Cause No. 612408-A

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
RICK ALLAN RHOADES, Applicant	§	HARRIS COUNTY, TEXAS

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

The Court, having considered the applicant's application for writ of habeas corpus, the Respondent's/State's Original Answer, the evidence elicited at the applicant's capital murder trial in cause no. 612408, the evidence elicited during all habeas proceedings, and official court documents and records in cause nos. 612408 and 612408-A, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Rick Allan Rhoades, was indicted and convicted of the felony offense of capital murder in cause no. 612408 in the 179th District Court of Harris County, Texas.

2. The applicant was represented during trial by counsel James Stafford and Deborah Keyser.

3. On October 8, 1992, the trial court assessed the applicant's punishment at death by lethal injection after the jury affirmatively answered the first special issue concerning future dangerousness and negatively answered the mitigation special issue (XXXIX R.R. at 99-101).

4. The Court of Criminal Appeals affirmed the applicant's conviction in a published opinion delivered on October 2, 1996. *Rhoades v. State*, 934 S.W.2d 113 (Tex. Crim. App. 1996).

FACTS OF THE CAPITAL MURDER

5. The Court finds that the applicant murdered both Charles Allen and his brother Bradley Allen during the same criminal transaction in Charles Allen's home at 624 Keith Street in Harris County, Texas on September 12, 1991. *See Findings Nos. 6-17, infra.*

6. On the morning of September 13, 1991, David Sanders discovered the bodies of brothers Bradley and Charles Allen when Sanders entered Charles Allen's house after getting no response at the door; Bradley Allen's body was on the other side of his bedroom door and Charles Allen's body was on the bed in the master bedroom, but Sanders had difficulty recognizing Charles Allen because he had been beaten on the head (XXVII R.R. at 41-77).

7. On October 11, 1991, the applicant was arrested as he was leaving a school he had burglarized; the applicant gave his name as Steven Ray Leland, but a Texas Inmate ID for David Alan Marcas with the applicant's photo was later found behind a mirror in the school (XXVIII R.R. at 247-65).

8. After the applicant's October 11TH arrest, he told a detective that he wanted to talk about the murder of two brothers that occurred three of four weeks ago, where one brother was beaten in the head, one was missing $160, and one was still alive when the murderer left (XXVIII R.R. at 270-3, 286).

9. The applicant gave a written statement to Houston Police detectives admitting that he killed Charles and Bradley Allen in the Keith Street house on September 12, 1991 (XXVIII R.R. at 360-413).

10. The applicant entered the Allen house, picked up a metal bar, repeatedly beat the first man [Charles Allen] in the head with a metal bar and stabbed him after the man fell on the bed in the large bedroom; the applicant stabbed the second man [Bradley Allen] when the second man entered the large bedroom and continuing stabbing him when the applicant followed him to his bedroom (XXVIII R.R. at 363-6).

11. The applicant, who cut his thumb at some point, took off his boots, walked around in his socks, took two knives from the kitchen drawer in case the second man – who was still alive – came after him, took clothes from the back bedroom because he had blood all over him, took money from the wallet in the clothes, got his boots, and realized his socks were bloody as he was walking down the driveway after leaving the house (XXVIII R.R. at 366-8).

12. The applicant broke into a vacant apartment at the Park Hollow Apartments, showered, changed clothes, put his socks in a door to the furnace, threw his own clothes in a dumpster, and broke into another vacant apartment where he spent the night (XXVIII R.R. at 368-9).

13. The applicant, who did not realize the second man was dead until he saw a news report the next day about the murders, returned to the vacant apartment so he could retrieve his bloody socks and clean up the blood, but he was unable to get in the apartment because the window had been fixed (XXVIII R.R. at 369).

14. The applicant, in his written statement, claimed that he followed the first man into the house because he thought the man was getting a gun; that the man got a knife from the kitchen drawer and came towards the applicant after the applicant picked up the metal bar; that the man asked what the applicant was doing in his house; and, that the knife the applicant used for the stabbings fell from the man's hand after the applicant beat him with the metal bar (XXVIII R.R. at 364-5).

15. Ken Hilleman, Houston Police Department, collected a bloody kleenex, a piece of pipe insulation that appeared to have blood on it; a sock from the furnace location, blood from the shower wall, blood from the bedroom window sill, and blood from a bedroom mini blind – all from the vacant Park Holland apartment where the applicant showered and changed clothes after the offense (XXVIII R.R. at 428-9).

16. Wesley Charles Seldon, Houston Police Department latent print examiner, made impressions of the applicant's feet wearing socks, compared them to bloody prints from the

floor of Charles Allen's house and determined that they appeared similar (XXVII R.R. at 230-6).

17. DNA testing conducted at the Kleberg Center at Baylor College of Medicine showed that the DNA pattern obtained from the blood on the kitchen floor and on the kitchen drawer in Charles Allen's house matched the applicant's DNA pattern that occurs in approximately 1 in 135 billion people of the Caucasian population and, using a more conservative method of calculation that includes all races, 1 in 66 million people (XXIX R.R. at 467, 508-14).

18. Dr. Aurelio Espinola, Assistant Medical Examiner, testified that Charles Allen suffered five lacerations on the back and right side of his head; two lacerations to his face resulting in a fractured jaw, cheek bone, and nasal bone; two stab wounds to his chest with one penetrating his heart and the other penetrating his lung; and two stab wounds to his back with one penetrating his left lung (XXIX R.R. at 561, 570-1, 581).

19. Dr. Espinola testified that the stab wounds to Charles Allen's chest and back were consistent with being caused by State's Exhibit 29, the knife recovered from the bed in Bradley Allen's bedroom, and Charles Allen's facial injuries and the five lacerations to the back of his head were consistent with being struck with State's Exhibit 30, the black metal weight bar recovered from the bed where his body was found (XXIX R.R. at 561-93, 616-7).

20. Dr. Espinola testified that, based on the amount of blood in Charles Allen's chest cavity, the blows to his head occurred before the stabbings; the cause of Charles Allen's death was one stab wound to his back, blunt trauma to his head, and two stab wounds to his chest (XXIX R.R. at 56[illegible], 584).

21. Dr. Espinola testified that Bradley Allen suffered three stab wounds to his chest with one penetrating his lung, one stab wound to his abdomen, five stab wounds to his back, one stab wound on his left thigh, stab wounds to his upper extremities, and defensive wounds on his arms; his wounds were consistent with being caused by State's Exhibit 29, the knife recovered from his bedroom; the cause of Bradley Allen's death was one stab

wound to his chest and one stab wound to his abdomen that penetrated his spleen and kidney (R.R. at 592-3, 603-6, 615-17).

STATE'S PUNISHMENT EVIDENCE

22. On August 27, 1981, the applicant received probation for unauthorized leave from Navy training; on September 27, 1982, the applicant was court-martialed and sentenced to 90 days hard labor for additional unauthorized absences (XXXIII R.R. at 592).

23. On July 6, 1982, the applicant was convicted of three counts of burglary of a structure and two counts of petit theft in cause no. 81-11174B, in Dade County, Florida and received three years probation, a probation that was later revoked based on the applicant being convicted of auto theft in Iowa in May 1983 (XXXVII R.R. at 129). *See Finding No. 26, infra.*

24. On January 4, 1983, the applicant was arrested in Missouri after driving from Indiana to Iowa in a stolen 1976 Buick Century, along with his fifteen-year old girlfriend Eileen Weber and another couple, after breaking into a church in Des Moines and stealing food, after burglarizing Robert Kilpatrick's farmhouse south of Des Moines and stealing four guns and diamond rings, and after stealing Kilpatrick's 1973 Ford when the stolen Buick Century got stuck in the farmhouse driveway (XXXII R.R. at 225-31, 236-75, 252-7, 298-303).

25. The applicant tried to reach for a gun under the car seat when police approached his car and arrested him in Missouri on January 4, 1983 (XXXII R.R. at 284).

26. On May 9, 1983, the applicant was sentenced in Iowa to five years in prison, probated to two years, for auto theft from Robert Kilpatrick; the applicant waived extradition and was returned to Indiana where he was sentenced to six years in an Indiana prison for burglary on September 2, 1983 (XXXII 130, 265-6, 310-2)(XXXVII R.R. at 151, 154).

27. On March 28, 1984, while the applicant was an inmate in an Indiana prison, a shank was recovered from the applicant's assigned area; on April 4, 1984, a toothbrush

with a razor blade melted in the handle was recovered from the applicant's pillowcase (XXXII R.R. at 338-60, 389-94).

28. On March 28, 1986, the applicant stole a 1986 Sunbird Pontiac from a residence in Longview, Texas, wrecked the car while fleeing from Longview police during a high-speed chase on March 31, 1986, and gave his name as David Allen Johnson after he was tracked down in the woods by a canine unit and arrested (XXXIII R.R. at 446-9, 454-69).

29. On April 9, 1986, the applicant escaped from the Gregg County courthouse after his March 31, 1986 arrest for auto theft and after the adult applicant gave an incorrect birthday so that he was processed as a juvenile (XXXIII R.R. at 471-8),

30. On April 10, 1986, the applicant was arrested by Longview police while burglarizing a Dairy Queen; the applicant had broken the drive-through window and had positioned the safe by the window when police arrived; the applicant, who fled on foot and was caught in the nearby woods, claimed to be sixteen years old and identified himself as David Johnson (XXXIII R.R. at 479-96).

31. On July 18, 1986, the applicant was sentenced to twelve years in prison for the April 10, 1986 burglary of a building – the Dairy Queen – in Gregg County, cause no. 15,684-A (XXXVII R.R. at 128).

32. On February 14, 1989, the applicant pulled a knife and threatened to kill the bouncer at a Pasadena club when he was refused entry; the applicant kept threatening to kill "all of the motherfuckers" when police arrived and he tried to kick out the windows of the patrol unit; the applicant was charged with possession of a prohibited weapon, a switchblade, cause no. 8905578 (XXXIII R.R. at 192-205, 214)(XXXVII R.R. at 126).

33. On March 10, 1989, the applicant was convicted of the offense of theft in cause no. 522688, in the 174TH Harris County District Court and was sentenced to one year in the Harris County Jail; the offense occurred on January 18, 1989 (XXXVII R.R. at 127).

34. On March 13, 1989, the applicant was convicted of possession of a prohibited weapon, a switchblade knife, and was sentenced in County Court at Law #6 in cause no.

8905578, to fourteen days confinement in the Harris County Jail; also, a motion to revoke the applicant's parole was filed (XXXI R.R. at 218)(XXXVII R.R. at 121, 125-6).

35. In November 1989, David Cote made a police report after learning that the applicant, who had been staying with Cote's family at the Park Hollow Apartments, had been making sexual remarks and inappropriately touching his teenage twin daughters (XXXIII R.R. at 518-28).

36. On November 9, 1989, after David Cote made the police report, the angry applicant came to the apartments, screamed at the Cote family, unzipped his pants and took out his penis while calling the girls sluts and whores, and got into a physical fight with David Cote (XXXIII R.R. at 529-32).

