46 RR 38–39. According to Dr. Vandiver, Merle was able to gain Applicant's trust, and he continues to assert that Merle is one of the most important persons in his life. 46 RR 44–45. Dr. Vandiver testified it was possible, given Applicant's background, that as a result of the sexual abuse he suffered from Merle, Applicant himself become a sexual offender. 46 RR 50–51. Dr. Vandiver also testified about how Applicant likely suffered from attachment problems. 46 RR 47–49.

Dr. Joan Mayfield, a neuropsychologist, testified regarding her evaluation of Applicant's cognitive strengths and weaknesses. 46 RR 114, 116. Dr. Mayfield testified that based upon her evaluation, Applicant was not suffering from severe brain damage. 46 RR 123. After administering additional tests to evaluate memory, she concluded that her examination did not warrant a current diagnosis. 46 RR 132. Additionally, Dr. Mayfield stated Applicant "had some concussions from playing football and from boxing and different sports that he participated in." 46 RR 132. In Dr. Mayfield's opinion, Applicant's test performance and "history of concussions" suggest he is "at high risk" for developing Alzheimer's, but he did not have it at the time of trial. 46 RR 132.

Dr. Steven Yount, a practicing physician, testified about Applicant's general health. He said Applicant had a skin infection around his neck with fungus, an enlarged liver and prostate, and Applicant's legs were swollen and "trunk-like." 46 RR 172–73. Dr. Yount testified that the skin above Applicant's ankle bone was very shiny and subject to small cracks and lesions that would eventually become ulcerations. 46 RR 176. He further reported Applicant has peripheral neuropathy, a condition in which the sensory nerves in an extremity become damaged and, as a result, Applicant experiences numbness. 46 RR 176. Applicant also had a benign fatty tumor on his neck, a fatty liver, and a sinus in his gallbladder that could become cancerous. 46 RR 185–87. Dr. Yount testified that a cystic mass on Applicant's neck was not life threatening but would continue to grow over time, eventually putting pressure on his carotid artery and trachea. 46 RR 187–91.

State's Rebuttal Punishment Evidence

The State presented additional witnesses in rebuttal. Michael McGhe, a former Hays County Jail inmate, testified that in 2011, he was housed at the jail in the same group of cells as Applicant. 47 RR 17. McGhe wrote a request to the jail staff asking that they move Applicant because he was causing trouble and making threats. 47 RR

17–18. The letter, 50 RR at SX 207, was read aloud: "Ms. Shaffer, Mr. Willie Jenkins is constantly trying to be in control of the TV, threatening people. And he said on more than one occasion that he doesn't give a fuck about anything because he's never going home. He's causing tension within the entire dorm. Please move him out of here before someone gets hurt." 47 RR 19. McGhe and five other inmates all signed the letter. 47 RR 19-20). McGhe said Applicant wanted it "his way or no way . . .when it came to the TV or really anything else in that dorm." 47 RR 20. He reported Applicant "stated on many different occasions that he really didn't give a damn because he wasn't going home" and that "he had nothing to lose." 47 RR 21.

Bradford Jones testified that around April 2011, he was incarcerated in "the tank" at the Hays County Jail on a probation issue, and Applicant was there. 47 RR 28–31. Jones verified that he signed the complaint letter written by McGhe, and he did so because Applicant made the cellblock uncomfortable for everyone with his attitude, his trying to run the tank, and his being very intimidating to everybody. 47 RR 31–32.

Monica Shaffer, a certified corrections officer with the Hays County Sheriff's Office, received the complaint filed by inmates in April 2011 asking that Applicant be relocated and went to talk to Applicant to get his side of the story. 47 RR 90–92. Applicant told her they could "put him under the jail or move him under the jail" but "he wasn't going to follow the rules – anywhere while he was incarcerated, any rules from anyone." 47 RR 92–93. Applicant's statements made her nervous and scared, so she reported the incident. 47 RR 93–94. The jail supervisors changed the rules from that point on so that Applicant would only be escorted by male officers, and it would be done with at least two officers at a time. 47 RR 94.

Jesse Hernandez was a sergeant with the Hays County Sheriff's Office who managed inmate classifications, housing, discipline, and other matters. 47 RR 99–100. Hernandez testified that Applicant was initially placed in general population. 47 RR 102–04. After receiving the complaint filed by six inmates in April 2011, Applicant was moved to segregation. 47 RR 105. Applicant was later returned to general population, but that lasted only one day; after an incident involving the TV, Applicant landed back in segregation. 47 RR 106. Applicant was then housed in an area of the jail that was not in use. 47 RR 104–105. Two other inmates were eventually housed there—a capital murderer and a Mexican Mafia member facing charges for murder. 47 RR 107–10. However, by May 2013, the two inmates wrote a request asking that Applicant be moved out of concern for their own safety. 47 RR 113–15; 50 RR at SX 207. Applicant was placed in segregation and remained there. 47 RR 117. Hernandez testified they made concessions in their handling of Applicant to try to maintain safety at the jail, but those measures would not be used in prison. 47 RR 119.

Finally, the State presented the testimony of Dr. Barry Hirsch, a clinical and forensic psychologist. 47 RR 38–86. Dr. Hirsch testified he evaluated Applicant in 2003 at the Atascadero State Hospital and concluded Applicant's confinement as a SVP should be continued because Applicant presented an ongoing risk of violent

recidivism. 47 RR 38, 44, 46. Dr. Hirsch additionally gave his opinion that Applicant "would continually present a risk to society on an ongoing basis probably whether supervised or unsupervised, whether incarcerated or within the general community." 47 RR 53. He testified that Applicant made statements to him during a clinical evaluation in 2012 that Applicant thought he would get a death sentence, that it would be twenty years before his execution, and that he had nothing to lose. 47 RR 54. Dr. Hirsch reported that Applicant had a long history of violence that included physical altercations in the California state hospitals, his biting patients, his threats of violence, and his acknowledgment that he had the capacity to kill someone. 47 RR 56–57. Dr. Hirsch found Applicant was violent or exhibited violence in his rapes of five women, in his 1975 rape and murder of Norris, in his having an uncontrollable urge to rape, and in his preying upon and "incesting" a young girl (Karen Woods) who later become his step-daughter. 47 RR 57–58, 63–66.

Dr. Hirsch further testified that he had always suspected Applicant had Antisocial Personality Disorder (ASPD), but could not diagnose it without evidence of a conduct disorder before the age of fifteen. 47 RR 58. After hearing testimony from Dr. Mendel that concerned Applicant's behavior in childhood, however, Dr. Hirsch found it supported a diagnosis of ASPD. 47 RR 58–60. He testified that with the additional information learned through Dr. Mendel's testimony, Applicant's score on the Hare Psychopathy Checklist Revised (PCL-R) should be increased and that Applicant should be understood as a psychopath. 47 RR 59–60. Dr. Hirsch reported Applicant scored a 32 on the Level of Service/Case Management Inventory (LS/CMI), which showed an extremely high risk of future violence. 47 RR 61–62. Finally, Dr. Hirsch stated he listened to the testimony presented by Applicant's experts at punishment, but it did not change his opinions on future dangerousness and mitigation. 47 RR 50, 53.

PROCEDURAL HISTORY

1. On November 19, 2010, Applicant Willie Roy Jenkins was indicted with one count of intentionally strangling Norris while in the course of committing or attempting to commit aggravated rape and one count of intentionally drowning Norris while in the course of committing or attempting to commit aggravated rape. 1 Clerk's Record (CR) 4.

2. On December 7, 2010, attorney Norman Lanford was appointed as Applicant's counsel. 1 CR 9.

3. Shortly after, the State noticed its intent to pursue a death sentence against Applicant, and Mr. Lanford requested the appointment of a second attorney. 1 CR 11. On March 16, 2011, Attorney John P. Bennett was initially appointed as Applicant's second counsel. *Id*.

4. On January 26, 2012, Bennett moved to withdraw as Applicant's counsel, and the court permitted him to do so on February 2, 2012. 1 CR 152, 154.

5. Attorney John Duer was then appointed as Applicant's second attorney on March 8, 2012. 1 CR 155. Lanford and Duer continued to represent Applicant throughout his trial.

6. Jury selection began on April 8, 2013, before Judge Gary Steel. 1 RR 10. During jury selection, a hearing was held on Lanford's ability to serve as first chair counsel in a capital case. 18 RR 5. After argument from the parties, the Court permitted Lanford to continue representing Applicant. 18 RR 10. Jury selection then resumed. 18 RR 16.

7. The guilt phase of Applicant's trial began on May 28, 2013, and ended on May 31, 2013, with a jury finding that Applicant was guilty of capital murder. 2 CR 342–45; 1 RR 41, 44.

8. The punishment phase began June 3, 2013, and ended on June 13, 2013, with a jury answering the special issues such that Applicant was sentenced to death. 2 CR 342–45; 1 RR 45, 50.

9. Applicant's conviction and sentence were affirmed on automatic direct appeal to the Court of Criminal Appeals (CCA). *Jenkins v. State*, 493 S.W.3d 583 (Tex. Crim. App. 2016). Applicant did not petition the Supreme Court for certiorari review.

10. Applicant filed an application for habeas relief on July 9, 2015. Initial Appl. for Writ of Habeas Corpus (Appl.). Applicant raised nine grounds for relief:

    a) Ground One: Applicant's due process rights were violated by the State's knowing use of false testimony during the guilt phase of Applicant's trial;

    b) Ground Two: Applicant's trial counsel provided ineffective assistance at the guilt phase of Applicant's trial, including;

        (1) Not being qualified to represent a capital defendant in a trial where the State was seeking the death penalty;

        (2) Failing to present testimony from a DNA expert;

        (3) Failing to correct false and misleading testimony presented by the State;

        (4) Failing to object to the State's presentation of Dr. Charles Bell's conclusions to the jury;

        (5) Failing to interview and present testimony from the original investigation; and

(6) Allowing DNA evidence to be presented prior to having a hearing on its admissibility;

c) Ground Three: Applicant's due process rights were violated by the State's knowing use of false testimony during the punishment phase of Applicant's trial;

d) Ground Four: Applicant's trial counsel provided ineffective assistance at the punishment phase of Applicant's trial, including:

(1) Failing to challenge or rebut Dr. Barry Hirsch's expert testimony with Dr. Brian Abbott or a similarly qualified expert;

(2) Failing to recall Dr. Joan Mayfield; and

(3) Failing to investigate and present an attachment expert in mitigation of punishment;

e) Ground Five: Applicant's trial counsel were ineffective when they created a conflict of interest by representing Applicant after their qualifications were challenged;

f) Ground Six: Applicant's trial counsel were ineffective during the voir dire of Applicant's trial, including:

(1) Failing to support their *Batson* motion with a comparative juror analysis; and

(2) Failing to properly preserve trial-court error when the court denied counsel's challenges for cause;

g) Ground Seven: Applicant's death sentence is unconstitutional because his ability to investigate and present evidence was impeded by the passage of time before his trial;

h) Ground Eight: Applicant's death sentence is unconstitutional because the jury instructions restricted the evidence that the jury could consider mitigating; and

i) Ground Nine: The cumulative impact of the preceding errors requires reversal.

11. Along with his application, Applicant submitted 44 exhibits, including expert and lay witness affidavits, other documentary evidence, and juror questionnaires. Applicant's Writ. Ex. (AWX) 1–44.

12. On January 5, 2016, the State timely filed its answer. State's Answer. Along with its answer, the State submitted 45 exhibits, including transcripts of the witness depositions played at trial, expert and lay witness affidavits, and other documentary evidence. State's Writ Ex. (SWX) 1–45.

13. On December 7, 2017, this Court entered an order designating Applicant's ineffective-assistance-of-trial-counsel (IATC) claims, as raised in Grounds Two, Four, Five and Six, for further evidentiary development. Order Designating Issues (ODI), at 1–2. Applicant's remaining claims (Grounds One, Three, Seven, Eight, and Nine) were not designated for further factual development. *See id.*; *see also* Tex. Code Crim. Proc. art. 11.071 § 8(a). Due to trial counsel being located outside of Texas, the Court initially ordered factual development would be done by interrogatory. 3 Post Conviction Reporter's Record (PCRR) (Dec. 7, 2017) 9–10, 14–15.

14. On February 14, 2018, Applicant moved to recuse Judge Steel from the proceedings. Applicant's Verified Mot. Recuse Judge Gary Steel, *Ex parte Jenkins*, No. CR-10-1063 (274th Dist., Hays Co., Tex. Feb. 14, 2018). Judge Steel declined to recuse himself.

15. A hearing was held before Honorable Doug Shaver, at which Applicant's motion to recuse Judge Steel was denied. PCRR (Oct. 11, 2018) 28.

16. A live evidentiary hearing was then initially scheduled for July 30, 2019, but that hearing was continued to November 4 and 5, 2019. 1 PCRR (Mar. 14, 2019) 14; 3 PCRR (Aug. 12, 2019) 13.

17. A little over a week before the hearing was set to begin, Applicant filed a motion to expand the hearing in which he proffered nine affidavits that had not been previously presented with his application. *See* Applicant's Mot. Expand Evid. Hr'g Exs. 5 (declaration of Janet Egizi), 10 (affidavit of Dr. Matthew Mendel), 11 (declaration of Willie Jewel Foster), 12 (declaration of Ronnie Shepherd), 13 (declaration of Ronald Jenkins), 14 (declaration of Essie McIntyre), 15 (declaration of Byron Albrecht), 16 (declaration of Nathaniel Patrick), 17 (declaration of Avril Jenkins).

18. The November 4, 2019 hearing was continued by party agreement due to technical issues with the remote teleconferencing software needed to permit trial counsel Duer to testify.

19. Judge Steel then sua sponte recused himself, and Honorable Sid Harle was eventually assigned to preside over Applicant's postconviction proceedings.

20. The Court then granted Applicant's request to expand the evidentiary hearing to permit evidentiary development of the prejudice prong of the IATC claims. *See* Order Granting in Part and Denying in Part Jenkins's Mots. to Designate

Claims and Expand Evid. Hr'g, *Ex parte Jenkins*, No. CR-10-1063 (274th Dist. Ct., Hays Co., Tex. May 19, 2021).

21. The Court presided over a seven-day evidentiary hearing held over three different settings between September 13, 2021, and December 27, 2021. During that hearing, the following individuals testified live on Applicant's behalf: Norman Lanford, Dr. Brian Abbott, Dr. Robert Cohen, John Duer, Dr. Bill Watson, Juanita Claiborne, Harold Jenkins, and Nathaniel Patrick. The Court also admitted various items of evidence, including several affidavits from witnesses who did not testify live. The State called no witnesses.

22. Following the hearing, the parties were ordered to submit proposed findings of fact and conclusions of law.

GROUND ONE—FALSE TESTIMONY AT THE GUILT PHASE OF TRIAL

Applicant's Allegation

23. Applicant claims his due process rights were violated when the State knowingly presented false testimony at the guilt phase of his trial. Appl. 20–66. Applicant specifically asserts: a) the State presented false testimony that Dr. Bell was dead and had concluded Norris was raped; b) the State allowed Andrus to mislead the jury about the scope and nature of his drug-dealing and criminal history; c) the State presented false testimony from Detective Dunn that Andrus's alibi had been "confirmed quite strongly"; d) the State presented false testimony from Urbanovsky that no marijuana had been found in Norris's apartment; e) the State presented false testimony from Detective Dunn that several of the original investigating officers were deceased; and f) the State misled the jury as to the DNA testing that occurred and its significance. *Id.*

24. The Court did not designate Ground 1 for further factual development.

Ground 1a: Dr. Bell

Factual Findings

25. Applicant alleges the State knowingly presented false testimony that Dr. Bell was deceased, when he was alive, and he had concluded Norris had been raped, when he had not. Appl. 25–37. Applicant alleges the State presented this false testimony on four occasions: 1) during its opening statement; 2) during Urbanovsky's testimony; 3) during Dr. Barnard's testimony; and 4) during closing argument. Appl. 29. Applicant alleges the State knew, or should have known, this testimony was false because the State was imputed with knowledge of Dr. Bell's status since he was a state actor and because the State possessed a copy of his autopsy report. Appl. 31–34. Finally, Applicant alleges the false testimony was material because: 1) rape was an essential element of

the offense; 2) the State relied on the false testimony in argument; and 3) the State was aware that putting forth Dr. Bell's conclusions would violate Applicant's Confrontation Clause rights. Appl. 34–37.

26. During opening argument, the State told the jury Dr. Bell had passed away, but that was not a problem because Urbanovsky was present when Dr. Bell conducted Norris's autopsy. 37 RR 59. The State argued to the jury that Urbanovsky and Dr. Bell had the "same conclusions" that "we're probably dealing with a rape/murder here," which prompted Dr. Bell to take a vaginal swab that showed spermatozoa. 37 RR 60.

27. During his testimony, Urbanovsky stated it was his understanding that Dr. Bell was deceased, but Urbanovsky was present when Dr. Bell conducted the autopsy. 37 RR 219. Urbanovsky testified that he was also present when Norris's body was lifted out of the tub and placed onto a gurney, at which point he noticed what appeared to be blood and fecal matter in her genital area. 38 RR 218. Urbanovsky testified that this supported his conclusion that Norris had been raped and murdered. 38 RR 218. When asked by the State whether he shared his concerns with Dr. Bell that "this was possibly a rape/murder," Urbanovsky testified:

> I don't recall. I think—I think that we did share that opinion. I don't remember him saying that. Of course, it's hard to remember that many years ago. But I think that he felt like that because of the results of one of the samples he had taken.

37 RR 222.

28. Dr. Barnard was the substitute medical examiner called in Dr. Bell's place. 38 RR 91. Dr. Barnard testified that he had become aware that Dr. Bell had been long since deceased. 38 RR 98–99. Dr. Barnard concluded, based on his review of the investigative report, crime scene phots, Dr. Bell's autopsy report, autopsy photos, supplemental investigative reports and statements, he believed the cause of Norris's death was strangulation and drowning, and homicide was the manner of her death. 38 RR 99. Dr. Barnard did not testify about Dr. Bell's conclusions in the autopsy report.

29. During closing argument, the State argued to the jury Dr. Barnard was not impressed with the autopsy Dr. Bell conducted. 40 RR 38. Specifically, Dr. Bell conducted the autopsy in 1975, and he was not a forensic pathologist, just a hospital pathologist. 40 RR 38. But, the State argued, Dr. Bell did one thing right—"he had the wherewithal and good sense" to not only get a vaginal swab but to put it in a glass jar that was preserved for 37 years. 40 RR 38.

30. In support of his allegation, Applicant offered the May 19, 2015 affidavit of Dr. Bell with his application. Applicant's Writ Ex. (AWX) 2.

a) Dr. Bell stated that, in 2013, he moved to Virginia from the Atria Senior Living Community in Spring, Texas, after his wife had passed away earlier that year. AWX 2, at 1 ¶ 2.

b) Dr. Bell stated that, in 1975, he practiced medicine and worked as a pathologist, which included conducting autopsies in San Marcos, Texas. AWX 2, at 1 ¶ 3.

c) Dr. Bell had conducted numerous autopsies throughout his career; thus, he has no independent recollection of Norris's autopsy that he conducted on November 24, 1975. AWX 2, at 1 ¶4.

d) Based solely on the autopsy report, Dr. Bell stated he was unable to conclude in 1975 whether Norris had been raped. AWX 2, at 1 ¶ 5. Dr. Bell noted his report contained no documented evidence of trauma or injury to the perineal or vaginal areas, which is usually, though not always, present in rape cases. *Id*. Based on his report, Dr. Bell thought he "could not unequivocally determine" Norris had been raped. *Id*.

e) Dr. Bell could not recall any prosecutors or law enforcement contacting him about Norris's autopsy or asking him to testify. AWX 2, at 2 ¶ 6.

f) The Court finds Dr. Bell is now deceased.

g) The Court finds Dr. Bell's affidavit not credible, as he has no personal knowledge or independent recollection of the events described therein.

31. In support of his allegation, Applicant also offered the June 23, 2015 affidavit of Detective Penny Dunn, which was provided by the State in response to Applicant's pre-writ motion for disclosure. AWX 7.

a) As relevant here, Detective Dunn described her efforts to locate Dr. Bell. AWX 7, at 2. Detective Dunn stated locating Dr. Bell was difficult as she had no identifying information other than his name and the fact that he performed Norris's autopsy at the Pennington Funeral Home. *Id*.

b) Detective Dunn stated in 1996 or 1997, she contacted Bill Pennington, owner of the Pennington Funeral Home, who advised that Dr. Bell was deceased. *Id*.

c) Detective Dunn believed Pennington to be an honest and credible person, and she ended her search after that conversation. *Id*.

d) The Court finds Detective Dunn's description of her efforts to locate Dr. Bell in the 1990s to be credible. The Court finds Detective Dunn believed Dr. Bell was deceased.

32. In support of his allegation, Applicant offered the June 2015 affidavit of prosecutor Lisa Tanner, which was provided by the State in response to Applicant's pre-writ motion for disclosure. AWX 12.

a) As relevant here, Tanner stated Detective Dunn informed her at their initial meeting in 2010 that Dr. Bell was deceased. AWX 12, at 1. Tanner was aware at that time that Detective Dunn had been working on Norris's case since April 1996, and it therefore did not occur to her to question the basis of Detective Dunn's statement. *Id*. at 2.

b) Tanner stated she never received any information from any source suggesting Dr. Bell was alive. AWX 12, at 2.

c) Based upon her belief that Dr. Bell was deceased, Tanner contacted Dr. Barnard to testify as a substitute medical examiner. AWX 12, at 2.

d) The Court finds Tanner's description of her knowledge of Dr. Bell's status to be credible. The Court finds Tanner believed Dr. Bell was deceased.

33. In support of his allegation, Applicant offered the July 2, 2015 affidavit of his post-conviction investigator Gabriel Solis. AWX 11.

a) As relevant here, Solis states that, in April 2015, he was asked by Applicant's counsel to locate the death certificate of Dr. Bell but was unable to find one. AWX 11, at 1 ¶ 2. Solis then searched several online databases, which allowed him to locate Charles D. Bell. *Id*. at ¶¶ 2, 3.

b) Solis stated he eventually located Dr. Bell's daughter, who confirmed Dr. Bell was her father and was living with her in Virginia. AWX 11, at 2 ¶ 5. Solis spoke with Dr. Bell about Norris's autopsy. *Id*.

c) A few days after speaking with Dr. Bell, Solis sent Dr. Bell an affidavit to review and sign, indicating Dr. Bell did not personally write his affidavit. AWX 11, at 2 ¶ 6. A month later, Solis received the signed and notarized affidavit from Dr. Bell. *Id*.

d) The Court finds Solis's descriptions of his efforts to locate Dr. Bell during postconviction review to be credible, but irrelevant to Applicant's knowing-use-of-false-testimony claim. The Court thus gives no weight to Solis's affidavit.

e) The Court further finds Solis's statement that Dr. Bell's affidavit was sent to him to be signed indicates Dr. Bell did not write his own affidavit. The Court finds this statement is therefore only relevant to further confirm Dr. Bell's affidavit is not credible.

34. In support of his allegation, Applicant also offered the June 30, 2015 affidavit of Bill Pennington, the owner and funeral director of Pennington Funeral Home in San Marcos, Texas, with his application. AX 10.

a) Pennington states he does not recall Detective Dunn or any other police officer from the San Marcos Police Department speaking with him in the 1990s about whether Dr. Bell was alive. AX 10, at 1 ¶ 3.

b) Pennington states that, prior to being informed otherwise by Applicant's counsel, he believed Dr. Bell was deceased because he had not seen Dr. Bell since he moved from Kyle, Texas. AX 10, at 1 ¶¶ 4,5. Pennington says he did not have definitive information proving Dr. Bell was dead, and if he told anyone that, it would have been speculation. AWX 10, at 1 ¶ 4. Pennington states it is possible he confused Dr. Bell with another local physician who performed autopsies at his Funeral Home who died in a plane crash in the 1970s. AWX 10, at 1 ¶ 6.

c) Pennington states Applicant's counsel, the Office of Capital and Forensic Writs (OCFW), informed him that Dr. Bell was alive. AWX 10, at 1 ¶ 5.

d) The only relevant and contested matter regarding Pennington was whether he told Detective Dunn that Dr. Bell was dead. The Court finds it troubling that Pennington was told by his interviewers that Dr. Bell was alive, thereby suggesting he was wrong if he told Detective Dunn Dr. Bell was dead. This type of suggestive interview makes the content of Pennington's affidavit suspect and unreliable.

e) Regardless, the Court finds credible Pennington's statements that he believed Dr. Bell was dead.

f) The Court finds not credible Pennington's statements that neither Detective Dunn nor any other officer came to talk to him in the 1990s,

in light of Detective Dunn's descriptions of her conversation with Pennington.

35. In response to Applicant's allegation, the State offered the December 16, 2015 affidavit of Detective Dunn. SWX 33.

a) As relevant here, Detective Dunn further described her investigative efforts in locating Dr. Bell. SWX 33, at 2. Detective Dunn acknowledges that, while Applicant's postconviction investigator may have been easily able to locate Dr. Bell using the internet in 2015, the internet capabilities Detective Dunn was using in 1996 were far less robust. *Id*. Detective Dunn states the San Marcos Police Department had limited access with a dial-up modem and likely used Netscape Navigator or Webcrawler as a browser. *Id*. Detective Dunn states there were far fewer available websites for internet searching then. *Id*. And record searched produced inconsistent results, with some sources returning numerous results while others returned limited results. *Id*.

b) Because of this, Detective Dunn had to use other sources available to her, and she believed Pennington could narrow down the possibilities since Pennington's family had owned and operated the funeral home for three generations. SWX 33, at 2. Detective Dunn had also personally known Bill Pennington for years before she contacted him in 1996 or 1997 about Dr. Bell. *Id*.

c) Detective Dunn says when she spoke to Pennington he gave an unqualified response that Dr. Bell was dead. SWX 33, at 2. Pennington gave no indication his statement was based on speculation or guessing. *Id*. Had Pennington indicated a lack of certainty, Detective Dunn states she would have continued her efforts to try to locate Dr. Bell. *Id*.

d) The Court finds Detective Dunn's statements credible. The Court finds Applicant's post-conviction investigator's efforts in 2015 have no relevance to Detective Dunn's efforts in 1996, almost 20 years prior. The Court credits Detective Dunn's statements that Pennington did not exhibit any lack of certainty when he advised her Dr. Bell was dead, in light of Pennington's own statements that he believed Dr. Bell was dead before OCFW told him otherwise. The Court further finds credible Detective Dunn's statements that, had Pennington said he was not sure, she would have continued her investigative efforts.

36. In response to Applicant's allegation, the State also offered Bill Pennington's "Corrected" affidavit, which Pennington appears to have signed on August 5,

2015, one month after Pennington executed the affidavit that Applicant attached to his application. SWX 32.

a) In his "Corrected" affidavit, Pennington appears to have handwritten clarifications in the margins of his June 2015 affidavit.

b) Contrary to his June 2015 affidavit, Pennington now remembers someone, or an officer, came by the funeral home in the 1990s to ask about Dr. Bell, though Pennington did not recall who. SWX 32, at 1. Pennington signed and dated that correction on August 5, 2015, at 9:05 a.m. *Id.*

c) Pennington also handwrote that he did not recall reading the June 2015 affidavit before he signed it. SWX 32, at 2. He states he simply assumed that "he put what I told him" in the affidavit. *Id.*

d) The Court finds Pennington's statement that "he put what I told him" into the affidavit indicates Pennington did not write his own affidavit. The Court therefore gives less weight to Pennington's June 2015 affidavit.

e) The Court finds Pennington's statement that someone in fact talked to him about Dr. Bell in the 1990s to be credible, in light of Detective Dunn's recollection of her conversation Pennington in 1996 or 1997.

f) The Court credits Pennington's "Corrected" affidavit over the June 2015 affidavit. The Court finds Pennington believed Dr. Bell was dead and told Detective Dunn such in 1996 or 1997.

37. In response to Applicant's allegation, the State also offered the January 4, 2016 affidavit of prosecutor Lisa Tanner. SWX 35.

a) As relevant here, Tanner explains her decision to call Dr. Barnard to testify as to conclusions about Norris's death. SWX 35, at 1–2.

b) Tanner states she provided Dr. Barnard with copies of Dr. Bell's autopsy report, relevant offense reports, photographs from the crime scene, photographs taken during the autopsy, and relevant lab reports. SWX 35, at 1. Tanner asked Dr. Barnard questions only about his own opinion based on the materials she sent him. *Id.* at 2.

c) Tanner states she was aware Dr. Bell was not a forensic pathologist or a medical examiner, but rather a private pathologist, which was not uncommon in 1975. SWX 35, at 2. Dr. Barnard, by contrast, was a board

certified forensic pathologist and the Chief Medical Examiner of Dallas County. *Id*.

d) Tanner states that, due to the disparities in qualifications, she would still have called Dr. Barnard at trial even if she had been aware Dr. Bell was alive and available to testify. SWX 35, at 2. Tanner states that, if she had been aware Dr. Bell was alive, she would have called him, if only to read from his autopsy report and highlight for the jury his foresight in obtaining the vaginal smear during the autopsy. *Id*. But Tanner would also have called Dr. Barnard to tie all of the evidence together. *Id*.

e) The Court finds Tanner's statements are supported by the record. The fact that Dr. Bell was a hospital pathologist, not a forensic pathologist, was discussed at trial. 38 RR 97; 40 RR 38 (Tanner arguing Dr. Bell was not a forensic pathologist). The fact that it was not uncommon for hospital pathologists to conduct autopsies in the 1970s was also discussed at trial. 38 RR 98.

f) The Court thus finds credible Tanner's statements that, even if she knew Dr. Bell had been alive, she would have called Dr. Barnard.

Availability of the claim at trial

38. The Court finds Applicant concedes that this claim of false testimony could have been raised at trial. *See* Appl. 65 (arguing "much of the State's [guilt-phase] false testimony could have been exposed based on evidence provided to trial counsel during the discovery process").

39. Applicant's lead counsel Lanford testified during the evidentiary hearing that he was aware at the time of trial that Dr. Bell was alive. *See* 7 Evidentiary Hearing Reporter's Record (EHRR) 88, 156; 8 EHRR 166; State's Hearing Exhibit (SHX) 10; SHX 11. The Court finds this testimony credible.

40. Trial counsel in fact possessed a copy of Dr. Bell's autopsy report, which Applicant alleges imputes knowledge of false testimony to the State. 38 RR 46–47 (trial counsel explaining to the court their concern that Dr. Barnard would testify to Dr. Bell's conclusions in his report).

41. The Court finds Applicant's false testimony allegation related to Dr. Bell was available at the time of trial.

42. The Court finds Applicant did not raise an objection at trial predicated on the falsity of testimony related to Dr. Bell.

Falsity of the evidence

43. The Court finds Dr. Bell was alive at the time of trial.

44. The Court finds the State admits that testimony about Dr. Bell being dead was false, and the Court finds the testimony of Urbanovsky and Dr. Barnard indicating Dr. Bell was deceased was false.

45. The Court finds the State's statements during opening and closing arguments are not testimony or evidence. *See Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016) (noting that, in a sufficiency-of-the-evidence analysis, "the arguments of the parties are of no consequence because arguments are not evidence") (citing *Hutch v. State*, 922 S.W.2d 166, 173 (Tex. Crim. App. 1996) (plurality) ("It is axiomatic that jury arguments are not evidence.")). The Court finds the State's arguments cannot be false testimony.

46. The Court finds Dr. Bell did not specifically conclude in his autopsy report that Norris had been raped. *See* AWX 13. The Court finds Dr. Bell also did not say in his autopsy report that Norris had *not* been raped.

47. The Court finds Urbanovsky did not testify that Dr. Bell concluded in the autopsy report that Norris had been raped. The Court finds Urbanovsky did not recall what Dr. Bell thought about whether Norris had been raped. 37 RR 222. The Court thus finds Urbanovsky's testimony was not false.

48. The Court finds Applicant entirely fails to point to any false testimony by Dr. Barnard regarding Dr. Bell's conclusions. The Court finds Dr. Barnard did not testify about the content of Dr. Bell's autopsy report, much less any conclusion therein. The Court finds the only mention Dr. Barnard made of Dr. Bell was that he was aware Dr. Bell was dead, that he did not know Dr. Bell before this case, and that he reviewed Dr. Bell's autopsy report and photographs in arriving at his independent expert conclusion. 38 RR 97–98. The Court finds Dr. Barnard provided no false testimony.

State's knowledge

49. The Court finds the State did not know Dr. Bell was alive at the time of trial.

50. The Court's finds Applicant has raised a knowing-use-of-false-testimony claim, and thus Applicant's attempts to impugn the diligence of the State's investigation at trial to be irrelevant to the question of whether the State knew he was dead.

51. In any event, the Court finds Detective Dunn's investigative efforts to locate Dr. Bell were reasonable. The Court finds Detective Dunn's reliance on

Pennington's unqualified representations that Dr. Bell was dead were also reasonable.

52. The Court finds Tanner's reliance on Detective Dunn's representation in 2010 that Dr. Bell had died was also reasonable, given Tanner's awareness of how long Detective Dunn had been working on the case.

53. The Court finds the fact that Applicant's postconviction investigator was able to easily locate Dr. Bell in 2015 has no bearing on the reasonableness of Detective Dunn's investigation in 1996 or 1997.

Materiality

54. The Court finds Urbanovsky testified that it was his own opinion that, after observing the presence of spermatozoa in vaginal smear slide sample, Norris had been raped. 37 RR 223–24. The Court finds Urbanovsky believed that regardless of Dr. Bell's conclusions or lack thereof.

55. The Court finds Urbanovsky was the DPS criminalist who was present at the crime scene, took samples for testing, spoke with the Texas Ranger as to Norris's schedule for the day, attended Norris's autopsy, submitted evidence from the crime scene and the autopsy to the Austin crime lab for analysis, and viewed the slide in which he and Dr. Bell observed the presence of spermatozoa. 37 RR 222–23. The Court finds Urbanovsky would have been called as witness regardless of whether Dr. Bell was alive, and the Court finds Urbanovsky was free to testify as to his impressions and conclusions arrived at in the course of his work.

56. The Court finds Dr. Barnard testified as to his own expert opinion, independent of Dr. Bell's conclusions. 38 RR 99, 113. The Court finds Dr. Barnard concluded Norris was raped.

57. The Court finds that, given the disparity between the qualifications of Dr. Barnard and Dr. Bell, the State would have called Dr. Barnard regardless of whether Dr. Bell was alive.

58. The Court finds the evidence at Applicant's trial showed that Norris left work and went home for lunch at noon. 37 RR 110. Shortly after 5:00 P.M., Andrus arrived at the apartment and found Norris's partially-clothed body laying face up, bent backwards over the bathtub with her head, lower arms, and shoulders submerged in the tub, which was almost full of water. 37 RR 144, 214, 263. The only clothes on Norris's body were the white blouse and pair of boots she had worn to work that morning. 37 RR 144, 214, 258. Blood and feces were found on Norris's buttocks and genital area. 37 RR 218, 265. And the condition and position of her body were consistent with someone intentionally strangling her

and drowning her in the course of committing a sexual assault. 38 RR 99, 113–14. Importantly, a wristwatch Norris was wearing at the time of her murder was submerged under water, with the clock stopped at 12:31—which would have been just 15 to 20 minutes after she returned home from work. 37 RR 263. The Court further finds the evidence at trial showed that, although Applicant denied knowing Norris or having any knowledge about the crime, 38 RR 159, his DNA profile was identified in semen inside Norris's body and from a hand print on the blouse she was wearing. 38 RR 162–65; 39 RR 237–38, 248–50, 255–58. Additionally, military records showed Applicant was granted emergency leave from his Marine post for a period of thirteen days starting November 22, 1975—just two days before Norris was murdered. 38 RR 192–93; 49 RR at SX 66. During that time, Applicant traveled to Texas to visit his wife who was hospitalized in San Antonio. 29 RR 30–32. He also stayed at the home of his wife's father in Marion, Texas, which is located roughly thirty miles from San Marcos, where the murder occurred. 29 RR 38. The Court finds Dr. Barnard testified as to his own expert opinion, independent of Dr. Bell's conclusions. 38 RR 99, 113. The Court finds Dr. Barnard concluded Norris was raped.

Conclusions of Law

Procedural Bar

59. Because Applicant could have, but failed to, raise an objection based on alleged false testimony at trial, Applicant's Ground 1a is procedurally barred on habeas review. *See Ex parte De La Cruz*, 466 S.W.3d 855, 864–65 (Tex. Crim. App. 2015) (applying procedural default principles to false evidence claim but finding there was no default "because the thrust of [Applicant's] complaint is premised on new factual and legal bases that were *not reasonably available to him during his trial* or direct appeal" (emphasis added)); *Ex parte Jimenez*, 364 S.W.3d 866, 880 (Tex. Crim. App. 2012) ("[W]e recently noted our trend to draw stricter boundaries regarding what claims may be advanced on habeas petitions because the Great Writ should not be used to litigate matters 'which should have been raised on direct appeal or at trial.") (cleaned up).

Alternative merits

60. The Due Process Clause of the Fourteenth Amendment can be violated when the State uses materially false testimony to obtain a conviction or sentence. *Ex parte Lalonde*, 570 S.W.3d 716, 722 (Tex. Crim. App. 2019) (citing *Ex parte Chabot*, 300 S.W.3d 768, 770–71 (Tex. Crim. App. 2009)); *Ex parte Ghahremani*, 332 S.W.3d 470, 477 (Tex. Crim. App. 2011). A violation may occur when false testimony is elicited by the State or by the State's failure to correct testimony it knows to be false. *Lalonde*, 570 S.W.3d at 722 (citing *Ex parte Ghahremani*, 332 S.W.3d at 478). "It does not matter whether the

prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence." *Ex parte Ghahremani*, 332 S.W.3d at 477 (quoting *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989)). "It is sufficient if the witness's testimony gives the trier of fact a false impression." *Id.* (quotation marks and citation omitted).

61. But "[n]ot only must the testimony be false, it must also be material." *Lalonde*, 570 S.W.3d at 722 (citing *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014)). False testimony is material "only if there is a 'reasonable likelihood' that it affected the judgment of the jury." *Ex parte Weinstein*, 421 S.W.3d at 665. This standard is the same standard as the well-known harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967). *See Lalonde*, 570 S.W.3d at 722. A habeas applicant "must still prove his habeas-corpus claim by a preponderance of the evidence, but in doing so, he must prove the false testimony was material and thus it was reasonably likely to influence the judgment of the jury." *Id.* (quoting *Weinstein*, 421 S.W.3d at 665). If a habeas applicant could have raised the false testimony allegation at trial or on direct appeal, the applicant must not only show the testimony was material but also it was not harmless. *Id.* at 723 (citing *Ex parte Ghahremani*, 332 S.W.3d at 481–82). The difference between the materiality standard and the harmless error standard is the "difference between a possibility and a probability." *Ex parte Fierro*, 934 S.W.2d 370, 376 (Tex. Crim. App. 1996).

62. The Court concludes Applicant fails to prove by a preponderance of the evidence that the State presented materially false testimony.

63. Because argument is not evidence, representations made by the State during opening/closing cannot be form basis of false testimony claim. *See Cary*, 507 S.W.3d at 766; *Hutch*, 922 S.W.2d at 173. Thus, Applicant fails to meet his burden to show by a preponderance of the evidence that the State's opening and closing arguments were materially false testimony.

64. The Court concludes the State neither knew nor should have known that the testimony related to Dr. Bell being alive was false. The Court concludes Detective Dunn reasonably investigated Dr. Bell's whereabouts and reasonably relied on Pennington's representations that Dr. Bell was dead. The Court also concludes Tanner reasonably relied on Detective Dunn's later representations that Dr. Bell was dead. The Court concludes Applicant has not shown the State should have known Dr. Bell was dead.

65. The Court concludes the State knew or should have known that Dr. Bell's autopsy report did not specifically conclude Norris had been raped. But the Court concludes Applicant has failed to show that any false testimony about Dr. Bell's conclusions in the autopsy report was presented.

66. Moreover, the Court concludes that, even if Applicant could prove falsity or knowledge, Applicant fails to show by a preponderance of the evidence that any of the allegedly false testimony was material.

67. The Court concludes, to the extent Applicant argues that, but for the testimony that Dr. Bell was dead, the State would not have called Urbanovsky or Dr. Barnard, Applicant is incorrect. Urbanovsky would have been called as a witness regardless, and he was free to testify to his impressions and conclusions arrived at in the course of his work. And the State would have called Dr. Barnard regardless of whether Dr. Bell was alive because Dr. Barnard was more qualified than Dr. Bell.

68. The Court concludes that, even if Dr. Bell had been available, and even if he was unable to conclude whether Norris was raped, the State was not bound to call only a single expert to opine as to cause of death. *See, e.g.*, *Harmel v. State*, No. 03-18-00381-CR, 2020 WL 913055, at *5 (Tex. App.—Austin Feb. 26, 2020) (no pet.) (State called two expert witnesses who opined as to victim's cause of death). The Court concludes the State is permitted to choose how it presents it case and would not have had to call Dr. Bell at all. *Cf. Williams v. Illinois*, 567 U.S. 50, 58 (2012) (plurality opinion) ("It has long been accepted that an expert witness may voice an opinion based on facts concerning the events at issue in a particular case even if the expert lacks first-hand knowledge of those facts."); *see also Williams v. State*, 513 S.W.3d 619, 637 (Tex. App.—Fort Worth 2016) (pet. ref'd) (finding admissible medical examiner's testimony where expert did not sponsor non-testifying examiner's autopsy report and "presented his own opinion regarding the cause and manner of Gregory's death based on his independent review of the autopsy report, autopsy photographs, and toxicology reports").

69. The Court further concludes that, given both Urbanovsky and Dr. Barnard independently concluded Norris had been raped, any alleged false testimony was not material because its effect on the trial would have been *de minimis*. *See Lalonde*, 570 S.W.3d at 724 ("However, this contribution is *de minimis* because Godfrey's testimony about Applicant's consent was similar to and cumulative of the evidence from the other officers.").

70. The Court concludes Applicant also fails to show that any false testimony was material in light of the overwhelming evidence tying Applicant to the rape and murder of Norris, evidence which, as described above, arose primarily from the physical evidence and circumstances of the crime rather than the opinion of Dr. Bell. The Court concludes the evidence presented at trial—separate and apart from medical testimony—definitively established that Norris had been sexually assaulted and murdered by Applicant. The Court concludes there is

no reasonable likelihood that the allegedly false testimony affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d at 665.

71. The Court concludes the CCA found on direct appeal the evidence at Applicant's trial to be more than sufficient to establish Applicant's guilt. *See Jenkins*, 483 S.W.3d at 600–01. The Court concludes any allegedly false testimony presented about Dr. Bell's conclusions would have no effect on the sufficiency of the evidence.

72. The Court concludes that, because Applicant could have raised the false testimony allegation at trial, Applicant must also show the allegedly false testimony was not only material but not harmless. *Lalonde*, 570 S.W.3d at 723. The Court concludes that, even if there is a *possibility* that any error affected the judgment of the jury, there is no *probability* that it did given the above evidence; thus, any error is harmless. *See Fierro*, 934 S.W.2d at 376; *Lalonde*, 570 S.W.3d at 723 (harmless error applies where could have raised claim at trial or direct appeal).

73. The Court recommends denying Applicant's Ground 1a.

Ground 1b: Andrus's drug-dealing and criminal history

Factual Findings

74. Applicant alleges the State presented false testimony regarding Andrus when it misled the jury about the scope and nature of Andrus's drug-dealing and criminal history. Appl. 38–47. Applicant contends Andrus provided false testimony regarding the money from a recent drug deal, that he only had two arrests as a marijuana dealer, and that Norris was unaware of his drug dealings. *Id.* at 40–46. Applicant suggests this testimony misled the jury by minimizing Andrus's possible roll in Norris's death. *Id.* at 38.

75. At trial, Andrus testified that he had sold drugs the week before Norris was killed. 37 RR 156. He testified that he told police he was concerned his actions may have played a role in Norris's death because he had "sold a significant amount of marijuana" just the week prior. 37 RR 156. He stated his concern arose because "there was money involved" and he thought someone involved in that transaction "might have been coming to the house looking for money and found Norris home and committed the crime." 37 RR 156. When asked by the State if there was a large amount of money in the apartment when Norris was killed, Andrus response, "no," but then answered affirmatively that someone may have thought there had been. 37 RR 157. On cross-examination, Andrus stated he did not remember if he had found money in the apartment, "like $10,000 or something." 37 RR 162. Andrus, however, cooperated fully, gave the police all the names of the people involved in the drug deal as well as anyone

else he thought of, and tried to help solve the crime as much as he could. 37 RR 155–58. Andrus testified that he spoke to Detective Dunn in 2000, but all he could tell her was the same thing he had told police from the original investigation. 37 RR 158–59.

76. Andrus also testified in general terms about his past criminal behavior, specifically, that he been on probation at the time of Norris's murder and had shared that information with the police. 37 RR 155–57, 159. He also shared later criminal history with Detective Dunn. 37 RR 159. Andrus specifically told Detective Dunn he had been arrested again in November of 1987 for a marijuana-related conspiracy and his son had been born two months after he was arrested for the last time, for which he received a probated sentence. 37 RR 159, 163. Andrus testified that since 1987, he could not remember even getting a traffic violation. 37 RR 159.

77. Andrus testified that Norris did not know anything about the marijuana deal that has occurred the week before her death. 37 RR 164. Andrus also testified that Norris was "never" "involved in any way in that aspect" of his life. 37 RR 164. Andrus said he purposely kept that from her. 37 RR 164–65.

78. To support his allegation that Andrus provided false testimony, Applicant offered: 1) a copy of a motion filed in the case *United States v. Brown*, No. 84-5-B (M.D. La.) in which Andrus is mentioned, AWX 14; 2) a copy of an August 16, 1984 Dallas Morning News article about Andrus, AWX 15; 3) a copy of an August 31, 1984 Dallas Morning News article about Andrus, AWX 16; 4) a print out of results from a search done on Andrus via the Florida Department of Law Enforcement Criminal History Information database, AWX 20; 5) a purported report from the Drug Enforcement Agency (DEA) related to Andrus, AWX 36; 6) a supplemental report written by Detective Dunn detailing an October 19, 2000 visit to Andrus in Florida, AWX 37; and 7) a January 21, 1984 investigative report written by Ronald C. Stewart, AWX 44.

Availability of the claim at trial

79. The Court finds Applicant concedes much of the evidence he now relies on to prove falsity was provided to trial counsel at trial. *See* Appl. 42 ("The DEA maintains a file on Andrus based on his history of drug transactions. That file contains a summary of his criminal history, which the State provided to trial counsel as part of discovery."); *id*. at 45 ("Both the DEA report [in AWX 36] and [Detective] Dunn's interview with Andrus [in AWX 37] were provided to trial counsel during the discovery process."); 7 EHRR 195–96 (Applicant admitting Detective Dunn's supplemental investigative report contained in AWX 37 "as a report that was in trial counsel's file and they had available to use during trial); 7 EHRR 200 (Applicant admitting the DEA Report contained in AWX 36 "as something that was in trial counsel's file and he had available to him" at

the time of trial); 7 EHRR 203 (Applicant admitted the Stewart Report contained in AWX 44 "as a document that was in the file and that [counsel] could have used had he chosen to in the trial").

80. The Court finds Applicant's false testimony allegation related to Andrus's drug dealing and criminal history was available at the time of trial.

81. The Court finds Applicant did not raise an objection at trial predicated on the falsity of testimony related to Andrus's background.

Falsity of the evidence

82. Applicant claims Detective Dunn's supplemental report detailing her October 2000 interview with Andrus proves Andrus's testimony that he did not have a large sum of money in the apartment was false. Appl. 40. Applicant also claims the report demonstrates Andrus's testimony insinuating that he had only two arrests was false. Appl. 41–42. Applicant finally claims Detective Dunn's report demonstrates Andrus's testimony regarding Norris's knowledge of his drug dealing was false. Appl. 46.

83. In her supplemental report, Detective Dunn reported that Andrus told her in October 2000 that "the week prior to Norris's death he had sold 1,000 pounds of marijuana." AWX 37, at 2. Andrus told Detective Dunn that, at the time, he was selling marijuana and cocaine, and he had previously sold marijuana, cocaine, and Quaaludes. *Id*. Andrus reported that he had been arrested for some of those transactions. *Id*. Andrus said he had realized profits of $20,000 to $30,000 from the 1,000-pound marijuana deal. *Id*.

84. In her report, Detective Dunn relayed that Andrus had never told anyone, but the money from the 1,000-pound marijuana deal had been wrapped in foil and hidden in his apartment freezer. AWX 37, at 3. Andrus asserted the police had never discovered the money, and he eventually returned to recover the money when the apartment was released to him after the murder. *Id*.

85. Andrus reported to Detective Dunn that Norris "had no idea about" the 1,000-pound marijuana deal "or that there was any money in the apartment." AWX 37, at 3. Andrus told Detective Dunn that Norris knew he dealt drugs but she "was never involved in any of the business." *Id*. Andrus said Norris never participated in any of the drug transactions. *Id*.

86. The Court finds Detective Dunn's October 2000 supplemental report (AWX 37) does not prove Andrus's testimony about money in the apartment false. The Court finds Andrus made the statement about the profits realized from the marijuana deal nearly 25 years after the transaction would have occurred. The Court thus finds Andrus's statement to Detective Dunn about events that

occurred 25 years before to be unreliable. Moreover, Andrus made that statement to Detective Dunn thirteen years prior to his testimony in 2013. The Court finds that, given the time that elapsed, he may have forgotten the specifics of what he said to Detective Dunn, and his answer that he did not remember whether he found money in the apartment suggests that was the case. Finally, even assuming it was true that Andrus realized profits of $20,000 to $30,000 from the deal in 1975, the Court finds this does not prove what amount of money was actually located in the apartment when Norris was killed a week later.

87. The Court also finds Detective Dunn's October 2000 supplemental report (AWX 37) does not prove Andrus's testimony about his past criminal history was false. The Court finds Andrus did not testify that he only had two arrests, nor did he testify that his drug dealing was limited only to marijuana.

88. The Court finds Detective Dunn's October 2000 supplemental report (AWX 37) does not prove Andrus's testimony about Norris's knowledge of his drug dealing was false. The Court finds Andrus's statements to Detective Dunn in 2000 were largely consistent with his testimony at trial in 2013. Andrus testified that Norris knew nothing about the 1,000-pound drug deal, which is what he told Detective Dunn. Andrus testified that Norris was not involved in that aspect of his life, which is what he told Detective Dunn. And Andrus testified that he purposely kept from Norris that aspect of his life, which is what he told Detective Dunn.

89. Applicant also claims the Stewart Report (AWX 44), the DEA Report (AWX 36), the Florida Criminal History print out (AWX 20), the Dallas Morning News articles (AWX 15 and 16), and the *United States v. Brown* motion (AWX 14) demonstrate Andrus misled the jury about his criminal history. Appl. 41–45.

90. The Court finds Applicant fails to identify any false testimony given by Andrus about his drug dealing that was false. The Court finds Applicant's claim is simply that Andrus should have volunteered more details about his criminal history. The Court finds that, together, the documents Applicant relies on mostly describe criminal activities by Andrus after Norris's murder occurred. The Court finds Andrus did not testify falsely or give the jury a false impression about his possible role in Norris's death.

State's Knowledge

91. The Court finds the State was aware of Andrus's drug dealing and criminal history.

92. The Court finds, however, that, because the testimony was not false, the State was not aware of any falsity.

Materiality

93. The Court finds the evidence at trial established that Detective Dunn thoroughly investigated a possible drug-related connection to Norris's death, but no connection was ever made. The Court finds the evidence did not indicate anyone ransacked the apartment hunting for drugs or money, or that drawers or cabinets were open as might be expected if such a search had occurred. The Court finds the evidence at trial did not support a theory that someone else, either Andrus or a random attacker related to Andrus's drug-dealing, raped and murdered Norris.

94. The Court finds the evidence at trial showed Applicant's DNA was found in and on Norris's body, even though he denied knowing her. 39 RR 102–05. The Court finds Applicant has proffered no credible explanation for his DNA being found in and on Norris's body. The evidence also showed Andrus had been excluded as a contributor to the sperm cell fraction of the vaginal smear slide. 39 RR 109.

Conclusions of Law

Procedural Bar

95. Because Applicant could have, but failed to, raise an objection based on alleged false testimony at trial, Applicant's Ground 1b is procedurally barred on habeas review. *See Ex parte De La Cruz*, 466 S.W.3d at 864–65; *Ex parte Jimenez*, 364 S.W.3d at 880.

Alternative merits

96. The Court concludes Applicant fails to prove by a preponderance of the evidence that the State presented materially false testimony.

97. The Court concludes Applicant fails to show Andrus's testimony was false, and because he cannot demonstrate falsity, he cannot demonstrate that the State was aware of any falsity. At most, Applicant shows inconsistencies in the record, but such does not prove falsity. *See Ex parte De La Cruz*, 466 S.W.3d at 870–71 ("Here, the record merely highlights the existence of inconsistencies in the evidence presented at applicant's trial with respect to the location of the shooting, but those inconsistencies do not, without more, support the trial court's fact finding that Torres's testimony is false.").

98. The Court concludes that, even if Applicant could demonstrate falsity and knowledge, Applicant fails to show by a preponderance of the evidence that any

of the allegedly false testimony was material. The Court concludes that Applicant attempts to use his allegations of false testimony by Andrus to proffer a theory that someone else, either Andrus or someone related to his criminal dealings, raped and murdered Norris. But the Court concludes Applicant's theory is baseless when compared to the overwhelming evidence connecting Applicant to the offense. The Court agrees with the CCA's holding on direct appeal: "On the record of this case, [Applicant]'s proffered scenario, in which [Applicant] had sexual intercourse with Norris and then someone else entered the apartment and murdered her, strains credulity." *Jenkins*, 493 S.W.3d at 601. The Court concludes there is no reasonable likelihood that the allegedly false testimony affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d at 665.

99. The Court concludes that, because Applicant could have raised the false testimony allegation at trial, Applicant must also show the allegedly false testimony was not only material but not harmless. *Lalonde*, 570 S.W.3d at 723. The Court concludes that, even if there is a *possibility* that any error affected the judgment of the jury, there is no *probability* that it did given the above evidence; thus, any error is harmless. *See Fierro*, 934 S.W.2d at 376; *Lalonde*, 570 S.W.3d at 723 (harmless error applies where could have raised claim at trial or direct appeal).

100. The Court recommends denying Applicant's Ground 1b.

Ground 1c: Andrus's alibi

Factual Findings

101. Applicant alleges the State presented false testimony when it allowed Detective Dunn to testify that Andrus's alibi had been "confirmed quite strongly" even though it had not been confirmed. Appl. 47–54.

102. At trial, Detective Dunn testified to the following during cross-examination by defense counsel:

> Q. Okay. And [Andrus] was a . . . prime suspect in this case for 30 years, wasn't he?
>
> A. Well, after—not 30 years because then in 1997 his—the DNA recovered from the vaginal slide was—we also had Charles Wayne Andrus's DNA. And we did a one-to-one comparison and he was not a match to that.
>
> Q. He wasn't a match for a sexual assault. Was he—did it exclude him as the murderer?

