

NO. AP-76,289
TC CAUSE #D-1-DC-07-302093

OCT 16 2013
At 12:39 p M.
Amalia Rodriguez-Mendoza, Clerk

EX PARTE § IN THE DISTRICT COURT

 § OF TRAVIS COUNTY, TEXAS

PAUL GILBERT DEVOE, III § 403rd JUDICIAL DISTRICT

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS
OF LAW AND ORDER TO TRANSMIT
HABEAS CORPUS RECORD
(ARTICLE 11.071 POST CONVICTION APPLICATION)**

ON THIS 16 day of November, 2013, came on to

be considered the Application for Writ of Habeas Corpus in the above cause. The Court has considered evidence in the form of testimony, affidavit, discovery, and/or personal recollection.¹ Having considered said evidence, the court makes the following findings of fact and conclusions of law:

Findings of Fact and Conclusions of Law

1. Applicant was convicted by a jury of the capital murders of Haylie Faulkner and Danielle Hensley, two teenaged girls, committed on or about August 24, 2007. Based upon the jury's answers to the two punishment issues submitted, the trial judge sentenced Applicant to death. On December 14, 2011, the Texas Court of Criminal Appeals

¹ See TEX. CODE CRIM. PROC. Art. 11.071 §9(a): “To resolve the issues, the court may require affidavits, depositions, interrogatories, and evidentiary hearings and may use personal recollection.

affirmed Applicant's conviction upon his automatic direct appeal. *Devoe v. State*, 354 S.W.3d 457 (Tex. Crim. App. 2011).

Ground for Relief One

Findings of Fact

1. Applicant concedes he did not file a motion in limine to exclude A.P. Merillat's testimony. Applicant concedes he did not seek to limit A.P. Merillat's testimony in any manner. Applicant further concedes he did not seek to exclude the anecdotal portions of A.P. Merillat's testimony.
2. On direct appeal, the Texas Court of Criminal Appeals rejected Applicant's claim that his right to due process was violated by the testimony of A.P. Merillat.
3. Also on direct appeal, the Texas Court of Criminal Appeals held that Applicant did not preserve anything for error concerning A.P. Merillat's testimony because Applicant did not object at trial "on constitutional or other grounds."
4. The Texas Court of Criminal Appeals further held that even if Applicant had preserved error, similar arguments have previously been rejected by the Court in *Jenkins v. State*, 912 S.W.2d 793, 818 (Tex. Crim. App. 1995) (on motion for reh'g).

5. As the Chief Investigator for the Special Prosecution Unit (SPU), A.P. Merillat had, at the time of his testimony in the instant case, over 20 years of experience in assisting with the investigation and prosecution of violent crimes committed in the Texas prison system.
6. While Applicant cites statistics in an attempt to demonstrate A.P. Merillat's testimony misrepresented the levels of violence within the Texas prison system, A.P. Merillat filed a detailed and credible affidavit that clarified any minor discrepancies between Applicant's statistics and his own occurred as a result of using information from two different sources. Further, A.P. Merillat provided context for the statistics he relied on for his testimony.
7. The anecdotal accounts provided by A.P. Merillat's throughout his testimony were neither false nor misleading. Specifically, A.P. Merillat's testimony regarding the prosecution of TDC inmate Michael Thomas for the killing of his cellmate was offered for the purpose of informing the jury that intoxicating substances are available to inmates in the prison system.
8. Applicant's claim that A.P. Merillat failed to respond to an Open Records Request is refuted by A.P. Merillat's affidavit.

9. A.P. Merillat's testimony that he was under no professional obligation to testify was credible and truthful, and his affidavit further supports his statement.
10. A.P. Merillat's testimony that he charges a fee because he "[tries to get back what it is costing [him]]" to testify was credible and truthful because he is not compensated by the SPU for travel, lodging, or any other expense associated with testifying, and he had to use one of his vacation days to attend the trial.
11. A.P. Merillat's testimony was not tailored to the Applicant personally, he did not know the facts of the case, and he did not give an opinion on whether Applicant would commit future acts of violence.
12. Aside from A.P. Merillat's testimony, the jury heard ample evidence on the issue of Applicant's future dangerousness including testimony regarding Applicant's violent criminal history as well as evidence of Applicant's history of violence while under the influence of alcohol and/or drugs.