37. The applicant fled from police when they arrived at the Park Hollow Apartments; the applicant was charged with retaliation in cause no. 547497, in Harris County, but the Cote family left Houston shortly afterward and, on January 9, 1990, the retaliation charge was dismissed based on a missing witness (XXXIII R.R. at 513-4, 534)(XXXVII R.R. at 133).

38. On March 8, 1990, the applicant was convicted of the offense of evading arrest in cause no. 9008969, and sentenced to fifteen days in the Harris County Jail after fleeing from police in Morgan's Point on March 6, 1990 (XXXIII R.R. at 373-87)(XXXVII R.R. at 124).

39. On April 12, 1990, the applicant and another man burglarized the home of John Botter in Houston, using a Buick Regal stolen from Andrew Barrera; the applicant, driving the stolen Buick, fled from police shortly after leaving the scene and eventually bailed out of the stolen car, ran from officers, and was later found hiding in a dog house (XXXI R.R. at 80-106, 124-30, 171-81).

40. Police recovered a loaded revolver from the driver's seat of the stolen Buick Regal and a brooch and watch belonging to John Botter from the applicant's pockets; the applicant gave his name as David Allen Marcas, David Moore, David Davin and Devin Marcas

and later told the arresting officer that he would have killed him if he had a gun (XXXI R.R. at 116, 125, 133, 163).

41. On May 21, 1990, the applicant was convicted of auto theft in cause no. 562306 and burglary of a habitation in cause no. 562307 in the 228TH District Court and sentenced to five years in TDC in each cause; on May 22, 1990, the applicant was convicted of carrying a weapon in cause no. 9015865 in County Court at Law #6 and sentenced to thirty days in the Harris County Jail (XXXI R.R. at 219)(XXXIII R.R. at 295-6)(XXXVII R.R. at 128, 132).

42. Chris Fitch, who was with the applicant when they evaded police at Morgan's Point in 1990, testified that the applicant contacted him in September, 1991, after the applicant got out of prison; that they met in the back of the Park Hollow Apartments near Keith Street and drank beer; that the applicant showed Fitch a cut on his hand the next day and claimed he got it from jumping a fence; that the applicant kept joking about a slasher being in the neighborhood after the bodies of Bradley and Charles Allen were discovered; and, that the applicant traded his boots for Fitch's Nike tennis shoes (XXXIII R.R. at 564-81).

43. On October 11, 1991, the applicant was arrested while in the process of burglarizing a school and taking items from the school (XXXI R.R. 5-13, 20-7, 29-31).

44. On November 9, 1991, the applicant threw his breakfast tray at his cell door in the Harris County Jail; in July or August, 1992, the applicant yelled obscenities, pounded on his cell door, and later told another jail inmate, "I am going to have to shank me a deputy to get a little respect around here" (XXXI R.R. at 59-71)(XXXIII R.R. at 522-6).

45. Janis Allen Andrews, sister of Bradley and Charles Allen, testified that their mother was not the same after the murder; that their family no longer felt safe; that she, her other brother, and her son had to have counseling after the murder; and, that her son began acting out and not sleeping by himself (XXXIII R.R. at 593-8).

46. Kelly Petersen testified that she and Bradley Allen planned to be married, and she was pregnant with their child when Bradley was murdered (XXXIII R.R. at 599-602).

DEFENSE EVIDENCE AT PUNISHMENT

47. The applicant presented the following punishment witnesses: Meyer Proler, assistant professor of physiology and neurology at Baylor College of Medicine (XXXIII R.R. at 617-31); Patricia Spenny, the applicant's birth mother (XXXIV R.R. at 697-724); Donna Rhoades, the applicant's adoptive mother (XXXIV R.R. at 747-64); Novella Pollard, the applicant's teacher at the Jester Unit (XXXIV R.R. at 818-25); Windel Dickerson, psychologist (XXXIV R.R. at 837-86); and, Ernest Rhoades, the applicant's adoptive father (XXXV R.R. at 893-923). *See Findings Nos. 52-53, infra.*

STATE'S REBUTTAL AT PUNISHMENT

48. David Ritchie, Harris County jailer, testified that the applicant beat on his cell door, yelled obscenities, and resisted efforts to be subdued; the applicant sometimes kicked his cell door for over an hour (XXXV R.R. at 1010-21).

49. Roy Smithy, investigator with the special prosecution unit in Huntsville, testified about prison procedures, classification, and violence in prison (XXXV R.R. at 1024-38).

First and Second Grounds for Relief: applicant's childhood photos

50. Outside the presence of the jury during punishment, trial counsel argued that childhood photos of the applicant, ranging from age four of five to ten with one more recent photo, should be admitted into evidence to humanize the applicant and to help the jury understand the applicant's development "through the various states of his life," and the trial court ruled that the photographs were irrelevant (XXXIV R.R. at 735-40).

51. On direct appeal of the applicant's conviction, the Court of Criminal Appeals rejected the applicant's claim that the trial court erred by refusing to admit the applicant's childhood photos, holding that such photos were not relevant to the applicant's moral blameworthiness concerning the instant offense and the applicant once being a child did not "diminish his moral culpability for the act of murder." *Rhoades,* 934 S.W.2d at 125-6.

52. The applicant presented punishment evidence of his mother's marriage at age sixteen, his being a healthy baby, his father's problems with alcohol and his abuse of the applicant's mother, his parents' separation when the applicant was four and his father's subsequent rape of his mother, his being almost drowned by one of his mother's boyfriends, his mother going to jail for hot checks and her later arrest for theft and burglary, his later adoption by the Rhoades family, his being malnourished when adopted, his hiding food and defecating or urinating in the closet or in drawers after his adoption, his inability to concentrate at school and being prescribed Ritalin, his being jittery and screaming in his sleep after his adoption, his being loving to everyone after his adoption, his being "gung-ho" into sports, his receiving counseling, his being a top student and valedictorian at the Jester Unit, his never being violent while at the Jester Unit, his quitting school and joining the Navy where he was a squad leader in boot camp, and his having an IQ of at least 110 and probably higher (XXXIV R.R. at 697-724, 747-62, 818-23, 842-852)(XXXV R.R. at 899-923).

53. The applicant presented expert punishment testimony through Meyer Proler, assistant professor of physiology and neurology, and Windel Dickerson, psychologist, that the applicant had previously done well in structured environments and that the applicant's EEG suggested the presence of bipolar disorder (XXXIII R.R. at 605-31)(XXXIV R.R. at 837-86).

54. The Court finds that trial counsel were able to present mitigating evidence and to humanize the applicant through punishment testimony concerning his childhood and background, rather than a photo that does not adequately inform the jury of his life.

55. The Court finds that the applicant's childhood photos are not relevant to the issue of whether the applicant would be a threat to society while living in a structured environment and do not show whether he would or would not commit future acts of violence.

56. The Court finds that the applicant argues in his first ground for relief that the excluded photos are expressly relevant to the future dangerousness special issue, but the applicant contradicts himself when he asserts in his nineteenth ground for relief that the excluded photos are "not so clearly within the ambit of the future dangerousness special issue." *Applicant's writ at 31-2, 38, 41, 144.*

57. The Court finds unpersuasive the habeas affidavit of Jo-Ann Williams, a member of the American Art Therapy Association, asserting that the excluded childhood photos of the applicant show that the applicant had normal experiences at a young age and participated in a normal family atmosphere; that he accepted someone as an authority within the structured family environment; and, that he was developing along normal lines in the structure. *Applicant's exhibit A.*

Third Ground for Relief: prohibition of informing jurors re: single hold-out vote
Fourth Ground for Relief: 12/10 Rule

58. At the conclusion of the punishment phase, the trial court instructed the jury that the State must prove the first special issue beyond a reasonable doubt; that the jury shall consider all the evidence admitted at guilt-innocence and punishment; that the jury may not answer the first special issue affirmatively unless the jury agreed unanimously; that the jury may not answer the first special issue negatively unless ten or more jurors agreed; and, that the jury need not agree on what particular evidence supports a negative answer to the first special issue (I-A Cl.R. at 290).

59. At the conclusion of the punishment phase, the trial court instructed the jury that the jury may not answer the mitigation issue "no" unless the jury agreed unanimously; that the jury may not answer the mitigation issue "yes" unless ten or more jurors agreed; and, that the jury need not agree on what particular evidence supports a "yes" answer to the mitigation issue (I-A Cl.R. at 291).

60. The Court finds that the applicant did not object to the punishment charge based on the trial court's instructing the jury that ten or more jurors had to agree in order to answer the future dangerousness issue "no" and to answer the mitigation issue "yes."

61. The Court finds that the applicant did not object to the punishment charge, given pursuant to TEX. CODE CRIM. PROC. art. 37.071, on the basis of the jury not being informed of the result of a single "holdout" vote or on the instructions allegedly misleading the jury as to the effect of a single "holdout" vote, i.e., the 10/12 rule.

62. The Court finds that the Court of Criminal Appeals has previously rejected the contention that the decisions in *Mills v. Maryland,* 486 U.S. 367 (1988), and *McKoy v. North Carolina,* 494 U.S. 433 (1990), are controlling and support the applicant's argument.

Fifth through Ninth Grounds for Relief: furlough testimony

63. Roy Smithy, investigator with the special prosecution unit that investigates and prosecutes all felony offenses that occur in the prison system, testified as a State's rebuttal punishment witness that a capital murderer who receives a life sentence goes through a diagnostic process to determine his classification and housing in prison, the same as inmates convicted of any felony offense other than those who receive the death penalty; that inmates are reclassified periodically depending on their behavior so an inmate who receives a life sentence for a capital murder may move up or down in the classification system; and, that an inmate who receives a life sentence would be in the population with other inmates (XXXV R.R. at 1033-5).

64. Smithy also testified that an inmate who received a life sentence for capital murder could be eligible for furlough if he obtained SAT [state approved trustee 3 status], and that there were different types of furloughs; trial court asked for a running objection to "all of this" and counsel approached the bench (XXXV R.R. at 1036-37).

65. After the trial counsel asked counsel to approach the bench, the appellate record notes that there was an off-the record conference held at the bench and then the court reporter was called to the bench (XXXV R.R. at 1037).

66. According to the affidavits of trial counsel Keyser and Stafford, trial counsel Stafford objected to Roy Smithy's furlough testimony during the off-the record bench conference before the court reporter was called to the bench, and the trial court "admonished" the State concerning the testimony. *State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.*

67. During the recorded portion of the bench conference, trial counsel argued that it was a miscarriage of justice for the prosecutor "to go into this stuff" and not inform the jury that the applicant would be locked up for thirty-five years (XXXV R.R. at 1037).

68. The trial court stated that it did not know "where your objection is in there" but that it did understand what counsel's previous objection was; that the prosecutor had been admonished; and, that the trial court was going to allow the prosecutor to complete her line of questioning after trial counsel again objected to any further questions along this line (XXXV R.R. at 1037).

69. Smith then testified that a furlough was when an inmate is allowed to leave the prison unescorted for such things as a family emergency or a funeral for a day, a weekend, or maybe three days, depending on the circumstances (XXXV R.R. at 1038).

70. During cross-examination, Smithy acknowledged that he was not aware of a furlough being granted to a capital murderer serving a life sentence during Smithy's seven years of employment with the special prosecution unit; Smithy also answered "yes" when asked if furloughs were basically the warden's decision (XXXV R.R. at 1042-3).