A. We—we continued to evaluate any person equally.

Q. And at what point did you conclude that Charles Andrus was not the killer?

A. *Well, early on his alibi had been confirmed by Sergeant John East. And I had spoke to Sergeant East and felt like it was confirmed quite strongly. When the—*

Q. *All right. Are the—*

A. *—DNA—*

. . .

Q. Okay. [Sergeant East] got a statement from Andrus. Did he get a statement from anybody else that verified where Andrus was?

A. No, he did not.

38 RR 174–75 (emphasis added).

103. To support his allegation that Detective Dunn provided false testimony, Applicant offered the November 25, 1975 statement that Andrus provided to police. AWX 42, at 1. In that statement, Andrus detailed his whereabouts the day of Norris's murder. *Id*. He said he left the apartment between 9:15 and 9:30am. *Id*. He said he dropped his clothes off at a laundry service and dropped his car off to be serviced. *Id*. Andrus states he spoke with a friend, Janet Brightman, over a cup of coffee at the Sandwich Shop, and then ate a burger at Burger Chef around 10:30am. *Id*. He then went to the library to study. *Id*. Andrus called home at 12:50pm and left a voice message before calling again to make sure Norris had not missed picking up the phone the first time. *Id*. Andrus stated he studied in the library until 3:00pm and stopped in the cafeteria for a piece of cake before going to take a history test from 3:30 to 4:30pm. *Id*. He then went to pick up his car, filled the car with gas, and returned home around 5:00pm. *Id*. It was then that he noticed the door was ajar and the stereo was blaring, and he discovered Norris's body shortly thereafter. *Id*.

104. To support his allegation, Applicant also offered a supplemental report written by Detective Dunn detailing an 1997 interview she conducted of Sergeant John East, an officer who assisted in the initial investigation into Norris's murder in 1975. AWX 39, at 1. As relevant here, Detective Dunn reports that Sergeant East told her "due to the amount of time that had passed since the murder he had difficulty recalling the finer details of the investigation[.]" *Id*. Sergeant East reported, however, that "he remembered attempting to verify Andrus'[s]

alibi for the day of the murder." *Id*. "East was unsure if he was unable to verify the alibi and was unsure if he had any notes related to verification of Andrus'[s] alibi." *Id.* East told Detective Dunn "he seemed to remember speaking with an employee at the Southwest Texas University library or cafeteria, but did not get the name of the woman." *Id*. East advised Detective Dunn that "he did remember that the woman could not remember seeing Andrus at school the day of the murder." *Id*. Detective Dunn noted she had "found no handwritten notes or reports in the original case file in reference to verification of Andrus's alibi." *Id*.

105. To support his allegation, Applicant also offered the July 2, 2015 affidavit of his postconviction investigator Solis with his application. AWX 11.

a) Solis details his investigation of the Janet Brightman that Andrus referred to in his statement. AWX 11, at 2–4.

b) Solis contacted a woman in 2015 named Janet Egizi, whom Solis believed was Janet Brightman. Solis believed this based on her date of birth, student records at Texas State University, telephone directories from 1970 to 1978, and her birth name, which Solis alleged was Brightman. AWX 11, at 2 ¶¶ 78, 3 ¶ 12.

c) Solis said Egizi informed him she had a "great memory" and "never had a friend or acquaintance named Charles Andrus." AWX 11, at 3 ¶ 8.

d) Solis reported that Egizi informed him she was never contacted by homicide investigators, the Texas Rangers, or Applicant's defense team. AWX 11, at 3 ¶¶ 8, 10. Egizi told Solis she did not even remember the murder happening and was thus "perplexed" why her name was mentioned in a 1975 homicide investigation report. *Id*. at 3 ¶ 9.

e) When asked if she would be willing to look at pictures of Andrus to see if it might jog her memory, Egizi declined, saying she would not provide any more information than she already had and she found it "mysterious" that her name was involved with the investigation. AWX 11, at 4 ¶ 13. Egizi then hung up the phone. *Id*.

f) The Court finds Solis's affidavit on this issue not credible as it is comprised entirely of hearsay. The Court further finds Solis has no personal knowledge of the relevant facts, i.e., whether Egizi actually knew Charles Andrus. The Court finds Solis's statement has no probative value to Applicant's allegation.

106. With his motion to expand the evidentiary hearing, Applicant offered the signed declaration of Janet Egizi née Brightman. Mot. Expand Evid. Hr'g Ex. (Mot. Expand Ex.) 5. The Court admitted Egizi's declaration at the evidentiary hearing over the State's objection. 8 EHRR 25 (admitting Applicant's Hearing Exhibit (AHX) 60). For ease of reference, the Court will cite to the hearing exhibit here.

a) In her declaration, Egizi avers that she was formally known as Janet Brightman. AHX 60. Egizi avers that she was a student at Texas State University from 1972 through 1976. AHX 60, at 1 ¶ 1.

b) Egizi states she has never heard of Charles Andrus, Sheryl Norris, or Joe Sewell. AHX 60, at 1 ¶ 2. Egizi states she never had lunch at a café in 1975 with anyone by the name of Charles Andrus or Charles Wayne Andrus. AHX 60, at 1 ¶3.

c) Egizi states she never spoke to police investigators or law enforcement officials about someone named Charles Andrus. AHX 60, at 1 ¶ 4.

d) The Court finds Egizi's declaration, signed in 2019, discusses forty-four-year-old memories. The Court finds Egizi's declaration to be unreliable and therefore gives it no weight.

107. In response to Applicant's allegation, the State offered Detective Dunn's December 16, 2015 affidavit. SWX 33.

a) As relevant here, Detective Dunn states that, at trial, she gave her opinion that Andrus's alibi had been strongly confirmed by the physical evidence, namely, the DNA evidence identifying Applicant on the vaginal smear and the blouse. SWX 33, at 3. Detective Dunn states that, had trial counsel not interrupted her, she would have finished her answer that she believed the alibi had been "confirmed quite strongly *by the DNA evidence* recovered from the body of Sheryl Norris and her blouse that identified his client, Mr. Jenkins." *Id*.

b) The Court finds Detective Dunn's statement that she meant to indicate that Andrus's alibi was confirmed quite strongly by the DNA evidence is supported by the record. The Court finds trial counsel interrupted Detective Dunn's testimony, and the records shows she started to talk about the DNA evidence in relation to the alibi before she was interrupted. 38 RR 174–75.

Availability of the claim at trial

108. The Court finds much of the evidence Applicant now relies on to prove falsity was provided to trial counsel at trial. *See* 7 EHRR 98 (Applicant showing AWX 42, Andrus's written statement, to trial counsel to refresh his recollection); 7 EHRR 118 (Applicant admitted Andrus's Statement as AHX 42); 7 EHRR 191–92 (Applicant admitting Detective Dunn's supplemental investigative report contained in AWX 39 as "a page from discovery that was in [Lanford's] file").

109. The Court finds Applicant's false testimony allegation related to Andrus's alibi was available at the time of trial.

110. The Court finds Applicant did not raise an objection at trial predicated on the falsity of testimony related to Andrus's alibi.

Falsity of the evidence

111. The Court finds the State did not elicit the complained-of testimony.

112. The Court finds Detective Dunn's initial testimony that "early on [Andrus's] alibi had been confirmed by Sergeant John East" was arguably false. *See* 38 RR 174–75.

113. The Court, however, finds the remainder of Detective Dunn's testimony—i.e., that she "had spoke[n] with Sergeant East and felt like [his alibi] was confirmed quite strongly"—was not false because trial counsel interrupted Detective Dunn before she could finish expressing her opinion that that alibi was "confirmed quite strongly" by the "DNA" evidence. 38 RR 174–75.

114. The Court further finds that, even if Detective Dunn's interrupted statement could give the jury the false impression that Andrus's alibi had been strongly confirmed, any false impression was immediately corrected by trial counsel when he elicited testimony from Detective Dunn that Sergeant East had not gotten a statement from *anybody* that verified where Andrus was. 38 RR 175.

115. The Court thus finds Detective Dunn's testimony, taken as a whole, did not give the jury the false impression that Andrus's alibi had been confirmed by another person.

State's Knowledge

116. The Court finds the State was aware Andrus's alibi had not been confirmed.

117. The Court finds, however, that, because Detective Dunn's testimony was not false, the State was not aware of any falsity.

Materiality

118. The Court finds the evidence at trial established Detective Dunn thoroughly investigated a possible drug-related connection to Norris's death, but no connection was ever made. The Court finds the evidence did not indicate anyone ransacked the apartment hunting for drugs or money, or that drawers or cabinets were open as might be expected if such a search had occurred. The Court finds the evidence at trial did not support a theory that someone else, either Andrus or a random attacker related to Andrus's drug-dealing, raped and murdered Norris.

119. The Court finds the evidence at trial showed Applicant's DNA was found in and on Norris's body, even though he denied knowing her. 39 RR 102–05. The Court finds Applicant has offered no credible explanation for his DNA being found in and on Norris's body. The evidence also showed Andrus had been excluded as a contributor to the sperm cell fraction of the vaginal smear slide. 39 RR 109.

Conclusions of Law

Procedural Bar

120. Because Applicant could have, but failed to, raise an objection based on alleged false testimony at trial, Applicant's Ground 1c is procedurally barred on habeas review. *See Ex parte De La Cruz*, 466 S.W.3d at 864–65; *Ex parte Jimenez*, 364 S.W.3d at 880.

Alternative merits

121. The Court concludes Applicant fails to prove by a preponderance of the evidence that the State presented materially false testimony.

122. The Court concludes that, even assuming Detective Dunn's statements on cross-examination regarding Sergeant East's confirmation of Andrus's alibi were false, Applicant cannot meet the falsity prong because the State did not allow such statements to go uncorrected. *See Lalonde*, 570 S.W. 3d at 722 (a violation occurs when the State either elicits or fails to correct testimony it knows to be false). Rather, defense counsel immediately corrected any false impression when he elicited further testimony that Sergeant East had not gotten "a statement from anybody else that verified where Andrus was." 38 RR 175. Therefore, no state action was necessary, and the claim fails. *Cf. United States v. Morrison*, 529 U.S. 598, 621 (2000) ("Foremost among these limitations is the time-honored principle that the Fourteenth Amendment, by its very terms, prohibits only state action.").

123. The Court further concludes Applicant fails to show Andrus's testimony was false, and because he cannot demonstrate falsity, he cannot demonstrate that the State was aware of any falsity.

124. The Court concludes that, even if Applicant could demonstrate falsity and knowledge, Applicant fails to show by a preponderance of the evidence that any of the allegedly false testimony was material. The Court concludes Applicant relies on this allegedly false testimony the same way he relies on Andrus's testimony in Ground 1b: to advance a theory that someone else—in this instance, Andrus—murdered Norris. But the Court concludes Applicant's theory is baseless given the overwhelming evidence connecting Applicant to the offense. *See Jenkins*, 493 S.W.3d at 601. The Court concludes there is no reasonable likelihood that the allegedly false testimony affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d at 665.

125. The Court concludes that, because Applicant could have raised the false testimony allegation at trial, Applicant must also show the allegedly false testimony was not only material but not harmless. *Lalonde*, 570 S.W.3d at 723. The Court concludes that, even if there is a *possibility* that any error affected the judgment of the jury, there is no *probability* that it did given the above evidence; thus, any error is harmless. *See Fierro*, 934 S.W.2d at 376; *Lalonde*, 570 S.W.3d at 723 (harmless error applies where could have raised claim at trial or direct appeal).

126. The Court recommends denying Applicant's Ground 1c.

Ground 1d: Marijuana in the apartment

Factual Findings

127. Applicant alleges the State presented false testimony when it allowed Urbanovsky to testify that no marijuana had been found in the apartment, thus further minimizing Andrus's drug-dealing and the role it might have had in Norris's murder. Appl. 54–57.

128. During cross-examination by defense counsel, the following exchange occurred:

> Q. All right. Okay. Let's look at State's Exhibit No. 8. Obviously that's the kitchen area. Did you, at the time of your investigation, make any note or seize—seize or gather up any evidence that may be of significance from the kitchen?
>
> A. To my knowledge, no. We did not—did not see anything there.

Q. Was there—was there ever anything submitted later to you like marijuana—or anything from the kitchen like a half pound of marijuana?

A. I have no recollection of that at all.

Q. Okay. Back in 1975 or '6, the DPS lab would have still been checking marijuana, wouldn't they?

A. It would have been checking marijuana if marijuana had been submitted. I would assume that it would come under the same case number that this has, but—

Q. And there's no record of there being any?

A. There—I have not seen a record, no.

38 RR 55–56.

129. To support his allegation that Urbanovsky testified falsely, Applicant offers three reports: 1) a DPS latent submission form submitted by Texas Ranger Joe Davis, AWX 21; 2) a DPS criminal offense report authored by Texas Ranger Wallace Spiller, AWX 40; and 3) a San Marcos Public Safety (SMPS) supplemental report by Sergeant East, AWX 41.

130. The DPS latent submission form indicates that, on December 5, 1975, Ranger Davis submitted to DPS "[o]ne bag of green, haylike substance believed to be marijuana." AWX 21, at 1. Ranger Davis submitted the marijuana to determine whether latent fingerprints could be identified. *Id.*

131. The DPS criminal offense report authored by Ranger Spiller indicates that, on November 25, 1975, he and Sergeant East "went through the apartment again, obtaining approximately a half a pound of marijuana by Sgt. East, located in the stove in the kitchen and other written material which showed possible involvement of subject Andrus as a dope dealer." AWX 40, at 3.

132. The SMPS supplemental report by Sgt. East relays the same facts Ranger Spiller's DPS report does, namely, that the two officers searched the apartment again on November 25, 1975, and "obtained approximately one half pound of marijuana which had been concealed in the bottom storage of the stove located in the kitchen." AWX 41, at 1–2. Sergeant East reported that the marijuana was seized and was in his possession. *Id.* at 2.

133. In support of his allegation, Applicant also offered the June 19, 2015 affidavit of Lieutenant James O'Connell with his application. AWX 9.

a) Lt. O'Connell states he responded to the apartment the day Norris was murdered, which he recalls because he had just started vacation but was called to the crime scene anyway. AWX 9, at 1 ¶ 4.

b) Lt. O'Connell states, while investigating the crime scene, he, "along with other officers," found marijuana in a drawer under the oven. AWX 9, at 1 ¶ 6. Lt. O'Connell stated the amount of marijuana presented caused him to believe the residents of the apartment were involved in dealing drugs. *Id*.

c) The Court finds Lt. O'Connell's affidavit, executed in 2015, discusses events that occurred forty years before. The Court finds Lt. O'Connell's declaration to be unreliable and therefore gives it no weight.

d) The Court further credits the contemporaneous reports of Ranger Spiller and Sgt. East over Lt. O'Connell's forty-year-later recollection. Specifically, in Ranger Spiller's report, he indicates Lt. O'Connell called him to the scene at 6:10pm on November 24, 1975. AWX 40, at 1. However, at 10:50pm that night, "[a]ll policemen and lab crew left and secured the apartment." *Id*. at 2. Ranger Spiller's report indicates the next day, November 25, 1975, he and Sgt. East returned to the apartment, at which point they discovered the marijuana. *Id*. at 3. Ranger Spiller's report does not indicate Lt. O'Connell was present when this occurred, as Lt. O'Connell's affidavit indicates. The same is true for Sgt. East's report, which indicates that, on November 25, 1975, only he, Ranger Spiller, and Fingerprint Expert Harold Hofmeister returned to the apartment and located the marijuana. AWX 41, at 1–2. The Court finds Lt. O'Connell was not present when the marijuana was located, and Lt. O'Connell did not find the marijuana "along with other officers." *See* AWX 9, at 1 ¶ 6. The Court thus finds Lt. O'Connell's testimony not credible as well as unreliable.

Availability of the claim at trial

134. The Court finds trial counsel were aware marijuana had been recovered in the apartment. *See* 38 RR 55–56 (trial counsel asking whether anything "like a half pound of marijuana" was found in the kitchen and submitted for testing); 40 RR 25 (trial counsel arguing during closing arguments that Andrus "couldn't remember what it was—a half pound or whatever was found in the apartment later"). The Court finds Applicant concedes such. *See* Appl. 99 ("Trial counsel had access to the reports noting that marijuana was found in the apartment because they had been turned over in the discovery process.").

135. The Court finds Applicant's false testimony allegation related to marijuana at the apartment was available at the time of trial.

136. The Court finds Applicant did not raise an objection at trial predicated on the falsity of testimony related to marijuana in the apartment.

Falsity of the evidence

137. The Court finds the State did not elicit Urbanovsky's testimony.

138. Regardless, the Court finds Urbanovsky reported to the crime scene on November 24, 1975, and then left the scene to attend the autopsy at Pennington Funeral Home later that night. 37 RR 222–29. The Court finds the reports Applicant relies on demonstrate the marijuana was not found in the apartment until the next day, November 25, 1975, when Urbanovsky was no longer there. The Court finds Applicant's evidence is therefore irrelevant to Urbanovsky's knowledge of whether marijuana was found in the apartment.

139. The Court finds Applicant offers no evidence showing Urbanovsky was present when the marijuana was found. Nor does Applicant offer any evidence showing Urbanovsky had any role in the processing of the marijuana at DPS. The Court thus finds Urbanovsky's testimony that, to his knowledge, no marijuana was found is not false. The Court further finds Urbanovsky's testimony that he did not recall seeing a submission or record of marijuana was not false. The Court finds Urbanovsky's also did not give the jury a misleading impression because the jury was aware that Andrus dealt drugs.

State's Knowledge

140. The Court finds the State was aware marijuana had been found in the apartment.

141. The Court finds, however, that, because Urbanovsky's testimony was not false, the State was not aware of any falsity.

Materiality

142. The Court finds whether marijuana was found in the apartment is relevant only to show that Andrus's drug dealing had something to do with Norris's murder.

143. The Court finds the evidence at trial that established a possible drug-related connection to Norris's death was thoroughly investigated but could not be proven in light of the evidence connecting Applicant, who claimed not to know Norris, to the crime. 39 RR 102–05. And the Court finds Applicant still has not

proffered any credible explanation for his DNA being found in and on Norris's body.

Conclusions of Law

Procedural Bar

144. Because Applicant could have, but failed to, raise an objection based on alleged false testimony at trial, Applicant's Ground 1d is procedurally barred on habeas review. *See Ex parte De La Cruz*, 466 S.W.3d at 864–65; *Ex parte Jimenez*, 364 S.W.3d at 880.

Alternative merits

145. The Court concludes Applicant fails to prove by a preponderance of the evidence that the State presented materially false testimony.

146. The Court concludes Applicant fails to show Urbanovsky's testimony was false, and because he cannot demonstrate falsity, he cannot demonstrate that the State was aware of any falsity.

147. The Court concludes, even if Applicant could demonstrate falsity and knowledge, Applicant fails to show by a preponderance of the evidence that any of the allegedly false testimony was material. The Court concludes that Applicant relies on this allegedly false testimony the same way he relied on the allegedly false testimony in Grounds 1b and 1c: to suggest someone else raped and murdered Norris. But the Court concludes Applicant's theory is baseless when compared to the overwhelming evidence connecting Applicant to the offense. The Court concludes there is no reasonable likelihood that the allegedly false testimony affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d at 665.

148. The Court concludes, because Applicant could have raised the false testimony allegation at trial, Applicant must also show the allegedly false testimony was not only material but not harmless. *Lalonde*, 570 S.W.3d at 723. The Court concludes that, even if there is a *possibility* that any error affected the judgment of the jury, there is no *probability* that it did given the above evidence; thus, any error is harmless. *See Fierro*, 934 S.W.2d at 376; *Lalonde*, 570 S.W.3d at 723 (harmless error applies where could have raised claim at trial or direct appeal).

149. The Court recommends denying Applicant's Ground 1d.

Ground 1e: Original investigating officers

Factual Findings

150. Applicant alleges the State presented false testimony when it allowed Detective Dunn to testify that all the officers from the original investigation, except for Officer Bethea and Ranger Davis, were dead, even though Lt. O'Connell was in fact alive. Appl. 57–59. Applicant argues this false testimony was material because it prevented the jury from hearing Lt. O'Connell's opinion regarding the crime scene and the subsequent investigation into Norris's death. Appl. 57.

151. During direct examination of Detective Dunn, the following exchange occurred:

> Q. Okay. And how many different officers, when you first looked at that case file, had been involved in the original investigation back in 1975, '76?
>
> A. Well, there was the patrol officer that initially responded, Albert Bethea; a sergeant John East with the Criminal Investigations Division; and they called in the Texas Rangers. The ranger for our region at that time was gone on a hunting trip and so he had made arrangements with another ranger out of Austin to cover his district. That was Wallace Spiller. Wallace then called in for a lab team to be sent down.
>
> Q. Okay. So were you able to locate some of the people that were involved in the original investigation or were some of them unable to be located?
>
> A. Yes. I was able to locate Albert Bethea. In fact, I knew him. He was with another agency not too far away. He was with Luling PD. I was able to locate Sergeant East. And Wallace Spiller was deceased.
>
> Q. Okay.
>
> A. I was able to locate also Joe Davis who came into—later into the investigation. He didn't respond to the initial scene, but he did do some followup work.
>
> . . .
>
> Q. Okay. So you learned some of the investigators are still alive, some aren't. And as of today, how many investigators are still alive that worked on this case?

A. From the initial scene—that responded to the initial scene, only—only one that I know of and that's Albert Bethea.

. . .

A. And as far as officers that worked on the case in whole, two: him and Joe Davis.

38 RR 55–56.

152. To support his allegation, Applicant offered the June 19, 2015 affidavit of Lieutenant James O'Connell with his application. AWX 9.

a) Lt. O'Connell states that, as of 2015, he was living in Oregon. AWX 9, at 1 ¶ 2.

b) Lt. O'Connell states that, in 1975, he was a Lieutenant for the San Marcos Police Department and in charge of the department's Criminal Investigations Division. AWX 9, at 1 ¶ 3.

c) Lt. O'Connell states he was called the crime scene the day Norris was murdered, and he contacted the Texas Rangers to assist with processing the crime scene. AWX 9, at 1 ¶¶ 4, 5.

d) Lt. O'Connell believes he and other officers found marijuana in the apartment, AWX 9, at 1 ¶ 6, but for the reasons stated above, this testimony is not credible, and the Court finds Lt. O'Connell was not present when the marijuana was found. Lt. O'Connell's affidavit does not otherwise describe any investigation that he personally conducted in Norris's case.

e) Lt. O'Connell states there were no signs of forced entry into the apartment, and he opines that Norris had been tortured. AWX 9, at 1 ¶ 4. Lt. O'Connell further opines that "whoever killed Norris tortured her and it appeared that they were trying to get something out of her." *Id.* at 2 ¶ 8. He acknowledges he does not know what said person was looking for but "thought it might have been money or information related to the drug dealing." *Id.*

f) The Court finds Lt. O'Connell is in fact alive. The Court finds O'Connell's description of his position at the San Marcos Police Department in 1975 and his decision to call the Texas Rangers is credible. The Court finds the remainder of his affidavit, recounting events that occurred more than forty years previously, to be unreliable and not credible.

g) The Court further finds Lt. O'Connell's testimony regarding Norris being tortured and its relation to her and Andrus dealing drugs is speculative at best, as it is not based on any evidence but only on Lt. O'Connell's unsupported personal opinion. The Court finds such testimony is improper lay person opinion and gives Lt. O'Connell's conclusions no weight.

153. To support his allegation, Applicant also offered a supplemental report written by Detective Dunn in which she details a July 1996 interview with Officer Bethea. AWX 38. In it, Detective Dunn reports that, as of July 1996, Lt. O'Connell was living in New Braunfels, Texas, and was managing an apartment complex near Schlitterbahn Water Park. *Id*. The Court finds O'Connell was alive in 1996.

154. In response to Applicant's allegation, the State offered Detective Dunn's December 16, 2015 affidavit. SWX 33.

a) Detective Dunn states that, at the time of Norris's murder, Lt. O'Connell was the supervisor of the Criminal Investigation Division. SWX 33 at 4. Detective Dunn states Lt. O'Connell "had very limited involvement in the case and it was not as an investigator." *Id*. Lt. O'Connell "responded to the scene, called for the Texas Rangers, and was likely kept up-to-date on the investigation by Sergeant East and Detective Picasso." *Id*. "There are no investigative reports written by Jim O'Connell in the case file, he is not mentioned in any investigator's report as performing any investigative function, and he did not approve any of the investigative reports." *Id*. Detective Dunn states that, therefore, she did not understand Lt. O'Connell to be an officer who "actually investigated the case." *Id*. at 5.

b) The Court finds Detective Dunn's affidavit on this issue credible because it comports with Lt. O'Connell's own description of his role in the murder. The Court finds Lt. O'Connell was not an "investigative" officer.

Availability of the claim at trial

155. The Court finds Applicant concedes trial counsel had information at trial that indicated Lt. O'Connell was not dead. *See* Appl. 100 ("[T]rial counsel had access to reports that suggested that Lieutenant O'Connell was still alive. [Detective] Dunn created a report from her July 22, 1996, interview with former Officer Bethea.").

156. The Court finds Applicant's false testimony allegation related to Lt. O'Connell was available at the time of trial.

157. The Court finds Applicant did not raise an objection at trial predicated on the falsity of testimony related to Lt. O'Connell.

Falsity of the evidence

158. The Court finds Detective Dunn did not mention Lt. O'Connell at all during her testimony, much less that he was dead. The Court thus finds Detective Dunn's testimony was not false.

159. The Court finds, given both Lt. O'Connell's and Detective Dunn's descriptions of Lt. O'Connell's role in the Norris case, Detective Dunn's belief that Lt. O'Connell was not an "investigating" officer was accurate. The Court thus finds Detective Dunn's testimony that Officer Bethea was the only original investigator still alive was true. The Court further finds Detective Dunn's testimony that Officer Bethea and Ranger Davis were the only two investigators who worked on the case as a whole still alive was also true. The Court finds Detective Dunn's testimony was not false and did not mislead the jury.

State's Knowledge

160. The Court finds the State was aware Lt. O'Connell was still alive.

161. The Court finds, however, that, because Detective Dunn's testimony was not false, the State was not aware of any falsity.

Materiality

162. The Court finds whether Lt. O'Connell was alive is relevant only to show that Andrus's drug dealing had something to do with Norris's murder.

163. The Court finds the evidence at trial established a possible drug-related connection to Norris's death was thoroughly investigated but could not be proven in light of the evidence connecting Applicant, who claimed not to know Norris, to the crime. 39 RR 102–05.

Conclusions of Law

Procedural Bar

164. Because Applicant could have, but failed to, raise an objection based on alleged false testimony at trial, Applicant's Ground 1e is procedurally barred on habeas review. *See Ex parte De La Cruz*, 466 S.W.3d at 864–65; *Ex parte Jimenez*, 364 S.W.3d at 880.

Alternative merits

165. The Court concludes Applicant fails to prove by a preponderance of the evidence that the State presented materially false testimony.

166. The Court concludes Applicant fails to show Detective Dunn's testimony was false, and because he cannot demonstrate falsity, he cannot demonstrate that the State was aware of any falsity.

167. The Court concludes that, even if Applicant could demonstrate falsity and knowledge, Applicant fails to show by a preponderance of the evidence that any of the allegedly false testimony was material. The Court concludes Applicant relies on this false testimony the same way he relies on Andrus's testimony regarding his criminal history (Ground 1b), Detective Dunn's testimony regarding Andrus's alibi (Ground 1c), and Urbanovsky's testimony regarding marijuana in the apartment (Ground 1d): to cast doubt on the clear evidence demonstrating Applicant's involvement in the offense. But the Court concludes Applicant cannot surmount the force of the DNA evidence tying him to Norris's rape and murder. The Court concludes there is no reasonable likelihood that the allegedly false testimony affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d at 665.

168. The Court concludes Applicant's allegation that, had the jury known Lt. O'Connell was alive, it would have "heard his opinion of the case," is meritless. Appl. 58. Lt. O'Connell's opinion is not admissible opinion testimony. The Court concludes Applicant's claim in this regard is really a complaint that Lt. O'Connell was not called to testify, but such a complaint sounds more in an ineffective-assistance-of-counsel claim. The State has no obligation to call every witness who was ever involved in the case.

169. The Court concludes that, because Applicant could have raised the false testimony allegation at trial, Applicant must also show the allegedly false testimony was not only material but not harmless. *Lalonde*, 570 S.W.3d at 723. The Court concludes that, even if there is a *possibility* that any error affected the judgment of the jury, there is no *probability* that it did given the above evidence; thus, any error is harmless. *See Fierro*, 934 S.W.2d at 376; *Lalonde*, 570 S.W.3d at 723 (harmless error applies where could have raised claim at trial or direct appeal).

170. The Court recommends denying Applicant's Ground 1e.

Ground 1f: DNA evidence

Factual Findings

171. Applicant alleges the State's witness Javier Flores misled the jury when he testified that there was nothing to gain from further testing of the blood recovered from the crime scene, even with newer testing techniques, and that the State's argument to the jury that the DNA profile operated as a "date and timestamp" of Applicant's presence was false. Appl. 59–63. Applicant argues newer testing techniques "created a possibility of the blood producing a DNA profile" and "in reality the presence of DNA did not establish when it was left." Appl. 59. Applicant argues this allegedly false testimony was material because the State's case against Applicant "was built on DNA evidence." *Id*.

172. On direct examination, DPS analyst Flores testified that in 1997, he was contacted by Detective Dunn to do some further forensic work on Norris's case. 39 RR 65. Flores noted Norris's case had been previously worked on in DPS, so her file already a file number on it. 39 RR 65. Flores testified that, at the time he was asked to work on the case, DPS was using DQ-Alpha and D1S80 kits to analyze DNA evidence, which meant the lab had the ability to look at two different locations on a DNA strand. 39 RR 66–67.

173. Flores testified that he was given, as relevant here, four small blood samples collected from the bathroom at the scene of the murder. 39 RR 81. Flores testified that he was not able to get "a DNA result" from any of those stains. 39 RR 82. This meant Flores was unable to get any DNA from the stains. 39 RR 82, 108. Flores explained that if the testing indicated "there is no DNA present, more than likely you don't want to go through the process of" doing any further testing, but "[i]f there is some DNA, but for some reason you weren't able to get a type, maybe further testing is recommended." 39 RR 82. Flores explained that he "only did the DQ-Alpha, [he] didn't think there was enough to do anything else with" the samples. 39 RR 82.

174. Flores testified that he left DPS at in 1999, at which point DPS analyst Cassie Carradine took over Norris's case. 39 RR 118. Flores testified that, by that time, a new kind of testing, called Short Tandem Repeat (STR), was on the horizon. 38 RR 119. STR testing was a more sensitive kit than DQ-Alpha because, rather than looking at just one location on the DNA, STR looked at 9 different locations, thus allowing for the more differentiation between people. 39 RR 119–21.

175. On cross-examination, Flores was asked further questions about the blood stain results:

> Q. . . . When you were talking about the blood stains in the bathroom—that there was an insufficient sample or insufficient DNA to get a DQ-Alpha profile, do you remember that?
>
> A. Yes. I think when I did the quantitation the indication was that there wasn't enough to work with.
>
> Q. Okay. Would that still have been the case—if you had had STR available to you then, *do you think you would have had enough to get a DNA profile*?
>
> A. *The quantitation that we used at that time was pretty sensitive. The fact that I didn't detect any DNA would have been the same result. It would have been an STR analysi*s.
>
> Q. *So you think even the more sensitive STR would not have detective it*?
>
> A. *I think so, yes*.

39 RR 129 (emphasis added).

176. During closing argument, the State argued:

> Do you remember the discussion about her watch? Her watch was submerged in the water. Do you remember when her watched stop[ped]? Her watched [stopped] at 12:31, 15 to 20 minutes after she left work. You don't get a timeline like that very often. Norris went home and all of this happened to her by 12:31.
>
> She walked out in these clothes and by 12:31 she is there in that tub. Now think about that. In order for the argument that Mr. Lanford just made to make sense to you, you have to believe that she walked in the door; she had something go on between her and [Applicant]; and then him leave and then someone else come in and do this to her by 12:31.
>
> Ladies and gentlemen, that's what we call unreasonable doubt. That's all it can be. Now sometimes—sometimes people may—in cases like this may say, "Well, you know, all they've shown is that this semen is in her body. You don't know when it got there,' wink, wink, nudge, nudge. He didn't say that, but the inference is there.

> Now here's how you know that that doesn't work. The reason that you know that doesn't work and the reason why I just put these clothes out here is one very simple thing. This, (indicating). This, (indicating). *This handprint is on her shirt. He might as well have put a date and timestamp on it to tell you: This happened after she put these clothes on, she went to work and she got home.*
>
> This isn't something that got there earlier. *He put a date and timestamp on the outside of her body and he put an evidence stamp inside her body with the semen.*

40 RR 33–34 (emphasis added).

177. In support of his allegation, Applicant offered the June 23, 2015 affidavit of DNA expert Dr. William Watson with his application. AWX 5.[2]

a) Dr. Watson was Applicant's DNA expert at trial. AWX 5, at 2 ¶ 6; 37 RR 124 (trial counsel noting for the record that "Mr. William Watson," their expert, is sitting in the courtroom); 39 RR 139 (DPS analyst Flores identifying Dr. Bill Watson as present in the courtroom). Dr. Watson was not asked to testify at Applicant's trial. *Id.*

b) Dr. Watson was retained by Applicant's postconviction counsel "to discuss issues regarding DNA and serology analysis that occurred during [Applicant]'s trial and the investigation into the underlying offense." AWX 5, at 2 ¶ 6.

c) As relevant here, Dr. Watson addresses the State's argument about "a date and timestamp." AWX 5, at 6 ¶ 15. He states "the presence of DNA does not provide an indication of when that DNA was left behind." *Id.* Dr. Watson states Applicant could therefore "have come into contact with the victim's blouse hours, days or weeks prior to her death and deposited sufficient DNA to generate the profile seen in this case." *Id.*

d) Regarding Flores's testimony about the sensitivity of quantification, Dr. Watson states the method used by Flores in 1997, called "slot blot analysis," "was only sensitive to approximately 0.25ng/ul." AWX 5, at 12 ¶ 24. Dr. Watson notes that, although it is true that the testing at the time "required more DNA than these samples contained, later STR

[2] The Court notes that Dr. Watson testified at the evidentiary hearing held on Applicant's IATC claims. *See* 11 EHRR 10–225. Because he testified, Dr. Watson's June 2015 affidavit was excluded. 8 EHRR 24 (Court sustained State's objections to admission of affidavits by testifying experts). The Court thus relies on Dr. Watson's affidavit solely for purposes of the non-designated claims.

analysis methods used to test other items could produce full or partial profiles with samples containing as little as 0.05ng of DNA." *Id.* Dr. Watson states "[t]hese levels of DNA would have been undetectable using slot blot quantification." *Id.* Dr. Watson suggests "there is no way that Mr. Flores could know that '. . . any DNA would have been the same result.'" *Id.* Dr. Watson concludes "[i]t is more likely that the newer quantification methods (real-time PCR) would have detected the presence of DNA, and newer STR testing methods would have produced a profile." *Id.*

e) Dr. Watson states he could have testified to the above information at trial had he been called to do so. AWX 5, at 15 ¶ 31.

f) The Court finds Dr. Watson's testimony on this issue to be credible.

Availability of the claim at trial

178. The Court finds Dr. Watson was present at trial when the complained-of testimony and argument was given. *See* 37 RR 124 (trial counsel noting for the record that Dr. Watson, their expert, is sitting in the courtroom); 39 RR 139 (DPS analyst Flores identifying Dr. Bill Watson as present in the courtroom); AWX 5, at 15 ¶ 31 (Dr. Watson saying he could have testified to the above if he had been called to do so).

179. Given Dr. Watson's knowledge at the time of trial, the Court finds trial counsel possessed the ability to make an objection to the alleged false testimony at trial.

180. The Court finds Applicant's false testimony allegation related to the DNA evidence was available at the time of trial.

181. The Court finds Applicant did not raise an objection at trial predicated on the falsity of testimony related to DNA evidence.

Falsity of the evidence

182. The Court finds Flores's testimony was not false. The Court finds Flores was asked his *opinion* on whether newer quantification methods might have yielded results, and his opinion is not a fact that can be proven false.

183. The Court further finds Dr. Watson too is only offering an opinion about what the newer quantification methods would have yielded. Flores said he did not expect detection to result with other methods while Dr. Watson speculates that maybe it will. The Court finds Dr. Watson's speculation is not sufficient to prove Flores's testimony false.

184. The Court finds the State's "date and timestamp" argument was argument, not evidence. *See Cary*, 507 S.W.3d at 766; *Hutch*, 922 S.W.2d at 173.

185. The Court further finds the State did not argue that "the presence of DNA itself [can] indicate when that DNA was left." Appl. 61. Rather, the State argued that, given the timeline of Norris's murder, the fact that Applicant's DNA was detected on the blouse she wore to work that morning was effectively a "date and timestamp" for the murder. The Court finds Applicant misrepresents the State's closing argument, and the State's argument is not false.

State's Knowledge

186. The Court finds Applicant admits he had no direct evidence showing Flores or Tanner knowingly provided false evidence regarding the DNA evidence. Appl. 62.

187. The Court finds Applicant is not raising a claim of knowing use of false testimony.

188. The Court finds that, even if Applicant were raising a knowing use of false testimony claim, there is no evidence that the State knew of any falsity.

Materiality

189. The Court finds Dr. Watson offers mere speculation that newer testing methods *could* have provided more evidence that Applicant did not kill Norris. The Court finds there is no definitive evidence currently before the Court that newer quantification methods would have yielded any DNA results.

190. The Court further finds the evidence upon which no DNA was detected was blood samples from inside of Norris's apartment and bathroom. *See* 39 RR 81–82. The Court finds Applicant's DNA was still found in and on Norris's body.

191. The Court finds the evidence at trial showed there was only a short window within which Norris had been murdered. Namely, Norris returned home around noon, her watch was stopped at 12:31p.m., and a handprint was found on the blouse she wore to work and was wearing at the time of the murder.

192. The Court finds that, while Dr. Watson opines that the presence of DNA does not indicate when it was left, Dr. Watson's opinion is presented in a vacuum, without any reference to the evidence presented at trial.

Conclusions of Law

Procedural Bar

193. Because Applicant could have, but failed to, raise an objection based on alleged false testimony at trial, Applicant's Ground 1f is procedurally barred on habeas review. *See Ex parte De La Cruz*, 466 S.W.3d at 864–65; *Ex parte Jimenez*, 364 S.W.3d at 880.

Alternative merits

194. The Court concludes Applicant fails to prove by a preponderance of the evidence that the State presented materially false testimony.

195. The Court concludes that, because argument is not evidence, representations made by the State during closing argument cannot form the basis of a false testimony claim. *See Cary*, 507 S.W.3d at 766; *Hutch*, 922 S.W.2d at 173. Thus, Applicant fails to meet his burden to show by a preponderance of the evidence that the State's closing arguments were materially false testimony.

196. The Court concludes Applicant fails to show Flores's testimony was false, and because he cannot demonstrate falsity, he cannot demonstrate that the State was aware of any falsity.

197. The Court concludes that, even if Applicant could demonstrate falsity and knowledge, Applicant fails to show by a preponderance of the evidence that any of the allegedly false testimony was material.

198. The Court concludes Dr. Watson's opinion on newer quantification methods is nothing more than speculation, and there is no possibility such speculation would have had any effect on the outcome of the jury's verdict. The Court concludes that, even if newer testing techniques could *possibly* have resulted in the detection of DNA in the blood samples from in and around Norris's apartment, such results would have no bearing on the fact that Applicant's DNA was still found in and on Norris's body, especially when Applicant denied knowing Norris at all.

199. The Court further concludes Dr. Watson's opinion on the "date and timestamp" argument, while credible, is irrelevant to the evidence presented at trial, given the timeline of Norris's murder. The Court concludes the timestamp argument involved a combination of all the evidence: Norris's return home, the watch stopping at 12:31pm, the handprint on the blouse worn to work and wearing at the time of the murder, not just, or even primarily, the DNA. *See Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019) (proper closing argument includes, *inter alia*, reasonable deductions from the evidence). The Court

concludes Dr. Watson failed to consider this timeline and failed to consider other evidence, such as the military records that document Applicant was in Twenty-nine Palms, California, two days before he drove to Texas with enough time to rape and murder Norris. 38 RR 187, 192–92; 49 RR at SX 66. Dr. Watson's hypothetical scenario where Applicant's DNA could've been left days or weeks before Norris's murder is immaterial and does not reflect any understanding of the substantial other evidence in the case that tied Applicant to the rape and murder.

200. The Court concludes there is no reasonable likelihood that the allegedly false testimony affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d at 665.

201. The Court concludes that, because Applicant could have raised the false testimony allegation at trial, Applicant must also show the allegedly false testimony was not only material but not harmless. *Lalonde*, 570 S.W.3d at 723. The Court concludes that, even if there is a *possibility* that any error affected the judgment of the jury, there is no *probability* that it did given the above evidence; thus, any error is harmless. *See Fierro*, 934 S.W.2d at 376; *Lalonde*, 570 S.W.3d at 723 (harmless error applies where could have raised claim at trial or direct appeal).

202. The Court recommends denying Applicant's Ground 1f.

GROUND TWO—IATC AT THE GUILT PHASE

Applicant's allegation

203. Applicant alleges IATC at the guilt phase of trial by: a) not being qualified to be first chair counsel in a death penalty case; b) failing to call DNA expert Dr. Watson as a witness; c) failing to correct allegedly false testimony; d) failing to investigate and present information from the original 1970s investigation into Norris's death; and e) allowing DNA evidence to be presented prior to a hearing on its admissibility. Appl. 66–116.

204. The Court designated this ground for factual development, and the claims were developed at an evidentiary hearing. The record for these claims is thus limited to the testimony and evidence presented at the evidentiary hearing.

Ground 2a: Qualifications of lead counsel

Factual Findings

205. Applicant alleges lead counsel Lanford was not qualified to represent Applicant at trial. Appl. 69–72. He specifically argues Lanford did not meet the prerequisites of Texas Code of Criminal Procedure Article 26.052(d)(2)(F)(ii),

which requires lead counsel "have trial experience in investigating and presenting mitigating evidence at the penalty phase of a death penalty trial." *Id*. at 69. Applicant argues Lanford never "presented" mitigating evidence at the punishment phase of a death penalty trial. *Id*. 71–72.

206. Lanford was appointed to represent Applicant as first chair counsel on December 7, 2010. 1 CR 9.

207. Lanford currently lives in Washington state. 7 EHRR 23. Lanford testified live via Zoom at the evidentiary hearing. 7 EHRR 23.

208. Lanford graduated in the top 12% from the University of Chicago School of Law in 1972. 8 EHRR 31. Lanford also received a Master's of Judicial Studies from the University of Nevada in 1992, and he graduated from the United States Army War College in 1992 or 1993. 8 EHRR 31.

209. Lanford was admitted to the Texas bar in 1972 and was board certified in criminal law from 1978 until his retirement in 2016. 8 EHRR 31–32. Lanford was also admitted to practice in the United States District Court for the Southern District of Texas, the United States Court of Military Appeals, the United States Court of Appeals for the Fifth Circuit, and the United States Supreme Court. 8 EHRR 31.

210. By the time Lanford began representing Applicant in 2010, Lanford had been a practicing attorney for nearly 40 years. 8 EHRR 32. About 97% of Lanford's practice was criminal law during that time, and the overwhelming majority was criminal defense work. 8 EHRR 32–33.

211. Lanford also served as a criminal court district judge in Harris County, Texas, for 7 years and served as a visiting judge for another nearly 5 years. 7 EHRR 25, 40; 8 EHRR 33.

212. Prior to Applicant's trial, Lanford had been appointed as first chair defense counsel in two capital trials where death was sought, though neither case made it to the punishment phase of the trial. 7 EHRR 36; 8 EHRR 35, 39. Though Lanford did not present mitigation evidence, he investigated mitigation evidence for at least one of those cases. 8 EHRR 35–36.

213. Lanford also presided over four full capital trials as a judge, three of which resulted in the imposition of a death sentence. 8 EHRR 37.

214. In addition to his experience trying and presiding over capital cases, Lanford also attended over 242 hours of capital-specific continuing legal education (CLE) classes prior to representing Applicant in 2010. 8 EHRR 39; State's

Hearing Exhibit (SHX) 106. From 2010, when Lanford first started representing Applicant, to 2013, when Applicant was convicted, Lanford received an additional 135 hours of capital-specific CLE hours. 8 EHRR 39–40.

215. Lanford applied to be on the list of capital-case qualified attorneys (capital list) for the Second and Third Administrative Judicial Regions. 8 EHRR 40; AHX 49; AHX 50. Everything Lanford provided in his applications as far as his background and qualifications was true and accurate to the best of his knowledge. 8 EHRR 41.

216. Lanford was on the capital list for the Third Administrative Judicial Region, which includes Hays County, 7 EHRR 41, since at least 2001, and he was on the Second Administrative Judicial Region's capital list since at least 2004. 8 EHRR 40. Lanford was never once rejected from either Administrative Judicial Region's list, and he was never removed from either list. 8 EHRR 40–41.

217. An issue related to Lanford's qualifications was raised by Carlos Garcia at trial. 8 EHRR 41–42. Garcia was an attorney from the Texas Defender's Service (TDS) that assisted on Applicant's case at trial. 8 EHRR 53–55.

218. A hearing was held before Judge Steel when the issue was brought to his attention. 18 RR 5–11. Judge Steel, the State, and Lanford discussed Lanford's qualifications under Texas statute. *Id*. Because there was no motion before the Court, Judge Steel declined to sua sponte intervene where Lanford had been found by the committees to be qualified to serve as first-chair counsel. 18 RR 10.

219. After the issue was raised, Lanford spoke with Applicant about it. *See* 8 EHRR 41–42 (Lanford testifying he had not spoken with Applicant about his qualifications before it was raised by Garcia); SHX 1, at 49 (Lanford writing in time log that on April 17, 2013, he spoke with Applicant "[a]fter court" "about the issue that [Garcia] raised that [Lanford] did not meet the requirements of lead counsel").

220. Applicant "laughed and told [Lanford] to go ahead and proceed." 8 EHRR 42; SHX 1, at 49. Applicant told Lanford that he was "comfortable with [him] as lead counsel." 8 EHRR 42; SHX 1, at 49.

221. The Court finds Lanford's testimony to be credible.

Conclusions of Law

Cognizability

222. The Court concludes Applicant has no constitutional right to statutorily-qualified first-chair counsel; thus, his clam can only arise under state statute. Consequently, Applicant's claim, at best, alleges a violation of Texas statute, which is not a cognizable claim on habeas review. *See Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002) (violations of statutes, rules, or other non-constitutional doctrines are not recognized; scope of habeas writ is confined "to jurisdictional or fundamental defects and constitutional claims"); *Ex parte McCain*, 67 S.W.3d 204, 206 (Tex. Crim. App. 2002) (concluding a violation of a procedural statute, even a "mandatory" one, is not cognizable on a writ of habeas corpus because it does "not embody a constitutional or fundamental right"); *see also Hughes v. Dretke*, 412 F.3d 582, 590 (5th Cir. 2005) (rejecting federal-habeas claim that counsel was not qualified under Article 26.052 because, "[b]y complaining only of a state statutory violation, Petitioner has failed to allege a constitutional violation").

Procedural Bar

223. The Court concludes Applicant was "comfortable" with Lanford as first chair counsel and asked him to proceed in that role, even after Lanford informed Applicant of the challenge to his qualifications. The Court therefore concludes that, if there was error in allowing Lanford to proceed, Applicant invited it, and the claim is thus barred on habeas review. *See Ex parte Pete*, 517 S.W.3d 825, 834 (Tex. Crim. App. 2017) ("Because the record reflects without contradiction that Appellant in fact invited the trial court to conduct a fresh punishment hearing before a different jury, he should not be heard to complain about it in subsequent habeas corpus proceedings or on appeal."); *Woodall v. State*, 336 S.W.3d 634, 644 (Tex. Crim. App. 2011) ("[A] party cannot take advantage of an error that it invited or caused, even if such error is fundamental."); *Prystash v. State*, 3 S.W.3d 522, 531 (Tex. Crim. App. 1999) (explaining "the law of invited error estops a party from making an appellate error of an action it induced" and overruling jury charge error complaining of an omission the defendant requested); *cf. Druery v. Thaler*, 647 F.3d 535, 545 (5th Cir. 2011) (holding the CCA's "invited-error doctrine qualifies as a state procedural bar").

224. The Court further concludes that, because a hearing was held at trial on this issue, Applicant's claim is a record-based claim that he could have, but failed to, raise on direct appeal. The Court concludes Applicant's claim is procedurally barred on habeas review. *Ex parte Gardner*, 959 S.W.2d 189, 190–91 (Tex. Crim. App. 1998) (holding writ of habeas corpus is not substitute for direct appeal).

Alternative merits

225. The Court concludes Article 26.052(d)(2) has two provisions governing the type of trial experience lead counsel in a capital case must have. The first requires counsel "have *tried to a verdict as lead defense counsel* a significant number of felony cases, including homicide trials and other trials for offenses punishable" as second degree felonies or higher. Tex. Code Crim. Proc. art. 26.052(d)(2)(E) (emphasis added). The second requires counsel to "have *trial experience* in," as relevant here, "investigating and presenting mitigating evidence at the penalty phase of a death penalty trial." *Id*. art. 26.052(d)(2)(F)(ii) (emphasis added).

226. The Court concludes that, under normal principles of statutory construction, the fact that one provision of Article 26.052(d)(2) requires experience "tr[ying] to a verdict as lead defense counsel" while the other only requires "trial experience" means the latter does not require counsel to actually have presented mitigating evidence at the punishment phase of trial. *See, e.g.*, *Duncan v. Walker*, 533 U.S. 167, 173 (2001) ("It is well settled that where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposefully in the disparate inclusion or exclusion." (cleaned up)). The Court concludes that, under Article 26.052(d)(2)(F)(ii), lead counsel is not required to have experience as *defense counsel* "investigating and presenting mitigating evidence."

227. The Court concludes that, as a matter of state law, Lanford was qualified to serve as Applicant's first chair counsel at trial, as the judges of each of the administrative districts have found in approving Lanford's application and as Judge Steel found in declining to sua sponte remove Lanford from Applicant's case. The Court concludes that, under Article 26.052(d)(2)(F)(ii), it was enough for Lanford to have presided over a trial where mitigation evidence was presented, even if he did not have experience presenting mitigation evidence as defense counsel.

228. The Court further concludes Applicant has no constitutional right to statutorily-qualified first-chair counsel. *See Hughes*, 412 F.3d at 590 (rejecting claim that counsel was not qualified under Article 26.052 because, "[b]y complaining only of a state statutory violation, Petitioner has failed to allege a constitutional violation").

229. Regardless, assuming Applicant has properly raised an IATC claim under *Strickland v. Washington*, 466 U.S. 668 (1986), the Court concludes Lanford was imminently qualified based on his experience and background, and Applicant raises no constitutional issue as a result.

230. The Court rejects Applicant's suggestion that the Court should weigh a purported lack of statutory qualification as a "relevant factor" in assessing trial counsel's performance in *other* IATC claims. *See* Appl. 72. The Court concludes its review of a properly raised *Strickland* claim proceeds under the familiar two-part test enumerated therein, and nothing requires the weighing of a free-floating factor against counsel's performance. To the contrary, Applicant must specifically allege how counsel was constitutionally deficient in specific acts or omissions. *See Strickland*, 466 U.S. at 702 (Brennan, J., concurring) (contrasting claims raised under *United States v. Cronic*, 466 U.S. 648 (1984), which concerns itself with general circumstances that make it so unlikely that counsel could be effective that prejudice is presumed, with claims under *Strickland*, which "concerns claims of ineffective assistance based on allegations of *specific errors* by counsel" (emphasis added)); *see also Hughes*, 412 F.3d at 590 (rejecting *per se* rule that purported violations of Article 26.052 were presumptively deficient).

231. The Court recommends denying Applicant's Ground 2a.

Ground 2b: DNA expert

Factual Findings

232. Applicant alleges trial counsel were ineffective because they failed to present their own DNA expert during the guilt phase of Applicant's trial. Appl. 73–87. Applicant specifically alleges trial counsel could've presented Dr. Watson to testify that: 1) the DNA linking Applicant to Norris's rape and murder was consistent with a sexual encounter the day before her death; 2) if Applicant was a secretor, then the ABO blood typing results are not consistent with Applicant having sexual contact with Norris shortly before her death; 3) the DNA on the blouse was not a "date and timestamp" for the murder; 4) additional avenues of DNA testing could've been conducted; and 5) the lack of a complete profile for Norris could've affected the interpretation of the DNA results. Appl. 78–87. Applicant also alleges trial counsel were ineffective for failing to request a *Daubert* hearing on the use of MiniFiler. Appl. 87. Applicant argues trial counsel's actions prejudiced him because their failure to present Dr. Watson "made it difficult for the jury to consider alternative explanations for Norris's death." Appl. 113–14. Applicant believes that, had trial counsel presented the above, it would have cast reasonable doubt on Applicant's guilt. Appl. 73.

Trial record

233. Applicant's case was a "cold case," or an unsolved case, for 35 years. 37 RR 62. The advancement of science is what finally led to the identification and apprehension of Applicant in 2010. *See* 39 RR 45–139, 148–281. Thus, the main evidence connecting Applicant to Norris's rape and murder was DNA evidence

showing his semen was inside her and his handprint was on the blouse she wore to the work that day and was found dead in. *See* Background Facts, *supra*.

234. The State presented three witnesses who testified about the analysis of the DNA evidence in Applicant's case. 39 RR 45–139, 148–281. DPS analyst Flores testified about the initial DNA testing conducted in the case until 1999. 39 RR 45–139. DPS analyst Carradine testified about the testing conducted from 1999, when she took over the case from Flores, to 2003, when she left DPS. 39 RR 148–214. And DPS analyst Negin Kuhlmann testified about the testing she conducted using the latest DNA testing kits in 2010. 39 RR 215–281.

235. The record shows Applicant's trial counsel conducted a limited cross examination of these three witnesses. 39 RR 124–31 (Duer cross of Flores), 196–205 (Duer cross of Carradine), 210–11 (Duer re-cross of Carradine), 272–77 (Duer cross of Kuhlmann), 280–81 (Duer re-cross of Kuhlmann).

236. The record also shows that, after Flores testified but before Carradine and Kuhlmann testified, Applicant's trial counsel unsuccessfully attempted to suppress the DNA evidence on the basis that the sample of DNA uploaded into CODIS did not follow proper protocols. 39 RR 141–46.

237. The record shows that, at the close of the State's case, the defense moved for a directed verdict, arguing the State had failed to prove Applicant was associated with the victim. 39 RR 282. The defense also argued the State's evidence showed, at best, that there was a sexual assault but did not tie Applicant to the cause or manner of death. 39 RR 282. The defense argued the evidence supporting Applicant's guilt was thus legally insufficient. 39 RR 282. The trial court denied Applicant's motion for a directed verdict. 38 RR 282.

