

No. _____

(CAPITAL CASE)

**In the
Supreme Court of the United States**

RODERICK NAPOLEON HARRIS,

Petitioner,

v.

ERIC GUERRERO, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
CORRECTIONAL INSTITUTIONS DIVISION,

Respondent.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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CAPITAL CASE

QUESTION PRESENTED

Strickland v. Washington, 466 U.S. 668 (1984), held that a defendant receives ineffective assistance of counsel when counsel’s performance “fell below an objective standard of reasonableness” and the deficient performance prejudiced the defense. Courts must compare counsel’s conduct to the “prevailing professional norms,” not merely accept counsel’s after-the-fact justification for why their challenged conduct was reasonable. *Id.* at 687–90. As Justice Alito emphasized, “[i]t is the responsibility of the courts to determine the nature of the work that a defense attorney must do in a capital case in order to meet the obligations imposed by the Constitution.” *Bobby v. Van Hook*, 558 U.S. 4, 14 (2009) (Alito, J., concurring).

The questions presented are:

1. Whether *Strickland* requires a habeas court to identify and apply the prevailing professional norms in order to determine whether trial counsel’s performance at trial was constitutionally deficient.
2. Whether a habeas court may defer to trial counsel’s post-hoc explanation for their performance at trial in determining whether their conduct was constitutionally deficient.
3. Whether the Fifth Circuit erred by applying the Arizona weighing framework described in *Thornell v. Jones*, 602 U.S. 154 (2024), in determining whether counsel’s introduction of stun-belt evidence was prejudicial under *Strickland* instead of Texas’s different non-weighting capital scheme.

PARTIES TO THE PROCEEDING

Petitioner (petitioner-appellant below) is Roderick Napoleon Harris.

Respondent (respondent-appellee below) is Eric Guerrero, Director, Texas Department of Criminal Justice, Correctional Institutions Division.

STATEMENT OF RELATED PROCEEDINGS

Texas v. Roderick Harris, No. F09-00409 (Crim. Dist. Ct. No. 7, Dallas Cnty., Tex.) (judgment entered May 21, 2012).

Roderick Harris v. Texas, No. AP-76,810 (Tex. Crim. App.) (judgment entered May 21, 2014).

Ex parte Roderick Harris, No. W09-00409-Y(A) (Crim. Dist. Ct. No. 7, Dallas Cnty., Tex.) (judgment entered Mar. 31, 2020).

Ex parte Roderick Harris, No. WR-80,923-01 (Tex. Crim. App.) (judgment entered Dec. 16, 2020).

Ex parte Roderick Harris, No. WR-80,923-01 (Tex. Crim. App.) (reconsideration denied Jan. 27, 2021).

Harris v. Lumpkin, No. 3:20-CV-3702-E (N.D. Tex.) (judgment entered Nov. 6, 2024).

Harris v. Guerrero, No. 24-70009 (5th Cir.) (judgment entered Mar. 31, 2026).

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PETITION FOR WRIT OF CERTIORARI

This capital case exposes two related, recurring, and consequential failures in how lower courts apply *Strickland v. Washington*, 466 U.S. 668 (1984), and *Wiggins v. Smith*, 539 U.S. 510 (2003). First, although *Strickland* requires a habeas court to compare counsel’s performance to the prevailing professional norms at the time of the trial, habeas courts routinely uphold counsel’s decisions without identifying the professional norms that supposedly made those decisions reasonable. This Court in *Bobby v. Van Hook*, 558 U.S. 4 (2009), held that the ABA Guidelines¹ are not dispositive, but as Justice Alito’s concurrence emphasized, this did not eliminate the constitutional inquiry into prevailing professional norms; it merely required courts to identify those norms from other sources when the ABA Guidelines were not controlling. In practice, however, lower courts often treat *Van Hook* as relieving them of the obligation to identify any objective professional norm at all.

Here, petitioner Roderick Harris presented evidence of the professional norms governing trial counsel’s performance: the ABA Guidelines, Texas capital-defense standards,² and expert testimony from an experienced Texas capital-defense practitioner. The State offered no contrary professional norms, and neither the state

¹ See *Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases*, 36 Hofstra L. Rev. 677 (2008); *American Bar Association Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 Hofstra L. Rev. 913 (2003) (“ABA Guidelines”); ABA Standards for Criminal Justice: Prosecution Function and Defense Function (3d ed. 1993).

² See State Bar of Tex., *Supplementary Guidelines and Standards for the Mitigation Function of Defense Teams in Texas Death Penalty Cases* (2015); State Bar of Tex., *Guidelines and Standards for Texas Capital Counsel*, 69 Tex. B.J. 966 (2006) (“Texas Guidelines”).

courts nor the federal courts below identified any either. The Fifth Circuit therefore found the conduct of Harris's counsel objectively reasonable without ever testing that conduct against the prevailing, objective norms for capital defense counsel.

Second, courts erroneously credit trial counsel's post-hoc explanation for failing to present mitigating evidence to the jury even where counsel never investigated that evidence and therefore could not have made an informed strategic decision. Before trial, Harris's counsel knew that he had been exposed in utero to alcohol and lead and then to lead again during childhood at one of Dallas's most notorious contamination sites. They knew his childhood was marked by poverty, mental illness, abuse, neglect, suicidality, special education, and instability. They knew the State intended to portray him as a gang member and future danger. Yet counsel did not investigate fetal alcohol spectrum disorder ("FASD"), lead poisoning, brain damage, Harris's full psychosocial history, or whether he was actually a member of a gang. And during trial, they elicited testimony that the State forced Harris to wear a stun belt in court, informing the jury that Harris had been subjected to a restraint this Court has recognized as inherently prejudicial because it suggested he was too dangerous to appear before the jury unrestrained.

Had they investigated, trial counsel could have discovered that Harris suffered from FASD and brain damage because of lead exposure. They would have discovered his deeply traumatic childhood and resulting mental illness. They would have discovered that he was not a gang member.

The district court below rejected the professional-norms evidence and deferred to counsel's self-serving, after-the-fact explanations of why they failed to present mitigating evidence to the jury. The Fifth Circuit then denied a certificate of appealability without addressing Harris's central argument that *Strickland* requires an objective benchmark before courts may credit counsel's post-hoc account of non-investigation.

Since *Van Hook*, lower courts have repeatedly rejected the ABA Guidelines without identifying and applying the prevailing professional norms *Strickland* requires. Instead, they often measure counsel's performance by counsel's own post-hoc explanations. *Strickland* does not permit that. Courts may reject the ABA Guidelines or other evidence of professional norms. But they may not reject the only evidence of those norms, identify none of their own, and then treat counsel's retrospective justification as the constitutional standard.

This Court should grant review to require the lower courts to apply *Strickland* as written: identify the governing professional norms, measure counsel's performance against them, require an adequate investigation before trial counsel make strategic decisions, reject post-hoc justifications for strategic decisions made without adequate investigation, and assess prejudice under the state capital punishment scheme that actually governed in the trial.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 2026 WL 887102 and is reprinted at App. 1a–4a. The district court's denial of Harris's petition for writ of habeas corpus and of a

certificate of appealability is reported at 756 F. Supp. 3d 249 and is reprinted at App. 5a–76a. The order of the Texas Court of Criminal Appeals (“CCA”) affirming the denial of habeas relief is reported at 2020 WL 8079824 and is reprinted at App. 77a–81a. The CCA’s unpublished denial of reconsideration, WR-80,923-01 (Tex. Crim. App. Jan. 27, 2021), is reprinted at App. 231a. The state habeas court’s unpublished Findings of Fact and Conclusions of Law, Cause No. F09-00409-Y (Criminal Dist. Ct., Dallas Cnty., Tex. Mar. 31, 2020), are reprinted at App. 82a–230a.

JURISDICTION

The Fifth Circuit issued its opinion affirming the district court’s decision denying a certificate of appealability on March 31, 2026. App. 1a. On June 9, 2026, Justice Alito extended the deadline to file a petition for certiorari to July 29, 2026. On July 14, 2026, Justice Alito further extended the deadline to file a petition for certiorari to August 28, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Sixth Amendment provides in relevant part: “In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.” U.S. Const. amend. VI. The Fourteenth Amendment provides in relevant part: “No state shall . . . deprive any person of life, liberty, or property, without due process of law. . . .” U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

A. Trial counsel failed adequately to prepare for Harris's capital trial and did not investigate obvious and known mitigation leads.

In 2012, a Dallas County jury convicted Harris of capital murder and sentenced him to death. App. 5a–8a, 15a. The Texas Court of Criminal Appeals affirmed on direct appeal. App. 77a–81a. Harris later filed a state habeas application raising ineffective-assistance-of-counsel claims, including claims that trial counsel failed to investigate and present available mitigation evidence and introduced prejudicial testimony that Harris wore a stun belt during trial. App. 16a & n.21.

Harris was represented at trial by court-appointed attorneys Brad Lollar, Doug Parks, and Mike Howard. Lollar was appointed lead counsel on April 1, 2009. ROA.22616.³ The State gave formal notice that it would seek death on August 24, 2009. ROA.784. Parks was appointed second chair in June 2011, and Howard joined the team in September 2011. ROA.22901–02; ROA.21692–716; ROA.22785; ROA.22806; ROA.22809. Trial began on May 7, 2012. ROA.22624.

Harris's trial lawyers did almost no work for years after their appointments. Although Lollar understood that the beginning of the case is the most critical time to prepare a defense, he worked only 33 hours between his April 2009 appointment and October 2011. ROA.22370; ROA.22616. Lollar did not begin reviewing witness videos until late March 2012 and did not review the record until early April 2012—little

³ “ROA” citations are to the record on appeal filed at the Fifth Circuit.

more than a month before trial. ROA.22623. In the first two years, he spent only three hours with Harris. ROA.22624–25.

Lollar's co-counsel devoted even less time to Harris's defense. Howard worked only 20.9 hours before voir dire and spent only 2.3 hours meeting with Harris. ROA.21675–91. Parks met Harris once before trial, for about ninety minutes, and had worked only 21.9 hours when voir dire began. ROA.22901–02; ROA.21692–21716.

The defense team also failed to conduct the basic mitigation investigation required in a capital case. Lollar claimed Howard was responsible for mitigation, but Howard denied it. ROA.22811; ROA.22814; ROA.21675–91. Defense investigator Brendan Ross understood that capital mitigation “requires extensive and generally unparalleled investigation into personal and family history,” and that the investigation must begin early because “witnesses disappear,” “memories fade,” and “records get lost.” ROA.22967–68. Yet Ross did no work until December 2010, more than a year after the State noticed its intent to seek death. ROA.22980–81. The team never created a social history for Harris, even though Ross admitted such a history should include abuse, family mental illness, domestic violence, poverty, instability, neighborhood conditions, peer influences, trauma, and education. ROA.22968–71.

Counsel also knew before trial of two significant mitigation issues: prenatal alcohol exposure and lead exposure. Lollar admitted that Harris's mother, Pamela Maddox, told him she drank while pregnant. ROA.21978; ROA.22377–78. Counsel also knew Harris and his mother grew up next to a lead smelter in Dallas, that their home was in a Superfund area, and that the area had been remediated because of

toxic lead in the soil and air. ROA.22381–82. Yet counsel did not investigate FASD or lead poisoning. ROA.22876–77; ROA.22379; ROA.22382.

Although counsel retained neuropsychologist Antoinette McGarrahan, they did not ask her to investigate FASD or lead poisoning. ROA.22379; ROA.22381–82; ROA.22710. In any event, McGarrahan was not qualified to diagnose FASD and had never diagnosed it. ROA.22698–22700; ROA.22812–13; ROA.22706. She did not begin work until July 2011, more than two years after counsel were appointed and nearly two years after the State noticed its intent to seek death. ROA.22703.

McGarrahan performed some testing, which she admitted showed neuropsychological deficits. ROA.22700; ROA.22744; ROA.22748–51. But she did not tell counsel her conclusions or possible testimony *until a week after trial began*. ROA.21852–53. She then wrote an email saying, for the first time, that she had nothing helpful to contribute. *Id.* Counsel later used that email as a post-hoc justification for not investigating FASD and lead poisoning—despite never having asked her to investigate those conditions and despite the fact that she never did.

Counsel also failed to investigate the State’s claim that Harris belonged to a gang. Before trial, counsel knew the State intended to argue Harris was a gang member and to call an expert to describe the danger posed by gang members. ROA.1419. Counsel did not investigate the State’s evidence and did not hire an expert to respond. ROA.9148; ROA.19157–58.

B. During the punishment phase, counsel failed to present the available mitigation evidence and instead introduced prejudicial stun-belt evidence.

The State's punishment case portrayed Harris as dangerous and irredeemable. The State called a gang expert and introduced photographs of Harris's tattoos, taken in April 2012, to argue that Harris belonged to the "Fish Trap Bloods." ROA.19140; ROA.19148–49; ROA.19156–58; ROA.20749–50; ROA.20757–58; ROA.20761–62; ROA.20765–66; ROA.20769–70. Defense counsel did not object. ROA.19157–58.

The mitigation case presented by Harris's defense lawyers was meager. Counsel called three experts, but none had reviewed the record, interviewed witnesses, or even met with Harris. ROA.20104; ROA.20137. They denied being asked to render any opinion about Harris specifically, instead offering only generalized testimony. ROA.20104–25; ROA.20137–47. And, perhaps most shockingly, counsel did not even prepare them for testifying until after trial had already begun, and then only briefly. ROA.22906–07.

Defense counsel also introduced damaging courtroom-security evidence. The State called Deputy Sheriff Bobby Moorehead only to identify two drawings Harris made during voir dire. ROA.20219–20. His direct testimony was brief, and the drawings were admitted without objection. *Id.* On cross-examination, however, counsel went far beyond the direct examination and told Moorehead to "[g]o ahead and tell [the jury] about the elevator incident." ROA.20225. Moorehead explained that he and another bailiff had accidentally left Harris alone in a courthouse elevator during voir dire, but that nothing happened. ROA.20225–27.

Defense counsel then elicited that Harris was wearing a remotely stun belt:

A. I placed a device on Mr. Harris called a RACC belt, R-A-C-C. That stands for remotely activated custody control device. I had the control to the device. The device is capable—

Q. Let me stop you there. That is a stun belt so in case they act up, you can zap them?

A. Some people refer to it as a stun belt.

Q. All right.

A. It has the capability of shocking a person with approximately 75 to 85,000 volts zero amperage, but it does incapacitate the person that's wearing it.

ROA.20226.

Counsel asked Moorehead to confirm that Harris had not attempted to escape while left alone in the elevator. ROA.20230. Moorehead confirmed that fact, but added that “Mr. Harris knew that I could stop him at that point. He had been told what the belt would do and I don’t think there was ever a doubt in his mind that I would activate it.” *Id.*

Because counsel opened the door, the State elicited still more stun-belt testimony on redirect. Moorehead testified that for all twelve weeks of voir dire he reminded Harris every morning what the stun belt would do if activated; that a bailiff controlled the remote at all times; that Harris signed a form each morning acknowledging the belt’s capabilities; and that Harris told Moorehead he thought Moorehead was going to shock him during the elevator incident. ROA.20231–32. Defense counsel did not object to any of the redirect testimony.

C. State habeas counsel developed the mitigation trial counsel failed to investigate.

In state habeas proceedings, Harris presented the mitigation case trial counsel could—and should—have offered at trial. The habeas court heard testimony from members of Harris’s family, members of the defense team (including trial counsel, the mitigation investigator, and McGarrahan), and multiple experts. App. 16a–17a.

Harris’s mother testified that she drank Wild Irish Rose and Thunderbird “every weekend” during her first trimester. ROA.21978; ROA.22121. Each defense attorney admitted knowing before trial that she drank while pregnant. ROA.22377–78; ROA.22811. Lollar knew at the time of trial that there is no safe amount of alcohol during pregnancy, especially in the first trimester. ROA.22379–80. Counsel nevertheless admitted they did not investigate whether Harris had FASD. ROA.22876–77; ROA.22379.

Counsel also admitted that an FASD diagnosis was recognized as powerful mitigation by the time of Harris’s trial. ROA.22379–80. Lollar conceded that if he had investigated and found FASD evidence, he “would have put that on.” ROA.22390.

Habeas counsel proved the FASD mitigation defense was real. Dr. Julian Davies, a pediatrician and expert in FASD at the University of Washington Fetal Alcohol Spectrum Diagnostic Clinic, diagnosed Harris with alcohol-related neurodevelopmental disorder, a form of FASD that severely affects executive function and cognitive ability. ROA.22109; ROA.27950–55; ROA.27959–72. Dr. Davies found that Harris suffered from a complex pattern of cognitive and behavioral abnormalities, including learning difficulties, deficits in school performance, poor

impulse control, problems in social perception, language deficits, impaired abstraction and metacognition, math deficits, and problems in memory, attention, and judgment. ROA.27969–70.

Dr. Joan Mayfield, a neuropsychologist with extensive experience diagnosing FASD, reviewed the tests McGarrahan had administered before trial and testified that those results showed significant impairment consistent with FASD. ROA.22485–86; ROA.22480; ROA.22520; ROA.22535. Less than one percent of the population performs as poorly as Harris did on the Wisconsin Card Sorting Test. ROA.22493–94. Harris’s fifteen-point split between verbal IQ and performance IQ was a significant red flag for FASD, and his memory testing also supported FASD. ROA.22498–99; ROA.22535; ROA.22501–02. Dr. Mayfield concluded that McGarrahan’s own pretrial tests pointed to FASD. ROA.22494–96; ROA.22499–22504; ROA.22518–19.

Habeas counsel also proved that trial counsel ignored serious lead-exposure. Counsel knew Harris grew up near a lead smelter, which closed in 1984, the year Harris was born. ROA.22381–82; ROA.783; ROA.22223–24. Harris’s mother lived approximately 2,000 feet downwind from the operating smelter while pregnant, and she ate dirt from the yard during pregnancy. ROA.25305; ROA.21983–84. The site had been subject to court-ordered remediation and government soil removal and eventually was listed on the National Priorities List of Superfund Sites. ROA.25893. Counsel did not hire a toxicologist or investigate whether Harris suffered brain

damage from lead exposure. ROA.22382. Lollar admitted that if he had found lead-exposure evidence, he would have presented it at trial. ROA.22390.

State habeas counsel retained toxicologist Dr. Thomas Dydek, who testified about Harris's high levels of lead exposure in utero and as a child. ROA.22209–10; ROA.22226–27; ROA.25307. Habeas counsel also had Harris's mother tested at the Icahn School of Medicine at Mount Sinai Hospital; her bone-lead concentration was approximately thirty percent higher than expected for someone her age. ROA.27878. Texas refused to allow Harris to be transported for the same test. ROA.28365.

An MRI also showed significant brain abnormalities. ROA.27886–87. Dr. Travis Snyder, a neuroradiologist, observed a cavum septum pellucidum, a space that ordinarily fuses during normal infant development; in an adult, it indicates abnormal fetal brain development. *Id.* Neuroscientist Dr. Jeffrey Lewine found low brain volume throughout Harris's brain, especially in temporal, parietal, and occipital regions and the left hippocampus, and correlated Harris's small brain size to prenatal and childhood exposure to toxins such as alcohol and lead. ROA.27888. Dr. Joseph Wu, a psychiatry professor emeritus at the University of California, Irvine, concluded that Harris's MRI showed significant abnormalities corroborating “a damaged brain most likely due to lead toxicity, traumatic brain injury and in utero exposure to alcohol.” ROA.27924. Dr. Wu also identified findings consistent with FASD, including abnormally small brain size and reduced caudate volume. ROA.27921.

Habeas counsel also developed the social history trial counsel never created. Dr. Laura Sovine, a clinical social worker and social historian at the University of

Texas, prepared a psychosocial history. ROA.22069; ROA.22653; ROA.25380. Her investigation showed that Harris was born in West Dallas to impoverished parents who abused drugs and alcohol, committed domestic violence, and suffered from serious mental illness. ROA.25406; ROA.21981; ROA.22653. Harris's mother has bipolar disorder and was hospitalized three times for mental-health issues; his biological father has schizophrenia. *Id.*

Harris's mother gave birth to him at seventeen after drinking alcohol and smoking marijuana during pregnancy. ROA.21977; ROA.25382. After his birth, she left him with "a rotating cast of caregivers" while she partied and struggled with her own mental health. ROA.25385; ROA.22654. She did not show Harris affection, hug him, or tell him she loved him. ROA.22769. She acknowledged that she "knew [she] had a baby," but "it wasn't real" to her. ROA.21979. Dr. Sovine explained that attachment to a primary caregiver is vital to infant brain development and that Harris did not receive that attachment. ROA.22654–55.

Harris's biological father went to prison shortly after Harris was born. ROA.25386; ROA.25469. When Harris was three, his mother married Ramon Maddox, who physically abused Harris, beating him with belts and extension cords, and sexually abused him. ROA.25393; ROA.22766; ROA.21988–92. Harris regularly witnessed Maddox beat and rape his mother. ROA.21990; ROA.22767; ROA.25387. Police were called to the Maddox home at least fifteen times. ROA.22766.

From early childhood, Harris displayed cognitive, emotional, and behavioral impairments consistent with prenatal alcohol and lead exposure. Public-school

records identified him as having “Learning Disabilities/Emotional Behavior Disorders.” ROA.25403; ROA.25673–886. He was in special education until he dropped out in eleventh grade. ROA.25673–886. Starting at seven, he repeatedly talked about killing himself. ROA.22420–21. He heard voices as a child. ROA.22413; ROA.22771. He received no psychiatric care or medication. ROA.22420–21; ROA.22413. He was diagnosed with ADHD, but his parents would not allow medication. ROA.25328. By high school, he self-medicated with illegal drugs. ROA.25334–35. When he was arrested for marijuana possession, the arrest report stated that “suitable supervision, care, or protection” was not being provided by a parent or guardian. ROA.25400–01. He struggled socially, was bullied, self-reported having “0 friends” at sixteen, ran away, preferred jail to returning home, dropped out before completing eleventh grade, and became homeless. ROA.22130–31; ROA.22768–69; ROA.27553; ROA.25394; ROA.22674; ROA.25404.

Habeas counsel also rebutted the State’s gang evidence. The State argued during the punishment phase that Harris belonged to a gang based on a tattoo. Trial counsel offered no rebuttal. But counsel’s own file contained a photograph taken shortly after Harris’s arrest and three years before trial, showing that Harris did not yet have the tattoo. ROA.27485. A reasonable investigation also would have shown that Harris’s juvenile records repeatedly stated that he had no gang affiliation. ROA.27489.

D. Harris offered the only evidence of prevailing professional norms.

Harris argued during the state habeas proceedings that counsel's performance must be measured against prevailing professional norms for capital defense at the time of trial. Harris contended that those norms were documented in the ABA Guidelines and the Texas Guidelines. Both require capital counsel to conduct "thorough and independent investigations relating to the issues of both guilt and penalty." *ABA Guidelines*, Guideline 10.7; *see also Texas Guidelines*, Guideline 11.1.

Harris also presented testimony from Richard Burr, a capital-defense standard-of-care expert with forty years of experience representing clients sentenced to death in Texas. ROA.22938; ROA.23005. Burr testified that trial counsel's failure to investigate FASD, lead poisoning, brain damage, and gang evidence fell below professional norms. ROA.23012–21. Burr explained that prenatal alcohol exposure had long been "a big red flag." ROA.23016. Even if neuropsychological testing "doesn't show much," a reasonable capital defense lawyer must "keep looking," because that fact alone does not negate FASD, particularly where exposure occurred during the first trimester when the brain is forming. ROA.23020–21.

Burr also testified that a lawyer has a duty to investigate lead exposure where counsel knows the client lived at a Superfund site with toxic lead levels. ROA.23035. He explained that, by 2009, the capital-defense community had long known that lead can constitute powerful mitigating evidence. ROA.23035–36.

Finally, Burr testified that retaining a gang expert was "essential" because alleged gang membership is "one of the highest impact facts there is"; "the mere

mention of it gives rise to the fear and stereotyping.” ROA.23046–48. Burr explained that prevailing norms required counsel to investigate whether Harris’s tattoos were gang-related and when he acquired them. ROA.23045–46.

The State identified no contrary professional norms. It did not call an expert to opine that reasonable Texas capital-defense practice permitted counsel to fail to investigate FASD, lead poisoning, social history, or gang evidence on this record.

E. The courts below rejected the norms evidence, identified no alternative norm, and deferred to counsel’s post-hoc rationalizations.

After Harris presented live evidence in the state habeas proceeding, the presiding judge left the bench before ruling. A new judge, who did not hear the testimony, signed the State’s proposed findings and conclusions verbatim (App. 82a–230a), except for deleting language stating that the findings were based on the court’s “personal knowledge and experience.” The new judge held no hearing or argument. The CCA adopted the findings and denied relief. App. 77a–81a, 231a.

Harris then filed a federal habeas petition raising, *inter alia*, ineffective-assistance claims based on counsel’s failure to investigate and present mitigation evidence concerning FASD and lead exposure, and counsel’s introduction of stun-belt testimony. App. 17a.

The district court denied relief and a certificate of appealability. App. 5a. It accepted trial counsel’s explanations under a “heavy measure of deference to counsel’s judgments” and excused counsel’s failure to investigate FASD and lead poisoning. App. 54a. It also excused counsel’s elicitation of stun-belt testimony, treating it as an

exercise of judgment despite settled law recognizing the prejudice from visible restraints. App. 62a–69a. The district court rejected Burr’s testimony and the objective professional norms offered by Harris, but identified no alternative norms under which counsel’s conduct was reasonable. App. 41a–42a.