Conclusions of Law

1. The State did not violate Applicant's right to due process in offering the testimony of prison expert A.P. Merillat.

2. Applicant's claim is procedurally barred because he failed to preserve any error concerning A.P. Merillat's testimony.
3. Applicant fails to show A.P. Merillat's testimony was perjurious.
4. The State did not knowingly use perjured testimony in sponsoring A.P. Merillat as an expert.
5. Even if it was error to admit A. P. Merillat's testimony, Applicant fails to show any harm that resulted from the State's use of A.P. Merillat's testimony because he cannot demonstrate that the outcome of his trial would have been different had the evidence not been admitted.
6. Applicant fails to show any prosecutorial misconduct in the use of A.P. Merillat's testimony.
7. Applicant's ground for relief one is without merit.

Ground for Relief Two

Findings of Fact

1. A.P. Merillat testified as the State's expert on prison violence.
2. A.P. Merillat's testimony gave insight into the workings of the prison system, the treatment of capital murder defendants who receive life sentences, and the prevalence of violent conduct and drug possession in prison populations.

3. Applicant's defense counsel both provided detailed affidavits in response to Applicant's ineffective assistance of counsel claims.
4. In anticipation of A.P. Merillat's testimony, defense counsel retained Larry Fitzgerald, a former Public Information Officer with the TDCJ.
5. Larry Fitzgerald has extensive experience testifying in direct rebuttal to A.P. Merillat's testimony in capital murder trials.
6. Defense counsel, with the help of Larry Fitzgerald, learned what A.P. Merillat would testify to, and how best to counteract that testimony.
7. At trial, defense counsel employed the strategies developed with Larry Fitzgerald to rebut A.P. Merillat's testimony and attempted to "expose incorrect statements by Merillat."

Conclusions of Law

1. The convicting court reviews Defense counsel's decisions from counsel's perspective at the time of trial, and the fact that another attorney may have pursued a different course of action does not support a finding of ineffectiveness.
2. Defense counsel's decision to present testimony from Larry Fitzgerald to rebut the anticipated subject of A.P. Merillat's testimony was reasonable in light of counsel's legal experience and defensive strategy.

3. Applicant does not show that defense counsel failed to reasonably rebut A.P. Merillat's testimony.
4. Defense counsel's performance was not deficient under the first prong of *Strickland v. Washington*, 466 U.S. 688 (1984).
5. A.P. Merillat's testimony was relevant and admissible because the term society encompasses prison society for purposes of future dangerousness under *Boyd v. State*, 811 S.W.2d 105, 119 (Tex. Crim. App. 1991).
6. A.P. Merillat's testimony regarding the prevalence of violent conduct and drug possession in prison populations was relevant and admissible in light of Applicant's history of violence associated with drug use.
7. Applicant does not show that the trial judge would have committed error in overruling an objection to A.P. Merillat's testimony.
8. It was not ineffective assistance when defense counsel failed to object to otherwise admissible testimony.
9. Defense counsel's performance did not fall below an objective standard of reasonableness.
10. Applicant fails in his burden to prove by a preponderance of the evidence that defense counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 688 (1984).

11. Applicant's ground for relief two is without merit.

Grounds for Relief Three

Findings of Fact

1. Although Applicant filed a generic pre-trial motion for a hearing pursuant to *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), Applicant concedes that a hearing on that motion was never requested or held to address Dr. Coons' testimony.
2. Applicant concedes that he made no objections at trial to Dr. Coons' qualifications or competency as an expert.
3. Applicant concedes that he made no constitutional challenge at trial to the admission of Dr. Coons' testimony.
4. The Court of Criminal Appeals considered and rejected Applicant's claim that Dr. Coons' testimony is unreliable, noting that Applicant failed to preserve the issue for review at trial.
5. Dr. Coons interviewed Applicant at length and reviewed Applicant's available medical records to formulate his opinion.
6. Dr. Coons utilized his extensive education and experience in the field of forensic psychiatry to formulate a methodology for determining future dangerousness.