238. The record shows trial counsel did not present any witnesses challenging the DNA evidence or any other witnesses during guilt. 39 RR 283, 285 (defense rests).

239. The record shows the defense requested, and was granted, a jury instruction for the lesser included offense of aggravated rape. 40 RR 8.

240. During closing arguments, the defense summarized the State's case as "remarkably simple." 40 RR 24. "We have a young woman who is in the prime of her life, ready to start something great, who meets a despicable death; and we have Willie Jenkins's DNA . . . on and in her body." 40 RR 24. The defense argued that, based on the science, there was no question that "Willie Jenkins was there and had sexual contact with Sherly Ann Norris[,]" but the State wanted the jury "to jump from the sex act to capital murder." 40 RR 24. The defense suggested Andrus could have murdered Norris. 40 RR 27. But as to the

DNA evidence: "We would be really crazy to try to dispute that DNA evidence on this date and all that stuff. We're not going to insult anybody's intelligence on that. It proves a sex act. No question about it. But does it prove murder?" 40 RR 28.

241. The State responded in closing arguments:

> Now let's talk about the DNA. And I'm glad to hear that Mr. Lanford is not contesting the fact that that is this defendant's DNA in and on Sheryl's body. Because one of the things you learn about the DNA in this case is that there's a whole bunch of it still sitting there in the lab. So if anybody ever wanted to go back and check the work, if anybody ever wanted to test it, they could.
>
> Mr. Watson isn't here with them again today, but he was here the whole time. Their DNA guy, he could have tested it if he wanted to. So I'm glad to hear that they're not coming here to tell you there's something wrong with the DNA.

40 RR 31–32. The State then referred to defense counsel's closing argument that only sexual assault had been proven as "unreasonable doubt" based on the timeline in the case. 40 RR 32. Specifically, Norris left work at noon that day in the shirt she put on that morning, got home around 5-10 minutes later, and her watch was submerged in water, stopping at 12:31pm. 40 RR 32–33. That timeline, combined with the handprint on Norris's shirt that was matched to Applicant was essentially "a date and timestamp" of Applicant's presence at the murder. 40 RR 34. As the State summarized, "[Applicant] put a date and timestamp on the outside of [Norris's] body and he put an evidence stamp inside her body with the semen." 40 RR 34.

242. The record shows the jury deliberated for about two hours in Applicant's case before finding him guilty of capital murder. 40 RR 43, 45.

243. Applicant's claim was developed at the evidentiary hearing. Relevant to this claim, Applicant's counsel—Lanford and Duer—and Applicant's DNA expert at trial, Dr. Watson, testified. Applicant also offered several affidavits relevant to this allegation. The Court summarizes the evidence proffered as follows:

Evidentiary hearing

A. Lanford

244. Lanford testified at the evidentiary hearing via Zoom. The Court was thus able to assess Lanford's demeanor.

245. Lanford testified that Applicant's case—wherein "[t]he client's sperm was found in a dead girl, and the collaborative issue was DNA was found on her blouse"—was a challenge. 8 EHRR 127–28. Applicant denied ever knowing Norris, and there was only a narrow window of time in which Applicant could have interacted with her. 8 EHRR 128. Added to that, Applicant had been previously convicted of other rapes and had difficulty remembering the difference between them. 8 EHRR 129. Worse, Applicant was a suspect in at least two other murders, both of which also occurred in conjunction with rape or attempted rape. 8 EHRR 129. This all also happened against a backdrop of the case remaining unsolved for 35 years. 8 EHRR 129. Lanford agreed that to say this case was difficult would be a "massive understatement." 8 EHRR 129.

246. Despite the difficulty of Applicant's case, Lanford put hundreds of hours into investigating and preparing the case. 8 EHRR 130. Lanford testified that they "examined every possible defense course of action [they] could come up with." 8 EHRR 130; *see also* 7 EHRR 144–45 (Lanford testifying the team "[w]ent through a number of scenarios of possib[le] defense strategies and plans"). They considered pleading guilty in exchange for stacked life sentences, but the State declined. 8 EHRR 130. They considered whether Applicant had an alibi but could not find one. 8 EHRR 130. They considered whether Applicant and Norris could have had consensual sexual contact but worried that would open the door to Applicant's extraneous offenses. 7 EHRR 143; 8 EHRR 130–31. They considered whether Applicant and Norris could've had consensual sexual contact prior to the day of the murder, whether somebody else could have murdered her, and whether they could throw the DNA evidence out. 7 EHRR 143; 8 EHRR 131.

247. But, Lanford testified, the problem with all of those defenses was Applicant's "DNA on the victim the day of her death." 8 EHRR 131. The other "400-pound gorilla" in the room was that Applicant had numerous prior rapes and possibly prior murders that they "could not open the door to[.]" 8 EHRR 131–32. Lanford testified that opening the door to those extraneous offenses "would have been an easy ineffective" assistance claim. 8 EHRR 132. "Had we done something to open the door to let those six victims come in and testify in the case-in-chief," that would "have amounted to malpractice" in Lanford's eyes. 8 EHRR 132; *see also* 7 EHRR 211 (Lanford testifying being worried about opening the door to Applicant's extraneous sexual assaults was "one of the driving forces in the way [they] handled the trial").

248. Lanford and Duer wrestled with what actions would be considered "opening the door," 7 EHRR 211; SHX 83, and the team had many discussions about it up to and even during trial, 8 EHRR 132. For example, five days before trial, Carlos Garcia informed the team that his "preliminary" research indicated that "if you do too much, especially on the validity [of the DNA evidence], then you

put the identity issues in the case," which would open the door. 7 EHRR 213; 8 EHRR 133; SHX 84. Garcia later sent the team a memo on the admissibility of extraneous offenses as well as a copy of the case *Segundo v. State*, 270 S.W.3d 79 (Tex. Crim. App. 2008). 8 EHRR 134–36; SHX 85. The bottom line of the memo and *Segundo* was if the defense "raised the issue of identity or the issue of consent, then . . . the door to the extraneous offenses could be opened." 8 EHRR 135–36; SHX 85, at 2. Counsel also thought challenging the "date and timestamp" of the DNA would open the door, as would arguments made during opening arguments or cross examination questions. 7 EHRR 214; 8 EHRR 138; AHX 89. "On the eve of trial, we are still trying to figure out if we can do something more than we did[.]" 8 EHRR 137; SHX 83.

249. The defense eventually landed on what Duer referred to at trial as "the potted plant defense," which was essentially to "just sit there and say[] it wasn't [Applicant]" without opening the door to the extraneous offenses. 7 EHRR 144–45. The potted plant defense was a way of saying there was a limit on what the defense could do. 7 EHRR 145.

250. On the second day of trial, Applicant signed a letter agreeing to this defense strategy after counsel explained the concept of opening the door to him. 7 EHRR 149; 8 EHRR 138; AHX 89. Counsel explained to Applicant that their strategy would mean waiving opening, doing minimal cross, or doing no cross at all. 8 EHRR 139; AHX 89. Lanford described Applicant's reaction as "quite cheerful about it" and stated Applicant told them to proceed. 8 EHRR 139. Lanford said Applicant was "lucid" and "aware at the time of what is going on and his predicament." 8 EHRR 140.

251. In practice, the potted plant defense meant trial counsel did not give an opening statement. 7 EHRR 146. It also meant they limited cross examination to those "points that [they] felt were critical to casting doubt on the case . . . without opening the door to those extraneous offenses." 7 EHRR 146. Lanford believed they were "reasonably vigorous" in cross examination. 7 EHRR 146–47. In fact, Lanford recalled that during his own cross examination regarding what other people might have been in the apartment, Duer had been "concerned how even close that was getting to opening the door." 7 EHRR 147. The potted plant defense also meant not putting on witnesses of the defense's own during guilt.7 EHRR 147–48. This left closing arguments, which was "the time to tie together the points that [counsel] had made with each witness and show [the jury] why [counsel] made them and hopefully cast some doubt on" the State's case. 7 EHRR 148.

252. Counsel's decisions were not uninformed. Lanford testified that, as relevant here, they hired Dr. Watson as their DNA expert at trial on June 29, 2012. 7

EHRR 216; 8 EHRR 87; SHX 39. Lanford testified that the DNA evidence was Duer's primary responsibility. 8 EHRR 145–46.

253. But, Lanford testified, hiring Dr. Watson was not the first time he, personally, started looking into DNA-related issues. 8 EHRR 143. Lanford's time logs reflect that, as early as June 8, 2011, Lanford discussed DNA issues with experts at seminars. 8 EHRR 143–44; SHX 1, at 7. And on August 31, 2011, Lanford called Duer before he was hired on the case to talk to him about his 32-year-old DNA case in McClennan County. 8 EHRR 144; SHX 1, at 9–10.

254. Lanford testified that the purpose of talking to people before ultimately hiring a DNA expert in this case was basically to answer the question of "is there a way that somebody can be confused" or "is there a way that [the DNA] could be degraded to the point to where it could be a wrongful identification[.]" 8 EHRR 144. In other words, Lanford wanted to know what effect the 35 years could have had on the collection or testing of the DNA such that "you could reasonably argue it was useless.[.]" 8 EHRR 144–45.

255. The general consensus among the experts he spoke with was that "the best you are going to get out of it" would have been not being able to get a reading from the DNA because it wasn't enough of a sample, but that there was no worry that a person had been misidentified. 8 EHRR 145; *see also* 7 EHRR 225 (Lanford testifying he had "been told unanimously" by the DNA experts he talked to that "we can't confuse the two people together or make up a third person out of two or whatever" when we have partial profiles).

256. Nonetheless, shortly before trial, Lanford testified that the team continued to grapple with whether they could do anything with the DNA without opening the door. 8 EHRR 155; SHX 88, at 2.

257. But as the trial approached, the defense leaned towards not calling Dr. Watson as a witness. 8 EHRR 156; SHX 88, at 1 (Duer saying it was "looking more and more like we're not going to actually put Watson on the stand").

258. Instead, trial counsel wanted Dr. Watson to sit in the courtroom and listen to testimony so that they didn't "miss something really important in the DNA testimony," SHX 88, at 1, and so he could "give [them] any points on cross-examination [he] felt necessary," 8 EHRR 156. Dr. Watson was present in the courtroom during the guilt phase of trial. SHX 88, at 1; 37 RR 124 (counsel noting for the record that Dr. Watson, their expert, is sitting in the courtroom); 39 RR 139 (DPS analyst Flores identifying Dr. Bill Watson as present in the courtroom). And he wrote questions for counsel to consider asking during the DNA portions of the trial. 7 EHRR 218; AHX 79.

259. Lanford testified that, ultimately, they deliberately chose not to put Dr. Watson on the stand because, while "[t]here may have been a couple of points . . . that would have been potentially good for the defense, . . . having him on there subject to cross-examination" would have allowed the State "to bolster their own witness." 8 EHRR 146; 7 EHRR 214, 229 (Lanford explaining that they chose not to call their own expert "because the consensus among everybody we talked to was that the DNA protocol that was used by the State was good"). In other words, putting Dr. Watson on the stand would have permitted the State to "use[] him to enhance the credibility of their own witness during cross-examination on the basic DNA stuff." 8 EHRR 146–47. Lanford saw this as pointless when the two points they could've raised "may or may not have been understood by a jury anyway." 8 EHRR 147.

260. Lanford believed not calling Dr. Watson was a joint decision between him, Duer, and "probably Dr. Watson." 8 EHRR 157. Lanford testified that counsel "talked to [Dr. Watson] about it, and I think the consensus was it wouldn't have served him well." 8 EHRR 157.

261. Regarding an earlier-in-time-consensual-sex theory, Lanford noted that the fact that Applicant's DNA was found on the blouse she wore to work "kind of wiped that [theory] out, because she would not have worn the same clothes" on "sequential days." 8 EHRR 150; *see also* AHX 78, at 2 (Ojeda noting in memo to defense team that the "DNA could be explained by consensual sex as JENKINS has claimed but the blood and fingerprint DNA is a problem"). Thus, there would have been no point to presenting DNA evidence that suggested the semen could have been left a day earlier. 8 EHRR 150. In Lanford's words, such a theory "[d]oesn't make sense." 8 EHRR 151.

262. Lanford further testified that putting Dr. Watson on the stand to testify that "it may be [Applicant's] DNA but deposited there a day or longer prior to the murder" would have "raise[d] a consent issue," which would have opened the door to the extraneous offenses. 7 EHRR 229; 8 EHRR 152.

263. In any event, Lanford recognized that the defense *did* "[v]ery carefully raise[] that issue" at trial. 7 EHRR 103. Lanford testified that because such a theory was "awful[ly] close to the identity and consent issue," they "skated it very, very gently." 7 EHRR 102. That was because they "knew that during this trial the State had six surviving witnesses in the courthouse ready to testify when [the defense] opened that door in the case-in-chief[.]" 7 EHRR 102.

264. Lanford testified that he was sure he discussed with Dr. Watson the effect of the serology results on the timing argument. 7 EHRR 226. Specifically, Dr. Watson may have told Lanford that if there is no blood antigen found in serology results, that would be indicative of time passing. 7 EHRR 226.

265. Further, Lanford testified that, in his experience as a judge and a lawyer in sexual assault cases, testimony about secretor or non-secretor status "made exactly zero impact on" juries or anybody else at trial. 7 EHRR 227. Lanford explained that secretor status "came up in virtually every one of" the sexual assault cases he presided over, "and it was totally meaningless to everybody involved." 7 EHRR 228. Lanford testified that he "probably would have ignored it had it been mentioned" and would not have tried "to build a defense around it." 7 EHRR 228.

266. And while he did not recall Dr. Watson talking to them about secretors, he would not have "place[d] too much on that as a way of defending" because they still had to address the presence of Applicant's DNA to begin with and that would have put them "right back to the identity question and the extraneous offenses" anyway. 7 EHRR 227.

267. Regarding Norris's incomplete DNA profile, Lanford testified that, based on the unanimous expert opinion, he "couldn't see where [Norris's] DNA profile would be relevant to anything." 7 EHRR 225. He acknowledged, to the extent it is relevant, such "was not pointed out to [him] during the preparation phase[.]" 7 EHRR 225.

268. As to a *Daubert* hearing, Lanford testified that the team discussed it and decided not to do one. 8 EHRR 234.

269. In the end, the defense strategy "successfully kept the extraneous [offenses] out of the guilt-innocence phase of the trial," which Lanford considered a major win. SHX 97, at 1; 8 EHRR 140. In Lanford's opinion, "the trial would have been a whole lot shorter if [they] would have opened that door" because the State "would have paraded in on the guilt/innocence phase, and that would not have been a pretty sight." 7 EHRR 102.

B. Duer

270. Duer, who was second chair counsel at Applicant's trial, currently lives in Spain. 10 EHRR 11. Duer testified at the evidentiary hearing via Zoom. 10 EHRR 11. The Court was thus able to assess Duer's demeanor.

271. Duer had been a licensed attorney since 1990. 10 EHRR 15. Prior to Applicant's trial, Duer had been appointed on four capital murder cases, one of which ended in a plea bargain and the other three which were postconviction matters. 10 EHRR 17–18. Duer had also previously retained DNA experts in criminal cases. 10 EHRR 235.

272. Duer was appointed to Applicant's case in March 2012. 10 EHRR 20. Duer, Lanford, and the defense team met regularly, most often at the TDS offices in Austin. 10 EHRR 21.

273. Duer reviewed the discovery for the case, reviewed the autopsy report, and performed most of the legal research because of his appellate experience. 10 EHRR 22, 30. Duer also handled the DNA evidence. 10 EHRR 107, 121.

274. Duer testified that he was aware of the numerous extraneous offenses that Applicant had committed or been suspected of committing. 10 EHRR 95–109. Duer testified that they were worried about two, possibly three, murders for which Applicant was a suspect. 10 EHRR 112. Duer testified that he was not worried as much about Applicant's prior sexual assaults coming in at the guilt phase so much as those prior rape/murders. 10 EHRR 113.

275. On cross-examination, Duer clarified that he knew they would not be able to keep the prior sexual assaults out at punishment but wanted to ensure they kept out the rape/murders, which they did. 10 EHRR 205. Duer testified that the issue with arguing a consensual sex defense was that "if we strayed off into the area of consensual sex sometime other than the day of the murder, that what we were doing was calling our client's identity into question" by insinuating it was someone else who murdered her. 10 EHRR 207. Thus, suggesting that Applicant had consensual sex with her one or two days before the murder would have "open[ed] the door to similar rape/murders." 10 EHRR 207. "Whether the State could prove them would have been another question," but their "goal was to keep them from trying." 10 EHRR 208.

276. Duer further clarified that "you don't want [the jury] hear about" other rapes at guilt if he is being accused of rape attendant to murder. 10 EHRR 206. "You don't want the jury to be thinking, oh, this guy has done it before so he must be guilty now." 10 EHRR 206. Duer acknowledged that the case law "seemed to really loosen the rules about using extraneous offenses for the purpose of proving identity," and it didn't seem "to take nearly as much to open that door as it used to[.]" 10 EHRR 206–07. Duer thus worried it would have opened the door to those rapes if they argued Applicant had consensual sex with Norris. 10 EHRR 207, 209; SHX 88, at 1 (Duer writing to Lanford that the "potted plant defense" was looking like the only hope "if we're going to keep out . . . at least one of the other rapes Willie was convicted"). This is especially true given that at least one of those rapes also involved strangulation. 10 EHRR 209; SHX 88, at 1 (noting that one or two of the other rapes were "where he choked the victim while raping her"). The theory would have been that the chances were low that *this* rape was consensual when all the others were not. 10 EHRR 208.

277. Though Duer continued to say that he didn't recall "being particularly worried about the choke rape at the guilt/innocence phase mainly because [they] had already decided on a different path," Duer acknowledged that the defense could essentially have done nothing to keep the prior sexual assaults at punishment because "once the finding of guilty comes in, the flood gates are open." 10 EHRR 209–10.

278. In any event, Duer testified that counsel explored all defenses, including pleading guilty, whether Applicant had an alibi, and whether Applicant and Norris had consensual sex the day before the murder. 10 EHRR 210–12; SHX 83, at 1; SHX 84, at 1; SHX 85, at 2, 11.

279. Duer understood that contesting identity or consent would open the door. 10 EHRR 216–17. He also understood that the door could be opened in many ways, including opening statements and cross-examination. 10 EHRR 217. Duer likened the trial to "a mine field" of myriad ways the door could be opened. 10 EHRR 217.

280. Duer confirmed that the defense team went with the "potted plant defense" at guilt. 10 EHRR 114–15, 214–15; SHX 88. Duer elaborated that the term came from congressional hearings on the Iran Contra Scandal. 10 EHRR 115–17. Essentially, the theory was "the less we say, the better off we will be." 10 EHRR 116–17. In other words, it looked "more and more like it would be better of us not to do extensive cross-examination for fear of crossing the line and opening the door." 10 EHRR 117. They did not call any witnesses at guilt and really the only witnesses that they had would've been Dr. Watson. 10 EHRR 117. But that did not mean that they sat on their hands and did nothing; rather, they were "stingy and careful" in their approach. 10 EHRR 166–67, 219; SHX 88.

281. Duer testified that he and Lanford explained this strategy to Applicant, and the day after, they brought a letter memorializing their discussions about "why [they] were going to proceed the way [they] ultimately did proceed with curtailed, for lack of a better word, cross-examinations or no cross-examinations." 10 EHRR 217; AHX 89. Applicant appeared to understand and was "on board with that particular approach." 10 EHRR 217–18. Duer testified that, if Applicant had not been alright with that approach, Duer "wouldn't have let [Applicant] sign the paper." 10 EHRR 218.

282. Dr. Watson had already been retained as a DNA expert before Duer was brought onto the case. 10 EHRR 235. Though Duer knew of Dr. Watson, he had never worked with him before. 10 EHRR 236. Duer said Dr. Watson "was very good" and "very helpful" to him. 10 EHRR 236. Duer stated Dr. Watson "would be at the top of [his] list to call for DNA" in future cases because Duer does not

"like experts who just tell you what they think you want to hear, and Watson won't do that." 10 EHRR 236.

283. Duer testified that they considered whether they could get the DNA evidence thrown out from the very beginning. 10 EHRR 215. But of the few issues Dr. Watson identified, none "would have changed the outcome of the analysis of the DNA." 10 EHRR 237. At most, there were some "potential admissibility issues." 10 EHRR 237.

284. Duer said "[t]alking to Dr. Watson was very enlightening," but ultimately, "Dr. Watson just basically said, I will do you more harm than good if you put me on the stand." 10 EHRR 215. "[T]hat's what Dr. Watson told me. I can't help you challenge these results. I can only help you with the process. Don't put me on the stand." 10 EHRR 237. Dr. Watson expanded that "he could not quarrel with the conclusions reached by the State's DNA people," aside from perhaps quarreling "a little bit about some of the procedures." 10 EHRR 215. Duer explained:

> [B]asically, Dr. Watson's advice was to let him sit in the courtroom, listen to the State's expert. Then we would take a break. He would give [Duer] a list of questions for cross-examination, which while not really casting doubt but just kind of dinging the process that led to the DNA conclusions [in a way that] would not open the door because we are not really saying the DNA is wrong. We are not saying it is somebody else. We are basically just giving the jury something—something else to think about before they go putting all their eggs in the DNA basket.

10 EHRR 216. Simply put, Dr. Watson's advice was to "[a]sk these questions and get out." 10 EHRR 237.

285. As to a *Daubert* hearing on Minifiler, Duer testified that MiniFiler was fairly new at the time of Applicant's trial. 10 EHRR 122. Duer's contemporaneous trial notes indicated that Duer was aware that Applicant's case was a "composite result," i.e., where Identifiler was used for the longer DNA segments and MiniFiler was used for the shorter segments. 10 EHRR 125; AHX 76, at 286. In those notes, Duer appeared to wonder whether that could be subject to a *Daubert* challenge. AHX 76, at 286.

286. Duer testified that he did not recall Dr. Watson asking the defense or telling the defense that they should do a *Daubert* challenge. 10 EHRR 125, 237. To Duer's memory, Dr. Watson indicated that he "could not quarrel with the State's conclusions" and he "would be more use for cross-examination purposes rather than putting him on the stand." 10 EHRR 126.

287. Duer testified that, at the time of trial, Dr. Watson told counsel that he was working on finding successful *Daubert* challenges to MiniFiler but hadn't had any luck so far. 10 EHRR 238–39; SHX 8, at 1. Duer testified that, if Dr. Watson was now saying that counsel should have challenged MiniFiler, that was not how he remembered it. 10 EHRR 239. That is also not what his email reflected; to the contrary, Dr. Watson's "challenges were to the process, not to the results or the MiniFiler itself." 10 EHRR 239.

288. Duer testified that "[c]hallenging the length of time that [the sperm] might have been there and trying to get a witness to say, well, it could have been two or three days, goes back to the issue of identity." 10 EHRR 231. In other words, if they suggested it was Applicant who left it two or three days before, they were back at opening the door. 10 EHRR 231. "I was concerned that any little thing could be seized upon by the State and possibly by the Court with the State's prompting to open the door to identity testimony. Everything from consent, the length of time, et cetera." 10 EHRR 231. Duer summarized: "[T]his was a dangerous area." 10 EHRR 231.

289. Duer testified that a timing argument was further complicated by "the timeline of [Applicant] leaving 29 Palms Marine Station in California, headed for Fort Sam Houston to the hospital where his wife, Merle, was in the hospital, and he came back to Texas." 10 EHRR 232. This timeline made it so that there was only a narrow "window of time during which the sexual intercourse could have happened." 10 EHRR 232.

290. Finally, Duer testified that the other problem with suggesting consensual sex was "finding anybody besides our client who could testify that [Applicant] and Ms. Norris had a previous relationship or that they even knew each other, that they even had seen each other." 10 EHRR 232. This was a "dangerous and ultimately impossible" option for the defense team. 10 EHRR 232.

291. In the end, Duer thought that putting Dr. Watson on the stand would have done more harm than good, and Dr. Watson agreed with that assessment when he told Duer not to call him. 10 EHRR 242–43. An insinuation from Dr. Watson that he should have been called at trial is inconsistent with what he told Duer at the time of trial. 10 EHRR 243.

292. Duer said he suggested several closing-argument topics, including that sperm could stay in the vagina for several days after intercourse, that there were no injuries in the genital region of the victim, that the scarves around her neck were lost, and that the touch DNA samples were a mixture. 10 EHRR 245. Duer testified that "all of those things would have been in front of the jury, whether at great length or just in passing[.]" 10 EHRR 245. But it was done in a way that didn't allow the State to open the door. 10 EHRR 245.

293. Ultimately, the defense team successfully kept out "the really, really, really bad stuff," i.e., the possible rape/murders, at both phases of trial and kept out "all the extraneous" during guilt. 10 EHRR 219. Duer believed that "[g]iven what [they] we were working with," they "did the best [they] could." 10 EHRR 219. Duer "didn't think anything else would have worked any better," even despite the outcome of the case. 10 EHRR 219–20.

C. Dr. Watson

294. Dr. Watson testified live at the evidentiary hearing, and the Court was thus able to observe his demeanor.

295. Dr. Watson's currently works as the State CODIS Administrator for the state of New Mexico. 11 EHRR 17. Dr. Watson is a DNA expert whose primary specialty is in forensic DNA databases. 11 EHRR 10. The State stipulated to Dr. Watson being qualified as a DNA expert. 11 EHRR 18.

296. Dr. Watson was hired by trial counsel at Applicant's trial in 2012 to review the testing conducted by DPS and Orchid Cellmark, provide an opinion, and provide guidance in court through either consultation or testimony. 11 EHRR 10–11, 25. Dr. Watson attended Applicant's trial and listened to the live testimony of the State's DNA witnesses. 11 EHRR 21. Dr. Watson evaluated the testimony to determine if there were areas that could be probed further, and he provided those questions to the attorneys. 11 EHRR 25–26; AHX 79. Dr. Watson did not testify for the defense. 11 EHRR 25.

297. Dr. Watson was hired by Applicant's postconviction counsel to review the transcripts, look at the notes, and answer questions outlined by postconviction counsel. 11 EHRR 28. Dr. Watson executed an affidavit on June 23, 2015, which Applicant submitted with his application. 11 EHRR 28–29. That affidavit was excluded from evidence at the evidentiary hearing. 8 EHRR 24.

298. Dr. Watson testified that he made a routine request for materials that included the raw data at trial. 11 EHRR 171. Dr. Watson believed trial counsel requested everything on his list, including the raw data, but the raw data was not provided to them. 11 EHRR 171. Dr. Watson does not recall if he specifically requested the raw data after it was not provided to him. 11 EHRR 172. He did not have the raw data at trial. 11 EHRR 25, 171.

299. Dr. Watson testified that he reviewed the raw data when it was provided to him postconviction, but he conducted no new testing, analysis, or recalculation of it. 11 EHRR 172–73. Dr. Watson never testified to any new information gleaned from the raw data.

300. In his review of the materials, Dr. Watson identified "a number of issues that in [his] opinion could have been raised in trial." 11 EHRR 11. Dr. Watson stated that he was "unsure" whether the issues were investigated by trial counsel but he knew they were not addressed in court. 11 EHRR 11.

301. Dr. Watson testified that, in Applicant's case, DQ Alpha testing, a polymerase chain reaction (PCR) based test, was used, as was STR testing when it became available. 11 EHRR 51–52. Dr. Watson speculated that DPS used certain tests and not others based on the amount of the sample and the age of the case. 11 EHRR 51–53.

302. DPS initially used an STR test called Identifiler, which tested for 50 STR markers ranging in size. 11 EHRR 53. With samples that were old or degraded, it would not be uncommon to get results on the smaller markers but nothing on the larger ones because larger ones tend to go away first. 11 EHRR 53, 60. MiniFiler, a later STR test, allowed analysts to look at eight of the markers in Identifiler that were on the larger size. 11 EHRR 53–54. MiniFiler is a more sensitive kit because it "amplifies smaller fragments of DNA," meaning it is more likely to show low-level contributors than Identifiler. 11 EHRR 59.

303. Dr. Watson testified that composite profiles can occur when the results of two tests, such as Identifiler and MiniFiler, are combined into one profile. 11 EHRR 56. Dr. Watson described this as common and acceptable "if your laboratory has validated that process," though there can be issues that arise based on issues with each of the kits themselves. 11 EHRR 56. MiniFiler and Identifiler, however, have some overlapping loci, which would allow an analyst to determine whether they were seeing consistent results between the two kits. 11 EHRR 58.

304. Dr. Watson testified that, in Applicant's case, Norris's blouse and the vaginal smear were both tested with Identifiler and MiniFiler. 11 EHRR 71. Identifiler produced an incomplete profile, so DPS opted to test again with MiniFiler. 11 EHRR 71. The profile that was produced from that was then uploaded to CODIS. 11 EHRR 71–72.

305. Dr. Watson testified that, based on his review of that testing, he brought up a possible *Daubert* issue to trial counsel. 11 EHRR 72. In an email dated April 5, 2013, Dr. Watson wrote to trial counsel that he was "still working on finding successful daubert challenges to mini STRs but no luck so far." SHX 8, at 1. Dr. Watson did not mention composite profiles in that email. SHX 8, at 1.

306. Nevertheless, Dr. Watson testified that the email was sent because he had "raised the issue related to the use of MiniFiler and the uses of composite" profiles. 11 EHRR 72–73, 83. Acknowledging that the decision of whether "to

actually pursue a *Daubert* challenge was not" his, Dr. Watson testified that Garcia from TDS "asked [him] to see if there was information related to successful *Daubert* challenges." 11 EHRR 83–84. While Dr. Watson did not have access to legal databases, he did have access to sources like forensic boards, which were email groups where scientists talk about potential gaps in the technology "all the time." 11 EHRR 84–85. Dr. Watson was informing trial counsel that he "had not found any information related to successful *Daubert* challenges of mini STRs" in those sources. 11 EHRR 86. Dr. Watson did not remember whether, in reporting his search results to trial counsel, he was looking at issues involving mini STR generally or specific fact application to this case, and he did not "recall the breadth of the search," i.e., whether he looked nationally or primarily in Texas. 11 EHRR 91.

307. Expanding further on a *Daubert* challenge to MiniFiler itself, Dr. Watson testified that he thought they could challenge it because it had been around for a while but was not commonly used. 11 EHRR 72. Dr. Watson testified that it was "important" to challenge kits when they are first introduced "because we don't want to introduce something into our testing stream that is going to provide unusual information or questionable information." 11 EHRR 72–73. Such kits should be validated by the forensic community, and Dr. Watson said *Daubert* challenges allow such investigation. 11 EHRR 72–73.

308. As to a *Daubert* challenge on the composite profile, Dr. Watson thought the MiniFiler profile appeared consistent with at least three individuals, whereas Identifiler appeared consistent with only a two-person mixture. 11 EHRR 75. He thought these issues "could potentially impact" what profile was pulled out of that mixture and searched against CODIS. 11 EHRR 76. Because Dr. Watson could not determine how the profile was interpreted based on the notes, he thought "that could have been investigated." 11 EHRR 81. He thus "recommended" challenging the composite profile. 11 EHRR 73, 81.

309. Dr. Watson clarified that by "recommended" he meant that "he would have pointed those issues out" because he believed they needed to be addressed." 11 EHRR 74, 87. But he does not "typically recommend an approach to attorneys" because "[t]hose are strategic issues that" he would not involve himself in. 11 EHRR 74, 87. Dr. Watson acknowledged that attorneys may make "a decision not to go with something that [he] point[s] out that is related to some other part of the case that [he's] unaware of," and the ultimate decision is always trial counsel's. 11 EHRR 74, 87. In short, Dr. Watson "would have brought it up as an issue that could be addressed," but would not have recommended a specific approach. 11 EHRR 74, 87. "I wouldn't tell an attorney they have to do a *Daubert* challenge." 11 EHRR 87.

310. To Dr. Watson's knowledge, trial counsel did not raise a *Daubert* challenge to either of the two issues raised by Dr. Watson at trial. 11 EHRR 82.

311. Dr. Watson testified that, to his knowledge, a complete DNA profile was never developed for Norris. 11 EHRR 95. He was not aware of why, stating he could only "make some assumptions." 11 EHRR 95.

312. Dr. Watson testified that there "were a number of items that were collected during the autopsy" that could have been used to try to get a complete profile, including fingernail clippings, hair, and tissue samples. 11 EHRR 96. Dr. Watson testified that they could possibly have used her clothing, though that would have come with difficulties because it was a sexual assault case. 11 EHRR 96–97. Dr. Watson also said a comparison could be made of the parents' DNA against other secondary sources to arrive at the "a solid position" in believing there was a good reference sample. 11 EHRR 97.

313. Dr. Watson testified that the problem with a lack of a complete profile for the victim is that "you're going to have to make assumptions about which alleles in that mixture belong to the victim and which belong to the perpetrator." 11 EHRR 98. "[W]ithout a reference sample from the victim and a profile at each locus, you don't know really which alleles are hers and which alleles are the perpetrator or even" if it could be a third person. 11 EHRR 98. There is also the "possibility that" the victim and suspect could share alleles at one location. 11 EHRR 99. That could complicate the interpretation because an analyst "might get that wrong." 11 EHRR 98. Dr. Watson testified that knowing who one of the contributors is makes it easier to interpret the profile. 11 EHRR 43.

314. Dr. Watson said another "concern in this case is that you can argue there was a clear major contributor perhaps in the Identifiler profile . . ., but the MiniFiler profile appeared to have two that were fairly close in concentration," which Dr. Watson said was "inconsistent with the results." 11 EHRR 99. While the profile uploaded to CODIS was described "as a major profile," the DPS notes specifically said "no major/minor," *see* SHX 132, and Dr. Watson testified he was "lost to know how they interpreted the profile[.]" 11 EHRR 99. Dr. Watson said, to him, "no major/minor" means that you cannot interpret a major profile from the mixture, but he did not know what that meant to DPS since he did know what they have determined qualifies as a major or a minor profile. 11 EHRR 104–05. Dr. Watson admitted he was speculating about the meaning of the note on the DPS form. 11 EHRR 208.

315. Dr. Watson testified that, while he would have preferred a reference sample from the victim, a female profile is not always necessary to make an interpretation. 11 EHRR 94, 210. Having a "full profile is going to give you more discriminating power." 11 EHRR 210. But Dr. Watson referred to his

preference as "best practice" that should have been attempted but not "critical," which would be too strong of a word. 11 EHRR 194.

316. Dr. Watson testified that a complete profile is also not necessary to interpret a profile. 11 EHRR 195–96. Dr. Watson agreed that a comparison of the amelogenin marker, or sex marker, could be indicative of the proportional contribution of another person to a mixture. 11 EHRR 199–210. In Applicant's case, it was apparent on the sperm fraction profile that any female would have contributed only about 9% to the sample, indicating that it was a primarily male profile. 11 EHRR 206–07. Dr. Watson testified that the profile was therefore consistent with either a single male contributor or a single and a lower-level male contributor. 11 EHRR 208. In other words, the female component of the profile was very small, and "there doesn't appear to be anything that is inconsistent with [Applicant]" on the sperm fraction result. 11 EHRR 210; SHX 132.

317. Seminal fluid is the liquid portion of ejaculate, consisting of chemicals like acid phosphatase, prostate-specific antigens, cellular material, and spermatozoa. 11 EHRR 106. Acid phosphatase (AP) is an enzyme typically found in higher amounts in seminal fluid and can be used in presumptive tests for the presence of seminal fluid. 11 EHRR 108. AP can be seen in females as well, and the high levels of AP in females can overlap with the low levels sometimes seen in males. 11 EHRR 109. Dr. Watson clarified on cross that it is only "a small area of overlap." 11 EHRR 184. Dr. Watson could not testify to the percentages of women who have high enough AP to meet the minimum testing threshold, the percentage of men who have a very low AP threshold, or how common it was for the two thresholds to overlap. 11 EHRR 185–86. If an AP test is positive, Dr. Watson said it is "a more likely result" that seminal fluid is present than that it is the female AP meeting that threshold. 11 EHRR 186.

318. Upon a positive result on the AP test, "you can proceed forward as though it is seminal fluid until you're able to confirm it or demonstrate that it in fact is a false positive." 11 EHRR 109. Next steps could include "additional chemical testing" if the reaction was weak, another AP test, or going "straight to visualization of sperm on a slide" or differential extraction. 11 EHRR 110. Even if an AP test is negative, one might still look at the sample microscopically for the presence of sperm, depending on the evidence available. 11 EHRR 179.

319. Dr. Watson testified that DPS did a presumptive test for AP on the vaginal swab, and it was positive. 11 EHRR 113. Spermatozoa was also detected in a microscopic examination. 11 EHRR 113. Dr. Watson testified that he was "not aware of any additional testing that was done to determine if the AP result was a false positive." 11 EHRR 113.

320. Despite this testimony, Dr. Watson acknowledged that he had previously authored an affidavit in which he said that "it did not appear from the information [he] reviewed that the presence of the chemical components of semina[l] fluid were confirmed by DPS." 11 EHRR 180–81. Dr. Watson attributed the inconsistency to "not see[ing] the page related to the serological screening" of the vaginal swab, contained on page 2 of SHX 131, and he based his wording on a DPS report that noted the presence of seminal fluid in some stains but not others. 11 EHRR 181. Dr. Watson stated it was his "belief that they had not tested for the presence of seminal fluid," but it was subsequently "pointed out to be incorrect." 11 EHRR 181. In other words, Dr. Watson "just missed it." 11 EHRR 183.

321. In any event, Dr. Watson testified that the chemical components can dissipate within 24 to 48 hours, but the sperm cells can last longer. 11 EHRR 113. The range of time on both components varies wildly. 11 EHRR 109–10, 115. As a result, its presence does not indicate a precise date and time that it was deposited. 11 EHRR 113–14, 116.

322. But Dr. Watson admitted you would expect to see seminal fluid if there was recent contact. 11 EHRR 187. Since seminal fluid was detected in Applicant's case, Dr. Watson agreed with the inference that Applicant had sexual contact with Norris anywhere from at the time of the murder to 48 hours before. 11 EHRR 188.

323. Dr. Watson testified that he spoke with trial counsel "about issues around how long the cellular component and the chemical component" could persist. 11 EHRR 116; SHX 9, at 2–30. Specifically in response to Urbanovsky's testimony, he told trial counsel that there was "no way to say whether the presence of the sperm is related to the homicide since sperm can remain in the vaginal canal for many days and in the cervical region for even longer." SHX 9, at 25; 11 EHRR 117. Dr. Watson also sent trial counsel several topical articles in response to their request for documentation of that theory. 11 EHRR 118–19; SHX 9, at 2–23.

324. Regarding serology testing, Dr. Watson testified that individuals who are secretors "can have antigens consistent with their ABO blood type in the clear fluids of their body," like saliva, seminal fluid, or tears. 11 EHRR 124. That is, they are "secreting the antigens that you would test for in order to get an ABO blood type." 11 EHRR 124. About 20% of the population are non-secretors, which means that you will not find their ABO blood antigens in their clear fluids. 11 EHRR 124.

325. Blood type antigens in a seminal fluid sample will "disburse over time like other components in the seminal fluid." 11 EHRR 125. If the person is a

secretor and the antigen is present, how long it persists "would depend on how much fluid was present." 11 EHRR 125. Dr. Watson said he was unaware of any studies that have examined the question of how long blood antigens are detectable in seminal fluid. 11 EHRR 125.

326. Serological tests are not as good at narrowing down possible sources as DNA because there are far fewer different types of blood, so many people would share the same blood type. 11 EHRR 126–27. In that sense, Dr. Watson testified that "DNA is better." 11 EHRR 126.

327. The vaginal smear was serologically tested, and it was determined that the ABO blood typing was a B and H, which is consistent with a person that is type B or BO. 11 EHRR 129–30. Andrus was a type O, and Norris was a type B. 11 EHRR 130. The ABO blood typing results therefore could not give "any precise information about who it is," unless the perpetrator was a secretor and a blood type other than B or BO. 11 EHRR 130–31, 133. That is, if you have a suspect who was a type A secretor and you do not see type A in the sample, "that is an indicator that they're not the actual perpetrator." 11 EHRR 133.

328. In this case, Dr. Watson was informed by trial counsel that Applicant was a type A, but they did not know whether he was a secretor. 11 EHRR 133–34. If he is a secretor, "his ABO blood type is not on that vaginal swab" and that could be inconsistent with sexual contact within 24 hours of Norris's death. 11 EHRR 134.

329. Dr. Watson shared the above information with trial counsel. 11 EHRR 135–36. To his knowledge, "there was no determination made" about whether Applicant was a secretor. 11 EHRR 136.

330. Dr. Watson testified that ABO blood typing was "available" in 2013 in that there were "a few labs that did that testing." 11 EHRR 136, 192. It would thus not have been impossible to do, though it was "not commonly done." 11 EHRR 126, 136. In fact, Dr. Watson admitted that the DNA lab he left three years before Applicant's trial did not even do ABO blood typing anymore. 11 EHRR 191. Dr. Watson also stated it would not surprise him in his expert experience that DPS was not able to do ABO blood typing in 2010. 11 EHRR 192.

331. Dr. Watson testified that he was suggesting counsel should have done testing even his own lab could not do in 2013 because "they did that testing on the original evidence and it was presumably probative at the time when it was originally done, so arguably it is still probative when they have a new suspect." 11 EHRR 192. Stated differently, Dr. Watson's testimony was that counsel should have used "obsolete testing" just because "the results still stand," all to prove that maybe the semen could have been left earlier. 11 EHRR 193.

332. Dr. Watson testified that he never personally verified Applicant's blood type. 11 EHRR 188. Dr. Watson also never verified Applicant's secretor status. 11 EHRR 188. Dr. Watson thus does not actually know whether Applicant is a secretor. 11 EHRR 189–90. His testimony was merely that, if Applicant is an A type secretor, then it could be "possible" the serology results are not consistent with recent contact. 11 EHRR 189–90.

333. Dr. Watson clarified he was not suggesting that the lack of an A type antigen in the serology results would exclude Applicant. 11 EHRR 189. Dr. Watson acknowledged that the DNA profile from the spermatozoa was consistent with Applicant. 11 EHRR 189. He also was not suggesting that the ABO blood typing results were more powerful than the DNA evidence. 11 EHRR 189–90. His testimony was just that it would have been more information for the trier of fact. 11 EHRR 190.

334. Dr. Watson testified that he did not think the State's "date and timestamp" argument regarding the handprint was accurate because "you can't determine anything about when a sample was deposited based on the DNA profile itself." 11 EHRR 143. "You would have to have some other information related to—to that sample to know what it could have gotten on there." 11 EHRR 143. The science supporting this was the same in 2013. 11 EHRR 144.

335. Dr. Watson testified that, based on his review of the case file, Norris had been strangled with a scarf. 11 EHRR 144–45. It is "possible" that the scarf contained DNA information about the suspect, but it was not tested because it was lost. 11 EHRR 145–46. If the DNA on the scarf did not match Applicant, it would indicate he did not use the scarf as a ligature. 11 EHRR 146.

336. Dr. Watson testified that he was aware that hairs were found on Norris's body, which the State argued could not provide useful DNA information. 11 EHRR 148. In this case, Orchid Cellmark did mitochondrial sequencing on the hairs and interpreted them as being inconclusive. 11 EHRR 149. Another lab "could have further investigated" the profile and "potentially" used the results to exclude potential suspects. 11 EHRR 149. In Dr. Watson's opinion, "there was an opportunity to use the profiles generated from those hairs to potentially exclude a perpetrator." 11 EHRR 148.

337. Dr. Watson testified that he informed trial counsel that Orchid Cellmark had indicated that they could not interpret a mixed mitochondrial DNA profile. 11 EHRR 152; AHX 80, at 1. He also informed them that other labs could interpret those profiles to the extent they could exclude an individual. 11 EHRR 151–52; AHX 80, at 1. He suggested that, if they wanted to do so, they should obtain the underlying data. 11 EHRR 152; AHX 80, at 1.

338. Dr. Watson testified that DNA could have been obtained from fingerprints left at the scene. 11 EHRR 152. Fingerprints could have been important because, if they were not consistent with the perpetrator or the lab personnel, it would indicate someone else had been involved. 11 EHRR 155. Other items that were available but not tested were fingernail clippings, which could have been a "potential clue" as to who she was in contact with. 11 EHRR 161.

339. Dr. Watson testified that bloodstains collected at the scene were extracted and quantified. 11 EHRR 155–56. When they were quantified for DQ alpha, the analysis did not detect human DNA in the sample. 11 EHRR 156. His understanding was that, once they made that determination, they did not believe they would get a result with STR testing. 11 EHRR 156. DQ alpha required a minimum of two nanograms of DNA. 11 EHRR 156. Later-developed tests used to quantitate were more sensitive, requiring as little as 200 picograms. 11 EHRR 157–58. Contrary to the testimony at trial, Dr. Watson believed it would be possible to get results with newer testing methods. 11 EHRR 159. Further testing would have had the "potential to tell you whose blood it is" and could have provided information about who committed the crime. 11 EHRR 159.

340. Dr. Watson stated there were "multiple bloodstains, and they were apparently all consumed, all depleted, and there was none left for potential testing with more sensitive testing." 11 EHRR 160. While analysts typically try to preserve a portion of the evidence, "that wasn't done in this case." 11 EHRR 160.

341. Dr. Watson testified that, in sum, he could not say that Applicant could be excluded from either the vaginal swab or the blouse. 11 EHRR 211. He could not say that he knows when the semen was deposited, and he did not conduct ABO blood typing of Applicant so he did not know Applicant's secretor status. 11 EHRR 212. He said it is not impossible to interpret a mixed profile without a known contributor, and it might not change the statistics if they did have a complete profile. 11 EHRR 212. He said DNA matches can be made on partial profiles, and the lack of a profile did not mean that Applicant was excluded. 11 EHRR 213. He did not conduct mitochondrial DNA testing of the hairs or deconvolute the mixtures of the hairs or test the latent fingerprints or the blood stains. 11 EHRR 213–14. He did not quantify the blood stain samples or conduct analysis on the fingernail clippings. 11 EHRR 214. He did not know whether a *Daubert* challenge would be successful and was not aware of a circumstance where a *Daubert* challenge to MiniFiler was successful. 11 EHRR 214–15. And he could not say anything about whether the semen was deposited consensually or otherwise. 11 EHRR 216. His testimony was simply that there is more information that "could have been" discovered that "potentially" could have had an effect. 11 EHRR 216–17.

D. Affidavits

342. Though Applicant was offered an opportunity to present live witnesses at the evidentiary hearing, Applicant offered a number of affidavits at the hearing in lieu of live testimony. The Court admitted those affidavits over the State's objection. 8 EHRR 23–24. However, the Court stated it would give those affidavits "the weight that they are entitled to" and, unless found credible, would find they "have no relevance" and would not be "appropriate in proposed findings of fact and conclusions of law." 8 EHRR 24. The Court summarizes Applicant's affidavit evidence here.

343. Relevant to this issue, Applicant admitted the October 21, 2019 affidavit of Ashley Steele. AHX 69.

a) Steele currently works for the Office of Forensic and Capital Writs, the same office of Applicant's current counsel. AHX 69, at 1 ¶ 1, 4 ¶ 19.

b) Steele was a legal intern at TDS who worked with Garcia on Applicant's case from May 2012 through August 2012, though she continued to volunteer her time to Applicant's case after that. AHX 69, at 1 ¶¶ 1, 4.

c) Steele states that, though she had only completed her first year of law school and TDS was her first job in the legal field, she was "surprised at how little the attorneys knew about and worked on [Applicant]'s case. AHX 69, at 2 ¶ 5.

d) Steele casts general aspersions on Applicant's trial counsel, suggesting that Lanford was forgetful, not qualified, and did not review any of the work the interns produced, while Duer was spread thin and did not devote time to Applicant's case. AHX 69, at 2 ¶¶ 6–8. Steele also claims that nobody but her scheduled regular team meetings "to make sure that the team was communicating." *Id.*

e) Steele suggests that "someone" had to consistently remind trial counsel "that putting [Applicant]'s identity at issue, or denying the sexual assault, would open the door to other extraneous bad acts to prove identity or lack of consent." AHX 69, at 3 ¶ 13.

f) Steele says that the team was "extremely suspicious" of the State's late discovery disclosure that the DNA on the white blouse matched Applicant because it was an old case and the "new forensic evidence involved blood." AHX 69, at 3 ¶ 14.

g) Steele claims that though she "heard at one point later that the team had obtained a DNA expert, this was not something that they discussed at the team meetings [she] attended." AHX 69, at 4 ¶ 15.

Deficiency

344. The Court finds Lanford's testimony to be credible.

345. The Court finds Duer's testimony to be credible. The Court notes that during his testimony, Duer mentioned not being concerned about evidence of the extraneous sexual assaults coming in at the guilt phase of trial. The Court notes this is belied by both his own testimony, Lanford's testimony, and his emails at trial. The Court finds Duer was clearly concerned about the State presenting evidence that Applicant had committed other, similar sexual assaults during the guilt phase of Applicant's trial. The Court finds Duer's testimony that he "wasn't worried about the sexual assaults" indicates that the team had decided not to do anything that would permit their introduction. The Court finds Duer may have been *more* worried about opening the door to the admission of evidence of the possible rape/murders rather than the sexual assaults, but that does not mean he was not similarly concerned about opening the door to the admission of evidence of the sexual assaults, particularly because the defense was aware that the State had live witnesses lined up to testify to the latter.

346. The Court finds trial counsel credibly testified that they thoroughly investigated all possible defenses at the guilt phase of trial.

347. The Court finds, as a result of that investigation, trial counsel credibly testified that they considered, and rejected, several possible defenses, including that Applicant had consensual sex with Norris either on the day of her murder or someday before that, that Applicant may have sexually assaulted Norris but did not murder her, and that the DNA evidence tying Applicant to the rape and murder was in some way invalid.

348. The Court finds trial counsel credibly testified that they rejected all those defenses because: 1) the timeline of Applicant's arrival in Texas severely narrowed the window during which earlier-in-time consensual sex could have happened; 2) counsel could find no witness who could testify to any connection whatsoever between Applicant and Norris, other than Applicant himself; 3) the rape and murder occurred within such a narrow window that to challenge either component would challenge identity or consent; 4) counsel could not find a valid way to exclude the DNA evidence tying Applicant to the crime; and most importantly, 5) Applicant had a history of sexual assaults and was a suspect in at least two more rape/murders.

349. The Court finds trial counsel credibly testified that the last of those considerations—namely, Applicant's history of violent sexual assault and other possible rape/murders—was of great concern to them, as they very much wanted to avoid allowing the jury to hear about that evidence when considering whether Applicant was guilty of *this* rape/murder.

350. The Courts finds trial counsel credibly testified that, as a result of the above considerations, they chose to pursue the "potted plant defense," which was a strategy involving minimal challenge to the State's case so as not to open the door to the presentation of highly damaging evidence, namely, Applicant's extraneous offenses, during the guilt phase of the trial.

351. The Court finds the record supports trial counsel's explanation of that strategy, as the record indicates that they made no opening statements, conducted only limited cross examination of the State's witnesses (if at all), did not present any of their own witnesses, and instead chose to rely on closing arguments. The Court finds counsel credibly testified that they intentionally chose not to present evidence that would challenge identity or consent.

352. The Court finds trial counsel credibly testified, and the hearing evidence supports, that Applicant consented to counsel's strategy at trial. The Court finds counsel credibly testified that Applicant understood the strategy when he consented to it. The Court find Applicant is now complaining about a strategy to which he agreed.

353. As to Applicant's specific DNA claim, the Court finds counsel credibly testified that they consulted several DNA experts before ultimately hiring Dr. Watson, and that based on those consultations, they decided that the only attempt they would make to challenge the DNA evidence was to try to suppress it on grounds that it did not comport with the CODIS requirements. *See* 39 RR 9–24.

354. The Court finds that counsel and Dr. Watson credibly testified that counsel was fully aware of many of the topics that Applicant now wishes they had presented, including: that the presence of spermatozoa did not indicate when it was deposited; that, if Applicant's blood type was type A and a secretor, then the serology results were not consistent with close-in-time sexual contact; that there were additional avenues of DNA testing that could have been done, including mitochondrial testing of the hairs and the fact that the scarves were not tested; that there was not a complete profile for Norris; and that the profile uploaded into CODIS was a composite profile of the results from both Identifiler and MiniFiler. The Court finds that counsel deliberately chose not to present any of that information after a full investigation.

355. The Court finds counsel credibly testified that Dr. Watson told them not to call him as a witness. The Court finds Dr. Watson told trial counsel he would do the defense more harm than good if called because he would only bolster the State's DNA witnesses. The Court finds the record supports trial counsel's credible testimony that Dr. Watson suggested that, instead of calling him, they have him be present for the testimony and assist with cross examination. The Court credits trial counsel's testimony over Dr. Watson's on this issue.

356. The Court further credits trial counsel's testimony over Dr. Watson's on the issue of whether Dr. Watson "recommended" that counsel raise a *Daubert* challenge. The Court finds, based on contemporaneous emails, that Dr. Watson may have investigated possible *Daubert* challenges but did not suggest that one should be done. In any event, even if Dr. Watson did initially suggest a *Daubert* hearing might have been a good idea, his emails indicate that trial counsel chose not to pursue that strategy because Dr. Watson's research bore no fruit.

357. The Court thus finds that counsel credibly testified that, based on the information available to them at the time, they deliberately chose not to call Dr. Watson as a witness during the guilt phase of Applicant's trial.

358. The Court finds that the record nevertheless supports trial counsel's credible testimony that they brought out some of the topics Applicant complains about during their limited cross of the State's witnesses. Trial counsel questioned Urbanovsky about the life expectancy of spermatozoa after a sex act, and Urbanovsky admitted it could be several days. 38 RR 79. Trial counsel asked DPS analyst Flores about whether he had tested any scarves. 38 RR 131. Trial counsel also questioned DPS analyst Kuhlmann about the MiniFiler results and got her to admit that it was possible there were three contributors. 39 RR 273. Duer also questioned Kuhlmann about the fact that she did not take any samples anywhere else on the blouse Norris was wearing in an attempt to make a complete profile for her. 39 RR 280–81.

359. The Court finds that the record also supports trial counsel's credible testimony that they raised in closing argument many of the arguments Applicant claims they should have offered affirmative evidence of, including: that the evidence showed only that Applicant had sex with Norris but did not show he murdered her, that maybe Applicant had consensual sex with Norris and somebody else murdered her, that the State lost the scarves that were found around her neck which could have provided helpful evidence about the perpetrator or been the "one thing" to tie Applicant to the murder. 40 RR 24, 26–28.

360. The Court finds that the State raised the "date and timestamp" argument for the first time during closing argument *after* the defense had rested and closed.

The Court thus finds that trial counsel could not have rebutted the "date and timestamp" argument because the evidentiary portion of the trial had closed, and trial counsel could not have presented further evidence at that point.