The Fifth Circuit denied a certificate of appealability. App. 4a. Harris had argued that the district court could not reject the ABA Guidelines, Texas Guidelines, and expert testimony, identify no contrary professional norms, and then defer to counsel’s post-hoc explanation of their “judgment.” The Fifth Circuit did not address that professional-norms argument. It did not discuss the ABA Guidelines, the Texas Guidelines, or Burr’s testimony. It did not identify any professional norms governing counsel’s duty to investigate fetal alcohol exposure, childhood lead poisoning, severe abuse, or counsel-created courtroom-security prejudice. It simply credited counsel’s post-hoc reliance on McGarrahan’s mid-trial email stating that she had no mitigating testimony to offer and upheld counsel’s performance without applying an objective benchmark. App. 3a. It also held that, even if counsel was ineffective for eliciting the stun-belt evidence, such evidence did not prejudice Harris. App. 4a.

REASONS TO GRANT THE PETITION

- I. This Court should grant certiorari to correct lower courts that continue to recite *Strickland*’s professional-norms requirement while failing to enforce it.**

This case presents a recurring and important problem in capital ineffective-assistance litigation. Courts acknowledge that *Strickland* requires an objective inquiry into whether counsel’s performance fell below “prevailing professional

norms.” 466 U.S. at 688. But when a habeas petitioner identifies the professional norms governing capital defense—through the ABA Guidelines, state capital-defense standards, and/or expert testimony—courts often reject those sources as nonbinding, identify no alternative norms, and then defer to trial counsel’s post-hoc rationalization for not investigating. That approach does not adhere to *Strickland*.

A. *Strickland* requires the court to identify norms of practice against which to judge trial counsel’s reasonableness.

This Court has made clear that while the ABA Guidelines and similar standards do not set forth mandatory constitutional rules, they are relevant guides. *Strickland* itself states that “[p]revailing norms of practice as reflected in American Bar Association standards and the like . . . are guides to determining what is reasonable.” 466 U.S. at 688. *Wiggins v. Smith*, 539 U.S. 510 (2003), applied that principle, holding that the ABA Guidelines described the capital-defense norms governing counsel’s mitigation investigation. *Id.* at 524 (“Counsel’s conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association (ABA)-standards to which we long have referred as ‘guides to determining what is reasonable.’”). *Rompilla v. Beard*, 545 U.S. 374, 387 (2005), likewise reiterated that this Court has “long” treated ABA standards as “guides to determining what is reasonable.”

Nor does *Bobby v. Van Hook*, 558 U.S. 4 (2009), allow courts to abandon professional norms. To the contrary, Justice Alito’s concurrence explained the proper framework. ABA Guidelines are not “inexorable commands,” *id.* at 8, but “[i]t is the responsibility of the courts to determine the nature of the work that a defense

attorney must do in a capital case in order to meet the obligations imposed by the Constitution.” *Id.* at 14 (Alito, J., concurring). Courts may reject a petitioner’s proposed source of professional norms, but they may not reject every source, identify none of their own, and then call counsel’s conduct reasonable because counsel later says it was.

That is what happened here. Harris offered the ABA Guidelines, the Texas Guidelines, and expert testimony as evidence of the professional norms governing trial counsel’s performance. The State offered no contrary professional norm. The state habeas court identified none, the district court identified none, and the Fifth Circuit identified none. The district court rejected the ABA Guidelines because they “do not set forth the operative standard of judicial review,” App. 41a, rejected Burr’s testimony, App. 30a, 39a, and then accepted counsel’s subjective, post-hoc rationalization for not investigating, App. 44a–48a, 52a–59a. The Fifth Circuit then denied a certificate of appealability without addressing Harris’s professional norms argument at all. App. 3a.

That silence is telling. Harris argued that courts cannot disregard the only record evidence of prevailing professional norms, identify no contrary norm, and then defer to counsel’s after-the-fact account. The Fifth Circuit instead credited counsel’s post-hoc reliance on a mid-trial email from Dr. McGarrahan, App. 3a, a neuropsychologist who had never diagnosed FASD, was not asked to evaluate it, and was not asked to investigate lead poisoning. That is exactly why further guidance is needed: lower courts require clear instruction that *Strickland*’s professional-norms

requirement is mandatory, not optional, and cannot be supplanted by retrospective deference to counsel's own account of their performance.

B. The Fifth Circuit's decision conflicts with decisions from other courts of appeals.

Two other courts of appeals have applied this Court's capital-mitigation precedent faithfully—without treating ABA standards as binding constitutional codes, but also without abandoning the objective-norms inquiry the Fifth Circuit ignored below. Those decisions confirm how far the courts below departed from the method *Strickland* requires.

In *White v. Ryan*, 895 F.3d 641 (9th Cir. 2018), trial counsel knew his client's mental health was an issue but failed to investigate further. They defended their failure to do so, explaining that they had reason to question whether White genuinely believed the delusional accusations he made in correspondence, and White's apparently normal demeanor made them suspect that he might be feigning a mental illness. The Ninth Circuit rejected that explanation. Although the court of appeals did not treat the ABA Guidelines as binding, it followed this Court's instruction and used them as "guides to determining what is reasonable." *Id.* at 668 (quoting *Rompilla*, 545 U.S. at 387). The court of appeals emphasized that the 1989 ABA Guidelines required counsel to make "efforts to discover all reasonably available mitigating evidence," including medical and mental-health evidence, and warned counsel not to "sit idly by, thinking that investigation would be futile." *Id.* Because, as in *Rompilla*, no one gave the court any "reason to think the [ABA] standard impertinent," the court applied it. *Id.* (quoting *Rompilla*, 545 U.S. at 387).

After applying the ABA Guidelines, the Ninth Circuit held that trial counsel failed adequately to investigate their client’s mental health status. Counsel’s skepticism that he suffered a mental illness may have been understandable, the court of appeals acknowledged, but counsel “was not a neutral factfinder—he was an advocate.” *Id.* at 667–68. Given evidence of mental-health problems, counsel had to investigate or seek funding for expert investigation. *Id.*

Two aspects of the Ninth Circuit’s approach in *White* conflict with the Fifth Circuit decision below. First, the Fifth Circuit refused to require the district court to adopt any professional norms. Harris offered the ABA Guidelines, the Texas Guidelines, and Burr’s expert testimony. The State offered no contrary norms. The courts below simply rejected or ignored the norms Harris offered and deferred to counsel’s retrospective explanation.

Second, Harris’s counsel’s failure to investigate was worse than that of White’s counsel in the Ninth Circuit case. Harris’s counsel knew his mother drank during pregnancy. They knew Harris had been exposed to lead in utero and as a child. They knew those issues could matter in mitigation. But they did not investigate FASD, did not investigate lead poisoning, did not retain qualified experts to do so, and did not ask McGarrahan to investigate either issue. Like the counsel in *White*, they were advocates, not neutral screeners entitled to stop investigating because an expert gave discouraging feedback on a different inquiry.

The Eleventh Circuit’s decision in *Williams v. Allen*, 542 F.3d 1326 (11th Cir. 2008), provides another decision conflicting with the Fifth Circuit’s approach. There,

counsel possessed a psychological report, a presentence report, and an interview with the defendant's mother, all of which revealed red flags: low IQ, personality disorder, depression, possible suicide risk, an alcoholic and abusive father, and psychological treatment. Counsel did not investigate these red flags. The Eleventh Circuit held that failure unreasonable under prevailing professional norms that it identified. *Id.* at 1339–41.

The Eleventh Circuit relied on *Wiggins* and the ABA Guidelines, explaining that the 1989 Guidelines required efforts to discover “all reasonably available mitigating evidence,” including family and social history, physical, sexual, and emotional abuse, and collateral sources to “verify, corroborate, explain and expand” the information obtained. *Id.* at 1339–40. The court of appeals required enough investigation to formulate an accurate life profile. *Id.* at 1339. Because the information counsel knew would have led a reasonable attorney to investigate further, counsel's performance was deficient. *Id.* at 1340–41. The failure “resulted from inattention, not reasoned strategic judgment.” *Id.* at 1341 (quoting *Wiggins*, 539 U.S. at 526).

Here, Harris's counsel had far more than the minimal leads in *Williams*. They knew about his mother's alcohol use during pregnancy and his lead exposure. Yet they did not build a psychosocial history and did not investigate the obvious neurological causes of Harris's impairments. Like counsel in *Williams*, they did not make a strategic decision after a reasonable investigation. They stopped before they knew what the investigation would reveal.

White and *Williams* illustrate the approach this Court's cases require. Courts must identify the governing professional norms, use the ABA Guidelines or other supported sources as guides, determine whether counsel's investigation satisfied those norms, and refuse to indulge post-hoc rationalizations where counsel never acquired the information needed to make an informed strategic decision. The courts below did the opposite.

C. The Fifth Circuit's failure to address the professional norms issue confirms the need for this Court's review.

This case is a strong vehicle for addressing the requirement that the courts identify applicable professional norms before evaluating the reasonableness of counsel's behavior. Harris argued in the Fifth Circuit that the district court failed to identify and apply any objective professional norms and that the State's answer—that courts need not identify norms at all—was contrary to *Strickland*. The State did not identify any contrary norms. It argued only that the district court was not required to consider the ABA Guidelines or Burr's testimony in particular. But that did not answer Harris's point. The court had to apply some objective norm.

The Fifth Circuit ignored the issue. It did not say the ABA Guidelines were displaced by some more specific Texas norms that justified trial counsel's decisions. It did not say the Texas Guidelines were outdated or irrelevant. It did not say Burr's testimony failed to describe any prevailing professional norms. It did not identify any contrary norms from the State. It did not explain what a reasonable Texas capital lawyer had to do when counsel knew of prenatal alcohol exposure, lead exposure, severe childhood abuse, and false gang evidence. It credited counsel's claimed reliance

on McGarrahan’s mid-trial statement that she had nothing helpful to say and denied a certificate of appealability.

Harris asked the Fifth Circuit to grant a certificate of appealability. As a result, Harris did not have to prove that he would necessarily prevail—just that reasonable jurists could debate the district court’s resolution of his constitutional claims. 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473, 484 (2000). The question whether courts may ignore the only evidence in the record of prevailing professional norms, identify no contrary norm, and defer to post-hoc rationalizations is at least debatable. Indeed, *White* and *Williams* show that courts applying this Court’s precedent properly would have found counsel deficient.

This Court’s review is needed because lower courts repeatedly overread *Van Hook*. They treat *Van Hook*’s statement that ABA Guidelines are not binding as permission to ignore an objective-norms inquiry altogether. But *Van Hook* reaffirmed that ABA Guidelines may be useful guides, and Justice Alito’s concurrence emphasized the court’s independent responsibility to determine the work capital counsel must do. The problem is not that lower courts refuse to make ABA Guidelines mandatory. The problem is that they reject the ABA Guidelines as nonmandatory and then apply nothing.

In *Shockley v. Crews*, 696 F. Supp. 3d 589 (E.D. Mo. 2023), the court devoted an extended discussion to explaining that the ABA Guidelines “do not set the standard” for effective assistance and that the proper inquiry is simply whether counsel’s performance was constitutionally deficient under *Strickland*, not whether

it conformed to prevailing professional standards. *Id.* at 635–38. Likewise, *Mendoza v. State*, 87 So. 3d 644 (Fla. 2011), characterized the ABA Guidelines as merely “guides” while emphasizing deference to counsel’s strategic choices in refusing habeas relief from a death sentence. *Id.* at 652–64. Having refused to rely on objective professional standards, these decisions then accept counsel’s post hoc rationalizations for why challenged decisions were “strategic,” invoke *Strickland*’s presumption of reasonableness, and ask only whether some conceivable strategic justification can be imagined. *Shockley*, 696 F. Supp. 3d at 637–38; *Mendoza*, 87 So. 3d at 655–64. The federal reports are replete with similar failures to comply with *Strickland*. *See, e.g., Hodges v. Colson*, 727 F.3d 517, 532–37 (6th Cir. 2013) (accepting counsel’s retrospective explanation for advising a guilty plea despite counsel’s acknowledgment that they “never sat down and did an analysis of what are the benefits of going to trial, what are the deficits and where did that lead us”). These cases never ask whether counsel performed as reasonably competent capital counsel should have under prevailing professional standards; instead, they ask only whether counsel after-the-fact can articulate any possible rationale.

The problem is illustrated by a growing line of habeas decisions. In *Kemp v. Kelley*, 924 F.3d 489 (8th Cir. 2019), the court rejected unrebutted expert testimony that trial counsel’s failure to investigate FASD fell below prevailing professional norms. *Id.* at 500–02. The expert testified that counsel’s performance violated the ABA Guidelines, including the commentary recognizing that counsel cannot adequately perform the necessary background investigation without investigators

and other specialists. *Id.* Rather than evaluate that testimony against any competing professional standard, the court simply reiterated that the ABA Guidelines are “only . . . guides” and accepted trial counsel’s post-hoc explanation that he observed only “hints” and no “red flags” suggesting FASD. *Id.* at 501–02.

Murphy v. Davis, 737 F. App’x 693 (5th Cir. 2018), followed the same pattern. The court acknowledged the professional norm requiring qualified mitigation specialists to develop a defendant’s psychosocial history. Yet it rejected the ineffective-assistance claim based almost entirely on counsel’s retrospective explanation that she could not locate a qualified mitigation specialist and believed an inexperienced psychologist would suffice. *Id.* at 705–06.

Likewise, in *Anderson v. Kelley*, 938 F.3d 949 (8th Cir. 2019), the majority rejected a claim that counsel rendered ineffective assistance by failing to investigate FASD, even though lead mitigation counsel admitted that the defense team “did not consider the possibility that [the defendant] might have been exposed to alcohol in utero or that he suffered from fetal alcohol syndrome.” *Id.* at 963–64 (Kobes, J., concurring in part and dissenting in part). The majority again minimized the significance of the ABA Guidelines, emphasizing that they are “only guides to what reasonableness means, not its definition.” *Id.* at 957 n.3 (quoting *Van Hook*, 558 U.S. at 8). But as the dissent explained, the majority improperly shifted responsibility from counsel to retained experts: “[Defendant’s] experts did not have access to everything that counsel did and, more importantly, they lacked the most valuable evidence in this case—[the mother’s] admission that she drank while pregnant—

because counsel failed to uncover it. . . . When counsel fail to ask important questions and turn up crucial facts, that failure cannot be shifted to experts.” *Id.* at 964 (Kobes, J., concurring in part and dissenting in part).

These cases reveal a recurring pattern. Citing *Van Hook*, habeas courts reject the ABA Guidelines but then fail to articulate or apply any objective professional standard. See Emily Olson-Gault, *Reclaiming Van Hook: Using the ABA’s Guidelines and Resources to Establish Prevailing Professional Norms*, 46 Hofstra L. Rev. 1279, 1285, 1304 (2018). They often reject qualified expert testimony describing prevailing local capital-defense practice for no legally cognizable reason, as occurred here. Having eliminated objective standards, the default “standard” becomes trial counsel’s own post-hoc rationalization for why the challenged decisions were supposedly strategic. That approach is irreconcilable with *Strickland*’s requirement that counsel’s conduct be measured against prevailing professional norms, not against counsel’s retrospective rationalizations or the reviewing court’s own intuition about what reasonable lawyers might have done.

This case cleanly presents that problem, and it does so in the starkest possible posture: the only professional-norm evidence in the record came from Harris; the State offered none; and the state habeas court, the district court, and the Fifth Circuit each identified none of their own. Because they never identified applicable professional norms, the courts in this case never compared trial counsel’s conduct with those norms to determine whether they acted reasonably. This Court should grant review to clarify that *Strickland* requires courts to identify and apply an

objective professional norm—whether drawn from ABA Guidelines, state standards, expert testimony, or another supported source—before crediting counsel’s explanation for non-investigation or counsel-created prejudice.

II. The decision below conflicts with this Court’s rule that counsel’s decisions are entitled to deference only if they conduct a reasonable investigation.

This Court’s capital cases hold that counsel’s strategic choices are entitled to deference only when they are preceded by a reasonable investigation. “[S]trategic choices made after thorough investigation” are reviewed deferentially, this Court explained, but choices made after incomplete investigation are reasonable only to the extent “reasonable professional judgments support the limitations on investigation.” *Strickland*, 466 U.S. at 690–91. *Wiggins* applied that rule and rejected deference where counsel made a strategic decision after an unreasonable investigation. 539 U.S. at 527–28. *Rompilla* rejected counsel’s failure to review readily available records. 545 U.S. at 383–90. *Porter v. McCollum*, 558 U.S. 30 (2009) (per curiam), rejected counsel’s failure to uncover facts concerning military service, childhood abuse, brain damage, and mental health. *Id.* at 36–44. *Andrus v. Texas*, 590 U.S. 806 (2020) (per curiam), rejected counsel’s failure to look for mitigation evidence including childhood abuse and neglect and mental illness. *Id.* at 814–22.

Harris’s counsel did not make an *informed* strategic judgment warranting the deference provided by the lower courts. They did not investigate FASD or lead poisoning. They did not develop the psychosocial history that would have revealed severe childhood abuse and neglect. They did not investigate the State’s assertion

that Harris was in a gang. And they did not identify any professional norm that allowed them to fail to investigate.

A. The lower courts' reliance on McGarrahan's email as evidence of "investigation" is post-hoc rationalization.

Harris's trial counsel attempted to justify the fact that they did not investigate FASD and lead-poisoning evidence based on McGarrahan's mid-trial email that she had nothing helpful to say. The district court treated that after-the-fact justification as a reasoned strategic choice entitled to a "heavy measure of deference to counsel's judgments." App. 54a. The Fifth Circuit adopted the same reasoning: it credited counsel's explanation that McGarrahan's email *during trial* justified their *earlier* inaction, and it never asked whether counsel could reasonably rely on a mid-trial opinion from an expert whom counsel never even asked to evaluate FASD or lead poisoning in the first place. App. 3a.

That reasoning has the causation backward. McGarrahan's mid-trial email said only that she had little to offer based on the limited work she had actually performed. ROA.21852–53. It could not retroactively make counsel's *earlier* failure to investigate reasonable, and by mid-trial it was too late to conduct the investigation counsel should have completed years earlier. Counsel never asked McGarrahan to evaluate FASD or lead poisoning; she was not qualified to diagnose FASD; she had never diagnosed FASD; and she did not begin work until years after counsel were appointed and only months before trial. ROA.22698–22700; ROA.22703; ROA.22812–13. Reviewing courts may not "indulge post-hoc rationalization for counsel's

decisionmaking that contradicts the available evidence of counsel's actions.”
Harrington v. Richter, 562 U.S. 86, 109 (2011) (cleaned up).

B. The district court's “open the door” rationale is another post-hoc rationalization, not reliance on a professional norm.

Counsel said they never investigated mitigating evidence because they feared opening the door to harmful rebuttal that Harris had an antisocial personality. But they never asked Dr. McGarrahan to investigate FASD or lead poisoning, and she investigated neither condition. She was not qualified to diagnose FASD, had never diagnosed it, and did not provide counsel her views until mid-trial. Counsel therefore could not have weighed the mitigating force of that evidence against the risk of rebuttal.

The district court accepted trial counsel's justification. It found that trial counsel was reasonable when they failed to investigate FASD and lead-poisoning evidence because there was risk that presenting an expert who personally examined Harris would “open the door” to a State expert who might testify about future dangerousness. App. 58a. That conclusion itself underscores why this Court's review is needed. The court focused only on the hypothetical risks of mitigation evidence that counsel never investigated. A competent decision whether to present certain evidence requires counsel to balance risks against benefits, and Harris's counsel could not perform that analysis because they never investigated the mitigating evidence and learned what benefits it offered. Without that predicate knowledge, counsel could not have made a reasonable decision to withhold the evidence. The “open the door” theory is not evidence of a professional norm; it is a post-hoc rationale invented to justify

counsel's failure to investigate. And that reasoning would make non-investigation self-justifying: counsel could always say they avoided investigation because it might uncover something unfavorable or invite dispute.

In sum, the decisions below allow counsel to avoid investigation whenever a mitigation lead *might* lead the prosecution to introduce harmful rebuttal evidence. That is the opposite of the approach required by *Strickland*, *Wiggins*, *Rompilla*, and *Andrus*.

C. Trial counsel's introduction of stun-belt evidence was not supported by any professional norm.

The lower courts' treatment of counsel's introduction of stun-belt evidence also failed to comply with *Strickland*. The courts never applied *Strickland*'s objective professional-norms requirement; they substituted post-hoc rationalization for the constitutional inquiry the Sixth Amendment demands.

This Court has recognized that visible restraints and courtroom-security measures are inherently prejudicial because they convey an official judgment about the defendant's dangerousness. *See Deck v. Missouri*, 544 U.S. 622, 630–35 (2005); *Holbrook v. Flynn*, 475 U.S. 560, 568–69 (1986). Inexplicably, Harris's counsel presented testimony to the jury that the State forced Harris to wear a stun belt capable of shocking him with 75,000 volts. ROA.20226. Counsel then allowed the State to present testimony that guards threatened Harris every morning with what the belt would do, that the bailiff controlled the belt, and that Harris was scared that the bailiff might shock him. ROA.20231–32. In a capital proceeding where the jury must assess Harris's future dangerousness and mitigation, his lawyers introduced

testimony that the State considered him so dangerous that it required him to wear a courtroom device capable of shocking him into submission. They did so without a compelling strategic reason grounded in competent professional judgment. And the courts below identified no professional norms under which competent capital counsel would introduce evidence that his client was forced to wear a stun belt.

III. The Fifth Circuit’s perfunctory prejudice analysis approved the district court’s application of the Arizona weighing standard instead of the Texas non-weighing standard.

In *Strickland*, this Court explained that, even if defense counsel’s representation at trial was constitutionally deficient, “any deficiencies in counsel’s performance must be prejudicial to the defense in order to constitute ineffective assistance under the Constitution.” 466 U.S. at 692. To prove prejudice, therefore, “[t]he defendant must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” *Id.* at 694. The Fifth Circuit did not address the *Strickland* prejudice prong with respect to the trial counsel’s failure to investigate mitigating evidence. App. 3a–4a. As to the stun-belt issue, the court of appeals held that, even if trial counsel were “constitutionally deficient” in eliciting the stun-belt testimony, Harris was not prejudiced. App. 4a. The Fifth Circuit’s stun-belt prejudice analysis made two related errors.

First, in applying the *Strickland* prejudice inquiry, the district court applied the capital-sentencing weighing framework discussed in *Thornell v. Jones*, 602 U.S. 154 (2024). App. 48a–51a, 59a–61a, 66a–69a. *Thornell* was a case arising under

Arizona law, which requires jurors in the sentencing phase of a capital case to assess whether aggravating factors “greatly outweigh” mitigating evidence. App. 51a. But Harris was tried in Texas, and Texas law is materially different: Texas is not a “weighing” state. Texas law does not require jurors to weigh the evidence and balance statutory aggravating and mitigating factors. Instead, Texas law directs the jury to determine whether, “taking into consideration all of the evidence,” including the circumstances of the offense, the defendant’s character and background, and his personal moral culpability, “there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.” Tex. Code Crim. Proc. art. 37.071, § 2(e)(1). The Texas CCA has made clear that “Texas’ capital sentencing scheme does not involve the direct balancing of aggravating and mitigating circumstances.” *Ex parte Gonzales*, 204 S.W.3d 391, 394 (Tex. Crim. App. 2006). The relevant question in Texas is whether the stun-belt evidence that defense counsel presented to the jury “might well have influenced the jury’s appraisal” of the defendant’s moral culpability. *Id.* at 399.

Thornell itself emphasized that a habeas court assessing capital-sentencing prejudice must apply the law of the state under which the defendant was tried and convicted. 602 U.S. at 159. The State below did not deny that the district court applied Arizona law as described in *Thornell* to a case governed by Texas law, nor deny that the law of these two states is significantly different. Yet the Fifth Circuit affirmed the district court’s erroneous application of the wrong law.

Second, while ignoring the district court’s erroneous application of the Arizona weighing regime from *Thornell*, the Fifth Circuit disposed of prejudice in a single, terse paragraph. The court of appeals assumed, without deciding, that counsel may have performed deficiently by eliciting testimony that Harris wore a stun belt during jury selection and by failing to object to that testimony. App. 4a. But it then held that a reasonable jurist could find no prejudice because Harris “robbed a house, held a family at gunpoint, and killed two people,” and because the jury heard evidence of “other aggravated robberies and a separate capital murder” (although Harris was not tried and convicted of another capital murder). *Id.* “Given the weight of this evidence,” the court of appeals concluded, “the state habeas court’s decision was not an unreasonable application of federal law.” *Id.*

That is not the prejudice analysis *Strickland* requires. The question was not whether the crime was aggravated; all capital cases involve an aggravated offense. Under Texas’s non-weighing capital-sentencing laws, the *Strickland* question was whether there is a reasonable probability that, if Harris’s trial counsel had not introduced the highly prejudicial stun-belt evidence, at least one juror would have found sufficient mitigating circumstances to warrant life. *Wiggins*, 539 U.S. at 537; *Andrus*, 590 U.S. at 821–22; *Gonzales*, 204 S.W.3d at 399. The stun-belt evidence was prejudicial because it gave the jury an emphatic, government-approved message that Harris was exceedingly dangerous—even too dangerous not to be violent in the courtroom itself. The stun-belt evidence was particularly damaging because, in a

Texas capital sentencing proceeding, the jury's future-dangerousness decision is decisive.