71. The Court finds that Smithy did not testify that the applicant would be granted a furlough; instead, Smithy's testimony was about the furlough process in general.

72. The Court finds that the habeas affidavit of Rose Fronckiewicz, TDCJ employee, relating that she was not aware of a capital murderer serving a life sentence being granted a furlough during her five years of employment, does not show that Smithy's testimony is

false and is consistent with Smithy's testimony that he was not aware of a capital murderer serving a life sentence being granted a furlough. *Applicant's exhibit C.*

73. The Court finds that the applicant, through the habeas affidavit of Rosie Fronckiewicz, presents the hearsay assertions of Lon Glenn, retired assistant warden; Jerry McGinty, retired chief of classification; Leroy Montgomery, retired lieutenant; Robert Herrera, assistant warden of the Michael Unit, and John Adamas, assistant warden of the Jester Unit. *Applicant's exhibit C.*

74. The Court finds, based on the Fifth Circuit Court of Appeals' decision in *Hogue v. Johnson,* 131 F.3d 466, 505 (5TH Cir. 1997), that the hearsay assertions in Fronckiewicz's affidavit are not substantive evidence of anything; thus, they are not dispositive to any habeas allegations.

75. The Court finds the following assertions, if made by TDCJ employees, would not render Smithy's testimony false: that an employee was not aware of or did not recollect any capital murderer serving a life sentence being granted a furlough; that a capital murderer serving a life sentence would not be considered for an unescorted furlough; that a specific employee would personally never approve furlough for a capital murderer serving a life sentence; or, that it is unlikely that a capital murderer serving a life sentence would ever achieve State Approved Trusty I status.

76. The Court finds, according to TEX. GOV'T CODE ANN. § 501.006, in effect at the time of the applicant's trial, that temporary furloughs were available to prison inmates and capital murderers serving a life sentence were not excluded in the provision.

77. After the conclusion of the applicant's trial and after trial counsel filed a motion for new trial, trial counsel reminded the trial court that counsel asked for a proffer of the rebuttal witness' testimony concerning prison information (XL R.R. at 11).

78. The Court finds that, during the hearing on the applicant's motion for new trial, the applicant introduced into evidence a 1987 administrative directive concerning furlough procedures that stated an inmate convicted of capital murder would be eligible for an

emergency furlough but not eligible for an appropriate-reason furlough; that the State Classification Committee has the final decision on whether to grant a furlough; and, that the only requirements for an unescorted emergency furlough were that the inmate be a State Approved Trustee who had been in custody for a reasonable period of time with no unresolved immigration detainers, no sexual offense conviction, and no major disciplinary penalties in the prior six months (XL R.R. at 26). *Applicant's MNT hearing exhibit 1.*

79. The Court finds that the only difference between Smithy's testimony and the prison administrative directive is the person or entity who makes the decision to grant a furlough, i.e., the State Classification Committee or warden, and that this administrative difference does not affect the substance of Smithy's testimony about capital murderers serving life sentences being eligible for furlough and is not "materially misleading."

80. The Court finds that Smithy's testimony, which was offered in rebuttal of defense testimony that the applicant would not be a future danger in the structured environment in prison, consisted mainly of information about prison classification and violence in the prison system and was not false or misleading (XXXV R.R. at 1027-43).

81. The Court finds that the testimony about furloughs did not prevent the applicant's jury from considering and giving effect to relevant mitigating evidence and did not render the applicant's sentence of death arbitrary and capricious.

82. The Court finds unpersuasive the assertion that the applicant's jury probably considered and speculated as to whether the applicant would receive a furlough.

83. The Court finds unpersuasive trial counsel's assertion, presented in his habeas affidavit, that the applicant received the death penalty because of Smithy's furlough testimony. *State's Writ Exhibit B, October 5, 2002 affidavit of counsel Stafford*

Tenth through Fourteenth Grounds for Relief: instruction on parole eligibility

84. At the conclusion of the punishment phase of the trial, the applicant requested that a parole eligibility instruction - that the applicant would not be eligible for parole until

he served 35 years - be given to the jury and objected to the charge in the event the instruction was not given; the trial court overruled the request (XXXIX R.R. at 4-5).

85. The Court finds that, at the time of the applicant's 1992 trial, parole law was not within the province of a capital jury. TEX. CODE CRIM. PROC. art. 37.071 (Vernon 1994).

86. On direct appeal of the applicant's conviction, the Court of Criminal Appeals noted that the Court had previously considered and rejected the argument that a trial court erred in refusing to instruct the jury on parole eligibility in capital cases; the Court held the trial court in the applicant's case did not err when it refused to give a parole instruction. *Rhoades,* 934 S.W.2d at 128.

87. The Court finds that the lack of a parole eligibility instruction did not impact the applicant's right to present mitigating evidence.

88. The Court finds baseless the applicant's contention in his eleventh ground for relief that the jury "likely" had a fundamental misunderstanding about the meaning of a life sentence for capital murder without a parole instruction.

89. The Court finds that because life without parole was not a sentencing option for the applicant, the Supreme Court's holding in *Simmons v. South Carolina,* 512 U.S. 154 (1994), is inapplicable to the applicant's case; unlike the capital defendant in *Simmons,* the applicant was not entitled to inform the jury of his parole ineligibility for 35 years.

90. The Court finds that although the applicant repeatedly argues in his tenth through fourteenth grounds for relief that his jury should have been informed of the rule on parole eligibility in the event of a life sentence, the applicant contradictorily acknowledges in his fifth ground for relief that "Texas law has been clear for over two decades: a jury in a capital sentencing procedure may not be provided with information concerning the possibility of parole if a capital defendant is sentenced to life imprisonment." *Applicant's writ at 72.*

Fifteenth Ground for Relief: constitutionality of death penalty/Justice Blackmun's dissent

91. The Court finds that the Court of Criminal Appeals, in *Bell v. State,* 938 S.W.2d 35, 53-4 (Tex. Crim. App. 1996) and in *Lawton v. State,* 913 S.W2d 542, 558 (Tex. Crim. App. 1995), expressly rejected Justice Blackmun's dissenting opinion in *Callins v. Collins,* 510 U.S. 114 (1994), in which Justice Blackmun stated that the "constitutional requirements of 'structured discretion,' as stated in *Furman v. Georgia,* 408 U.S. 238 (1972), and freedom to consider mitigating evidence as expressed in *Penry v. Lynaugh,* [492 U.S. 223 (1989)] are ultimately irreconcilable."

92. The Court finds that the mitigation special issue does not render the Texas death penalty scheme unconstitutional and does not permit the type of open-ended discretion condemned by the Supreme Court in *Furman v. Georgia,* 408 U.S. 238 (1972); instead, it serves as a potential benefit to a capital defendant as it gives the jury a vehicle to consider and give effect to mitigating evidence and to find that a life sentence, rather than a death sentence, is warranted.

Sixteenth Ground for Relief: death penalty in Harris County/assignment of court

93. The Court finds, based on trial counsel James Stafford's October 5, 2000 affidavit, that trial counsel Stafford was not aware at the time of the applicant's trial of any Harris County trial court instructing jurors about the thirty-five year parole rule. *See State's Writ Exhibit B, October 5, 2000 affidavit of trial counsel Stafford.*

94. The Court finds, based on prosecutor Carol Davies October 23, 2000 affidavit, that prosecutor Davies asserted that few, if any, trial courts were giving a parole eligibility instruction in a capital trial at the time of the applicant's trial. *See State's Writ Exhibit C, October 23, 2000 affidavit of prosecutor Davies.*

95. The Court finds unpersuasive the habeas affidavits that the applicant presents of other defense counsel stating that there were some judges who instructed the jury on parole eligibility in capital cases prior to the change in law that allowed the submission of

such instruction; the Court finds that what other judges might have done in other cases does not undermine or affect the trial court's following the law in the applicant's case.

96. The Court finds that the applicant's case being assigned to the 179TH District Court, as opposed to other Harris County district courts, does not render the Texas death penalty statute unconstitutional, either facially or as applied.

Seventeenth Ground for Relief: death penalty in Harris County/mitigation evidence

97. The Court finds that the applicant was allowed to present extensive punishment evidence in an attempt to mitigate his sentence, and the lack of a parole eligibility instruction or alleged disparity among Harris County district courts' treatment of the submission of a parole instruction did not limit the applicant's right to present mitigating evidence or prevent the applicant from responding to the State's punishment evidence, See *Findings Nos. 52-53, supra.*

Eighteenth Ground for Relief: alleged ineffective assistance of appellate counsel/alleged disparity in treatment of parole eligibility instruction

98. The Court finds that appellate counsel are not ineffective for not presenting on direct appeal the meritless claim of ineffective assistance of trial counsel for not objecting to Harris County district courts' alleged disparity in treatment concerning the parole eligibility instruction. *See Findings Nos. 93-97, supra.*

Nineteenth Ground for Relief: constitutionality of mitigation special issue/blameworthiness

99. At the conclusion of the punishment phase of the applicant's trial, the statutory mitigation instruction asked the jury, "[d]o you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Rick Allen Rhoades, that there is sufficient mitigating circumstance of circumstances to warrant that a sentence of life imprisonment rather than a sentence of death be imposed" (I-A Cl.R. at 295).

100. The trial court also instructed the jury that it need not agree on what particular evidence supports an affirmative finding to the mitigation special issue, and that, in answering the mitigation special issue, "you shall consider mitigating evidence to be evidence that a juror might regard as reducing the defendant's moral blameworthiness" (I-A Cl.R. at 291).

101. The applicant objected to the punishment charge based on the failure to identify the factors the defense introduced and considered mitigating, and the trial court responded that the jurors were told during *voir dire* that the statute does not set out what is mitigating and jurors are instructed to determine what weight to give any mitigating factor (XXXIX R.R. at 3-4).

102. The Court finds that the applicant did not object to the punishment charge based on the mitigation instruction allegedly limiting the mitigating evidence to that which a juror might regard as reducing the defendant's moral blameworthiness.

103. The Court finds that, in *Shannon v. State,* 942 S.W.2d 591, 597 (Tex. Crim. App. 1996), the Court of Criminal Appeals rejected the argument that the mitigation special issue, set out in TEX. CODE CRIM. PROC. art. 37.071, unconstitutionally narrows a jury's discretion to consider as mitigating only those factors concerning moral blameworthiness.

Twentieth Ground for Relief: parole eligibility/furlough testimony

104. At the conclusion of the punishment phase of the trial, the applicant requested an instruction on parole eligibility in light of the admission of furlough evidence, and the trial court denied the request (XXXIX R.R. at 4-5).

105. On direct appeal of the applicant's conviction, the Court of Criminal Appeals rejected the applicant's contention that the parole instruction was "necessary" after furlough testimony was admitted, noting that the issues of parole eligibility and furlough were unrelated and holding that the trial court did not err in refusing to instruct the jury on parole eligibility. *Rhoades,* 934 S.W.2d at 128.

106. The Court finds that Roy Smithy's testimony, including testimony about prison classification and about furloughs, did not open the door to the admission of evidence concerning parole eligibility or a charge on parole eligibility.