361. The Court finds that trial counsel would still not have called Dr. Watson at trial to testify to the testimony he proffered at the evidentiary hearing for the following reasons:

a) Dr. Watson "just missed" a critical piece of evidence during his postconviction review and that critical piece of evidence was pointed out to him by somebody else. State's Hearing Exhibit 131, which contained the page from the DPS files showing an AP-positive result on the vaginal swab, was the same as State's Exhibit 23 that was offered and admitted at trial. *Compare* SHX 131, *with* 49 RR, at SX 23; 37 RR 232 (State admitting SX 23), 244–45 (discussing SX 23). Dr. Watson was present at trial when this exhibit was admitted and when it was discussed with the State's witnesses. Given the importance of the case and the assertions made, the Court finds that Dr. Watson's failure to thoroughly look at all the records when executing an affidavit reduces his credibility as an expert. The Court thus finds Dr. Watson's post hoc attempt to impugn the AP positive result by suggesting it could have come from the female contributor is not credible. His opinion was also not reliable because Dr. Watson could provide no statistics about the likelihood of that occurring.

b) The Court finds Dr. Watson demonstrated other instances of not thoroughly reviewing the postconviction record on which he based his expert opinion. Dr. Watson testified that he could "only make assumptions" about why a complete profile was never made for Norris. But the trial transcript, which Dr. Watson supposedly reviewed, shows that the reason there was no complete profile is because one could not be obtained. The record showed that a blood sample that was obtained from Norris had degraded by the time DNA testing was done. 39 RR 78–79 (DPS analyst Flores testifying that they did not have any luck analyzing the blood drawn from the autopsy because it did not have preservatives and degraded over time in the tube, so they could not use that as a reference sample). The record also showed that they tried to obtain a profile from Norris's pubic hair but initially could not get a reference sample from there either. 39 RR 79–80. The record showed that eventually DPS analyst Carradine was able to get "a very small amount of profile from a pubic hair from the known samples of Sheryl Norris" as well as from the epithelial fraction of the vaginal smear. 39 RR 168–70. Dr. Watson's speculative assertion that there were ways to get a reference profile was rebutted by the record he purported to review. And, again, he was present when this testimony was presented. The

Court again finds that Dr. Watson's failure to thoroughly review the records he was provided before offering an opinion reduces his credibility as an expert.

c) The Court finds that Dr. Watson's testimony was internally inconsistent. Dr. Watson attempted to impugn the AP positive result by suggesting that DPS did no further testing to confirm whether it was a "false positive." But Dr. Watson had previously testified that the next steps an analyst may take upon a positive result included, among other things, a microscopic analysis. That is what DPS did, and they confirmed the presence of spermatozoa. Thus, the Court finds that, contrary to Dr. Watson's assertions, DPS did take further steps to confirm the positive result, and the fact that they detected spermatozoa means that it was not a false positive. The Court finds trial counsel would not have presented this testimony at trial.

d) The Court finds that Dr. Watson's testimony that he "recommended" trial counsel raise a *Daubert* challenge against both the use of MiniFiler itself as well as the use of a composite profile is not credible. The contemporaneous emails sent to trial counsel show only that Dr. Watson investigated *Daubert* challenges against the use of MiniFiler; they made no mention of a composite profile. SHX 8, at 1. While Duer credibly testified that his notes reflected a question about composite profiles, there is no evidence in the record suggesting Dr. Watson recommended a *Daubert* challenge on such basis. The Court finds that Dr. Watson did not recommend challenging the use of the composite profile, and the Court finds trial counsel would not have raised a *Daubert* challenge on that basis even if it had been suggested.

e) The Court finds Dr. Watson's testimony was primarily speculative. He took no steps to ascertain whether his theories would bear results. He did not thoroughly review the record, he did not appear to have reanalyzed or recalculated the raw data provided to him, and he did not request further testing of any of the pieces of evidence he suggested could have been tested. He devoted a large portion of his testimony to a suggestion that the absence of Applicant's blood antigens in the vaginal smear could mean earlier sexual contact but did not personally confirm what Applicant's blood type was or whether he was a secretor. He also testified at length about the "major profile" notation on DPS's notes but admitted he did not know what those notes meant. The Court finds that an opinion based on mere speculation is unreliable and not credible, and the Court finds trial counsel would not have presented such unreliable and not credible testimony. The Court further finds that trial counsel would not have presented such testimony even if reliable and credible

because all it serves to do is to challenge identity and consent, and counsel chose a strategy of not presenting such evidence to avoid opening the door to Applicant's extraneous offenses.

f) The Court finds that Dr. Watson's opinion about further testing that could be done on the blood stains is purely hypothetical. Dr. Watson testified that, while newer quantitation tests may be more sensitive, the samples have been depleted. Thus, no further results could be obtained from the blood vials. The Court finds Dr. Watson's suggestion to the contrary to be not credible.

362. The Court further finds the affidavit of Ashley Steele to be not credible for the following reasons:

a) Steele's affidavit is not reliable because she did not testify in person, thus depriving the State of the opportunity to cross examine her and depriving the Court of the opportunity to assess her credibility.

b) The Court finds Steele is a biased witness because she previously worked on Applicant's trial team and now works for Applicant's postconviction counsel.

c) The Court finds that Steele's retrospective, first-year-law-student impressions of trial counsel, as well as her aspersions on their character and performance, have no relevance to the issues before the Court. Even if it was relevant, the Court gives it no weight.

d) The Court finds Steele's recollection that the team was "suspicious" of the State's disclosure regarding the blouse is irrelevant. In any event, the Court finds Steele's credibility is diminished because her recollection of the evidence is incorrect: the DNA evidence on the blouse was not blood, but touch DNA.

e) The Court finds not credible Steele's assertion that trial counsel had to be reminded about opening the door during the guilt phase of trial. Lanford and Duer credibly testified that they were well aware of the possibility of opening the door and always concerned about that outcome. Lanford and Duer's testimony is corroborated by their contemporaneous notes and correspondence.

f) The Court further finds Steele's assertion that she did not know trial counsel hired a DNA expert is false. Steele communicated with Dr. Watson after he was hired and in fact provided him the materials he

reviewed. *See* SHX 126, at 1. The Court finds that Steele's credibility is significantly reduced by this falsity.

g) Having found Steele's affidavit not credible, the Court gives it no weight, in line with its prior ruling.

363. Finally, the Court conditionally admitted several of Applicant's exhibits at the evidentiary hearing in the event that the State relied on or cited to the affidavit of Jody Koehler that was proffered with the State's answer. *See* 6 EHRR 91. The Court finds that, because the State did not proffer that affidavit at the evidentiary hearing, it is not part of the habeas record. Moreover, the State has not relied on the affidavit at the hearing or in its findings. The Court therefore now finds that Applicant's Hearing Exhibits 81, 82, 83, and 84 are excluded.

Prejudice

364. The Court finds the record supports trial counsel's credible testimony that they brought out some of the topics Applicant complains about during their limited cross of the State's witnesses. *See* 38 RR 79, 131; 39 RR 273, 280–81. The Court finds the jury was not persuaded by trial counsel's attempts to inject doubt.

365. The Court finds the record also supports trial counsel's credible testimony that they raised in closing argument many of the arguments Applicant claims they should have offered affirmative evidence of. 40 RR 24, 26–28. The Court finds the jury rejected these arguments when it found Applicant guilty.

366. The Court finds Dr. Watson's postconviction testimony, even if assumed to be reliable and credible, was largely speculative. Dr. Watson repeatedly used words such as "could have," "possibly," and "potentially" when discussed what results the various avenues of further investigation would have yielded. Dr. Watson conducted no analysis or testing himself.

367. The Court finds that, assuming Dr. Watson's testimony is reliable and credible, Dr. Watson testified that Applicant could not be excluded from sperm fraction of the vaginal smear and that the fact that AP was detected indicated that sexual contact occurred within 24 hours from the time of the murder.

368. The Court finds that, had trial counsel called Dr. Watson, the State would have presented evidence of Applicant's history of violent sexual assaults to undermine an assertion that Norris consented or that Applicant did not kill her.

369. The Court finds Dr. Watson's testimony fails to take into account the confined timeline within which Applicant could have been physically in Texas and

within which the rape and murder had to occur. Specifically, Dr. Watson's statement failed to consider: Norris left work around noon on the day she was murdered; her watch stopped at 12:31; Applicant's handprint on the blouse Norris wore to work that day and was wearing at the time of the murder; Applicant's semen inside Norris's body; the signs of a violent sexual assault and attendant struggle leading to her strangulation, drowning, and murder; and records indicating Applicant was on leave from his Marine post in California and staying within 30 miles of where the crime occurred. The Court finds the evidence of Applicant's guilt was overwhelming given that timeline and the DNA evidence.

Conclusions of Law

Strickland standard of review

370. A defendant is entitled to the effective assistance of trial counsel. *Strickland v. Washington*, 466 U.S. 668, 687 (1984). To show that counsel were ineffective, Applicant must show by a preponderance of the evidence that (1) counsel's performance were deficient and (2) that the deficient performance prejudiced the defense. *Id.*; *Perez v. State*, 310 S.W.3d 890, 892–93 (Tex. Crim. App. 2010); *Ex Parte Briggs*, 187 S.W.3d 458, 466 (Tex. Crim. App. 2005).

371. To establish deficiency, Applicant must show that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 687–88; *Briggs*, 187 S.W.3d at 466. The court reviewing the effectiveness of trial counsel must apply a "strong presumption" that trial counsel operated within the "wide range" of reasonable professional assistance." *Strickland*, 466 U.S. at 689; *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008); *Ex parte Ellis*, 233 S.W.3d 324, 330 (Tex. Crim. Ap. 2007). "Surmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 371 (2010). And a "vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent." *Bone v. State*, 77 S.W.3d 828, 836 (Tex. Crim. App. 2002).

372. "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[S]trategic decisions made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable." *Id.* at 690.

373. A reviewing court operating under *Strickland*'s deferential standard must defer to trial counsel's strategic decision to forego admitting evidence of a "double-edged nature," which might harm the defendant's case. *Boyle v. Johnson*, 93 F.3d 180 (5th Cir. 1996).

374. To show prejudice due to ineffective assistance, Applicant must show a "reasonable probability" that the result of the proceeding would have been different but for trial counsel's deficient conduct. *Id*. at 694–95; *Ex parte Flores*, 387 S.W.3d 626, 633 (Tex. Crim. App. 2012); *Ex parte Ramirez*, 280 S.W.3d 848, 852 (Tex. Crim. App. 2007). A "reasonable probability" is one "sufficient to undermine confidence in the outcome" such that counsel's deficiency was "so serious as to deprive the defendant of a fair trial whose result is reliable." *Strickland*, 466 U.S. at 687, 694.

375. "Both prongs of the *Strickland* test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight." *Ex parte Flores*, 387 S.W.3d at 633–34.

376. Applicant has the burden of proving by a preponderance of the evidence that he received the ineffective assistance of counsel. *Jackson v. State*, 877 S.W.2d 768, 711 (Tex. Crim. App. 1994); *see Bone v. State*, 77 S.W.3d 828, 833 (Tex. Crim. App. 2002).

Trial counsel were not deficient

377. The Court concludes Applicant fails to show trial counsel were deficient for failing to call Dr. Watson during the guilt phase of Applicant's trial.

378. The Court concludes trial counsel conducted a reasonable investigation into all possible guilt-phase defenses. The Court concludes trial counsel's guilt-phase investigation was not objectively unreasonable.

379. The Court concludes trial counsel were fully informed of the various ways the DNA evidence could be contested and reasonably chose not to contest it beyond minimal cross-examination of the State's witnesses and closing argument.

380. The Court concludes trial counsel's strategy to avoid actions that would raise questions of identity or consent, and thus open the door to highly damaging extraneous offense testimony, was reasonable. This informed, strategic decision made after a thorough investigation is "virtually unchallengeable." *Strickland*, 466 U.S. at 690.

381. The Court concludes that Applicant specifically consented to trial counsel's strategy and cannot now complain about that chosen strategy with the benefit of hindsight. *See Ex parte Flores*, 387 S.W.3d at 633–34.

382. The Court concludes that trial counsel reasonably chose not to call Dr. Watson based on Dr. Watson's own advice that they should not call him. The Court concludes counsel was entitled to rely on their expert's advice. *See Murphy v. Davis*, 901 F.3d 578, 592 (5th Cir. 2018) (holding that, although hiring an

expert and having her testify "does not give counsel license to 'completely abdicate . . . responsibility,'" "counsel should be able to rely on that expert to alert counsel to additional needed information or other possible routes of investigation"); *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016) ("Counsel should be permitted to rely upon the objectively reasonable evaluations and opinions of expert witnesses without worrying that a reviewing court will substitute its own judgment, with the inevitable hindsight that a bad outcome creates, and rule that his performance was substandard for doing so." (quoting *Smith v. Cockrell*, 311 F.3d 661, 676–77 (5th Cir. 2002))); *Dowthitt v. Johnson*, 230 F.3d 214, 747–48 (5th Cir. 2000) (counsel may rely upon their retained experts and need "not canvass[] the field to find a more favorable defense expert").

383. The Court nevertheless concludes that trial counsel still raised several of the issues that Applicant wishes had been raised at trial through cross examination and closing argument. The Court concludes that Applicant's argument thus boils down to a matter of degree, which is not enough to establish a *Strickland* claim. *See Skinner v. Quarterman*, 576 F.3d 214, 220 (5th Cir. 2009) ("[W]e must be particularly wary of argument[s] that essentially come[] down to a matter of degrees." (quoting *Dowthitt*, 230 F.3d at 743)).

384. The Court concludes that, because counsel raised the issues Applicant now wishes they had raised, counsel's decision not to present cumulative testimony is not deficient performance. *See United States v. Fields*, 761 F.3d 443, 456 (5th Cir. 2014) ("[O]ur review of the evidence presented at trial, when compared to the additional evidence Fields claims his counsel should have discovered, convinces us that reasonable jurists would not disagree with the district court's determination that the new evidence is not materially different from that presented at trial. Rather, it offers more detail about each category of mitigation evidence, but duplicates the evidence already presented."); *Coble v. Quarterman*, 496 F.3d 430, 436 (5th Cir. 2007).

385. The Court also concludes that counsel could not have been deficient for failing to rebut the State's "date and timestamp" argument because that argument was not made until after the close of evidence and after the defense made its closing argument. The Court concludes Applicant's wish that counsel foresaw the State's closing argument is impractical and impermissibly relies on hindsight. *See Ex parte Flores*, 387 S.W.3d at 633–34.

386. The Court concludes that counsel reasonably chose not to raise any *Daubert* challenges to the DNA evidence because they believed, based on Dr. Watson's research, that such would be futile. Counsel "is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects

for success—for recommending that a weak claim be dropped altogether." *Knowles v. Mirzayance*, 556 U.S. 111, 127 (2009).

387. In sum, while Applicant may now wish that trial counsel had chosen to attack the DNA evidence in a different manner, that does not prove counsel's strategic choices deficient. *See Knowles*, 556 U.S. at 127 ("The law does not require counsel to raise every available nonfrivolous defense."); *Strickland*, 466 U.S. at 689 ("There are countless ways to provide effective assistance in any given case. Even the best criminal defense attorneys would not defend a particular client in the same way.").

388. Applicant fails to meet his burden to overcome the presumption that counsel acted reasonably.

Applicant was not prejudiced

389. The Court also concludes Applicant also fails to show he was prejudiced by counsel's decision not to call Dr. Watson.

390. The Court concludes Dr. Watson's testimony echoes the essence of Applicant's theory at trial, which was rejected by the jury, i.e., that even if the evidence established that he had sexual intercourse with Norris—possibly forcibly—the State's evidence did not rule out the possibility that someone else entered the apartment and murdered her. 40 RR 24–25, 28. The Court concludes that Dr. Watson's testimony is thus largely cumulative of what was presented at trial, and therefore, counsel's failure to call Dr. Watson is not prejudicial. *See Wong v. Belmontes*, 558 U.S. 15, 22 (2009) (holding that adding cumulative evidence to "what was already there would have made little different").

391. The Court further concludes that, while it may be true that the presence of DNA does not indicate precisely when the DNA was left, Dr. Watson's testimony on that front ignores the substantial evidence tying Applicant to the rape and murder of Norris. This overwhelming evidence of Applicant's guilt means that Applicant cannot show *Strickland* prejudice stemming from trial counsel's alleged deficiency in failing to rebut the State's "date and timestamp" argument, especially given that the expert he now proffers does nothing more than echo an argument that was already presented to—and rejected by—the jury in Applicant's trial.

392. The Court concludes that Applicant fails to demonstrate prejudice particularly when some of Dr. Watson's testimony—namely, that Applicant's profile was consistent with the profile of the sperm fraction of the vaginal smear and that the presence of acid phosphatase on the vaginal smear indicated close-in-time sexual contact—would have been more harmful than helpful to Applicant. *See Belmontes*, 558 U.S. at 20 (in considering prejudice a court must "consider all

the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path—not just the . . . evidence [the inmate] could have presented, but also the . . . evidence that almost certainly would have come in with it.").

393. The Court concludes it is highly unlikely that a jury that had rejected counsel's attempts to "carefully" insinuate that someone else raped and murdered Norris would have reached a different result if Applicant presented more of the same evidence in combination with harmful evidence further tying Applicant to the crime. The Court concludes that there was no probability of a different result, and Applicant has failed to meet his burden. *Strickland*, 466 U.S. 694–95.

394. The Court recommends denying Ground 2b.

Ground 2c: Rebutting false testimony

Factual Findings

395. Applicant next asserts that counsel were ineffective for failing to correct or rebut allegedly false testimony presented by the State. Appl. 88–102. Applicant raises the same alleged false testimony that he raised in Ground 1, *supra*. Namely, applicant faults trial counsel for failing to: a) present evidence that Dr. Bell was alive and that he did not conclude Norris was raped or object to the introduction of that testimony and argument; b) impeach Andrus's testimony about the money in the apartment and the scope of his drug dealing and criminal history; c) impeach Detective Dunn's testimony that Andrus's alibi had been "confirmed quite strongly"; d) independently investigate Andrus's alibi; e) present evidence that marijuana was discovered in the apartment; and f) impeach Detective Dunn's testimony that Lt. O'Connell was dead. *Id*. Applicant believes, had counsel corrected the above testimony, they would not only have cast down on Applicant's guilt but damaged the credibility of the State's witnesses. *Id*. at 114.

396. The Court has thoroughly described the relevant trial testimony to these claims in its discussion of Ground 1 above. For the sake of brevity, the Court will not repeat its discussion here. Rather, it limits its factual discussion in this section to the relevant testimony and evidence developed at the evidentiary hearing.

Evidentiary hearing

A. Lanford

397. Relevant to Dr. Bell, Lanford testified that he received an email from his fact investigator, Rick Ojeda, on September 17, 2012, saying that he had located Dr. Bell and spoken with him on the phone. 7 EHRR 88, 156; SHX 10. Lanford

testified that Ojeda sent a second email on March 27, 2013, reiterating that Dr. Bell had been located. SHX 11. Lanford testified that he was thus aware at the time of trial that Dr. Bell was alive. 7 EHRR 156; 8 EHRR 166.

398. Lanford testified that the team had "a lengthy discussion about Dr. Bell." 7 EHRR 89. Lanford said they chose not to call him because of his age and memory issues. 7 EHRR 160; 8 EHRR 168. Lanford further said that choosing not to call Dr. Bell to testify about his conclusions "was a deliberate strategic choice not to do that." 7 EHRR 162; 8 EHRR 238 ("The ultimate strategic and tactical decision was not to call [Dr. Bell].").

399. Lanford recalled that the defense did not want Dr. Bell's autopsy report in evidence. 7 EHRR 162–63. The autopsy report was not an important issue to the case because they already had a cause of death and they otherwise would prefer to keep the details of the autopsy out. 8 EHRR 169–70. Lanford testified that the team "didn't figure why talking about the autopsy and grinding home the details of the autopsy would have made any difference to the overall defense scheme." 8 EHRR 167–8.

400. Lanford testified that, if the State said at trial that Dr. Bell was dead, he would not have known that to be false because the defense "knew that [Dr. Bell] was having mental problems at the time [Ojeda] talked to him" and it would not have been "an outrageous concern" if he had died in the interim. 7 EHRR 160. In other words, Lanford "didn't know that to be true or untrue at the time." 7 EHRR 161, 168. Lanford testified that, in any event, it "didn't bother [him] one way or another" that the State said he was dead because neither party was going to call him. 7 EHRR 160.

401. Lanford did not recognize the name Bill Pennington and did not know whether Ojeda interviewed Pennington but would not dispute it if his written records did not show reports or notes about an interview with Pennington. 7 EHRR 104–05.

402. Lanford was not sure why they did not object to any testimony that Dr. Bell had not concluded Norris was raped, 7 EHRR 162–63, but did not think such would be worth objecting to, as it would not have "hurt enough to object to it or to make an issue out of it" in front of the jury, 8 EHRR 170. Lanford further noted that presenting evidence that it was not rape "would be back to that consent issue again," which they wanted to "keep all of that out." 8 EHRR 170.

403. Relevant to Andrus's testimony, Lanford testified that, as early as September 2011, Ojeda had located Andrus, who was a suspect in the case, in Florida. 7 EHRR 90. Lanford did not believe that Ojeda went to Florida to interview Andrus, as they had decided that such an interview "would probably not be

productive enough to justify the expense." 7 EHRR 91. They specifically considered the fact that Andrus "had denied [committing the crime] for 35 years" and was "going to keep denying it," so without any physical evidence to tie him to the crime, they thought it would not be productive. 7 EHRR 93. Lanford testified that the team thus "disregarded Mr. Andrus very early" in trying to defend Applicant. 7 EHRR 207. As far as the defense was concerned, Andrus "was kind of a side character." 7 EHRR 207.

404. Lanford also testified that they decided not to send Ojeda to Florida to investigate Andrus because, by that time, they had conducted significant research about "the possibility of the State introducing extraneous offenses" at the guilt phase of trial, and "one of the ways to do that" "very quickly" was "to either raise consent or raise identity." 7 EHRR 92. Lanford testified that investigating Andrus would have been part of a "some other dude did it," or "SODDI," defense, which fell into the category of challenging identity. 7 EHRR 92–93. Thus, they decided not to investigate Andrus further once they decided they were no longer going to be contesting Applicant's identity. 7 EHRR 93.

405. Lanford was fully aware based on the evidence presented at trial that Andrus was a drug dealer. 7 EHRR 93. Lanford was also aware that marijuana was found in the apartment, that Andrus had sold 1,000 pounds of marijuana the week before Norris's death, and that money was in the fridge. 7 EHRR 93–94. Lanford was also aware of Andrus's criminal history. 7 EHRR 95.

406. Lanford testified that he questioned Andrus about whether money had been found in the apartment, and when Andrus said he did not remember, Lanford stopped probing further because that was the answer he wanted. 7 EHRR 194–95. Getting Andrus to deny remembering the money was about "all [they] could get out of him essentially" and "was one of the points [they] wanted" on cross. 7 EHRR 195. Lanford testified that they wanted to "paint [Andrus] as a dope dealer that was not telling the truth all the time." 7 EHRR 197. And Lanford didn't choose to use any specific reports to question him further because he wanted him "to appear to be evasive in dodging the questions." 7 EHRR 198.

407. Lanford did not obtain certified criminal convictions and did not choose to confront Andrus about his criminal history because "[i]t wasn't the issue of [the defense's] concern, and [he] didn't see any way that Mr. Andrus could be productive." 7 EHRR 95–96. In Lanford's opinion, they did not need to ask questions about how many illegal drug transactions Andrus had participated in or over what duration because "[t]he fact that he had was sufficient." 7 EHRR 198–99.

408. Lanford testified that he had the DEA report outlining Andrus's drug dealing history and "if [he] had felt [it was] necessary or felt it would have helped" or

gone to "a material issue," he would have used it. 7 EHRR 202; AHX 36. The same is true for any other documents indicating a more extensive criminal history than Andrus revealed at trial. 7 EHRR 205–206; AHX 44.

409. Lanford summarized his "position on Andrus" as follows:

> [W]e got what we needed out of him. Throw a little shade on it, point out that he is a dope dealer and not truthful, and then otherwise get rid of him so that he can hang around maybe in the juror's mid in the background someplace as a doubt.

8 EHRR 160.

410. As to Detective Dunn's testimony about Andrus's alibi, Lanford testified that the team was well aware that Andrus's alibi had never been confirmed at the time of trial because he was "still an unofficial suspect." 8 EHRR 163–64; SHX 7, at 29 (Ojeda reporting to the defense team on October 17, 2011, that it appeared "the boyfriend was the only one who was never completely cleared").

411. Lanford testified that, even so, they did not challenge Detective Dunn's testimony or follow up with her to ask why she believed that to be the case because the defense still wanted to "sort of hang it in the background that [Andrus] may have been involved, so [they] didn't ask [Dunn] to firm up [her] belief that it was not a good alibi." 7 EHRR 190.

412. Lanford was not aware if Ojeda ever spoke with Janet Egizi née Brightman. 7 EHRR 99. Lanford never received a report or was otherwise informed that Ojeda had a conversation with her. 7 EHRR 99. But Lanford testified that the defense team decided not to investigate Andrus's alibi because "if the State couldn't prove it after all of those years, we didn't have the resources to prove it" either. 8 EHRR 164. Further, Lanford felt he "had the information [he] needed on Mr. Andrus and [he] acted upon it." 7 EHRR 101. Lanford said the team decided that "chasing [Andrus] down was going to be a rabbit [trial], and it wasn't going to lead anywhere." 7 EHRR 101.

413. Lanford testified that attempting to present affirmative evidence that Andrus's alibi was not corroborated "may have been [important to raise] or it could have been a waste of time." 7 EHRR 100–01. In particular, Andrus's alibi "wasn't going to change the identity of the DNA issues, so it was a side issue that would not have had any effect on where the trial was going and what they were trying to accomplish." 7 EHRR 101.

414. Lanford testified that he was not sure "what would have been the point" of presenting all the evidence about Andrus that Applicant suggests he should

have. 8 EHRR 161. Lanford acknowledged they "could have destroyed his reputation further in front of the jury" but that "wouldn't have accomplished a whole lot" substantively, except perhaps "a bit of satisfaction." 8 EHRR 161. But Lanford saw no "point in it because that had nothing to do with how the DNA got where it got and how she wound up dead." 8 EHRR 162. "[T]hat was what [their] concern was, not whether or not [Andrus] was some greater dope dealer than he professed to be, as probably most of them are." 8 EHRR 162.

415. Further, to the extent the point of this evidence was to suggest Andrus or someone he knew murdered her, Lanford said "that's also an identity matter" that they in fact investigated and considered presenting. 8 EHRR 162.

416. As to Lt. O'Connell, Lanford testified that he did not recall testimony at trial saying Lt. O'Connell was dead and he "did not remember anything about the detective being alive or dead." 7 EHRR 185–86.

417. Lanford testified that he was aware that the original 1975 investigation into Norris's murder focused primarily on a possible drug connection. 8 EHRR 158.

418. Lanford did not talk to any of the original officers involved because he "did not want to hear them cover . . . themselves[.]" 7 EHRR 107.

419. Lanford testified that, if he had known that Lt. O'Connell would have testified that whoever killed Norris had tortured her, that would have been helpful to their strategic decisions because it would have been "another reason to keep him out of the courtroom." 7 EHRR 187–88.

420. Lanford testified that it would not have been useful to know that Lt. O'Connell believed that whoever killed Norris was "trying to get something out of her" because it was too "indefinite." 7 EHRR 188.

421. Lanford testified that it would not have been "very helpful" to know that Lt. O'Connell believed that Norris's murder was connected to Andrus's drug dealing because of "all this other stuff that would have come in," namely, the extraneous offenses if they suggested someone other than Applicant killed her. 7 EHRR 188.

422. In other words, while the information might have been helpful to know, it still would not have "solve[d] the DNA problems and some of the other things that we have, so it was a deliberate choice not to get into that can of worms." 7 EHRR 188–89.

423. Lanford also testified that one of the reasons they didn't call the police officers during trial was because police officers "have a remarkable memory in the

courtrooms of things that suddenly help out the State's cause[.]" 8 EHRR 239. Further, Lanford did not think it would be appropriate for police officers to speculate as to what they thought happened. 8 EHRR 240.

424. Lanford testified that he does not "make every possible objection because it slows the case down. You can aggravate the jury, and it doesn't help anything." 7 EHRR 185. Lanford believed that "cross-examining on some of these points would have just been an enormous waste of time and aggravate the jury," so he "deliberately" did not object to some of it. 7 EHRR 185.

B. Duer

425. Duer testified that, in preparation for the evidentiary hearing, he reviewed Applicant's initial application, some portions of the trial record, his handwritten notes, and various exhibits showed to him by the parties. 10 EHRR 11–12.

426. As to Dr. Bell, Duer testified that he thought Dr. Bell was deceased. 10 EHRR 34–35, 44, 220. Duer, however, acknowledged that he had received emails from Ojeda before trial saying that Dr. Bell had been located. 10 EHRR 85–86, 220; SHX 10; SHX 11. Duer has no memory of receiving those emails, though he identified his email in the recipient line and had no reason to dispute that he would have read those emails at the time they were sent. 10 EHRR 220–21.

427. Duer testified that, "if it had been in the front of [his] mind" at the time of trial, he believes he would have said something when the State said Dr. Bell was dead. 10 EHRR 221–22. But Duer acknowledged that they "didn't talk about it at all during the entire trial." 10 EHRR 222.

428. Duer testified that, as far as he knew, no one else from the defense team reached out to Dr. Bell after Ojeda's initial contact with him. 10 EHRR 89–90.

429. Duer agreed that the defense team's strategy was to keep Dr. Bell's autopsy report out of evidence. 10 EHRR 35; SHX 77; SHX 105. Duer recalled that Ashley Steele, the intern from TDS, provided legal research on whether the team could successfully keep out Dr. Bell's report. 10 EHRR 36, 222–23; SHX 77, at 1. Duer could not remember the specifics of Steele's research, but he did recall that everything they discussed was helpful. 10 EHRR 37–38. Duer also recalled that their psychology consulting expert, Dr. Cecil Reynolds, warned the defense team that the State would be able to bring in another pathologist to testify, which the State ultimately did. 10 EHRR 39, 223–24; SHX 77, at 1. "Experts are allowed to testify based on reports from other experts." 10 EHRR 224. Duer confirmed that the defense team did not hire their own pathologist. 10 EHRR 39.

430. Duer testified that, in response to Ashley Steele's questions during trial about whether they kept out the autopsy report, he informed her that it had gone "as well as can be expected" because "Dr. Barnard from SWIFS in Dallas[] never mentioned the original autopsy, except to say it was among several things he considered when he reached his conclusions." 10 EHRR 226–27; SHX 129.

431. Duer testified that the only difference calling Dr. Bell would've made was that "it might have allowed [them] to hammer home the fact that he didn't find sexual assault." 10 EHRR 228. But Duer acknowledged that the physical evidence still tied Applicant to the crime, that Applicant's semen was still inside Norris, and that his touch DNA was on the blouse she was wearing. 10 EHRR 228. Duer also acknowledged the short and condensed timeline of the murder. 10 EHRR 229–30. The evidence together made it seem likely that whoever raped Norris was also the person who murdered her. 10 EHRR 228.

432. Putting Dr. Bell on the stand would also have come with risk: if they put on evidence to contest the sexual assault, they would open the door to the extraneous offenses. 10 EHRR 230. Duer noted that it would have "open[ed] up the possibility that reading his paperwork refreshed [Dr. Bell's] recollection" and "suddenly he remembered telling Urbanovsky, yeah, that sure looks like sexual assault to me, but I can't say 100 percent." 10 EHRR 230.

433. Duer testified that bringing up with Dr. Barnard the fact that Norris had a live-in boyfriend in an attempt to point the finger at Andrus would have "made it less likely" that "the intercourse [with Applicant] happened previous to the day of the murder." 10 EHRR 231–32. This was further complicated by "the timeline of [Applicant] leaving 29 Palms Marine Station in California, headed for Fort Sam Houston to the hospital where his wife, Merle, was in the hospital, and he came back to Texas." 10 EHRR 232. This timeline made it so that there was only a narrow "window of time during which the sexual intercourse could have happened." 10 EHRR 232.

434. Duer testified that they were well aware that Andrus was a drug dealer and "had his background, his whole thing[.]" 10 EHRR 232–33. Counsel was also aware that Andrus had money in the apartment; there were in fact "several versions of that story." 10 EHRR 233. Duer also knew Andrus had marijuana in the apartment and had "just done some big deal a few days prior to the murder." 10 EHRR 233.

435. In Duer's view, "[t]he State established [Andrus's] criminal history. It wasn't anything for us to do. They laid it right out." 10 EHRR 233. The State did so because they wanted to suggest that "until [Applicant] was tagged on the DNA for this case, [Andrus] spent 37 years thinking that one of his drug dealing buddies had something to do with it, that they had come for the money, that

they had heard about the deal, somebody he stiffed, somebody that he never named and could never prove or provide any useful evidence of." 10 EHRR 234. The State brought out Andrus's convictions and drug dealing to essentially "get ahead of the idea that it was one of his drug dealing buddies." 10 EHRR 234.

436. But if the defense tried to point to one of those drug dealing buddies or brought other people to speculate about Andrus's criminal history, that would have opened the door. 10 EHRR 234. "Once you start pointing the finger at a strawman, you have questioned the identity, and you are right back in the soup." 10 EHRR 234. For that reason, "Andrus was a non-entity" to Duer. 10 EHRR 234. "[T]he only reason the State brought him was to keep us from saying her boyfriend did it[, a]nd because of the DNA, it was unlikely we were going to go down that route anyway." 10 EHRR 234.

437. Duer suggested that Lanford argue during closing arguments that nobody verified Andrus's alibi. 10 EHRR 245.

C. Affidavits

438. Applicant presented no other live witnesses on this issue, though he was offered the opportunity to do so. Instead, he presented the affidavits of Janet Egizi, Lt. O'Connell, Gabriel Solis, and Dr. Bell. *See* AHX 2, 7, 9, 10, 60. These are the same affidavits that the Court summarized in Ground 1. The Court admitted these affidavits at the hearing over the State's objection. 8 EHRR 23–24. However, the Court stated it would give those affidavits "the weight that they are entitled to" and, unless found credible, would find they "have no relevance" and would not be "appropriate in proposed findings of fact and conclusions of law." 8 EHRR 24. The Court now summarizes the affidavits, as relevant to Applicant's IATC claim.

439. Applicant admitted the May 19, 2015 affidavit of Dr. Bell. AHX 2; *see* Appl. 89 (citing to affidavit of Dr. Bell).

a) Dr. Bell stated that, in 2013, he moved to Virginia from the Atria Senior Living Community in Spring, Texas, after his wife had passed away earlier that year. AHX 2, at 1 ¶ 2.

b) Dr. Bell had conducted numerous autopsies throughout his career; thus, he has no independent recollection of Norris's autopsy that he conducted on November 24, 1975. AHX 2, at 1 ¶ 4.

c) Based solely on the autopsy report, Dr. Bell stated he was unable to conclude in 1975 whether Norris had been raped. AHX 2, at 1 ¶ 5. Dr. Bell noted that his report contained no documented evidence of trauma or injury to the perineal or vaginal areas, which is usually, though not

always, present in rape cases. *Id*. Based on his report, Dr. Bell thought he "could not unequivocally determine" that Norris had been raped. *Id*.

440. Applicant admitted the June 19, 2015 affidavit of Lt. O'Connell. AHX 9; *see* Appl. 99 (citing to Lt. O'Connell's affidavit).

a) Lt. O'Connell states that, while investigating the crime scene, he, "along with other officers," found marijuana in a drawer under the oven. AHX 9, at 1 ¶ 6. Lt. O'Connell stated that the amount of marijuana presented caused him to believe that the residents of the apartment were involved in dealing drugs. *Id*.

441. Applicant admitted the July 2, 2015 affidavit of his postconviction investigator Solis. AHX 11.

a) Solis details his investigation of the Janet Brightman that Andrus referred to in his statement. AWX 11, at 2–4.

b) Solis contacted a woman in 2015 named Janet Egizi, whom Solis believed was Janet Brightman. Solis believed this based on her date of birth, student records at Texas State University, telephone directories from 1970 to 1978, and her birth name, which Solis alleged was Brightman. AWX 11, at 2 ¶¶ 78, 3 ¶ 12.

c) Solis said Egizi informed him that she had a "great memory" and "never had a friend or acquaintance named Charles Andrus." AWX 11, at 3 ¶ 8.

d) Solis reported Egizi informed him that she was never contacted by homicide investigators, the Texas Rangers, or Applicant's defense team at any point. AWX 11, at 3 ¶¶ 8, 10. Egizi told Solis she did not even remember the murder happening and was thus "perplexed" why her name was mentioned in a 1975 homicide investigation report. *Id*. at 3 ¶ 9.

e) When asked if she would be willing to look at pictures of Andrus to see if it might jog her memory, Egizi declined, saying that she would not provide any more information than she already had and that she found it "mysterious" that her name was involved with the investigation. AWX 11, at 4 ¶ 13. Egizi then hung up the phone. *Id*.

442. Applicant admitted the signed declaration of Janet Egizi née Brightman. AHX 60.

a) Egizi avers that she was formally known as Janet Brightman. AHX 60. Egizi avers that she was a student at Texas State University from 1972 through 1976. AHX 60, at 1 ¶ 1.

b) Egizi states that she has never heard of Charles Andrus, Sheryl Norris, or Joe Sewell. AHX 60, at 1 ¶ 2. Egizi states that she never had lunch at a café in 1975 with anyone by the name of Charles Andrus or Charles Wayne Andrus. AHX 60, at 1 ¶3.

c) Egizi states she never spoke to any law enforcement officials about someone named Charles Andrus. AHX 60, at 1 ¶ 4.

Deficiency

443. The Court finds Lanford's testimony to be credible.

444. The Court finds Duer's testimony to be credible. The Court notes Duer testified that he did not know Dr. Bell was alive at the time of trial. The Court notes this is belied by Lanford's testimony and contemporaneous emails. Lanford testified that the team had many discussions about Dr. Bell. Duer confirmed he was a recipient of two emails that stated Dr. Bell was alive and he testified he would have no reason to dispute that he would have read those emails at the time of trial. The Court finds Duer's recollection of Dr. Bell's status was likely affected by the fact that it has been nearly 10 years since the trial, as well as the fact that Duer stated he read Applicant's application.

445. The Court finds none of Applicant's affidavits credible for the following reasons:

a) The affidavits of Lt. O'Connell, Egizi, and Solis are not credible because they did not testify in person, thus depriving the State of the opportunity to cross examine them and depriving the Court of the opportunity to assess their credibility.

b) Because Dr. Bell is now deceased, the Court finds that he could not have testified at the evidentiary hearing. However, Dr. Bell's affidavit did not meet the hearsay exemption for deceased witnesses because it was not prior testimony that was subjected to cross-examination. *See* Tex. R. Evid. 801(e)(1). The Court thus finds Dr. Bell's affidavit is also not reliable.

c) The Court further finds Dr. Bell's affidavit not credible, as he had no personal knowledge or independent recollection of the events described therein.

d) The Court finds Lt. O'Connell's affidavit not credible and not reliable because it discusses events that occurred forty years before. The Court also finds Lt. O'Connell's forty-year-later recollection that marijuana was discovered in the apartment to be irrelevant to the question of trial counsel's knowledge and strategy at the time of trial.

e) The Court finds Solis's affidavit not credible and not reliable because it is comprised entirely of hearsay and because he has no personal knowledge of the relevant facts, i.e., whether Egizi knew or remembered Andrus. The Court finds Solis's statements have no probative value to Applicant's IATC claim.

f) The Court finds Egizi's declaration not credible and not reliable because it discusses forty-four-year-old memories. The Court finds it unsurprising that, more than forty years later, Egizi does not recall having lunch or coffee with a person named Andrus on a specific day.

446. Having found all of Applicant's affidavits not credible, the Court gives them no weight. 8 EHRR 24.

447. The Court finds as it has previously that, aside from the testimony that Dr. Bell was deceased, none of the testimony Applicant complains of was false. At most, Applicant complains about inconsistencies in the record that might have been appropriate for cross-examination, which is what counsel did when they felt it was necessary.

448. Regarding Dr. Bell, the Court finds trial counsel were aware before trial that Dr. Bell was alive.

449. The Court finds counsel credibly testified that they strategically decided not to call Dr. Bell as a witness because he lacked any personal recollection of Norris's autopsy and because they did not otherwise want evidence about the autopsy report or his conclusions coming in at trial. The Court finds counsel was worried that Dr. Bell's memory might be refreshed upon reviewing his autopsy report and testifying, such that he might testify to opinions or impressions he might have had about whether Norris was sexually assaulted that did not make it into the report.

450. The Court also finds counsel credibly testified that they strategically decided not to object to evidence that Dr. Bell was deceased because: 1) they thought it

was possible given Dr. Bell's memory issues that he could have died in the interim from when their investigator last spoke to him; and 2) it did not matter to them either way because they did not want to call him and because another expert could testify to his own conclusions anyway, as Dr. Barnard did.

451. The Court further finds counsel credibly testified that they strategically chose not to object to argument or testimony about Dr. Bell's conclusions, or lack thereof, because if they had suggested Norris had not been raped, that would have opened the door to Applicant's history of violent sexual assaults, which they had studiously attempted to avoid during the guilt phase of trial. *See* Ground 2b, *supra*.

452. Regarding the many ways Applicant wishes counsel had impeached, challenged, or disparaged Andrus, the Court finds counsel credibly testified that were fully aware of many of the facts that Applicant wishes they had presented, including: that Andrus had an extensive drug dealing background, that money from a drug deal was in the apartment, that marijuana was found in the apartment, that Andrus had a criminal history, and that Andrus's alibi was never confirmed. The Court finds trial counsel possessed nearly all of the documents upon which Applicant now relies.

453. The Court finds counsel credibly testified that they disregarded Andrus early in their investigation because: 1) Andrus had denied involvement for 35 years and the State had never been able to prove he did it, so they thought it unlikely their resources would prove any different; 2) pointing the finger at Andrus still would not explain Applicant's DNA found in and on Norris's body; and 3) doing so would only go to an alternative suspect theory, the "SODDI defense," which they had considered and rejected. *See* Ground 2b, *supra*.

454. The Court finds counsel credibly testified that pointing the finger at Andrus would have contested identity and thus opened the door to Applicant's extensive history of violent sexual assaults, an outcome which counsel had strategically decided to avoid.

455. The Court finds that, based on that strategy, counsel would not have investigated or presented Egizi, even assuming her affidavit is reliable and credible, because such would not have aligned with their strategic decisions at trial.

456. The Court finds the record supports counsel's credible testimony that instead of choosing to investigate and present evidence about Andrus's background or alibi, they chose to paint Andrus as a liar, a drug dealer, and a criminal through a limited cross examination, thereby calling into question his credibility without opening the door to identity. *See* 37 RR 161–62 (counsel

bringing out the fact that, when Andrus moved to San Marcos, he was on probation for a marijuana-related offense out of Georgia), 162 (counsel reiterating that Andrus had sold a substantial amount of marijuana a week before Norris's death and asking whether there was some money, "[l]ike $10,000 or something" in the apartment at some point after the murder), 163 (counsel asking Andrus whether he was arrested for "[a]nother marijuana case" around when his son was born); *see also* 40 RR 25 (counsel arguing during closing argument that Andrus was sitting there "[n]ervous as a long-tailed cat in a room full of rocking chairs").

457. The Court finds counsel credibly testified that he chose not to question Detective Dunn further about why she thought Andrus's alibi was confirmed quite strongly because he did not want to give her an opportunity to explain why she thought so. The Court finds the record supports that, instead, counsel followed up with a clarifying question to show that no statements from anybody verifying Andrus's alibi had ever been obtained. 38 RR 175.

458. As to Lt. O'Connell, the Court finds counsel did not know whether Lt. O'Connell was alive or dead at the time of trial. The Court thus finds that counsel had no reason to object, even assuming Detective Dunn testified falsely that Lt. O'Connell was dead, though she did not. *See* Ground 1e, *supra*.

459. The Court finds that, in his application, Applicant pointed to documents that should have essentially put trial counsel on notice that Lt. O'Connell was still alive. *See* Appl. 100 (citing AX 38, a report from Detective Dunn). But the Court finds Applicant did not offer that report at the hearing. The Court finds such report not to be part of the habeas record for this claim.

460. The Court finds counsel credibly testified that, had they known Lt. O'Connell was alive, they would not have called him to testify because they would be suspicious of a police officer's forty-year-later speculation about the murder. The Court finds counsel credibly testified that, in his experience, police officers are not helpful witnesses to the defense, so it would not have made a difference to him to know what Lt. O'Connell might have testified to.

461. The Court finds counsel credibly testified that objecting to or cross examining on many of the points Applicant wishes they had would have been a waste of time or would have aggravated the jury.

Prejudice

462. The Court finds the record supports trial counsel's credible testimony that they brought out some of the topics Applicant complains about during their limited cross of the State's witnesses. *See* 37 RR 161–62, 162, 163. The Court finds the jury was not persuaded by trial counsel's attempts to inject doubt.

463. The Court further finds many of the points Applicant wishes counsel had raised were in fact raised during closing argument. For example, counsel argued regarding Andrus:

> Wayne Andrus the boyfriend, the dope dealer, he told you that the week or so before he did a major drug deal. He couldn't remember whatever it was—a half pound or whatever was found in the apartment later, but he told you he was already on probation for marijuana.
>
> Now this is 1975. Marijuana was not the kind of business that it is today. No big deal. Lose a pound, nothing—nobody worries about it now. [But t]his is 1975, when all that was new.
>
> [Andrus] said he sold a sizable amount of marijuana. And he was sitting—you could tell him there, he was nervous. Nervous as a long-tailed cat in a room full of rocking chairs. He didn't want to be here because he knew for 37 years he had exposed Sheryl Norris to an element of society that could very well have been the cause of her death.

40 RR 25. Counsel also specifically argued that nobody ever checked Andrus's alibi. 40 RR 27. Counsel pointed out that the State "took a statement" from Andrus, and "this is a murder case" but "nobody checked it" out. 40 RR 27. Counsel even outlined Andrus's statement about his whereabouts the day of the murder, pointing out that "[n]one of that can be traced." 40 RR 27. And consistent with their strategy to wait until closing argument to suggest someone other than Applicant murdered Norris, counsel argued that Andrus "might have gone home for lunch and saw Willie leaving the apartment," suggesting Applicant and Norris had consensual sex and Andrus may have seen it within the same time frame. 40 RR 27.

464. The Court finds none of the evidence Applicant wishes counsel had presented would have accounted for Applicant's DNA being found in and on Norris's body when she died.

465. The Court finds that, if counsel had presented the evidence Applicant wishes counsel had presented or cross-examined witnesses on the bases he suggests, such would have contested either identity or consent and opened the door to the State's presentation of Applicant's violent history of sexual assault.

Conclusions of Law

Trial counsel were not deficient

466. The Court concludes Applicant fails to show trial counsel were deficient for failing to rebut or challenge any of the allegedly false testimony Applicant wishes they had challenged during the guilt phase of trial.

467. The Court concludes that because none of the testimony—except as to Dr. Bell's death—was false, counsel could not be deficient for failing to challenge it. *See Ex parte Scott*, 541 S.W.3d 104, 118 (Tex. Crim. App. 2017) (adopting trial court's finding that trial counsel was not deficient for making futile objection); *Ex parte Chandler*, 182 S.W.3d 350, 356 (Tex. Crim. App. 2005) ("[A] reasonably competent counsel need not perform a useless or futile act[.]").

468. The Court concludes that, at most, there are inconsistencies in the record which would have been appropriate fodder for cross examination, which counsel reasonably chose to do when they believed appropriate.

469. The Court concludes trial counsel were fully aware that Dr. Bell was alive, but reasonably chose not to call Dr. Bell as a witness. The Court concludes counsel reasonably believed objecting to the testimony about Dr. Bell's death was pointless, since they were not planning on calling him regardless.

470. The Court also concludes trial counsel's desire to keep out Dr. Bell's autopsy report was reasonable based on the fact that counsel reasonably believed challenging the lack of sexual assault would have opened the door to harmful extraneous offense evidence.

471. The Court concludes counsel's decision to disregard Andrus as an investigative avenue was reasonable. The Court concludes counsel reasonably believed that suggesting in any way that Andrus or Andrus's drug-dealing friends were involved with the murder would have opened the door to harmful extraneous offense evidence. The Court finds counsel's decision objectively reasonable.

472. The Court further concludes that counsel reasonably chose to raise the issue of Andrus's drug dealing history and unconfirmed alibi during closing argument, when the State could no longer introduce extraneous offense evidence.

473. The Court concludes that counsel was fully informed about the original investigation into Norris's death, including the officers involved and the idea that the investigation originally centered on a drug-dealing connection. The Court concludes counsel's decision not to pursue that line of investigation because it would again risk opening the door was objectively reasonable.

474. The Court concludes that counsel's informed, strategic decision made after a thorough investigation is "virtually unchallengeable." *Strickland*, 466 U.S. at 690.

475. The Court concludes Applicant has failed to prove that counsel had any reason to know Lt. O'Connell was alive at the time of trial. The Court thus concludes counsel could not have been deficient for failing to rebut any testimony about Lt. O'Connell's status because: 1) they had no reason to believe he was alive; and 2) they had strategically chosen to disregard evidence from the original investigation.

476. The Court concludes trial counsel were not deficient for not calling Egizi or Lt. O'Connell as witnesses.

477. The Court finally concludes that much of the evidence Applicant wishes had presented was presented in some form at trial, whether through cross examination or closing argument. The Court concludes counsel cannot be deficient to failing to present cumulative evidence. *See Fields*, 761 F.3d at 456; *Coble*, 496 F.3d at 436.

478. Applicant fails to meet his burden to overcome the presumption that counsel acted reasonably.

Applicant was not prejudiced

479. The Court concludes Applicant also fails to show he was prejudiced by counsel's actions.

480. The Court concludes counsel cross-examined witnesses on some of the areas Applicant wishes he had and that they argued many of the themes Applicant now faults them for not raising. The Court concludes that much of the evidence Applicant now proffers is thus largely cumulative of what was presented at trial, and therefore, counsel's failure to present it cannot be prejudicial. *See Belmontes*, 558 U.S. at 22.

481. The Court further concludes that none of the testimony Applicant wishes counsel had presented accounts for the substantial evidence tying Applicant to the rape and murder of Norris, in particular the DNA evidence found in and on Norris's body. The Court concludes that Applicant cannot show prejudice from any deficiency in light of the overwhelming evidence of Applicant's guilt.

482. The Court concludes that Applicant fails to demonstrate prejudice particularly when contesting Applicant's identity or suggesting a consensual relationship would have opened the door to the presentation of extremely harmful evidence by the State. *See Belmontes*, 558 U.S. at 20 (in considering prejudice a court

must "consider all the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path—not just the . . . evidence [the inmate] could have presented, but also the . . . evidence that almost certainly would have come in with it.").

483. The Court concludes that there was no probability of a different result, and Applicant has failed to meet his burden. *Strickland*, 466 U.S. 694–95.

484. The Court recommends denying Ground 2c.

Ground 2d: Original investigation

Factual Findings

485. Applicant next alleges counsel were ineffective for failing to investigate and present testimony from the original 1975 investigation. Appl. 103–10. Applicant specifically alleges that trial counsel should have called: a) Glenda Gay, Andrus and Norris's downstairs neighbor; b) Officer Albert Bethea, who was the first officer to respond to the scene in 1975; c) Lt. O'Connell; and d) Texas Ranger Joe Davis. *Id*. Applicant believes that, had counsel investigated and presented these witnesses, they could have painted a "much different" picture than the evidence presented at trial suggesting Applicant's rape and murder of Norris was a random attack. *Id*. at 103, 116.

Evidentiary Hearing

A. Lanford

486. Lanford testified that he was aware of Gay, Bethea, Lt. O'Connell, and Ranger Davis at the time of trial because they had several records in which each of those witnesses' names appeared. 7 EHRR 105; 8 EHRR 158. Lanford testified that he was also aware that the original 1975 investigation into Norris's murder focused primarily on a possible drug connection. 8 EHRR 158.

487. Lanford testified that he was aware that Gay was downstairs during the commission of the murder. 8 EHRR 236. Lanford was also aware that Gay did not hear anything like Norris being murdered, and that she heard the water running for hours. 8 EHRR 236.

488. Lanford testified that he chose not to present that evidence because it "would have no explanation whatsoever to do with the DNA or the sexual assault," particularly when Applicant had no known connections to Norris. 8 EHRR 159. Lanford testified that presenting that evidence would also "have questioned identity and things, and that would have opened the door again." 8 EHRR 159. Simply put, it would have been a "great risk." 8 EHRR 159.

489. Lanford testified that he thought somebody on the trial team had talked to Gay, though he did not dispute that Ojeda's records did not show Ojeda had talked to her. 7 EHRR 103.

490. Lanford testified that, if a witness testified over forty years after the crime in greater detail than she provided to police in her initial statement, he would question her credibility. 8 EHRR 239–40.

491. Lanford was not aware if Ojeda spoke to Lt. O'Connell or Ranger Davis. 7 EHRR 106–07.

492. Lanford did not personally talk to any of the original officers involved because he "did not want to hear them cover . . . themselves[.]" 7 EHRR 107.

493. Lanford testified that, if he had known that Lt. O'Connell would have testified that whoever killed Norris had tortured her, it would have been helpful to their strategic decisions because it would have been "another reason to keep him out of the courtroom." 7 EHRR 187–88.

494. Lanford testified that it would not have been useful to know that Lt. O'Connell believed whoever killed Norris was "trying to get something out of her" because it was too "indefinite." 7 EHRR 188.

495. Lanford testified that it would not have been "very helpful" to know Lt. O'Connell believed Norris's murder was connected to Andrus's drug dealing because of "all this other stuff that would have come in," namely, the extraneous offenses, if they suggested someone other than Applicant killed her. 7 EHRR 188.

496. Lanford also testified that one of the reasons they didn't call the police officers during trial was because police officers "have a remarkable memory in the courtrooms of things that suddenly help out the State's cause[.]" 8 EHRR 239. Further, Lanford did not think it would be appropriate for police officers to speculate as to what they thought happened. 8 EHRR 240.

497. In other words, while the information might have been helpful to know, it still would not have "solve[d] the DNA problems and some of the other things that we have, so it was a deliberate choice not to get into that can of worms." 7 EHRR 188–89.

B. Duer

498. Applicant developed no testimony from Duer about Gay, Officer Bethea, Ranger Davis, or Lt. O'Connell.

C. Affidavits

499. Applicant presented no other live witnesses on this issue, though he was offered the opportunity to do so. Instead, he presented the affidavits of Glenda Gay, Lt. O'Connell, and Ranger Davis. *See* AHX 6, 8, 9. Applicant also presented the affidavit of his investigator Solis, in lieu of an affidavit from Bethea. AHX 11. The Court admitted these affidavits over the State's objection. 8 EHRR 23–24. However, the Court stated it would give those affidavits "the weight that they are entitled to" and, unless found credible, would find they "have no relevance" and would not be "appropriate in proposed findings of fact and conclusions of law." 8 EHRR 24. The Court now summarizes the affidavits, as relevant to Applicant's IATC claim.