In sum, the Fifth Circuit's prejudice analysis erred twice: it approved the district court's use of *Thornell's* Arizona weighing scheme in a Texas non-weighing case, and it failed to inquire, as *Strickland* requires, whether, without the stun-belt evidence, at least one juror would have chosen life. This Court should grant certiorari and require the lower courts to apply *Strickland's* prejudice inquiry under the sentencing framework Texas actually uses.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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APPENDIX

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United States Court of Appeals for the Fifth Circuit

No. 24-70009

United States Court of Appeals
Fifth Circuit

FILED

March 31, 2026

Lyle W. Cayce
Clerk

RODERICK NAPOLEON HARRIS,

Petitioner—Appellant,

versus

ERIC GUERRERO, *Director, Texas Department of Criminal Justice,*
Correctional Institutions Division,

Respondent—Appellee.

Application for Certificate of Appealability from the
United States District Court for the Northern District of Texas
USDC No. 3:20-CV-3702

Before GRAVES, WILLETT, and HO, *Circuit Judges.*

PER CURIAM:*

Roderick Napoleon Harris murdered two people during an armed robbery in 2009. He was convicted of murder and sentenced to death. After a series of appeals, Harris filed the instant habeas petition in the Northern District of Texas arguing that his trial attorneys were constitutionally ineffective for failing to properly investigate mitigating evidence and eliciting

* This opinion is not designated for publication. *See* 5TH CIR. R. 47.5.

No. 24-70009

testimony that he wore a stun belt during jury selection. The district court denied habeas relief. Harris now seeks a certificate of appealability.

To obtain a COA, Harris “must demonstrate a substantial showing of the denial of a constitutional right.” *Nelson v. Davis*, 952 F.3d 651, 658 (5th Cir. 2020) (citation modified); 28 U.S.C. § 2253(c)(2). Because the district court denied his claims on the merits, Harris can only be granted a COA if “jurists of reason could disagree with the district court’s resolution of his constitutional claims or that jurists could conclude the issues presented are adequate to deserve encouragement to proceed further.” *Id.* (citation modified). Our precedents make clear that “[t]he COA standard is less burdensome in capital cases, as ‘in a death penalty case any doubts as to whether a COA should issue must be resolved in the petitioner’s favor.’” *Id.* (quoting *Clark v. Thaler*, 673 F.3d 410, 425 (5th Cir. 2012)).

An ineffective assistance of counsel claim has two parts. First, counsel must have been deficient. “This requires showing that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” *Strickland v. Washington*, 466 U.S. 668, 687 (1984). Second, the deficiency must have prejudiced the defendant. “This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial.” *Id.* “[C]ounsel is strongly presumed to have rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment.” *Id.* at 690.

But his claims are still subject to the relitigation bar. The Antiterrorism and Effective Death Penalty Act (“AEDPA”), 28 U.S.C. § 2254, “requires a district court to defer to a state habeas court’s determination of the merits of a prisoner’s claims unless the state decision was contrary to, or involved an unreasonable application of, clearly established Federal law or was based on an unreasonable determination of the

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facts in light of the evidence presented in the State court proceeding.” *Hughes v. Vannoy*, 7 F.4th 380, 386–87 (5th Cir. 2021) (citation modified). “When reviewing a state habeas court’s decision under AEDPA’s deferential standard of review, we review ‘only the ultimate legal determination by the state court—not every link in its reasoning.’” *Charles v. Stephens*, 736 F.3d 380, 387 (5th Cir. 2013) (quoting *Trottie v. Stephens*, 720 F.3d 231, 241 (5th Cir. 2013)). Accordingly, federal courts may only grant habeas relief if “no fairminded jurist could” come to the same conclusion as the state habeas court. *Hughes*, 7 F.4th at 387.

So, “[w]hen the claim at issue is one for ineffective assistance of counsel, . . . AEDPA review is doubly deferential.” *Woods v. Etherton*, 578 U.S. 113, 117 (2016) (citation modified). Harris cannot overcome that deferential standard of review.

First, he argues that trial counsel insufficiently investigated mitigating evidence, especially regarding possible brain damage due to fetal alcohol and childhood lead exposure. Counsel must make a reasonable investigation into potential mitigating evidence. *Wiggins v. Smith*, 539 U.S. 510, 524 (2003). Thus, “[i]n investigating potential mitigating evidence, counsel must either (1) undertake a reasonable investigation or (2) make an informed strategic decision that investigation is unnecessary.” *Charles*, 736 F.3d at 389.

Harris has not met his burden. His trial team did consult with a neuropsychologist who told them that she found “very little, if anything, in the way of cognitive impairment,” and that her testimony would be unhelpful as it may allow a prosecution expert to provide conflicting testimony. She was also concerned that Harris showed signs of malingering and exaggeration during his examinations. So, a reasonable jurist could conclude, at least, that counsel made a reasonable decision not to investigate the issue further. *See id.*

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Second, Harris argues that trial counsel was ineffective for eliciting testimony that he wore a stun belt during jury selection and for failing to object to that testimony. But even if this was constitutionally deficient, a reasonable jurist could conclude that it did not prejudice the defense. After all, Harris robbed a house, held a family at gunpoint, and killed two people. *Harris v. State*, No. AP-76,810, 2014 WL 2155395, at *1-2 (Tex. Crim. App. May 21, 2014). The jury also heard evidence that Harris committed other aggravated robberies and a separate capital murder. *Id.* at *2. Given the weight of this evidence, the state habeas court's decision was not an unreasonable application of federal law.

So, Harris' motion for a certificate of appealability is DENIED.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

ROBERICK NAPOLEON HARRIS,
TDCJ No. 999573,

Petitioner,

v.

BOBBY LUMPKIN, Director,

Respondent.

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Civil Action No. 3:20-CV-3702-E

MEMORANDUM OPINION AND ORDER

Petitioner Roderick Napoleon Harris filed this federal habeas corpus action pursuant to 28 U.S.C. Section 2254 challenging his May 2012 Dallas County conviction for capital murder and sentence of death. For the reasons explained below, Harris is entitled to neither federal habeas corpus relief nor a Certificate of Appealability.

I. BACKGROUND

A. The Offense

There is no genuine factual dispute as to the facts of Harris's capital offense. On March 17, 2009, while committing an armed robbery and home invasion of the Gallardo family residence Harris fatally shot Alfredo Gallardo and Gallardo's brother Carlos. During the robbery a member of the family managed to escape out a window and contact a security guard who notified police. After exiting the Gallardo home, Harris ignored calls from police to surrender, exchanged gunfire with multiple Dallas police officers who had surrounded the Gallardo home, and was struck by two bullets. He was immediately transported to a hospital and treated for his injuries.

B. The Indictment

On June 2, 2009, a Dallas County grand jury indicted Harris on a single count of capital murder, to wit, intentionally causing the death of Alfredo Gallardo by fatally shooting Gallardo with a firearm while in the course of committing and attempting to commit the robbery of Gallardo.¹

C. Guilt-Innocence Phase of Trial

The guilt-innocence phase of Harris's capital murder trial commenced on May 8, 2012.²

1. The Prosecution's Evidence

The Texas Court of Criminal Appeals opinion affirming Harris's conviction on direct appeal accurately summarized the testimony of multiple Gallardo family members and other evidence introduced at the guilt-innocence phase of trial as follows:

The evidence showed that, at about 9:00 p.m. on St. Patrick's Day, Alfredo was at home with his wife, Maria, his brother, Carlos, a son, a grandson, and his thirteen-year-old daughter, Yahaira. Alfredo was about to go out to look for Yahaira's older sister when a "black guy" burst through the door and pointed his gun at Alfredo's head. Yahaira was "shocked" and "scared," the more so when the man—appellant—told her, "Come here, bitch." Yahaira's mother started to cry as appellant pointed his gun at them and, in a loud voice, asked for money, jewelry, and drugs. Yahaira translated appellant's demands for her parents because they did not speak much English. She took her mother's purse from the counter and gave appellant all of the money inside—two dollars.

Yahaira's father was sitting on the sofa, but when he started to stand up, appellant hit him so hard in the face with the back of his gun that his cheek started bleeding. Then, when Carlos tried to get his wallet out of his pocket, appellant hit

¹ Copies of the indictment of Harris appear at various places among the state court records filed by Respondent. One copy appears at ECF no. 26-13, at p. 3. Another copy appears at ECF no. 21-6, at p. 7.

² The verbatim transcription from the guilt-innocence phase of Harris's capital murder trial (i.e., Volume 58-60 of 67) appears in two places among the voluminous and duplicative state court records submitted by Respondent. The entire trial transcript (more than 5,000 pages) appears as a single docket entry at ECF no. 23-1. A more user-friendly set of those volumes appears at ECF nos. 24-23 through 24-25. Henceforth citations to the verbatim transcript of testimony and other proceedings from Harris's *trial* will be designated by "volume number," followed by "RR Trial," and then the page number(s) of the respective volume.

him near the eyebrow with the gun. Carlos also started bleeding. Appellant told Alfredo and Carlos to get down on the floor, and then, still pointing his gun at them, appellant took their wallets from their pants pockets.

Then he took everyone to the master bedroom, and Yahaira handed him the little bit of jewelry—a necklace and two rings—that they had. Appellant pushed them all through the bathroom and toward a closet, still pointing his gun at them. He told Yahaira to tie her uncle's hands with some belts while he tied her father's hands. He was shouting at them as he kept trying to close and lock the closet door, and Yahaira's mother was crying. Yahaira thought, "We were going to die." Appellant then asked for the keys to their red truck, but Yahaira told him that her brother Omar had them and that he was at a party.

Appellant "told us like, what kind of family like us didn't have money? And that if we didn't have money, we should do like—we should do what he did; that he didn't hurt people, he just robbed houses." Then he pointed to Yahaira's mother and said that she was to go with him because "he wanted to take her." She was crying and praying in Spanish, so appellant pointed at Yahaira and said that he was going to take her instead. When Yahaira's mother kept crying, appellant finally pointed his gun at Alfredo while telling Yahaira's mother to calm down or he would "hurt" them. Yahaira thought he would shoot them.

Then appellant grabbed Alfredo's shirt and started walking him toward the restroom, but they fell on top of the Jacuzzi "and that's when the shooting came out[.]" Appellant shot Alfredo in the face and chest. Then Carlos, Yahaira's uncle, got up as if he were trying to help, and appellant shot him in the face and shoulder. Yahaira and her mother were crying on the floor of the closet when Yahaira felt the wind from another bullet pass by her. She thought appellant had fired a total of about six bullets.

Yahaira looked back out to the bathroom and saw appellant push "my dad off of him like he was disgust[ed], because of the blood." He finally ran out the door. Yahaira heard "snoring" sounds from either her father or her uncle lying on the floor and saw her father shaking. Finally, a policeman ran in and took them out of the house.

Appellant had killed both Alfredo and Carlos.

Harris v. State, AP-76,810, 2014 WL 2155395, *1-*2 (Tex. Crim. App. May 21, 2014) (Footnotes omitted).

The trauma surgeon who treated Harris immediately after his arrest testified that (1) Harris suffered gunshot wounds to the right leg and abdomen, (2) Harris's toxicology screen was positive

for opioids but not for PCP, and (3) Harris was uncooperative during his examination and treatment.³ The medical examiner who conducted the autopsy of Alfredo Gallardo testified that Alfredo died as a result of multiple gunshot wounds – one of which entered at the left cheek, traveled downward through the esophagus through the right upper lobe of the lung into the right upper chest wall and the other entered the left side of the chest traveling front to back and left to right, and penetrated the bladder.⁴ The medical examiner who conducted the autopsy of Carlos Gallardo testified Carlos died as a result of two gunshot wounds – one to the face and one to the left shoulder.⁵

2. The Defense's Evidence

The defense recalled Yahaira Gallardo who testified that Alfredo was wearing a white shirt at the time he was shot by Harris.⁶

3. The Guilt-Innocence Phase Verdict

On May 11, 2012, the jury returned its verdict at the guilt-innocence phase of trial, unanimously finding Harris guilty beyond a reasonable doubt of capital murder as charged in the indictment.⁷

D. Punishment Phase of Trial

The punishment phase of Harris's capital murder trial commenced on May 14, 2012.⁸

³ Statement of Facts from Harris's Trial (henceforth "RR Trial"), Volume 59, at 104-26.

⁴ 59 RR Trial 261-88.

⁵ 59 RR Trial 289-302.

⁶ 60 RR Trial 80-81.

⁷ 60 RR Trial 126. The jury's verdict at the guilt-innocence phase of Harris's capital murder trial, as recorded in its verdict form, is found at ECF no. 22-8, at p. 51 (1 Supp. CR 51) and ECF no. 22-9, at p. 22 (1 Supp. CR 22).

⁸ The verbatim transcription of testimony and other proceedings during the punishment phase of Harris's capital murder trial (i.e., Volumes 61-66 of 67) appears at both ECF no. 23-1 and ECF nos. 24-26 through 24-31.

1. The Prosecution's Evidence

The Texas Court of Criminal Appeals accurately summarized the prosecution's evidence at the punishment phase of Harris's capital murder trial as follows:

During the punishment phase, the State offered evidence of several other aggravated robberies, including another capital murder, that appellant had committed during the month before the charged capital murder. On February 15, 2009, appellant and his cohort confronted Luis Gonzalez at his apartment door, forced him inside, tied him up, and robbed him of his wallet with \$450 in it, his watch and shoes, a set of wheel rims, a stereo, and his friend's wallet, which was hidden in the sofa, with \$900 in it. Then they dragged Mr. Gonzalez into the bedroom while they ransacked his apartment. Mr. Gonzalez managed to untie himself while appellant and his fellow robber were carrying items out to their car, and he ran and locked them out of his apartment. Appellant started beating on the door, saying, "[O]pen the door, you son-of-a-you-know-what." Mr. Gonzalez did not open the door, but he couldn't call the police because appellant had stolen his cell phone. The robbers finally left in appellant's car. Appellant's DNA was on a glove left at Mr. Gonzalez's apartment.

At about 10:30 p.m. on March 3, 2009, Karen De La Cruz Espinoza was walking through the parking lot of her apartment complex with her eleven-year-old son when she saw three black men coming hurriedly toward her. As she got to her front door, one of them—appellant—pushed open the door and shoved her and her son inside. Her husband and three of her four other children were already inside. The robbers immediately closed all of the shades, pointed their guns at the heads of two of her children, and told Karen that they wanted her handbag with money and that "if we didn't give them what they wanted, that they were going to kill us all." One of the robbers went to the back room, grabbed Karen's husband, pulled him into the living room, and threw him on the floor.

The robbers then ransacked the bedrooms, pulling out all of the drawers and emptying the contents on the floor and beds. They took Karen's wallet with her paycheck in it, as well as her husband's wallet, her watch, an Xbox, DVDs, and other items. As two of the robbers started taking items down the stairs, Karen heard several shots and thought that the robbers had "found someone else" to hurt. The third robber immediately picked up the rest of the bags of property that they had collected, but Karen rushed forward, pushed him out the door, and locked it. They all stood back from the door because they were worried the robber would start shooting through it.

Appellant then went to another apartment at the complex, that of Roberto Ramos. Roberto's 27-year-old brother, Eustacio, heard a commotion in the hallway

while he was in the bathroom talking on the phone to his grandmother in Mexico. When he looked out, he saw Roberto struggling with appellant, who had gotten inside the apartment. Roberto was trying to push him back outside, but appellant was too big and strong. When Eustacio went to help Roberto, appellant shot Eustacio in the chest from about four feet away. Roberto cried, “Oh, he shot you, he killed you, he hit you in the heart.” Eustacio was “stunned” and fell backwards as he saw his brother struggling with appellant. Eustacio said, “I heard a shot and then a moment later, seconds later, I heard another shot. And I was saying, oh, God, and I was screaming to my brother. After that, I didn't know anything else.”

A third brother, Martin, came into the living room and saw Roberto struggling with appellant, but when Martin came toward the door, appellant reached over Roberto's shoulder and shot him in the face. Then, as another neighbor watched from his door, Roberto “bearhugged” appellant who then shot Roberto three times—in the upper back, in the mouth, and in the left thigh. Roberto died in the apartment breezeway, but his two brothers, Eustacio and Martin, survived. Roberto's thirteen-year-old daughter, Jasmine, called 911 and then found her dead father outside: “I told him I loved him and I kissed him on his cheek.” The robbers escaped.

The State also offered evidence of appellant's youthful conduct: He was assigned to a behavioral adjustment classroom for disruptive students when he was in middle school. A school resource officer testified that appellant had a poor reputation for being peaceful and law-abiding at age fourteen and recalled an incident in which appellant became “combative” when his mother reported him as a run-away. In high school, he carried a knife with a six-inch blade to school. When it was discovered, he was arrested. He was arrested the next year for possession of marijuana.

Appellant had numerous gang tattoos on his body, including “HUSTLA” on his right forearm. The State's gang expert explained that this tattoo indicated that appellant is “hustling for his money. He is hustling in life. He is hustling to get ahead,” usually by selling narcotics. He also had a “Fish Trap” tattoo, stars, and the numbers 212 and 3500, which indicate that appellant is a Fish Trap Bloods gang member. The expert said that the Fish Trap Bloods are a particularly violent gang known for “murders, aggravated robberies, narcotics selling, assaults, home invasion robberies. You name it, they have done it.”

The State also called several police officers who testified that they had arrested appellant in Dallas for various offenses: on December 5, 2002, for unauthorized use of a motor vehicle; on December 23, 2003, on warrants for probation violation and burglary; on September 20, 2006, for traffic violations in which he was later charged with being a felon in possession of a firearm; on April

17, 2007, for unauthorized use of a motor vehicle; and on December 27, 2007, for possession of marijuana.

Harris v. State, AP-76,810, 2014 WL 2155395, *2-*3 (Footnotes omitted).

2. The Defense's Mitigating Evidence

Harris's defense counsel presented numerous witnesses at the punishment phase of trial, including family members who testified regarding Harris's childhood and background,⁹ a memory

⁹ More specifically, Harris's mother, Pamela Maddox, testified that (1) Harris's biological father was Eric Dexter Propes, whom she described as having spent most of his adult life in prison; (2) Propes had very little contact with Harris during Harris's childhood; (3) she had Harris at age seventeen, when she described herself as irresponsible in that she smoked marijuana and drank alcohol including while she was pregnant with Harris; (4) the divorce of her parents destroyed her emotionally; (5) she married Ramon Maddox when Harris was two or three; (6) her marriage to Ramon Maddox was characterized by violence and abuse; (7) Harris grew up in an abusive and violent home in that Harris witnessed violence between his mother and step-father and his step-father routinely beat Harris with belts and extension cords; (8) when Harris was fifteen, she and Ramon Maddox resolved their problems without violence but Harris witnessed a great deal of violence prior to that time; (9) she sometimes abandoned Harris while she partied and Harris was left with family and friends; (10) Harris struggled in school from an early age (he was held back in first grade); (11) Harris was diagnosed with Attention Deficit Hyperactivity Disorder ("ADHD"), for which he was prescribed Ritalin, a medication on which he remained until he reached puberty; (12) Harris was placed in Special Education programs, which resulted in him being taunted by other students; (13) at age two, Harris was injured in a car accident that left him unconscious and with a facial laceration that required hospital treatment; (14) at age fifteen Harris stood up to his step-father and instructed Ramon Maddox not to strike his mother anymore; (15) Harris grew up feeling that he did not get enough attention and she believed she had failed to furnish Harris with emotional support growing up; (16) she was diagnosed with manic depression (including multiple suicide attempts) and bipolar disorder and her grandmother spent many years in a mental health facility; (17) Eric Propes had a family history of mental illness that included a diagnosis of schizophrenia, bipolar disorder, and chronic substance abuse; (18) Harris dropped out of school in the tenth or eleventh grade; (19) Harris subsequently fathered three children (with two women), for whom he is a good father; and (20) she denied Harris had any gang affiliation and denied that Harris is a violent person. 64 RR Trial 215-55.

Harris's younger brother Ramon Maddox, Jr. testified that (1) he got along with Harris; (2) Harris was a good older brother to his two younger half-brothers; (3) growing up, Harris witnessed domestic violence between his step-father and mother, including an incident in which Harris saw Pamela with a knife and his stepfather with a hammer; (4) their family moved a lot when Harris was growing up; (5) Harris made friends easily growing up but was also easily led by others; (6) Harris was in Special Education classes by the third or fourth grade; (7) as he grew older, Harris used alcohol and marijuana and frequently talked to himself; (8) the night Harris was arrested for capital murder, he identified himself to police using his younger brother's (Ramon, Jr.'s) name; (9) Harris is a loving father to his children; (10) when Harris smoked wet (Marijuana dipped in PCP), Harris became hyper and paranoid; (11) at times Harris chose not to come home; and (12) both their parents worked but also partied. 64 RR Trial 256-93.

Harris's stepfather Ramon Maddox, Sr., testified that (1) his own father was a heroin addict and his mother an alcoholic; (2) his own father went to prison for beating his mother; (3) he married Harris's mother in 1988 when Harris was very young; (4) their family moved a lot when Harris was growing up; (5) Harris grew up in a household where there was physical abuse; (6) he and Harris's mother fought and argued frequently; (7) he was a very strict father toward Harris; (8) he frequently beat Harris with belts and extension cords; (9) both he and Harris's mother abused alcohol and marijuana; (10) Harris had difficulty learning in school and was in Special Education classes; (11) Harris was prescribed Ritalin for his hyperactivity from age six or seven; (12) at age seven, Harris set a back room on fire; (13) Harris's mother began hallucinating and was hospitalized with a diagnosis of schizophrenia, bipolar disorder, and manic depression; (14) Harris's biological father was also diagnosed with a mental illness; (15) Harris began running away from home in his youth (around ages 13-14); (16) Harris was ridiculed by other kids for being in Special

expert who testified on the problematic nature of eyewitness identifications (Dr. Charles A. Weaver III),¹⁰ an expert pharmacologist who testified regarding the addictive nature of alcohol and drugs (Dr. John Roache),¹¹ a clinical psychologist who identified the risk factors for early youth violence and hyperactivity which Harris experienced during his childhood (Dr. Gilda Kessner),¹² and a pair of experts on prison administration who testified about the means prison administrators can employ to decrease an inmate's risk of violence (James Aiken and S.O. Woods).¹³

Education classes; (16) Harris was a good father to his children and had begun thinking better since going to jail (which stopped his drug abuse); (17) Harris was remorseful for his crimes; and (18) Harris was not a monster. 65 RR Trial 29-63 & 69-87.

Harris's slightly younger cousin Shamy Conley testified that (1) Harris's family moved around a lot when he was growing up; (2) she grew up with Harris, who was protective of his younger cousins; (3) Harris became paranoid when he smoked wet; (4) Harris worked for a time at a company packaging baseball cards; (5) Harris was traumatized by witnessing the fatal shooting of Conley's sister Nakitha in 2005; (6) Harris had been much calmer since his arrest; (7) Harris is a good person and not a monster; (8) she allowed Harris to babysit her young daughter; and (9) Harris was a good parent to his oldest child, his daughter. 65 RR Trial 88-118.

¹⁰ 64 RR Trial 155-214. Dr. Weaver, a psychology professor and researcher, testified regarding the difficulty of eyewitnesses under stress accurately remembering sufficient facial features to permit a reliable identification after the fact and high incidence of inaccurate identifications made across racial or ethnic groups.

¹¹ 65 RR Trial 119-46. On direct examination, Dr. Roache, a professor of psychiatry and pharmacology, testified about (1) the changes in brain chemistry and circuitry caused by addictive substances, (2) the fact that most addictive drugs result in increased impulsivity and impairment of frontal lobe development and functioning, (3) the fact that PCP is highly addictive and causes both a dissociative state and a high level of dependence, (4) PCP use can also result in psychosis involving paranoia and violence, (5) the fact that Dallas County Jail medical personnel diagnosed Harris with PCP/marijuana dependence, and (6) his belief that, once off PCP and marijuana, Harris would pose a significantly lower risk of violent and impulsive behavior. On cross-examination, however, Dr. Roache admitted that he had not interviewed Harris and could not testify that Harris was using PCP or marijuana at the time of his capital offense, he had no first-hand information regarding Harris's alleged addiction to PCP and marijuana, and he was relying almost exclusively on third-party reports of Harris's addiction.

¹² 65 RR Trial 152-70. Dr. Kessner, a clinical psychologist, testified that Harris faced many risk factors during his childhood, including being borne to a mother who because of her own youth and immaturity lacked good parenting skills, the inability of Harris's mother to show affection to him, the fact that Harris's biological father was a career criminal who showed no desire to be involved in Harris's life, the fact that Harris's stepfather treated Harris more harshly than the other children in the household, and the fact Harris's mother experienced mental health problems which required hospitalization. Dr. Kessner testified that all of these factors, as well as Harris's struggles academically, negatively influenced Harris's development. On cross-examination, Dr. Kessner admitted that she had not interviewed Harris or any of his family members and that the presence of Harris's mother had been a constant in Harris's life from an early age.

¹³ More specifically, James Aiken, a former prison administrator with both state and federal experience, testified there is no correlation between the severity of an inmate's offense or sentence and that inmate's behavior while incarcerated and that training of prison employees is a significant factor in managing an inmate population. 65

The TCCA accurately summarized the defense's lay witness testimony at the punishment phase of Harris's capital murder trial as follows:

In his punishment case, appellant called four family members to testify to his family history, youth, education, and good character. They said that appellant was diagnosed with attention deficit disorder at age six or seven and that he was placed in special education classes because of his behavioral problems. When he was young, appellant set a room of his family's house on fire. Family members testified that appellant's mother, who suffers from manic depression and schizophrenia, gave him insufficient attention and affection when he was young. By the time he was eleven or twelve, he was helping to care for his two younger brothers and protecting them from his parents' violence and fighting.