Twenty-First Ground for Relief: alleged ineffective assistance of trial counsel/parole eligibility/furlough testimony

107. The Court finds that trial counsel are not ineffective for not advancing the meritless objection that the applicant's right to due process was allegedly violated when the trial court refused to allow the applicant to present evidence of parole eligibility after the State introduced Roy Smithy's testimony about furloughs. *See Finding No. 105, supra.*

Twenty-Second Ground for Relief: alleged ineffective assistance of appellate counsel/State allegedly "opened the door" to parole eligibility

108. The Court finds that appellate counsel are not ineffective for not presenting on direct appeal the meritless claim of ineffective assistance of trial counsel for not raising a due process objection when the court refused to allow the applicant to present evidence of parole eligibility in light of the admission of furlough testimony. *See Finding No. 105, supra.*

Twenty-Third Ground for Relief: alleged ineffective assistance of trial counsel/objection to Roy Smithy's testimony
Twenty-Fourth Ground for Relief: alleged ineffective assistance of trial counsel/motion to strike Smithy's testimony or request limiting instruction

109. Trial counsel objected to Roy Smithy's testimony about furloughs during an off-the-record bench conference; during the subsequent recorded portion of the bench conference, trial counsel argued against the prosecutor going "into this stuff" and not informing the jury that the applicant would be locked up for thirty-five years; the trial court stated it did not know what counsel's objection was but did understand counsel's "previous" objection; trial counsel objected to any further questions along this line and the trial court stated it was going to allow the prosecutor to complete her line of questioning (XXXV R.R. at 1037). *See Findings Nos. 64-69, supra; State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.*

110. The Court finds that the trial court's reference to understanding counsel's "previous" objection is a reference to trial counsel's objection to Smithy's testimony made during the unrecorded portion of the bench conference.

111. At the conclusion of the punishment phase, trial counsel objected to the punishment charge on the basis that the jury be instructed to disregard Smithy's furlough testimony, and the trial court overruled the request (XXXIX R.R. at 4-5).

112. On direct appeal of the applicant's conviction, the Court of Criminal Appeals held that the applicant's lack of a specific and/or timely objection waived his appellate complaints concerning the admission of Smithy's testimony about prison furloughs, the denial of his motion to strike offered in the guise of a jury instruction to disregard, and the denial of his motion for new trial. *Rhoades,* 934 at 127 (citing *Zillender v. State,* 557 S.W.3d 515, 517 (Tex. Crim. App. 1977)).

113. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals was bound by the parameters of the appellate record which did not include the contents of the unrecorded portion of the bench conference when trial counsel objected to Smithy's furlough testimony (XXXV R.R. at 1037).

114. The Court finds that Smithy's testimony rebutted the applicant's evidence concerning the applicant not being a danger in a controlled environment, related the violence in prison, and explained the prison classification system and procedures – including furlough procedures.

115. The Court finds that trial counsel are not ineffective for allegedly failing to object to Smithy's admissible testimony, just as trial counsel are not ineffective for not moving to strike Smithy's testimony or requesting a limiting instruction.

116. The Court finds that trial counsel's actions concerning Smithy's testimony did not give the jury "unfettered discretion to utilize their speculation as to what any given warden might due (sic) that would cause them [jurors] to consider Applicant's mitigating evidence as a demand for a death sentence." *Applicant's writ at 179.*

Twenty-Fifth Ground for Relief: alleged ineffective assistance of trial counsel/objection to evidence of violence in prison

117. Roy Smithy, investigator for the special prison prosecution unit that investigates and prosecutes all felony offenses that occur in the prison system, testified that the unit was founded in 1984 when there was an abundance of felony offenses; that he began working with the special prison prosecution unit in 1985 and has had many occasions to investigate violent crimes in prison; that the abolishment of the building tender system in 1983 created a vacuum in the prison system that was filled by gang violence; that the unit investigated and/or prosecuted over 1,800 cases from 1984 to 1991; that 70% or 80% of the violent crimes investigated were gang-related from approximately 1985 to 1988 or 1989; that the crimes investigated did not include weapons or drug cases; that some assaults and acts of violence do not get reported in prison; that inmates make weapons out of almost anything; that he has seen many occasions where these weapons were used to inflict injuries on other inmates or prison staff; and, that inmates use intimidation for self-preservation (XXXV R.R.at 1024-33, 1040).

118. The Court finds that trial counsel objected based on relevancy the first time Smithy testified about violence in prison, i.e., that the special prosecution unit was founded in 1984 to investigate felony offenses in prison when there was an abundance of felony offense (XXXV R.R. at 1025).

119. Trial counsel objected based on relevancy and on improper rebuttal after Smithy testified about the special prosecution unit investigating and/or prosecuting over 1,800 cases during a period of time, and the trial court overruled the objection (XXXV R.R. at 1029-30).

120. The Court finds that trial counsel are not ineffective for allegedly failing to lodge a contemporaneous objection to Smithy's testimony about violence in prison – testimony that was relevant to rebut the applicant's evidence of prison being a controlled environment.

Twenty-Sixth Ground for Relief: alleged ineffective assistance of appellate counsel/not presenting claim of ineffective assistance of trial counsel for lack of timely, specific objection, lack of motion to strike Smithy's testimony or lack of request for limiting instruction

121. The Court finds that appellate counsel are not ineffective for not presenting on direct appeal the meritless claim that Roy Smithy's testimony was false and/or misleading. *See Findings Nos. 79-80, supra.*

122. The Court finds that appellate counsel are not ineffective for not presenting on direct appeal the meritless claim that trial counsel are ineffective for not timely and specifically objecting to Smithy's furlough testimony, moving to strike Smithy's testimony about furloughs, or requesting an instruction to disregard Smithy's testimony about furloughs. *See Findings Nos. 109-115, supra.*

Twenty-Seventh Ground for Relief: alleged ineffective assistance of trial counsel/jury argument

123. During guilt-innocence argument, the prosecutor argued that she guessed that trial counsel would say that the applicant did not intend to kill the Allens, asked rhetorical questions of why the applicant went in the house and why he killed the two young men, stated, "Ask [defense counsel] to tell you why he would do a thing like that," and argued that the evidence supports the conclusion that the applicant went into the house to burglarize it (XXX R.R. at 821).

124. Trial counsel objected to the argument on the basis that it was not supported by the record, and the trial court overruled the objection (XXX R.R. at 821-2).

125. The Court finds that trial counsel did not object to the prosecutor's argument based on it allegedly being a comment on the applicant's failure to testify – the complaint he presents on habeas.

126. After the prosecutor's argument, trial counsel argued that there was no reason for the applicant to lie in his statement; that every sentence in the statement was supported by the evidence; that the applicant stated that he thought Charles Allen had gone for a gun so he rushed in to confront him; and, that the applicant was "going to go in and set this

situation straight" when he saw Charles Allen confronting him with a knife (XXX R.R. at 827-30).

127. At the conclusion of the guilt-innocence phase, the trial court instructed the jury concerning the law of self-defense, the applicant's right not to testify, and how not testifying could not be discussed or used against him (I-A Cl.R. at 270-1, 278)

128. The Court finds that the prosecutor's argument was a reasonable inference from the self-defense claim presented at trial, including the applicant's written statement giving his version of why he entered the house and why he killed Charles and Bradley Allen.

129. The Court finds that the prosecutor's argument was not such where the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the applicant's failure to testify.

130. The Court finds that trial counsel are not ineffective for not objecting to the prosecutor's argument based on it allegedly being a comment on the applicant's failure to testify.

Twenty-Eighth Ground for Relief: alleged ineffective assistance of trial counsel/trial court's comment during argument

131. After trial counsel objected that the prosecutor's applicant's argument that the evidence supported the conclusion that the applicant went in the Allen house to burglarize it, the prosecutor responded that the argument was a reasonable deduction from the evidence (XXX R.R. at 821-2).

132. The trial court overruled the applicant's objection and stated "could be a reasonable deduction from the evidence;" trial counsel did not object to the trial court's statement (XXX R.R. at 821-2).

133. The Court finds that, according to the affidavits of trial counsel Keyser and Stafford, that trial counsel believed that the trial court's comment indicated an explanation for the trial court's ruling, rather than a comment on the evidence. *State's Writ Exhibit A,*

October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.

134. The Court finds that the trial court's comment that the argument could be a reasonable deduction from the evidence was not reasonably calculated to prejudice the applicant's right or benefit the State, pursuant to TEX. CODE CRIM. PROC. art. 38.05.

135. The Court finds that the trial court's comment that the argument could be a reasonable deduction from the evidence was not fundamental error of constitutional dimension that required no objection.

Twenty-Ninth Ground for Relief: alleged ineffective assistance of trial counsel/pre-trial investigation for guilt-innocence and punishment

136. Trial counsel filed the following motions on behalf of the applicant: Motion to Allow Defendant to View the Scene of the Crime with His Attorney; Motion for Disclosure of Evidence in a Capital Trial; Motion for Discovery and inspection of Evidence Number Two; Motion for Court Appointed Psychiatrist; Motion to Inspect, Examine and Test Physical Evidence; Motion to Suppress Defendant's Confession; Motion to Elect Punishment; Motion to Invoke Rule Prior to *Voir Dire,* Prohibit Witnesses from Conversing, and to Enjoin the District Attorney from Advising Witnesses of Previous Testimony; Motion to Prohibit Jury Dispersal and to Prohibit Jury's Exposure to Victim's Family or Friends; Motion to Require the Prosecution to Designate Whether It Will Rely on the Law of Felony Murder; Motion to Restrict the Prosecution's Challenges of Venireman Having Conscientious Scruples with Regard to the Infliction of the Punishment of Death for Crime; Motion for Jury List; Motion to Enjoin Victim's Family from Showing Emotion in the Courtroom While Sitting as Spectators; Motion for a Protective Order Regulating the Conduct of the Courtroom Audience; Motion to Be Arraigned Out of the Jury's Presence; Motion for Discovery and Inspection of Evidence Number Three; Motion in Limine Prohibiting Jury Argument; Motion for Individual Examination of Capital Veniremen Separate and Apart from the Entire Panel; Motion for Separate Jury to Determine Punishment; Motion for Protective Order to Govern

the Release of Information by the Prosecutor; Supplemental Motion for Discover and Motion to Quash; Motion to Compel Disclosure of Evidence to be Offered in Support of Special Issues and Information Relating to Mitigating Circumstances; Memorandum of Law in Support of Motion for Disclosure of Evidence; Motion for Specific Discovery Regarding Prospective Jurors; Motion to Compel Prosecution to Disclose an Non-Statutory Aggravating Factor It Will Present at Sentencing; Ex parte Motion for the Appointment of a Scientific Expert to Assist the Defendant; Motion to Declare Texas Death Penalty Procedures and Statute Unconstitutional; Three Notices of Business Records Filings; Motion for Appointment of Blood Spatter Analysis Expert; Motion to Quash State's Subpoena; and, Motion for New Trial (I Cl.R. at 18-137, 149-72)(I-A Cl.R. at 218-245, 265-6, 283-4, 206-11).