500. Applicant admitted the March 19, 2015 affidavit of Glenda Gay. AHX 8.

a) Gay stated that in November 1975, she lived with her husband in the Ye Olde Colony Apartment Complex in San Marcos, Texas. AHX 8, at 1 ¶ 2.

b) Gay stated she was interviewed by police officers on November 24, 1975, about the murder because it occurred it the apartment directly above hers. AHX 8, at 1 ¶ 3.

c) Gay stated she did not personally know the inhabitants of that apartment and never spoke with them. She recalled though that, at one point, two men and one woman lived there, and one of the men moved out shortly before the crime occurred. AHX 8, at 1 ¶ 4.

d) Gay stated the only "unusual thing" she noted about the inhabitants of the apartment was that all three of them had brand new vehicles all around the same time. AHX 8, at 1 ¶ 4. Gay thought this was unusual enough that it "made [her] comment to [her] husband that [she] wondered if they were selling drugs to get the money to by [sic] the cars." AHX 8, at 1 ¶ 4.

e) Gay states she remembers hearing water running in the apartment above hers starting around 10 am. AHX 8, at 1 ¶ 5. She thought the water sounded like it was running in a bathtub, as opposed to a shower or some other source. *Id*. Gay stated the water ran for a long time and was still running at around 11:45 am when she left her apartment. *Id*. She said she remembered thinking that someone was taking an unusually long bath. *Id*.

f) Gay states during that same time frame, she heard footsteps in the apartment, though there was nothing unusual about them. AHX 8, at 2 ¶ 5.

g) She believed she provided this same information to the police when she gave them a statement in 1975, though she is not certain that she told them the water was running the entire time. AHX 8, at 2 ¶ 5. Gay says she is, however, certain she heard water running and footsteps in the apartment around those times of day. AHX 8, at 2 ¶ 5.

h) Gay states she left her apartment around 11:45 am that day to go to Austin with a friend of hers, and when she returned around 6 or 6:30 pm, there was an ambulance and police at the apartment. AHX 8, at 2 ¶ 6.

i) Gay states she still remembers this information because it was shocking to learn someone was killed in the apartment above hers and because she spoke with the police about it. AHX 8, at 2 ¶ 7.

501. Applicant admitted the June 2015 affidavit of Lt. O'Connell. AHX 9.

a) Lt. O'Connell states, in 1975, he was a Lieutenant for the San Marcos Police Department and in charge of the department's Criminal Investigations Division. AHX 9, at 1 ¶ 3.

b) Lt. O'Connell states he was called to the crime scene the day Norris was murdered, and he contacted the Texas Rangers to assist with processing the crime scene. AHX 9, at 1 ¶¶ 4, 5.

c) Lt. O'Connell states there were no signs of forced entry into the apartment, and he opines that Norris had been tortured. AHX 9, at 1 ¶ 4. Lt. O'Connell further opines that "whoever killed Norris tortured her and it appeared that they were trying to get something out of her." *Id.* at 2 ¶ 8. He acknowledges that he does not know what said person was looking for but "thought it might have been money or information related to the drug dealing." *Id.*

d) Lt. O'Connell states he and other officers found marijuana in the apartment. AHX 9, at 1 ¶ 6. Lt. O'Connell states there was enough marijuana that they believed "the residents of the apartment were involved in dealing drugs." *Id.*

e) Lt. O'Connell states officers investigated "leads that suggested Norris's death may have been connected to drug dealing that she and/or her

boyfriend, Charles Andrus, appeared to be involved in." AHX 9, at 1 ¶ 7. Their investigation led them to Florida, though he could not recall what specifically led them there. *Id*. at 1–2 ¶ 7. Lt. O'Connell recalled there "was a lead from a car rental agency, and that the suspects that were involved in dealing drugs had returned a car." *Id*. at 2 ¶ 7.

502. Applicant admitted the June 26, 2015 affidavit of Ranger Joe Davis. AHX 6.

a) Davis was a Texas Ranger in 1975 who investigated Norris's murder. AHX 6, at 1 ¶ 2. Ranger Davis assisted with the follow up investigation after Ranger Wallace Spillar responded to the scene. *Id*.

b) Ranger Davis currently has no independent recollection or memories of the investigation. AHX 6, at ¶ 3. Ranger Davis "only [knew] what is contained in" the reports that he and Ranger Spillar created after refreshing his recollection with them. *Id*.

503. Applicant admitted the July 2, 2015 affidavit of Applicant's postconviction investigator Solis, who recounts his conversation with Albert Bethea. AHX 11.

a) Solis states he interviewed Bethea on April 21, 2015, at his home in Luling, Texas. AHX 11, at 4 ¶ 14.

b) Solis states Bethea was a patrol officer in San Marcos in 1975 and was a first responder to the crime scene. AHX 11, at 4 ¶ 15.

c) Solis states Bethea informed him that he did not observe any signs of forced entry, such as a broken door frame or kick marks at Norris's apartment. AHX 11, at 4 ¶ 16.

d) Solis stated Bethea told him that he found a brick of marijuana, which he believed was too much for personal use. AHX 11, at 5 ¶ 18. Solis reported Bethea said he believed the murder was related to drug dealing, particularly because the murder did not appear to be random. *Id*. ¶ 19. Bethea told Solis that he later learned Andrus was a "drug dealer and had drug connections." *Id*. Bethea recalled learning information suggesting Norris's death was related to people she knew from her home state of Florida. *Id*.

e) Solis claimed Bethea stated he was not contacted by Applicant's defense team prior to his testimony. AHX 11, at 5 ¶ 20.

f) Solis tried to call Bethea again in June 2015, but the phone number Bethea provided was no longer in service. AHX 11, at 5 ¶ 22. When Solis

traveled to the address he had for Bethea, no one answered the door, so Solis left a note requesting he be contacted. *Id*. Bethea did not contact him. *Id*. at 6 ¶ 22.

Deficiency

504. The Court finds Lanford's testimony to be credible.

505. The Court finds Applicant failed to develop any testimony from Duer on these issues.

506. The Court finds not reliable and not credible Gay's affidavit for the following reasons:

a) Because Gay is now deceased, the Court finds that she could not have testified at the evidentiary hearing. However, Gay's affidavit did not meet the hearsay exemption for deceased witnesses because it was not prior testimony that was subjected to cross-examination. *See* Tex. R. Evid. 801(e)(1). The Court thus finds Gay's affidavit is also not reliable because the Court was deprived of the opportunity to assess her credibility and the State did not have an opportunity to cross examine her.

b) The Court finds her affidavit unreliable and not credible because it was executed in 2015, more than forty years after the events of the murder.

c) The Court finds unreliable Gay's testimony that she can recall the precise time the water began running and stopped running in the apartment above hers, even though she could not recall whether she shared that information with police in 1975. The Court makes a negative credibility determination on this testimony.

507. The Court finds not reliable and not credible Lt. O'Connell's affidavit for the following reasons:

a) Lt. O'Connell did not testify in person, thus depriving the State of an opportunity to cross examine him and depriving the Court of an opportunity to assess his credibility.

b) The Court further finds that Lt. O'Connell's testimony regarding Norris being tortured and its relation to her and Andrus dealing drugs is speculative at best, as it is not based on any evidence but only on Lt. O'Connell's unsupported personal opinion. The Court finds such testimony is improper lay person opinion and gives Lt. O'Connell's conclusions no weight.

c) The Court finds his affidavit unreliable and not credible because it was executed in 2015, more than forty years after the events of the murder.

508. The Court finds not reliable and not credible Ranger Davis's affidavit for the following reasons:

a) Ranger Davis did not testify in person, thus depriving the State of an opportunity to cross examine him and depriving the Court of an opportunity to assess his credibility.

b) The Court finds Ranger Davis's affidavit offers nothing of substantive value because it merely states that he reviewed reports—that he did not attach or otherwise incorporate—over which he had no independent recollection. The Court finds Ranger Davis's affidavit has no probative value whatsoever.

c) Even if this Court were to find Ranger Davis's affidavit to have some evidentiary value, the Court finds his lack of personal knowledge around the Norris investigation—and lack of ability to remember details—makes his affidavit inherently unreliable.

d) The Court makes a negative credibility finding regarding Ranger Davis's affidavit for the additional reason that it was executed in 2015, forty years after his investigation into the murder of Sheryl Norris.

509. The Court gives no weight to Solis's affidavit for the following reasons:

a) Solis did not testify in person, thus depriving the State of an opportunity to cross examine him and depriving the Court of an opportunity to assess his credibility.

b) The Court finds Solis's affidavit to be inherently unreliable because it is double hearsay, recounting statements he collected from other individuals who did not themselves execute affidavits. *See* Tex. R. Evid. 805.

c) Because Solis's affidavit is not based on personal knowledge and recollection of the events to which Bethea testified, the Court finds the affidavit not credible.

d) The Court makes a negative credibility finding regarding Bethea because he is recounting events that occurred more than forty years after the murder occurred.

e) The Court further finds not credible Bethea's opinion that the murder was related to drug dealing because it is speculative at best, as it is not based on any evidence but only on Bethea's forty-year-later unsupported personal opinion. The Court finds such testimony is improper lay person opinion and gives Bethea's testimony, via Solis, no weight.

510. The Court finds because none of the witnesses' affidavits are credible, the Court gives them no weight in accordance with its prior ruling. 8 EHRR 24.

511. The Court finds because the witnesses provided no credible testimony, the Court finds that counsel would not have called them at trial.

512. The Court further finds counsel credibly testified that he was fully aware of each witness at the time of trial, as well as the fact that the original investigation focused on a drug-dealing connection.

513. The Court finds counsel credibly testified that they chose not to investigate anything related to the original investigation because they chose to reject an alternative suspect theory, or SODDI, defense.

514. The Court finds counsel credibly testified that they would not have presented any of these witnesses because it would been too risky in terms of opening the door to harmful extraneous offense evidence.

515. The Court finds counsel credibly testified that they would have questioned the credibility of a witness who testified in specific detail about events that occurred 40 years ago. The Court finds counsel credibly testified he chose not to investigate and present Gay, and the Court finds counsel credibly testified he would not call her now, even knowing what she may have said.

516. The Court finds counsel credibly testified that, in his experience, police officers are not generally witnesses favorable to the defense, as they tend to recall helpful information for the State when put on the stand. The Court finds counsel credibly testified that he deliberately chose not to investigate and present the police officers from the original investigation because he believed their testimony would have been unhelpful and risky.

517. The Court finds counsel credibly testified that none of the evidence Applicant wishes he had presented would account for the DNA evidence tying Applicant to the crime.

Prejudice

518. The Court finds, had counsel presented information regarding the original investigation into Norris's death, such would have challenged identity and opened the door to harmful extraneous offense evidence.

519. The Court finds, nevertheless, counsel carefully raised the issue of a drug dealing connection to the offense by their questioning of Andrus. The Court finds counsel argued such in closing arguments as well. The Court finds the jury rejected those arguments.

Conclusions of Law

Trial counsel were not deficient

520. The Court concludes Applicant fails to show trial counsel were deficient for failing to investigate and present evidence from the original investigation into Norris's death during the guilt phase of trial.

521. The Court concludes trial counsel were fully aware that the focus of the original investigation was a drug-dealing connection and reasonably chose not to investigate that connection further because doing so would have raised an identity challenge by suggesting someone related to the drug dealing murdered Norris. The Court concludes that counsel's informed, strategic decision made after a thorough investigation is "virtually unchallengeable." *Strickland*, 466 U.S. at 690.

522. The Court concludes counsel's credible testimony that he would not have called these witnesses even assuming their postconviction testimony to be true is objectively reasonable.

523. Applicant fails to meet his burden to overcome the presumption that counsel acted reasonably.

Applicant was not prejudiced

524. The Court concludes Applicant also fails to show he was prejudiced by counsel's actions.

525. The Court concludes counsel raised the specter of an alternative, drug-dealing-related suspect at trial. The Court concludes therefore the evidence Applicant wishes counsel had presented is largely cumulative of what was presented at trial and rejected by the jury. The Court finds counsel's failure to present it cannot be prejudicial. *See Belmontes*, 558 U.S. at 22.

526. The Court further concludes that none of the testimony Applicant wishes counsel had presented accounts for the substantial evidence tying Applicant to the rape and murder of Norris, in particular the DNA evidence found in and on Norris's body. The Court concludes that Applicant cannot show prejudice from any deficiency in light of the overwhelming evidence of Applicant's guilt.

527. The Court concludes that Applicant fails to demonstrate prejudice particularly when contesting Applicant's identity or suggesting a consensual relationship would have opened the door to the presentation of extremely harmful evidence by the State. *See Belmontes*, 558 U.S. at 20 (in considering prejudice a court must "consider all the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path—not just the . . . evidence [the inmate] could have presented, but also the . . . evidence that almost certainly would have come in with it.").

528. The Court concludes that there was no probability of a different result, and Applicant has failed to meet his burden. *Strickland*, 466 U.S. 694–95.

529. The Court recommends denying Ground 2d.

Ground 2e: Admissibility hearing DNA evidence

Factual Findings

530. Applicant alleges counsel were ineffective for allowing DNA evidence to be presented to the jury prior to having an admissibility hearing. Appl. 110–12. Applicant argues counsel should have presented their motion to suppress the DNA evidence before any argument or testimony about the DNA evidence was heard. *Id.*

Trial testimony

531. The record shows that trial counsel filed a motion to suppress the DNA evidence on the first day of trial. 37 RR 81–82; 2 CR 317–19. When counsel filed it, he stated that he thought "it might be a good idea to have it heard sometime prior to the testimony of Negin Kuhlmann from the DPS crime lab." 37 RR 82. No further discussion about the motion was had on that day of trial.

532. The record shows the defense sought to suppress the DNA evidence on the basis that it failed to meet CODIS's quality assurance standards, specifically, that the results were obtained without the use of a reagent blank. 2 CR 317. The defense argued that, "[a]bsent violations of DPS by their own procedures in the testing of the original DNA sample, their violation of Texas law, and their violation of FBI quality assurance standards," Applicant would not have been a suspect because the profile would not have been uploaded to CODIS. 2 CR 318. Counsel argued, therefore, that, because the results were obtained in

violation of statute and procedure, they and any further results following, should be suppressed as fruit of the poisonous tree. CR 318.

533. The record shows that, at the start of testimony on the third day of trial, the Court inquired as to when the defense would like their motion heard, stating that it "assume[d] it's before we present the DNA evidence if it's going to be suppressed." 39 RR 9. The State responded that "[t]hat witness" would be at the court by noon. 39 RR 9.

534. Defense counsel clarified, asking whether the only DNA witness the State intended on presenting was not testifying until noon. 39 RR 9. The State said, "[T]hat's not the only DNA witness we're presenting, but that's the DNA witness that is relevant to the Motion to Suppress that they filed." 39 RR 9. Duer made clear: "Well if the motion is successful, we don't want the other DNA witnesses testifying before the hearing on the motion." 39 RR 10.

535. The State explained that the other DNA witnesses were not going to testify "to the result that implicated the defendant." 39 RR 10. The following exchange occurred:

> MS. TANNER: What you're complaining about is something that occurred in 2010. The other DNA witnesses are testifying to work that was done in 1997 and 2001 up until 2010 and is different than the work that [the defense] is complaining about.
>
> MR. DUER: That is right. *Our complaint starts with the CODIS hit. So anything that happened prior to that will not be—would not be encompassed. . . .*

39 RR 10 (emphasis added).

536. The Court at that point made a preliminary ruling that he was going to allow testimony, notwithstanding the motion, on how the DNA "progressed even past 2010 or how we got to 2010[.]" 39 RR 10.

537. The defense's motion was then heard before both Carradine and Kuhlmann testified, as requested by the defense. 39 RR 141. The defense argued that a deviation request had been submitted on the sample that was uploaded to CODIS, which suggested that protocol was not followed. 39 RR 142. Thus, the sample should not have been uploaded into CODIS, and Applicant would not have been discovered as a suspect. 39 RR 142.

538. The State responded that the regulations defense counsel referred to applied to samples extracted on or after July 1, 2009, but the sample at issue in

Applicant's case was obtained in 1997. 39 RR 143, 145. The State also argued that a defendant does not have a "constitutional right to have them follow whatever protocols they think should be followed for DNA testing." 39 RR 145.

539. The Court denied the defense's motion to suppress, finding the motion did not "go to admissibility" and that fruit of the poisonous tree was "a major reach." 39 RR 146; *see also* 2 CR 319. The Court ruled that it would allow testimony as to how any breach of protocol might affect the credibility of the testimony along those lines. 39 RR 146.

Evidentiary Hearing

540. Applicant developed no evidence on this issue at the evidentiary hearing.

Deficiency

541. The Court finds that counsel's motion to suppress was limited to the DNA profile that was uploaded to CODIS and the results of that CODIS hit.

542. The Court finds that the trial court made a preliminary ruling that testimony on how the DNA got to 2010 and past 2010 would be permitted.

Prejudice

543. The Court finds that the trial court effectively denied a motion to suppress going to *all* of the DNA evidence when it made its preliminary ruling.

544. The Court finds that the trial court denied the defense's motion to suppress in its entirety.

545. The Court also finds that the CCA considered Applicant's claim on direct review that the trial court erred in denying the motion to suppress and held the trial court did not abuse its discretion. *Jenkins*, 493 S.W.3d at 605. Notably, the CCA held:

> Even if [Applicant] had proven the alleged procedural irregularity, it would not merit the exclusion of evidence under Article 38.23. Creating a DNA profile from a biological sample obtained from Norris'[s] body, and uploading the profile into CODIS, did not implicate [Applicant]'s privacy or property rights. Therefore, the DNA profile and the CODIS hit are not subject to exclusion under [Texas Code of Criminal Procedure] Article 38.23. For the same reasons, Article 38.23 does not require the exclusion

> of other inculpatory evidence that, arguably, was obtained as a result of the DNA profile and the CODIS hit.

Id. (internal footnotes and citations omitted).

Conclusions of Law

Trial counsel were not deficient

546. The Court concludes Applicant fails to show trial counsel were deficient for failing to move to suppress the DNA evidence earlier.

547. The Court concludes that, because Applicant proffered no evidence on this claim at the evidentiary hearing, he wholly fails to meet his burden to rebut the presumption that trial counsel acted reasonably.

548. The Court concludes counsel reasonably decided to challenge only the CODIS-protocol aspect of the DNA evidence. The Court concludes that such aspect was relevant only to witnesses Carradine and Kuhlman, and it was thus reasonable for counsel to wait until before those witnesses testified to officially raise the motion.

549. The Court concludes that counsel raising the motion any earlier would have been futile, as indicated by the trial court's preliminary denial of the motion, and counsel cannot be deficient to failing to raise a futile objection. *Ex parte Scott*, 541 S.W.3d at 118; *Ex parte Chandler*, 182 S.W.3d at 356; *cf. Knowles*, 556 U.S. at 127 (counsel need not have any other reason beyond his assessment that a particular strategy would be futile).

550. Applicant fails to meet his burden to overcome the deference afforded to trial counsel's actions.

Applicant was not prejudiced

551. The Court concludes Applicant also fails to show he was prejudiced by counsel's actions.

552. The Court concludes that Applicant cannot show prejudice where the trial court specifically ruled against any earlier attempt to suppress all of the DNA evidence and where the court also specifically rejected the motion to suppress. Applicant makes no effort to show how the outcome of the motion would have been any different had counsel raised it sooner.

553. The Court concludes that Applicant cannot show prejudice where the CCA has determined that "[c]reating a DNA profile from a biological sample obtained from Norris'[s] body, and uploading the profile into CODIS, did not implicate

[Applicant]'s privacy or property rights." *Jenkins*, 493 S.W.3d at 605. Thus, even if any procedural irregularity had occurred, Applicant's motion to suppress would not have been granted.

554. The Court concludes that there was no probability of a different result, and Applicant has failed to meet his burden. *Strickland*, 466 U.S. 694–95.

555. The Court recommends denying Ground 2e.

GROUND THREE—FALSE TESTIMONY AT PUNISHMENT

Applicant's Allegation

556. Applicant claims the State presented false, misleading, and unreliable testimony at the punishment phase of trial through Dr. Hirsch in the following ways: 1) Dr. Hirsch testified that Applicant is a "psychopath"; 2) Dr. Hirsh testified that Applicant is an extremely high risk to reoffend; 3) Dr. Hirsch opined that Applicant suffers from antisocial-personality disorder (ASPD); 4) Dr. Hirsch discounted the testimony of a neuropsychologist; 5) Dr. Hirsch said Applicant's statements that he has "nothing to lose" indicate that Applicant is dangerous; 6) Dr. Hirsch testified that Applicant's paranoia makes him more dangerous; and 7) Dr. Hirsch testified that lower testosterone levels do not correlate with lower levels of aggression. Appl. 116–39.

Factual Findings

557. At punishment, Applicant presented the testimony of Dr. Matthew Mendel, who testified that Applicant suffered from attachment disorder in large part due to his traumatic childhood. Dr. Mendel testified that Applicant "ran the streets" when he was only 5 or 6 years old; that one time while playing with his uncle's gun, he fired it at the refrigerator causing the bullet to ricochet and hit his mother; and that he would walk out the back of his school and wander the streets in kindergarten and first grade. 45 RR 208, 211. Dr. Mendel also testified that people with attachment disorder struggle to form healthy relationships with people. *Id.* at 217. Before the State cross examined Dr. Mendel, the Court ordered Dr. Mendel to turn over his notes to the State. 45 RR 224–229.

558. At punishment Applicant presented the testimony of Dr. Mayfield, a neuropsychologist. 46 RR 113–33. Before trial, Dr. Mayfield evaluated Applicant and assessed his cognitive functioning and neuropsychological integrity. *Id.* at 116–131. Dr. Mayfield testified that Applicant showed significant short-term memory deficits that put him at high risk for developing Alzheimer's Disease. *Id.* at 132. During cross examination, Dr. Mayfield

conceded that prior evaluators of Applicant had not noted the types of deficits identified by Dr. Mayfield. *Id*. at 143.

559. At punishment, Applicant presented the testimony of Dr. Yount, who testified that lower testosterone levels have a "negative relationship with aggression" and that Applicant has low testosterone levels. 46 RR 191–92.

560. Dr. Hirsch provided rebuttal testimony to Applicant's experts. Dr. Hirsch testified that Applicant met the definition of a psychopath, was a high risk to commit future acts of violence and met the diagnostic criteria for antisocial personality disorder. 47 RR 52–73. Dr. Hirsch also noted that Applicant was a paranoid individual who said he had "nothing to lose[,]" which made him more dangerous. *Id*. at 55–57. Dr. Hirsch said he did not note any neurological deficits while evaluating Applicant. *Id*. at 73–76. Finally, Dr. Hirsch testified that some studies showed that low levels of testosterone are unrelated to aggression. *Id*. at 77–80.

561. In support of his allegation, Applicant offered the July 1, 2015 affidavit declaration of Dr. Brian Abbott:[3]

a) Dr. Abbott said Dr. Hirsch incorrectly stated Applicant's scores on the Psychopathy Checklist-Revised (PCL-R). AWX 1, at 6 ¶¶21–23. He also took issue with Dr. Hirsch's use of the PCL-R in general. *Id*. at 8–10 ¶¶ 25–28.

b) Dr. Abbott disagreed with Dr. Hirsch's use of the Level of Service/Case Management Inventory (LS/CMI) test to predict Applicant's future dangerousness. AWX 1, at 11–17 ¶¶ 29–38. In Dr. Abbott's opinion, the LS/CMI is not a reliable predictor of future dangerousness. *Id*.

c) Dr. Abbott disagreed with Dr. Hirsch's ASPD diagnosis of Applicant, which relied on Applicant's report to Dr. Mendel that revealed signs of conduct disorder as a child. AWX 1, at 17–19 ¶¶ 39–43. Dr. Abbott opined that Dr. Mendel's testimony did not indicate Applicant having conduct disorder as a child but rather indicated parental neglect and lack of supervision. *Id*. at 18 ¶ 42. Dr. Abbott also opined that Dr. Hirsch's ASPD diagnosis may have been incorrect as ASPD remits with age. *Id*. at 19 ¶ 43.

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[3] As with Dr. Watson in Ground 1, *see* n.2, *supra*, Dr. Abbott also testified at the evidentiary hearing held on Applicant's IATC claims. *See* 8 EHRR 243–347; 9 EHRR 90–114. Because he testified, Dr. Abbott's June 2015 affidavit was excluded. 8 EHRR 24 (Court sustained State's objections to admission of affidavits by testifying experts). The Court thus relies on Dr. Abbott's affidavit solely for purposes of the non-designated claims.

d) Dr. Abbott said Dr. Hirsch provided false testimony when he said Applicant was reviewed by prior neuropsychologists who also failed to note any neuropsychological deficits. AWX 1, at 30 ¶ 67. Dr. Abbott also said an individual may have neurological deficits that are "subtle and not easily detected by clinical interview or by simply 'looking for neuro damage.'" *Id*. at 30 ¶ 68 (citing 47 RR 76).

e) Dr. Abbott said Dr. Hirsch took Applicant's statement that he had "nothing to lose" out of context to make him seem more dangerous. AWX 1, at 19–21 ¶¶ 44–49. Dr. Abbott also said Dr. Hirsch intended to badger Applicant into saying he had "nothing to lose," which reflected Dr. Hirsch's bias and misrepresentations.

f) Dr. Abbott said Dr. Hirsch was incorrect when he said Applicant was more dangerous due to his paranoia because Applicant's paranoia was in fact an adaptive reaction to a violent prison environment. AWX 1, at 24–26 ¶¶ 57–60. He also says Dr. Hirsch should have been able to show how Applicant's paranoid condition affected his functioning while free in the community. *Id*. at 26 ¶ 60.

g) Dr. Abbott said Dr. Hirsch provided false testimony when he said lower levels of testosterone are not correlated to lower levels of aggression. AWX 1, at 26 ¶ 61. Dr. Abbott also said Dr. Hirsch was not qualified to give such an opinion, as he is not a medical doctor, and violent and sexual offenses do decrease with lower testosterone levels. *Id*. at 28 ¶ 64.

h) The Court finds Dr. Abbott and Dr. Mendel's disagreement with Dr. Hirsch over whether Applicant's behavior as a child showed evidence of conduct disorder does not show Dr. Hirsch's testimony was false. By relying on the DSM-IV, Dr. Hirsch provided credible evidence that, under Dr. Mendel's testimony, Applicant did show signs of conduct disorder by running the streets and skipping school when he was five or six years old. SWX 39, at 7–8 ¶ 35. At trial Dr. Hirsch also noted Applicant told Dr. Mendel that as a child he was "running with gangs" and "doing various kinds of juvenile activities and criminal activities as a very young man – as basically an adolescent, a child that were totally unknown to me before that." 47 RR 57–58.

562. In support of his allegation, Applicant offered the June 10, 2015 declaration of Dr. Joan Mayfield:

a) Dr. Mayfield said Dr. Hirsch is not a neuropsychologist and did not administer any neuropsychological testing to Applicant. AWX 3, at 6 ¶¶ 27–28.

b) Dr. Mayfield said she is not surprised that Applicant's short-term-memory deficits were not observable to Dr. Hirsch from his clinical evaluation of Applicant. AWX 3, at 6 ¶¶ 30–32.

c) Dr. Mayfield said she was surprised Dr. Hirsch relied on his clinical evaluation to opine that "[t]here were no memory problems anywhere in there." AWX 3, at 6 ¶ 31 (quoting Dr. Hirsch's testimony).

563. In response to Applicant's allegation, the State offered the December 31, 2015 declaration of Dr. Barry Hirsch. SWX 39

a) Dr. Hirsch acknowledged that he made a mistake in explaining Applicant's PCL-R scores to the jury. SWX 39, at 6 ¶ 30, 9–10 ¶¶ 40–42. He also explained that he was able to rescore Applicant's PCL-R scores based on new information and the fact that Applicant had never revealed that information to prior evaluators. *Id.* at 8–9 ¶ 39.

b) The evidence shows Dr. Hirsch did testify falsely in explaining Applicant's PCL-R scores to the jury. AWX 17; AWX 18; 47 RR 59.

c) Dr. Hirsch said Dr. Abbott's opinion on the LS/CMI score was a mere disagreement and Dr. Abbott failed to show his reliance on the LS/CMI score to predict Applicant's future dangerousness was false testimony. SWX 39, at 10 ¶ 46. Dr. Hirsch also responded to Dr. Abbott's claims with his own opinion that the LS/CMI is a reliable indicator of future violence. *Id.* at 10–13 ¶¶ 44–58. Finally, Dr. Hirsch attested that, even without the LS/CMI score, he would have testified that Applicant is a high risk for future violence. *Id.* at 13 ¶ 59–60.

d) Dr. Hirsch said his observation that Applicant did not show signs of neuropsychological deficits was not false or misleading. SWX 39, 14 ¶ 61. During trial, Dr. Hirsch specified that screening for neuropsychological deficits so that a subject may be referred to a neuropsychologist is part of his forensic screening process. 47 RR 75–76.

e) Dr. Hirsch said Applicant showed "a conduct disorder" before the age of 15 because he told Dr. Mendel that he fired a gun that struck his mother,

he ran the streets when he was 5 or 6 years old, and he would walk out the back of his school and roam the streets when he was in kindergarten and first grade. SWX 39, at 6–8 ¶¶ 31–37.

f) At trial, when explaining evidence of conduct disorder, Dr. Hirsch also mentioned Applicant told Dr. Mendel that as a child he was "running with gangs" and "doing various kinds of juvenile activities and criminal activities as a very young man – as basically an adolescent, a child that were totally unknown to me before that." 47 RR 57–58.

g) Dr. Hirsch said he did not testify falsely when he opined on Applicant stating he had "nothing to lose," because Applicant did make remarks consistent with a "nothing to lose" mentality. SWX 39, at 15 ¶¶ 65–66. Dr. Hirsch also attests that Applicant had previously said he had "nothing to lose" while in the Coalinga State Hospital and in the Hays County Jail, and both times he made that statement in conjunction with aggressive and assaultive behavior. *Id*. at 15–16 ¶¶ 67–68.

h) Dr. Hirsch said Dr. Abbott merely disagreed that Applicant's violent behaviors were tied to an underlying paranoia and Dr. Abbott's disagreement did not show Dr. Hirsch's opinion was false. SWX 39, at 16 ¶ 71.

i) Dr. Hirsch said Dr. Abbott merely disagreed that testosterone levels are not correlated with aggressive behavior and Dr. Abbott's disagreement did not show that Dr. Hirsch's opinion was false. SWX 39, at 16–18 ¶¶ 72–79.

564. With his motion to expand the evidentiary hearing, Applicant offered the October 24, 2019 affidavit of Dr. Matthew Mendel. Mot. Expand Evid. Hr'g Ex. (Mot. Expand Ex.) 10. The Court admitted Dr. Mendel's affidavit at the evidentiary hearing over the State's objection. 8 EHRR 25 (admitting AHX 120). For ease of reference, the Court will cite to the hearing exhibit here.

a) Dr. Mendel said he could have provided testimony to rebut the testimony of Dr. Hirsch if asked at trial. AHX 120, at 1 ¶ 8. Dr. Mendel said Dr. Hirsch's list of conduct disorders shown by Applicant were not conduct disorders but were rather the result of parental neglect and lack of supervision. *Id*. at 2–3 ¶¶ 10–16.

b) Dr. Mendel also said Dr. Hirsch's examples of conduct disorder were incorrect: Dr. Mendel said Applicant shooting a gun while playing was not evidence of conduct disorder because Applicant was not trying to harm anyone. AHX 120, at 2 ¶ 12. He also said Applicant running the

streets when he was 5 and 6 years old was not evidence of conduct disorder because it did not appear to violate any rules. *Id.* ¶ 13. Finally, Dr. Mendel said that Applicant skipping school in kindergarten and the first grade was not evidence of conduct disorder because Applicant was very young and because it was not clear how habitual the conduct was. *Id.* at 3, ¶ 15.

c) Dr. Mendel fails to address Dr. Hirsch's reference to Applicant reporting to Dr. Mendel running around with gangs and committing crimes as a child. 47 RR 57–58. Dr. Hirsch's affidavit shows some crimes meet certain criteria of conduct disorder. SWX 39 Attachment F. Dr. Mendel never mentions Dr. Hirsch's mention of Applicant reporting running around with gangs and committing crimes as a child was incorrect or false.

d) Dr. Mendel said, even if Applicant skipping school were evidence of conduct disorder, that criterion alone would not be enough to warrant a diagnosis of conduct disorder under the DSM-IV and DSM-V. AHX 120, at 3 ¶ 15.

e) The Court notes Dr. Hirsch never diagnosed Applicant with conduct disorder. Instead, he said that Applicant "showed some kind of conduct disorder" as a child. 47 RR 58–60. Moreover, as Dr. Hirsch points out through his attachment, a diagnosis of conduct disorder is not required for a diagnosis of ASPD. SWX 39 Attachment F. Instead, an ASPD diagnosis only requires "evidence" of conduct disorder with "onset before age 15 years." *Id.*

f) Dr. Mendel said the conduct Dr. Hirsch noted occurred when Applicant was young and stopped when he moved in with his father, which suggested that Applicant's conduct was the result of his mother's neglect, not conduct disorder. AHX 120, at 3 ¶ 16.

g) Dr. Mendel said Dr. Hirsch's use of his testimony to increase the scores on Applicant's tests was inappropriate. AHX 120, at 4 ¶ 17.

Availability at trial

565. The Court finds Applicant concedes this claim of false testimony could have been raised at trial. *See* Appl. 147 (arguing "trial counsel did nothing to challenge the presentation of Dr. Hirsch's false, misleading, and unreliable expert opinion to the jury, even though they had the tools to do so"). Applicant also concedes trial counsel had the "SVP reports by Dr. Jackson and Dr. Goldberg, and Dr. Hirsch's own report—in their possession." *Id.*

566. Applicant's counsel testified that they in fact possessed copies of the reports containing the PCL-R scores of prior evaluators. 7 EHRR 255–56 (Lanford testifying that the civil commitment reports "were in the file"); *see also* 7 EHRR 256 (Applicant admitting AHX 17 and 18 as "information with trial counsel's file that they could haves used in the cross-examination of Dr. Hirsch but did not"); 10 EHRR 148 (Duer testifying that they "had the records" of the expert reports with the PCL-R scores).

567. The Court finds Applicant's false testimony allegation related to Dr. Hirsch was available at the time of trial.

568. The Court finds Applicant did not raise an objection at trial predicated on the falsity of testimony related to Dr. Hirsch.

Falsity

569. The Court finds Dr. Hirsch testified falsely regarding Applicant's PCL-R scores.

570. The Court finds the State admits that Dr. Hirsch testified falsely about Applicant's PCL-R scores.

571. The Court finds, other than his opinion about Dr. Hirsch misstating Applicant's PCL-R scores, Dr. Abbott's remaining opinions amount to mere disagreements and do not establish Dr. Hirsch provided false testimony.

572. The Court finds Dr. Mendel's opinions amount to mere disagreements and do not establish that Dr. Hirsch provided false testimony.

573. The Court finds Dr. Mayfield's opinions amount to mere disagreements and do not establish that Dr. Hirsch provided false testimony.

Knowledge

574. The Court finds the State should have known the falsity of Dr. Hirsch's false testimony on Applicant's PCL-R scores.

575. The Court finds, because the other pieces of Dr. Hirsch's testimony were not false, the State had no knowledge of any falsity.

Materiality

576. Dr. Hirsch testified that, even if someone had pointed out he testified incorrectly about Applicant's PCL-R score, he would not have changed his

opinion that Applicant would commit future acts of violence. SWX 39, at 10 ¶ 43.

577. The Court finds five different women testified at punishment that Applicant violently sexually assaulted them.

578. The Court finds the jury convicted Applicant of capital murder in the course of sexually assaulting Sheryl Norris.

579. The Court finds the jury was presented with evidence of Applicant's assaultive and aggressive behavior both in state hospitals and jail, in which he assaulted employees and fellow inmates over verbal provocations, and sometimes with no provocation.

Conclusions of Law

Procedural Bar

580. Because Applicant could have, but failed to, raise an objection based the alleged falsity of Dr. Hirsch's testimony about the PCL-R score at trial, Applicant's Ground 3 is procedurally barred on habeas review. *See Ex parte De La Cruz*, 466 S.W.3d at 864–65; *Ex parte Jimenez*, 364 S.W.3d at 880.

Alternative Merits

581. As stated previously, Applicant's due process rights can be violated when the State uses materially false testimony to obtain a conviction or sentence. *Ex parte Lalonde*, 570 S.W.3d at 722 (citing *Ex parte Chabot*, 300 S.W.3d at 770–71); *Ex parte Ghahremani*, 332 S.W.3d at 477. A violation may occur when false testimony is elicited by the State or by the State's failure to correct testimony it knows to be false. *Lalonde*, 570 S.W.3d at 722 (citing *Ex parte Ghahremani*, 332 S.W.3d at 478). "It does not matter whether the prosecutor actually knows that the evidence is false; it is enough that he or she should have recognized the misleading nature of the evidence." *Ex parte Ghahremani*, 332 S.W.3d at 477 (quoting *Duggan*, 778 S.W.2d at 468). "It is sufficient if the witness's testimony gives the trier of fact a false impression." *Id.* (quotation marks and citation omitted).

582. But "[n]ot only must the testimony be false, it must also be material." *Lalonde*, 570 S.W.3d at 722 (citing *Ex parte Weinstein*, 421 S.W.3d at 665). False testimony is material "only if there is a 'reasonable likelihood' that it affected the judgment of the jury." *Ex parte Weinstein*, 421 S.W.3d at 665. This standard is the same standard as the *Chapman* harmless error standard. *See Lalonde*, 570 S.W.3d at 722. But a habeas applicant "must still prove his habeas-corpus claim by a preponderance of the evidence, but in doing so, he must prove that

the false testimony was material and thus it was reasonably likely to influence the judgment of the jury." *Id.* (quoting *Weinstein*, 421 S.W.3d at 665). If a habeas applicant could have raised the false testimony allegation at trial or on direct appeal, the applicant must not only show that the testimony was material but also that it was not harmless. *Id.* at 723 (citing *Ex parte Ghahremani*, 332 S.W.3d at 481–82). The difference between the materiality standard and the harmless error standard is the "difference between a possibility and a probability." *Ex parte Fierro*, 934 S.W.2d at 376 (Tex. Crim. App. 1996).

583. The Court concludes Applicant has shown by a preponderance of the evidence that Dr. Hirsch's testimony of Applicant's PCL-R scores was false and that the State had reason to know about it.

584. The Court concludes Applicant fails to show Dr. Hirsch's false testimony regarding Applicant's PCL-R scores was material.

585. The Court concludes Applicant has failed to show by a preponderance of the evidence that the State knowingly presented materially false testimony through Dr. Hirsch's opinion on: 1) Applicant's LS/CMI score, 2) Applicant's ASPD diagnosis, 3) Applicant's memory deficits, 4) Applicant's "nothing to lose" statements, 5) Applicant's paranoia, and 6) testosterone's link to aggressiveness.

586. Moreover, the Court concludes that, even if Applicant could prove falsity or knowledge through the testimony listed in the preceding conclusion of law, Applicant fails to show by a preponderance of the evidence that any of the allegedly false testimony was material given the overwhelming aggravating evidence presented at punishment. The Court concludes that there is no reasonable likelihood that the allegedly false testimony affected the judgment of the jury. *See Ex parte Weinstein*, 421 S.W.3d at 665.

587. The Court concludes that, because Applicant could have raised the false testimony allegation at trial, Applicant must also show that the allegedly false testimony was not only material but not harmless. *Lalonde*, 570 S.W.3d at 723. The Court concludes that, even if there is a *possibility* that any error affected the judgment of the jury, there is no *probability* that it did given the above evidence; thus, any error is harmless. *See Fierro*, 934 S.W.2d at 376; *Lalonde*, 570 S.W.3d at 723 (harmless error applies where could have raised claim at trial or direct appeal).

588. The Court recommends denying Applicant's Ground 3.

GROUND FOUR—IATC AT PUNISHMENT

Applicant's Allegation

589. Applicant raises several allegations related to trial counsel's punishment-phase assistance. Appl. 143–76. He generally raises two categories of claims in this regard: a) his counsel were ineffective for failing to challenge or rebut Dr. Hirsch's rebuttal testimony; and b) counsel should have investigated and presented mitigating evidence from an attachment expert. *Id*. Applicant raises many subclaims within the former claim, addressed further below. Applicant arguably also changed the nature of his former claim, also addressed further below.

590. The Court designated these claims for further factual development at the evidentiary hearing. The record for these claims is thus limited to the testimony and evidence presented at the evidentiary hearing.

Ground 4a: Dr. Hirsch's testimony

591. In Claim 4a, Applicant claims trial counsel were ineffective for: 1) failing to object to, voir dire, impeach, or cross examine Dr. Hirsch,; 2) failing to present the testimony of Dr. Abbott or a similarly qualified expert testimony to testify that Dr. Hirsch's methods were unreliable and that Dr. Hirsch was not qualified to testify about testosterone's correlation with aggression or neuropsychological deficits; 3) failing to ask Dr. Mayfield to sit in on Dr. Hirsch's testimony and then recalling Dr. Mayfield to rebut Dr. Hirsch's testimony on Applicant's memory; 4) failing to ask Dr. Mendel to sit in on Dr. Hirsch's testimony and then recalling Dr. Mendel to rebut Dr. Hirsch's testimony that Applicant showed evidence of conduct disorder as a child; and 5) failing to investigate and call lay witnesses and Dr. Cohen, or a similarly qualified expert, to provide context showing that Applicant's behavior as a child was a result of trauma, not conduct disorder. Appl. 143–176.

Trial record

592. The punishment phase testimony provided by defense experts Dr. Mendel, Dr. Mayfield, and Dr. Yount are described above in Ground 3. The Court here only provides additional detail about Dr. Hirsch's testimony, as well as other facts relevant to the IATC claim.

593. As indicated above, the State called Dr. Hirsch in rebuttal to Applicant's experts. Dr. Hirsch testified to Applicant's scores on the PCL-R and said, based on Dr. Mendel's information about Applicant's childhood, Applicant's PCL-R scores would indicate he is a psychopath. 47 RR 59. He also testified that Applicant's score on the LS/CMI risk assessment instrument, would indicate he is a high risk for future violence, and that Dr. Mendel's information of

Applicant's childhood would increase his LS score. *Id*. at 61–62. Dr. Hirsch further testified that, according to Dr. Mendel, Applicant reported running with gangs and doing various kinds of juvenile activities and criminal activities as a young man, as basically an adolescent, a child . . ." and that he could now diagnose Applicant with ASPD because Dr. Mendel's testimony showed Applicant had "some kind of conduct disorder before the age of 15." *Id*. at 57–59. Dr. Hirsch also noted Applicant was a paranoid individual who said he had "nothing to lose[,]" which made him more dangerous. *Id*. at 55–57. Dr. Hirsch said he did not note any neurological deficits while evaluating Applicant. *Id*. at 73–76. Finally, Dr. Hirsch testified that some studies showed that low levels of testosterone are unrelated to aggression. *Id*. at 77–80.

594. At the close of Dr. Hirsch's direct examination testimony, counsel indicated his belief that his cross-examination would not take more than half an hour or 45 minutes. 47 RR 84. Court then adjourned for a fifteen-minute break. *Id*.

595. Upon returning from the break, the defense passed the witness. 47 RR 85. Counsel therefore did not cross-examine Dr. Hirsch. *Id*.

596. The State presented several other rebuttal witnesses after Dr. Hirsch. Counsel did not present a surrebuttal witness to Dr. Hirsch's rebuttal testimony. *See generally* 47 RR.

597. During closing argument, trial counsel described Applicant's traumatic childhood and argued that Applicant became the way that he did because he "never had a chance." 48 RR 36. He also argued TDCJ would be able to control Applicant's behavior better than the California institutions that housed Applicant. *Id*. at 51–53. Trial counsel went on to describe Applicant's poor health and urge that this would make Applicant less dangerous in the future. *Id*. at 55–57. He finally went on to use Dr. Hirsch's opinion that Applicant has paranoia, psychopathy, ASPD, and paraphilia to say that Applicant was "sick" and that "even in Texas we don't kill sick people." *Id*. at 58–60.

598. The record shows that the jury deliberated for four hours before sentencing Applicant to death. 48 RR 109–10.

Evidentiary Hearing

A. Lanford

599. Lanford first met with Applicant on December 14, 2010, within a week of his appointment. 8 EHRR 42–43, 65. Assisting him on Applicant's case were John Bennett (initial co-counsel), Duer, and Carlos Garcia and Kathryn Kase from TDS. *Id*. at 43, 53–56.

600. As early as February 2011—only two months after he was appointed as trial counsel—Lanford hired Gerald Byington as the trial team's mitigation investigator. 7 EHRR 67; 8 EHRR 44–45. Lanford testified that Byington was well-respected in the industry. 7 EHRR 67. Lanford also remembered working with Byington in a prior case and said he "is a real pro at what he does and is excellent" and that he is "very thorough." 8 EHRR 45.

601. Lanford noted that, though the "law requires that you go to three different generations" when investigating mitigation, "that was impossible in this case, because [Applicant] was already nearing 60, so three generations was gone." 7 EHRR 68; 8 EHRR 71–72; SHX 3, at 6.

602. As early as April 2011, Byington had met with Applicant "at least a few times" and had already begun seeking records related to Applicant. 8 EHRR 60–61; SHX 7, at 2. Byington also located remaining family members, talked to Applicant several times, and went to Coalinga State Hospital in California to interview Applicant's friends there. 7 EHRR 68. Lanford described Byington's work as "good quality mitigation," especially in light of the age of the case and the age of the people involved. 7 EHRR 68.

603. Lanford testified that they had retained nine experts to assist them in their case. 8 EHRR 88–89. Dr. Brian Abbott served as an expert on Applicant's California designation as a sexually violent predator. *Id*. at 80–81. Dr. Cecil Reynolds served as a consulting expert. *Id*. at 81. Dr. Steven Yount performed medical tests on Applicant. *Id*. at 82. Dr. Mayfield performed neuropsychological testing on Applicant. *Id*. Dr. Matthew Mendel served as a psychological expert. *Id*. Dr. Donna Vandiver served as an expert on female sexual offenders. *Id*. at 84. Dr. Susan Stone served as a psychiatric expert. *Id*. Dr. Watson served as their DNA expert at guilt. *Id*. at 87. And Frank AuBuchon served as their prison classification expert. *Id*. at 88.

604. Lanford testified that he let Byington guide his own investigation, and he did so while informing counsel of which witnesses he was able to find, which he couldn't find, and where he was going. 7 EHRR 109. Byington was in fact the person "that went out to find [Applicant's] childhood home" and he reported back on that as well. *Id*. Byington also advised Lanford to hire some of the expert witnesses they retained. 8 EHRR 77–78.

605. Byington found and interviewed several of Applicant's siblings. 7 EHRR 111. But some of the ones he found were uncooperative or otherwise not good witnesses. *Id*. They decided not to call some of those people. *Id*. Several people, including perhaps Applicant's daughter, just "flat refused to discuss [Applicant] at all and didn't want anything to do with him and hadn't seen him in 20 or 30 years because he had been locked up in California all of that time."

7 EHRR 112. Byington "went out looking for family members, but he had a whole lot of trouble finding anybody that would say something nice." *Id*.

606. Lanford testified that, for at least part of the time that they represented Applicant, including within the year before trial, Applicant directed counsel not to contact his family members about the case and told his family that he'd asked counsel not to talk to them. 8 EHRR 73–77; SHX 110; SHX 123, at 2. On redirect, Applicant asked whether Lanford was aware that American Bar Association (ABA) guidelines said "investigation regarding the penalty [phase] should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented[.]" 8 EHRR 219–20. Lanford answered affirmatively and said they complied with the guidelines. 8 EHRR 220.

607. Lanford testified that he remembered "extensive stories about Marion and there may have been a murder there," but he was not aware of whether Byington tried to find or couldn't find anybody associated with the murder. 7 EHRR 114–15. His understanding was that Byington had "probably checked that out." 7 EHRR 116.

608. Lanford testified that they were aware at the time of trial that Applicant suffered from profound neglect, did not have adult supervision as a child, and did not have strong relationships with parental figures. 7 EHRR 277–78.

609. Lanford testified that their "[b]asic strategy" at punishment "was to go after the continuing threat issue, basically[,]" by showing that Applicant would not be dangerous in the future. 7 EHRR 230; 8 EHRR 196. Lanford explained this strategy was why they offered "all the depositions from [Applicant's] friends" at Coalinga State Hospital, as well as why they called the retired Aubuchon "to testify about how capital murder[ers] live within the system perfectly well, for the most part." 7 EHRR 230–31; 8 EHRR 196. This was also why they called Dr. Yount to testify that Applicant was "now ill" and therefore he was "long since passed being any danger to anybody[.]" 7 EHRR 231; 8 EHRR 197.

610. Lanford explained that the defense also combined the strategy of showing that Applicant was "no longer a danger to anybody" with a presentation of "all of this bad stuff in his history that has kind of put him where he is," and "why he became the way he was." 7 EHRR 231; 8 EHRR 175.

611. In April 2013, Lanford and Duer met with several mitigation witnesses to build their case of showing how Applicant became the way he was. *Id*. at 176, 180–81, 183; SHX 3, at 5–6; SHX 78, at 1; SHX 79, at 1; SHX 81, at 1. This entailed investigating "Jenkins's life in Marion" and his difficult developmental history growing up. 8 EHRR 177–78; SHX 17, at 15. Lanford testified that one issue

with Byron Albrecht's testimony was that Albrecht never visited Applicant's home, so he could not testify about Applicant's home life. 8 EHRR 181; SHX 78, at 1.

612. Lanford testified that, as part of this strategy, trial counsel also hired Dr. Mendel to "get an expert opinion on how to approach" certain "issues." 8 EHRR 191. Dr. Mendel sent an email to trial counsel mentioning Applicant's childhood and advising questioning on Applicant's attachment problems. *Id*. at 191–92; SHX 95, at 4. Lanford testified that Dr. Mendel was able to help develop themes of Applicant's difficult development for the jury. 8 EHRR 192. Dr. Vandiver also mentioned potential attachment issues in her demonstrative at trial. *Id*. at 192–93; SHX 23, at 18–19. Lanford testified that he did not remember Dr. Mendel or Dr. Vandiver recommending any testing and that he would rely on experts to indicate when testing is warranted. 8 EHRR 193–94.

613. Lanford explained that the State "had a lot to work with" in terms of a strategy in Applicant's case. 7 EHRR 233–34. Lanford pointed out that they didn't ask questions of "at least half of the State's punishment witnesses" as a "deliberate choice" because the victims had "already been victimized." 7 EHRR 233. The State "had to make [Applicant] look bad" and they were able to with instances like the TV remote control. 7 EHRR 233–34. The difficulty was that, while the defense was trying to show that Applicant was sick and old, the State could show that Applicant was "still bull[ying] his way around even at the jailhouse." 7 EHRR 234.

614. Lanford was concerned Applicant's criminal history was going to make Applicant look dangerous no matter what the defense did. 7 EHRR 234. Lanford testified that the punishment phase was difficult because Applicant had sexually assaulted multiple women and repeatedly fought other inmates in an institutional setting. 8 EHRR 171–72.

615. Lanford testified that, unlike the potted plant defense at guilt, they approached punishment with the idea that they would make an "affirmative showing [Applicant] wasn't that bad a guy." 7 EHRR 234. They knew Applicant was going to get at least a life sentence and, with Applicant's advanced age, they thought they would "try to just get him stuck in general population until nature took its course, because he wasn't going anywhere, and he was certainly never going to be paroled no matter what kind of sentence he got." 7 EHRR 234.

616. Lanford was surprised to recall that they called seven witnesses at punishment. 7 EHRR 235. Lanford was aware that there were other people out there, but some were ones they "deliberately chose not to call to the stand because they were unreliable and just didn't come across good." *Id*. There were

others they discussed but "decided not to talk to them or not to waste the effort on them." *Id*. at 236. Though they would not know what those witnesses were going to say, they still "determined [] not to spend resources chasing them down." *Id*.

617. Lanford stated that, if people Byington spoke to gave more details to Applicant's post-conviction counsel than Byington, that would not surprise him because those people "knew the result of the trial" and therefore knew if "they loosened up a bit with their tongue, they might be able to help some." 7 EHRR 237.

618. Specifically, Lanford testified about the difficulties in calling certain witnesses. Essie McIntyre initially refused to testify but was ultimately convinced by Byington to testify. 8 EHRR 185–86; SHX 92; SHX 98, at 2. Trial counsel planned to call Ronald Jenkins to testify but decided not to because he could potentially be charged with sexual assault of a child. 8 EHRR 187–88; SHX 91. Trial counsel planned to call Willie Jewel Foster, but she ignored Byington's calls and only reached out to Dr. Mendel when the punishment phase was underway to say her doctor told her not to testify. 8 EHRR 188–89; SHX 116; 7 EHRR 238–39; AHX 62. Though the defense conducted several depositions in this case, they did not ask to depose Jewel "because her refusal [to attend the trial] came too late[.]" 7 EHRR 240.

619. Lanford stated they "couldn't figure out any way to get rid of" Dr. Hirsch at trial. 7 EHRR 240. Lanford testified that it could have been useful to have additional information that might have provided context to stories Dr. Hirsch relied on to diagnose Applicant with ASPD. 7 EHRR 242. But Lanford emphasized that the defense would have needed "the people to do it, and those people simply made themselves unavailable and wouldn't talk." 7 EHRR 242.

620. Lanford explained that they viewed Dr. Hirsch as the "California version of the State's experts in Texas capital murders," in that they thought he would "say whatever he needs to say to get the death penalty." 7 EHRR 246. They believed that if they tried "to cross-examine him on it, he will just double down on" the testimony. 7 EHRR 246. Because of that, they wanted to get "him off the stand" "as soon as he quieted down." 7 EHRR 246. Counsel stated they "kind of knew what to expect from" Dr. Hirsch. 7 EHRR 246–47.

621. None of the defense experts told him that they had diagnosed Applicant with ASPD. 7 EHRR 249. Lanford did not know, however, that they "ever specifically asked [the experts] for a mental health diagnosis[.]" *Id*. As far as he knew, none of the defense experts ever expressed that Applicant had psychopathy either. *Id*. at 258. Lanford testified that he was aware "psychopathy" is "one of those loose words that go around in the business" but

is not a diagnosis in the DSM. *Id*. at 253. Lanford testified that, in his experience with juries, the terms "antisocial behavior" and "psychopath" are "interchangeable." *Id*. Lanford acknowledged that "in the real world psychopath is much worse, but to your basic lay jury, [his] experience is that they do not make that differentiation." *Id*.

622. As a result of his experience, Lanford said he "would not jump up and fight[] over the term 'psychopath' probably because [he] wouldn't want to have driven the point any further home to the jury." 7 EHRR 253. In other words, "[t]here are times and place to pick your quarrels." *Id*. And he had "seen enough jury trials to know what does and doesn't impact them on that," and he therefore "would have decided not to make an issue of that." *Id*.