Harris v. State, 2014 WL 2155395, *4.

3. The State's Rebuttal Evidence

The prosecution called several members of the Gallardo family who gave compelling victim-impact testimony, as well as numerous law enforcement officers who either (1) had encountered Harris prior to the date of his capital offense, (2) had personal knowledge of Harris's behavior while incarcerated, or (3) identified various recordings of telephone conversations Harris had with others during his pretrial detention.

One such law enforcement officer was Dallas County Sheriff's Deputy Bobby Morehead, who had served as a court bailiff during jury selection in Harris's capital trial.¹⁴ On cross-examination by Harris' trial counsel, Morehead testified that Harris had never once been

RR Trial 170-92. S.O. Woods, a retired Texas Department of Criminal Justice administrator, testified about (1) the details of TDCJ's inmate classification system, (2) the fact that, since 2005, inmates convicted of capital murder cannot be assigned a classification level less secure than G-3, and (3) the fact that the street gang with which Harris had once been associated is not considered by TDCJ to be a disruptive group inside TDCJ. 65 RR Trial 193-233. On cross-examination, Woods admitted that since 2005 TDCJ had experienced multiple acts of violence, including three murders in February 2012 and the shanking of a guard on death row.

¹⁴ 65 RR Trial 234-35.

disrespectful to the bailiffs during the twelve weeks of jury selection.¹⁵ Morehead also described an incident that took place during jury selection: As Harris was being transported to jury selection that morning wearing street clothes over a stun belt, the guards accompanying Harris all stepped off the courthouse elevator in which Harris was the lone remaining occupant on the second floor; at that moment, a pair of court employees on a higher floor punched a button which caused the elevator doors to close and the elevator carrying Harris to rise to their floor; the two court employees entered the elevator and punched the button to return it to the second floor; during the ride back down to the second floor, as the two court employees discussed Harris's trial, he politely identified himself to them as the defendant in that case; and the elevator arrived back on the second floor without further incident.¹⁶ Harris's trial counsel elicited testimony from Morehead that Harris made no effort to flee or escape during the incident and Harris was respectful to the two court employees he encountered during the incident.¹⁷

The TCCA accurately summarized the testimony of the prosecution's other rebuttal evidence at the punishment phase of trial as follows:

Appellant started using drugs—alcohol, marijuana, and PCP—when he was young. He would become paranoid and hear voices when he used drugs. Appellant

¹⁵ 65 RR Trial 237.

¹⁶ 65 RR Trial 240-45. The court reporter's record reveals that Morehead's recitation of the incident which was referenced by the terms "the elevator incident" or "the stun belt incident," elicited laughter in the courtroom. *Id.*, at 243. Morehead testified on cross-examination that Harris was routinely fitted with a stun belt each day of jury selection. *Id.*, at 242-43. On redirect examination, Morehead testified further that Harris was well aware of what the stun belt could do to him if activated and that Harris was required to sign an acknowledgement of that fact each day when he was outfitted with the stun belt. *Id.*, at 246-47.

Harris's lead trial counsel later testified during Harris's state habeas corpus proceeding that he would have called Morehead to testify at the punishment phase of trial had the prosecution not done so – because he believed the jury would construe the incident as showing that Harris would not pose a danger of future violence while incarcerated and such evidence would support the defense's punishment-phase trial strategy of showing that Harris had not been violent during prior periods of pretrial detention or incarceration. Testimony of Brad Lollar, verbatim transcription of Harris's State Habeas Hearing (henceforth "RR SHH"), Volume 4, at pp. 90-91, 96, 109-14. Attorney Lollar also testified that no one testified at trial that Harris wore the stun belt at any time during trial. *Id.*, at 115.

¹⁷ 65 RR Trial 245.

has three children. While in jail awaiting trial, appellant told the mother of one of his children—who had accused him of not “caring” or he would not have put himself in his present situation—that he had “motherfucking bills to pay.” In another phone call, appellant told a friend that when he got to prison he would “put bread in his pocket” and continue “the hustle.” He was already running the jail tank by bullying other inmates and using their commissary funds.

Harris v. State, 2014 WL 2155395, *4.

4. The Punishment Phase Verdict

On May 21, 2012, the jury returned its verdict, finding (1) unanimously and beyond a reasonable doubt there was a probability Harris would commit criminal acts of violence that would constitute a continuing threat to society and (2) taking into consideration all of the evidence, including the circumstances of the offense and the defendant’s character, background, and personal moral culpability, there was not a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without the possibility of parole be imposed rather than a death sentence.¹⁸ The state trial court imposed a sentence of death.¹⁹

E. Direct Appeal

Harris appealed his conviction and sentence. Attorney John Tatum filed Harris’s direct appeal brief on September 3, 2013, asserting forty points of error.²⁰ The Texas Court of Criminal

¹⁸ 66 RR Trial 103-06. The jury’s punishment-phase verdict is contained in its verdict form found at ECF no. 21-7, at pp. 189-90 (2 CR 684-85) and ECF no. 22-8, at pp. 41-42 (1 Supp. CR 41-42).

¹⁹ 66 RR Trial 107-08.

²⁰ Harris’s state appellant’s brief appears at ECF no. 21-1. Harris’s state appellant’s brief included (1) four *Batson* claims challenging prosecution peremptory strikes of venire members (points 1-4); (2) six points of error arguing the trial court erred in denying the defense’s challenges for cause directed against six venire members (points 5-10); (3) two points arguing the jury was biased and, therefore, he was denied a fair trial (points 11-12); (4) a point of error arguing the trial court erred in denying the defense’s motion for mistrial based a juror reading an article about evidence in the case (point 13); (5) a point of error arguing the trial court erred in overruling the defense’s objection to the trial court’s response to a jury note during guilt-innocence phase deliberations (point 14); (6) a point arguing there was insufficient evidence to support the jury’s guilty verdict (point 15); (7) a point arguing the trial court erred in denying the defense’s request for a jury instruction on reasonable doubt (point 16); (8) two points challenging the trial court’s admission of crime scene and autopsy photos (points 17-18); (9) a point arguing the trial court erred in

Appeals affirmed Harris's conviction and sentence. *Harris v. State*, AP-76,810, 2014 WL 2155395 (Tex. Crim. App. May 21, 2014). The United States Supreme Court denied Harris's certiorari petition. *Harris v. Texas*, 574 U.S. 1080 (2015).

F. State Habeas Corpus Proceeding

The Texas Office of Capital Writs filed Harris's state habeas corpus application on June 11, 2014, asserting numerous ineffective assistance claims for relief.²¹ The state habeas trial court

excusing a prosecution witness from the Rule during the punishment phase of trial (point 19); (10) two points arguing the trial court erred in admitting testimony from prosecution gang expert Barrett Nelson regarding the meaning of Harris's "HUSTLA" and "Fishtrap Bloods" tattoos (points 20 & 22)); (11) a point arguing the trial court erred in admitting evidence of Harris's misdemeanor conviction in Georgia (point 21); (12) a point arguing there was insufficient evidence to support the jury's affirmative answer to the future dangerousness special issue (point 23); (13) a point arguing the trial court erred in denying the defense's motion to disqualify the Dallas County District Attorney's Office (point 24); (14) a point arguing the administrative judge erred in recusing an elected trial judge from hearing the case (point 25); (15) a point arguing the trial court abused its discretion in denying the defense's motion to videotape voir dire (point 26); (16) a point arguing the trial court erred in denying the defense's request for a jury instruction explaining the effect of a hung jury at the punishment phase of trial (point 27); (17) a point arguing the Texas capital sentencing statute is unconstitutional because it vests the jury with too much discretion (point 28); (18) four points of error arguing the Texas capital sentencing statute's mitigation special issue is unconstitutional because it fails to place the burden of proof on the prosecution (points 29-31 & 35); (19) a point arguing the Texas capital sentencing statute's twelve/ten rule is unconstitutional (point 32); (20) a point arguing that various terms employed in the Texas capital sentencing statute's special issues are unconstitutionally vague (point 33); (21) a point arguing the Texas capital sentencing statute's mitigation special issue is unconstitutional because it fails to require the jury to consider all mitigating evidence (point 34); (22) a point arguing the mitigation special issue is unconstitutional because it affords the jury open-ended discretion (point 36); (23) a point arguing the Texas capital sentencing scheme is unconstitutional because it fails to afford a meaningful opportunity for appellate review of the jury's answers to the sentencing special issues (point 37); (24) a point arguing the trial court erred in failing to quash the indictment (point 38); and (25) two points asserting cumulative error under the federal and state constitutions (points 39-40).

²¹ Harris's state habeas corpus application appears at ECF no. 25-3, at pp. 33-153 and at ECF no. 26-13, at pp. 17-137. The Office of Capital Writs was subsequently redesignated the Office of Capital and Forensic Writs ("OCFW").

Harris's state habeas application argued (1) his trial counsel rendered ineffective assistance by failing to adequately investigate Harris's background and present available mitigating evidence showing Harris suffered from the effects of (a) Fetal Alcohol Syndrome Disorder (i.e., in utero exposure to alcohol) and (b) in utero and childhood exposure to toxic levels of lead (claim 1); (2) his trial counsel rendered ineffective assistance by failing to present testimony from a social historian showing the mitigating impact of Harris's difficult and troubled childhood (claim 1); (3) his trial counsel rendered ineffective assistance by failing to present testimony from a gang expert to refute the testimony of the prosecution's gang expert Barrett Nelson (claim 2); (4) his trial counsel rendered ineffective assistance by failing to object on hearsay grounds to testimony showing Harris wore a stun belt in an elevator outside the courtroom (claim 3); (5) his trial counsel rendered ineffective assistance by failing to object to the admission of testimony showing the results of the forensic examination of his victims other than Alfredo Gallardo (claim 4); (6) his trial counsel rendered ineffective assistance by failing to object to evidence showing the crime scene and the fact that Harris fired his weapon at police officers (claim 5); and (7) the Texas capital sentencing statute is unconstitutional

held a lengthy evidentiary hearing on May 29-31, June 1 & 16, and September 10-12, 2018, during which it heard testimony from multiple members of Harris's family, members of Harris's defense team (including his trial counsel, mitigation specialist, and court-appointed mental health expert), and many additional experts for each party.²²

On March 31, 2020, the state habeas trial court issued an order containing its findings of fact, conclusions of law, and recommendation that Harris's state habeas application be denied.²³ On October 20, 2020, Harris filed objections to the trial court's findings, conclusions, and recommendation.²⁴ The Texas Court of Criminal Appeals adopted the state habeas trial court's findings and conclusions and denied Harris's state habeas application. *Ex parte Harris*, WR-80,923-01, 2020 WL 8079824 (Tex. Crim. App. Dec. 16, 2020).

G. Proceedings in this Court

Harris filed his federal habeas corpus petition in this court on December 14, 2021 (ECF no. 13), asserting claims that his state trial counsel rendered ineffective assistance (1) by failing to investigate Harris's background adequately and present available mitigating evidence showing Harris suffered from (a) Fetal Alcohol Syndrome Disorder and (b) childhood exposure to toxic lead and (2) failing to object to testimony showing that Harris wore a stun belt during trial.

because of the twelve/ten rule and the failure of Texas to instruct the jury on the effect of a hung jury on any of the capital sentencing special issues (claim 6).

²² For unknown reasons, the Texas Attorney General's Office, which is responsible under Rule 5(c) of the Rules Governing Section 2254 Cases in the United States District Courts for filing the relevant portions of the state court record, filed two sets of the verbatim transcription of the hearing conducted in Harris's state habeas corpus proceeding. These duplicate but un-chronologically ordered records appear at ECF nos. 26-2 & 25-5 through 25-14 and ECF nos. 26-1 through 26-10.

²³ Copies of the state habeas trial court's findings, conclusions, and recommendation appear at ECF no. 26-21, at pp. 182-330 and as an exhibit attached to Harris's original petition, i.e., ECF no. 13.

²⁴ Harris's objections to the state habeas trial court's findings and conclusions appear at no. 25-19.

Respondent filed its answer on July 6, 2022 (ECF no. 20), arguing, in part, the evidence from Harris's state habeas proceeding showed that (1) the defense's mental health expert (Dr. McGarrahan) concluded after evaluating Harris and meeting repeatedly with Harris's mother (in part to investigate Harris's in utero exposure to alcohol and drugs) that Harris suffered from no significant mental illness or cognitive impairments; (2) Dr. McGarrahan advised Harris's trial counsel against putting her or another mental health expert who had evaluated Harris on the stand because doing so would open the door to an evaluation by, and potentially devastating testimony from, a prosecution mental health expert (including testimony that Harris exhibits Antisocial Personality Disorder); and (3) Harris's trial counsel acted reasonably in relying on Dr. McGarrahan's conclusions and recommendation in developing and presenting their case in mitigation at the punishment phase of Harris's trial.

Harris filed his Reply brief on September 6, 2022 (ECF no. 30), arguing in part that the state habeas court improperly applied a preponderance of the evidence standard instead of an objective reasonableness standard in reviewing and rejecting Harris's ineffective assistance claims on the merits and that the state habeas court wrongfully refused to employ a cumulative error approach to Harris's ineffective assistance claims (thereby implicitly requesting de novo review by this court of his ineffective assistance claims).

II. STANDARD OF REVIEW

Because Harris filed this federal habeas corpus action after the effective date of the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"), this Court's review of his claims for federal habeas corpus relief is governed by AEDPA. *Penry v. Johnson*, 532 U.S. 782, 792 (2001).

The legislative history of the AEDPA indicates that it was intended as a limitation upon the scope of federal habeas review, not as an enactment intended to broaden the scope of federal

habeas review or to reconfigure federal habeas courts as super state appellate courts. One of the principal purposes of the AEDPA was to reduce delays in the execution of state and federal criminal sentences, especially capital sentences. *Ryan v. Valencia Gonzales*, 568 U.S. 57, 76 (2013); *Schriro v. Landrigan*, 550 U.S. 465, 475 (2007); *Rhines v. Weber*, 544 U.S. 269, 276 (2005). Another purpose of the AEDPA was to encourage litigants to pursue claims in state court prior to seeking federal collateral review. *Duncan v. Walker*, 533 U.S. 167, 181 (2001); *see also Hernandez v. Johnson*, 108 F.3d 554, 558 n.4 (5th Cir. 1997) (the AEDPA imposes the burden on a petitioner to litigate to the maximum extent possible, including fairly presenting all available evidence supporting, his claims in state court). The AEDPA was also intended to prevent piecemeal litigation and gamesmanship. *Maywood v. Patterson*, 561 U.S. 320, 334 (2010). Thus, under the AEDPA, federal habeas review of claims is limited to the record that was before the state court that adjudicated the prisoner's claims on the merits. *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011). "The AEDPA statute of limitations promotes judicial efficiency and conservation of judicial resources, safeguards the accuracy of state court judgments by requiring resolution of constitutional questions while the record is fresh, and lends finality to state court judgments within a reasonable time." *Day v. McDonough*, 547 U.S. 198, 205-06 (2006). Collectively, the provisions of the AEDPA further the principles of comity, finality, and federalism. *Panetti v. Quarterman*, 551 U.S. 930, 945 (2007); *Miller-El v. Cockrell*, 537 U.S. 322, 337 (2003).

Under the AEDPA standard of review, this Court cannot grant Harris federal habeas corpus relief in connection with any claim that was adjudicated on the merits in state court proceedings, unless the adjudication of that claim either: (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, or (2) resulted in a decision that was based on an unreasonable

determination of the facts in light of the evidence presented in the state court proceeding. *Brown v. Davenport*, 142 S. Ct. 1510, 1525 (2022); *Brown v. Payton*, 544 U.S. 133, 141 (2005); *Williams v. Taylor*, 529 U.S. 362, 404-05 (2000); 28 U.S.C. § 2254(d).

The Supreme Court has concluded the “contrary to” and “unreasonable application” clauses of Title 28 U.S.C. § 2254(d)(1) have independent meanings. *Bell v. Cone*, 535 U.S. 685, 694 (2002). Under the “contrary to” clause, a federal habeas court may grant relief if (1) the state court arrives at a conclusion opposite to that reached by the Supreme Court on a question of law or (2) the state court decides a case differently than the Supreme Court on a set of materially indistinguishable facts. *Brown*, 544 U.S. at 141; *Mitchell v. Esparza*, 540 U.S. 12, 15-16 (2003) (“A state court’s decision is ‘contrary to’ our clearly established law if it ‘applies a rule that contradicts the governing law set forth in our cases’ or it ‘confronts a set of facts that are materially indistinguishable from a decision of this Court and nevertheless arrives at a result different from our precedent.’”). A state court’s failure to cite Supreme Court authority does not, per se, establish the state court’s decision is “contrary to” clearly established federal law: “the state court need not even be aware of our precedents, ‘so long as neither the reasoning nor the result of the state-court decisions contradicts them.’” *Mitchell*, 540 U.S. at 16.

Under the “unreasonable application” clause, a federal habeas court may grant relief if the state court identifies the correct governing legal principle from the Supreme Court’s decisions but unreasonably applies that principle to the facts of the petitioner’s case. *Brown*, 544 U.S. at 141; *Wiggins v. Smith*, 539 U.S. 510, 520 (2003). A federal court making the “unreasonable application” inquiry should ask whether the state court’s application of clearly established federal law was “objectively unreasonable.” *McDaniel v. Brown*, 558 U.S. 120, 132-33 (2010) (“A federal habeas court can only set aside a state-court decision as ‘an unreasonable application of . . . clearly

established Federal law,’ § 2254(d)(1), if the state court’s application of that law is ‘objectively unreasonable.’”); *Wiggins*, 539 U.S. at 520-21. The focus of this inquiry is on whether the state court’s application of clearly established federal law was objectively unreasonable; an “unreasonable” application is different from a merely “incorrect” one. *Schriro v. Landrigan*, 550 U.S. 465, 473 (2007) (“The question under the AEDPA is not whether a federal court believes the state court’s determination was incorrect but whether that determination was unreasonable – a substantially higher threshold.”); *Wiggins*, 539 U.S. at 520; *Price v. Vincent*, 538 U.S. 634, 641 (2003) (“[I]t is the habeas applicant’s burden to show that the state court applied that case to the facts of his case in an objectively unreasonable manner”). “Under the Antiterrorism and Effective Death Penalty Act, a state prisoner seeking a writ of habeas corpus from a federal court ‘must show that the state court’s ruling on the claim being presented in federal court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.’” *Bobby v. Dixon*, 565 U.S. 23, 24 (2011) (quoting *Harrington v. Richter*, 562 U.S. 86, 101 (2011)).

Legal principles are “clearly established” for purposes of AEDPA review when the holdings, as opposed to the dicta, of Supreme Court decisions existing at the time of the relevant state-court decision establish those principles. *Brown*, 142 S. Ct. at 1525 (“It is not enough that the state court decision offends lower federal court precedents.”); *Yarborough v. Alvarado*, 541 U.S. 652, 660-61 (2004) (“We look for ‘the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision.’”); *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003).

AEDPA also significantly restricts the scope of federal habeas review of state court fact findings. Section 2254(d)(2) of Title 28, United States Code, provides federal habeas relief may

not be granted on any claim that was adjudicated on the merits in the state courts unless the state court's adjudication of the claim resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *Wood v. Allen*, 558 U.S. 290, 301(2010) (“[A] state-court factual determination is not unreasonable merely because the federal habeas court would have reached a different conclusion in the first instance.”); *Williams v. Taylor*, 529 U.S. at 410 (“[A]n *unreasonable* application of federal law is different from an *incorrect* application of federal law.”). Even if reasonable minds reviewing the record might disagree about the factual finding in question (or the implicit credibility determination underlying the factual finding), on habeas review, this does not suffice to supersede the trial court's factual determination. *Wood*, 558 U.S. at 301; *Rice v. Collins*, 546 U.S. 333, 341-42 (2006).

In addition, § 2254(e)(1) provides that a federal habeas petitioner challenging state court factual findings must establish by clear and convincing evidence that the state court's findings were erroneous. *Schriro*, 550 U.S. at 473-74 (“AEDPA also requires federal habeas courts to presume the correctness of state courts' factual findings unless applicants rebut this presumption with ‘clear and convincing evidence.’”); *Rice*, 546 U.S. 333, 338-39 (2006) (“State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by ‘clear and convincing evidence.’”); *Miller-El v. Dretke*, 545 U.S. 231, 240 (2005) (“[W]e presume the Texas court's factual findings to be sound unless Miller-El rebuts the ‘presumption of correctness by clear and convincing evidence.’”); 28 U.S.C. §2254(e)(1). It remains unclear at this juncture whether § 2254(e)(1) applies in every case presenting a challenge to a state court's factual findings under § 2254(d)(2). *See Wood*, 558 U.S. at 300-01 (choosing not to resolve the issue of § 2254(e)(1)'s possible application to all challenges to a state court's factual

findings); *Rice*, 546 U.S. at 339 (likewise refusing to resolve the Circuit split regarding the application of § 2254(e)(1)).

The deference to which state-court factual findings are entitled under AEDPA does not imply an abandonment or abdication of federal judicial review. *See Miller-El*, 545 U.S. at 240 (the standard is “demanding but not insatiable”); *Miller-El v. Cockrell*, 537 U.S. 322, 340 (2003) (“Even in the context of federal habeas, deference does not imply abandonment or abdication of judicial review. Deference does not by definition preclude relief.”).

Before a federal court may grant a state prisoner habeas corpus relief on a claim that was adjudicated on the merits in state court, the petitioner must not only satisfy the requirements of AEDPA but must also convince the court that the error committed by the state court during its adjudication of the petitioner’s criminal case was not harmless within the meaning of *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Brown v. Davenport*, 142 S. Ct. 1510, 1517 (2022). In *Shinn v. Jenkins*, 142 S. Ct. 1718, 1732 (2022), the Supreme Court held that when a federal habeas petitioner has properly exhausted state court remedies on a federal constitutional claim through direct appeal or a state habeas corpus proceeding, federal habeas review of that claim is circumscribed in that the federal court is limited to reviewing the record before the state court that resolved the claim on the merits and the petitioner must establish that, under Supreme Court precedent, no fair-minded jurist could have reached the same result as the state court. *See also Shoop v. Twyford*, 142 U.S. 2037, 2044 (2022) (where a petitioner failed to develop the factual bases for his claims in state court, he is entitled to present new evidence in support of his claims before the federal habeas court only in the two limited circumstances outlined in Section 2254(e)(2)).

Absent a showing that there is an absence of available state corrective process or that circumstances exist that render such process ineffective to protect the rights of a petitioner, this Court is statutorily precluded from granting federal habeas corpus relief on any claim that has not been fairly presented to the state courts. *Davila v. Davis*, 582 U.S. 521, 527 (2017) (the exhaustion requirement is designed to avoid the unseemly result of a federal court upsetting a state court conviction without first affording the state courts an opportunity to correct a constitutional violation); 28 U.S.C. § 2254(b)(1). Nonetheless, this Court is authorized to deny federal habeas relief on the merits notwithstanding a petitioner’s failure to exhaust available state court remedies. *See Rhines v. Weber*, 544 U.S. 269, 277 (2005) (a federal habeas court abuses its discretion if it grants a petitioner a stay when his unexhausted claims are plainly meritless); 28 U.S.C. § 2254(b)(2) (“An application for a writ of habeas corpus may be denied on the merits, notwithstanding the failure of the applicant to exhaust the remedies available in the courts of the State.”).

If the state courts failed to adjudicate a claim on the merits that Harris now presents to this Court (such as claims (1) the state courts summarily dismissed under the Texas writ-abuse statute or Texas rules of procedural default or (2) which Harris failed to fairly present to the state courts), then this Court’s review of the un-adjudicated claim is de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009) (de novo review of the allegedly deficient performance of petitioner’s trial counsel was necessary because the state court failed to address the prejudice prong of *Strickland*); *Rompilla v. Beard*, 545 U. S. 374, 390 (2005) (de novo review of the prejudice prong of *Strickland* was required where the state court rested its rejection of an ineffective assistance claim on the deficient performance prong and never addressed the issue of prejudice); *Wiggins*, 539 U.S. at 534 (same).

III. INEFFECTIVE ASSISTANCE BY TRIAL COUNSEL

A. Overview of the Federal Claims

Harris argues in his first and second claims for federal habeas relief that his state trial counsel rendered ineffective assistance by (1) failing to adequately investigate Harris's background and present mitigating evidence showing that Harris (a) suffered the deleterious effects of in-utero exposure to alcohol, tobacco, and marijuana (resulting in Fetal Alcohol Syndrome Disorder ("FASD") and Alcohol-Related Neurodevelopmental Disorder ("ARND")) and (b) suffered from the deleterious impact of in-utero and early childhood exposure to toxic lead [ECF no. 13, at 30-61 & 73-90]²⁵ and (2) failing to object to testimony showing that Harris wore a stun belt during trial [ECF no. 13, at 90-105].²⁶

B. State Court Disposition of *Wiggins* Claim

1. State Habeas Application

In his state habeas application, Harris presented five claims of ineffective assistance by his state trial counsel. In claims one and three, Harris argued, in pertinent part, that his state trial counsel rendered ineffective assistance by (1) failing to adequately investigate Harris's background and present mitigating evidence showing Harris's in-utero exposure to alcohol and childhood exposure to lead and (2) failing to object to hearsay testimony during the punishment phase of his trial regarding Harris wearing a stun belt during the elevator incident described above in Section I.D.3. State Habeas Application, at 16-70 & 75-84.