7. Dr. Coons relied on a regularly employed methodology to arrive at his opinion on future dangerousness.
8. Applicant's own witness, Psychiatrist Dr. Robert Cantu, testified that the recurring theme in Applicant's medical, criminal, and other records is one of alcohol and drug abuse.
9. Dr. Cantu testified that Applicant had consumed alcohol and smoked methamphetamine prior to the murders.
10. Dr. Cantu also testified on cross-examination that Applicant would be a danger to others in prison if he had access to large quantities of drugs or alcohol, an opportunity to harm weaker people, and an unstructured environment without direct supervision.
11. A.P. Merillat, a senior criminal investigator for the Texas Special Prosecution Unit, reliably testified that inmates in Texas prisons have access to drugs and alcohol, and violence occurs inside of Texas Prisons.

Conclusions of Law

1. The failure to object in a timely and specific manner during trial fails to preserve an issue for review, even when the error may concern a constitutional right. *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002).

2. Applicant failed to preserve for review any issue concerning Dr. Coons' testimony, therefore, his claim is procedurally barred.
3. Forensic psychiatry is a legitimate field of expertise, and the prediction of future dangerousness is well within the scope of that field.
4. Dr. Coons' testimony on future dangerousness was relevant and scientifically reliable and therefore admissible.
5. Applicant is not entitled to a reversal of his conviction unless he demonstrates that the outcome of his trial would have been different had the evidence not been admitted.
6. The facts of the case alone were sufficient to support a finding of future dangerousness.
7. Applicant does not show that the outcome of his trial would have been different had Dr. Coons' testimony not been admitted.
8. Applicant's ground for relief three is without merit.

Ground for Relief Four

Findings of Fact

1. Defense counsel made the decision not to challenge the admissibility of Dr. Coons' testimony pursuant to a developed trial strategy.

2. Defense counsel chose not request a hearing under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), to challenge the admissibility of Dr. Coons' testimony because (a) he knew that Dr. Coons had recently interviewed Applicant, (b) he knew, on the basis of years of experience, that the court would likely allow the testimony, and (c) he did not want to alert Dr. Coons to the nature of his questioning outside the presence of the jury because doing so might give Dr. Coons the time to improve his responses to questions once the jury was seated.
3. Defense counsel rigorously cross-examined Dr. Coons at trial pursuant to a developed trial strategy.
4. Defense counsel demonstrated that Dr. Coons only interviewed Applicant on one occasion.
5. Defense counsel demonstrated that Dr. Coons did not review Applicant's jail and prison stays.
6. Defense counsel demonstrated that Dr. Coons knew of no explosive disorders or violent acts by Applicant in Gowanda State Prison or in the Suffolk, Burnet, or Travis County Jails.
7. Defense counsel demonstrated that Dr. Coons knew of no incidences where Applicant had refused his medication while incarcerated.

8. Forensic psychiatry is a legitimate field of expertise, and the prediction of future dangerousness is well within the scope of that field.
9. Dr. Coons' testimony on future dangerousness was relevant and scientifically reliable and therefore admissible.
10. There was ample evidence, including testimony from Applicant's own expert psychiatrist Dr. Cantu, that Applicant would pose a future danger under certain circumstances.
11. Other testimony reliably replicated the testimony provided by Dr. Coons.
12. Testimony from the State's expert, A.P. Merillat, established that the conditions under which Applicant could pose a future danger are present in Texas prisons.
13. On direct review, the Court of Criminal Appeals noted that even if the trial court had erred in admitting Dr. Coons' testimony, "there was ample evidence that there was a probability that [Applicant] would commit future acts of violence."

Conclusions of Law

1. The convicting court reviews defense counsel's decisions from counsel's perspective at the time of trial, and the fact that another

attorney may have pursued a different course of action does not support a finding of ineffectiveness.

2. Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable under *Strickland v. Washington*, 466 U.S. 688 (1984).
3. Defense counsel's decision not to challenge the admissibility of Dr. Coons' testimony was reasonable as part of a well-developed and sound trial strategy in light of counsel's legal experience and defensive strategy.
4. Applicant does not show that defense counsel's strategy to rebut Dr. Coons' testimony through rigorous cross-examination was not a reasonable, strategic plan.
5. Defense counsel's performance was not deficient under the first prong of *Strickland v. Washington*, 466 U.S. 688 (1984).
6. Dr. Coons' testimony regarding future dangerousness was relevant and admissible.
7. Applicant does not show that the trial judge would have committed error in overruling an objection to Dr. Coons' testimony.
8. It was not ineffective assistance when defense counsel failed to object to otherwise admissible testimony.

9. Defense counsel's performance did not fall below an objective standard of reasonableness.
10. Applicant fails in his burden to prove by a preponderance of the evidence that defense counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 688 (1984).
11. Erroneously admitting evidence "will not result in reversal when other such evidence was received without objection, either before or after the complained of ruling." *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010), quoting *Leady v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).
12. The replication of Dr. Coons' testimony by Applicant's own expert, Dr. Cantu, when he indicated Applicant would constitute a future danger bars reversal of Applicant's conviction.
13. Applicant does not show that the outcome of his trial would have been different had the evidence been excluded.
14. Applicant's ground for relief four is without merit.

Ground for Relief Five

Findings of Fact

1. The Findings of Fact under Ground for Relief Three are herein incorporated.

2. Applicant concedes that Dr. Coons' testimony on the lack of motivation for life without parole inmates to behave well went unchallenged at trial.
3. In support his contention that Dr. Coons had no experience to testify concerning the lack of motivation for life without parole inmates to behave well Applicant offers no other evidence but that the option of sentencing capital inmates to life without parole had, at the time of the instant trial, only been in effect for the previous four years.
4. Dr. Coons testified that he based his opinion on the lack of motivation for life without parole inmates to behave well on his own experience with such inmates.
5. Applicant never challenged Dr. Coons' assertion that he had such experience at trial.

Conclusions of Law

1. The failure to object in a timely and specific manner during trial fails to preserve an issue for review, even when the error may concern a constitutional right. *Saldano v. State*, 70 S.W.3d 873 (Tex. Crim. App. 2002).
2. Applicant failed to preserve any issue concerning Dr. Coons' testimony for review, therefore his claim is procedurally barred.

3. Dr. Coons' testimony on the lack of motivation for life without parole inmates to behave well was relevant and reliable and therefore admissible.
4. Applicant is not entitled to a reversal of his conviction unless he demonstrates that the outcome of his trial would have been different had the evidence not been admitted.
5. Applicant does not show that the outcome of his trial would have been different had Dr. Coons' testimony not been admitted.
6. Applicant's ground for relief five is without merit.

Ground for Relief Six

Findings of Fact

1. The Findings of Fact under Ground for Relief Four are herein incorporated.
2. Dr. Coons' opinion about the lack of motivation of capital inmates sentenced to life without parole to behave well in prison was based on his experience in working with such inmates.

Conclusions of Law

1. The convicting court reviews defense counsel's decisions from counsel's perspective at the time of trial, and the fact that another

attorney may have pursued a different course of action does not support a finding of ineffectiveness.

2. Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable under *Strickland v. Washington*, 466 U.S. 688 (1984).
3. Defense counsel's decision to not challenge the admissibility of Dr. Coons' testimony was reasonable as part of a well-developed and sound trial strategy in light of counsel's legal experience and defensive strategy.
4. Applicant does not show that defense counsel's strategy to rebut Dr. Coons' testimony through rigorous cross-examination was not a reasonable, strategic plan.
5. Defense counsel's performance was not deficient under the first prong of *Strickland v. Washington*, 466 U.S. 688 (1984).
6. Dr. Coons' testimony regarding the lack of motivation for life without parole inmates to behave well was relevant and admissible.
7. Applicant does not show that the trial judge would have committed error in overruling an objection to Dr. Coons' testimony.
8. It was not ineffective assistance when defense counsel failed to object to otherwise admissible testimony.