623. Lanford acknowledged he had the civil commitment reports containing prior PCL-R scores in his files. 7 EHRR 256; AHX 17; AHX 18. But if those reports could have been used to demonstrate that Dr. Hirsch's testimony recalculating the PCL-R was wrong, they would only have been one of "thousands of pages of discovery [they] had, and the practicality of reaching in the briefcase and pulling one out on the spot would probably dictate that particular stuff from Coalinga would not be sitting there." 7 EHRR 258–59.

624. When Dr. Hirsch testified that Applicant had psychopathy, Lanford agreed that he could "[t]echnically" have asked to voir dire him outside the presence of the jury, though he was not sure he could have "[a]s a practical matter[.]" 7 EHRR 261. Further, while Lanford certainly could have asked Dr. Hirsch questions to test the basis of his opinions, Lanford testified that he "absolutely [would] not" have done so because he "would not want [Dr. Hirsch] to start all over again" with his opinion. *Id*. Similarly, he would not have objected or moved to strike the opinion from the record because he "didn't want to call attention to it." *Id*. at 261–62. The same would have been true for cross examination. *Id*. at 262.

625. Lanford elaborated that he did plan on crossing Dr. Hirsch at some point. 8 EHRR 200; SHX 99, at 3. But after hearing Dr. Hirsch's testimony and discussing with Byington, counsel decided not to cross examine him. *Id*. at 201; SHX 4, at 64. Lanford testified that Dr. Hirsch only testified to "part" of what he could have said about Applicant, so trial counsel decided to pass Dr. Hirsch rather than give the State "a chance to put in more on redirect[.]" 8 EHRR 202; SHX 1, at 57. The team's decision was to just get Dr. Hirsch off the stand "as soon as possible and address it" during closing arguments instead. 7 EHRR 262; AHX 72, at 1722. Lanford testified that this was "a deliberate, tactical decision." 8 EHRR 202.

626. Lanford said it would have been helpful if one of their experts had seen Dr. Hirsch's testimony. 7 EHRR 263. Lanford acknowledged that Dr. Reynolds had asked to be present during Dr. Hirsch's testimony, but he was not present. *Id*. Lanford testified that trial counsel did decide to have Dr. Stone sit in on Dr. Hirsch's testimony, but Dr. Stone was ill the day that Dr. Hirsch testified. 8 EHRR 208; AHX 72, at 1721–22.

627. Lanford testified that "[n]othing stopped [Dr. Reynolds] from being there" during Dr. Hirsch's testimony. 8 EHRR 234. If Dr. Reynolds "wanted to attend so that he could give some advice," trial counsel "would certainly have welcomed him had he been there." 8 EHRR 234.

628. Lanford testified that Byington considered Dr. Hirsch's testimony best cleaned up during closing argument. 8 EHRR 208–09. Lanford testified that, during closing arguments, he "tried to minimize Dr. Hirsch as much as [he] could minimize him." 7 EHRR 264. Lanford testified that he used Dr. Hirsch's diagnosis of Applicant to argue that Applicant was "sick" and that "out of decency" "we do not execute sick people." 8 EHRR 211; 7 EHRR 265. Lanford testified that the strategy was the State had "just painted [itself] in a corner" wherein now they couldn't kill him. 7 EHRR 265. The same strategy applied to Lanford characterizing Applicant as a sociopath during closing arguments. *Id*. "[T]he idea was to paint him as a sick person, a little bit mentally . . . and certainly physically [ill] as a reason not to" impose the death penalty on him. *Id*.

629. Lanford testified that he recalled Dr. Abbott was one of the doctors who "had some positive reaction to Mr. Jenkins when he was in California," which was one of the reasons they brought Dr. Abbott onto the defense team. 7 EHRR 267. Dr. Abbott flew back to California the date after the suppression hearing concluded. 7 EHRR 268; SHX 47. Dr. Reynolds suggested to the defense team that, if Dr. Hirsch testified, they may want to consider bringing Dr. Abbott back from California. SHX 93, at 1. Duer responded to Dr. Reynolds's email saying that he did not think that the State planned to call Dr. Hirsch unless the defense called Dr. Abbott. SHX 93, at 1. Relevant to Lanford, however, was the comment from Duer that it was his opinion "that calling [Dr.] Abbott in front of the jury wouldn't accomplish anything" because they needed "more recent information." 7 EHRR 271 (Lanford testifying that "the relevant part of that paragraph is [Duer's] comment that calling Abbott wouldn't accomplish anything"); SHX 93. In Lanford's words, "that accounts for probably why [Dr. Abbott] wasn't called." 7 EHRR 271. Even if their consulting expert suggested calling him back, the "decision amongst the lawyers" was "not do it." 7 EHRR 271.

630. Lanford testified that Dr. Hirsch testified in rebuttal and that therefore any rebuttal expert to Dr. Hirsch would have been called in surrebuttal. 8 EHRR 211–12. Lanford testified that he had never seen a surrebuttal expert called, that the judge might not even "go for it," and that it would not have been a good idea. *Id*. at 212. Specifically, Lanford explained that doing so "would have given another opportunity for the State to cross-examine our experts on the things that Dr. Hirsch found and just keep compounding that issue to the jury." *Id*. He also reasoned that the jury, after hearing about Applicant's numerous sexual and physical assaults, would not have "cared less" about experts fighting over whether he is a psychopath. *Id*. at 212–13.

B. Duer

631. Duer testified that Dr. Mendel interviewed Applicant and reported to trial counsel that Applicant had a traumatic childhood full of violence, neglect, and a lack of supervision. 10 EHRR 133.

632. Duer testified that he recalled Dr. Stone fell ill and was not able to be present at trial. 10 EHRR 152.

633. Duer testified that he could not be sure whether having Dr. Reynolds sit in on Dr. Hirsch's testimony could have led to "having rebuttal testimony or anything else." 10 EHRR 156.

634. Duer testified that the trial team's decision regarding Dr. Hirsch was just to get him off the stand because "[t]he less time he spent up there hammering on the same points over and over again, the better." 10 EHRR 161. Duer testified that addressing an expert in closing argument without cross examining him "allows you to provide your spin on what he said without him being able to say something." *Id*. at 162.

635. Duer testified that he did not believe it was a good idea to call Dr. Abbott to testify because his evaluation of Applicant in 2008 was outdated and because his opinion of Applicant had already been rejected by the California Court of Appeals. 10 EHRR 249–50; SHX 90.

636. Duer testified that counsel did not cross examine Dr. Hirsch probably so the jury did not "hear the same thing twice," and that crossing Dr. Hirsch "wasn't going to help." 10 EHRR 251–52. Duer said trial counsel just wanted to get Dr. Hirsch off the stand because, "[t]he less time he spent up there hammering on the same points over and over again, the better." *Id*. at 161.

637. Duer testified that he could not remember ever calling a surrebuttal expert witness. 10 EHRR 252. He also testified that, after hearing about how Applicant raped women and assaulted other people, he did not think the jury

would want to hear experts fight over whether Applicant was a psychopath. *Id.* at 253. Duer doubted whether the jury listened to any expert and instead reasoned that the jury focused on Applicant's violent criminal history. *Id.*

638. Duer testified that it was his idea to use Dr. Hirsch's opinion to Applicant's advantage by arguing Applicant suffered from mental illnesses and that "we don't execute sick people" to the jury. 10EHRR at 251. He also testified that this job was made more difficult by Applicant's extensive criminal history. *Id.* at 253.

C. Dr. Abbott

639. Dr. Abbott testified live at the evidentiary hearing, and the Court was thus able to observe his demeanor.

640. Dr. Abbott has a Ph.D. in Clinical Psychology and is in private practice as a clinical and forensic psychologist. 8 EHRR 244, 247–50. Dr. Abbott was retained by trial counsel because he had previously evaluated Applicant and to rebut the potential testimony of Dr. Hirsch. *Id.* at 244–45.

641. Dr. Abbott was asked by Applicant's postconviction counsel "to discuss the work that I did on Mr. Jenkins' case, and then also to review and respond to the expert testimony presented at his trial by both the State and Mr. Jenkins' trial counsel." 8 EHRR 271. He testified that in preparation for his testimony he reviewed trial transcripts, expert reports, and affidavits from lay witnesses. *Id.* at 256–59.

642. Dr. Abbott testified regarding Dr. Hirsch's determination that Applicant was a "psychopath" based on his PCL-R scores. Dr. Abbott testified that there is no clinical diagnosis for psychopathy in the Diagnostic and Statistical Manual (DSM). 8 EHRR 277. He also testified that Dr. Hirsch inappropriately used the PCL-R as a diagnostic tool. *Id.* at 280. Dr. Abbott pointed out that Dr. Hirsch's testimony about Applicant's PCL-R scores were incorrect, as they were lower than Dr. Hirsch said. *Id.* at 284. Dr. Abbott also testified that Dr. Hirsch inappropriately increased Applicant's score on the PCL-R based upon testimony heard at trial. *Id.* at 286.

643. Dr. Abbott testified that Dr. Hirsch inappropriately increased Applicant's score on the LS/CMI based upon testimony heard at trial. 8 EHRR 292–93. He also attacked the reliability of the LS/CMI as a predictor of recidivism. *Id.* at 302–303. Dr. Abbott testified that Applicant's original score on the LS/CMI was 32 which "falls in the highest risk level, very high for any type of criminal offending." *Id.* at 294.

644. Dr. Abbott testified that Dr. Hirsch inappropriately used Dr. Mendel's testimony at trial to diagnose Applicant with conduct disorder. 8 EHRR 308, 320. According to Dr. Abbott, Dr. Mendel's testimony was too "sketchy" and "nonspecific" to be used to make a diagnosis. *Id.* at 309–10. He also said that Applicant's behavior as described by Dr. Mendel "mimics conduct disorder, but actually was not conduct disorder." *Id*. at 309. He testified that context is important in diagnosing conduct disorder and the events Dr. Mendel testified to could be negative and lead to a diagnosis of conduct disorder or could come from other motivations, such as a dangerous home environment. *Id.* at 307–08, 311–12. Dr. Abbott testified he believes the information Dr. Hirsch used to diagnose conduct disorder was more indicative of poor home environment. *Id.* at 315. He also testified that parental neglect can lead to symptoms of conduct disorder. *Id*. at 316–17.

645. Dr. Abbott says there is no conduct disorder "simply called running the streets." 8 EHRR 310. Dr. Abbott said that this could "imply" symptoms of conduct disorder, but that "one would have to explore further what was happening when he was running the streets. And did any of the behavior that he engaged in when running the streets, was it repetitive and persistent? Did it – was its intent to violate social norms, or, you know, hurting other people and something like that." *Id*. at 311. Dr. Abbott testified that conduct disorder must be a pattern that is "repetitive and persistent" throughout childhood. 9 EHRR 36–37.

646. Dr. Abbott testified that the DSM contains guidelines and that the ultimate diagnosis is a product of professional judgment. 9 EHRR 15. He also testified that ultimately a subject's diagnosis is a professional opinion formed based upon the professional's experience and education. *Id.* at 51–52. He testified that two different doctors can come to two different diagnoses in an ethical, intellectual, and honest manner even if the doctors interpret symptoms differently. *Id*. at 31–32. Dr. Abbott testified that it was a "reasonable inference" that Applicant's truancy in kindergarten and the first grade could be attributed to neglect and abuse instead of conduct disorder. *Id*. at 32–33. Moreover, Dr. Abbott testified that "the opposite" of his interpretation of Applicant's childhood behavior could be true. *Id*. at 35.

647. Dr. Abbott testified that Dr. Hirsch mischaracterized the conversation with Applicant in which Applicant said he "had nothing to lose." 9 EHRR 321–22. Dr. Abbott also testified that Dr. Hirsch inappropriately linked together Applicant's capacity to kill and "nothing to lose" mentality to find that Applicant had dangerous potential. *Id*. at 325–26. According to Dr. Abbott, Dr. Hirsch left out Applicant's statement that he would not act on his ability to kill. *Id*.

648. Dr. Abbott testified that he believed Applicant did not demonstrate paranoia but rather showed an adaptive reaction to prison. 9 EHRR 330–31. He testified that he "think[s]" Applicant's prison environment was one where "one had to be on their guard to protect themselves." *Id*. Despite testifying that behavior in penal institutions is directly relevant to future dangerousness, 9 EHRR 82, Dr. Abbott never reviewed the Hays County Jail records prior to trial. *Id.* at 81. Moreover, Dr. Abbott never discussed any of the multiple assaults Applicant committed while institutionalized, in which he was the physical aggressor. He also failed to discuss Applicant's history of fighting, sexual assault, and murder outside of institutionalized settings.

649. Dr. Abbott testified that, as Dr. Hirsch is not a medical doctor, he was not qualified to offer opinions on how testosterone levels relate to violence. 8 EHRR 334. Dr. Abbott then offered his own opinion that Dr. Hirsch's conclusion was inaccurate based on the literature. 8 EHRR 334–36. The State voir dired Dr. Abbott on the basis of his conclusion, and the Court sustained the State's objection to Dr. Abbott's testimony. 8 EHRR 336–37.

650. Dr. Abbott testified that one must have specialized training in neuropsychology to administer and interpret neuropsychological tests to further interpret an individual's neuropsychological functioning. 8 EHRR 339–40. Dr. Abbott also testified that Dr. Hirsch was not qualified to offer an opinion on Dr. Mayfield's neuropsychologist testing or the validity of that testing. *Id*. at 341, 343.

651. Dr. Abbott testified that 75% of the time he is asked to evaluate a person for a mental disorder in the context of an SVP hearing, he finds that the person does not suffer from a legally-defined mental disorder. 9 EHRR 62–63. He also conceded he is a "defense expert" and cannot remember the last time he testified for the State. *Id*. at 64–65.

D. Dr. Cohen

652. Dr. Robert Cohen testified partially live at the evidentiary hearing and partially over Zoom. The Court was able to observe his demeanor.

653. Dr. Cohen is a licensed psychologist. 9 EHRR 117–18.

654. In arriving at his conclusion, Dr. Cohen relied on his evaluation and interview of Applicant, testing he administered during that interview, prior psychological evaluations of Applicant, prior expert notes and affidavits, witness declarations, court records, school records, and military records. 9 EHRR 151–58. Dr. Cohen said he was not provided, and thus did not review, the transcripts of the depositions admitted during the punishment phase of Applicant's trial or Dr. Hirsch's pre-trial report. 14 EHRR 74–75, 268–69.

655. Dr. Cohen testified that Applicant grew up in a violent Houston neighborhood called the "bloody nickel," which was filled with poverty, racism, and violence. 9 EHRR 157–59. He testified that Applicant's mother physically abused and neglected him, and never showed him any love or affection. *Id*. at 174–79. He said Applicant was forced to survive on the streets by finding food and sleeping in abandoned cars. *Id*. at 179–81.

656. Dr. Cohen testified that, around the age of six, Applicant moved to Marion to live with his father. 9 EHRR 184–85. He said Applicant's father physically abused him, did not feed him, did not clothe him, treated him like a slave, and locked him out of the house. *Id*. at 187–89. Dr. Cohen said Applicant did not have any rules or structure in Marion, other than doing chores. *Id*. at 190. Dr. Cohen testified that Applicant's life in Corpus Christi was not any better. *Id*. He also testified that Applicant witnessed his friend's racially-motivated murder. *Id*. at 194–96.

657. Dr. Cohen concluded Applicant suffered from emotional, physical, and sustenance neglect, as well as frequent and severe physical abuse. 9 EHRR 203. He also opined that Applicant may have skipped school as a child because he lacked food, safety, and rules. *Id*. at 208. Dr. Cohen concluded that, in the context of Applicant's life, Applicant's behavior of skipping school and running the streets was not consistent with conduct disorder but rather of survival. *Id*. at 209. He then opined that Dr. Hirsch's opinion that Applicant showed signs of conduct disorder was not consistent with his findings. *Id*.

658. Dr. Cohen conceded that several of the details of Applicant's abuse and neglect during childhood were never reported by Applicant during his several prior psychological evaluations. 14 EHRR 31–38, 46–48, 58–60, 61–63, 99–108. Dr. Cohen said he was cautious when Applicant reported these facts but trusted them because they were corroborated by other sources of information and validity testing. *Id*. at 33. He conceded that even with validity testing, he could not be sure someone is being truthful. *Id*. at 52.

659. Dr. Cohen said it would be helpful to follow up on a patient's contradictory statements to verify the veracity of those statements but he did not "have to" follow up on Applicant's contradictory statements. 14 EHRR 52. He said he may have failed to ask Applicant about them because he had "a lot to cover," because he may not have "read everything that had been provided to [him] when he evaluated Applicant." *Id*. at 39. He said he did not even "recall those inconsistencies being a part of [his] evaluation." *Id*. Despite admitting Applicant also gave an inconsistent statement on whether anybody in Marion cared about black men dating white women—which conflicted with his report that he witnessed his friend murdered over interracial dating—Dr. Cohen said

it did not change his opinion "because he said that he witnessed it, and there is nothing suggesting that he didn't witness it." *Id*. at 105–06.

660. Dr. Cohen said he did not know why Applicant did not disclose the details of abuse and neglect to prior evaluators, but suspected it was because he did not trust them. 14 EHRR 39. Dr. Cohen assumed that might be the reason for Applicant's inconsistent statements. *Id*. at 42–44. Dr. Cohen also admitted Applicant failed to report certain details of abuse and neglect to his trial team's own psychologist, Dr. Mendel. *Id*. at 46–49. Dr. Cohen said he did not know why Applicant reported different facts to Dr. Mendel and that it was "something [he] overlooked." *Id*. at 52–54. Dr. Cohen also conceded that validity testing did not screen for self-reporting information about childhood. *Id*. at 55. Dr. Cohen admitted "you could see" his failure to follow up on inconsistencies as a "blind spot in the reliability of [his] evaluation[.]" *Id*. Dr. Cohen justified his failure to follow up on inconsistencies by relying on corroborative information. *Id*. at 56.

661. Dr. Cohen was asked why, in light of his sexual assault convictions, Applicant said "doesn't apply" to a question on the Life Events Checklist (LEC) about whether he had caused serious injury, harm, or death to someone else. 14 EHRR 63–64. Dr. Cohen explained that he instructed Applicant to confine his answers on the LEC to his childhood, and that Applicant committed the sexual assaults as an adult. 14 EHRR 65. When told that Applicant included his adult life on some items on the LEC, Dr. Cohen said he did not know if Applicant disregarded his instructions to be oppositional or out of confusion. *Id*. at 67. Dr. Cohen said he did not ask Applicant why he said he never caused someone serious injury, harm, or death to someone else because "there was no indication he was lying at that point." *Id*. at 69. Dr. Cohen conceded Applicant has a history of giving inconsistent reports about his sexual assault convictions. *Id*. at 74–79.

662. Dr. Cohen testified that he relies on the DSM-V when making or considering a diagnosis. 14 EHRR 109. He also said, however, that he would not say the DSM-V is "authoritative" and he is not "sure how reliable it is." *Id*.

663. Dr. Cohen testified that a person (1) with four separate sexual assault convictions, (2) who sexually assaults hitchhikers by offering them rides, (3) who sexually assaults strangers he comes across by chance and finds attractive, (4) frequently punches and gouges the eyes of people during fights, (5) commits acts of violent and forcible sexual assault against women, (6) sexually assaults women without thinking about their pain, and (7) does not think about the harm he has caused his sexual assault victims could have traits of ASPD and "could" meet one of the diagnostic criterion for ASPD "in the right context" and if the pattern of behavior were "pervasive." 14 EHRR

110–27. Dr. Cohen also testified that Applicant showed several traits of ASPD. 14 EHRR 252–72.

664. Dr. Cohen testified that conduct disorder is a "repetitive and persistent pattern of behavior in which the basic rights of others or major age-appropriate societal norms or rules are violated" as indicated by the presence of three out five criteria "in the past 12 months." 14 EHRR 132. Dr. Cohen testified that those criteria include breaking into somebody else's house, building, or car, stealing items of nontrivial value without confronting the victim, staying away at night despite parental prohibitions beginning before age 13 years, and is often truant from school beginning before age 13 years. *Id*. at 133.

665. Dr. Cohen testified that Applicant admitted to Dr. Mendel that he burglarized buildings, broke into buildings, stole hubcaps, ran away from home, ran around with gangs, and skipped school when he lived in Houston as a child. 14 EHRR 156–59. Dr. Cohen opined that Applicant was only six years old when he engaged in this behavior, and that this indicated he was too impressionable for the behavior to be considered conduct disorder. *Id*. at 160–62. Dr. Cohen also testified that, under the DSM-V, the onset of conduct disorder may occur as early as pre-school years. *Id*. at 162. Dr. Cohen testified that parental rejection and neglect, harsh discipline, physical abuse, lack of supervision, large family size, frequent change of caregivers, parental substance-related disorder, association with a delinquent peer group, and neighborhood exposure to violence are all risk factors for conduct disorder. *Id*. at 171–73.

666. Dr. Cohen conceded Applicant's traumatic upbringing was "consistent with" risk factors for conduct disorder and made Applicant more likely to develop conduct disorder. 14 EHRR 173, 175. But he opined that because Applicant's behavior occurred from five to six years old but stopped when he changed environment, his behavior was not "pervasive." *Id*. at 173–74, 184. Dr. Cohen conceded the DSM-V says conduct disorder after onset is variable and a "fair reading" of that part of the DSM-V means that "whether or not somebody changes doesn't necessarily determine whether or not somebody has it, whether or not they changed their behavior." *Id*. at 174–75. Dr. Cohen also testified that the DSM-V does not say anything about dissipation of symptoms after a change of environment ruling out conduct disorder. *Id*. at 175–76. He also said he could not "give" research supporting his opinion. *Id*. at 177.

667. Dr. Cohen testified that, while Applicant's father's house was as traumatic as his mother's house, it "wasn't as bad as it was when he lived with his [mother]." *Id*. at 179. He said the structure Applicant's father provided by making him do chores and pick cotton indicated Applicant's behavior in Houston was due to a lack of structure. *Id*. at 179–80. Dr. Cohen agreed that Applicant had previously reported that his mother sent him away because he was running

around with gangs, not going to school, stealing, burgling, and breaking into buildings. *Id*. at 180. Dr. Cohen refused to say that this "sound[s]" like Applicant had rules that he was not living up to and that "the school was complaining to her." *Id*. at 181. Dr. Cohen said Applicant's mother telling him not to run around with gangs and telling him to go to school is not structure because his mother ignored the "rest of [his] life." *Id*. at 181–82. When confronted with the fact that Applicant's father also reportedly neglected Applicant, Dr. Cohen noted "there were rules" such as having to pick cotton. *Id*. at 182. Dr. Cohen refused to say whether Applicant engaging in the relevant behavior every day over the course of a couple of years would be repetitive and persistent because he did not "know how long he did it." *Id*. at 184–85. Dr. Cohen agreed that the behavior "might have happened repetitively." *Id*. at 185. Dr. Cohen said he did not bother to ask Applicant how often he engaged in the relevant behavior and said it "could" have been helpful to ask Applicant."

668. Dr. Cohen testified that clinical judgment is necessary when considering whether someone has conduct disorder in the context of a person's life. 14 EHRR 281. Dr. Cohen testified that he was not aware that Dr. Hirsch had evaluated Applicant twice. *Id*. at 281. Dr. Cohen conceded that Dr. Hirsch "knew information" about the context of Applicant's life, but that he is "not sure he integrated it." *Id*. at 282. Dr. Cohen also testified that he had not been provided a copy of Dr. Hirsch's report and it would have been helpful. *Id*. at 74–75.

E. Juanita Claiborne

669. Juanita Claiborne, Applicant's paternal half-sister, testified live at the evidentiary hearing. The Court was thus able to observe her demeanor.

670. Claiborne testified she and Applicant share the same father, Iamoore Douglas Jenkins ("Chummy"). 13 EHRR 11–12. Claiborne was not close with Chummy.

671. During one summer vacation when she was seven- to nine-years old, Claiborne stayed with Applicant's father and mother, who was pregnant with Applicant at the time, in Houston. 13 EHRR 14, 34. At some point that summer, Applicant's mother asked Claiborne to get "black dirt" for her to eat while she was pregnant with Applicant. *Id*. at 34–35. That same summer, Claiborne witnessed Applicant's father hit Applicant's mother on the head with a heavy milk bottle, causing her to bleed and the police and ambulance to come. *Id*. at 37–39. Claiborne recalled Applicant and his sister, Willie Jewel Jenkins, being babies when this fight happened. *Id*. at 41–42.

672. Claiborne saw Applicant when he lived in Marion when Applicant was about ten years old. 13 EHRR 47. She took Applicant and two other boys to the movies. *Id.*

673. Claiborne did not live with Applicant growing up and did not witness Applicant being abused, neglected, or deprived of resources. 13 EHRR 42–44. She never knew Applicant's father to be an alcoholic and believed Applicant's stepmother to have good character. *Id.* at 42–44. She did not have a strong relationship with Applicant. *Id.* at 21.

F. Harold Jenkins

674. Applicant's paternal half-brother, Harold Jenkins, testified live at the evidentiary hearing. The Court was thus able to observe his demeanor.

675. Harold testified that he is the older half-brother of Applicant by two years. 13 EHRR 132. Harold and Applicant share the same father, Iamoore Douglas Jenkins. *Id.* at 132. Harold refers to his father as "ID." *Id.* at 130. Harold did not find out that he and Applicant were brothers until he was around the age of 20. *Id.* at 132.

676. Harold grew up in Houston, Texas. 13 EHRR 129. He lived with his mother Marjorie Lee Jenkins, his grandfather, his sister, and an older brother. *Id.* at 130, 135 He testified that they lived in an area on the north side of Houston known as the Fifth Ward, in the Kelly Court projects. *Id.* at 142. Harold lived in Houston all his life until he joined the Air Force in 1970. *Id.* at 153.

677. Harold described the area he grew up in as "[l]ow income housing." 13 EHRR 142. He testified that the area was "rough" and had "teenager gangs" and "abandoned cars." *Id.* at 144. He testified that this area was known as the "bloody field" because there had been killings "in the area." *Id.* at 144. Harold testified that growing up, he saw domestic violence and fights between teenagers–sometimes with weapons. *Id.* at 145–46.

678. Harold testified that he was not close with his father, and his father was not around when he was growing up. 13 EHRR 135. The only times Harold would see his father were during limited interactions when ID would visit him for one or two hours during the night twice a month. *Id.* at 135. Harold testified that he did not love his father. *Id.* at 138. Harold testified that during these visits, ID never treated him badly and never hit him. *Id.* at 154–55. Harold never saw ID hit anybody else. *Id.* at 154–55.

679. Harold testified that during his visits with ID, he never saw ID drinking alcohol, and ID never appeared to be intoxicated. 13 EHRR 155. Harold never

saw ID with a whiskey bottle. *Id*. at 155. When Harold was an adult, he saw ID drink a beer or two; but ID did not appear to be drunk. *Id*. at 155.

680. Harold testified that he has no memories about seeing Applicant when they were children. 13 EHRR 154. Harold never saw Applicant in Houston when they were children. *Id*. at 153–54. Nor did Harold ever go to Marion to visit Applicant when they were children. *Id*. at 154. Harold testified that he never saw any interactions between ID and Applicant. *Id*. at 154.

G. Nathaniel Patrick

681. Nathaniel Patrick, a step-brother of Applicant, testified via Zoom at the evidentiary hearing. The Court was thus able to observe his demeanor.

682. Patrick's father, Montee Patrick, and Applicant's mother, had a romantic relationship for a time. 13 EHRR 54, 60, 74–75. As a child, Patrick lived partially with his father and partially with his mother. *Id*. at 55. Patrick knew Applicant and lived in the same building as Applicant for about one year when Applicant was about five to six years old and Patrick was twelve to thirteen years old. *Id*. at 60, 74. This building, owned by Patrick's father, was located in the Third Ward of Houston, Texas, *Id*. at 60–64.

683. Applicant's mother moved into Patrick's father's downstairs apartment while they dated, but her children, Applicant and his three siblings, stayed in the upstairs apartment. 13 EHRR 61–63, 76–78. Patrick lived downstairs. *Id*. at 61–63. As far as Patrick knew or could remember, Applicant and his siblings stayed in the upstairs apartment. *Id*. at 78. Patrick admitted he never went up to that apartment as it "wasn't [his] business. *Id*. Patrick agreed that he could not say one way or another whether another adult entered the upstairs apartment. *Id*. at 110. Patrick could not recall exactly how much time he spent with Applicant, but he agreed that he did not spend every moment with Applicant, and he agreed they never lived together. *Id*. at 100–01, 114–15.

684. Patrick described the Third Ward during this time as a segregated, black neighborhood, with dilapidated houses, trash strewn about, absentee landlords, and "not very many facilities for recreation." 13 EHRR 63, 67. The people that lived in the Third Ward were "poor" and lived on little to no income. *Id*. at 63, 67. Patrick recalled seeing frequent criminal behavior in the neighborhood. *Id*. at 64–70.

685. Patrick believed Applicant's mother was "rough," and that she treated her children roughly. 13 EHRR 79. Patrick stated she would hit and whip the children, talk loudly to them, and would curse at them. *Id*. at 79, 82. Patrick never witnessed Applicant's mother hug or show affection to Applicant or tell him she loved him. *Id*. at 80–81. Patrick perceived Applicant's mother's

behavior as that of a "typical ghetto mother," which was pretty common in the neighborhood. *Id.* at 110–11.

686. Patrick testified that he lived near the Fifth Ward, which he called the "bloody nickel," because it was known for being particularly dangerous. 13 EHRR 95. Patrick recalled Applicant's mother moving to the Fifth Ward, but he was not certain whether Applicant lived in the neighborhood. *Id.* at 96, 110–11.

H. Affidavits

687. Applicant presented no other live witnesses on this issue, though he was offered the opportunity to do so. Instead, he presented the expert affidavits of Dr. Mayfield, Dr. Mendel, Dr. John Edens, and Dr. Cecil Reynolds. *See* AHX 3, 67, 113, 116, 119. Applicant also offered the lay witness affidavits of Willie Jewel Foster, Ronnie Shepherd, Ronald Jenkins, Byron Albrecht, Essie McIntyre, and Avril Jenkins. AHX 59, 61, 63, 64, 65, 68. The Court admitted these affidavits over the State's objection. 8 EHRR 23–24. However, the Court stated it would give those affidavits "the weight that they are entitled to" and, unless found credible, would find they "have no relevance" and would not be "appropriate in proposed findings of fact and conclusions of law." 8 EHRR 24. The Court now summarizes the affidavits, as relevant to Applicant's IATC claim.

688. Applicant admitted the October 2019 and June 2015 declarations of Dr. Mayfield:

a) Dr. Mayfield attested that she was not asked to stay at trial for the State's rebuttal testimony. AHX 116, at 1 ¶ 7.

b) Dr. Mayfield attested that, if called on surrebuttal, she could have testified that Dr. Hirsch's testimony that Applicant could remember his childhood does not account for her testing of Applicant's delayed memory. AHX 116, at 2 ¶ 11. She said Applicant has delay-memory impairment which impairs his ability to remember new information 30 minutes after he hears it. *Id.*; AHX 3, at 6 ¶ 32. She said such deficits in cognition are not always apparent in conversation, which is why she performed neuropsychological testing. AHX 116, at 2 ¶ 11; AHX 3, at 6 ¶ 32.

689. Applicant admitted the October 24, 2019 declaration of Dr. Mendel:

a) Dr. Mendel attested that he could have provided testimony to rebut the testimony of Dr. Hirsch if asked at trial. AHX 119, at 1 ¶ 8. Dr. Mendel said Dr. Hirsch's list of conduct disorders shown by Applicant were not

conduct disorders but were rather the result of parental neglect and lack of supervision. *Id.* at 2–3 ¶¶ 10–16.

b) Dr. Mendel also said Dr. Hirsch's examples of conduct disorder were incorrect: Dr. Mendel said Applicant shooting a gun while playing was not evidence of conduct disorder because Applicant was not trying to harm anyone. AHX 119, at 2 ¶ 12. He also said Applicant running the streets when he was 5 and 6 years old was not evidence of conduct disorder because it did not appear to violate any rules. *Id.* at 2 ¶ 13. Finally, Dr. Mendel said Applicant skipping school in kindergarten and the first grade was not evidence of conduct disorder because Applicant was very young and because it was not clear how habitual the conduct was. *Id.* at 3 ¶15. Dr. Mendel's notes reflect Applicant's mother sent him away because he kept running around with gangs and that he would "often" skip school. SHX 137, at 3–4.

c) Dr. Mendel does not address Dr. Hirsch's reference to Applicant running around with gangs and committing crimes as a child as evidence of conduct disorder. 47 RR 58. Dr. Mendel's notes show Applicant reported that, as a child, he ran around with gangs, burglarized buildings, stole hubcaps, and broke into and entered buildings. SHX 137, at 3. And Dr. Cohen testified at the hearing that the diagnostic criteria of conduct disorder includes "deceitfulness or theft, has broken into someone else's house, building or car" and "stolen items of nontrivial value without confronting [the] victim." 14 EHRR 156–57.

d) Dr. Mendel attested that, even if Applicant skipping school were evidence of conduct disorder, that criterion alone would not be enough to warrant a diagnosis of conduct disorder under the DSM-IV and DSM-V. AHX 119, at 3 ¶ 15.

e) The record shows Dr. Hirsch never diagnosed Applicant with conduct disorder. Instead, he said that Applicant "showed some kind of conduct disorder" as a child. 47 RR 58–60. Moreover, as Dr. Cohen testified, the DSM-V does not require a diagnosis of conduct disorder as a prerequisite for an ASPD diagnosis, but only requires "evidence" of conduct disorder before the age of 15, which means "a history of some symptoms of conduct disorder." 14 EHRR 127–28.

690. Applicant admitted the August 6, 2021 declaration of Dr. John Edens:

a) Dr. Edens stated he was asked to "comment on the potential implications of the introduction of the PCL-R [psychopathy checklist]

and [Antisocial Personality Disorder] evidence in [Applicant's] capital murder trial." AHX 113, at 4–5 ¶ 9.

b) Dr. Edens attested to his opinion on "the lack of probative value and considerable prejudicial impact of PCL-R evidence" and that the rating scale "should not be used in the context of psychological evaluations conducted in capital murder cases." AHX 113, at 8–9 ¶ 17.

c) Dr. Edens said, after reviewing research he believes shows "a strong likelihood of unduly prejudicing jurors against a defendant," AHX 113, at 9 ¶ 18, he concluded such evidence is "unreliable, unscientific, and prejudicial in relation to assessing mental health status and violence risk potential of defendants in capital murder cases." *Id.* at 17 ¶ 33.

d) Finally, Dr. Edens attested that he believed that "such biased information describing [Applicant] as a psychopath would [] unduly prejudice jurors against him during his sentencing hearing." AHX 113, at 18 ¶ 33.

691. Applicant admitted the August 19, 2021 declaration of Dr. Cecil Reynolds:

a) Dr. Reynolds was "retained [by Applicant's trial counsel] . . . as a consulting expert in mental health and neuroscience issues." AHX 67, at 2 ¶ 5. Dr. Reynolds said he often assists and consults with defense counsel prior to and during the trial. *Id.* at 3 ¶ 8.

b) Dr. Reynolds complains that Applicant's defense team did not invite him to "observe testimony and did not consult with [him] on evidentiary matters during" the trial, despite previously advising the defense team to allow him to watch any mental health testimony at the penalty phase. *Id.* at 3 ¶ 9.

c) Dr. Reynolds claims he did not "recall knowing that Dr. Hirsch testified that [Applicant] had Anti-Social Personality Disorder or was a psychopath[.]" AHX 67, at 3 ¶ 10. Dr. Reynolds believes he was not told of this testimony until post-conviction counsel reached out to him. *Id.* Dr. Reynolds asserted that, had he known of Dr. Hirsch's testimony, he would "would have advised counsel to voir dire Dr. Hirsch as to the basis of his opinions." *Id.*

d) Dr. Reynolds further states he would have advised Applicant's trial counsel on the "falsity of [Dr. Hirsch's] scores." AHX 67, at 4 ¶ 12. Dr. Reynolds claimed that defense counsel had records showing Applicant's

PCL-R scores, which Dr. Reynolds reviewed, and would show that Dr. Hirsch "mis-remembered." *Id.*

e) Dr. Reynolds claimed he was unaware that "counsel had endorsed the idea that [Applicant] is a psychopath in their closing arguments," until post-conviction counsel informed him. AHX 67, at 4 ¶ 13. Dr. Reynolds asserted that he was never asked, "from a mental health perspective," what psychopathy is, and what is needed to label one a psychopath. *Id.* He would have informed defense counsel to "prevent the State form using the term . . . because there was insufficient evidence that [Applicant] was a psychopath." *Id.*

f) Despite enough funding, Dr. Reynolds believed he was not being used to the extent he typically experienced in capital cases. AHX 67, at 4 ¶ 14. Dr. Reynolds claimed he was not informed that the State had its own expert evaluate Applicant until after Dr. Hirsch completed his own exam. *Id.* Dr. Reynolds asserts, had he known, he would have advised defense counsel over what "they should consider regarding" the State expert's examination of Applicant; this included video recording the examination, being present during the examination, or having Dr. Reynolds on hand to advise defense counsel during the examination. *Id.* Dr. Reynolds further claimed he would have advised counsel to "seek an order limiting the scope of the exam." *Id.*

g) The State admitted several e-mails between Dr. Reynolds and Applicant's trial defense team. *See* SHX 120. Those emails show that defense counsel informed Byington and Dr. Reynolds on May 9, 2013, that the State would send a "shrink" to evaluate Applicant the following Saturday. SHX 120, at 1. Dr. Reynolds responded back in an e-mail without acknowledging the upcoming evaluation by the State's expert. *Id.*

692. Applicant admitted the August 7, 2021 affidavit of Sean O'Brien. AHX 125.

a) O'Brien states he was an attorney licensed before the state and federal courts in Missouri, the Sixth Eighth, and Tenth Court of Appeals, and the U.S. Supreme Court. O'Brien, after listing his qualifications, asserted that he had been "qualified as an expert witness in multiple jurisdictions on the issue of the competent performance of counsel in capital cases." AHX 125, at 1 ¶ 1.

b) O'Brien represented "prisoners under sentence of death in federal and/or state courts in Arizona, Kansas, Wyoming, and Arkansas." AHX 125, at

2 ¶3. Thus, O'Brien had not practiced law or handled a capital murder case in Texas. *Id*.

c) O'Brien asserts Applicant's trial counsel performed multiple deficiencies at the trial, particularly concerning Dr. Hirsch's testimony of Applicant's psychopathy and ASPD. AHX 125, at 17–51 ¶¶ 34–84.

693. Applicant also admitted several lay-witness declarations:

a) Willie Jewel Foster attested to Applicant's life in Houston and Marion, including about the abuse they endured from their parents and the injuries sustained by Applicant as a child. *See generally* AHX 61.

b) Ronnie Shepherd attested to Applicant's life in Marion, including about how Applicant did not have resources growing up in Marion, about Applicant's mental state as a child, and about racism in Marion. *See generally* AHX 68.

c) Ronald Jenkins attested to Applicant's life in Marion, including about the abuse they endured from Applicant's father, about injuries sustained by Applicant as a child, about racism in Marion, and about Applicant's relationship with Merle. *See generally* AHX 64.

d) Byron Albrecht attested to Applicant's life in Marion, including about racism in Marion, about the neglect Applicant endured from his family, about Applicant's mental state, and about Applicant's relationship with Merle. *See generally* AHX 59.

e) Essie McIntyre attested to Applicant's life in Marion, including about how Applicant's father and stepmother mistreated him, about racism in Marion, and about Applicant's relationship with Merle. *See generally* AHX 65.

f) Avril Jenkins attested to information about Applicant's father, how Applicant was a good father to her, and about how she felt racism was responsible for Applicant's capital murder conviction. *See generally* AHX 63.

Deficiency

694. The Court finds Lanford's testimony to be credible.

695. The Court finds Duer's testimony to be credible.

696. The Court finds Lanford credibly testified that they thoroughly investigated all available generations of Applicant's family to prepare for the punishment-phase of trial. Trial counsel hired a mitigation specialist who found numerous family members and friends to provide information about Applicant's developmental history. Trial counsel also hired several expert witnesses to help guide them in the presentation of mitigating facts about Applicant.

697. The Court finds Duer credibly testified that Dr. Mendel gave trial counsel information about Applicant's traumatic childhood full of violence, neglect, and lack of supervision.

698. The Court finds the record supports the thoroughness of trial counsel's investigation.

699. The Court finds credible Lanford's testimony that several of Applicant's siblings were uncooperative and that Byington had "trouble finding anybody that would say something nice."

700. The Court also finds Applicant impeded the investigation for at least some of the time because he directed counsel not to talk to his family and told his family the same thing.

701. The Court finds credible Lanford's testimony that trial counsel knew that Applicant as a child suffered from profound neglect, did not have adult supervision as a child, and did not have strong relationships with parental figures.

702. The Court finds, as a result of that investigation, trial counsel credibly testified that they would (1) attack the future dangerousness special issue by pointing to TDCJ security and Applicant's physical health and (2) show the jury how Applicant became the way he was through testimony about his childhood and the effect of his developmental history.

703. The Court finds credible Lanford's testimony that there were some witnesses that they chose not to call as witnesses because they "were unreliable and just didn't come across good." 7 EHRR 235.

704. The Court finds credible Lanford's testimony that trial counsel did not call Ronald Jenkins to testify out of fear that he would be subjected to a charge for sexual assault of a child and did not call or depose Willie Jewel Foster because her refusal to show up for trial came too late for a deposition.

705. The Court finds credible Lanford's testimony that trial counsel believed cross examining Dr. Hirsch would just make him double-down on his opinion and

that trial counsel strategically decided to get Dr. Hirsch off the stand as soon as possible.

706. The Court finds credible Lanford's determination that juries do not differentiate between ASPD and psychopathy and that, based on his experience, he would not want to make an issue over whether Applicant were a psychopath out of fear of driving the point further with the jury.

707. The Court finds credible Lanford's testimony that he would not want to object to or strike Dr. Hirsch's testimony or cross-examine Dr. Hirsch out of fear of calling attention to his testimony.

708. The Court finds credible Lanford's testimony that Dr. Hirsch could have said more harmful facts about Applicant than he did and that this supported trial counsel's strategy to get Dr. Hirsch off the stand as soon as possible by not cross-examining him.

709. The Court finds credible Duer's testimony that the trial team's strategy was just to get Dr. Hirsch off the stand because cross-examining him would not have helped and would have led to Dr. Hirsch hammering the same points for the jury a second time.

710. The Court finds that the record shows that Dr. Hirsch could have said more harmful facts about Applicant than he did at trial.

711. The Court finds the report supports counsel's credible testimony that trial counsel planned to have Dr. Stone sit in on Dr. Hirsch's testimony until she fell ill.

712. The Court finds that the record supports trial counsel's credible testimony that, though they initially anticipated crossing Dr. Hirsch, they ultimately decided that his testimony would be best addressed during closing argument because that would give them the opportunity to put a spin on his testimony when he could not respond.

713. The Court finds credible counsel's testimony that Dr. Abbott's testimony likely would not accomplish anything, and thus they decided not to call Dr. Abbott. The Court further finds counsel credibly testified that, even if a consulting expert suggested calling Dr. Abbott to rebut Dr. Hirsch, the decision "amongst the lawyers" was "not to do it." 7 EHRR 271.

714. The Court finds the record supports Duer's credible testimony that he did not believe it was a good idea to call Dr. Abbott to testify because his 2008 evaluation was outdated and had already been rejected by a California court.

715. The Court finds credible counsel's testimony that they had never seen a surrebuttal expert called, that a judge might not allow such a witness, and that it would not have been a good idea, as it would only compound the aggravating issues for the jury.

716. The Court further finds credible counsel's testimony that, given Applicant's numerous sexual and physical assaults, the jury would not want to hear experts fight over whether Applicant was a psychopath.

717. The Court finds trial counsel would still not have called Dr. Abbott at trial to testify to the testimony he proffered at the evidentiary hearing for the following reasons:

a) Dr. Abbott's opinion on conduct disorder is not credible because he testified that Dr. Mendel's testimony was "too sketchy" to be evidence of conduct disorder but ignores facts in Dr. Mendel's notes that provide more information about Applicant's behavior as a child. For example, Dr. Abbott ignores the fact that Applicant exhibited criminal behavior while "running the streets" and that he admitted to "often" skipping school.

b) Dr. Abbott's opinion on conduct disorder is not reliable because his opinion that conduct-disorder behavior must be repetitive and persistent "throughout childhood" is inconsistent with Dr. Cohen's recitation of the DSM-V, which indicates that conduct-disorder behavior need only be repetitive and persistent over a twelve-month period. 14 EHRR 132.

c) Dr. Abbott's opinion that Dr. Hirsch took Applicant's "nothing to lose" statement out of context to portray him as dangerous is not credible because Applicant used that very phrase when displaying assaultive behavior. SHX 139, at 55, 65. The fact that Dr. Abbott overlooked that evidence also makes his opinion not reliable.

d) Dr. Abbott's opinion that Applicant's behavior is the result of adaptation to a violent prison environment, and not the result of paranoia, is not reliable because Dr. Abbott failed to discuss Applicant's assaults while institutionalized, as well as his history of fighting, sexual assault, and murder outside of institutionalized settings.

e) Dr. Abbott's opinion on Dr. Hirsch's interpretation of Dr. Mayfield's testing data is inappropriate for surrebuttal because Dr. Hirsch never opined on the validity of Dr. Mayfield's neuropsychological testing. 47 RR 73–76.

f) Even if Dr. Hirsch opined on the validity of Dr. Mayfield's neuropsychological testing, Dr. Abbott would not be qualified to respond at surrebuttal because he is not a neuropsychologist.

g) Dr. Abbott's opinion on the relationship between testosterone and aggression is unreliable because he is not qualified as a medical doctor.

718. The Court finds trial counsel would still not have called Dr. Cohen at trial to testify to the testimony he proffered at the evidentiary hearing for the following reasons:

a) The Court finds Dr. Cohen is not a credible expert as he admitted to relying on the DSM-V despite not knowing "how reliable it is."

b) The Court finds Dr. Cohen's opinion is not credible and not reliable because he showed a pattern of failing to inquire about any of the numerous and significant inconsistencies between Applicant's statements to Dr. Cohen and Applicant's statements to previous evaluators.

c) The Court finds Dr. Cohen's opinion on conduct disorder is not credible and not reliable because Dr. Cohen was willing to believe Applicant's self-report no matter what evidence contradicted the self-report. For example, despite admitting Applicant contradicted himself in reporting to Dr. Mendel that no one in Marion cared about interracial dating, and then telling Dr. Cohen he witnessed his friend murdered over interracial dating, Dr. Cohen still said there was no reason to believe Applicant did not witness the murder.

d) The Court finds Dr. Cohen's opinion is unreliable because his testing data is unreliable. Applicant disregarded Dr. Cohen's instructions on the Life Events Checklist, and Dr. Cohen admitted he did not know why Applicant was not following instructions and he failed to ask Applicant the reason for his failure to follow instructions.

e) The Court finds Dr. Cohen's opinion rebutting Dr. Hirsch's conduct-disorder diagnosis is unreliable because his testimony that conduct-disorder criteria under the DSM-V only looks at a repetitive and persistent pattern of behavior over a 12-month period conflicts with his opinion that conduct-disorder criteria looks to whether behavior persists after a future change in environment. 14 EHRR 184, 131–32.

f) The Court finds Dr. Cohen's opinion is not reliable because he showed a pattern of avoiding questions that might show Applicant had symptoms

of conduct disorder. For example, despite evidence that Applicant engaged in conduct-disorder behavior from the ages of five to six, upon a question of whether conduct occurring every day over this time period would be considered persistent and repetitive, Dr. Cohen said he did not know how often Applicant engaged in that behavior and he did not bother to ask Applicant how often he engaged in that behavior. 14 EHRR 185–86.

g) The Court finds that Dr. Cohen's opinion is unreliable because his opinion that Applicant's young age during the conduct-disorder behavior ruled out conduct disorder is inconsistent with the diagnostic criteria for conduct disorder, which says that conduct disorder can occur as early as pre-school years.

h) The Court finds Dr. Cohen's opinion is not credible because his scope of review was artificially cabined, as he only reviewed documents provided by Applicant's counsel, many of which were declarations written by Applicant's friends and family. Notably, despite giving a rebuttal opinion that Dr. Hirsch did not consider the context of Applicant's life, Dr. Cohen was unaware that Dr. Hirsch had interviewed Applicant twice and he did not read the transcript of Dr. Hirsch's interview with Applicant. The issue with Dr. Cohen's artificially narrowed scope of review was further compounded by Dr. Cohen's failure to request any collateral source not provided by Applicant's counsel, even when confronted with inconsistencies in Applicant's self-report.

i) The Court finds Dr. Cohen's opinion is not reliable because he testified that, as an expert, he does not "have" to back up his opinion with any research despite his opinion routinely conflicting with the diagnostic criteria for conduct disorder.

719. The Court finds trial counsel would still not have called Juanita Claiborne, Harold Jenkins, and Nathaniel Patrick at trial to testify to the testimony he proffered at the evidentiary hearing for the following reasons:

a) The Court finds Harold Jenkins and Juanita Clairborne did not have personal knowledge of any significant mitigating facts or details pertaining to Applicant's childhood.

b) The Court finds trial counsel investigated and knew about the impoverished conditions of the neighborhoods Applicant grew up in as testified to by Harold Jenkins and Nathaniel Patrick.

c) The Court finds trial counsel investigated and knew about how Applicant's mother treated Applicant as testified to by Nathaniel Patrick, and that trial counsel presented evidence of this treatment through Dr. Mendel.

720. The Court finds none of Applicant's affidavits credible for the following reasons:

a) The affidavits of Dr. Edens, O'Brien, Dr. Mayfield, Dr. Mendel, Dr. Reynolds, Willie Jewel Foster, Ronnie Shepherd, Ronald Jenkins, Essie McIntyre, Byron Albrecht, and Avril Jenkins are not reliable because they did not testify in person, thus depriving the State of the opportunity to cross examine them and depriving the Court of the opportunity to assess her credibility.

b) The Court finds that, in the affidavits of Willie Jewel Foster, Ronnie Shepherd, Ronald Jenkins, Essie McIntyre, Byron Albrecht, and Avril Jenkins, the affiants do not explain whether their testimony is derived from personal knowledge, hearsay, or speculation. Therefore, the testimony is unreliable and not credible. It is also therefore unclear whether the lay-witness-declarant testimony would have even been admissible during the punishment phase of trial.

c) The Court finds that the testimony of Avril Jenkins is irrelevant to any claim related to Applicant's childhood.

d) The Court finds Dr. Reynolds's statement that he should have been asked to help more before trial so that he could have advised trial counsel on how to handle Dr. Hirsch's examination of Applicant, is not credible. Dr. Reynolds received notice from the defense team that an expert from the State would be evaluating Applicant, and Dr. Reynolds responded to the email but failed to acknowledge the evaluation by the State's expert. SHX 120. The Court thus finds Dr. Reynolds's credibility as a witness to be significantly diminished.

e) Dr. Mendel's opinion is not reliable because he ignores facts in his own notes that support Dr. Hirsch's testimony. His opinion is also not reliable because he fails to address the correct diagnostic criteria for ASPD. His opinion is also not reliable because his reference to Applicant's young age as a reason Applicant did not have conduct disorder is contrary to the correct diagnostic criteria for conduct disorder.

f) The Court finds Dr. Mayfield's affidavit is not credible because, contrary to her claim, Dr. Hirsch never disputed her neuropsychological findings.

721. Having found Applicant's affidavits to not be credible, the Court gives them no evidentiary weight.

Prejudice

722. After reviewing the affidavits of Dr. Eden and O'Brien, the Court specifically finds both are not qualified experts with specialized knowledge that will help this Court as the "trier of fact to understand the evidence or to determine a fact in issue." Tex. R. Evid. 702. Expert testimony helps the trier of fact when that expert's knowledge is "beyond that of the average juror"—or, in this case, the Court—and that knowledge would facilitate an understanding of the evidence or determine a fact at issue. *Blumenstetter v. Texas*, 135 S.W.3d 234, 248 (Tex. App.—Texarkana 2004) (citing *K-Mart v. Honeycutt*, 24 S.W.3d 357, 360 (Tex. 2000)). Neither the reasonableness of an attorney's actions nor the prejudice that might result under *Strickland* is "a question of law to be decided by [this Court, and is] not a matter subject to factual inquiry and evidentiary proof." *Provenzano v. Singletary*, 148 F.3d 1327, 1332 (11th Cir. 1998). Thus, the affidavits and statements about whether counsel was deficient or about the prejudicial impact of testimony has no probative value, as determining both are legal conclusions entirely within the province of this Court. The Court gives neither affidavit any weight.

723. In the alternative, even if this Court were to consider Dr. Edens's affidavit, his opinion also fails to address the considerable impact that Applicant's extensive criminal and violent history could have had on the jury. Specifically, Applicant displayed many of the personality traits that Dr. Edens says are associated with psychopathy, such as remorselessness, callousness, and manipulativeness. AHX 113, at 16–18 ¶¶ 31–33. Dr. Edens's failure to account for these facts in speculating about the prejudicial impact of Dr. Hirsch's testimony renders his opinion unreliable.

724. And even if the Court were to consider O'Brien's affidavit, the Court would find the affidavit not credible because it fails to fully address all the difficult issues defense counsel had to face at the time of the trial. For example, O'Brien criticizes defense counsel for failing to present Willie Jewel Foster's testimony about the abuse she and Applicant faced as children. AHX 125, at 46–48, ¶ 79. However, O'Brien fails to note that defense counsel intended to call Foster to testify, but she failed to appear at the trial, allegedly due to health problems. 8 EHRR 185, 189–90; SHX 116. Additionally, O'Brien ignores Applicant's extensive criminal and violent history and its impact on the defense team's strategies.

725. The Court finds trial counsel presented evidence of Applicant's childhood through the testimony of family members, friends, and Dr. Mendel. Therefore, any additional evidence of Applicant's childhood would have been cumulative.

726. The Court finds that, had trial counsel cross-examined Dr. Hirsch, it could have allowed Dr. Hirsch to double down on his opinion and it would have further emphasized his findings for the jury.

727. The Court finds that, had trial counsel called a surrebuttal expert to rebut Dr. Hirsch's testimony, the State could have elicited more aggravating facts about Applicant or reiterated Dr. Hirsch's aggravating findings about Applicant. Specifically, Dr. Hirsch failed to mention that Applicant told him that he will "chew your dick off if necessary if you fuck with me," that he did not think about the women he raped because "hindsight is 40/40" and "there's no sense in crying over spilled milk," and that, when he raped his victims, he did not think about how he was causing them physical pain. SHX 96, at 199, 282, 353. A surrebuttal witness would have been confronted with these types of statements and this type of behavior, specifically how they indicated traits of ASPD, thus further emphasizing Dr. Hirsch's findings for the jury. *See* 14 EHRR 252–73.