2. Evidentiary Hearing

²⁵ Harris also argues in his federal habeas corpus petition that he suffers from the negative *cumulative* impact of his in-utero and early-childhood exposure to tobacco, lead, alcohol, and marijuana. ECF no. 13, at 86-89.

²⁶ In addition, Harris's federal habeas corpus petition also includes a series of arguments that amount to a separate claim that he was deprived of due process during his state habeas corpus proceeding by virtue of interplay between the Texas habeas corpus statute applicable to capital cases (Texas Code of Criminal Procedure Article 11.071) and the state habeas trial court's various procedural and substantive rulings. ECF no. 13, at 61-73. This unexhausted due process claim will be addressed separately below.

The state habeas trial court reviewed extensive documentation and affidavits as well as testimony from both lay witnesses regarding Harris's background and experts regarding their opinions on a wide range of subjects.

a. Applicant's Evidence

Harris's mother repeated much of her trial testimony describing her pregnancy with Harris and Harris's childhood but added some new details after explaining that she suffered an anxiety attack during Harris's trial and, as a result, felt she had been unable to give all the testimony she had wanted.²⁷ Likewise, Harris's female cousin repeated much of her punishment phase trial testimony but added a few new details to her account of Harris's difficult childhood.²⁸

²⁷ More specifically, Pamela Maddox testified during Harris's state habeas hearing that (1) Harris's biological father Eric Propes only met Harris three or four times, once when Harris was three or four years old and the next time when Harris was a teenager; (2) her parents divorced when she was fourteen or fifteen and she became pregnant with Harris when she was seventeen; (3) contrary to what she told Harris's defense team, she drank alcohol daily when a teenager, including during the first three months of her pregnancy with Harris; (4) Harris's birth was a difficult C-Section during which he suffered fetal distress due to his umbilical cord being wrapped around his neck and body; (5) her doctors were forced to resuscitate Harris at birth; (6) she received no treatment for her post-partum depression, had no support when she went home from the hospital with Harris, and had a difficult time bonding with him; (7) she was later much better able to raise the two sons she had with Ramon Maddox; (8) she often left Harris with others while she went out and partied; (9) she has been diagnosed with bipolar disorder and hospitalized three times; (10) her grandmother was hospitalized with mental health issues for many years and her sister committed suicide; (11) Harris's biological father has a family history of psychoses and mental health issues; (12) Harris grew up in an area that was later the subject of lead remediation; (13) she ate dirt while pregnant with Harris; (14) Harris was in a serious car accident at age three in which he suffered a facial laceration (which required stitches) and concussion (which required Harris to remain in the hospital for several hours under observation); (15) Ramon Maddox, an alcoholic, married her when Harris was four years old and later whipped Harris with belts and extension cords until Harris reached age fifteen, when Harris stood up to his stepfather; (16) Ramon Maddox frequently beat her in the presence of Harris; (17) she tried to protect Harris from his stepfather but Harris began running away from home at age eight or nine; (18) Ramon Maddox was much harsher with Harris than he was with their other two sons; (19) Harris had behavioral issues at school, including sleeping in class, which were complicated by the fact their family frequently moved, forcing Harris to change schools; (20) Harris was diagnosed with ADHD at an early age and prescribed Ritalin; (21) Harris smoked marijuana in high school; (22) when he grew older Harris indicated an interest in seeing his biological father but Eric Propes never reciprocated Harris's interest; (23) Harris is nonetheless a good father to his daughter; and (24) she divorced Ramon Maddox in 2016. 2 RR SHH 30-82.

²⁸ More specifically, Shamy Conley testified during Harris's state habeas hearing that (1) she grew up in the same apartment complex as Harris until she was nine years old; (2) Harris treated her like he was her brother and was never violent as a child; (3) Harris's stepfather Ramon Maddox was mean and violent toward Harris, beating Harris with sticks and electrical cords; (4) Ramon Maddox once knocked a tooth from Pamela Maddox's mouth; (5) Harris's mother did not protect Harris from his stepfather; (6) Harris had no one to turn to for protection growing up; (7) Harris began running away from home to get away from his abusive stepfather, essentially living on the streets; (8) at one point Harris lived with her family out in the country until he got into trouble; (9) nonetheless Harris was good with

A pediatrician and expert on FASD, Dr. Julian Kent Davies, described FASD as “an umbrella term” for a number of diagnoses caused by maternal drinking of alcohol during pregnancy and testified that, after interviewing Harris and reviewing records, he had diagnosed Harris with ARND.²⁹

Laura Sovine, a social worker who investigated Harris’s life history, testified that Harris experienced a difficult childhood (including being abandoned by his teenage mother with multiple

her daughter and she had him babysit her daughter at times; and (10) Harris never received help for his drug addiction (smoking marijuana dipped in PCP). 2 RR SHH 83-103.

²⁹ Dr. Davies testified in pertinent part that (1) diagnoses of FASD and ARND have been around since the 1970’s; (2) these diagnoses are characterized by distinctive facial features, small size at birth and developmental deficiencies, and neurodevelopmental disorders resulting from structural brain damage due to in utero alcohol exposure; (3) Harris qualified for Special Educational services in school and displayed learning disabilities, including a pronounced difficulty with mastering mathematics typical of individuals with FASD and ARND; (4) Harris was also diagnosed with ADHD at age seven – another trait common among those with FASD and ARND; (5) Harris displayed difficulties fitting into social settings with his peers, displayed a history of running away from home, and had a pattern of behavioral challenges consistent with FASD and ARND; (6) some of Harris’s neuropsychological test results showed difficulties in executive functioning while others were within the average range; (7) one of the hallmarks of brain damage from in utero alcohol exposure is variability in such test results; (8) Harris scored a full scale 84 on the WAIS-IV but displayed a large gap between his nonverbal IQ test score and his math achievement score showing significant math impairment; (9) no neural imaging had been done on Harris to confirm structural brain damage; (10) while Harris’s mother described to his defense team that she had only had a couple glasses of wine on the weekends during the first six weeks of her pregnancy, underestimations of alcohol intake during pregnancy are quite common and Harris’s mother subsequently revealed to his state habeas counsel that she had ingested alcohol daily during the first two to three months of her pregnancy with Harris, consisting of fortified wine – which has a significantly higher alcohol content than regular wine; (11) in utero exposure to lead, as well as lead exposure during early childhood can have a multiplying effect on the deleterious impact of in utero alcohol exposure; (12) Harris also suffered from depression as a child and from witnessing, and being the victim of, acts of violence within his home; (13) Harris’s low average IQ also put him at increased risk of adverse outcomes as he grew up; (14) Harris is just smart enough to make his impairments dangerous because he is capable of concealing his significant disabilities; (15) Harris did receive some academic support from his schools growing up but insufficient psychological evaluation; (16) *during his interview, Harris displayed significant difficulty with planning and other executive functioning*; (17) *during his interview, Harris displayed significant problems with anger management, was easily distracted, and displayed a high level of impulsivity*; (18) *Harris also displayed poor judgment and concrete thinking, i.e., he struggled with abstract thinking*; and (19) there is no such thing as a safe level of alcohol consumption during pregnancy. 3 RR SHH 24-77.

Dr. Davies admitted, however, that (1) fatigue, distractions, and other factors can affect a test subject’s performance on neuropsychological tests; (2) in addition to the absence of any neuro-imaging confirming that Harris actually suffered brain damage typical of those with FASD, Harris does not have any of the distinctive facial features of persons with FASD, Harris’s birth weight and birth size were well within the normal range; and Harris’s records did not display any of the growth or physical developmental deficiencies (i.e., delays in growth or meeting developmental milestones) typical of those with FASD; (3) there was no record of any health care provider testing Harris for FASD symptoms during his childhood; (4) FASD is not included as a recognized diagnosis in the American Psychiatric Association’s Diagnostic and Statistical Manual of mental Disorders but, instead, is listed as a diagnosis worthy of further examination and research; and (5) Harris admitted to using marijuana almost daily beginning around age fourteen to seventeen. 3 RR SHH 37-38, 40-41, 43, 51-52, 75, 96, 98-101.

caregivers, witnessing and being the victim of domestic violence, suffering a traumatic head injury as a child, witnessing his dog being run over by a motorcycle, being unable to form an attachment with a primary caregiver during his first three years of life, being diagnosed with ADHD and placed in Special Education classes, being diagnosed with depression and suicidal ideation at an early age, and being deprived of the psychological care he required) all of which resulted in Harris growing into an anxious, distracted, and irritable individual who displayed pathological behavior, such as drug abuse, running away from home, bringing a knife to school, and becoming involved with a street gang.³⁰

A pediatric neuropsychologist with experience working with children with FASD, Dr. Joan Mayfield, testified that she believed the neuropsychologist retained by Harris's state trial defense team (Dr. Antoinette McGarrahan) should have performed additional testing of Harris's executive functioning, pointing to the fifteen-point difference between Harris's verbal and performance scores on the WAIS-IV, which is common among children with FASD.³¹

³⁰ 3 RR SHH 112-25; 7 RR SHH 10-56.

Ms. Sovine repeatedly criticized Harris's school officials for punishing Harris for his misbehavior instead of getting Harris the mental health counseling she believed he needed. 7 RR SHH 11-12, 24. She admitted on cross-examination that she was unfamiliar with the facts of Harris's capital offense. *Id.*, at 46-47.

³¹ 6 RR SHH 10-37. Dr. Mayfield also testified that she believed (1) symptoms such as ADHD and learning disabilities required good educational plans; and (2) educators and parents need to help children control their behaviors. *Id.*, at 19, 22.

On cross-examination, Dr. Mayfield testified that (1) Harris's records showed he had engaged in chronic PCP use from ages nineteen to twenty-four and long term marijuana abuse starting in his pre-teens; (2) the causes of ADHD are unknown; (3) chronic drug abuse can affect cognitive functioning; (4) access to raw test data from neuropsychological testing is not usually made available to attorneys, even in criminal cases, but is limited to the psychologists who are asked to opine on the defendant's mental health; (5) both Dr. McGarrahan and the mental health expert appointed by the state trial court to examine Harris prior to trial (Dr. Christine Reed) agreed on a diagnosis of Antisocial Personality Disorder ("ASPD"); (6) she found no evidence of malingering in Dr. McGarrahan's test results; (7) she could not diagnose Harris with FASD because she did no testing for FASD; and (8) she believed from her view of Harris's records and Dr. McGarrahan's test results that Harris showed significant cognitive impairment. 6 RR SHH 37-63 & 67-69.

On redirect examination, Dr. Mayfield opined that Harris's tests scores obtained by Dr. McGarrahan were consistent with a diagnosis of FASD but admitted that poor nutrition could cause childhood learning problems. *Id.*, at 64-67.

An expert on public health and exposure to chemicals, Dr. Thomas Dydek, testified that (1) through his work with the Texas Air Control Board, he was personally familiar with the history of the lead smelting plant located in West Dallas near where Harris's grandmother resided and Harris's mother grew up; (2) the plant in question polluted a wide area of residential West Dallas with toxic levels of lead; (3) lead exposure in children can lead to significant negative effects on brain and central nervous system development, including ADHD, lack of impulse control, poor academic performance, delinquency, and violence; (4) there is no safe level of lead exposure; (5) toxic lead can be passed on in utero from mother to child; (6) lead remains in the bones even after it has left the blood stream; (7) based upon his research, it was likely Harris was exposed to lead both in utero and as a small child through the lead-contaminated soil in the neighborhood where Harris's grandmother lived and Harris's mother grew up; (8) Harris's exposure to lead in utero and as a child explains his tendency toward violence; and (9) Harris's childhood history of ADHD, depression, and behavioral problems was consistent with lead poisoning.³²

An expert in cultural studies and education, Dr. Courtney Robinson, testified about the "school to prison pipeline," and opined that (1) school children, particularly children of color, who are disciplined in school (through in-school suspension and out-of-school suspension) tend to end up in the criminal justice system; (2) black children were far more likely to be reported for disciplinary problems in school, and to receive suspensions than white students; (3) Harris had a long history of school disciplinary problems; (4) given Harris's demonstrated depression and ADHD at an early age, he should, instead, have received immediate and aggressive intervention in the form of referral to a psychologist and testing for autism; (5) the Ritalin prescribed for Harris

³² 3 RR SHH 125-62. Dr. Dydek admitted, however that (1) a simple, non-invasive test is available to determine if an individual's bones reflect lead poisoning yet there was no record of either Harris, his mother, or his grandmother ever having been tested for lead poisoning. *Id.*, at 153, 159.

would have treated his ADHD but not his underlying depression; (6) arrest is traumatic for children, who often do not understand the process; (7) children are often labeled or designated as gang members even when they are not involved in actual gang activity; and (8) Harris did not get the treatment he needed during his school years.³³

Finally, Harris called attorney Richard Burr, a veteran post-conviction defense advocate, who testified that (1) in utero exposure to alcohol was a red flag for defense counsel as early as 2009; (2) FASD is associated with communications problems; (3) ASPD has evolved into a diagnosis of behaviors rather than a mental illness and can be addressed by reference to other mental health problems which explain the defendant's violent behavior; (4) the use of drugs is often associated with mental health problems; (5) by 2009 defense counsel were also aware of the deleterious effects of exposure to toxins; and (6) social history testimony can be helpful in helping a jury understand how mental health problems result from brain damage.³⁴

b. State's Evidence

The State called Dr. Christine Reed, a clinical and forensic psychologist who testified that she was appointed by the state trial court to examine Harris prior to trial (and to file a sealed report with the trial court) to be available to the prosecution in the event the defense introduced testimony

³³ 5 RR SHH 8-37, 60-68, & 69-70.

On cross-examination, however, Dr. Robinson testified that (1) she would not have been available to testify on Harris's behalf during his 2012 capital murder trial; (2) she had not been able to review any of Harris's Special Education records, including his Individual Educational Plans; (3) in high school, Harris had an inclusive support teacher and was working toward mainstreaming; (4) while drugs are often used to self-medicate, PCP is not a mood stabilizer; and (5) Harris checked himself out of school when he turned eighteen. 5 RR SHH 37-60, 69.

³⁴ 9 RR SHH 69-117 & 138-39.

On cross-examination, attorney Burr admitted that (1) he had very little experience trying criminal cases, including virtually none in the State of Texas; (2) he had not reviewed any of the records from Harris's trial court proceedings; and (3) his experience and training in mental health issues consisted of taking a single graduate level course in Florida. 9 RR SHH 117-38.

by a mental health expert who had examined Harris.³⁵ Dr. Reed testified in pertinent part that (1) she conducted a clinical interview of Harris, administered several tests, and reviewed Harris's records; (2) she diagnosed Harris with psychotic disorder not otherwise specified, depression disorder not otherwise specified, substance abuse, and ASPD; (3) her findings were consistent with those reached by the defense's mental health expert, Dr. McGarrahan; (4) at the state trial court's direction, she filed a copy of her report under seal in the trial court and did not discuss Harris's case with the prosecution or furnish a copy of her report to the prosecution until 2015; (5) Harris reported starting a fire during his youth and admitted to gang membership as a youth, consisting primarily of fighting – which later ended when he withdrew from his gang; (6) Harris reported PCP use on a daily basis beginning around age fifteen-to-sixteen, usually by smoking tobacco or marijuana dipped in PCP; (7) Harris reported symptoms of depression, auditory hallucinations, and problems focusing; (8) Harris's full scale score on the WAIS-IV she administered was 92 (higher than the 84 obtained by Dr. McGarrahan prior to trial); (9) she found no significant intellectual disability and Harris's below average scores on a variety of academic skills tests were consistent with his IQ score; (10) her testing showed Harris had engaged in exaggeration – but not malingering – on the MMPI and PAI personality tests; (11) ASPD is a lifelong pattern of behavior consisting of criminal activity, aggressive behavior, irresponsibility, lack of remorse, and deceitfulness, all of which was consistent with Harris's history – which included a juvenile diagnosis of conduct disorder; (12) Harris reported auditory hallucinations dating back to age twelve – prior to the start of his PCP abuse; (13) Harris reported he had not been on any mental

³⁵ 4 RR SHH 14-16.

health medication since middle school; and (14) Harris appeared to be attempting to exaggerate his mental health problems.³⁶

Dr. Fed Andrew Falkowski, a clinical and forensic neuropsychologist testified that (1) he had reviewed the results of the tests administered to Harris by Dr. McGarrahan and Dr. Reed, which he believed to be accurate; (2) he found Harris's scores to be consistent with Harris's educational background, including Harris's history of emotional disturbances, changing schools, and chronic PCP abuse; (3) he also reviewed the scoring done by Dr. Underhill, whom the defense's experts had relief upon, and found that Dr. Underhill erroneously scored a number of tests administered on July 5, 2011 by Dr. McGarrahan as "zero" when, in fact, Harris became tired and Dr. McGarrahan chose not to administer the tests in question; (4) Dr. Underhill's error interpreting McGarrahan's tests results meant Dr. Underhill's finding of significant cognitive impairment was erroneous; (5) Dr. Davies and several other experts who testified or furnished affidavits on behalf of Harris during his state habeas proceeding relied on Dr. Underhill's erroneously scored report; (6) he believed Dr. McGarrahan and Dr. Reed accurately determined Harris displayed below average academic skills consistent with Harris's IQ score and educational attainment but little cognitive impairment; (7) some of Harris's low test scores in July 2011 could likely also be attributed to fatigue, disengagement, poor education, chronic drug abuse, or lack of motivation; (8) Harris also scored poorly on a test which measured effort; (9) Harris scored in the average range on most tests of executive functioning and he did not see any reason for additional tests on that skill set; (10) he concluded that Harris's test scores indicated above average results in executive functioning given Harris's IQ and educational attainment, mild to moderate impairment in verbal learning, but no indication of neurological dysfunction or significant deficits; (11) a few

³⁶ 4 RR SHH 5-65.

low scores scattered across the testing landscape did not indicate cognitive impairment given Harris's below average IQ; (12) Harris's low math scores could be attributable to his history of disruptions in his education resulting from arrests, detention, and his move to Georgia and then back to Texas during his teen years; (13) Harris's test results were consistent with the "practice effect" in that Harris scored higher on the neuropsychological tests administered by Dr. Reed *after* Dr. McGarrahan administered her tests; (14) chronic drug abuse can cause memory impairment and neurological damage; (15) the 15-point disparity between Harris's verbal and performance IQ scores was unremarkable given that the WAIS manual reports such disparities in twenty per cent of the general population (with ten to thirteen percent of the population scoring fifteen points higher in the performance portion than on the verbal portion); and (16) he did not believe that Harris's test scores warranted testing for in utero exposure to alcohol.³⁷

The defense's mental health expert at trial, forensic neuropsychologist Dr. Antoinette McGarrahan, testified that (1) that Harris's cognitive test results in July and October 2011 were consistent with a number of etiologies, including FASD, ADHD, and developmental issues such as head trauma and long term PCP abuse; (2) despite doing multiple interviews with her, it was unclear to the defense team just how much Harris's mother drank during her pregnancy; the defense team did not have information suggesting Harris's mother's alcohol intake during pregnancy was greater than that to which she testified at trial; (3) despite multiple interviews of Harris's mother and grandmother, it was unclear to the defense team just how much alcohol Harris's mother drank during her pregnancy; (4) Harris's mother denied significant alcohol consumption but emphasized her marijuana consumption; (5) she informed Harris's defense counsel that she did not believe her testimony would prove beneficial at trial, in part, because her

³⁷ 6 RR SHH 70-140.

testimony would open the door to testimony by Dr. Reed, which Dr. McGarrahan knew would prove very harmful to the defense; (6) she disagreed with the diagnosis of jail medical officials that Harris suffers from schizoaffective disorder; (7) instead, she diagnosed Harris with ASPD as the better diagnosis; (8) Harris displayed very little cognitive impairment during her testing; (9) Harris's memory problems were mild; (10) Harris does not suffer from a mental illness; (11) Harris told her that he had a good relationship with both his mother and stepfather; (12) Harris admitted a history of gang membership, running away from home frequently, daily marijuana usage starting at age thirteen, and daily PCP usage starting at age nineteen; (13) Harris reported auditory hallucinations beginning at age eighteen-to-nineteen around the time he started daily PCP use; (14) tests she conducted in October 2011 showed a high probability of malingering and she advised Harris's trial counsel to admonish Harris not to exaggerate his mental health symptoms when interviewed by Dr. Reed; (15) Harris's low average IQ did not suggest neuro-cognitive damage; (16) Dr. Underhill (whose report formed the basis for many of the opinions expressed by defense's experts during the state habeas proceeding) did not have the results of her October 2011 testing of Harris and erroneously scored a number of tests she did not administer in July 2011 as "zero," thus misinterpreting the test data; (17) Harris exhibited fatigue when she administered the California Verbal Learning test cited by several defense experts as the basis for their opinion that Harris has significant cognitive impairment; (18) Harris's responses were sloppy and he did poorly when he became fatigued; (19) she found no impairment in Harris's executive functioning – in fact Harris did rather well on tests of executive functioning in light of his IQ score; (20) Harris's scattered poor test results likely reflect his poor language skills rather than frontal lobe damage; (21) the only areas in which she found Harris displayed potential deficits were in complex memory and the test results in that area were obtained when Harris was fatigued; (22) the fifteen point difference

between Harris's verbal and performance IQ scores could be explained by Harris's PCP use; (23) Harris's low math scores could have been caused by depression, emotional influences, genetic abnormalities, in utero lead or alcohol exposure, low socioeconomic status, or low academic skills; (24) Harris's ADHD could have been attributable to depression, emotional influences, genetic factors, or in utero lead or alcohol exposure; (25) there is no objective testing available to establish FASD; (26) there was insufficient reason to recommend that Harris be given an MRI to look for evidence of organic brain damage; (27) Harris reported regular beatings with belts from an early age; (28) Harris witnessed his stepfather beating his mother, which resulted in the police arriving at the home many times; and (29) Harris was teased, bullied, and not well liked as a child because of his placement in Special Education classes.³⁸

The social worker who served as a mitigation specialist for Harris's trial counsel, Brandon Ross, testified that (1) it was difficult to get information from Harris's mother prior to trial because Pamela Maddox was suicidal and often related conflicting information to the defense team; (2) Harris had significant learning disabilities and dropped out of school; (3) Pamela Maddox was heavily medicated when she testified at Harris's trial; and (4) getting information from Harris's family was difficult and often required multiple interviews.³⁹

The state habeas court also heard extensive testimony from all three attorneys who represented Harris at trial. Attorney Brad Lollar, Harris's lead defense counsel, testified in pertinent part that (1) Dr. McGarrahan reported her test results to the defense team in May 2012, reported that Harris had very little cognitive impairment, and recommended that she not be called to testify at trial; (2) Dr. McGarrahan also reported that Harris's personality testing was likely

³⁸ 7 RR SHH 57-140.

³⁹ 9 RR SHH 16-64.

invalid because Harris over-represented his lifelong symptoms; (3) Dr. McGarrahan recommended that the defense consider using Harris's family and Dr. Kessner to identify mitigating aspects of Harris's background without opening the door to testimony by a prosecution mental health expert; (4) Dr. McGarrahan did not recommend that the defense explore or investigate the possibility Harris suffered from in utero alcohol or lead exposure; (5) Dr. McGarrahan did not recommend additional neuropsychological testing be performed on Harris; (6) he believed there was little value in pursuing additional mental health testing after Dr. McGarrahan reported Harris had only low reductions in performance on the tests she administered; (7) the defense opposed the State's pretrial motion for an evaluation of Harris by a prosecution expert but the trial court allowed Dr. Reed to conduct such an evaluation and then file a sealed report with the court; (8) putting a defense mental health expert on the stand who had evaluated Harris would have opened the door under applicable state evidentiary rules to testimony by Dr. Reed, whom Dr. McGarrahan had reported would likely diagnose Harris with ASPD; (9) the defense's trial strategy was premised on the recommendations of Dr. McGarrahan; (10) the defense's punishment phase trial strategy was to focus on the future dangerousness special issue and attempt to convince the jury that, based upon Harris's non-violent record during his previous incarcerations, once incarcerated and away from PCP, Harris would not pose a danger of future violence; (11) Harris's capital offense was particularly violent in light of the fact it included the murder of multiple victims, a pecuniary motive, the fact Harris threatened to take the wife and daughter of his victim hostage, and the fact Harris had been involved in a pair of prior home invasions that included multiple shooting victims (and the presence of multiple witnesses to each such shooting); (12) the defense was unable to trace Harris's mild cognitive impairments to any particular cause (whether FASD, lead exposure, or a violent childhood); (13) evidence showing Harris was impaired due to the incurable, lifelong

effects of lead or alcohol exposure in utero or as a child would not have been beneficial to the defense's goal of obtaining a negative jury verdict on the future dangerousness special issue; (14) evidence showing Harris sold drugs and robbed other drug dealers during his teen years would not have helped the defense – and the defense managed to keep such evidence away from Harris's jury; (15) he believed evidence of the incident on the elevator supported a finding that Harris would not pose a future danger; and (16) the jury was never informed that Harris had worn a stun belt during trial – only that he wore a stun belt during his transport to the courtroom from the jail during jury selection.⁴⁰

Attorney Mike Howard testified in pertinent part that (1) the defense's punishment phase strategy was to focus on Harris's PCP use and to argue, based on the testimony of the defense's experts (Dr. Roache, James Aiken, and S.O. Woods), that Harris would not be a future danger once incarcerated and deprived of access to PCP; (2) Dr. Kessner's testimony showed that Harris's penchant for violence was the result his abandonment by his biological father, exposure to domestic violence, lack of supervision as a child, head injuries, and in utero alcohol exposure; (3) during jury selection, the defense encountered many potential jurors who said they did not want to hear "excuses" for why Harris was not culpable for his offense; (4) the problem with evidence showing Harris's lead exposure in utero or as a child was that Harris had only low cognitive impairment; (5) the problems with evidence of FASD were that Harris did not show any of the visible facial features distinctive of individuals with FASD, Harris's mother insisted to the defense team that she had only consumed a glass or two of wine on the weekends during the first few weeks of her pregnancy with Harris, and Harris's neuropsychological testing did not suggest FASD; (6) pursuing a weak theory such as lead exposure or FASD could cause the defense to lose

⁴⁰ 4 RR SHH 66-150.

credibility with the jury; and (7) Harris's grandmother told the defense team that Harris's childhood had not been that bad.⁴¹

Attorney Doug Parks testified that (1) Harris admitted to his defense team and Dr. Reed that he was a member of the Fish Trap Bloods, a street gang; (2) even street gangs commit criminal acts; (3) there was no evidence Harris's capital offense was gang-related; and (4) the defense believed that focusing on Harris's transitory PCP use was a better strategy than attempting to argue that Harris's minor cognitive impairments were the result of permanent brain damage caused by factors such as lead exposure or FASD.⁴²

3. Findings, Conclusions, & Recommendation

The state trial court's Order containing its findings of fact, conclusions of law, and recommendation that Harris's state habeas application be denied included findings and conclusions that Harris's trial counsel did not render deficient performance by failing to investigate Harris's background adequately and failing to present available mitigating evidence showing Harris suffered from FASD, ARND, and lead exposure.⁴³ Likewise, the state habeas trial court concluded Harris was not prejudiced by the failure of his trial counsel to conduct such an investigation and to present such evidence.⁴⁴

More specifically, the state habeas trial court's findings and conclusions regarding FASD and ARND included the following findings:

⁴¹ 7 RR SHH 144-92.