9. Defense counsel's performance did not fall below an objective standard of reasonableness.
10. Applicant fails in his burden to prove by a preponderance of the evidence that defense counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 688 (1984).
11. Erroneously admitting evidence "will not result in reversal when other such evidence was received without objection, either before or after the complained of ruling." *Coble v. State*, 330 S.W.3d 253 (Tex. Crim. App. 2010), quoting *Leady v. State*, 983 S.W.2d 713, 718 (Tex. Crim. App. 1998).
12. The replication of Dr. Coons' testimony by Applicant's own expert, Dr. Cantu, when he indicated Applicant would constitute a future danger bars reversal of Applicant's conviction.
13. Applicant does not show that the outcome of his trial would have been different had the evidence been excluded.
14. Applicant's ground for relief six is without merit.

Ground for Relief Seven

Findings of Fact

1. At the time of Applicant's trial, defense counsel Tom Weber had 20 years of experience as a criminal defense attorney, had tried more than

two hundred jury trials and had represented more than 25 capital defendants.

2. Defense counsel conducted and completed a thorough investigation into Applicant's social, medical, academic, and family background in preparation for trial.
3. Defense counsel collected and reviewed all of Applicant's existing jail and prison documentation in preparation for trial.
4. Defense counsel, along with Applicant's mitigation specialist, Gerald Byington, and his investigator, JW Thompson, conducted extensive interviews with Applicant's mother, sister, brother, maternal aunt Gwene Cancel, maternal aunt Laura Nelson, and Laura Nelson's husband, Ed Nelson, maternal uncle John O'Connell, John O'Connell's ex-wife, Janice, and Applicant's former employer Bernard Valentine either in person, via telephone, or both.
5. Prior to the interviews conducted by Applicant's investigator JW Thompson, defense counsel issued Thompson a number of clear directives to make specific inquiries, including but not limited to uncovering: Applicant's family member's knowledge of Applicant's learning disabilities, problems in school such as special education classes, or mental health treatment; Applicant's family member's

opinions on if Applicant was violent; whether anyone in the family wanted to testify; and whether Applicant had suffered any physical, emotional, or sexual abuse.

6. Applicant's mitigation specialist Gerald Byington was fired two months prior to trial for refusing to travel to New York to meet with Applicant's family at trial counsel's direction, despite trial counsel's offer to absorb the cost of the trip.
7. Prior to being fired, Mr. Byington had completed all of his assigned tasks in preparation for Applicant's trial with the exception of in-person interviews with Applicant's family. After his release, defense counsel assigned this remaining task to JW Thompson who completed it along with second-chair trial counsel Jim Erickson.
8. Defense counsel did not fail to conduct a mitigation investigation.
9. Defense counsel elicited testimony from Applicant's aunt Laura Nelson that Applicant was mistreated by his stepfather.
10. Defense counsel elicited testimony from Applicant's mother that he was neglected and mistreated by his biological father.
11. Defense counsel elicited testimony from all family members that mental illness and alcoholism affected many generations of Applicant's family.

12. Defense counsel elicited testimony from Dr. Rosenstein that Applicant showed the indicative characteristics of fetal alcohol syndrome, that Applicant suffered from impaired brain functioning as a likely result of exposure to alcohol in utero, that Applicant's mental and cognitive abilities were similar to somebody with mental retardation, and that Applicant's impaired brain functioning is likely to lead to problems with problem solving, cognitive flexibility, and impulsivity.
13. Defense counsel elicited testimony from Dr. Saey that Applicant had borderline intellectual function.
14. Defense counsel attempted to humanize Applicant by eliciting testimony from Applicant's mother about Applicant's hobbies and his help with cooking and cleaning, and from Applicant's sister that he aided with her husband when he was confined to a wheelchair and with her daughter when she was born.
15. Defense counsel pursued a trial strategy for the defense that focused on persuading the jury that because Applicant had never been a threat during previous, lengthy periods of incarcerations over the preceding 27 years that Applicant would not be a future threat if sentenced to life without parole.

16. Notwithstanding the fact that his trial strategy on punishment was to focus on whether Applicant presented a threat of future dangerousness, defense counsel also presented, to the jury, the significant and compelling mitigating evidence it was able to uncover during its mitigation investigation.
17. Writ counsel, despite the help of mitigation specialist Mary Burdette, has not uncovered any new evidence that differed in a substantial way from the information collected by Applicant's trial counsel.
18. Much of the information relied upon by writ counsel to attack trial counsel's performance utilizes information already uncovered during trial counsel's investigation of the Applicant's background.
19. Applicant has failed to substantiate any allegations of sexual abuse by a parish priest.