Conclusions of Law

Procedural Bar

728. In Claim 4a(5), Applicant appears to allege that counsel was deficient for failing to investigate and present lay witnesses and Dr. Cohen, or a similarly qualified expert, to provide context showing that Applicant's behavior as a child was a result of trauma, not conduct disorder. 6 EHRR 62–63, 71–72, 75.

729. A person raising claims "must identify the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Strickland*, 466 U.S. at 690.

730. The Court concludes, in his Application, Applicant never alleged trial counsel should have investigated Applicant's childhood and hired a trauma expert to evaluate his childhood to rebut Dr. Hirsch's testimony. *See generally* Appl. Applicant conceded as much at a pretrial conference. 6 EHRR 62–63, 71–72, 75. While Applicant alleges trial counsel were ineffective for failing to keep Dr. Mendel or Dr. Abbott in the courtroom to rebut Dr. Hirsch's testimony on conduct disorder by contextualizing his childhood, that constitutes a different set of "acts or omissions" than investigating Applicant's childhood and hiring a new expert to rebut Dr. Hirsch's testimony.

731. Therefore, the Court concludes Applicant's claim that trial counsel should have conducted a biopsychosocial investigation into Applicant's childhood and hired a trauma expert to evaluate his childhood to rebut Dr. Hirsch's testimony is an untimely amendment to his application. *See* Tex. Code Crim. Proc. art. 11.071 § 5(f) ("If an amended or supplemental application is not filed within the time specified under [§] 4(a) or (b), the court shall treat the application as a subsequent application under this section."); *see id*. § 4(a) (requiring application be filed within 180 days of the latest of either the appointment of postconviction counsel or forty-five days after the State files its brief on direct appeal). Accordingly, the claim constitutes a subsequent writ application that must be dismissed. *See id*. § 5.

Trial counsel were not deficient

732. The Court concludes Applicant fails to show by a preponderance of the evidence that trial counsel were ineffective for (1) failing to object to, voir dire, impeach, or cross examine Dr. Hirsch, (2) failing to present the testimony of Dr. Abbott or a similarly qualified expert testimony to testify that Dr. Hirsch's methods were unreliable and that Dr. Hirsch was not qualified to testify about testosterone's correlation with aggression or neuropsychological deficits, (3) failing to ask Dr. Mayfield to sit in on Dr. Hirsch's testimony and then recalling Dr. Mayfield to rebut Dr. Hirsch's testimony on Applicant's memory, (4) failing to ask Dr. Mendel to sit in on Dr. Hirsch's testimony and then recalling Dr. Mendel to rebut Dr. Hirsch's testimony that Applicant showed evidence of conduct disorder as a child, and (5) failing to present contextual evidence of Applicant's childhood at surrebuttal to rebut Dr. Hirsch's conduct-disorder testimony through lay witnesses and a trauma expert.

733. The Court concludes trial counsel thoroughly investigated Applicant's childhood by speaking to his friends and family and enlisting the expertise of Dr. Mendel. Trial counsel were thus fully informed about the "context" of his childhood.

734. The Court concludes that counsel's investigation was also reasonable in light of the fact that Applicant attempted to impede it for some time not long before trial by directing counsel not to speak with his family and by telling his family he said that. *See Strickland*, 466 U.S. at 691 ("The reasonableness of counsel's actions may be determined or substantially influenced by the defendant's own statements or actions."). The Court finds without merit Applicant's suggestion at the hearing that the ABA guidelines had some bearing on the whether counsel reasonably submitted to Applicant's wishes. As Judge Hervey has previously noted:

> Habeas counsel suggested at the habeas hearing that ABA standards require "a thorough investigation, going beyond what

> the client tells you." *Strickland*, however, states that ABA standards "are guides to determining what is reasonable, but they are only guides." *Strickland*, 466 U.S. at 688, 104 S.Ct. 2052; *see also Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527 (same but deleting the language "but they are only guides"). It does not appear that *Strickland* was intended to empower the American Bar Association, by promulgating new ABA standards, to negate portions of *Strickland* and the Constitution. And, despite *Wiggins*' deletion of *Strickland*'s "but they are only guides" language, *Wiggins* still retains *Strickland*'s language that ABA standards "are guides to determining what is reasonable." *See Wiggins*, 539 U.S. at 524, 123 S.Ct. 2527. (Emphasis added).

Ex parte Martinez, 195 S.W.3d 713, 738 n.8 (Tex. Crim. App. 2006) (Hervey, J., concurring).

735. The Court concludes trial counsel reasonably chose not to call a surrebuttal witness to Dr. Hirsch because (1) their strategy was to explain why Applicant was the way he was, (2) they did not want their own expert to be questioned about Dr. Hirsch's findings, and (3) the jury would not have cared about battling experts was reasonable. Trial counsel's informed, strategic decision made after a "thorough" investigation is "virtually unchallengeable." *Strickland* 466 U.S. at 690.

736. Trial counsel's decision not to voir dire, impeach, or cross-examine Dr. Hirsch was reasonable in light of their informed strategy. Given Applicant's antisocial behavior and extremely aggravating criminal and assaultive history, trial counsel reasonably determined not to challenge Dr. Hirsch's findings and instead to incorporate them into closing argument to avoid eliciting more harmful information. *See Boyle*, 93 F.3d at 180. Trial counsel reasonably decided to address Dr. Hirsch's findings during closing argument to fit them into their informed strategic mitigation theme: why he became this way. *See Strickland* 466 U.S. at 690.

737. The Court concludes counsel's appraisal of the likelihood of being permitted to call witnesses—whether lay or expert—in *surrebuttal* to the State's case was reasonable.

738. The Court concludes trial counsel's tactical decision not to force the issue of challenging Dr. Hirsch's findings and to instead use his findings during closing argument is not deficient simply because Applicant now proposes a different potential strategy. *Strickland*, 466 U.S. at 689.

739. The Court concludes trial counsel were not deficient for failing to present lay-witness testimony about Applicant's childhood, as they presented evidence of Applicant's traumatic childhood through Dr. Mendel. Counsel's decision not to present cumulative testimony is not deficient performance. . *See Fields*, 761 F.3d at 456; *Coble*, 496 F.3d at 436.

740. In the alternative, even if trial counsel's informed strategy did not support their decision to not voir dire, impeach, or cross-examine Dr. Hirsch, that decision was still reasonable given the circumstances. Trial counsel told their consulting expert, Cecil Reynolds, about the State's plan to evaluate Applicant, but Dr. Reynolds provided no substantive input in his reply email. Moreover, trial counsel planned for Dr. Stone to sit in on Dr. Hirsch's testimony, but Dr. Stone fell ill when Dr. Hirsch testified. Given these circumstances, trial counsel's decision not to voir dire, impeach, or cross examine Dr. Hirsch was reasonable. *See Strickland*, 466 U.S. at 690 ("The court must then determine whether, in *light of all the circumstances*, the identified acts or omissions were outside the wide range of professionally competent assistance.").

741. The Court concludes, given trial counsel's thorough investigation, trial counsel's informed strategy and the circumstances in this case, Applicant fails to rebut the presumption that trial counsel operated within the wide range of professionally competent assistance. *Strickland*, 466 U.S. at 690. Trial counsel were confronted with a defendant with a particularly frightening and aggravating history and decided that challenging aggravating facts elicited at punishment would be of little use. Instead, they made the informed decision to craft a strategy which explained those impossible-to-refute aggravating facts and also explained why Applicant would not be a future danger in spite of those facts. Therefore, applying the requisite "deference" to trial counsel's informed judgments, trial counsel's decision not to challenge Dr. Hirsch through voir dire, impeachment, cross-examination, or surrebuttal testimony was reasonable. *Strickland*, 466 U.S. at 690.

742. The Court concludes Applicant fails to meet his burden to overcome the presumption that counsel acted reasonably.

743. The Court recommends denying Applicant's Ground 4a.

Applicant was not prejudiced

744. The Court concludes Applicant fails to show he was prejudiced by trial counsel's decision not to voir dire, impeach, cross-examine, or rebut Dr. Hirsch's testimony.

745. The Court concludes, given the aggravating nature of Applicant's underlying capital murder conviction and the aggravating nature of Applicant's criminal

history and history of other assaultive acts, Applicant fails to show a reasonable probability that the jury would not have sentenced him to death had trial counsel challenged Dr. Hirsch's findings. *See Russell v. Lynaugh*, 892 F.2d 1205, 1213 (5th Cir. 1999) ("Given the weakness of such testimony when juxtaposed with the overwhelming evidence of guilt, the horrifying nature of the crime, and the abundant impeachment material available to the state, [Russell's] lawyer acted reasonably in not putting these witnesses on the stand.").

746. Moreover, the Court concludes, had trial counsel called a surrebuttal expert to rebut Dr. Hirsch's conduct-disorder testimony, the surrebuttal expert could have been asked about Applicant's antisocial behavior, which would have drawn more emphasis to the aggravating facts presented at punishment. *See Belmontes*, 558 U.S. at 20 (in considering prejudice a court must "consider all the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path—not just the . . . evidence [the inmate] could have presented, but also the . . . evidence that almost certainly would have come in with it.").

747. Therefore, the Court concludes that Applicant fails to meet his burden of showing that, but for trial counsel not presenting contextual evidence of Applicant's childhood to rebut Dr. Hirsch's conduct-disorder testimony, there is a reasonable probability that the jury would not have sentenced him to death. *Strickland*, 466 U.S. 694–95.

Ground 4b: Attachment expert

Factual Findings

748. In Claim 4b, Applicant claims that trial counsel were ineffective for failing to investigate and present mitigating evidence from an attachment expert. *Id.* at 153–76.

Trial record

749. Dr. Mendel interviewed Applicant for a total of "approximately seven hours" over two consecutive days. 45 RR 204. He talked with Applicant about several topics including Applicant's traumatic childhood and his experience with racism growing up. SHX137. Dr. Mendel also spoke with Applicant's sister on the phone, and they discussed Applicant's childhood as well. SHX 116. Based on these conversations, Dr. Mendel concluded that Applicant suffered from attachment difficulties, which rendered Applicant "unable to attach to others" or to "rely on them." *See generally* SHX94; *see id.* at 3.

750. At punishment, Dr. Mendel testified specifically about how Applicant's childhood was violent, his frequent change in caregivers, violence in the home, weapons in the home, lack of parental supervision, lack of basic provisions, truancy, and roaming the streets at a young age. 45 RR 207–16. Based on these determinations he concluded Applicant's childhood was "the most perfect setup that I can imagine for somebody growing up unable to form attachments to other human beings – unable to form healthy attachments to others." *Id*. at 205. Dr. Mendel testified that a person with a childhood like Applicant's would have difficulty forming attachments with other people. *Id*. at 216–18.

751. Dr. Vandiver also testified at punishment about how Applicant's attachment issues were likely augmented by his victimization by Merle. Dr. Vandiver interviewed Applicant for one to two hours and talked to him about his relationship with Merle. 46 RR 31. Based on her conversation with Applicant, she concluded he was a victim of a female sex offender.

752. Specifically, Dr. Vandiver testified that Merle, a 32-year-old woman, giving a 17-year-old Applicant motherly support was a form of grooming and fell under nurturer or teacher/lover category of offending. 46 RR 38–43. She explained that male sex abuse victims suffer from trust issues and fail to form attachments to people. *Id*. at 47–49; SHX 23, at 18–19.

Evidentiary hearing

A. Trial Counsel

753. Lanford testified that Byington advised him to hire certain expert witnesses, which led to the hiring of psychologists Dr. Mendel and Dr. Donna Vandiver. 8 EHRR 77–78, 82, 84.

754. Lanford testified that trial counsel were aware at the time of trial that Applicant suffered from profound neglect, did not have adult supervision as a child, and did not have strong relationships with parental figures. 7 EHRR 277–78.

755. Lanford explained that one of trial counsel's punishment strategies was showing that Applicant had "all of this bad stuff in his history that has kind of put him where he is," and "why he became the way we was." 7 EHRR 231; 8 EHRR 175.

756. Lanford testified that, as part of this strategy, trial counsel hired Dr. Mendel to "get an expert opinion on how to approach" certain "issues." 8 EHRR 191. Dr. Mendel sent an email to trial counsel mentioning Applicant's childhood and advising questioning on Applicant's attachment problems. *Id*. at 191–92; SHX 95, at 4. Lanford testified that Dr. Mendel was able to help develop themes of

Applicant's difficult development in front of the jury. 8 EHRR 192. Dr. Vandiver also mentioned potential attachment issues in her demonstrative at trial. *Id*. at 192–93; SHX 23, at 18–19.

757. Lanford testified that he did not remember Dr. Mendel or Dr. Vandiver recommending any testing and that he would rely on experts to indicate when testing is warranted. 8 EHRR 193–94.

758. Duer testified that Dr. Mendel interviewed Applicant and reported to trial counsel that Applicant had a traumatic childhood full of violence, neglect, and a lack of supervision. 10 EHRR 133.

759. Duer testified that he did not recall Dr. Vandiver ever recommending that trial counsel call an expert to talk about insecure attachments. 10 EHRR 248. Duer also testified that if "any of" trial counsel's experts had recommended calling an attachment expert early enough to ask for funding, trial counsel "might have done that." *Id*. But he did not "recall anybody saying we needed to do that." *Id*.

B. Affidavits

760. Applicant presented no other live testimony relevant to this issue, though he was offered the opportunity to do so. Instead, he presented the expert affidavit of Dr. Shelley Riggs. AHX 4. The Court admitted this affidavit over the State's objection. 8 EHRR 23–24. However, the Court stated it would give those affidavits "the weight that they are entitled to" and, unless found credible, would find they "have no relevance" and would not be "appropriate in proposed findings of fact and conclusions of law." 8 EHRR 24. The Court now summarize the affidavit, as relevant to Applicant's IATC claim.

761. Applicant admitted the July 1, 2015 affidavit of Dr. Riggs.

a) Dr. Riggs was asked to complete an evaluation of Applicant to "assess Mr. Jenkins's childhood experiences with respect to attachment relationships and maltreatment, as well as his current adult attachment patterns." AHX 4, at 3–4 ¶ 15. Dr. Riggs's evaluation included the Adult Attachment Interview (AAI) and three self-report questionnaires—the Childhood Trauma Questionnaire (CTQ), Parental Bonding Instrument (PBI), and the Experiences in Close Relationships Scale (ECF) *Id*. at 4–7 ¶¶ 16–20. In addition to testing, Dr. Riggs relied on trial transcripts, trial-expert notes, depositions, school records, and prior psychiatric evaluations. *Id*. at 9 ¶ 26.

b) Dr. Riggs administered the PBI three times to separately assess his relationships with his mother, father, and step-mother. AHX 4, at 26–

27 ¶ 63. The PBI for Applicant's father and mother resulted in a characterization of a parenting style labeled as "Affectionless Control." The PBI for Applicant's step-mother resulted in a characterization of a parenting style labeled as "Neglectful." *Id*. Applicant's score on the self-reported CTQ shows severe-to-extreme on four of the five scales: emotional and physical abuse and emotional and physical neglect. *Id*. at 26 ¶ 62. The sexual abuse score was classified as "none". *Id*. The minimization/denial scale suggests possible underreporting. *Id.* Applicant's primary ECR classification was "fearful-avoidant attachment style" with a close secondary classification of "dismissing-avoidant attachment style." *Id.* at 27 ¶ 64. "Dismissing classification is overrepresented in samples characterized by externalizing problems and disorders, such as antisocial personality disorder, conduct disorder, and psychopathy." *Id.* at 9 ¶ 25.

c) Dr. Riggs concludes Applicant's early life placed him at significant risk for "maladaptive psychological and social development." AHX 4, at 29 ¶ 68. Many features of Mr. Jenkins' family history fit the profile of individuals who exhibit insecure attachment and other problematic outcomes, including delinquent or antisocial behavior. *Id*. The results of the PBI are "associated with adolescent or adult emotional and behavioral disturbance, including depression, anxiety, eating disorders, conduct problems, delinquency, and aggressive and violent behavior" and "reflect[] a complete absence of love from significant parental figures." *Id.* at 32–33 ¶ 75. Avoidant and dismissing-avoidant attachment like Applicant's has led to documented outcomes of hostility, aggression, conduct problems, substance abuse, and early-onset antisocial behavior. *Id.* at 33 ¶ 76. Applicant's self-reported Dismissing-avoidant and Fearful-avoidant attachment styles have been found to be related to sexual coercion, violent offending, and rape perpetration. *Id*. at 34–35 ¶ 79. Test results similar to Applicant's are consistent with histories of traumatic abuse. *Id.* at 37 ¶ 82. Applicant's results are consistent with the "empirical evidence linking these attachment classifications to aggression, delinquent/criminal behavior and sexual violence." *Id*. at 38 ¶ 84.

d) Dr. Riggs indicated that, based on her evaluation, Applicant was predisposed to aggressive, violent, and antisocial behavior. AHX 4, at 29–30 ¶¶ 68–70, 33–34 ¶¶ 76–77. She summarized that Applicant's upbringing prevented his ability to empathize with others, and that such deficits led to a "high degree of aner and aggression, controlling behavior, dishonesty, and inadequate moral development . . [.]" *Id*. at 37–38 ¶ 83. She concluded that Applicant's classifications on the AAI and the ECR, "are consistent with conceptualizations of criminal

behavior and violence as severe disorders of attachment and are in line with a wealth of empirical evidence linking these attachment classifications to aggression, delinquent/criminal behavior, and sexual violence." *Id*. at 38 ¶ 84.

Deficiency

762. The Court finds counsel credibly testified that none of their trial experts recommended testing by an attachment expert, and they would have relied on their retained experts to advise what testing was necessary.

763. The Court nonetheless finds that counsel presented evidence to the jury through their existing psychological episodes showing that Applicant had attachment issues as a result of both his difficult childhood as well as the abuse he suffered as a result of his relationship with Merle.

764. The Court finds trial counsel would not have called Dr. Riggs at trial to testify to the testimony she proffered at the evidentiary hearing for the following reasons:

a) Dr. Riggs's affidavit not reliable because she did not testify in person, thus depriving the State of the opportunity to cross examine her and depriving the Court of the opportunity to assess her credibility.

b) The Court finds Dr. Riggs's statement should receive less consideration due to her failure to turn over her testing data to the State as ordered by the Court. *See* 6 EHRR 59 (Court denying State's motion to exclude Dr. Riggs's affidavit for failure to turn over her underlying data).

c) The Court finds Dr. Riggs's testimony is largely cumulative of Dr. Mendel's testimony. Both experts attested that Applicant suffered from attachment disorder derived from his traumatic childhood.

d) The Court finds, contrary to Applicant's arguments, Appl. 155–156, Dr. Riggs's testing would not have been more reliable than Dr. Mendel's testimony. Like Dr. Mendel, Dr. Riggs relied in large part on Applicant's self-report in coming to her opinion. Moreover, Dr. Riggs did not administer any effort testing to screen for malingering.

e) The Court finds Dr. Riggs's testimony would have revealed more aggravating evidence supporting Dr. Hirsch's testimony about Applicant's antisocial and aggressive behavior, and that this would have conflicted with Duer and Lanford's objective of avoiding repetition of aggravating facts.

Prejudice

765. The Court finds trial counsel presented evidence of Applicant's attachment disorder through the testimony of Dr. Mendel and Dr. Vandiver.

766. The Court finds that, had Dr. Riggs testified, her findings would have been subjected to the same scrutiny as Dr. Mendel's findings because her report was largely predicated on Applicant's self-report.

767. The Court finds that, had Dr. Riggs testified, the State could have elicited aggravating evidence of Applicant's antisocial and aggressive behavior, which would support Dr. Hirsch's findings.

Conclusions of Law

Trial counsel were not deficient

768. The Court concludes trial counsel were not deficient for presenting Dr. Mendel's testimony on attachment disorder instead of Dr. Riggs's testimony on the same issue. A reviewing court operating under *Strickland*'s deferential standard must be wary of IATC clams that come down "to a matter of degrees" which "are even less susceptible to judicial second-guessing." *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999). Applicant's argument that trial counsel should have presented Dr. Riggs's testimony instead is simply a matter of degrees, which fails to show that trial counsel's representation fell below an objective standard of reasonableness.

769. The Court concludes Dr. Riggs's declaration is cumulative of Dr. Mendel's trial testimony. Counsel's decision not to present cumulative testimony is not deficient performance. *See Coble*, 496 F.3d at 436. Applicant's argument that trial counsel failed to present evidence cumulative of the evidence they presented fails to show trial counsel were deficient.

770. The Court finds trial counsel acted reasonably in relying on their experts to advise when testing was necessary. Therefore, when trial counsel hired Dr. Mendel and Dr. Vandiver to testify about Applicant's attachment issues, trial counsel was reasonable to rely on their testimony and their expert opinion that they were qualified and able to attest to those issues without further testing or hiring of another expert.

Applicant was not prejudiced

771. The Court concludes that, given the cumulative nature of Dr. Riggs's testimony, Applicant fails to show a reasonable probability that the jury would

not have sentenced him to death had trial counsel called Dr. Riggs as a witness. *See Belmontes*, 558 U.S. at 22.

772. The Court concludes, given the aggravating nature of Applicant's underlying capital murder conviction and the aggravating nature of Applicant's criminal history and history of other assaultive acts, Applicant fails to show a reasonable probability that the jury would not have sentenced him to death had trial counsel called Dr. Riggs as a witness. *See Russell*, 892 F.2d at 1213.

773. The Court concludes that, given the double-edged nature of Dr. Riggs's proposed testimony, there is not a reasonable probability that the jury would not have sentenced Applicant to death had trial counsel presented the testimony of Dr. Riggs. *See Belmontes*, 558 U.S. at 20 (in considering prejudice a court must "consider all the relevant evidence that the jury would have had before it if [the inmate] had pursued a different path—not just the . . . evidence [the inmate] could have presented, but also the . . . evidence that almost certainly would have come in with it.").

774. The Court recommends denying Applicant's Ground 4b.

GROUND FIVE—CONFLICT OF INTEREST

775. Applicant alleges that trial counsel were ineffective when they created a conflict of interest by choosing to continue representing Applicant after their qualifications were challenged. Appl. 177–83. Applicant relies on the same facts proffered in Ground 2a, but argues that Lanford's supposed lack of statutory qualifications created a conflict of interest. *Id*. Applicant argues that the alleged conflict of interest affected trial counsel's representation in two regards: 1) Lanford could have used his lack of qualifications to get a motion for continuance granted; or 2) Lanford was generally ineffective. *Id*. at 182–83. Applicant, in a footnote, alternatively argues that, to the extent appellate counsel failed to raise this claim on direct appeal, then appellate counsel provided ineffective assistance too. *Id*. at 183 n.41.

776. The Court designated this ground for factual development, and the claim was developed at an evidentiary hearing. The record for these claims is thus limited to the testimony and evidence presented at the evidentiary hearing.

Factual Findings

777. The Court finds Applicant was present in court when a hearing was held on counsel's qualifications and Applicant did not raise an objection.

778. The Court finds Applicant did not raise a claim predicated on trial counsel's alleged conflict of interest on direct appeal.

779. The Court has recited the facts relevant to Lanford's statutory qualifications above in Ground 2a, *supra*. The Court incorporates those findings here.

780. The Court finds Lanford credibly testified at the evidentiary hearing that Applicant told Lanford he was comfortable with his representation, even after Lanford explained the qualifications issue to him.

Conclusions of Law

Procedural Bar

781. Because Applicant did not object to counsel's continued representation at trial, the Court concludes Applicant is procedurally barred from advancing such habeas grounds. Tex. R. App. P. 33.1(a); *Ex parte Pena*, 71 S.W.3d 336, 338 (Tex. Crim. App. 2002) ("Even if Mr. Pena had alleged a constitutional or jurisdictional defect, he would not be entitled to habeas corpus relief because he could have, and should have, complained about the fine at the time it was imposed or on direct appeal."); *Ex parte Bagley*, 509 S.W.2d 332 (Tex. Crim. App. 1974) ("We, therefore, hold that the contemporaneous objection rule serves a legitimate State interest in this question, and that the failure of petitioner, as defendant, to object at the trial, and to pursue vindication of a constitutional right of which he was put on notice on appeal, constitutes a waiver of the position he now asserts.").

782. The Court concludes that because a hearing was held on this issue before trial, this claim is a record based that Applicant could have, but did not, raise on direct appeal. As such, he is barred from raising this ground on habeas review. *Ex parte Gardner*, 959 S.W.2d at 190–91 (holding that writ of habeas corpus is not substitute for direct appeal).

783. The Court further concludes that Applicant's alternative argument that appellate counsel was ineffective for not raising this claim on direct appeal—raised only in a footnote—is not adequately brief and is therefore not considered by this Court. *See Ex parte Pena*, No. WR-84,073-01, 2017 WL 8639778, at *2 n.3 (Tex. Crim. App. Nov. 15, 2017) (not designated for publication) (finding Fourth Amendment claim inadequately briefed where argument was "limited to a single sentence citing a non-binding Fifth Circuit case"); *Ex parte Granger*, 850 S.W.2d 513, 514 n.6 (Tex. Crim. App. 1993) (holding that where appellant proffered "no argument or authority as to the protection provided by the[] state [constitutional and statutory] provisions or how that protection differs meaningfully from that provided by the [federal constitution], we consider his claims based on these state provisions inadequately briefed and not properly presented for our consideration"); *Cf. Heiselbetz v. State*, 906 S.W.2d 500, 512 (Tex. Crim. App. 1995) ("Appellant cites no authority in support of his proposition, nor does he provide any

argument beyond his conclusory assertion. From appellant's brief, we cannot discern his specific arguments, and we will not brief appellant's case for him.").

Alternative Merits

784. The vast majority of Sixth Amendment ineffectiveness claims are subject to a two-prong standard that requires the applicant to prove deficient performance and actual prejudice as a result. *Strickland*, 466 U.S. at 694. However, under *Cuyler v. Sullivan*, a defendant may "demonstrate a violation of his Sixth Amendment rights" upon establishing that "an actual conflict of interest adversely affected his lawyer's performance." 446 U.S. 335, 350 (1980). "[T]he possibility of conflict is insufficient to impugn a criminal conviction." *Id*. at 350.

785. The Supreme Court "has yet to decide on the issue of whether *Cuyler* is limited to cases of multiple representation[.]" *Acosta v. State*, 233 S.W.3d 349, 354 (Tex. Crim. App. 2007). But the Supreme Court has "never expressly limited *Cuyler* to such cases either." *Id*. The CCA, too, "has never drawn any distinction between 'types' of conflict of interest that may form the basis of a claim of ineffective assistance of counsel" and has declined to adopt a narrow rule limited conflict of interest to cases of multiple representation of co-defendants. *Id*. at 355–56. Indeed, the CCA has found *Cuyler*-conflict can apply to other multi-representation contexts, such as when the same attorney represented both the defendant in a criminal trial and the defendant's wife in a custody battle. *Id*. 354, 356. Conversely, the CCA found that *Strickland* was the appropriate analysis applied to a claim of conflict predicated on an attorney's self interest in protecting against future ineffectiveness claims. *See Monreal v. State*, 947 S.W.2d 559, 565 (Tex. Crim. App. 1997) (holding no actual conflict of interest existed and court of appeals did not err in analyzing conflict-claim under *Strickland*).

786. The CCA defines its conflict standard as follows: "An 'actual conflict of interest' exists if counsel is required to make a choice between advancing his client's interest in a fair trial or advancing other interests (perhaps counsel's own) to the detriment of his client's interest." *Acosta*, 233 S.W.3d at 355 (quoting *Monreal*, 233 S.W.2d at 564).

787. If such a conflict is shown, then prejudice is presumed. *Cuyler*, 446 U.S. at 349–50; *Routier v. State*, 112 S.W.3d 554, 582 (Tex. Crim. App. 2003) ("No additional showing of harm or prejudice is required"). But "until a defendant shows that his counsel actively represented conflicting interests, he has not established the constitutional predicate for his claim of ineffective assistance." *Cuyler*, 446 U.S. at 350. In other words, the *Cuyler* standard still "requires proof of effect upon representation but (once such effect is shown) presumes prejudice." *Mickens v. Taylor*, 535 U.S. 162, 173 (2002).

788. Importantly, Applicant "bears the burden of proof by a preponderance of the evidence on a claim of conflict-of-interest ineffective assistance, which is to say that if 'no evidence has been presented on the issue' or in the event that 'the evidence relevant to that issue is in perfect equipoise,' the [applicant's] claim will fail." *Odelugo v. State*, 443 S.W.3d 131, 136–37 (Tex. Crim. App. 2014).

789. The Court concludes Applicant fails to demonstrate an actual conflict. As indicated previously, the Court concludes Lanford was qualified as a matter of state law. *See* Ground 2a, *supra*. Thus, Lanford had no "personal interest" that he sought to advance over Applicant's interest. *See Acosta*, 233 S.W.3d at 355. And the Court declines to adopt a per se rule that anytime competent counsel's qualifications are challenged, they must remove themselves from the case due a conflict created by the mere fact of the challenge. At best, Applicant proves a *possibility* of conflict, but such is not enough to demonstrate an actual conflict. *See Owens v. State*, 357 S.W.3d 792, 795 (Tex. App.—Houston [14th Dist.] 2011, pet. ref'd) (finding no actual conflict of interest where the defendant filed a grievance with the State Bar of Texas against his trial counsel); *cf. James v. State*, 763 S.W.2d 776, 780 (Tex. Crim. App. 1989) ("The problem with the appeals court analysis is precisely that potential, speculative conflicts of interest are, *post hoc*, elevated to the position of actual, significant conflicts.").

790. Moreover, Applicant attempts to prove adverse effect by suggesting Lanford could have, but did not, use his lack of qualifications to seek a continuance and by simply cross-referencing his run-of-the-mill IATC claims. Appl. 181–82. But Applicant provides no evidence of a connection between counsel's purported "divided-loyalties" and his strategic trial decisions. *See Moss v. United States*, 323 F.3d 445, 469 (6th Cir. 2003) (explaining that the "causative language of *Cuyler* requires that the defendant demonstrate a nexus between the conflict and the adverse effect on counsel's performance."). And, as the Court has concluded, Applicant's IATC claims are meritless so he cannot show any adverse effect.

791. The Court concludes Applicant has failed to prove by a preponderance of the evidence that an actual conflict of interest existed or that any such conflict adversely affected Lanford's performance. The Court thus concludes that *Cuyler*'s presumed prejudice standard does not apply to Applicant's case.

792. The Court also concludes that Applicant consented to Lanford's representation even after Lanford's representations were challenged and Lanford explained the issue raised.

793. The Court alternatively concludes that, applying *Strickland*, Applicant fails to prove a federal constitutional violation. The Court has already concluded that Lanford was imminently qualified, and Applicant has no constitutional right

to statutorily-qualified counsel; rather, he is entitled only "to reasonably effective assistance of counsel at trial." *James v. State*, 763 S.W.2d 776, 778 (Tex. Crim. App. 1989). Additionally, Applicant was represented by Duer who Applicant does not allege was unqualified or conflicted. *Cf. McFarland v. Lumpkin*, 26 F.4th 314, 320 (5th Cir. 2022) (rejecting *Chronic* claim alleging trial counsel slept during trial, where the petitioner was also represented by co-counsel at every stage of trial). Applicant got far more than "reasonably effective" counsel, so there is no defective performance on that basis.

794. The Court further concludes Applicant show no prejudice under *Strickland*. As already stated, the Court has found Applicant's IATC claims individually meritless, so no prejudice can be shown by any of the specific allegations he raises in those claims. And as to counsel's decision not to use his supposed lack of qualifications to support a motion for continuance on an unrelated issue, Applicant entirely fails to offer any evidence showing that such a motion would have been granted had Lanford sought to base his request on his qualifications. This is particularly so where both the State, defense counsel, and the Court agreed Lanford was qualified only a little over a month before. *Compare* 18 RR 5 (hearing held on April 16, 2013, on Lanford's qualifications), *with* 2 CR 310 (showing motion for continuance denied on May 20, 2013).

795. The Court concludes Applicant has failed to prove by a preponderance of the evidence that trial counsel were ineffective.

796. The Court recommends denying Ground 5.

GROUND SIX—IATC AT VOIR DIRE

Applicant's Allegation

797. In his final ineffective-assistance claim, Applicant alleges that counsel were ineffective during jury selection. Appl. 183–212. Applicant's IATC-at-voir-dire claim has two parts: 1) he believes his counsel were ineffective for failing to fully argue their *Batson* motion, *id*. at 186–95; 2) he faults his counsel for failing to properly preserve for appellate review trial court errors regarding the denials of the defense's challenges for cause on direct appeal, *id*. at 195–212.

798. The Court designated this ground for factual development, and the claim was developed at an evidentiary hearing. The record for these claims is thus limited to the testimony and evidence presented at the evidentiary hearing.

Ground 6a: *Batson*

Factual Findings

799. Applicant alleges that counsel were ineffective for failing to support their *Batson* motion with a comparative analysis. Appl. 186–95. Applicant argues there is a reasonable probability that counsel would have prevailed on his *Batson* motion had he argued that the State's race-neutral reasons for striking the only Black juror in the jury pool were pretextual when compared to other, similarly situated white jurors who were not struck. *Id*. at 189–95.

Trial Record

800. Jury selection in Applicant's case took place over a six-week period, beginning on April 9, 2013, and ending with the parties' exercise of peremptory strikes on May 22, 2013. 16 RR 21 (general voir dire); 36 RR 7–17 (peremptory strikes exercised).

801. Voir dire in Applicant's case was conducted via the "pool" method, which primarily meant that the parties did not use peremptory strikes until after a pool of a certain number of qualified veniremembers, i.e., veniremembers against whom a challenge for cause had not been successful or who had not otherwise been excused, were met. 14 RR 26–27. Because each side got 15 strikes, plus 1 each for alternates, it was determined that they would stop once they reached a pool of 44 veniremembers. 14 RR 28–29; 35 RR 30. Peremptory strikes would then be exercised one at a time, with the State going first, followed by the defense, until twelve jurors were seated. 37 RR 7–16.

802. After a pool was qualified, the State exercised a peremptory strike against veniremember Cleaves, who was the only Black veniremember within the "strike zone." 36 RR 8, 16, 19.

803. Counsel lodged a *Batson* objection to the State's strike, and the Court asked the State to explain the reasons for its strike. 36 RR 16.

804. The State explained Cleaves indicated in his questionnaire that he had a brother who had been in prison in several states for multiple robberies as well as kidnappings. 36 RR 19–20. When asked by the State about that statement—as they asked other jurors who had family members with "criminal issues"—Cleaves expanded that his brother was "very violent" in his younger days. 36 RR 19. He specifically explained that his brother had committed "multiple robberies," "kidnappings," "that women would come up to him and say they were afraid of him and they were afraid to go near him because they thought he would hurt them[.]" 36 RR 19. The State reported Cleaves was the only veniremember they spoke with who had family with a "violent criminal

history," though the State noted that it had also struck veniremembers Jackson and Bialaszewski, both of whom had relatives with some violence in their history. 36 RR 20 (State explaining Jackson had "a brother-in-law who had some domestic violence issues" and Bialaszewski had a son with "assault cases" for which he served state-jail time).

805. The State further explained that, while Cleaves did not use the words "aging out," Cleaves indicated that he felt like his brother had gotten older and stopped acting "that way." 36 RR 20–21. The State further explained that it was concerned by Cleaves's testimony that he felt the reason "his brother had been so violent was because his skin was very black and people picked on him about it." 36 RR 21. The State said they couldn't have somebody who had essentially explained away his brother's violence because of his skin color, as that would go towards mitigation in Applicant's case. 36 RR 22. The State, having sat through the California depositions with defense counsel, had heard "the tenor of the questions they ha[d] asked people" and believed that one of the big issues at Applicant's punishment would be whether he had "aged out." 36 RR 21. But the State emphasized that, regardless of race or ethnicity, if *any* juror had described having a brother with a very violent past that went to prison numerous times, had lots of run ins with the law, robbed people, kidnapped people, threatened to hurt women, got better based on age, the State would not have kept them. 36 RR 22–23.

806. Trial counsel did not respond to the State's reasons. 36 RR 23. The Court overruled the defense's *Batson* objection, noting that its memory of veniremember Cleave's testimony was the same as the State's with regard to the aging out theory and that the State would've struck any veniremember who said that regardless of their race. 36 RR 23–24.

Evidentiary hearing

A. Lanford

807. Lanford testified that he was a practicing attorney when *Batson* was decided. 7 EHRR 290; 8 EHRR 121. Lanford testified that he had previously raised successful *Batson* objections as a litigator and had sustained *Batson* objections in trials over which he presided as a judge. 8 EHRR 121–22.

808. Lanford testified that, given the fact that Cleaves was the only black veniremember, they intended to raise a *Batson* objection no matter what if he was struck. 8 EHRR 122–23. Lanford expected such an objection to be overruled. 8 EHRR 124.

809. Lanford testified that they did not respond to the State's race-neutral explanation because, "[i]n [his] professional opinion, it wouldn't have done any

good," would have been a waste of time, and essentially pointless. 8 EHRR 123–24. Lanford explained that, "based on being in practice during the entire life of *Batson v. Kentucky*, [and] seeing that it would go from surprising everybody to meaning something and then gradually slipping off to meaning nothing again," he did not make further argument after the State's reasons. 7 EHRR 289–90. In his experience, "[i]f the State can come up with the most obscene, race neutral reason," the strike would be permissible. 7 EHRR 290.

810. With regard to using a comparative analysis to rebut the State's race-neutral reasons, Lanford described the difficulties of doing so "[w]ithout the luxury of a lot of time" and without the ability to review a transcript of the proceedings. 8 EHRR 125–27. All counsel would have had to rely on would be their notes and their memories, both of which could have been more than a month old by the time strikes were exercised. 8 EHRR 125–26.

811. Though Lanford anticipated that they would raise an objection if the State struck Cleaves, Lanford testified that he did not spend time the night before strikes comparing Cleaves's testimony to other possible jurors because, as a "matter of allocation of resources," counsel was looking at other issues that they might not have had time to do if they'd "taken the time between setting up the pool and doing the comparison." 8 EHRR 126; *id.* at 224 ("[W]e spent that time going over the other jurors' list to . . . finalize our strike list, and [a comparative analysis] was not a priority. Organization of the strike list was.").

812. Further, "[h]aving been a judge and with the desire to keep things moving," Lanford believed that the Court would have felt that it would've "unnecessarily delayed the proceedings" if they'd asked for a recess *during* strikes to go through all their notes to prepare such an analysis. 8 EHRR 125–26.

813. Thus, even if the State had not objected to a white juror who "had a violent family member with a violent family history," Lanford testified he would not have pointed out that disparity because he didn't "remember the sequence of when that all occurred," in particular how much time had elapsed or whether "that wasn't particularly on [his] mind at the time [they] were dealing with the black juror." 7 EHRR 291.

814. In sum, Lanford testified that attempting to rebut the State's reasons using a comparative analysis would have been "impractical" at the least and "almost impossible." 8 EHRR 125. Lanford described such an endeavor as "sort of the things a law professor might want, but in the real world it is not going to work, not going to be possible to do." 8 EHRR 125. Lanford stated "[i]t would have been unreasonable to expect [them] to have done [a comparative analysis] off the top of [their] heads at that time." 8 EHRR 127.

B. Duer

815. Duer testified that, prior to Applicant's case, he had lodged several *Batson* objections, though none were successful. 10 EHRR 196. Duer noted "on paper the *Batson* challenge looks really good," but in practice, *Batson* challenges are "enormously difficult" to win. 10 EHRR 197.

816. Duer testified that, since Cleaves was the only black juror within the strike zone, they intended to lodge a *Batson* objection if he was struck anyway. 10 EHRR 198.

817. Duer did not recall the reason the defense did not respond to the State's proffered race-neutral reasons, but a contemporaneous email from him to Ashley Steele indicated that the State "had sufficient race-neutral reasons" for striking Cleaves. 10 EHRR 200; SHX 87, at 1.

818. Regarding a comparative analysis, Duer testified:

> Certainly if you have all the time in the world or a photographic memory, that is doable. If you don't have a photographic memory and you're in the middle of striking jurors, . . . I understand that the case law says things about comparative analysis as one of the things that is available to the defense if they can show that the State—the disparate treatment between a white juror and a juror of color.
>
> In practice, it is very difficult to do. Even if you go back and look at it later and say, oh, well, you know, dang, we could have done that. Well, later when you're sitting—when you're sitting in the hotel waiting for the next day to [] start, things come to you. But in the heat of battle, things don't always come to you.

10 EHRR 200–01. In short, it was simply not practical. 10 EHRR 201.

819. And while counsel could have theoretically asked for a recess in the middle of the strikes to try a comparative analysis, Duer's opinion was that time would be better spent on other things. 10 EHRR 201.

820. Duer testified that the difficulties with comparative analysis at trial are compounded with the pool method of jury selection. 10 EHRR 202. Jury selection took six weeks, which could make it difficult to recall specific answers unless "you have a photographic memory[.]" 10 EHRR 202.

821. Duer thought, aside from the verdict, they "were [not] going to do any better" in terms of the jury in Applicant's case. 10 EHRR 203.

Deficiency

822. The Court finds Lanford's and Duer's testimony credible.

823. The Court finds counsel credibly testified that they intended to raise a *Batson* objection, regardless of any merit, if the State struck the only Black veniremember on the pool.

824. The Court finds counsel credibly testified that they did not believe such an objection would be successful but chose to raise it anyway.

825. The Court finds counsel credibly testified that, while they certainly could have spent the night before strikes attempting to bolster a futile *Batson* objection, they chose to spend their limited time and resources on their overall strike list.

826. The Court finds counsel credibly testified that attempting a comparative analysis on the spot, in the middle of the strikes, would have been impractical based on the fact that jury selection lasted over six weeks and it would have been difficult to remember the precise testimony of every single veniremember.

827. The Court finds counsel credibly testified that they chose not to ask for a recess during the strikes to attempt to conduct such an analysis because they believed a recess would not be granted and they would still have been faced with the same difficulties of attempting to sort through six weeks' worth of notes and memories.

828. The Court finds counsel credibly testified that they believed the State's reasons were sufficiently race-neutral.

Prejudice

829. The Court finds the trial court found the State's reasons to be race-neutral and based its denial of the *Batson* motion on its own impressions and memories as well.

830. The Court finds the record supports the State's reasons race-neutral reasons. In response to the State's questioning about his brother, Cleaves volunteered that his brother had "a few troubles" and "had his run-ins with the law for quite a while" back in the 1960s. 21 RR 103. When asked if his brother was doing better now, Cleaves stated his brother was "much better" because he was around 66 years old now and had held onto a job for almost 18 years. 21 RR 103. When probed by the State about whether Cleaves felt his brother was treated fairly by the system, Cleaves answered affirmatively because his brother "had some very serious crimes as a young man" and was "quite violent" "in a lot of ways" when he was 18 years old. 21 RR 103–04. Cleaves explained

that "young ladies use to run up" and tell him they were scared of his brother. 21 RR 104. Cleaves said his brother was into robbery, kidnapping, would threaten to "knock [people's] head off their body," and was overall a "quite violent" young man. 21 RR 104. When asked by defense counsel whether his brother had gotten better because he had gotten "too old to keep doing it," Cleaves agreed and said as he got older in his life, he could look at things differently. 21 RR 168. He also explained that his brother was "a very dark-skinned guy and [he] remember[ed his] people used to call him you black this and all this here, you know." 21 RR 168. Cleaves thought that made his brother angry over the years, an anger that "carried over to a lot of the way he acted[.]" 21 RR 168–69. When prodded again by defense counsel, Cleaves agreed that "[b]y the time we get older, we change." 21 RR 169. The Court finds, as Judge Steel did at trial and as Duer credibly testified, that these reasons were sufficiently race-neutral.

831. The Court finds veniremember Pina was not similarly situated to veniremember Cleaves. In response to a question on the questionnaire related to whether the person had any family member or close friend who had ever been accused and/or convicted of a criminal offense, Pina checked "yes" and stated, "Rolando Pina? Laredo, TX/attempted robbery." AHX 33, at 2. When questioned about that statement during individual voir dire, Pina explained that Rolando Pina was her brother-in-law. 20 RR 104. Pina stated that Rolando "held up a bank supposedly at gunpoint, but he didn't have a gun with him," though Rolando "said he did." 20 RR 104. Pina stated this occurred over 30 years ago. 20 RR 104. When asked if her brother-in-law was doing okay now, Pina simply replied that he was fine. 20 RR 104–05. Pina did not say Rolando had committed any other offenses in those 30 years. *Id.* Importantly, Pina never talked about Rolando getting older and essentially "aging out" of a long history of criminal violence. *See generally* 20 RR 96–191.

832. The Court finds Pina's relationship with her brother-in-law is not the same as Cleaves's apparently closer relationship with his brother. The Court also finds Pina's description of a single criminal offense 30 years ago is nowhere near the kind of repeated and consistent "run ins" with the law that Cleaves described or the "very violent" history his brother had when he was younger. Moreover, the Court finds nothing in Pina's testimony supports a finding that her testimony that her brother-in-law is "fine" now is the same as Cleaves's in-depth discussion with defense counsel about getting older and aging out of violence.

833. The Court further finds that none of the other veniremembers Applicant points to were similarly situated to Cleaves either. *See* Appl. 191–93. Indeed, none of the nine veniremembers Applicant points to "who identified family members with 'violent' criminal histories," actually have violent criminal histories. *See*

AHX 22, at 2 (Altenhoff describing nephew with drug charges); AHX 23, at 2 (Best describing cousin who committed breaking and entering of home); AHX 28, at 2 (Glomb describing brother who committed theft); AHX 29, at 2 (Gutierrez describing father and another relative with DWI and other warrants); AHX 30, at 2 (alternate juror McClemore describing trespassing in his past); AHX 31, at 3 (Nelson describing his own possession of a concealed weapon offense); AHX 34, at 2 (Shott describing his own arrest for possession of pain medications); AHX 35, at 2 (Whitman describing husband who had committed theft). The fact that the State did not ask questions of Altenhoff, Glomb, Gutierrez, and Whitman, *see* Appl. 191, reflects only that those jurors did not report the kind of "violent history" the State was concerned about. And that other jurors, upon questioning by the State, described largely one-off occurrences in their relative's or their own teenage years, is not the same kind of "aging out" testimony that Cleaves gave in response to defense counsel's pointed questions.

Conclusions of Law

Trial counsel were not deficient

834. The Court concludes that Applicant has failed to demonstrate by a preponderance of the evidence that his counsel was deficient.

835. The Court concludes counsel's decision to raise a *Batson* objection even though they apprised the claim to be futile before raising it was reasonable. Counsel lost nothing by doing so and could have reasonably believed the State might proffer a reason they would be able to rebut.

836. The Court further concludes counsel's decision not to respond to the State's race-neutral reasons because it deemed those reasons to be sufficient was reasonable. Counsel "is not required to have a tactical reason—above and beyond a reasonable appraisal of a claim's dismal prospects for success—for recommending that a weak claim be dropped altogether." *Knowles*, 556 U.S. at 127.

837. The Court concludes that counsel's decision not to spend the night before strikes anticipating the State's race-neutral reasons and parsing their notes to prepare a rebuttal to those reasons was objectively reasonable. "Counsel was entitled to formulate a strategy that was reasonable at the time and to balance limited resources in accord with effective [] tactics and strategies." *Harrington v. Richter*, 562 U.S. 86, 107 (2011). Counsel reasonably decided that their time was better spent sorting through their own strike list. The Court concludes counsel did not have the benefit of time and the record that Applicant's postconviction counsel did, and Applicant's insinuation that counsel could have done what he did is the type of "distorting effect[] of hindsight" *Strickland*

warns against using. *See Strickland*, 466 U.S. at 688–89 (holding that every effort must be made to eliminate the "distorting effects of hindsight").

Applicant was not prejudiced

838. The Court further concludes that Applicant has failed to show by a preponderance of the evidence that any alleged deficiency prejudiced him. To obtain relief on an IATC-*Batson* claim, Applicant must demonstrate the typical outcome-determinative *Strickland* prejudice. *See Batiste v. State*, 888 S.W.2d 9, 15 (Tex. Crim. App. 1994) ("("[W]e hold that the likelihood that failure of counsel to ensure that racial discrimination did not take place in jury selection will render trial unfair is not so great as to justify exempting ineffective counsel claims for lack of a *Batson* objection from *Strickland*'s 'prejudice' prong."). This means that, to prove prejudice, Applicant must show that the seated jurors could not have "render[ed] a fair and impartial verdict in the trial of a minority defendant." *Id*. at 14–15.

839. The Court concludes that Applicant makes no attempt to argue, much less prove, that, as a result of trial counsel's failure to argue *more* in support of their *Batson* motion, he was forced to accept jurors who were incapable of acting impartially with respect to his race.[4] And Applicant can never establish *Strickland* prejudice with reference to *only* the racial composition of his jury because doing so is a direct violation of *Batson* itself: "Race cannot be a proxy for determining juror bias or competence. A person's race simply is unrelated to his fitness as a juror." *Powers v. Ohio*, 499 U.S. 400, 410 (1991). The CCA has acknowledged the extreme difficulty state habeas applicants face when attempting to prove *Strickland* prejudice in this circumstance. *See Batiste*, 888 S.W.2d at 16 ("A jury of any racial makeup is presumptively capable of providing the impartial tribunal necessary to ensure proper functioning of the adversarial process.").

840. Even if *Batiste* were inapplicable and Applicant could show *Strickland* prejudice by proving only a likelihood of success on the *Batson* motion itself, the Court concludes Applicant still fails to prove prejudice by a preponderance of the evidence.

841. The Court concludes that, because veniremember Pina and the other veniremembers to which Applicant points were not similarly situated to

[4] In Ground 6b, Applicant alleges that trial counsel were also ineffective for failing to properly preserve for appeal the denials of their challenge for cause. But Applicant makes no allegation that any of those jurors were biased against him or that such bias had any relationship to Applicant's race or the constitutional scope of the supposed *Batson* violation. Thus, any allegations of non-racial bias in Ground 6b would be unavailable to establish prejudice under *Batiste*.

veniremember Cleaves, counsel would not have succeeded in changing the Court's mind that the State had proffered sufficient race-neutral reasons. *See Rhoades v. Davis*, 914 F.3d 357, 382–83 (5th Cir. 2019) (rejecting *Batson* claim where the seated jurors were distinguishable from the struck veniremember because, unlike the struck veniremember, none of the jurors had a sibling who was incarcerated). Indeed, none of the other veniremembers to which Applicant points testified to the primary thing Judge Steel relied on in denying the motion: Cleaves's testimony during defense counsel's questioning that his brother had effectively "aged out" of his violent criminal history. *See* 36 RR 23–24. The Court must give "great deference" to the trial court's assessment of the prosecutor's credibility. *See Snyder v. Louisiana*, 552 U.S. 472, 478 (2008). In light of that deference, and Applicant's burden on habeas review, the Court concludes Applicant fails to prove that the outcome of his *Batson* motion would have been any different had counsel conducted and offered a comparative analysis.

842. The Court recommends denying relief on Applicant's Ground 6a.

Ground 6b: Challenges for cause

Factual Findings

843. Applicant claims counsel failed to properly preserve alleged trial court errors for direct appeal. Appl. 195–212. Applicant specifically alleges counsel failed to properly for appellate review the denial of their challenges for cause by: 1) failing to use a strike against all veniremembers they had unsuccessfully challenged for cause; 2) failing to request more peremptory strikes after exhausting their others so they could use such strikes on "objectionable" jurors who actually sat on Applicant's jury. *Id*. at 195–96. Applicant argues that, because counsel failed to comply with the steps required to preserve error, his appellate counsel "were unable to complain of the propriety of the trial court's rulings on direct appeal." *Id*. at 196.

Trial Record

844. The overall process of voir dire is described in Ground 6a, *supra*. Specific to this allegation, the records shows, during voir dire, trial counsel lodged nineteen total challenges for cause during individual voir dire, fourteen of which were denied.

845. The Court specifically denied the defense's challenges for cause to the following veniremembers, in order of their juror numbers: 1) Best, *see* 18 RR 157; 2) Dees, *see* 18 RR 273; 3) Gardner, *see* Supp.RR 162; 4) Oana, *see* Supp.RR 221; 5) Gutierrez, *see* 20 RR 73; 6) Pina, *see* 20 RR 193; 7) Nelson, *see* 22 RR 124; 8) Moore, *see* 23 RR 66; 9) Bera, *see* 24 RR 63; 10) Blackson, *see* 26 RR 238;

11) Burke, *see* 27 RR 197; 12) Helm, *see* 32 RR 271; 13) McCully, *see* 34 RR 166; and 14) Stiever, *see* 34 RR 89.

846. The record reflects that, at Judge Steel's behest, trial counsel requested additional peremptory strikes five days before voir dire concluded. 33 RR 26, 29. They specifically requested 6 additional strikes but were granted only two. 33 RR 26, 29. Judge Steel granted only two additional strikes because, upon reviewing his notes, he felt only two of the defense's denied challenges-for-cause were "even close to a grey area." 33 RR 30. Judge Steel indicated that he would "not foreclose" a later motion for yet more peremptory strikes at the conclusion of voir dire. 33 RR 27. The defense therefore had a total of 17 peremptory strikes. 7 EHRR 285.

847. Peremptory strikes were exercised on May 22, 2013. 36 RR 7–16. The State used 14 of its strikes, and the defense used all 17 strikes. 36 RR 14–15.

848. Of those veniremembers that the defense unsuccessfully challenged for cause, the defense exercised peremptory strikes against twelve of them: Best, Dees, Gardner, Oana, Gutierrez, Pina, Nelson, Moore, Bera, Blackson, Burke, and McCully. *See* 36 RR 7–16.

849. Counsel exercised their remaining five peremptory strikes against veniremembers they had not previously challenged for cause, namely: Whitman, Creekmore, Chouinard, Bach, and Badger. *See* 36 RR 7–16.

850. This meant counsel did not use a peremptory strike against juror Helm, even though they had previously challenged him for cause and even though they had an available strike to use against him. *Compare* 35 RR 14 (defense using their sixteenth strike again veniremember Badger), *with* 35 RR 15 (defense accepting juror Helm). Nine jurors had already been empaneled by the time the parties reached juror Helm in the strikes. 36 RR 15 (parties accepting juror number 9).

851. Counsel instead used their remaining strike against veniremember McCully, who followed juror Helm and who they had also previously challenged for cause. *See* 34 RR 166; 36 RR 15 (defense using their seventeenth strike against McCully).

852. Because counsel had exhausted their peremptory strikes on McCully, they were forced to accept the next juror in line, juror Stiever, who they had also previously challenged for cause. *See* 34 RR 89; 36 RR 15 (court naming Stiever as juror number twelve).

853. Counsel did not request additional peremptory strikes at that point. *See generally* 36 RR 15–16. The defense instead lodged a *Batson* objection to the State's striking of veniremember Cleaves.

854. In the end, two jurors empaneled on Applicant's jury—specifically jurors Helm and Stiever—were jurors that the defense had unsuccessfully challenged for cause.