⁴² 8 RR SHH 10-90.

⁴³ FFCL pp. 37-101, ¶¶ 43-321 [Copies of FFCL appear at ECF no. 26-21 (at 182-330) and as an exhibit to Harris's original petition (ECF no. 13)]. Of particular note are the state habeas trial court's findings and conclusions with regard to deficient performance found at FFCL pp. 71-72, ¶¶ 188-93.

⁴⁴ FFCL pp. 72-74, ¶¶ 194-203.

- Harris's mother Pamela Maddox gave testimony describing her drinking while pregnant with Harris that differed significantly from the testimony she gave at trial and which she disclosed to Harris's trial counsel prior to trial.
- Harris's trial counsel were not deficient for failing to act on information which Pamela Maddox failed to disclose to them.
- Dr. McGarrahan reported to Harris's defense counsel that Harris's neuropsychological deficits were minimal.
- In closing jury arguments, Harris's defense counsel both emphasized that Harris suffered from in utero exposure to harmful substances.
- Dr. Davies' opinions and conclusions were based, in part, on the scoring report of Dr. James Underhill.
- Harris does not demonstrate the facial features or growth deficiencies typical of individuals with FASD.
- In forming her opinions, Dr. Mayfield did not review Dr. McGarrahan's raw test data and did not consider the impact of Harris's chronic marijuana and PCP abuse on his neuropsychological functioning.
- Dr. McGarrahan has extensive experience testifying in criminal proceedings and concluded after conducting seven hours of neuropsychological tests and a clinical interview with Harris that he showed little, if any, cognitive impairment.
- Dr. McGarrahan concluded that Harris exhibits problems with exaggerating and malingering his mental health symptoms during his clinical interview and meets the diagnostic criteria for ASPD.
- Dr. Reed agreed with Dr. McGarrahan's diagnosis of ASPD, as did Dr. Falkowski.
- Dr. Underhill's report did not rely on testing conducted by Dr. McGarrahan in October 2011.
- Dr. Underhill scored Harris with a "zero" on several tests which Dr. McGarrahan actually did not administer in July 2011 because Harris indicated he was fatigued and was essentially done with testing that day.
- Dr. Underhill's scoring of Harris with "zero" on these tests was erroneous and impacted all those other defense experts who later relied on his report.
- Dr. Reed concluded Harris had no gross problems with attention or memory and characterized her testing as consistent with that of Dr. McGarrahan.
- The state habeas trial court authorized an MRI examination of Harris which Dr. Joshua Shimony reported in an affidavit to have shown Harris's brain as "normal."
- The conclusions reached by Dr. Shimony were credible.
- Contrary conclusions interpreting Harris's MRI results reached by defense experts Dr. Jeffrey Lewine and Dr. Joseph Wu were unsupported by sworn affidavits and based upon highly dubious Diffusor Testing Imaging ("DTI") and Volumetrics analysis, which Dr. Shimony rejected as invalid and which the state habeas court concluded were not credible.
- Attorney Burr did not review the record from Harris's pretrial proceedings, jury selection, or trial but, instead, relied on selected information furnished by Harris's state habeas counsel.
- As of the date of his testimony before the state habeas court, attorney Burr had never tried a criminal case in Texas.

- There was no direct link between Harris's ARND and his criminal behavior.
- Harris's trial counsel did not render deficient performance by failing to present Dr. Davies's diagnosis of ARND.
- Had Harris's trial counsel presented evidence of Harris's alleged ARND, the prosecution would in all reasonable likelihood been granted access to the report and testimony of Dr. Reed, which would have included a wealth of information detrimental to Harris, included details of his adolescent gang membership and long history of criminal behavior, including robbing drug dealers at gunpoint and his own drug dealing, as well as Dr. Reed's diagnosis of ASPD.
- Harris failed to show by a preponderance of the evidence that, but for the failure of his trial counsel to present evidence of ARND, the outcome of the punishment phase of Harris's capital murder trial would have been different.⁴⁵

The state habeas trial court's findings and conclusions regarding ineffective assistance and Harris's alleged in utero and early childhood exposure to lead poisoning (i.e., that this ineffective assistance claim was not supported by evidence showing either deficient performance or prejudice) were equally compelling and included findings that:

- Dr. Dydek, the defense's expert on lead poisoning, had never testified in a criminal trial.
- Dr. Dydek reviewed affidavits, including those of Harris's mother and grandmother but did not interview Harris or any of his family members.
- Dr. Dydek opined that "more likely than not" Harris was exposed to toxic lead levels both in utero and in early childhood.
- Recent studies indicate that in utero or early childhood exposure to lead can lead to increases in delinquency and violent behavior among teenagers and young adults.
- Recent exposure to lead is tested in the blood and long term exposure to lead is tested through bone testing.
- No evidence of blood or bone testing for Harris, his mother, or his grandmother was introduced during Harris's state habeas proceeding.
- Childhood lead exposure is only one risk factor for neuropsychological damage.
- Dr. Dydek did not review Dr. McGarrahan's conclusion that Harris showed little-to-no neuropsychological impairment.
- Harris failed to show by a preponderance of the evidence that the failure of Harris's defense team to investigate and present evidence of Harris's in utero and early childhood lead exposure amounted to deficient performance.
- There was no medical evidence (through blood or bone testing) showing that Harris suffered exposure to lead.
- Not all inhabitants of the neighborhoods surrounding the smelter in Dallas County sustained elevated blood lead levels.

⁴⁵ FFCL 37-73, ¶¶ 43-51, 55, 57-63, 75, 80-82, 85-92, 97, 100-01, 104-14, 116-27, 129-69, 178-203.

- Harris's defense counsel believed that a weak claim could diminish the impact of the defense's remaining mitigating evidence.
- Evidence showing Harris's childhood exposure to lead and its correlation to violent behavior could have harmed the defense at the punishment phase of trial on the issue of future dangerousness.
- Calling an expert who had examined Harris to testify at the punishment phase of trial would necessarily have opened the door to potentially harmful testimony from Dr. Reed and other prosecution experts.
- Harris's defense team received a report from its mental health expert that Harris had limited cognitive impairment.
- There was no substantial likelihood that testimony from Dr. Dydek regarding Harris's possible exposure to lead in utero or in early childhood and evidence showing the link between such exposure and violent behavior would have resulted in a different verdict at trial.⁴⁶

This court has undertaken a careful and independent review of the entire record before the state habeas court and finds all of the foregoing factual determinations were fully supported by the evidence before that court. Harris has not presented this court with any clear and convincing evidence to the contrary. Nor has Harris identified any evidence in the record before the state habeas trial court refuting the foregoing factual determinations.

With the exception of a noted clerical error, the TCCA adopted the state habeas trial court's factual findings when it rejected Harris's initial claim for state habeas relief on the merits. *Ex parte Harris*, WR-80,923-01, 2020 WL 8079824, *2 (Tex. Crim. App. Dec. 16, 2020).

C. Clearly Established Federal Law

Harris's ineffective assistance claims reference or are premised upon his trial counsels' alleged failure to comply with the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases. Insofar as Harris relies upon the ABA's Guidelines, those recommendations for the performance of trial counsel do not set forth the operative standard of *judicial* review for the performance of trial counsel. *Bobby v. Van Hook*, 558 U.S. 4, 8 (2009)

⁴⁶ FFCL 75-82, ¶¶ 207, 210-16, 218-23, 225-35.

(the ABA Guidelines are “only guides” to what reasonableness means, not its definition); *Druery v. Thaler*, 647 F.3d 535, 541 n.2 (5th Cir. 2011) (“Best practices urged by the ABA do not necessarily track the contours of the Sixth Amendment. Consequently, the guidelines do not function as ‘inexorable commands’ with which all capital defense counsel ‘must fully comply.’”).

No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate decisions regarding how best to represent a criminal defendant. Any such set of rules would interfere with the constitutionally protected independence of counsel and restrict the wide latitude counsel must have in making tactical decisions.

Strickland v. Washington, 466 U.S. 668, 688-89 (1984).

The constitutional standard for determining whether a criminal defendant has been denied the effective assistance of trial counsel, as guaranteed by the Sixth Amendment, was announced by the Supreme Court in *Strickland*, 466 U.S. at 687:

A convicted defendant’s claim that counsel’s assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel’s performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the “counsel” guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel’s errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

To satisfy the first prong of *Strickland*, a convicted defendant must show that counsel’s representation “fell below an objective standard of reasonableness.” *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Williams v. Taylor*, 529 U.S. 362, 390-91 (2000). In so doing, a convicted defendant has the burden of proof and must overcome a strong presumption that the conduct of his trial counsel “falls within [a] wide range of reasonable professional assistance.” *Strickland*, 466 U.S. at 689. “No particular set of detailed rules for counsel’s conduct can satisfactorily take account of the variety of circumstances faced by defense counsel or the range of legitimate

decisions regarding how best to represent a criminal defendant.” *Bobby*, 558 U.S. at 7 (quoting *Strickland*, 466 U.S. at 688-89). Under the well-settled *Strickland* standard, the Supreme Court recognizes a strong presumption that counsel rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment. *See Wiggins*, 539 U.S. at 523; *Bell v. Cone*, 535 U.S. 685, 698 (2002); *Strickland*, 466 U.S. at 690.

To satisfy the “prejudice” prong, a convicted defendant must establish a reasonable probability that, but for the objectively unreasonable misconduct of his counsel, the result of the proceeding would have been different. *Wiggins*, 539 U.S. at 534; *Strickland*, 466 U.S. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the proceeding. *Thornell v. Jones*, 144 S. Ct. 1302, 1310 (2024); *Strickland*, 466 U.S. at 694. “This requires a substantial, not just conceivable, likelihood of a different result.” *Jones*, 144 S. Ct. at 1310; *Pinholster*, 563 U.S. at 189.

In instances in which the state courts failed to adjudicate either prong of the *Strickland* test (such as those complaints the state courts summarily dismissed under the Texas writ-abuse statute or which the petitioner failed to fairly present to the state courts), this Court’s review of the unadjudicated prong is de novo. *See Porter v. McCollum*, 558 U.S. 30, 39 (2009); *Rompilla v. Beard*, 545 U. S. 374, 390 (2005).

Under the AEDPA’s deferential standard of review, claims of ineffective assistance adjudicated on the merits by a state court are entitled to a doubly deferential form of federal habeas review. The AEDPA, by setting forth necessary predicates before state-court judgments may be set aside, “erects a formidable barrier to federal habeas relief for prisoners whose claims have been adjudicated in state court.” *Burt v. Titlow*, 571 U.S. 12, 19 (2013). Under 28 U.S.C. § 2254(d)(1), ““a state prisoner must show that the state court’s ruling on the claim being presented in federal

court was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement.” *White v. Wheeler*, 577 U.S. 73, 77 (2015) (quoting *White v. Woodall*, 572 U.S. 415, 419-20 (2014)); *Harrington v. Richter*, 562 U. S. 86, 103 (2011).

The pivotal question is whether the state court’s application of the *Strickland* standard was unreasonable. This is different from asking whether defense counsel’s performance fell below *Strickland*’s standard. Were that the inquiry, the analysis would be no different than if, for example, this Court were adjudicating a *Strickland* claim on direct review of a criminal conviction in a United States district court. Under AEDPA, though, it is a necessary premise that the two questions are different. For purposes of § 2254(d)(1), “an *unreasonable* application of federal law is different from an *incorrect* application of federal law.” A state court must be granted a deference and latitude that are not in operation when the case involves review under the *Strickland* standard itself.

A state court’s determination that a claim lacks merit precludes federal habeas relief so long as “fairminded jurists could disagree” on the correctness of the state court’s decision. And as this Court has explained, “[E]valuating whether a rule application was unreasonable requires considering the rule’s specificity. The more general the rule, the more leeway courts have in reaching outcomes in case-by-case determinations. “[I]t is not an unreasonable application of clearly established Federal law for a state court to decline to apply a specific legal rule that has not been squarely established by this Court.”

Harrington, 562 U. S. at 101 (Citations omitted).

D. AEDPA Analysis of *Wiggins* Claim

1. No Deficient Performance

The evidence before the state habeas court was uncontroverted with regard to what Harris’s mother and family members told Harris’s defense team *prior to trial* about his mother’s drinking and drug use during her pregnancy with Harris. As Dr. McGarrahan and Ms. Ross testified during the state habeas proceeding, Pamela Maddox repeatedly denied any history of extensive drinking, insisting instead that her primary means of relaxing on weekends was to smoke marijuana. Harris’s defense team were aware that Mrs. Maddox had consumed a glass or two of wine on the weekends

during the first six weeks to two months of her pregnancy. It was not until Harris was convicted of capital murder and sent to Texas' death row that his mother began proclaiming that she had consumed alcohol (in the form of fortified wine) daily for the first three months of her pregnancy. Dr. McGarrahan and Ms. Ross were unable to elicit any similar information from Mrs. Maddox prior to Harris's trial, despite their suspicions that Mrs. Maddox was being less than forthcoming with them.

Dr. McGarrahan concluded after extensive evaluation of Harris that, while his IQ fell in the low average range, Harris did not display any significant cognitive impairments. She also concluded that, given his IQ score, Harris's executive functioning was a strength for him rather than a deficit. Dr. McGarrahan, an experienced forensic neuropsychologist with a great deal of familiarity with capital murder trials in Texas, advised Harris's defense team that she did not believe any further neuropsychological testing of Harris was justified. Dr. McGarrahan also advised Harris' defense team that any testimony by a defense mental health expert who had evaluated Harris might very well open the door to potentially devastating testimony regarding ASPD by Dr. Reed or another prosecution expert. Dr. Reed and Dr. Falkowski, who like Dr. McGarrahan are *forensic* neuropsychologists, agreed with Dr. McGarrahan's analysis of Harris's test results and her conclusion that Harris satisfies the diagnostic criteria for ASPD.

An MRI conducted on Harris in September 2019 showed his brain appeared to be normal. The state habeas court reasonably credited the opinion of Dr. Shimony, who furnished an affidavit on that subject, rather than the questionable reliance by Dr. Lewine and Dr. Wu on DTI and Volumetric analysis – particularly since these two defense experts did not furnish the state habeas court with live testimony, an affidavit, or a sworn declaration in support of their opinions.

The defense experts who testified during the state habeas proceeding that Harris displays significant cognitive impairments either (1) practice primarily in areas focused on pediatrics (e.g., Dr. Davies, Dr. Robinson, and Dr. Mayfield); (2) did not conduct a clinical interview or personally evaluate Harris (e.g., Dr. Mayfield, Dr. Dydek, Dr. Underhill, and Dr. Robinson); (3) did not furnish an affidavit or sworn statement to the state habeas court (e.g., Dr. Lewine and Dr. Wu); (4) relied upon Dr. Underhill's erroneous interpretation of Dr. McGarrahan's raw test data (e.g., Dr. Davies); or (5) did not choose to testify at the state habeas proceeding (e.g., Dr. Lewine, Dr. Wu, Dr. Brown and Dr. Underhill). It was objectively reasonable for the state habeas court to credit the live testimony of Dr. McGarrahan, Dr. Reed, and Dr. Falkowski on the issue of whether Harris's neuropsychological testing showed deficits in executive functioning and significant cognitive impairments over that of the defense's proffered experts. The State's three testifying mental health experts had considerably more real-world experience dealing with *adults* in the criminal justice system than did the defense's testifying experts, who focused their practice on pediatrics.

As of the date of Harris's capital murder trial, FASD and its kin ARND were part of a group of diagnoses that had not yet been accepted into the mainstream of the psychiatric community – as evidenced by the treatment of FASD in the American Psychiatric Association's DSM-V. Instead, FASD remained a boutique diagnosis deemed deserving of further study but not inclusion in the main body of the DSM-V.⁴⁷ Furthermore, it was undisputed during Harris's state habeas hearing that Harris displayed none of the facial features, abnormally low birth weight and size, or developmental delays in childhood typical of those diagnosed with FASD.

⁴⁷ See the testimony of Dr. Davies on cross-examination on this very point, 3 RR SHH 98-101.

While the deleterious effects of lead exposure – both in utero and during early childhood – may well have been established prior to the date of Harris’s trial, Harris failed to present the state habeas court with any medical evidence showing that either he, his mother, or his maternal grandmother had ever tested positive, via blood or bone, for lead poisoning. It was far from clear during Harris’s state habeas proceeding that everyone (or even most people) who resided in the Dallas neighborhoods affected by the lead smelter in question had tested positive for lead poisoning.⁴⁸

Harris’s trial counsel chose to focus on the future dangerousness special issue and to argue at the punishment phase of trial that, while Harris had suffered from in utero exposure to alcohol and marijuana, Harris’s violent behavior was the product of the transitory effects of his PCP addiction, rather than the result of the permanent effects of FASD/ARND and/or lead poisoning. The state habeas court reasonably concluded that reliance by Harris’s state trial counsel on mitigating evidence focusing the jury’s attention on FASD/ARND and/or lead poisoning could harm their ability to get a favorable jury verdict on the future dangerousness special issue. Unlike the mitigation special issue, in Texas the prosecution squarely bears the burden of proving future dangerousness beyond a reasonable doubt. The state habeas court reasonably concluded that Harris’s trial counsel reasonably chose a punishment phase strategy that kept the future dangerousness special issue in play rather than a strategy (asserting FASD/ARND and/or lead poisoning) which all but conceded future dangerousness.

Under such circumstances, it was objectively reasonable for the state habeas court to conclude that the decision by Harris’s defense team not to investigate the possibility of Harris’s in

⁴⁸ Dr. Dydek testified without contradiction during Harris’s state habeas hearing that the lead smelter in question ceased operation a few years before Harris was born and that a cleanup effort commenced circa 1984-85. 3 RR SHH 145-52.

utero alcohol exposure (at least any *further* than Dr. McGarrahan and Ms. Ross were able to get on that subject during their multiple interviews with Harris's mother) or in utero/early childhood exposure to lead was likewise objectively reasonable.

2. No Prejudice

The state habeas court likewise reasonably concluded that Harris's ineffective assistance complaints about his trial counsels' failure to further investigate and present evidence showing Harris suffered from FASD/ARND and/or lead poisoning did not prejudice Harris within the meaning of *Strickland*.

Harris faults the state habeas court's analysis of *Strickland*, in part, because that court found Harris's new mitigating evidence of FASD/ARND and lead poisoning to be less than compelling in view of (1) the state habeas hearing testimony of Dr. McGarrahan, Dr. Reed, and Dr. Falkowski and (2) the absence of any evidence showing a causal connection between Harris's alleged ARND and lead poisoning and Harris's capital offense. ECF no. 13, at 31-33, 76-77, 81-84. The Supreme Court recently emphasized, however, that a federal habeas court reviewing a *Wiggins* claim is required to conduct a comparative analysis of the competing expert opinions before it when balancing the weight of the new mitigating evidence against the totality of the aggravating evidence before it. *Jones*, 144 S. Ct. at 1310 (where a prosecution expert has furnished an opinion contrary to those of the defense's experts, it is hard to see how the state court could decide how much weight to give the defense expert's opinions without making a comparative analysis). Likewise, in *Jones* the Supreme Court repeatedly noted the significance of the absence of evidence showing a causal link between his proffered new mitigating evidence and his capital offense. *Id.*, at 1310-13 (recognizing that the absence of any causal link between Jones's new mitigating evidence (of mental illness, cognitive impairments caused by childhood trauma, childhood sexual

abuse, and substance abuse) and Jones’s capital offense meant his new mitigating evidence had little value). Harris’s state habeas court cannot reasonably be faulted for failing to engage in the same analytical errors the Supreme Court condemned in *Jones*.

Contrary to the arguments contained in Harris’s federal habeas petition, the state habeas court was not free to completely disregard the opposing mental health expert opinions presented by the State during Harris’s state habeas proceeding, i.e., the opinions of Dr. Reed, Dr. Falkowski, and Dr. McGarrahan. *See Jones*, 144 S. Ct. at 1310 (“When an ineffective-assistance-of-counsel claim is based on counsel’s performance at the sentencing phase of a capital case, a defendant is prejudiced only if ‘there is a reasonable probability that, absent [counsel’s] errors, the sentencer . . . would have concluded the balance of aggravating and mitigating circumstances did not warrant death.’” (quoting *Strickland*, 466 U.S. at 695)). “Determining whether a defense expert’s report or testimony would have created a reasonable probability of a different result if it had been offered at trial necessarily requires an evaluation of the strength of that report or testimony. And where a prosecution expert has expressed a contrary opinion, it is hard to see how a court could decide how much weight to give the defense expert without making a comparative analysis.” *Jones*, 144 S. Ct. at 1310. Likewise, contrary to the arguments contained in Harris’s federal habeas petition, the Supreme Court has also held that it is *not* error for a court reviewing an ineffective assistance claim arising in the context of a capital sentencing proceeding to attach diminished persuasive value to mental health conditions when it finds no causal link between those conditions and the defendant’s conduct when he committed his capital offense. *Id.*

As explained above, and as Harris’s state trial counsel and the State’s mental health experts pointed out during their state habeas testimony, the new mitigating evidence Harris presented of both FASD/ARND and lead poisoning was weak. In his federal habeas petition, Harris concedes

the practical difficulty of making an FASD/ARND diagnosis. ECF no. 13, at 35-45. Harris did not display any of the distinctive facial features of FASD or any of the other objective criteria for that diagnosis such as low birth weight and size or a history of developmental delays. All the experts who testified during Harris's state habeas proceeding acknowledged that his birth weight and size were within the normal range and there was no evidence that he failed to timely meet his developmental goals growing up. Likewise, despite testimony from Dr. Dydek that there is a simple, non-invasive test available to check (at the heel bone) for long term lead poisoning, Harris presented the state habeas court with no evidence suggesting that either he, his mother, or his maternal grandmother had ever tested positive for lead poisoning. As explained above, the state habeas court reasonably credited the affidavit of Dr. Shimony stating that Harris's 2019 MRI scan showed Harris's brain was normal, as opposed to the contrary, unsworn reports of Dr. Lewine and Dr. Wu submitted by Harris.

The State's three testifying mental health experts (Dr. Falkowski, Dr. Reed, and Dr. McGarrahan), all forensic psychologists with experience in the adult criminal justice system, agreed that Harris's displayed no significant deficits in executive functioning, overall Harris's test scores were consistent with his IQ score, and Harris's low scores on some neuropsychological tests could have been attributable to fatigue or other external factors, such as long term drug abuse, malingering, or exaggeration of his mental health issues. These three experts each independently concluded that Harris displayed ASPD and very little cognitive impairment.

As explained in detail in Section I.D.2. above, during the punishment phase of trial, Harris's trial counsel presented a substantial case in mitigation, including Dr. Kessner's testimony identifying multiple risk factors for violence Harris encountered during his unstable, chaotic, violent childhood, including his exposure to domestic violence, his mother's inability to bond with

him at an early age, his ADHD and placement in Special Education classes, and his in utero exposure to alcohol and marijuana.

In contrast, the aggravating evidence that was before the state habeas court included not only the aggravating evidence that was before Harris's capital sentencing jury, i.e., the brutal facts of Harris's capital offense (three victims shot, two of whom died, Harris's actions in terrorizing the female members of the Gallardo family, Harris's actions in firing at surrounding police officers as he left the Gallardo home, and Harris's actions in resisting arrest even after he had been twice shot and tackled to the ground) and the extensive testimony detailing Harris's participation in a pair of violent home-invasion-robberies just weeks before his capital offense (during which multiple victims were robbed and shot, one fatally). The state habeas court also had before it *new* aggravating evidence in the form of admissions by Harris's family, social worker, and examining mental health experts that Harris (1) sold drugs as a teenager, (2) obtained a gun and began robbing other drug dealers at age nineteen, (3) had a much longer and more extensive history of abusing marijuana and PCP than revealed at trial, (4) admitted to gang membership as an adolescent, and (5) had been diagnosed by both Dr. McGarrahan and Dr. Reed prior to trial as satisfying the criteria for a diagnosis of ASPD. "[W]here the aggravating factors greatly outweigh the mitigating evidence, there may be no 'reasonable probability' of a different result." *Jones*, 144 S. Ct. at 1311.