Conclusions of Law

1. The effectiveness of defense counsel's representation of Applicant is not determined by whether presented sufficient mitigating evidence. Defense counsel's effectiveness is determined by whether the investigation supporting counsel's decisions regarding the use of the mitigating evidence was reasonable.

2. The convicting court reviews defense counsel's decisions regarding mitigating evidence from counsel's perspective at the time of trial, and the fact that another attorney may have pursued a different course of action does not support a finding of ineffectiveness.
3. Strategic choices made after a thorough investigation of the law and the facts relevant to plausible options are virtually unchallengeable under *Strickland v. Washington*, 466 U.S. 688 (1984).
4. Defense counsel developed a defensive strategy that was reasonable and supported by the facts and circumstances of the investigation of this capital murder.
5. Defense counsel's investigation of the existence of mitigating evidence was reasonable in light of counsel's legal experience, defensive strategy, facts of the offense, and the lack of any new significant mitigating evidence.
6. Defense counsel's presentation of evidence at trial uncovered during the mitigation investigation was a matter of sound trial strategy and was reasonable.
7. Defense counsel's utilization of expert witnesses at trial was a matter of sound trial strategy and was reasonable.

8. Trial counsel need not retain, much less maintain, a mitigation specialist for the duration of trial preparation on a capital case.
Strickland v. Washington, 466 U.S. 688 (1984).
9. Applicant fails to demonstrate the existence of any new evidence that differs substantially from the evidence actually presented at sentencing.
10. Applicant does not show that defense counsel failed to conduct a reasonable mitigation investigation.
11. Defense counsel's performance did not fall below an objective standard of reasonableness.
12. Applicant fails in his burden to prove by a preponderance of the evidence that defense counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 688 (1984).
13. Applicant's ground for relief seven is without merit.

Ground for Relief Eight

Findings of Fact

1. During Applicant's initial detention in the Travis County Jail he shared a cell with an individual by the name of Stephen Barr for only a few hours.

2. At the time of Stephen Barr's testimony in the instant case, the jury was aware that, at the time he met Applicant, he was incarcerated on a charge of non-payment of child support.
3. In the first few minutes of their brief encounter, Applicant told Stephen Barr that he had killed six people, prompting Stephen Barr to request that he no longer be required to share a cell with Applicant. This request was granted and Applicant was moved to a different cell.
4. Stephen Barr was only one of many State's witnesses that testified concerning Applicant's statements that he had killed six people.
5. The affidavit prepared by Applicant's uncle, Ed Nelson, alleges that he was contacted by a man claiming to be a cell mate of Applicant, and that the man asked for money. Ed Nelson could not remember the man's name at the time that his affidavit was generated.
6. In the affidavit, Ed Nelson mentions also speaking to the man's wife, and further states that he felt the request for money was an attempt to solicit a bribe, even though the persons he spoke to did not expressly promise anything in exchange for the money..
7. The limited time Applicant and Stephen Barr shared a cell and interacted with one another makes it unlikely that the man contacting

Ed Nelson was Stephen Barr, or that the woman was Stephen Barr's wife.

8. Defense counsel Erickson had no recollection of ever being notified by Ed Nelson of any contact between himself and Stephen Barr.
9. Defense counsel Weber only vaguely remembers Ed Nelson mentioning something concerning Stephen Barr during the punishment phase, well after Stephen Barr's testimony. Mr. Weber does not have any recollection of Mr. Nelson alleging that Mr. Barr promised Ed Nelson anything in return for money.
10. Defense counsel Weber stated that even if he had learned of Ed Nelson's claims prior to Stephen Barr's testimony, he would not have attempted to impeach Mr. Barr with the information provided by Mr. Nelson because Mr. Barr "would have denied it" and it is bad trial strategy to ask an adverse witness a question to which you do not know the answer.

Conclusions of Law

1. The convicting court reviews Defense counsel's decisions from counsel's perspective at the time of trial, and the fact that another attorney may have pursued a different course of action does not support a finding of ineffectiveness.