Evidentiary hearing

A. Lanford

855. Lanford testified that, prior to Applicant's trial in 2013, he had conducted several hundred voir dires. 8 EHRR 90. Of those, he presided over four capital voir dires as a judge. 8 EHRR 90–91. Lanford had also taken at least 38 hours of CLE on capital voir dire alone. 8 EHRR 91; SHX 106.

856. Because several weeks could have elapsed from the time counsel questioned any one individual juror and when strikes were ultimately exercised, Lanford testified that he took extensive notes during individual voir dire. 8 EHRR 93–96; AHX 75. Lanford testified that Duer also kept his own notes during voir dire. 8 EHRR 95–96.

857. Lanford testified that he and Duer kept a color-coded "strike list," which was an ongoing list of the attorneys' assessment of veniremembers for purposes of deciding later whether to strike them. 8 EHRR 96–99; SHX 82. Lanford testified Duer would rank jurors from most objectionable to least. 8 EHRR 99.

858. Lanford testified that, in terms of desirable jurors, the defense was "looking for a person that could accept the death penalty while wasn't overly qualified for it." 7 EHRR 283. They were "also looking to see some sort of education, can understand the nuances of what we were going to try to accomplish, their intellectual ability, and did they relate very well." 7 EHRR 283.

859. In terms of which jurors to avoid, Lanford stated they wanted to get rid of "people who would assign the death penalty to things that weren't murder" or who "might indicate a racial bias or something to that nature that you can sense out from them." 7 EHRR 284.

860. Lanford testified that juror Helm was a medium-level objectionable juror, which meant "[s]trike if we don't run out of strikes." 8 EHRR 99–100; SHX 82. Lanford opined, based on his judicial background, that Helm had enough of an explanation about his position on the death penalty that a motion for cause was not going to be successful, but they challenged him anyway, knowing they likely would not win, and they did not. 8 EHRR 101–02.

861. Addressing why they did not exercise a peremptory strike against juror Helm, Lanford explained that their "strike list" made evident that two jurors following Helm—namely, McCully and Stiever—were far more objectionable than Helm, so they chose to accept juror Helm instead of making the "grave tactical error" of striking him and being forced to accept two worse jurors. 8 EHRR 103–04.

862. With regard to veniremembers they struck that they had *not* previously challenged for cause, Lanford testified that veniremember Whitman was rated in their strike list as "light orange," which was also a medium-level objectionable juror. 8 EHRR 104; SHX 82. Lanford noted several concerns about Whitman, namely, that she had served on a prior jury in which punishment was assessed and that her mother had served as a juror on a murder case. 8 EHRR 104–07; AHX 75, at 31. Lanford also noted Whitman was asked a "stripping question," which is a leading question designed "to get rid of those people who have the attitude about the death penalty of kill them all and let God sort them out." 8 EHRR 108–09. This question is not asked of every juror, just those that counsel feels may not be completely honest or transparent about their feelings on the death penalty. 8 EHRR 109.

863. Lanford testified that the defense would sometimes find jurors objectionable even if it did not rise to the level of challengeable-for-cause. 8 EHRR 110. Lanford thought all the concerns indicated in his notes supported striking her, even though she hadn't been challenged for cause. 8 EHRR 111. This was further supported by the fact that, by the time juror Whitman was reached, the defense had used only 7 of their 17 strikes and only one juror had been empaneled. 8 EHRR 111.

864. Regarding veniremember Creekmore, Lanford testified that Creekmore was ranked in their "strike list" as "bold red," which meant she was a highly objectionable juror. 8 EHRR 111–12l SHX 82. There were only seven total veniremembers who ranked the same level of objectionability. 8 EHRR 112; SHX 82. Lanford noted several concerns about Creekmore. 8 EHRR 112–14; AHX 75, at 39. Creekmore was an investigator at the Child Support Division of the Office of the Texas Attorney General, an office who was also involved with prosecuting Applicant's case. 8 EHRR 112–13; AHX 75, at 39. By virtue of her experience, Creekmore had noted during her individual voir dire that Applicant must "have done something else to get into the system" and had mentioned "DNA some three times[.]" 8 EHRR 113–14.

865. In Lanford's estimation, Creekmore "[w]ith her background [and] experience" would have known "how to answer all the questions properly to get on the jury panel" but would still not have been a good juror. 8 EHRR 115. Thus, while Creekmore may not have been challengeable for cause, she was "absolutely

worth" one of their peremptory strikes, especially because, by the time she was reached, the defense had only used 10 of its 17 strikes. 8 EHRR 115–16.

866. Regarding veniremember Chouinard, Lanford said she was ranked as "red" on the "strike list," which was objectionable but not as objectionable as "bold red." 8 EHRR 116; SHX 82. Chouinard also raised several concerns for Lanford. Chouinard was a paramedic who worked regularly with the police and fire departments. 8 EHRR 117; AHX 75, at 41. Lanford also felt Chouinard had given a "cop out answer" during voir dire and was "smart enough to answer the questions correctly while hiding her true desires in the case[.]" 8 EHRR 117–18; AHX 75, at 41. Lanford noted he "couldn't get a cause basis" for Chouinard, which is why she remained very objectionable. 8 EHRR 118; AHX 75, at 41. The defense used their twelfth strike against her. 36 RR 12.

867. Lanford testified that the five strikes they used on people who had not been challenged for cause were "[a]bsolutely" used on people who they did not want on Applicant's jury, including the above discussed veniremembers who were "ones [they] felt probably were objectionable for cause but [they] couldn't get it" and thus "were worth using a strike on." 8 EHRR 119. In other words, Lanford testified, having a challenge for cause denied is "not the only reason" to exercise a strike against someone. 8 EHRR 119.

868. Addressing the question of why he did not ask for more peremptory strikes, Lanford said he "would not have expected to get anymore, so [he] had to act accordingly." 8 EHRR 121. Lanford also believed that Judge Steel's comments about reviewing his notes on the denials of challenges for cause counseled against making a later request for more strikes "as a practical matter." 8 EHRR 121.

869. Lanford testified that counsel does not have a duty "to preserve all" appeal issues, just "the ones that they deem important[.]" 8 EHRR 225. Lanford believed he "did not have a constitutional level issue to raise with [respect to the denial of their challenges for cause], so [they] didn't go any further with it." 8 EHRR 227.

B. Duer

870. Duer testified that he had conducted dozens of voir dires prior to Applicant's trial, though Applicant's was the first time he conducted individual voir dire because it was his first capital trial. 10 EHRR 169–70.

871. Duer explained that their "bottom line" during voir dire was "trying to get rid of as many people as possible that we thought were too pro death penalty." 10 EHRR 171–72. They did so by asking the "stripping questions" that Lanford referred to as well. 10 EHRR 171.

872. Duer testified that the age of the case had an effect on jurors' "willingness to assess the death penalty." 10 EHRR 172. Some people "were more willing to assess the death penalty because he got away with it for 37 years," while others other felt they might not be able to give death in a case that old. 10 EHRR 172.

873. Duer testified that he considered numerous things in deciding whether to challenge a juror for cause, including an "[i]nability to follow the law, inability to consider the entire range of punishment, which in this case with lesser included offenses went all the way from two years to 20." 10 EHRR 173. He also considered any "obvious bias against the defense." 10 EHRR 173. Duer testified that these considerations were essentially the same as any felony case, though death penalty cases differ by virtue of the gravity of the offense. 10 EHRR 173.

874. Duer took extensive notes during voir dire. 10 EHRR 174; AHX 76. Duer relied on these notes, as well as Lanford's notes, when it came to deciding later whether to strike a certain juror. 10 EHRR 177–78.

875. In addition to his notes, Duer kept a "strike list," in which he color-coded veniremembers in terms of their objectionability as they proceeded through voir dire. 10 EHRR 179–80; SHX 82. Duer testified that the dark red were "people [he] thought [they] had to get rid of at all cost," red were people they would try to get rid of if they succeeded in removing all the dark red and had strikes left, and dark orange, regular orange, and black were decreasing levels of undesirability. 10 EHRR 180–81. The strike list was a living document that was updated as people were added to the jury pool. 10 EHRR 181.

876. Duer testified that juror Helm was dark orange, which was a medium-level objectionable juror. 10 EHRR 182; SHX 82, at 2. Duer's notes reflect that Helm was originally categorized as a "dark red" objectionable juror. 10 EHRR 183; AHX 76, at 124. Duer said Helm was later moved down "two levels in [his] mind" to dark orange, so "something changed along the way." 10 EHRR 184. Looking at his strike list, Duer acknowledged three veniremembers after Helm were rated as "dark red," and given that, by the time they reached Helm they only had one strike left, "that may have been the only reason that he wasn't struck." 10 EHRR 184; SHX 82, at 2. In other words, Helm was not worth the defense's last strike. 10 EHRR 184.

877. Discussing veniremembers that had *not* been challenged for cause, veniremember Whitman was the "fourth level down for [Duer] strike-wise," which meant she was light orange. 10 EHRR 185; SHX 82, at 2. Duer's notes reflected Whitman's mother-in-law was a juror on a "capital murder trial in Williamson County, and the jury assessed the death penalty." 10 EHRR 185; AHX 76, at 39. Duer noted that was "a cause for concern" because one of his "inviolable rules for jury selection" is that if a juror has ever been on a jury

before, that juror "won't sit on this one I'm picking now." 10 EHRR 186. That was because in "nearly every jury that" Duer was involved with, "once a guilty verdict and a sentence came back, either the prosecutor or the judge or both would talk to the jury, at which point the jury would find out the rest of the story." 10 EHRR 187. Duer didn't "want anybody on [his] jury . . . wondering what they're not hearing." 10 EHRR 187. In Whitman's case, she "was prior jury service once removed." 10 EHRR 186.

878. Veniremember Creekmore was rated as "dark red," which in Duer's mind "was at the top of the heap" of jurors they did not want on their jury. 10 EHRR 188; SHX 82, at 2. Like Lanford, Duer's notes reflected Creekmore speculated that "for the case to be this old and just going to trial, [Applicant] must have done something else to get in the system for" the DNA to hit. 10 EHRR 188; AHX 76, at 51. Duer stated he did not believe Creekmore when she said she could wait to hear the evidence. 10 EHRR 188. Duer also noted Creekmore had indicated she could not see how it was "possible to decide against the death penalty once you convict somebody of capital murder." 10 EHRR 189; AHX 76, at 51. Finally, Duer noted Creekmore worked for the Attorney General's office, and he did not "want law enforcement people on [his] jury either." 10 EHRR 190; AHX 76, at 51.

879. The defense did not challenge Creekmore for cause, likely because they "decided that she had been rehabilitated by the State and she wasn't challengeable." 10 EHRR 190. But because Creekmore was "already dark red and [they] still had a handful of strikes left, it was worth removing . . . her from the pool." 10 EHRR 191.

880. Veniremember Chouinard was rated as "regular red," which meant she was pretty objectionable but not as much as Creekmore. 10 EHRR 191; SHX 82, at 2. Duer's notes indicated Chouinard was a paramedic in Bexar County, which, in Duer's mind, was "law enforcement once removed[.]" 10 EHRR 191–92; AHX 76, at 53. Duer noted paramedics "see a lot of death on the highway," and he did not believe Applicant's case would be a good case for that. 10 EHRR 192. The defense used their twelfth strike on her because she was still an objectionable juror. 10 EHRR 192.

881. Duer testified, if they used five of their strikes against people they had not previously challenged for cause, that would be because they still did not want those people on their jury. 10 EHRR 193. Denied challenges for cause are "one thing that you think about," in part because it could set up "potential appellate things when you're asking for more peremptory strikes." 10 EHRR 193.

882. Duer testified that he believed the defense would not have asked for more [strikes] once they actually started exercising strikes "because [they] had

already asked[.]" 10 EHRR 194. They did not feel that Judge Steel was going to give them anymore strikes. 10 EHRR 195.

883. Duer also noted the risk in using a strike against a juror solely for purposes of error preservation, namely, that "you can always find somebody worse." 10 EHRR 195–96. Duer testified that he didn't "think that [he] would ever burn a peremptory strike for the sole purpose of preserving . . . the record on [the] denial of extra" strikes. 10 EHRR 196.

884. Duer testified that, while sometimes an attorney should err on the side of caution to preserve issues, "you can't always know in the moment which issue is going to be the most important in the end." 10 EHRR 119. "You make decisions as the case progresses" and "on the fly." 10 EHRR 119. An attorney has to decide whether he is "going to make a big deal out of something to make the jury think it is more than it is, or whether [an attorney is] going to sit back and not do something and not allow the State to make a bigger deal out what their testimony is than it would have been otherwise." 10 EHRR 119.

Deficiency

885. The Court finds Lanford's testimony credible.

886. The Court finds Duer's testimony credible.

887. The Court finds claims related to the trial court's denials of challenges for cause were not raised on direct appeal. *See Jenkins*, 493 S.W.3d at 609–13. Instead, the only voir dire claim raised on direct appeal was a claim of juror misconduct on the part of juror Altenhoff. *Id*.

888. The Court finds counsel credibly testified that they made strategic decisions about which veniremembers to prioritize in terms of their undesirableness.

889. The Court finds counsel credibly testified that they based those decisions on their extensive notes, the constantly-updated strike list, and their memories and impressions of veniremembers' demeanors.

890. The Court finds counsel credibly testified that they appraised the chances of success on a constitutional claim of the denial of challenges for cause to be low, and therefore, while they were aware of the necessary steps for preserving appellate remedies on the trial court's denials of their challenges for cause, they instead chose to prioritize getting Applicant a good jury.

891. The Court finds counsel credibly testified that they chose to accept Helm and strike McCully, because even though they had previously challenged Helm for

cause, they had only one strike left by the time they reached Helm, and McCully was much more objectionable than Helm.

892. The Court finds counsel credibly testified they chose not to exercise a strike against Helm solely for the purpose of preserving their appellate remedies on the trial court's denial of their challenge for cause against him.

893. The Court finds counsel exhausted their last peremptory strike against veniremember McCully, and counsel therefore did not have a strike to exercise against juror Stiever.

894. The Court finds counsel credibly testified that they used five of their allotted peremptory strikes against people they deemed objectionable but not challengeable for cause. The Court finds counsel's specific explanations, by way of example, for their strikes against Whitman, Creekmore, and Chouinard were credible. The Court finds the record supports that counsel made similar decisions about the other two veniremembers—Bach and Badger—who they exercised strikes against but had not challenged for cause. *See* SHX 82, at 2 (showing Bach and Badger were rated as "bold red" and "light red," respectively).

895. The Court finds counsel credibly testified that they did not ask for more peremptory strikes because they believed Judge Steel would not grant them given Judge Steel's discussion at the time he granted the two additional peremptory strikes, which he based on "close call" denials of challenges for cause.

Prejudice

896. The Court finds Judge Steel would not have granted the defense more peremptory strikes if they asked again during the exercise of the strikes.

897. The Court finds Applicant offered no evidence at the evidentiary hearing that appellate counsel would have raised trial court error claims predicated on the erroneous denials of challenges for cause on appeal if such claims had been properly preserved.

Conclusions of Law

898. The Court notes at the outset that it is difficult to understand what Applicant's argument on this issue is. Applicant points to fourteen alleged trial-court errors, arguing that each was erroneous. *See* Appl. 197–211. But Applicant is not raising in this Court a straight challenge to those denials of the challenges for cause because he cannot—such a claim would, if properly preserved, be a record-based claim that would only be appropriate on direct appeal. Instead,

he raises a claim that trial counsel was ineffective for *not* properly preserving the all fourteen of the underlying alleged trial-court errors. *Id.* at 195–212. His argument goes: had counsel properly preserved the trial court errors, then appellate counsel might have raised them, the CCA might have found them to have merit on appeal, and Applicant might have had his conviction overturned. On its face, the claim appears straightforward. But the Court concludes it is not. That's because Applicant fails to account for a necessary link in the chain of causation: trial counsel's strategies and the effect of those strategies on the *trial*, not the appeal, i.e., what *Strickland* requires. The Court addresses the many layers of Applicant's argument below.

Trial counsel were not deficient

899. There are five steps necessary to preserve an alleged error predicated on the erroneous denial of challenges for cause. *See Comeaux v. State*, 445 S.W.3d 745, 749 (Tex. Crim. App. 2014). That is, "a defendant must show on the record that '(1) he asserted a clear and specific challenge for cause; (2) he used a peremptory challenge on the complained-of veniremember; (3) his peremptory challenges were exhausted; (4) his request for additional strikes was denied; and (5) an objectionable juror sat on the jury.'" *Id.* (quoting *Davis v. State*, 329 S.W.3d 798, 807 (Tex. Crim. App. 2010)). "The purpose of the five steps on a challenge for cause is to demonstrate that the defendant suffered a detriment from the loss of a peremptory strike; this error actually harmed the defendant." *Id.*

900. Here, if we stripped away the habeas layers of Applicant's ineffective-assistance claim and looked at the claim through the direct appeal lens, we encounter three issues. First, Applicant could not have complained about juror Helm on direct appeal because a peremptory strike was not used against him. *See Newbury v. State*, 135 S.W.3d 22, 32 (Tex. Crim. App. 2004) ("Because appellant could have but did not use peremptory challenges to remove Taylor (point ten) and Francis (point twelve), appellant has failed to show any harm from any error in the trial court's denial of appellant's challenges for cause to these two veniremembers.").

901. Second, the denial of a challenge for cause against Stiever might not have been preservable because trial counsel exhausted their last strike on McCully. Had counsel asked for an additional peremptory after using their last on McCully, and had the request been denied, Stiever could have been identified as the objectionable juror, but he would not have been the one preserved for appeal. Thus, for appellate purposes, McCully would have been the last venireperson about which appellate counsel could have complained.

902. But that raises the third issue: trial counsel constructively did not exhaust all their peremptory strikes, even if they did so in actuality. That is, the record

shows counsel used five of their seventeen strikes to strike jurors they had *not* previously challenged for cause, and as such, "the problem is that it was entirely [counsel]'s fault that an objectionable juror sat on the jury," if one had been identified. *See Comeaux*, 445 S.W.3d at 751. "If appellant did not use all of his peremptory strikes, then he obviously has not suffered any detriment—he could have struck the objectionable juror[s], but he chose not to." *Id*. This is "tantamount to failing to exhaust all remaining peremptory strikes." *Id*. That's because he was not "force[d]" to "waste a peremptory strike" on a juror that should have been removed for cause, which is the harm that preservation is designed to prevent. *See id*.

903. It is thus clear that counsel did *not* preserve error, if any, for appellate review. But that is not the end of the inquiry, as Applicant would have the Court believe; it is the beginning precisely *because* this is not direct appeal and *because* this is an ineffective-assistance claim to which *Strickland* applies. *See State v. Morales*, 253 S.W.3d 686, 697 (Tex. Crim. App. 2008) (en banc) (noting that a properly preserved constitutional claim of juror partiality might vitiate a conviction upon the showing of even a single partial juror, "it is a right which is to be exercised at the option of the defendant," which means "it also subject to the legitimate strategic or tactical decision-making processes of defense counsel during the course of the trial"). This means, as it always does, that Applicant must establish that counsel's actions or omissions were deficient and that such deficiency prejudiced the defense. *Strickland*, 466 U.S. at 687.

904. As to deficiency, "if the exigencies of trial call upon trial counsel to make a difficult choice between exercising a scarce peremptory challenge to preserve such an error for appeal, on the one hand, and exercising that peremptory challenge for some other purpose in order to secure a perceived advantage at trial, on the other, it does not violate the defendant's Sixth Amendment right to the effective assistance of counsel for trial counsel to opt for the latter." *State v. Morales*, 253 S.W.3d 686, 696 (Tex. Crim. App. 2008) (en banc). In other words, even assuming that all fourteen of the jurors Applicant challenged for cause were in some way biased, "that does not mean that [Applicant's] trial counsel could not have made a legitimate tactical decision *not* to exercise a peremptory challenge in order to preserve the trial court's error in overruling his challenge for cause for appeal." *Id*. Simply put, the decision whether to effectively waive the right to an impartial jury is "subject to the legitimate strategic or tactical decision-making processes of defense counsel during the course of trial." *Id*.; *see also Cardenas v. State*, 30 S.W.3d 384, 391 (Tex. Crim. App. 2000) (holding appellant failed "to rebut the presumption that counsel's decision to reserve a peremptory strike was formulated on 'sound trial strategy'" (quoting *Strickland*, 466 U.S. at 689)).

905. Applicant's briefing suggests no basis for making this determination. Instead, he appears to suggest the mere fact of counsel's failure to preserve the denials of the challenges for cause is deficient conduct itself. *See* Appl. 196 ("Trial counsel has a duty to preserve erroneous trial court rulings for appeal.). He cites to nothing but American Bar Association (ABA) guidelines to support this proposition. *Id*. at 196. But Applicant is wrong in his approach for two reasons: 1) "Prevailing norms of practice as reflected in [ABA] standards and the like are guides to determining what is reasonable, but they are only guides." *See Strickland*, 466 U.S. at 689 (internal citation omitted); and 2) the CCA has already rejected the notion that, "because the [applicant]'s trial attorneys failed to exercise a peremptory challenge against [a juror] and thereby failed to preserve their challenge for cause against her for appeal, they necessarily performed deficiently in contemplation of *Strickland*," even assuming the juror was biased. *Morales*, 253 S.W.3d at 698. This Court, too, rejects that assertion. Thus, the Court concludes Applicant's conclusory briefing fails to show by a preponderance of the evidence that his counsel was deficient.

906. More importantly, the Court concludes the evidence adduced at the evidentiary hearing establishes Applicant could not meet that burden even if he had properly pled it.

907. Here, Applicant's counsel "was put to the choice whether to preserve the error (if any) in the trial court's denial of that challenge for cause by peremptorily striking" Helm and Stiever, "or instead to exhaust all his peremptory challenges against other prospective jurors whom he deemed, for whatever reasons, more objectionable." *Morales*, 253 S.W.3d at 698. The Court concludes that counsel's decision to prioritize keeping objectionable jurors off the jury rather than appellate preservation for the sake of doing so was "a reasonable tactical choice, albeit a difficult one." *Id*.

908. In particular, the Court concludes counsel made a deliberate, strategic choice, based on their notes, their memories, their impressions of the jurors' demeanors, and their overall trial strategy, to not exercise a strike against juror Helm, even though they had one to use, because they thought he was a less objectionable juror than the jurors that followed him. Counsel was "well aware of the procedure for preserving a denial of a challenge or [sic] cause for appeal and that [they] made a" decision not to strike Helm. *See Morales*, 253 S.W.3d at 698. This decision was reasonable.

909. Similarly, the Court concludes counsel made a reasonable tactical choice to exercise five of their peremptory strikes against jurors they had *not* previously challenged for cause (Whitman, Creekmore, Chouinard, Bach, and Badger), thereby leaving too few strikes to challenge Stiever, who they *had* previously

challenged for cause. The Court concludes counsel had a reasonable, strategic reason for each of those five strikes.

910. The Court concludes that Applicant fails to rebut the strong presumption that counsel acted reasonably.

Applicant was not prejudiced

911. Further still, Applicant fails to prove by a preponderance of the evidence that he was prejudiced by any alleged deficiency. On this issue, too, his briefing fails to even suggest a proper basis for ascertaining that, instead relying on success on appeal for prejudice. But that is the wrong standard. Indeed, as with IATC-*Batson* claims, the relevant prejudice inquiry is *not* whether a claim would have been successful on appeal but for trial counsel's alleged deficiencies. *See* Ground 6a, *supra* (citing *Batiste*, 888 S.W.2d at 15). Rather, to prove prejudice, Applicant must show that the seated jurors could not have "render[ed] a fair and impartial verdict in the trial of a minority defendant." *Batiste*, 888 S.W.2d at 14–15; *see also Reyna v. State*, No. 03-10-00231-CR, 2011 WL 2621314, at *4 (Tex. App.—Austin July 1, 2011, pet. ref'd) ("Reyna cites no evidence and makes no argument that the failure to preserve the challenge-for-cause issue led to the seating of an objectionable juror or, more important, that but for trial counsel's failure to preserve that issue there is a reasonable probability that the outcome of the proceeding would have been different."); *Mitschke v. State*, No. 14-99-00747-CR, 2001 WL 931182, at *3 (Tex. App.—Houston [14th] Aug. 16, 2001) (holding "no reasonable probability that the outcome of the trial would have been different" if counsel had preserved the denial of a challenge for cause of a juror who had been seated on the jury), *aff'd on different grounds by* 129 S.W.3d 130 (Tex. Crim. App. 2004); *Castaneda v. State*, Nos. 05-99-00123-CR, 05-99-00124-CR, 2000 WL 792391, at *2 (Tex. App.—Dallas June 21, 2000, pet. ref'd) ("Appellant's assertion that a different juror may have influenced the jury to reach a different conclusion does not reach the level of a reasonable probability. Consequently, appellant has not established he was prejudiced by trial counsel's alleged failure to preserve for review the challenge for cause."). Applicant fails to address any effect on the trial at all.

912. Even assuming that prejudice can be assessed with reference to success on appeal, the Court concludes Applicant would still not be able to prove such because it is far too speculative. Simply put, there are too many links on the causal chain between trial counsel's actions during voir dire and the likelihood that he would have won on appeal. In fact, the Court concludes Applicant fails at the outside to prove at least one link in that chain even as an evidentiary matter: he proffered no evidence at the evidentiary hearing establishing that Applicant's appellate counsel *would* have raised trial-court error claims predicated on the denials for challenges for cause had they been properly preserved. And there is nothing in the record from which that fact can even be

assumed: appellate counsel did not raise *any* trial-court-error claims related to the denials of the challenges for cause. The Court concludes there is no evidence in the record upon which a likelihood of success on appeal could be established.

913. The Court finally concludes that, even looking at the appropriate prejudice standard, Applicant fails to show that any of the fourteen jurors that counsel unsuccessfully challenged for cause were biased as a matter of state law. As such, he certainly cannot show a reasonable probability that the trial would have had any different result had Helm and Stiever not sat on his jury.

914. The Court recommends that Ground 6b be denied.

GROUND SEVEN—PASSAGE OF TIME

Applicant's Allegation

915. Applicant argues that his death sentence violates his due-process rights because, due to the passage of time between his capital murder and his trial, his trial counsel were unable to fully investigate and present mitigation evidence in defense at the punishment phase of trial. Appl. 212–17.

916. The Court did not designate this claim for further factual development.

Factual Findings

917. The Court finds Applicant did not object or file a motion predicated on his passage-of-time argument at trial.

918. The Court finds Applicant did not raise his passage-of-time argument on direct appeal.

919. The Court finds trial counsel presented mitigating evidence about Applicant's childhood through family members, friends, and an expert who spoke with Applicant and Applicant's sister. *See generally* 45 RR; 46 RR.

920. The Court finds that the passage of time between Applicant's capital murder and the trial is not due to any misconduct of the State but is rather due to Applicant evading investigation for nearly four decades.

Conclusions of Law

Procedural Bar

921. Because Applicant did not raise his passage-of-time argument at trial, the Court concludes Applicant is procedurally barred from advancing such habeas

grounds. Tex. R. App. P. 33.1(a); *Ex parte Pena*, 71 S.W.3d at 338; *Ex parte Bagley*, 509 S.W.2d at 332.

922. The Court further concludes that, because Applicant could have, but did not, raise his passage-of-time claim on direct appeal, he is barred from raising such ground on habeas review. *Ex parte Gardner*, 959 S.W.2d at 190–91 (holding that writ of habeas corpus is not substitute for direct appeal).

Alternative Merits

923. The Court concludes that Applicant fails to show by a preponderance of the evidence that the passage of time between his capital offense and his trial violates his due process rights.

924. Applicant fails to cite any authority showing that a passage of time violates his due-process rights. The Court concludes that no such authority exists. *See State ex rel. Watkins*, 352 S.W.3d 493, 500 (Tex. Crim. App. 2011) ("The problem with Reed's legal position is that the United States Supreme Court has not recognized a due-process claim that would preclude a retrial (or preclude the availability of a particular punishment) after a lengthy delay on appeal."); *State v. Azania*, 865 N.E.2d 994, 1009 (Ind. 2007) (holding that the unavailability of mitigation witnesses due to delay does not rise "to the level of depriving Azania of his due process rights). The Court thus concludes that Applicant seeks a new rule of criminal procedure that is barred by nonretroactivity principles because his conviction is final. *See Teague v. Lane*, 489 U.S. 288, 310 (1999) (plurality opinion) (holding that, unless a new constitutional rule falls within one of the enumerated exceptions, the new rule "will not be applicable to cases which have become final before the new rule[is] announced"); *Ex parte De Los Reyes*, 392 S.W.3d 675, 679 (Tex. Crim. App. 2013) (the CCA "follows *Teague* as a general matter of state habeas practice").

925. In the alternative, the Court concludes that, even if the passage of time could violate a capital defendant's due process rights by depriving him of the ability to prove mitigation, Applicant fails to show such constitutional harm as applied to him because he was able to find several witnesses who knew about his personal characteristics. Applicant cannot show he was deprived of his ability to show the jury mitigating evidence due to the death of certain potential mitigation witnesses when other witnesses—who had the same information about Applicant—were still alive. *See Watkins*, 352 S.W.3d at 503 ("The fact that Reed might not be able to present his mitigation case (if he is found guilty in the retrial) in precisely the form he would prefer does not violate his constitutional rights.").

926. The Court recommends that Ground Seven be denied.

GROUND EIGHT—MITIGATION JURY INSTRUCTION

Applicant's Allegation

927. Applicant alleges that his death sentence should be vacated because the punishment-phase jury instruction unconstitutionally restricted the evidence the jury could determine was mitigating. Appl. 217–23.

928. The Court did not designate this clam for further factual development.

Factual Findings

929. The Court finds Applicant did not object to the punishment jury charge at trial. 47 RR 131.

930. The Court finds Applicant did not raise a claim that the punishment charge unconstitutionally limited the jury's consideration of evidence on direct appeal.

931. Special issue two in the Court's jury charge at punishment instructed the jury regarding their consideration of mitigating evidence. 2 CR 331–32.

932. The Court's mitigation special issue complied with the requirements of Tex. Code Crim. Proc. art. 37.071 § 2(e), (f).

Conclusions of Law

Procedural Bar

933. Because Applicant did not object to the constitutionality of Special Issue Two at trial, the Court concludes Applicant is procedurally barred from advancing such habeas claims. *See* Tex. R. App. P. 33.1(a); *Ex parte Pena*, 71 S.W.3d at 338; *Ex parte Bagley*, 509 S.W.2d at 332.

934. The Court further concludes that, because Applicant could have, but did not, raise on direct appeal a claim concerning the mitigation jury instruction, Applicant is barred from raising such a claim on habeas review. *Ex parte Gardner*, 959 S.W.2d at 190–91 (holding that writ of habeas corpus is not substitute for direct appeal).

Alternative Merits

935. The Court concludes that the complained-of language in the mitigation special issue did not unconstitutionally narrow the definition of mitigating evidence to that which reduced Applicant's moral blameworthiness. *See Williams v. State*, 301 S.W.3d 675, 694 (Tex. Crim. App. 2009) (rejecting claim that Texas death penalty scheme unconstitutional based on its definition of mitigating

evidence allegedly limiting Eighth Amendment concept of "mitigation" to factors that render defendant less morally blameworthy for commission of capital murder); *Roberts v. State*, 220 S.W.3d 521, 534 (Tex. Crim. App. 2007).

936. Special Issue Two posed no barrier to the jury giving effect to any of Applicant's alleged mitigating evidence. *Roberts*, 220 S.W.3d at 534.

937. The Court recommends that Applicant's eighth claim be denied.

GROUND NINE—CUMULATIVE ERROR

Applicant's Allegations

938. In his ninth ground for relief, Applicant argues that the cumulative impact of the errors he alleges warrant relief. Appl. 223–25.

939. The Court did not designate this claim for further factual development.

Conclusions of Law

940. The Court concludes that none of Applicant's grounds for relief should be cumulated in their impact, because Applicant fails to show error. *See Gamboa v. State*, 296 S.W.3d 574, 585 (Tex. Crim. App. 2009) ("[W]e have never found that 'non-errors may in their cumulative effect cause error.'" (quoting *Chamberlain v. State*, 998 S.W.2d 230, 238 (Tex. Crim. App. 1999))).

941. The Court concludes that, while it did find the State's representation of Dr. Bell's death and Dr. Hirsch's representation of Applicant's PCL-R scores were false, those grounds for relief were procedurally defaulted, as Applicant knew about the falsity of those representations at trial. Because they are procedurally defaulted on habeas review, their effect cannot be cumulated with other constitutional error. *See Gamboa*, 296 S.W.3d at 585.

942. The Court concludes in the alternative that, even if the State's representation of Dr. Bell's death and Dr. Hirsch's representation of Applicant's PCL-R scores were not procedurally defaulted on habeas review, the impact of those representations could still not be cumulated with the impact of any other grounds. Both of those two false representations involved a different stage of trial. Thus, their prejudicial effect, if any, cannot be combined with one another. And because the Court found no other error in Applicant's remaining grounds for relief, the impact of those two representations cannot be cumulated with any such grounds. *See Gamboa*, 296 S.W.3d at 585.

943. The Court recommends that ninth claim be denied.

RECOMMENDATION

The court recommends that Applicant's Application for Writ of Habeas Corpus be denied.

Signed this _____ day of _____, 2022.

_____
Sid Harle
Presiding Judge
274th District Court
Hays County, Texas

Sitting by Assignment

Writ Cause No. CR-10-1063-C-WHC1

	§	IN THE 274TH DISTRICT COURT
Ex parte	§	
WILLIE ROY JENKINS	§	OF
Applicant.	§	
	§	HAYS COUNTY, TEXAS

ORDER

The clerk is hereby ORDERED to prepare a state habeas record in writ cause number CR-10-1063-C-WHC1 (trial court cause number CR-10-1063-A) and transmit the same to the Court of Criminal Appeals, as provided in Article 11.071 of the Texas Code of Criminal Procedure. The state habeas record shall include certified copies of:

1. All of the parties' pleadings filed in writ cause number CR-10-1063-C-WHC1 (trial court cause number CR-10-1063-A) since July 9, 2015;

2. All transcripts and evidence from evidentiary hearings in writ cause number CR-10-1063-C-WHC1 (trial court cause number CR-10-1063-A) since July 9, 2015;

3. The recommended findings of facts and conclusions of law denying relief made by this court in writ cause number CR-10-1063-C-WHC1 (trial court cause number CR-10-1063-A);

The clerk is further ORDERED to send a copy of the court's recommended findings of fact and conclusions of law to the parties:

Gwendolyn Vindell
Post Office Box 12548, Capitol Station
Austin, Texas 78711
Gwendolyn.vindell2@oag.texas.gov

Tara Witt
Office of Capital and Forensic Writs
1700 N. Congress Ave., Suite 460
Austin, Texas 78701
Tara.Witt@ocfw.texas.gov

Signed this _____ day of _____, 2022.

_____
Sid Harle
Presiding Judge
274th District Court
Hays County, Texas

Sitting by Assignment

CERTIFICATE OF SERVICE

I certify that on March 24, 2022, a true and correct copy of the foregoing document was served through the State's electronic service provider and the Court's electronic filing manager to all counsel of record:

Tara Witt
Office of Capital and Forensic Writs
1700 N. Congress Ave., Suite 460
Austin, Texas 78701
Tara.Witt@ocfw.texas.gov

/s/ Gwendolyn S. Vindell
GWENDOLYN S. VINDELL
Assistant Attorney General/
Assistant District Attorney
Hays County, Texas

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Lynette Karch-Schroder on behalf of Gwendolyn Vindell2
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Envelope ID: 62909788
Status as of 3/24/2022 10:49 AM CST

Associated Case Party: The State of Texas

Name	BarNumber	Email	TimestampSubmitted	Status
Ali M.Nasser		ali.nasser@oag.texas.gov	3/24/2022 9:57:33 AM	SENT
Gwendolyn Vindell		Gwendolyn.Vindell@oag.texas.gov	3/24/2022 9:57:33 AM	SENT

Case Contacts

Name	BarNumber	Email	TimestampSubmitted	Status
Tara Witt	24086945	tara.witt@ocfw.texas.gov	3/24/2022 9:57:33 AM	SENT

APPENDIX C

Order, *Ex parte Jenkins*, No. WR-86,569-01 (Tex. Crim. App. Mar. 1, 2023)

IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-86,569-01

EX PARTE WILLIE ROY JENKINS, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS IN CAUSE NO. CR-10-1063-C-WHC1 IN THE 274TH JUDICIAL DISTRICT COURT HAYS COUNTY

***Per curiam*. YEARY and SLAUGHTER, JJ., concurred.**

O R D E R

We have before us an initial application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071.[1]

In June 2013, a jury convicted Applicant of a 1975 capital murder for committing murder in the course of committing aggravated rape. *See* TEX. PENAL CODE ANN. § 19.03(a). The jury answered the special issues submitted under Article 37.0711 and the trial court, accordingly, set Applicant's punishment at death.

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

This Court affirmed Applicant's conviction and sentence on direct appeal. *Jenkins v. State*, 493 S.W.3d 583 (Tex. Crim. App. 2016). On July 9, 2015, Applicant filed in the convicting court this, his initial Article 11.071 application for a writ of habeas corpus, in which he raises nine claims. According to defense counsel, new developments have arisen regarding the DNA evidence presented in the case.[2]

In light of this information, we remand this case to the trial court and instruct that court to consider the alleged new developments discussed in Applicant's Motion to Stay the Article 11.071 Proceedings which was filed in this Court and determine whether those developments affect the claims Applicant raised in his initial writ application. After additional investigation or development of the claims, if any is necessary, the court shall also make additional and/or different findings of fact and conclusions of law, if necessary.

Any additional development of these claims, along with any findings and conclusions issued by the Court, shall be completed and the record returned to this Court within 180 days of the date of this order. Any extensions of this time shall be requested by the trial court and obtained from this Court.

It has also come to our attention that although proposed findings of fact and conclusions of law and the trial court's initial findings and conclusions have been made and filed, we have not received these portions of the writ record. Therefore, we order the clerk to immediately forward to this Court any parts of the record not previously

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[2] *See* Applicant's Motion to Stay Article 11.071 Proceedings.

forwarded, and to forward as soon as possible any additional pleadings, documents, hearing records, and findings and conclusions filed or made pursuant to this remand.

IT IS SO ORDERED THIS THE 1st DAY OF MARCH, 2023.

Do Not Publish

APPENDIX D

State District Court's Supplemental Findings of Fact and Conclusions of Law, February 26, 2024

Writ Cause No. CR-10-1063-C-WHC1

Ex parte	§	IN THE 274TH DISTRICT COURT
	§	
WILLIE ROY JENKINS	§	OF
Applicant.	§	
	§	HAYS COUNTY, TEXAS

SUPPLEMENTAL FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to an order of the Court of Criminal Appeals entered on March 1, 2023, the Court submits the following findings of fact and conclusions of law:

Factual Findings

Procedural background

1. On May 31, 2013, Applicant Willie Jenkins was found guilty of capital murder for the 1974 rape and murder of Sheryl Norris. On June 13, 2013, based on the jury's answers to special issues, he was sentenced to death.

2. On July 9, 2015, Applicant's habeas counsel filed his initial application for post-conviction writ of habeas corpus pursuant to Article 11.071 of the Texas Code of Criminal Procedure.

3. In his initial writ, Applicant raised two grounds for relief related to the presentation of DNA evidence at his trial. First, he argued in ground 1 that the State presented false testimony when: 1) State's witness Javier Flores testified that nothing could be gained from further testing of blood recovered from the crime scene, even with newer testing techniques; and 2) the State argued during closing argument that the DNA profile operated as a "date and timestamp" of Applicant's presence. Appl. 59–63. Second, he argued in ground 2 a multipart ineffective-assistance-of-trial-counsel (IATC) claim for failure to present a DNA expert during the guilt phase of Applicant's trial. Appl. 73–87. Specifically, he argued that a DNA expert could have testified that: 1) the DNA linking Applicant to Norris's rape and murder was consistent with a sexual encounter the day before her death; 2) if Applicant was a secretor, the ABO blood typing results were inconsistent with sexual contact with Norris shortly before her death; 3) the DNA on the blouse she was wearing when she died was not a "date and timestamp" for the murder; 4) additional avenues of DNA testing could've been conducted; 5) the lack of a complete profile for Norris could've affected the interpretation of the DNA results. Appl. 78–87.

4. The State filed an answer contesting Applicant's claims, and the Court held a seven-day evidentiary hearing in 2021 on Applicant's IATC claims, including the above.

5. On May 12, 2022, this Court adopted the State's March 24, 2022 proposed findings of fact and conclusions of law (FFCL). Trial Court's Order Adopting State's Prop. FFCL 4–7.

6. As to the DNA-related factual allegations Applicant raised in ground 1, this Court found that Flores's testimony about "newer testing" was directly related to four blood samples collected from the bathroom at the scene of the murder. *See* FFCL 52–53 ¶¶172–75. Flores testified that he was not able to get "a DNA result" from any of those stains, and he later testified on cross-examination that he did not think the later, more sensitive Short Tandem Repeat testing would have yielded a different result. *Id.* at 52–53 ¶¶173, 175. This Court found that Flores's opinion testimony was not proven false by Applicant's postconviction expert's mere speculation to the contrary. *Id.* at 55 ¶¶182–83, 57 ¶196. The Court also concluded that, even if Applicant could show falsity, he failed to show the false testimony was material. *Id.* at 57–58 ¶¶197–201.

7. Similarly, the Court found that Applicant's complaint in ground 1 about the State's "date and timestamp" closing argument was not false testimony because it was argument, not evidence, and thus could not be the basis of a false testimony claim. *See* FFCL 56 ¶184, 57 ¶195 (citing *Cary v. State*, 507 S.W.3d 761, 766 (Tex. Crim. App. 2016) (noting that, in a sufficiency-of-the-evidence analysis, "the arguments of the parties are of no consequence because arguments are not evidence")). The Court also concluded that, even if Applicant could show falsity, he failed to show the false testimony was material. *Id.* at 57–58 ¶¶197–201.

8. As to the DNA-related IATC claim raised in ground 2, the Court found that trial counsel's strategic decision not to present a DNA expert was reasonable. FFCL 85–91 ¶¶344–63. The Court concluded that Applicant's trial counsel were not deficient and that Applicant was not prejudiced. *Id.* at 93–96 ¶¶377–93.

9. The Court recommended that Applicant's claims be denied and ordered the state habeas record, along with the FFCL, be forwarded to the CCA.

10. On January 19, 2023, Applicant filed in the CCA a motion to stay his Article 11.071 proceedings based on new developments in the DNA evidence since his trial. The State opposed.

11. On March 1, 2023, the CCA entered an order remanding the case to this Court with instructions to "consider the alleged new developments discussed in Applicant's Motion to Stay" and to "determine whether those developments affect the claims Applicant raised in his initial writ application." Order 2, *Ex parte Jenkins*, No. WR-86,569-01 (Tex. Crim. App. Mar. 1, 2023) (Order). The CCA ordered the Court to, if necessary, conduct additional investigation or factual development and enter additional findings of fact and conclusions of law. *Id.* The CCA ordered that such be done within 180 days of its order or by August 28, 2023.

12. On requests from this Court, the CCA extended the time for this Court to complete the remand proceedings to February 27, 2024.

Post-trial developments in the DNA evidence in Applicant's case

13. The facts of Applicant's offense are summarized in the Court's FFCL. *See* FFCL 1–6.

14. On August 21, 2015, the Texas Forensic Science Commission published a communication to the Texas criminal justice community informing them of possible DNA mixture interpretation issues. *See* Supp. FFCL Ex. A, at 1.

15. Pursuant to that communication, the Hays County District Attorney's Office requested on or around May 30, 2017, that the Texas Department of Public Safety (DPS) evaluate whether such issues might affect the DNA results in Applicant's case. *Id.*

16. On September 7, 2017, DPS reported that Applicant's "case may benefit from reinterpretation." *Id.*

17. In July 2022, DPS informed the parties that, due to its use of new, more sensitive DNA testing, it had detected low levels of contamination in the reagent blank associated with the epithelial cell fraction of the vaginal swab obtained from Norris's autopsy. Supp. FFCL Ex. B, 1, 3. The DNA profile obtained from the epithelial cell fraction had been used as the known DNA profile for the victim Norris. DPS inquired of the parties whether there was any other evidence from which a DNA profile for Norris could be obtained since, without one, the reinterpretation of the mixture sample from the blouse Norris was wearing when she died could not be completed. *See id.* at 1.

18. The State requested that DPS proceed with the reinterpretation of the mixture on the blouse using the current known profile of Norris on December 21, 2022.

19. On June 27, 2023, DPS issued a report detailing the results of the reinterpretation, including:

a) Applicant cannot be excluded as a contributor to the sperm cell fraction of the vaginal slide collected from Norris's autopsy, and the likelihood that it was him is even greater than testing showed at the time of trial. *Compare* Supp. FFCL Ex. A, at 5 (reporting probabilities in the septillions), *with* FFCL 5 (reporting probabilities in the quadrillions and quintillions).

b) The partial DNA profile from the epithelial cell fraction of the vaginal slide is now consistent with a mixture of contributors, and because it is not a single source, it cannot be used as an alternate known profile for Norris. Supp. FFCL Ex. A, at 1–2, 5.

c) The DNA profile obtained from the white blouse Norris was wearing when she died is also consistent with a mixture of at least three contributors, but without a known profile from Norris, a comparison cannot be made. *Id.* at 2, 6.

20. The low-level contamination that was detected by DPS in 2022 is unrelated to these new results. *See* Supp. FFCL Ex. C, at 1 ("This contamination did not affect the case, as the associated sample was not used for analysis, due to being unsuitable for use."). The epithelial cell fraction cannot be used as a known DNA profile for the victim because it is a mixture, not because the associated reagent blank contained low levels of contamination. *See* Supp. FFCL Ex. A, at 2 ("Because the epithelial cell sample is not a single source profile, it cannot be used as an alternate known DNA profile for the victim.").

21. In any event, the new developments in the DNA—the detected contamination and the new DNA results—were obtained using a newer, more sensitive testing kit called Qiagen Investigator 24plex QS. *Id.* at 1. Neither the contamination nor the mixture in the epithelial cell fraction had been detected during prior testing in this case, and DPS's inability to interpret the cutting from the blouse is a result of the newly-detected mixture in the epithelial cell sample. *Id.* at 1–2; *see also* 39 Reporter's Record (RR) 123, 209 (the reagent blank associated with the epithelial cell fraction of the vaginal smear displayed no results when tested in 1997); 49 RR at State's Exhibit 79a p.2 (showing "NR" for reagent blanks of sperm cell fraction (SP) and epithelial cell fraction (EC)).

22. DPS did not start using the 24plex kit until 2017, four years after Applicant's trial. Supp. FFCL Ex. A, at 1.

23. The kits used for prior testing in this case were less sensitive than the 24plex kit, and the detection of contamination as well as the new DNA results are explained by the increased sensitivity. *Id.* at 2.

24. On July 6, 2023, the State informed the Court that the DNA reinterpretation process was complete.

25. On July 11, 2023, the State moved the Court to terminate the remand proceedings because the post-trial DNA developments have no impact on the claims raised in Applicant's initial writ. *See* State's Mot. Terminate Remand Proc. 2 (filed July 11, 2023). In support of its motion, the State attached a July 11, 2023 affidavit from DPS DNA Section Supervisor Allison Heard, which is attached to these supplemental findings as Exhibit A. The State also attached a July/August 2022 email exchange between the parties and DPS, which is attached to these supplemental findings as Exhibit B.

26. On the same date that the State moved to terminate the proceedings, Applicant moved the Court to seek an extension of the remand deadline from the CCA and for discovery from DPS. Applicant's Mot. for Trial Ct. to Seek Ext. of Time from CCA & Mot. DNA Disc. (filed July 11, 2023).

27. The Court held a hearing on the parties' motions on August 3, 2023. Supp. FFCL Ex. D. The Court denied the State's motion to terminate the remand proceedings and granted Applicant's motions to seek an extension of time and for discovery. *Id.* at 22.

28. The parties received copies of Applicant's requested discovery from DPS shortly after the hearing.

29. The State then filed a renewed request for this Court to terminate the remand proceedings. *See* State's Renewed Mot. Terminate Remand Proc. (filed Nov. 9, 2023).

30. This Court held a hearing on the State's motion on November 21, 2023. *See* Supp. FFCL Ex. E. At that hearing, Applicant requested another extension of time so he could obtain documents from DPS that it had not previously provided. *Id.* at 6–7. The State agreed to withdraw its renewed motion to terminate the remand proceedings and to permit another extension of time if the Court entered a scheduling order. *Id.* at 14–15. The Court granted Applicant's request and entered an order requiring the parties to submit a status report within thirty days and proposed FFCL within sixty days. *Id.*; *see also* Prop. Sched. Order (entered Nov. 30, 2023).

31. The parties filed a joint status report informing the Court that DPS had provided the parties with the remaining discovery. Jnt. Status Rep. Regarding DPS Disclosure of Disc. Materials 2 (filed Dec. 21, 2023). The Court

subsequently extended the parties' deadline to file proposed FFCL another ten days. Am. Sched. Order (entered Jan. 23, 2024).

32. On February 1, 2024, each party submitted its own proposed FFCL. With his proposed FFCL, Applicant attaches a January 30, 2024 affidavit from DPS DNA Section Supervisor Allison Heard, which is attached to these supplemental findings as Exhibit F.

Relation to Applicant's claims

33. After reviewing Applicant's initial application for writ of habeas corpus, the parties' pleadings, all exhibits, the Court's FFCL, the CCA's March 1, 2023 Order, and the parties' proposed FFCL, the Court finds that the post-trial DNA developments are unrelated to the claims raised in Applicant's initial writ.

34. The Court finds the 2023 and 2024 affidavits of Allison Heard to be credible. *See* Supp. FFCL Exs. A, F.

35. The Court finds that neither the contamination nor the new DNA results are related to the factual allegations Applicant raised in his false testimony claims in ground 1. The contamination detected in the reagent blank of the epithelial cell fraction and the new DNA results interpreting the mixture samples from the same and the blouse are unrelated to whether testimony regarding blood samples from in and around Norris's apartment was false. Similarly, any change in the DNA results is unrelated to this Court's conclusion that the State's "date and timestamp" closing argument fails as a matter of law because it was not evidence.

36. The Court finds that neither the contamination nor the new DNA results are related to the factual allegations Applicant raised in his IATC claims in ground 2. The Court finds that Applicant's claims were predicated on facts that trial counsel knew or could have been aware of at trial, and the post-trial developments in the DNA evidence could not have been known to trial counsel at trial. The Court finds that trial counsel could not have presented at Applicant's 2013 trial the fact that later, more sensitive testing kits detected contamination or obtained different results because such results did not exist at the time of Applicant's trial.

37. Because the post-trial developments in the DNA evidence are unrelated to Applicant's initial writ claims, the Court finds that any factual allegations Applicant would now raise predicated on those developments would be new.

38. The Court notes that on page 5 ¶¶ 25–27 of Allison Heard's 2024 affidavit, *see* Supp. FFCL Ex. F, she discusses DPS's interpretation guidelines from 2010–2012 as they might have applied to resolving a major contributor in a

mixture sample in 2010. The Court finds that this discussion exceeds the scope of the CCA's remand, which was limited to *new* post-trial developments in the DNA evidence. The Court finds that those 2010–2012 guidelines are not related to the new post-trial DNA testing because they were available at the time of Applicant's trial in 2013. The Court further finds that any claim predicated on the use of those guidelines at trial is unrelated to the claims raised in Applicant's initial writ. The Court finds that any factual allegations Applicant would now raise predicated on the use of the 2010–2012 at trial would be new.

Conclusions of Law

39. The Court concludes that, because the post-trial developments in DNA evidence are unrelated to Applicant's claims, those developments have no effect on the claims Applicant raised in his initial writ.

40. The Court concludes that neither the contamination detected in the reagent blank, the new DNA results, nor the 2010–2012 DPS interpretation guidelines have any effect on whether the State presented false testimony about blood samples from in and around Norris's apartment because the DNA samples at issue are entirely distinct.

41. The Court concludes that neither the contamination, the new DNA results, nor the 2010–2012 DPS interpretation guidelines have any effect on whether the State's "date and timestamp" closing was false because such argument is not evidence.

42. The Court concludes that post-trial developments in DNA (specifically, the new results and the contamination) can likewise have no effect on trial counsels' decisions *at the time of trial*, which is the necessary lens through which trial counsel's effectiveness must be judged. *See Strickland v. Washington*, 466 U.S. 668, 689 (1986) ("A fair assessment of attorney performance requires that every effort be made to eliminate the distorting effects of hindsight, to reconstruct the circumstances of counsel's challenged conduct, and to evaluate the conduct from counsel's perspective *at the time*." (emphasis added)); *Ex parte Flores*, 387 S.W.3d 626, 633–34 (Tex. Crim. App. 2012) ("Both prongs of the *Strickland* test are judged by the totality of the circumstances as they existed at trial, not through 20/20 hindsight.").

43. The Court concludes that any new factual allegations or claims predicated on the post-trial developments in DNA or on the 2010–2012 DPS interpretation guidelines would be untimely amendments to Applicant's initial writ, which means any such claims would be subsequent. Tex. Code Crim. Proc. art. 11.071 § 5(f) ("If an amended or supplemental application is not filed within the time specified under Section 4(a) or (b), the court shall treat the application as a

subsequent application under this section."); *id.* § 4(a) (an application must be filed with 180 days of postconviction counsel's appointment or forty-five days after the state files its brief on direct appeal, whichever is later); *see also Ex parte Jennings*, 662 S.W.3d 379, 379 n.1 (Tex. Crim. App. 2018) ("Because the 'supplement' to the application was filed after the time allowed in Article 11.071 for filing an initial application and because it raised a new claim, the 'supplement' was designated a subsequent application.").

44. The Court concludes that because any amendments would constitute a subsequent application, the Court lacks jurisdiction to consider or act upon such allegations unless and until the CCA permits it. The Court is only permitted to "immediately" forward any subsequent application to the CCA, who shall, upon receipt, "determine whether the requirements of [§ 5(a)] have been satisfied." Tex. Code Crim. Proc. art. 11.071 §§ 5(b)(3), 5(c). This Court "may not take further action on the application before" the CCA finds that the requirements of § 5 have been satisfied. *Id.* at § 5(c).

45. The Court concludes that, because it has no jurisdiction over any subsequent claims Applicant might raise predicated on the new DNA developments or the 2010–2012 DPS interpretation guidelines, the remand proceedings should be terminated and the case returned to the CCA for resolution of the initial writ.

The Court hereby ORDERS the Hays County District Clerk to prepare a Supplemental Clerk's Record consisting of this document, as well as the parties' pleadings and exhibits filed since May 12, 2022, and transmit it to the CCA as soon as practicable, but not later than February 26, 2024.

The clerk is further ORDERED to send a copy of the court's findings of fact and conclusions of law to the parties:

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Signed this 26th day of February, 2024.

Sid Harle
Judge Presiding by Assignment
274th District Court
Hays County, Texas