137. The instant capital murder occurred on September 13, 1991; the applicant gave a statement to police on October 11, 1991; trial counsel Doug Davis was originally appointed to represent the applicant but withdraw in March, 1992, after accepting a position with the U.S. Attorney's Office; subsequently, trial counsel James Stafford was appointed in the applicant's case and trial counsel Deborah Keyser was appointed at second chair. *State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.*

138. The Court finds, based on the affidavits of trial counsel Keyser and trial counsel James Stafford, that counsel read the State's file that remained open until trial; interviewed the applicant; visited the neighborhood and scene of the crime; flew to East Texas to interview the applicant's adoptive parents; subpoenaed the applicant's school records, birth records, medical and psychological records in an attempt to explore all avenues of potential mitigation evidence; contacted the attorney who arranged the applicant's adoption; petitioned the court to un-seal the applicants adoption records; hired an investigator to locate the applicant's biological parents in Florida and California; contacted and interviewed both biological parents; convinced the applicant's birth mother to appear and testify at the applicant's trial; retained an expert witness to review the applicant's psychological records

and to interview and evaluate the applicant; obtained a referral to a neurologist to perform a computerized, quantitative electroencephalogram; met with the medical examiner to review the autopsy report and to explore alternate theories on how particular wounds may have been inflicted in an attempt to show a defensive struggle; subpoenaed the applicant's medical, psychological, disciplinary, and school records from TDCJ; met with the applicant's teachers at TDCJ; and, presented the testimony of one of the applicant's teachers at TDCJ in an attempt to show his non-violent nature and his ability to do well in prison society. *State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.*

139. The Court finds, based on the affidavit of trial counsel Keyser, that trial counsel explored all legal arguments to the Texas capital punishment scheme and attempted to anticipate future areas ripe for attack; had a pre-trial hearing on the alleged unconstitutionality of the first special issue based on the alleged inability to accurately predict future dangerousness; and, presented the testimony of psychologist Wendell Dickerson and numerous studies, articles and position papers at the pre-trial hearing. *State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser.*

140. The Court finds, based on the appellate record, that trial counsel reviewed the State's file, gave an opening statement, was aware of the facts of the offense and applicable law, made objections and cogent argument throughout the trial, cross-examined State's witnesses at guilt-innocence and punishment, presented evidence at guilt-innocence, made relevant jury arguments at guilt-innocence and at punishment, made objections and requests to the charge at guilt-innocence and at punishment, presented expert testimony, presented punishment witnesses in an attempt to mitigate the applicant's punishment, and presented a plausible trial strategy of self-defense.

141. The Court finds that, after the trial court denied trial counsel's motion to suppress the applicant's written statement, trial counsel presented the reasonable trial strategy of self-defense, as asserted by the applicant in his statement.

142. The Court finds that the applicant, in his habeas affidavit, asserts that he sold marijuana to one of the Allen brothers at Chris Fitch's request; that the brother did not make full payment but the applicant went to prison for burglary before he got all the money; that he went to the Allen house after he got out of prison to collect his money but the brother would not pay; that he followed the brother in the house where he attacked the brother; that he chased the brother after the brother grabbed a knife; that he picked up a weight bar, went into a rage and hit the brother in the head many times and stabbed him; that he attacked the second man and stabbed him repeatedly when he came into the room; and, that he was not drunk or high at the time. *Applicant's exhibit B.*

143. The Court finds that former habeas counsel Jim Leitner presents a hearsay affidavit in which he asserts that Fitch told Leitner's investigator he gave a written statement to police before the applicant's trial in which he claimed that the applicant killed the brothers over drugs and was high at the time, and that Fitch told the investigator that his statement was allegedly not true. *Applicant's exhibit E.*

144. The Court finds, based on the Fifth Circuit Court of Appeals' decision in *Hogue v. Johnson,* 131 F.3d 466, 505 (5TH Cir. 1997), that the hearsay assertions in Leitner's affidavit are not substantive evidence of anything; thus, they are not dispositive to any habeas allegations.

145. The Court finds that Chris Fitch did not testify concerning any alleged drug deal between the applicant and one of the Allen brothers (XXXIII R.R. at 566-85).

146. The Court finds, based on the October 23, 2000 affidavit of prosecutor Carol Davies, that the State showed Chris Fitch's statement to trial counsel on May 29, 1992; that Fitch's sworn statement does not include any allegation concerning a drug-related basis for the murders; that Fitch's statement attached to Davies' affidavit tracks Fitch's testimony at trial; and, that there was no information or evidence supporting the applicant's post-trial assertion that the murders were drug-related. *State's Writ Exhibit C, October 23, 2000 affidavit of prosecutor Davies.*

147. The Court finds that trial counsel Keyser and trial counsel Stafford reviewed their files and do not think that they saw an alleged statement from Chris Fitch that gave a drug-related basis for the applicant's committing the murders, and that counsel would noticed such alleged statement because it supposedly included an admission of guilt by the applicant. *State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.*

148. The Court finds unpersuasive the applicant's habeas argument that alleged evidence that the applicant killed the Allens over drug money would have been more mitigating than the applicant's presented claim of self-defense.

149. The Court finds that trial counsel are not ineffective based on their pre-trial investigation for the guilt-innocence and punishment phase of the applicant's trial.

Thirtieth Ground for Relief: alleged ineffective assistance of trial counsel/retaliation evidence against the applicant

150. During punishment, the State introduced State's Exhibit 213, a certified copy of an indictment in cause no. 547497, alleging that the applicant committed the offense of retaliation against David Cote (XXXI R.R. at 47).

151. During punishment, the State introduced State's Exhibit 214, a certified copy of the State's dismissal of cause no. 547497 based on a missing witness (XXXI R.R. at 47).

152. Trial counsel stated that he no objection of any of the State's proffered exhibits – that included State's Exhibit 213 and State's Exhibit 214 - other than State's Exhibit 209 (XXXI R.R. at 47).

153. The State published State's Exhibits 213 and 214 by reading the retaliation indictment in cause no. 547497 and by informing the jury that cause no. 547497 was dismissed on January 9, 1990, because of a missing witness (XXXIII R.R. at 589).

154. The Court finds that in a capital case, unlike a non-capital case, the State may introduce evidence of an unadjudicated offense and that such admission does not rebut the applicant's presumption of innocence for the primary offense.

155. The Court finds that trial counsel are not ineffective for not lodging a meritless objection to the admission of State's Exhibits 213 and 214, the indictment charging the applicant with the offense of retaliation and the State's subsequent dismissal of the cause based on a missing witness.

Thirty-First Ground for Relief: alleged ineffective assistance of appellate counsel/Smithy's alleged false, misleading testimony

156. The Court finds that appellate counsel are not ineffective for not presenting on direct appeal the meritless claim that Roy Smithy's testimony was false and/or misleading. *See Findings Nos. 79-80, supra.*

157. The Court finds that appellate counsel are not ineffective for not presenting on direct appeal the meritless claim that trial counsel are ineffective for not timely and specifically objecting to Smithy's furlough testimony, moving to strike Smithy's testimony about furloughs, or requesting an instruction to disregard Smithy's testimony about furloughs. *See Findings Nos. 109-115, supra.*

Thirty-Second Ground for Relief: alleged ineffective assistance of trial counsel/objecting to Smithy's testimony based on reliability or relevance re Rule 702 and 705
Thirty-Third Ground for Relief: alleged ineffective assistance of trial counsel/objecting to Smithy's testimony based on Rule 401 and 402

158. The Court finds that trial counsel are not ineffective for not objecting to Smithy's testimony on the basis of TEX. R. EVID. 401 and 402; Smithy's testimony about prison conditions, procedures, and classification was relevant and admissible as rebuttal to the applicant's punishment evidence that he would not be a future danger in prison.

159. The Court finds that trial counsel are not ineffective for not lodging an objection, pursuant to TEX. R. EVID. 702, concerning expert testimony, or pursuant to TEX. R. EVID. 705, requesting a hearing outside the presence of the jury about whether Smithy was qualified to testify; the Court finds that Smithy established his qualifications to testify at the beginning of his testimony (XXXV R.R. at 1024-5).

Thirty-Fourth Ground for Relief: alleged ineffective assistance of trial counsel at guilt-innocence/admission of evidence of applicant's arrest for extraneous burglary, his prior prison sentences, his being released on parole before the instant offense; his giving false names when arrested

160. Prior to the State's opening statement at guilt-innocence, trial counsel stated that he had no objection to the State referring to the applicant being arrested while burglarizing a building and being in custody when he confessed to the capital murder (XXXVII R.R. at 7, 8).

161. The Court finds that, during the guilt-innocence phase, evidence was presented by both the State and trial counsel concerning the applicant's arrest for burglary, his prior prison sentences, and his being in custody when he confessed to the capital murder.

162. According to the affidavits of trial counsel, counsel made a strategic decision to let the jury know of these "aggravating" facts, such as the applicant being arrested for burglary, his previously being in prison, and his being released from prison less than twenty-four hours before the capital murder, in an effort to "de-sensitize" them; the prominent defense focus was on punishment, and trial counsel believed that the jury would be "incensed," causing the extensive mitigation evidence to "fall on deaf ears" if information about the applicant's arrest and prior prison sentence was presented for the first time at punishment. *State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.*

163. The court finds that trial counsel are not ineffective for making the plausible decision to focus on punishment and to allow the jury to hear information about the applicant's prior history at guilt-innocence, so that the jury would not ignore the mitigation evidence at punishment.

Thirty-Fifth Ground for Relief: alleged disparity in rules of evidence re parole eligibility/complainants' peaceful nature

164. The Court finds that the applicant asserted a self-defense claim in his statement; that trial counsel argued self-defense at guilt-innocence; and, that the trial court

instructed the jury on self-defense at guilt-innocence (xxx Cl.R. at xx)(XXX R.R. at 825-38, 848-66).

165. During guilt-innocence, Don Allen, the father of Charles and Bradley Allen, testified over objection that Charles was a peaceful person and not aggressive or combative (XXIX R.R. at 540-1).

166. The Court finds that the issue of Charles Allen's peaceful nature was raised by the applicant's assertion that he attacked Charles Allen in self-defense and that Don Allen's testimony was in rebuttal to the applicant's assertion of self-defense.

167. The Court finds that trial counsel did not object when Gary Andrews, Charles Allen's brother-in-law, testified that he was familiar with the reputation and character of Charles in the community and that he was peaceful and not aggressive or combative (XXIX R.R. at 639).

168. The Court finds that trial counsel subsequently objected when the State asked Gary Andrews if Charles Allen's character was law-abiding; the applicant re-urged his motion in limine on victim impact testimony and moved for mistrial – a motion the trial court denied (XXIX R.R. at 639).

169. The Court finds that the applicant's lack of timely objection to Gary Andrews' testimony that Charles Allen was peaceful and not aggressive or combative waives the applicant's habeas complaint concerning Don Allen's testimony that Charles Allen was a peaceful person and not aggressive or combative (XXIX R.R. at 540-1).

170. The Court finds that the admission of testimony that Charles Allen was peaceful did not open the door or warrant the admission of evidence or a jury instruction concerning the applicant's parole eligibility – evidence that was inadmissible at the time of the applicant's trial.