2. Defense counsel's decision to not impeach Stephen Barr's credibility was reasonable in light of defense counsel's legal experience, defensive strategy, and the strength of the State's case without the use of this witness.
3. Applicant does not show that defense counsel was unreasonable in failing to use Stephen Barr's criminal history to impeach Barr's credibility when it was already known Stephen Barr was in jail for non-payment of child support.
4. Applicant does not show that there is sufficient evidence to demonstrate either that Stephen Barr was the person who contacted Ed Nelson, or that, even if it was Stephen Barr who did so, that a bribe was being solicited.
5. Defense counsel's performance was not deficient under the first prong of *Strickland v. Washington*, 466 U.S. 688 (1984).
6. Defense counsel's performance did not fall below an objective standard of reasonableness.
7. Applicant fails in his burden to prove by a preponderance of the evidence that defense counsel rendered ineffective assistance under *Strickland v. Washington*, 466 U.S. 688 (1984).

8. Applicant does not show that the outcome of his trial would have been different had the witness's credibility been directly impeached by defense counsel.

9. Applicant's ground for relief eight is without merit.

Ground for Relief Nine

Findings of Fact

1. Applicant does not allege any facts to support his claim that trial counsel failed to preserve error at trial, or that appellate counsel inadequately drafted and researched the brief they filed with the Texas Court of Criminal Appeals.

Conclusions of Law

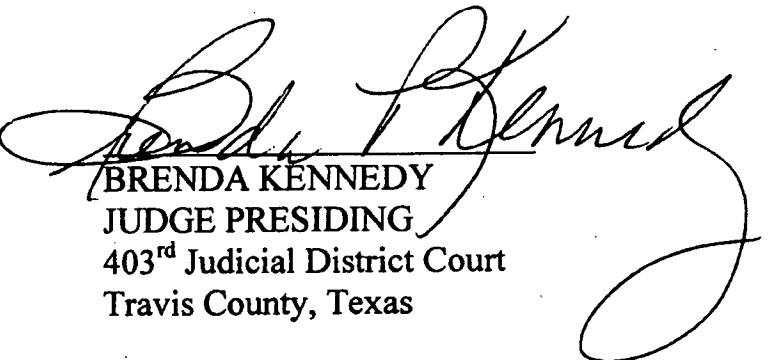
1. In post-conviction proceedings, Applicant has the burden of proving facts, which, if true, entitle him to relief. Applicant must do more than state mere conclusions of law or allegations of error. *Ex Parte Maldonado*, 688 S.W.2d 114, 116 (Tex. Crim. App. 1985); *Ex Parte McPherson*, 32 S.W.3d 860, 861 (Tex. Crim. App. 2000).
2. Applicant has failed to provide adequate facts to support his claims, and instead merely makes allegations of error.
3. Applicant's ground for relief nine is without merit.

On the basis of the above findings and conclusions the court recommends that relief be **DENIED**. The court hereby **ORDERS** that the District Clerk of Travis County prepare and transmit the record herein to the Court of Criminal Appeals, including:

- (A) the application;
- (B) the answers and motions filed;
- (C) the court reporter's transcript;
- (D) the documentary exhibits introduced into evidence;
- (E) the proposed findings of fact and conclusions of law;
- (F) the findings of fact and conclusions of law entered by the court;
- (G) the sealed materials such as a confidential request for investigative expenses; and
- (H) any other matters used by the convicting court in resolving issues of fact.

The court hereby **ORDERS** that the District Clerk of Travis County immediately prepare and transmit to counsel for the applicant, Mr. Alex Calhoun, 3301 Northland Dr., Suite 215, Austin, Texas, 78731 and to counsel for the State, Kathryn Scales, Assistant District Attorney for the Travis County District Attorney's Office, P.O. Box 1748, Austin, Texas, 78767:

- (A) orders entered by the convicting court;
- (B) proposed findings of fact and conclusions of law; and
- (C) findings of fact and conclusions of law entered by the court.


BRENDA KENNEDY
JUDGE PRESIDING
403rd Judicial District Court
Travis County, Texas