Under such circumstances, the state habeas court reasonably ascribed less weight to Harris's new evidence of FASD/ARND and lead poisoning than it did to the overwhelming aggravating evidence, including the new diagnoses of ASPD presented by the State's three testifying mental health experts.

3. Conclusions

The state habeas court acted in an objectively reasonable manner when it concluded that Harris's first claim for state habeas relief failed to satisfy either prong of *Strickland*. The TCCA's decision to reject Harris's first claim for state habeas relief on the merits was neither contrary to, nor involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States, nor resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in Harris's trial, state direct appeal, and state habeas proceedings. Under the AEDPA, Harris's initial claim herein does not warrant federal habeas corpus relief.

E. *De Novo* Review of *Wiggins* Claim

Among the arguments Harris included in his federal habeas corpus petition is a contention that the state habeas court violated due process principles in the way it analyzed Harris's ineffective assistance claims. ECF no. 13, at 61-73. Therefore, out of an abundance of caution, this court will undertake an alternative *de novo* review of Harris's initial claim for federal habeas corpus relief.

1. No Deficient Performance

In the context of penalty phase mitigation in capital cases, the Supreme Court has held that it is unreasonable not to investigate further when counsel has information available to him that suggests additional mitigating evidence – such as mental illness or a history of childhood abuse – may be available. *See, e.g., Porter*, 558 U.S. at 39-40 (trial counsel failed to interview any witnesses or to request any of the defendant's school, medical, or military records and ignored information in a report on the defendant's competency evaluation suggesting possible mitigating evidence - including evidence of mental illness - could be gleaned from investigation into the

defendant's family background and military service); *Wiggins*, 539, U.S. at 524-26 (counsel failed to investigate the defendant's background beyond review of summary records from competency evaluation, presentence report, and records from the state foster care system, failed to compile a social history of the defendant, and presented no mitigating evidence concerning the defendant's background); *Williams*, 529 U.S. at 395-96 (counsel failed to conduct even a cursory investigation into the defendant's background which would have shown the defendant's parents had been imprisoned for the criminal neglect of the defendant and his siblings, the defendant had been severely beaten by his father, and had been returned to his parents' custody after they were released from prison). Such claims are commonly referred to as *Wiggins* claims.

As explained in Section I.D.2. above, Harris's trial counsel, mitigation specialist and mental health expert undertook an extensive investigation into Harris's background and presented a substantial case in mitigation at trial. The problems with Harris's *Wiggins* claim are legion. The fundamental problem with this ineffective assistance claim is Harris's fallacious assertion that his defense team was required to exhaustively interview (and present testimony from) both lay and expert witnesses who could furnish additional details about Harris's difficult childhood and new possible sources of the cognitive impairment which Dr. McGarrahan advised Harris's trial counsel prior to trial was relatively modest in nature. Harris's defense team was not obligated to engage in a wide-ranging exploration for every conceivable source of information potentially beneficial to the defense. *See Thomas v. Lumpkin*, 995 F.3d 432, 456 (5th Cir. 2021) (Duty to investigate does not force defense lawyers to "scour the globe on the off chance something will turn up." (quoting *Rompilla*, 545 U.S. at 383)). Counsel in death penalty cases have a duty to make *reasonable* investigations or to make a reasonable decision that makes particular investigations unnecessary. *Andrus v. Texas*, 140 S. Ct. 1875, 1881 (2020); *Bobby*, 558 U.S. at 11-12; *Wiggins*,

539 U.S. at 521; *Strickland*, 466 U.S. at 688-91. ““In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.”” *Andrus*, 140 S. Ct. at 1881 (quoting *Wiggins*, 539 U.S. at 521-22); *Strickland*, 466 U.S. at 688-91.

As explained at length in Section III.B.2. above, Harris’s mitigation specialist, mental health expert, and lead trial counsel testified during Harris’s state habeas proceeding and detailed the extensive nature of their deep dive into Harris’s lengthy and violent criminal history, as well as Harris’s unstable and abusive childhood. Harris’s defense team then presented an extensive case in mitigation.

As is readily apparent from the trial testimony of Dr. Kessner, Harris’s mother, brother, stepfather, and cousin, and Dr. Roache, Harris’s defense team managed to obtain a wealth of documentation and other information about Harris’s background which they communicated to his mental health experts. Harris’s mental health experts, Dr. Kessner and Dr. Roache, testified extensively about the external risk factors which likely impacted Harris’s violent behavior as an adult, including the deleterious nature of Harris’s difficult childhood and the addictive nature of the substances Harris abused. The defense presented Harris’s jury with many details of Harris’s unstable, violent, and abusive childhood.

Thus, Harris’s trial counsel presented an extensive case in mitigation. This distinguishes his case from the scenarios the Supreme Court addressed in *Porter*, *Wiggins*, and *Williams*. Equally significantly, it distinguishes Harris’s case from the Supreme Court’s recent decision in *Andrus*, where defense counsel made no effort to investigate or present evidence of the defendant’s extremely difficult childhood. Harris’s defense team, in sharp contrast, discovered and presented extensive mitigating evidence showing Harris was the product of a childhood characterized not

just by physical and emotional abuse (i.e., Harris's abandonment by his biological father and the inability of his mother to bond with Harris because of her own mental health issues) but also which included Harris witnessing acts of extreme violence between his mother and stepfather.

In contrast to the jury in *Andrus*, Harris's capital sentencing jury was well aware of the difficulties Harris faced as a child. Harris's mother was described by defense experts as an unstable teenager who often left Harris in the care of others while she partied. Harris's biological father was described to the jury as a career criminal who made no effort to be a part of Harris's life. Harris's stepfather was described as physically abusive and favoring his own children over Harris. Dr. Kessner's trial testimony explained to the jury how the difficulties Harris faced as a child detrimentally impacted his conduct as an adult, particularly his penchant for violence.

Admittedly, a substantial portion of Harris's case in mitigation was presented through his expert witnesses, none of whom had evaluated Harris. But generally, the decision on whether to introduce mitigating evidence through lay witnesses versus expert witnesses lies within the sound discretion of trial counsel. *See Hummel v. Davis*, 908 F.3d 987, 991-92 (5th Cir. 2018) (recognizing the wide range of discretion counsel generally enjoy regarding how best to present mitigating evidence and holding trial counsel was not ineffective for making reasonable decisions regarding the manner in which mitigating evidence was presented, including the steps taken by defense counsel to avoid opening the door to admission of harmful rebuttal evidence). In this particular case, Harris's trial counsels' decision to rely primarily upon non-evaluating experts to build its case in mitigation was objectively reasonable.

Harris's trial counsel, mitigation specialist, and Dr. McGarrahan testified during Harris's state habeas proceeding about both (1) the difficulties the defense team encountered in seeking cooperation from Harris's mother and grandmother, the latter of whom described Harris's

childhood as “not that bad,” and (2) the practical problems they encountered with Harris’s tendency to exaggerate his mental health issues. The reasonableness of counsel’s strategic decisions is substantially influenced by the defendant’s own statements. *Strickland*, 466 U.S. at 691; *Carter v. Johnson*, 131 F.3d 452, 456 (5th Cir. 1997) (counsel’s duty to investigate is tempered by the information provided by the defendant).

In addition, Harris’s trial counsel, mitigation specialist, and Dr. McGarrahan testified that some of Harris’s family interviewed by the defense team had the potential to offer testimony harmful to the defense, including family members who confirmed Harris’s adolescent gang membership, history of selling drugs, and history of robbing other drug dealers. Harris’s trial counsel acted in an objectively reasonable manner in choosing not to call such witnesses out of concern for what could happen on cross-examination.

An *informed* decision by trial counsel not to proceed with a particular strategy that has the potential for a double-edged outcome is objectively reasonable. *Mejia v. Davis*, 906 F.3d 307, 316 (5th Cir. 2018) (informed decision to forego a lesser-included offense instruction when defendant was entitled to same); *Chanthakoummane v. Stephens*, 816 F.3d 62, 70 (5th Cir. 2016) (informed decision not to present testimony from defendant’s family because of concern that calling family members to testify could invite the prosecution to present evidence of defendant’s gang affiliation and history of violence); *St. Aubin v. Quarterman*, 470 F.3d 1096, 1103 (5th Cir. 2006) (informed decision not to present evidence that could be construed by jury as both mitigating and aggravating); *Rector v. Johnson*, 120 F.3d 551, 564 (5th Cir. 1997) (informed decision not to present evidence showing the defendant suffered from child abuse, family instability, a poor educational background, low IQ, gunshot injuries, and defendant’s mother was severely and chronically mentally ill). *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir. 1994) (informed decision

not to present evidence of low intelligence and abusive childhood entitled to “a heavy measure of deference”).

Harris has failed to allege any specific facts or furnished any evidence showing his trial counsels’ decision to present mitigating evidence in the particular manner and scope they did at Harris’s trial was anything other than an informed, strategic decision made after (1) an objectively reasonable investigation into Harris’s background, and (2) consultation with the defense’s experienced mental health expert, Dr. McGarrahan. The fact that Harris’s state habeas counsel identified new experts willing to furnish different etiologies (FASD/ARND and lead poisoning) for Harris’s ADHD, learning difficulties, and propensity for violence as an adult does not mean there was anything professionally deficient about the investigation undertaken by Harris’s trial team.

After evaluating Harris, Dr. McGarrahan did not advise Harris’s defense counsel that any additional testing or investigation into other possible sources of Harris’s mild cognitive impairments was necessary. Harris has alleged no specific facts and presented no evidence showing it was objectively unreasonable for his trial counsel to rely on the information and opinions furnished by Dr. McGarrahan. On the contrary, the evidence at Harris’s state habeas proceeding was clear that Harris’s mother repeatedly downplayed her alcohol intake during her pregnancy with Harris when interviewed by members of the defense team.

This conclusion is further supported by the evidence presented during Harris’s state habeas proceeding showing there was substantially more aggravating evidence potentially available to the prosecution which Harris’s trial counsel endeavored to conceal from the prosecution.

Dr. McGarrahan and Harris’s trial counsel testified that they were concerned Harris’s tendency to exaggerate his mental health symptoms (as demonstrated by his jail mental health

records) might be construed by Dr. Reed as a form of malingering. Harris's defense team was also concerned that, by presenting a mental health expert at trial who had evaluated Harris, the defense might open the door to a new mental health evaluation by a prosecution expert (such as Dr. Reed). The defense feared that such an evaluation could reveal Harris's admissions that he had engaged in multiple additional bad acts and result in the jury hearing a diagnosis of ASPD.⁴⁹ Dr. McGarrahan informed his defense counsel that she was concerned Harris would be diagnosed with ASPD. In fact, Dr. Reed did diagnose Harris with ASPD, a diagnosis confirmed by Dr. Falkowski.

The objective reasonableness of Harris defense team's concern about avoiding a possible ASPD diagnosis is beyond argument. Harris's trial counsel acted reasonably in choosing not to present testimony from a mental health expert who had evaluated Harris because doing so could have opened the door to evidence of Harris's ASPD from Dr. Reed or another prosecution mental health expert. *See Smith v. Davis*, 927 F.3d 313, 337 (5th Cir. 2019) (trial counsel acted reasonably

⁴⁹ The Fifth Edition of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5") describes antisocial personality disorder as "a pervasive pattern of disregard for, and violation of, the rights of others that begins in childhood or early adolescence and continues into adulthood." *DSM-5*, at p. 659. Deceit and manipulation are central features of antisocial personality disorder. *Id.*

The DSM-5 defines antisocial personality disorder through the following diagnostic criteria:

A. A pervasive pattern of disregard for and violation of the rights of others, occurring since age 15 years, as indicated by three (or more) of the following:

1. Failure to conform to social norms with respect to lawful behaviors, as indicated by repeatedly performing acts that are grounds for arrest.
2. Deceitfulness, as indicated by repeatedly lying, use of aliases, or conning others for personal profit or pleasure.
3. Impulsivity or failure to plan ahead.
4. Irritability and aggressiveness, as indicated by repeated physical fights or assaults.
5. Reckless disregard for safety to self or others.
6. Consistent irresponsibility, as indicated by repeated failure to sustain consistent work behavior or honor financial obligations.
7. Lack of remorse, as indicated by being indifferent to or rationalizing having hurt, mistreated, or stolen from another.

B. The individual is at least age 18 years.

C. There is evidence of conduct disorder with onset before age 15 years.

D. The occurrence of antisocial behavior is not exclusively during the course of schizophrenia or bipolar disorder.

DSM-5, at p. 659.

in choosing not to present mental health testimony that would have opened the door to evidence the defendant had confessed to other offenses and could be diagnosed as ASPD). It is well-settled under both federal and Texas law that testimony by an examining mental health expert on behalf of a criminal defendant effectively grants the prosecution the right to have the defendant evaluated by a prosecution mental health expert. *See Kansas v. Cheever*, 571 U.S. 87, 94 (2013) (recognizing that introduction by the defense of mental health testimony from an expert who evaluated the defendant requires the defendant to submit to an evaluation by a prosecution expert); *LaGrone v. State*, 947 S.W.2d 602, 610-11 (Tex. Crim. App. 1997) (“[O]nce a defendant has executed a limited waiver of the Fifth Amendment's protection by constructively testifying through an expert on the issue of future dangerousness, the trial court may order that defendant to submit to a state-sponsored future dangerousness examination.” (citing *Soria v. State*, 933 S.W.2d 46-58-60 (Tex. Crim. App. 1996))).

2. No Prejudice

For the same reasons discussed in detail in Section III.D.2. above, this Court finds there is no reasonable probability that, but for the failure of Harris’s trial counsel to present the evidence showing Harris suffers from FASD/ARND and/or lead poisoning which Harris presented to the state habeas court, the outcome of the punishment phase of Harris’s capital murder trial would have been any different. When resolving the prejudice prong of *Strickland* in connection with a *Wiggins* claim, a court must consider the totality of the evidence before the sentencing jury or judge – both mitigating and aggravating. *Jones*, 144 S. Ct. at 1310.

The new mitigating evidence of FASD/ARND and lead poisoning presented by Harris during his state habeas proceeding was weak for the reasons discussed above. It was also double-edged in nature. *See Brown v. Thaler*, 684 F.3d 482, 499 (5th Cir. 2012) (explaining that mitigating

evidence is “double-edged” when it might permit an inference that the defendant is not as morally culpable for his behavior but also might suggest that, as the product of his environment, the defendant is likely to continue to be dangerous in the future); *Ladd v. Cockrell*, 311 F.3d 349, 360 (5th Cir. 2002) (“Although the evidence of Ladd’s inadequate supervision as a child might permit an inference that he is not as morally culpable for his behavior, it also might suggest Ladd, as a product of his environment, is likely to continue to be dangerous in the future.”). The Fifth Circuit has identified several other forms of double-edged evidence. *See, e.g., Broadnax v. Lumpkin*, 987 F.3d 400, 413 (5th Cir. 2021) (evidence of intoxication and defendant’s troubled upbringing); *Howard v. Davis*, 959 F.3d 168, 173 (5th Cir. 2020) (evidence of head injury); *Smith v. Davis*, 927 F.3d 313, 337 (5th Cir. 2019) (evidence of mental illness); *United States v. Fields*, 761 F.3d 443, 459 (5th Cir. 2014) (evidence of mental illness); *Johnson v. Cockrell*, 306 F.3d 249, 253 (5th Cir. 2002) (evidence of alleged brain injury); *Kitchens v. Johnson*, 190 F.3d 698, 703 (5th Cir. 1999) (evidence of substance abuse).

In contrast, the evidence of Harris’s propensity for violence, as demonstrated by his actions on the date of his capital offense and just weeks before, when combined with the new evidence of Harris’s ASPD diagnosis and additional bad acts (dealing drugs and robbing other drug dealers at gunpoint) presented to the state habeas court, was both compelling and overwhelming. Harris’s capital sentencing jury was well aware of most of the details of Harris’s unstable, emotionally and physically abusive childhood, his problems with ADHD and academic deficiencies, his low average IQ, his history of substance abuse, and his exposure to domestic violence during childhood. While Harris did tell one of the officers present at the time of his arrest for his capital offense that he was sorry, Harris’s profession of remorse must be viewed in the context of the fact that he violently resisted arrest after exiting the Gallardo residence, fired at officers surrounding

the home, attempted to flee, and continued resisting even after he had fired all the ammunition in his handgun and was twice wounded by return gunfire. The record before the state trial court showed that Harris joined with others to engage in a pattern of home-invasion-robberies in which they targeted and terrorized working-class Hispanic families and shot most of the adult males present. The victim impact testimony offered by the state included witnesses who had survived but been widowed or scarred, both physically and emotionally, by the brutality Harris demonstrated so ruthlessly during his violent pattern of criminal offenses. While Harris's trial counsel pointed at closing jury argument to Harris's PCP addiction as an explanation for Harris's violent behavior, when transported to the hospital immediately after his arrest the night of his capital offense, Harris tested positive for opioids but not PCP.

There is no reasonable probability that, but for the failure of his trial counsel to present the new mitigating evidence presented to the state habeas court, the jury would have returned different answers to either of the Texas capital sentencing special issues. "A reasonable probability is a probability sufficient to undermine confidence in the outcome. That requires a substantial, not just conceivable, likelihood of a different result." *Jones*, 144 S. Ct. at 1310 (quoting *Pinholster*, 563 U.S. at 189).

3. Conclusions

After conducting an independent, *de novo* review of the entire record from Harris's trial, direct appeal, and state habeas corpus proceedings, this Court concludes that Harris's initial ground for federal habeas relief fails to satisfy either prong of *Strickland*. Harris's first claim does not warrant federal habeas relief.

F. AEDPA Analysis of Stun Belt/Elevator Claim

1. The Claim Restated

In his second claim for federal habeas relief, Harris argues that his state trial counsel rendered ineffective assistance by failing to object to Harris wearing a stun belt during trial. ECF no. 13, at 90-105.

2. State Court Disposition

a. Trial Court Proceedings

As explained in Section I.D.3. above, on cross-examination by Harris' trial counsel at the punishment phase of trial, Deputy Sheriff Bobby Morehead testified that Harris had never once been disrespectful to the bailiffs during the twelve weeks of jury selection.⁵⁰ Morehead also described an incident that took place during jury selection: As Harris was being transported to jury selection that morning wearing street clothes over a stun belt, the guards accompanying Harris all stepped off the courthouse elevator in which Harris was the lone remaining occupant on the second floor; at that moment, a pair of court employees on a higher floor punched a button which caused the elevator doors to close and the elevator carrying Harris to rise to their floor; the two court employees entered the elevator and punched the button to return it to the second floor; during the ride back down to the second floor, as the two court employees discussed Harris's trial, he politely identified himself to them as the defendant in that case; and the elevator arrived back on the second floor without further incident.⁵¹ Harris's trial counsel elicited testimony from Morehead that

⁵⁰ 65 RR Trial 237.

⁵¹ 65 RR Trial 240-45. The court reporter's record reveals that Morehead's recitation of the incident which was referenced by the terms "the elevator incident" or "the stun belt incident," elicited laughter in the courtroom. *Id.* at 243. Morehead testified on cross-examination that Harris was routinely fitted with a stun belt each day of jury selection. *Id.*, at 242-43. On redirect examination, Morehead testified further that Harris was well aware of what the stun belt could do to him if activated and that Harris was required to sign an acknowledgement of that fact each day when he was outfitted with the stun belt. *Id.*, at 246-47.

Harris made no effort to flee or escape during the incident and Harris was respectful to the two court employees he encountered during the incident.⁵²

During his testimony, Morehead volunteered that, immediately before the elevator incident, he placed Harris in a stun belt worn under Harris's clothes for the purpose of transporting Harris to the courthouse from the jail.⁵³ There was no objection when Morehead volunteered this information. Instead, Harris's trial counsel merely asked Morehead to explain to the jury that the device was a stun belt. Harris's trial counsel then asked Morehead to explain that Harris was wearing no visible restraints on the date in question.⁵⁴ Morehead then completed his recitation of the incident.

b. State Habeas Application

In his third claim for state habeas relief, Harris argued that his state trial counsel rendered ineffective assistance by failing to object to hearsay testimony suggesting that Harris wore a stun belt while in an elevator. State Habeas Application 75-84.

c. State Habeas Hearing

Harris's lead trial counsel, attorney Brad Lollar, testified during Harris's state habeas hearing about the incident, Morehead's trial testimony, and explained that he would have called Morehead to testify at the punishment phase of trial had the prosecution not done so because the

Harris's lead trial counsel later testified during Harris's state habeas corpus proceeding that he would have called Morehead to testify at the punishment phase of trial had the prosecution not done so – because he believed the jury would construe the incident as showing that Harris would not pose a danger of future violence while incarcerated and such evidence would support the defense's punishment-phase trial strategy of showing that Harris had not been violent during prior periods of pretrial detention or incarceration. Testimony of Brad Lollar, verbatim transcription of Harris's State Habeas Hearing (henceforth "RR SHH"), Volume 4, at pp. 90-91, 96, 109-14. Attorney Lollar also testified that no one testified at trial that Harris wore the stun belt at any time during trial. *Id.*, at 115.

⁵² 65 RR Trial 245.

⁵³ 65 RR Trial 241-42.

⁵⁴ 65 RR Trial 242-43.

defense believed that hearing the facts of the elevator incident could help convince the jury that Harris would not pose a risk of future dangerousness if incarcerated.⁵⁵ When asked why he chose not to object to Morehead volunteering the information that Harris wore the stun belt, attorney Lollar replied as follows:

Well, I figured that the jury had to know that there was [sic] some restraints on any capital murder defendant standing trial. So it was obvious he was not shackled; he was not wearing handcuffs.

So I figured that they would observe or not be surprised by the fact that he's wearing a stun belt. I felt the facts of the - - what could have been a very bad situation, turning out the way it did, outweighed the relation, I guess, to the jury that he was wearing a stun belt.⁵⁶

Lollar also explained that there was no specific revelation to the jury that Harris wore a stun belt during trial.⁵⁷

d. Findings, Conclusions, and Recommendation

The state habeas trial court concluded that Harris's third claim for state habeas relief failed to satisfy either prong of *Strickland*. It recommended that state habeas relief be denied.⁵⁸ In its findings of fact in support of its conclusions, the state habeas trial court found that:

- Harris's trial counsel elicited testimony from deputy Morehead establishing that Harris had never been disrespectful toward Morehead, had never tried to assault Morehead, and made no effort to threaten or harm the two court employees with whom Harris found himself on the date in question..
- Morehead spontaneously volunteered the fact that Harris wore a stun belt during the elevator incident.

⁵⁵ 4 RR SHH 108-14.

⁵⁶ 4 RR SHH 112-13.

⁵⁷ 4 RR SHH 114.

⁵⁸ FFCL 125-31, ¶¶ 418-38.

- Lollar did not object but, instead, continued his cross-examination of Morehead and elicited testimony showing that Harris had made no effort to abscond when left unaccompanied on the elevator.
- Lollar testified the defense team felt the elevator incident was evidence favorable to the defense on the future dangerousness special issue.
- Morehead's testimony established only that Harris wore the stun belt during the twelve weeks of jury selection.
- Neither the prosecution, defense counsel, nor Morehead indicated to the jury that Harris wore the stun belt during the trial or inside the courtroom.
- Evidence about the elevator incident strongly supported the defense's argument that Harris was not a danger when detained and without access to PCP.
- Nothing in the record indicated the jury was aware that Harris wore the stun belt when in the jury's presence and the jury may well have believed the stun belt was utilized during the proceedings conducted in close quarters during jury selection.
- Lollar's decision not to object to Morehead's spontaneous comment about the stun belt was an objectively reasonable trial strategy.
- There was no reasonable probability that, but for the failure of Lollar to object to Morehead's spontaneous utterance, the outcome of the punishment phase of Harris's capital murder trial would have been any different.⁵⁹

The TCCA adopted the foregoing findings and conclusions when it denied Harris's third state habeas claim on the merits. *Ex parte Harris*, WR-80,923-01, 2020 WL 8079823, *2.

3. AEDPA Analysis of the Stun Belt/Elevator Claim

a. No Deficient Performance

The state habeas court reasonably concluded that attorney Lollar acted in an objectively reasonable manner by not objecting when Morehead spontaneously commented that Harris wore a stun belt during the elevator incident, i.e., while Harris was being transported from the jail to the courthouse during jury selection. As found by the state habeas court, the evidence showed that the elevator incident took place months before the start of trial, during jury selection proceedings that were often conducted in the judge's conference room, rather than in open court. There was no testimony or other evidence

⁵⁹ FFCL at 126-31, ¶¶ 418, 420-22, 424-37.

suggesting the jury was ever advised that Harris wore a stun belt during trial. Under such circumstances, Lollar could reasonably have believed that an objection to Morehead's spontaneous mention of the stun belt would detract from the emphasis on the elevator incident which Lollar wished to convey to the jury through Morehead's cross-examination. The state habeas court reasonably concluded that Lollar's decision not to object to Morehead's spontaneous utterance was a reasonable trial strategy.