Thirty-Sixth Ground for Relief: alleged ineffective assistance of trial counsel at punishment/ alleged cumulative effect
Thirty-Seventh Ground for Relief: alleged ineffective assistance of trial counsel at guilt-innocence/alleged cumulative effect
Thirty-Eighth Ground for Relief: alleged ineffective assistance of appellate counsel/alleged cumulative effect

171. The Court finds that there is no cumulative effect of error based on the allegations of ineffective assistance of trial counsel at punishment and other alleged punishment errors presented in the applicant's application for writ of habeas corpus.

172. The Court finds that there is no cumulative effect of error based on the allegations of ineffective assistance of trial counsel at guilt-innocence and other alleged guilt-innocence errors presented in the applicant's application for writ of habeas corpus.

173. The Court finds that there is no cumulative effect of error based on the allegations of ineffective assistance of appellate counsel on direct appeal.

174. The Court finds that statements in the affidavits of trial counsel Keyser and Stafford concerning whether counsel believes a particular action was error are the opinion of trial counsel and do not establish trial error or ineffectiveness of trial counsel, pursuant to the requirements of *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052 (1984).

CONCLUSIONS OF LAW

First and Second Grounds for Relief: applicant's childhood photos

1. Because the issue of whether the trial court erred in refusing to admit into evidence photos of the applicant's childhood was raised and rejected on direct appeal, such issue need not be considered in the instant writ proceeding or subsequent proceedings. *See Ex parte McFarland,* 163 S.W.3d 743, 748 (Tex. Crim. App. 2005)(holding that claims that have been raised and rejected on direct appeal normally cannot be re-litigated in habeas proceedings); *Ex parte Acosta,* 672 S.W.2d 470, 472 (Tex. Crim. App. 1984)(holding that reviewing court need not address previously raised and rejected issues).

2. In the alternative, the trial court did not err in refusing to admit during punishment the applicant's childhood photos – photos that did not "diminish his moral culpability for the act of murder" and were not relevant to the issue of whether the applicant would be a future danger. *See Rhoades,* 934 S.W.2d at 125-6.

3. The applicant fails to show that he was denied due process, prevented from introducing evidence to rebut the State's punishment evidence, or denied his constitutional rights under U.S. CONST. amend. VIII.

Third Ground for Relief: prohibition of informing jurors re single hold-out vote
Fourth Ground for Relief: 12/10 Rule

4. Based on the lack of objection to the punishment charge concerning the prohibition of informing the jury of the effect of a single "hold-out" vote and concerning the 12/10 rule, the applicant is procedurally barred from presenting such claims on habeas. *See* Tex. R. App. P. 33.1(a); *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978); *see also Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999)(holding that defendant's failure to comply with Texas contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

5. In the alternative, the applicant fails to show that the 12/10 rule and/or the prohibition against informing the jury of the effect of a single "hold-out" vote renders TEX. CODE CRIM. PROC. art. 37.071 unconstitutional. *See Cantu v. State,* 939 S.W.2d 627, 639 (Tex. Crim. App. 1997)(holding that art. 37.071 does not violate provisions of U.S. CONST. amend. VIII, by failing to instruct jury that single "no" vote would result in life sentence); *Hughes v. State,* 897 S.W.2d 285, 301 (Tex. Crim. App. 1994)(citing *Rousseau v. State,* 855 S.W.2d 666, 687 (Tex. Crim. App. 1993)(rejecting capital defendant's contention that the decisions in *Mills v. Maryland,* 486 U.S. 367 (1988) and *McKoy v. North Carolina,* 484 U.S. 433 (1990) support similar claim)).

6. The applicant fails to show that the punishment instructions, given to his jury pursuant to TEX. CODE CRIM. PROC. art. 37.071, injected confusion and arbitrariness into the

trial proceedings or created an unreliable sentencing determination. *See Johnson v. State,* 68 S.W.3d 644, 656 (Tex. Crim. App. 2002)(rejecting capital defendant's constitutional challenge to death penalty based on 12/10 rule).

7. The applicant fails to show that the punishment instructions, given to his jury pursuant to TEX. CODE CRIM. PROC. art. 37.071, violated his rights under U.S. CONST. amends. VIII and XIV or TEX. CONST. art. I, § 13.

Fifth through Ninth Grounds for Relief: furlough testimony

8. On direct appeal of the applicant's conviction, the Court of Criminal Appeals held, based on the appellate record, that trial counsel's complaint about Roy Smithy's testimony concerning prison furloughs was not specific, so the complaint was waived. *Rhoades,* 934 S.W.2d at 127. Thus, the applicant is procedurally barred from advancing his habeas claims concerning Roy Smithy's testimony about prison furloughs. *See* Tex. R. App. P. 33.1(a); *Hodge,* 631 S.W.2d at 757; *see also Hughes,* 191 F.3d at 614 (holding that defendant's failure to comply with Texas contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

9. In the alternative, based on trial counsel's habeas assertion that counsel specifically objected to the furlough testimony during an unrecorded bench conference, the applicant is not procedurally barred from presenting his habeas claims, but the applicant fails to show that such claims have merit. *See Lagrone v. State,* 942 S.W.2d 602, 618 (Tex. Crim. App. 1997)(holding that attorney must object as soon as basis for objection became apparent to preserve error).

10. In his fifth and sixth grounds for relief, the applicant fails to show that the furlough testimony rendered his sentence arbitrary and capricious under U.S. CONST. amend. V, or violated the separation of powers clause, or denied the applicant due process and due course of law under TEX. CONST. art. I, §§ 10, 13, and 19 and art. III, § 1. *See and cf. Arave v. Creech,* 507 U.S. 463, 471 (1993)(quoting *Lewis v. Jeffers,* 497 U.S. 764 (1990)(noting

"a capital sentencing scheme must suitably direct and limit the sentencer's discretion so as to minimize the risk of wholly arbitrary and capricious action.")).

11. In his seventh and eighth grounds for relief, the applicant fails to show he was denied his right to due process and right to reliable sentencing, pursuant to U.S. CONST. amends. VIII and XIV and TEX. CONST. art. I, § 19, based on the applicant's unsupported contention that the applicant's jury speculated or probably considered whether the applicant would be granted a furlough. *See Ex parte Empey,* 757 S.W.2d 771, 775 (Tex. Crim. App. 1988)(holding applicant's bare allegations, even those sworn to, insufficient to meet habeas burden of proof).

12. In his ninth ground for relief, the applicant fails to show that the testimony concerning a capital defendant who is sentenced to life being eligible for a furlough if he reaches a certain classification was materially false or misleading; the applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends. V, VIII, and XIV or TEX. CONST. art. I, §§ 10 and 19, were violated. *See* TEX. GOV'T CODE ANN. § 501.006 (Vernon 1992)(providing for prison furloughs and not excluding capital murderers serving life sentence in the provision); *see also applicant's MNT hearing exhibit 1* (1987 administrative directive concerning furlough procedures stating inmate convicted of capital murder would be eligible for emergency furlough if he reached State Approved Trustee status, had been in custody for reasonable period of time with no unresolved immigration detainers, no sexual offense conviction, and no major disciplinary penalties in the prior six months). The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends V, VIII, and XIV and TEX. CONST. art. I, §§ 10 and 19, were violated.

Tenth through Fourteenth Grounds for Relief: instruction on parole eligibility

13. Because the applicant's claim that the trial court erred in not instructing the jury on parole eligibility was raised and rejected on direct appeal, it need not be considered in the instant habeas proceeding or subsequent proceedings. *See McFarland,* 163 S.W.3d at 748 (holding that claims that have been raised and rejected on direct appeal normally

cannot be re-litigated in habeas proceedings); *Acosta,* 672 S.W.2d at 472 (holding that reviewing court need not address previously raised and rejected issues).

14. In the alternative, the trial court properly refused to instruct the applicant's jury on parole eligibility – an issue that was not within the province of a capital jury at the time of the applicant's 1992 trial. *See Rhoades,* 934 S.W.2d at 128; *see also* TEX. CODE CRIM. PROC. art. 37.071 (Vernon 1994).

15. The applicant fails to show that the trial court's proper refusal to instruct the jury on parole eligibility violated his constitutional rights, pursuant to U.S. CONST. amends. VIII and XIV; the applicant also fails to show that his right to present mitigating evidence was impaired or that the jury "likely" had a fundamental misunderstanding about the meaning of a life sentence for someone convicted of capital murder. *See Rhoades,* 934 S.W.2d at 128 (citing *Broxton v. State,* 909 S.W.2d 912, 918-9 (Tex. Crim. App. 1995)(holding that trial court's refusal to allow jury to consider parole eligibility did not violate defendant right to due process, due course of law, or the right to be free from cruel and unusual punishment)); *Cantu,* 939 S.W.2d at 632 (holding defendant not entitled to instruction on parole law in capital case under Texas Constitution)(citing *Elliott v. State,* 858 S.W.2d 478 (Tex. Crim. App. 1993)).

Fifteenth Ground for Relief: constitutionality of death penalty/Justice Blackmun's dissent

16. The applicant fails to show that the Court of Criminal Appeals should adopt Justice Blackmun's dissenting opinion in *Callins v. Collins,* 510 U.S. 114 (1994). *See Bell v. State,* 938 S.W.2d 35, 53-4 (Tex. Crim. App. 1996); *Lawton v. State,* 913 S.W.2d 542, 558 (Tex. Crim. App. 1995), *overruled on other grounds, Mosley v. State,* 983 S.W. 249 (Tex. Crim. App. 1998)(expressly rejecting Justice Blackmun's dissenting opinion in *Callins v. Collins,* in which Justice Blackmun stated that the "constitutional requirements of 'structured discretion,' as stated in *Furman v. Georgia*, 408 U.S. 238 (1972), and freedom to consider mitigating evidence as expressed in *Penry v. Lynaugh,* [492 U.S. 223 (1989)] are ultimately irreconcilable.").

Sixteenth Ground for Relief: death penalty in Harris County/assignment of court

17. The applicant fails to show that the death penalty was arbitrarily given to him based on his case being tried in the 179TH District Court, as opposed to other district courts; the trial court's following the applicable law at the time of the applicant's case, concerning not instructing capital juries on parole eligibility, did not render the Texas death penalty scheme unconstitutional and did not violate the applicant's constitutional rights, pursuant to U.S. CONST. amends. V, VIII, and XIV and TEX. CONST. art. I, §§ 10 and 19. *See and cf. Morris v. State,* 940 S.W.2d 610, 613-4 (Tex. Crim. App. 1996)(holding that defendant's constitutional rights were not violated based on his receiving death penalty and his co-defendants being sentenced to a term of years; "it is possible for two people who have committed identical murders to receive different sentences based on differing degrees of mitigating character and background evidence.").

Seventeenth Ground for Relief: death penalty in Harris County/mitigation evidence

18. The applicant fails to show that the lack of a parole instruction or the alleged disparity among Harris County district courts' treatment concerning the submission of a parole instruction limited the applicant's right to present mitigating evidence or prevented the applicant from responding to the State's punishment evidence, *See* TEX. CODE CRIM. PROC. art. 37.071 (Vernon 1991)(providing evidence may be presented by State or defense as to any matter court finds relevant to sentence in capital case; providing that jury in death penalty case shall consider at punishment all evidence admitted at guilt-innocence and punishment, including evidence of defendant's background or character or circumstances of offense; providing for submission of mitigation special issue for jury to consider and give effect to mitigating evidence).

19. The applicant fails to show that he was denied equal protection or due process or that his right of protection against cruel and unusual punishment was violated based on his case being assigned to the 179TH District Court. *See Ex parte Maldonado,* 688 S.W.2d

114, 116 (Tex. Crim. App. 1985)(holding defendant must plead and prove facts which, if true, entitle him to relief in habeas proceeding).

Eighteenth Ground for Relief: alleged ineffective assistance of appellate counsel/alleged disparity in treatment of parole eligibility instruction

20. The applicant fails to show ineffective assistance of appellate counsel for not presenting on direct appeal the meritless claim of ineffective assistance of trial counsel for not objecting to Harris County district courts' alleged disparity in treatment concerning the parole eligibility instruction. *See Jones v. Barnes,* 463 U.S. 745 (1983)(holding courts cannot second-guess appellate attorney's professional judgment to brief only stronger points of error). The applicant fails to show that that, but for appellate counsel's not presenting such claim on direct appeal, the results of the proceeding would have been different. *See Ex parte Butler,* 884 S.W.2d 782, 783 (Tex. Crim. App. 1994)(*Strickland* standard applies to appellate counsel as well as trial counsel).

Nineteenth Ground for Relief: constitutionality of mitigation special issue/blameworthiness

21. Because of the lack of objection to the punishment charge on the basis that the mitigation instruction allegedly limited the mitigating evidence to that which a juror might regard as reducing the applicant's moral blameworthiness, the applicant is procedurally barred from presenting such claim in the instant habeas proceeding or any subsequent proceedings. *See* Tex. R. App. P. 33.1(a); *Hodge,* 631 S.W.2d at 757, *see also Hughes,* 191 F.3d at 614 (holding that defendant's failure to comply with Texas contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

22. In the alternative, the mitigation special issue, set out in TEX. CODE CRIM. PROC. art. 37.071, does not unconstitutionally narrow a jury's discretion to consider as mitigating only those factors concerning moral blameworthiness. *See Shannon v. State,* 942 S.W.2d 591, 597 (Tex. Crim. App. 1996)(rejecting argument that mitigation issue narrows capital jury's discretion to consider as mitigating only factors concerning moral blameworthiness).

Twentieth Ground for Relief: parole eligibility/furlough testimony

23. On direct appeal of the applicant's conviction, the Court of Criminal Appeals rejected the applicant's claim that a parole eligibility instruction was "necessary" after furlough testimony was admitted. *Rhoades,* 934 S.W.2d at 128. Thus, such habeas contention has been raised and rejected and need not be considered in the instant habeas proceeding or any subsequent proceedings. *Acosta,* 672 S.W.2d at 472 (holding *that* reviewing court need not address previously raised and rejected issues).

24. In the alternative, the trial court properly refused to instruct the jury on parole eligibility, regardless of furlough testimony being admitted, and the applicant fails to show that furlough testimony opened the door to parole eligibility evidence or instruction. *Rhoades,* 934 S.W.2d at 128 (noting that issues of parole eligibility and furlough were unrelated and holding that trial court did not err in refusing to instruct jury on parole eligibility). The applicant fails to show that his right to due process was violated based on the trial court's proper ruling.

Twenty-First Ground for Relief: alleged ineffective assistance of trial counsel/parole eligibility/furlough testimony

25. The applicant fails to show ineffective assistance of trial counsel based on counsel not advancing the meritless objection that the applicant's right to due process was allegedly violated when the trial court refused to allow the applicant to present evidence of parole eligibility after the State introduced testimony about prison furloughs. *Rhoades,* 934 S.W.2d at 128 (noting that issues of parole eligibility and furlough were unrelated and holding that trial court did not err in refusing to instruct jury on parole eligibility).

26. The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends. V, VI, and XIV and TEX. CONST. art. I, §§ 19 and 26, were violated.

Twenty-Second Ground for Relief alleged ineffective assistance of appellate counsel/State allegedly "opened the door" to parole eligibility

27. The applicant fails to show ineffective assistance of appellate counsel based on appellate counsel not presenting on direct appeal the meritless claim of ineffective

assistance of trial counsel for not raising a due process objection when the court refused to allow the applicant to present evidence of parole eligibility in light of the admission of furlough testimony; the applicant fails to show that, but for appellate counsel not presenting such claim on direct appeal, the results of the proceeding would have been different. *See Butler,* 884 S.W.2d 783 (holding *Strickland* standard applies to appellate counsel as well as trial counsel).

Twenty-Third Ground for Relief: alleged ineffective assistance of trial counsel/objection to Roy Smithy's testimony
Twenty-Fourth Ground for Relief: alleged ineffective assistance of trial counsel/motion to strike Smithy's testimony or request limiting instruction

28. Based on trial counsel's objection to Roy Smithy's testimony made during an unrecorded bench conference, the applicant fails to show ineffective assistance of counsel for allegedly not objecting to Smithy's testimony concerning prison furloughs. *See State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser, State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford; see also Lagrone,* 942 S.W.2d at 618 (holding that attorney must object as soon as basis for objection became apparent to preserve error).

29. In the alternative, the applicant fails to show ineffective assistance of trial counsel based on lack of specific and/or timely objection to Smithy's proper testimony – offered to rebut the applicant's evidence of lack of future dangerousness in a controlled environment - about prison procedures, including furlough, or based on lack of a motion to strike Smithy's testimony or request a limiting instruction. *See and cf. Soria v. State,* 933 S.W.2d 46, 55-6 (Tex. Crim. App. 1996)(holding that defendant opens door to State's presentation of psychiatric evidence at punishment to rebut psychiatric evidence defendant presented at punishment).

30. The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends. V, VI, VIII, and XIV and TEX. CONST. art. I, §§ 10, 13, and 19, were violated.

Twenty-Fifth Ground for Relief: alleged ineffective assistance of trial counsel/objection to evidence of violence in prison

31. The applicant fails to show ineffective assistance of trial counsel based on counsel allegedly not objecting to Smithy's testimony about violence in prison; trial counsel objected based on relevancy when Smithy first testified concerning violence in prison and later objected on relevance and improper rebuttal when Smithy testified about the special prosecution unit investigating and/or prosecuting over 1,800 cases during a period of time (XXXV R.R. at 1025, 1029-30). *See Lagrone,* 942 S.W.2d at 618 (holding that attorney must object as soon as basis for objection became apparent to preserve error).

32. In the alternative, the applicant fails to show ineffective assistance of trial counsel for not lodging a contemporaneous objection to Smithy's testimony about violence in prison – testimony that was relevant to rebut the applicant's evidence of prison being a controlled environment. *See Kinnamon v. State,* 791 S.W.2d 84, 97 (Tex. Crim. App. 1990)(counsel not ineffective for failing to request jury charge on lesser-included of murder when the evidence did not support such charge), *overruled on other grounds, Cook v. State,* 884 S.W.2d 485 (Tex. Crim. App. 1994).

33. The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends. V, VI, VIII, and XIV and TEX. CONST. art. I, §§ 10, 13, and 19, were violated.

Twenty-Sixth Ground for Relief: alleged ineffective assistance of appellate counsel/not presenting claim of ineffective assistance of trial counsel for lack of timely, specific objection, lack of motion to strike Smithy's testimony or lack of request for limiting instruction

34. The applicant fails to show ineffective assistance of appellate counsel based on appellate counsel not presenting on direct appeal the meritless claim that Roy Smithy's testimony was allegedly false or misleading. *Jones v. Barnes,* 463 U.S. 475 (1983)(holding appellate counsel cannot be held ineffective for choosing not to advance meritless appellate claim).

35. The applicant fails to show ineffective assistance of appellate counsel based on appellate counsel not presenting on direct appeal the meritless claim of ineffective

assistance of trial counsel based on counsel allegedly not timely and/or specifically objecting to Smithy's furlough testimony, moving to strike Smithy's testimony about furloughs, or requesting an instruction to disregard Smithy's testimony about furloughs. *Id.*

Twenty-Seventh Ground for Relief: alleged ineffective assistance of trial counsel/jury argument

36. Because the applicant's objection at trial to the State's jury argument about why the applicant entered the house and killed Charles and Bradley Allen and the State's telling the jury to "ask" defense counsel does not comport with the applicant's objection at habeas to such argument, the applicant is procedurally barred from presenting his habeas claim that such argument was allegedly a comment on the applicant's failure to testify. *See Carmona v. State,* 941 S.W.2d 949, 953 (Tex. Crim. App. 1997)(holding that trial objection based on attorney-client privilege does not preserve error for appellate claim based on work-product doctrine); *Guevara v. State,* 97 S.W.3d 579, 583 (Tex. Crim. App. 2003)(holding defendant did not preserve error where complaint on appeal differed from trial objection; *see also* Tex. R. App. P. 33.1(a); *Hodge,* 631 S.W.2d at 757; *Hughes,* 191 F.3d at 614 (holding that defendant's failure to comply with Texas contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

37. In the alternative, the prosecutor's proper jury argument was a reasonable deduction from the evidence in light of the applicant claiming he killed Charles and Bradley Allen in self-defense. *See Borjan v. State,* 787 S.W.2d 53, 55 (Tex. Crim. App. 1990)(holding summary of evidence, reasonable inference from evidence, response to opposing counsel's argument, and plea for law enforcement proper areas for jury argument); *Wolfe v. State,* 917 S.W.2d 270, 281 (Tex. Crim. App. 1996)(noting rhetorical question generally within scope of jury argument so long as based on reasonable deduction from the evidence and is not a question to which only the defendant can explain)(quoting *McKay v. State,* 707 S.W.2d 23, 36-37 (Tex. Crim. App. 1985)(holding prosecutor's

argument that "looks like it to me" concerning whether boot made certain print based on evidence and not unsworn testimony)).

38. The applicant fails to show ineffective assistance of trial counsel based on counsel not advancing the meritless objection that the State's argument was a comment on the applicant's failure to testify; the prosecutor's argument was not such where the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the applicant's failure to testify. *Randolph v. State*, 353 S.W.3d 887 (Tex. Crim. App. 2011)(citing *Cruz v. State,* 225 S.W.3d 546, 548 (Tex. Crim. App. 2007)(holding prosecutor's language must be manifestly intended or was of such character that jury would necessarily and naturally take it as comment on defendant's failure to testify)); *Garcia v. State,* 126 S.W.3d 921, 924 (Tex. Crim. App. 2004)(noting that State's reference to what defendant said in statement admitted into evidence is not comment on defendant's failure to testify); *Bustamante v. State,* 48 S.W.3d 761, 765 (Tex. Crim. App. 2001)(noting it is not sufficient that comment might be construed as implied or indirect allusion to defendant's failure to testify).

39. The applicant fails to meet the two-prong *Strickland* test; the applicant's constitutional rights, pursuant to U.S. CONST. amends. V and VI, were not violated.

Twenty-Eighth Ground for Relief: alleged ineffective assistance of trial counsel/trial court's comment during argument

40. The applicant fails to show that the trial court's statement "could be a reasonable deduction form the evidence," made after the trial court overruled the applicant's objection to the State's jury argument, was reasonably calculated to prejudice the applicant's right or benefit the State, pursuant to TEX. CODE CRIM. PROC. art. 38.05, or was fundamental error of constitutional dimension that required no objection. *See Barnes v. State,* 503 S.W.2d 267, 270 (Tex. Crim. App. 1974)(holding that trial court's comment, when overruling defense's objection to prosecutor's jury argument, that court "would assume that that was deduction from the evidence" not reversible error because it did not

prejudice or injure defense or benefit the State); *see and cf. Jasper v. State,* 61 S.W.3d 413, 421 (Tex. Crim. App. 2001)(holding that unless trial court's comments are fundamental errors of constitutional dimension that taint defendant's presumption of innocence, objections to comments are necessary to preserve error).

41. The applicant fails to show that the trial court's statement indicated a disbelief in the applicant's position or was calculated to convey to the jury the trial court's opinion of the case. *See Beshears v. State,* 461 S.W.2d 123, 125 (Tex. Crim. App. 1970)(holding that trial court's statement of "reasonable deduction" made after defense objected to prosecutor's argument did not constitute comment on weight of evidence -unless remark gives State a benefit or defense an injury that would not have been present if court simply overruled objection).

42. In the alternative, based on the record as a whole, the applicant fails to show harm; the applicant fails to show that there is a reasonable probability that the trial court's comment moved the jury from a state of nonpersuasion to one of persuasion beyond a reasonable doubt, especially in light of the applicant's confession. *See Wesbrook v. State,* 29 S.W.3d 103, 119 (Tex. Crim. App. 2000); *see also Motilla v. State,* 78 S.W.3d 352, 359 (Tex. Crim. App. 2002)(noting that existence of substantial evidence of defendant's guilt may be most significant factor in harm analysis).

43. The applicant fails to show ineffective assistance of trial counsel for not objecting to the trial court's statement that trial counsel reasonably interpreted as an explanation for the trial court's ruling, rather than a comment on the evidence. *See State's Writ Exhibit A, October 4, 2000 affidavit of counsel Keyser; State's Writ Exhibit B, October 5, 2000 affidavit of counsel Stafford.*

44. The applicant fails to show that the results of the proceeding would have different, but for trial counsel not objecting to the trial court's statement. *See Strickland v. Washington,* 466 U.S. 668 (1984). The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amends. V and VI, were violated.

Twenty-Ninth Ground for Relief: alleged ineffective assistance of trial counsel/pre-trial investigation for guilt-innocence and punishment

45. The applicant fails to show ineffective assistance of trial counsel based on pre-trial investigation for guilt-innocence and punishment in light of trial counsels' thorough pre-trial motions, extensive investigation for possible mitigation evidence, exploration of alternate theories of how particular wounds may have been inflicted on Charles and Bradley Allen to corroborate the applicant's claim of self-defense, presentation of a plausible trial strategy, use of experts, review of the applicant's school and medical records, presentation of evidence, and thorough knowledge of the facts and applicable law. *See Ex parte Martinez,* 195 S.W.3d 713, 721 (Tex. Crim. App. 2006)(citing *Wiggins v. Smith,* 539 U.S. 510, 527 (2003)(noting when assessing reasonableness of attorney's investigation, reviewing court must consider quantum of evidence already known to counsel and whether known evidence would lead reasonable attorney to investigate further)).

46. The applicant fails to show ineffective assistance of trial counsel based on not presenting testimony, if any such alleged testimony exists, that the applicant went to the Allen home to collect money from a drug deal – evidence that would be more harmful than beneficial. *See Rompilla v. Beard,* 545 U.S. 374 (2005)(distinguishing between counsel following "sure bet" investigation from "potential lines of inquiry"); *Bone v. State,* 77 S.W.3d 828, 835 (Tex. Crim. App. 2000)(holding that "[i]neffective assistance of counsel claims are not built are retrospective speculation; they must 'be firmly founded in the record.'"). The applicant fails to show that his constitutional rights, pursuant to U.S. CONST. amend. VI and TEX. CONST. art. I, § 10, were violated.

Thirtieth Ground for Relief: alleged ineffective assistance of trial counsel/retaliation evidence against the applicant

47. The applicant fails to show ineffective assistance of trial counsel based on counsel not lodging a meritless objection to the admission of the unadjudicated and dismissed offense of retaliation. *See Paredes v. State,* 129 S.W.3d 530, 536 (Tex. Crim. App. 2004)(admission of unadjudicated offenses at punishment in capital murder trial does

not violate due process); *Williams v. State,* 622 S.W.2d 116 (Tex. Crim. App. 1981)(holding that, absent showing of unfair surprise, unadjudicated offense is admissible during punishment in capital case and does not deny defendant due process and equal protection).

Thirty-First Ground for Relief: alleged ineffective assistance of appellate counsel/Smithy's alleged false, misleading testimony

48. The applicant fails to show ineffective assistance of appellate counsel based on appellate counsel not presenting on direct appeal the meritless claim that Roy Smithy's testimony was allegedly false or misleading. *Jones v. Barnes,* 463 U.S. 475 (1983)(holding appellate counsel cannot be held ineffective for choosing not to advance meritless appellate claim).

49. The applicant fails to show ineffective assistance of appellate counsel based on appellate counsel not presenting on direct appeal the meritless claim of ineffective assistance of trial counsel based on counsel allegedly not timely and/or specifically objecting to Smithy's furlough testimony, moving to strike Smithy's testimony about furloughs, or requesting an instruction to disregard Smithy's testimony about furloughs. *Id.*

Thirty-Second Ground for Relief: alleged ineffective assistance of trial counsel/objecting to Smithy's testimony based on reliability or relevance re Rule 702 and 705
Thirty-Third Ground for Relief: alleged ineffective assistance of trial counsel/objecting to Smithy's testimony based on Rule 401 and 402

50. The applicant fails to show ineffective assistance of trial counsel based on trial counsel not specifically objecting to Roy Smithy's relevant, proper rebuttal testimony on the basis of TEX. R. EVID. 401 and 402. *See Mallett v. State,* 65 S.W.3d 59, 63 (Tex. Crim. App. 2001)(holding review is highly deferential and presumes counsel's actions fell within wide range of reasonable and professional assistance).

51. The applicant fails to show ineffective assistance of trial counsel based on trial counsel not specifically objecting to Roy Smithy's testimony on the basis of TEX. R. EVID. 702 and 705; the State properly established Smithy's qualifications to testify on prison classifications, procedures, and conditions. *See Martin v. State,* 623 S.W.2d 391 (Tex.

Crim. App. 1981)(fact that another attorney would employ different tactics is insufficient to support a claim of ineffective assistance of counsel).

Thirty-Fourth Ground for Relief: alleged ineffective assistance of trial counsel at guilt-innocence/admission of evidence of applicant's arrest for extraneous burglary, his prior prison sentences, his being released on parole before the instant offense; his giving false names when arrested

52. Trial counsel are not ineffective for adopting the plausible trial strategy of focusing on punishment and allowing the jury to hear about the applicant's arrest for an extraneous burglary, his being in custody when he confessed to the capital murder, and his prior prison sentences, including the fact that he had been released from prison just a short time before the offense, so that the applicant's jury would concentrate on mitigation evidence at punishment. *See Ex parte Kunkle,* 852 S.W.2d 499, 506 (Tex. Crim. App. 1993)(holding counsel's strategic choices made after thorough investigation of law and facts virtually unchallengeable under Sixth Amendment).

Thirty-Fifth Ground for Relief: alleged disparity in rules of evidence re parole eligibility/complainants' peaceful nature

53. Because the applicant did not object to Gary Andrews' testimony that Charles Allen was peaceful and not aggressive, the applicant is procedurally barred from advancing his habeas complaint concerning Don Allen's testimony objected-to testimony that Charles Allen was peaceful and not aggressive. *See Anderson v. State,* 717 S.W.2d 622, 628 (Tex. Crim. App. 1986)(holding improperly admitted harmless if other evidence admitted without objection that proves same fact that inadmissible evidence sought to prove); *see also* Tex. R. App. P. 33.1(a); *Hodge,* 631 S.W.2d at 757; *see also Hughes,* 191 F.3d at 614 (holding that defendant's failure to comply with Texas contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

54. In the alternative, the issue of Charles Allen's peaceful nature was raised by the applicant's assertion that he attacked Allen in self-defense; testimony that Charles Allen was peaceful did not open the door or warrant admission of evidence of a jury instruction concerning the applicant's parole eligibility – evidence that was inadmissible at the time of

the applicant's trial. *See* TEX. R. EVID. 404(a)(2)(providing evidence of peaceable character of victim admissible in murder case to rebut evidence that victim was first aggressor).

Thirty-Sixth Ground for Relief: alleged ineffective assistance of trial counsel at punishment/ alleged cumulative effect
Thirty-Seventh Ground for Relief: alleged ineffective assistance of trial counsel at guilt-innocence/alleged cumulative effect
Thirty-Eighth Ground for Relief: alleged ineffective assistance of appellate counsel/alleged cumulative effect

55. The applicant fails to show cumulative effect of error, if any, based on the applicant's claims of ineffective assistance of trial counsel at punishment and other alleged punishment errors presented in the applicant's application for writ of habeas corpus. *Bone,* 77 S.W.3d at 836 (noting "[a] vague, inarticulate sense that counsel could have provided a better defense is not a legal basis for finding counsel constitutionally incompetent.").

56. The applicant fails to show cumulative effect of error, if any, based on the applicant's claims of ineffective assistance of trial counsel at guilt-innocence and other alleged guilt-innocence errors presented in the applicant's application for writ of habeas corpus. *Id.*

57. The applicant fails to show cumulative effect of error, if any, based on the applicant's claims of ineffective assistance of appellate counsel on direct appeal. *Id.; Butler,* 884 S.W.2d at 783 (holding *Strickland* standard applies to appellate counsel as well as trial counsel).

58. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Cause No. 612408-A

EX PARTE	§	IN THE 179TH DISTRICT COURT
	§	OF
RICK ALLAN RHOADES, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 612408-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 612408-A, including his application for writ of habeas corpus;

2. all of the State's/Respondent's pleadings filed in cause number 612408-A, including the State's/Respondent's Original Answer;

3. this court's findings of fact, conclusions of law and order denying relief in cause no. 612408-A;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or State/Respondent in cause no. 612408-A;

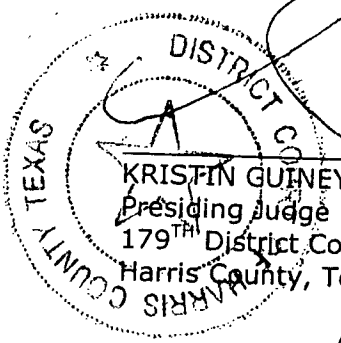
5. any affidavits and exhibits filed in cause no. 612408-A; and,

6. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 612408, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to the applicant's counsel: Jerome Godinich; 929

Preston; Houston, Texas 77002 and to State/Respondent: Roe Wilson; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002-1901.

SIGNED this 21 day of May, 2014.



MAY 2 1 2014

KRISTIN GUINEY
Presiding Judge
179TH District Court
Harris County, Texas