Strategic decisions by trial counsel are entitled to a strong presumption of reasonableness. *Dunn v. Reeves*, 594 U.S. 731, 739 (2021); *Harrington*, 562 U.S. at 104; *Strickland*, 466 U.S. at 688-89. Harris has failed to identify any evidence in the record sufficient to overcome this presumption, i.e., to establish that Lollar's split-second decision on whether to object when Morehead made his spontaneous utterance was objectively unreasonable. "The challenger's burden is to show 'that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment.'" *Harrington*, 562 U.S. at 104 (quoting *Strickland*, 466 U.S. at 687). The state habeas court reasonably concluded Harris failed to overcome this strong presumption.

a. No Prejudice

For the same reasons discussed at length in Sections III.D.2. and III.E.2. above, it was objectively reasonable for the state habeas court to conclude that Harris was not prejudiced within the meaning of *Strickland* by Lollar's failure to object to Morehead's spontaneous utterance regarding the stun belt. Morehead's volunteered statement added very little to the overwhelming aggravating evidence already before the jury showing (1) the brutality of Harris's capital offense (i.e., three people shot – two fatally, the pecuniary nature of the offense, the fact Harris taunted and terrorized the Gallardo family during the home invasion, and Harris's violent attempts to resist

arrest – even after he was shot twice by police); and (2) the fact Harris and others engaged in multiple violent home invasions targeting work-class Hispanic families which each involved shooting multiple victims (one fatally) in the weeks immediately before Harris’s capital offense. When viewed in the context of this aggravating evidence, as well as the new aggravating evidence showing Harris’s diagnosis of ASPD and his admissions that he not only dealt drugs but also obtained a gun and began robbing other drug dealers when he was nineteen, the state habeas court reasonably concluded that any potential harm to Harris from Lollar’s decision not to object to Morehead’s spontaneous utterance was not prejudicial within the meaning of *Strickland*. See *Jones*, 144 S. Ct. at 1311 (where the aggravating factors greatly outweigh the mitigating evidence, there may be no reasonable probability of a different result).

F. *De Novo* Review of Stun Belt/Elevator Claim

As explained above, because Harris argues he was deprived of due process in connection with his ineffective assistance claims during his state habeas proceeding, out of an abundance of caution, this court will undertake an alternative *de novo* review of Harris’s second federal habeas claim.

After independent, *de novo* review of the entire record from Harris’s trial, direct appeal, and state habeas proceedings, this court concludes, as did the state habeas court, that the decision by attorney Lollar not to interrupt the flow of his punishment phase cross-examination of deputy Morehead by objecting to the spontaneous utterance about the stun belt was objectively reasonable. The elevator incident took place months before the start of trial. There was no evidence before the jury, and no suggestion from any attorney, that Harris wore a stun belt during trial or inside the courtroom. Under such circumstances, objecting to Morehead’s comment could well have created confusion in the minds of the jury and distracted from the point Lollar was attempting to make

during his cross-examination, i.e., that Harris had made no effort to abscond despite being left unattended by bailiffs in a courthouse elevator. In fact, rather than objecting to Morehead's comment, Lollar reasonably elicited an explanation from Morehead regarding the exact nature of the device before proceeding to explore further details of the elevator incident. Harris fails to allege facts or present evidence showing that Lollar's decision fell outside the broad range of objectively reasonable trial strategy and the presumption of reasonableness afforded such strategic decisions under *Strickland*. A court analyzing the *Strickland* deficient performance standard must apply a strong presumption that trial counsel's representation was within the wide range of reasonable professional assistance. *Harrington*, 562 U.S. at 104; *Strickland*, 466 U.S. at 687. Harris has not overcome that presumption.

This court also independently concludes after *de novo* review that the failure of Lollar to object to Morehead's utterance did not prejudice Harris within the meaning of *Strickland*. Realistically, the most attorney Lollar could have hoped to obtain by making such an objection would have been a trial court instruction that the jury disregard Morehead's comment about the stun belt. There is no reasonable probability that, absent a timely objection and a trial court instruction to disregard, the outcome of the punishment phase of Harris's capital murder trial would have been any different. There is likewise no reasonable probability that the state trial would have granted a motion for mistrial based solely on Morehead's spontaneous comment about the stun belt. The elevator incident was simply too remote in time to the trial for Morehead's comment to have been prejudicial within the meaning of *Strickland* at the punishment phase of Harris's capital murder trial. Because Harris's jury never saw any shackles or other visible restraints on Harris during trial and no witness or counsel suggested Harris wore a stun belt during trial, Harris's citation to the Supreme Court's holding in *Deck v. Missouri*, 544 U.S. 622 (2005),

is unpersuasive. Finally, as repeatedly explained above, the evidence at the punishment phase of Harris's capital murder trial supporting prosecution-friendly answers to the Texas capital sentencing special issues was overwhelming. Far from that fact being altered by Harris's new mitigating evidence of FASD/ARND and lead poisoning, this court finds the balance of the aggravating versus mitigating evidence presented during Harris's state habeas proceeding to be even more overwhelmingly in favor of the prosecution than the evidence presented during Harris's trial. *See Jones*, 144 S. Ct. at 1311 (where the aggravating factors greatly outweigh the mitigating evidence, there may be no reasonable probability of a different result).

In conclusion, after *de novo* review, this court concludes Harris's second claim for federal habeas relief fails to satisfy either prong of *Strickland*. This claim does not warrant federal habeas relief.

IV. UNEXHAUSTED DUE PROCESS CLAIM

A. The Claim

In his federal habeas petition Harris spends considerable time and energy arguing that, in the course of rendering its findings of fact relating to his ineffective assistance claims, the state habeas trial court erroneously applied various legal principles, including those of issue preclusion, thereby depriving Harris of his constitutional right to due process. ECF no. 13 at 61-73.

B. *De Novo* Review

For a variety of reasons, Harris's complaints about the manner in which the state habeas trial court applied applicable state procedural statutes and applied state substantive issue preclusion principles do not furnish a basis for federal habeas relief.

First it is well-settled that a state court's interpretation of state law binds a federal habeas court. *See Bradshaw v. Richey*, 546 U.S. 74, 76 (2005) ("We have repeatedly held that a state

court's interpretation of state law, including one announced on direct appeal of the challenged conviction, binds a federal court sitting in habeas corpus.”); *Garza v. Stephens*, 738 F.3d 669, 677 (5th Cir. 2013) (holding a Texas habeas court's interpretation of evidentiary rules was binding in a federal habeas case); *Paredes v. Quarterman*, 574 F.3d 281, 291 (5th Cir. 2009) (a state court's interpretation of state law binds a federal court sitting in habeas corpus).

Second, it is equally well-settled that alleged errors of state law do not furnish a basis for federal habeas relief. Federal habeas corpus relief will not issue to correct errors of state constitutional, statutory, or procedural law, unless a federal issue is also presented. *See Estelle v. McGuire*, 502 U.S. 62, 67-68 (1991) (holding complaints regarding the admission of evidence under California law did not present grounds for federal habeas relief absent a showing that admission of the evidence in question violated due process); *Lewis v. Jeffers*, 497 U.S. 764, 780 (1990) (recognizing that federal habeas relief will not issue for errors of state law); *Pulley v. Harris*, 465 U.S. 37, 41 (1984) (holding a federal court may not issue the writ on the basis of a perceived error of state law). In the course of reviewing state criminal convictions in federal habeas corpus proceedings, a federal court does *not* sit as a super-state appellate court. *Estelle v. McGuire*, 502 U.S. at 67-68; *Lewis v. Jeffers*, 497 U.S. at 780; *Pulley v. Harris*, 465 U.S. at 41.

When a federal district court reviews a state prisoner's habeas corpus petition pursuant to 28 U.S.C. § 2254 it must decide whether the petitioner is “in custody in violation of the Constitution or laws or treaties of the United States.” The court does not review a judgment, but the lawfulness of the petitioner's custody *simpliciter*.

Coleman v. Thompson, 501 U.S. 722, 730 (1991).

Third, when reviewing a state court's rejection of a claim on the merits under the AEDPA, the federal habeas court's duty is to analyze whether the state court's ultimate decision was reasonable *not* the written opinion explaining that decision. *Russell v. Denmark*, 68 F.4th 252, 262

(5th Cir. 2023); *Schaetzle v. Cockrell*, 343 F.3d 440, 443 (5th Cir. 2003); *Neal v. Puckett*, 286 F.3d 230, 246 (5th Cir. 2002). In so doing, the federal habeas court must consider not only the arguments the state court actually relied upon in reaching its ultimate decision but also all the arguments and theories it could have relied upon. *Sheppard v. Davis*, 967 F.3d 458, 467 (5th Cir. 2020) (quoting *Evans v. Davis*, 875 F.3d 210, 216 (5th Cir. 2017)). Under this standard, so long as a plausible argument exists to support the state court’s ruling, the federal habeas court must defer to the state court’s decision even if its stated rationale was unreasonable. *Sheppard*, 967 F.3d at 467; *Thomas v. Vannoy*, 898 F.3d 561, 569 (5th Cir. 2018); *Neal*, 286 F.3d at 246. Thus, when reviewing a state habeas court’s rejection on the merits of an ineffective assistance claim, the federal habeas court must focus on the objective reasonableness of the state court’s ultimate decision reached by the state habeas court, i.e., its conclusions with regard to the dual prongs of *Strickland*, and not get bogged down in the state court’s fact findings in support of those conclusions – unless the petitioner can show by clear and convincing evidence that the state habeas court’s factual findings were erroneous. *Schriro*, 550 U.S. at 473-74 (“AEDPA also requires federal habeas courts to presume the correctness of state courts’ factual findings unless applicants rebut this presumption with ‘clear and convincing evidence.’”); *Rice*, 546 U.S. 333, 338-39 (2006) (“State-court factual findings, moreover, are presumed correct; the petitioner has the burden of rebutting the presumption by ‘clear and convincing evidence.’”); *Miller-El*, 545 U.S. at 240 (“[W]e presume the Texas court’s factual findings to be sound unless Miller-El rebuts the ‘presumption of correctness by clear and convincing evidence.’”); 28 U.S.C. §2254(e)(1). Harris has failed to satisfy this standard with regard to the state habeas court’s fact findings identified by this court as supporting that court’s rejection on the merits of Harris’s ineffective assistance claims.

Finally, it is also well-settled in this Circuit that infirmities in state post-conviction proceedings do not furnish a basis for federal habeas relief. *See, e.g., In re Palacios*, 58 F.4th 189, 190 (5th Cir. 2023) (state attorney who opposed defendant's state habeas application also prepared the state habeas trial court's findings of fact and conclusions of law); *Rockwell v. Davis*, 853 F.3d 758, 761 n.5 (5th Cir. 2017) (state habeas court allegedly failed to adhere to Texas criminal procedural laws); *Tercero v. Stephens*, 738 F.3d 141, 147 (5th Cir. 2013) (state habeas court failed to hold an evidentiary hearing on petitioner's *Roper* claim); *In re Gentrass*, 666 F.3d 910, 911 (5th Cir. 2012) (state appellate court allegedly used flawed procedures to review state petitions for post-conviction review); *Stevens v. Epps*, 618 F.3d 489, 502 (5th Cir. 2010) (allegedly inadequate funding and staffing of the Mississippi Office of Capital Post-Conviction Counsel); *Haynes v. Quarterman*, 526 F.3d 189, 195 (5th Cir. 2008) (alleged ineffective assistance by initial state habeas counsel); *Brown v. Dretke*, 419 F.3d 365, 378 (5th Cir. 2005) (state habeas judge who issued findings of fact was not the same judge who presided over the petitioner's state habeas hearing); *Elizalde v. Dretke*, 362 F.3d 323, 331 (5th Cir. 2004) (recognizing that Supreme Court precedent does not recognize a general right to effective assistance in a state post-conviction proceeding); *Henderson v. Cockrell*, 333 F.3d 592, 606 (5th Cir. 2003) (state habeas court held that an alleged violation of a petitioner's state statutory right to effective representation in an initial state habeas proceeding did not furnish a basis for relief in a subsequent state habeas proceeding); *Rudd v. Johnson*, 256 F.3d 317, 319 (5th Cir. 2001) (petitioner denied access to the prosecution's file during state habeas corpus proceeding); *Beazley v. Johnson*, 242 F.3d 248, 271 (5th Cir. 2001) (state habeas court allegedly overburdened petitioner's state habeas counsel by assigning multiple state habeas cases to the same counsel at the same time); *Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir. 2001) (state habeas court's refusal to consider a supplemental state writ application);

Trevino v. Johnson, 168 F.3d 173, 180 (5th Cir. 1999) (state habeas court adopted the prosecution’s proposed findings of fact and conclusions of law only three hours after they were filed with the state court); *Hallmark v. Johnson*, 118 F.3d 1073, 1080 (5th Cir. 1997) (state court policy against considering challenges to prison disciplinary proceedings in state habeas corpus proceedings); *Nichols v. Scott*, 69 F.3d 1255, 1275 n.36 (5th Cir. 1995) (state habeas judge had been the prosecutor in one of the petitioner’s prior convictions that was introduced into evidence at the punishment phase of petitioner’s capital murder trial, state habeas judge failed to recuse himself *sua sponte*, and state habeas judge signed prosecution’s proposed findings and conclusions without change); *McCowin v. Scott*, 67 F.3d 100, 102 (5th Cir. 1995) (petitioner proceeded *pro se* and without a copy of the transcript in his state habeas proceeding and state habeas court failed to hold an evidentiary hearing); *Duff-Smith v. Collins*, 973 F.2d 1175, 1182 (5th Cir. 1992) (state habeas court quashed subpoenas *duces tecum* served on County District Attorney, State Attorney General, and U.S. Marshal).

This is because an attack on the procedural propriety of a state post-conviction proceeding does not challenge the validity of the underlying conviction or sentence imposed by a state trial court. *See Moore v. Dretke*, 369 F.3d 844, 846 (5th Cir. 2004) (holding alleged misapplication by state habeas court of state procedural rules did not furnish a basis for federal habeas relief because “an attack on the state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself” (quoting *Rudd*, 256 F.3d at 320)); *Morris v. Cain*, 186 F.3d 581, 585 n.6 (5th Cir. 1999) (holding an attack on a state habeas proceeding is an attack on a proceeding collateral to the detention and not the detention itself and, therefore, will not furnish a basis for federal habeas relief (quoting *Nichols*, 69 F.3d at 1275)). Thus, Harris’s due process challenges

to the procedures utilized by the state habeas court to make its legal conclusions and factual findings are simply not cognizable in this proceeding brought under Section 2254.

Harris's reliance upon the Supreme Court's opinion in *District Attorney's Office for the third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), is unavailing. *Osborne* did not arise in the context of a Section 2254 federal habeas corpus proceeding. Instead, *Osborne* brought a Section 1983 civil action seeking the release of certain materials for post-conviction DNA testing. Whether Harris's due process complaints in this cause might hold water in an action brought in an appropriate federal court pursuant to Section 1983 challenging a Texas trial court's denial of post-conviction DNA testing under Chapter 64 of the Texas Code of Criminal Procedure is not properly before this court. For the reasons detailed above, this Section 2254 proceeding is not the proper forum for a challenge to a hypothetical adverse ruling by Texas courts on a Chapter 64 motion or win a similar state statutory proceeding. It is also not the proper forum for Harris's due process claims.

For the foregoing reasons, Harris's due process arguments contained in his federal habeas petition lack arguable merit and do not warrant federal habeas relief, even under a *de novo* standard of review.

V. CERTIFICATE OF APPEALABILITY

Under AEDPA, before a petitioner may appeal the denial of a habeas corpus petition filed under § 2254, the petitioner must obtain a Certificate of Appealability ("CoA"). *Miller-El v. Johnson*, 537 U.S. 322, 335-36 (2003); 28 U.S.C. § 2253(c)(2). Likewise, under AEDPA, appellate review of a habeas petition is limited to the issues on which a CoA is granted. *See Crutcher v. Cockrell*, 301 F.3d 656, 658 n.10 (5th Cir. 2002) (holding a CoA is granted on an issue-by-issue basis, thereby limiting appellate review to those issues); *Lackey v. Johnson*, 116

F.3d 149, 151 (5th Cir. 1997) (holding the scope of appellate review of denial of a habeas petition limited to the issues on which CoA has been granted). In other words, a CoA is granted or denied on an issue-by-issue basis, thereby limiting appellate review to those issues on which CoA is granted. *Crutcher*, 301 F.3d at 658 n.10; 28 U.S.C. § 2253(c)(3).

A CoA will not be granted unless a petitioner makes a substantial showing of the denial of a constitutional right. *Tennard v. Dretke*, 542 U.S. 274, 282 (2004); *Miller-El v. Johnson*, 537 U.S. at 336; *Slack v. McDaniel*, 529 U.S. 473, 483 (2000); *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983). To make such a showing, the petitioner need *not* show he will prevail on the merits but, rather, must demonstrate that reasonable jurists could debate whether (or, for that matter, agree) the petition should have been resolved in a different manner or that the issues presented are adequate to deserve encouragement to proceed further. *Tennard*, 542 U.S. at 282; *Miller-El*, 537 U.S. at 336. This Court is required to issue or deny a CoA when it enters a final Order such as this one adverse to a federal habeas petitioner. *Rule 11(a), Rules Governing Section 2254 Cases in the United States District Courts*.

The showing necessary to obtain a CoA on a particular claim is dependent upon the manner in which the District Court has disposed of a claim. “[W]here a district court has rejected the constitutional claims on the merits, the showing required to satisfy §2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court’s assessment of the constitutional claims debatable or wrong.” *Miller-El*, 537 U.S. at 338 (quoting *Slack*, 529 U.S. at 484). In a case in which the petitioner wishes to challenge on appeal this Court’s dismissal of a claim for a reason not of constitutional dimension, such as procedural default, limitations, or lack of exhaustion, the petitioner must show jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right *and* whether this Court was

correct in its procedural ruling. *See Slack*, 529 U.S. at 484 (holding when a district court denies a habeas claim on procedural grounds, without reaching the underlying constitutional claim, a CoA may issue only when the petitioner shows that reasonable jurists would find it debatable whether (1) the claim is a valid assertion of the denial of a constitutional right and (2) the district court's procedural ruling was correct). This court did not dispose of any of Harris's federal habeas corpus claims on procedural grounds. This court addressed the merits of all of Harris's federal constitutional claims.

Reasonable minds could not disagree with this Court's conclusions that (1) regardless of whether reviewed under the AEDPA or a *de novo* standard of review, all of Harris's complaints of ineffective assistance by his trial counsel fail to satisfy the prejudice prong of *Strickland*; and (2) Harris's due process claim is without arguable merit. Harris is not entitled to a CoA from this Court.

Accordingly, it hereby **ORDERED** that (1) all relief requested in either Harris's original petition (ECF no. 13) or his Reply Brief (ECF no. 30) is **DENIED**; (2) Harris is **DENIED** a Certificate of Appealability with regard to all of his claims for relief; and (3) all pending motions are **DISMISSED** as moot.

SIGNED November 6, 2024.



Ada Brown
UNITED STATES DISTRICT JUDGE



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

NO. WR-80,923-01

EX PARTE RODERICK HARRIS, Applicant

**ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS
FROM CAUSE NO. F-0900409-Y IN CRIMINAL DISTRICT COURT NO. 7
DALLAS COUNTY**

Per curiam.

ORDER

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

In May 2012, a jury convicted Applicant of the capital murder of Alfredo Gallardo in the course of committing or attempting to commit robbery. *See* TEX. PENAL CODE § 19.03(a)(2). The jury answered the special issues submitted under Article 37.071 of the

Texas Code of Criminal Procedure, and the trial court, accordingly, set punishment at death.¹ This Court affirmed Applicant’s conviction and sentence on direct appeal. *Harris v. State*, No. AP-76,810 (Tex. Crim. App. May 21, 2014) (not designated for publication).

In his application, Applicant presents six claims challenging the validity of his conviction and sentence. The trial court held an evidentiary hearing, entered findings of fact and conclusions of law, and recommended that we deny the relief that Applicant seeks.

We have reviewed the record regarding Applicant’s allegations. Some of his claims are multifarious and overlapping. In Claims 1 and 2, Applicant argues that counsel were ineffective for failing to introduce certain mitigating evidence, including:

- Expert testimony to show that he has suffered permanent brain damage due to Fetal Alcohol Spectrum Disorder and toxic lead exposure;
- A social worker to explain how his childhood experiences influenced his behavior;
- A gang expert to rebut the State’s gang expert and to place in context Applicant’s past involvement in a youth gang; and
- An expert to discuss the “school to prison pipeline.”

In Claim 3, Applicant argues that his counsel were ineffective for failing to object to testimony that he was wearing a stun belt when he was inadvertently allowed to ride unsupervised in an elevator. In Claims 4 and 5, Applicant faults defense counsel’s decision not to object—and appellate counsel’s decision not to bring a claim—regarding testimony and evidence about:

¹ Unless otherwise indicated, all references to “Articles” refer to the Texas Code of Criminal Procedure.

- The fatal injuries Applicant inflicted on Carlos Gallardo, Alfredo Gallardo’s brother, during the same criminal transaction;
- First responders’ efforts to save Alfredo Gallardo;
- The fact that Applicant shot at responding officers as he tried to escape;
- Items found in a car that was parked at the scene of the crime; and
- Applicant’s booking sheet which listed the car’s license plate.

Applicant fails to meet his burden under *Strickland v. Washington*, 466 U.S. 668 (1984), to show by a preponderance of the evidence that his counsel’s representation fell below an objective standard of reasonableness and that there was a reasonable probability that the result of these proceedings would have been different but for counsel’s deficient performance. *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland*, 466 U.S. at 688).

In Claim 4, Applicant additionally alleges that he was denied due process by trial counsel’s failure to object—and the trial court’s overruling counsel’s pretrial evidentiary objections—to the admission of forensic evidence regarding the death of Carlos Gallardo. Applicant killed Carlos Gallardo during the same robbery in which he killed Alfredo Gallardo. He fails to demonstrate that the trial court or trial counsel erred. *Cf. Devoe v. State*, 354 S.W.3d 457, 469 (Tex. Crim. App. 2011) (“Evidence of another crime, wrong, or act also may be admissible as same-transaction contextual evidence where ‘several crimes are intermixed, or blended with one another, or connected so that they form an indivisible criminal transaction, and full proof by testimony . . . of any one of them cannot be given

without showing the others.’’)) (citations omitted); *see also Sonnier v. State*, 913 S.W.2d 511, 519 (Tex. Crim. App. 1995) (“[W]hen the power of the visible evidence emanates from nothing more than what the defendant has himself done we cannot hold that the trial court has abused its discretion merely because it admitted the evidence.”). Similarly, Applicant has not demonstrated that a due process violation resulted from counsel’s decision not to object to the forensic evidence enumerated in Claim 5.

Applicant’s constitutional challenge in Claim 6 to Article 37.071’s “10-12 Rule” is not cognizable on habeas review and lacks merit; he raised a similar claim on direct appeal and we have previously rejected such challenges. *See Ex parte Hood*, 304 S.W.3d 397, 402 n.21 (Tex. Crim. App. 2010) (“[T]his Court does not re-review claims in a habeas corpus application that have already been raised and rejected on direct appeal.”); *see also Smith v. State*, 297 S.W.3d 260, 278 (Tex. Crim. App. 2009) (rejecting the argument that the “10-12 rule” violates the Eighth Amendment principles discussed in *Mills v. Maryland*, 486 U.S. 367 (1988), and that the trial court violated the defendant’s constitutional rights “by instructing the jury in this manner”). Applicant also argues in Claim 6 that the statutory instructions misled at least one juror, offering a juror’s affidavit in support. The affidavit describes the juror’s deliberative process and purports to convey aspects of the group’s deliberations. Her affidavit is not competent, admissible evidence here. *See TEX. R. EVID.* 606(b).

We adopt the trial court’s findings of fact and conclusions of law.² Based upon the

² We note that, in Findings 264, 355, and 365, the habeas court refers to “the capital
(continued...) ”

trial court’s findings and conclusions and our own review of the record, we deny relief.

IT IS SO ORDERED THIS THE 16TH DAY OF DECEMBER, 2020.

Do Not Publish

(...continued)

murder of Carlos Gallardo,” instead of the capital murder of *Alfredo* Gallardo. This appears to be a clerical error and does not affect the validity of the court’s findings.

Cause No. W09-00409-Y(A)

In Criminal District Court No. 7 of Dallas
County, Texas

Trial Court Cause No. F09-00409-Y

EX PARTE RODERICK HARRIS

FINDINGS OF FACT AND CONCLUSIONS OF LAW

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Having considered the original application for writ of habeas corpus; the State's answer; official court documents and records from the trial, direct appeal, and these writ proceedings; evidence presented at the hearings conducted on May 29, 2018 through June 1, 2018, July 16, 2018, and September 10 through 12, 2018; other filings by the parties in this writ proceeding; the Court makes the following findings of fact and conclusions of law.

BACKGROUND FACTS

Applicant was convicted and sentenced to death for the March 17, 2009 capital murder of Alfredo Gallardo committed in the course of a home-invasion robbery.

Alfredo and Maria Carmin Gallardo lived in a mobile home in east Dallas with their children and Alfredo's brother, Carlos Gallardo. (RR58: 31-32, 36, 38, 56-57, 126; SE 1-5).¹ On the evening of March 17, 2009, Alfredo, his wife Maria, brother Carlos, sons Omar and Jair, daughter Yahaira, and grandson Martine Junior were at home. (RR58: 61, 63-64, 67-68, 133). As Alfredo started to exit the front door at nine o'clock p.m. to check on his daughter who was at a friend's home, Applicant forcefully pushed the door open and pointed a gun at Alfredo's head. (RR58: 77-79, 126-128). Thirteen-year-old Yahaira attempted to retreat with her younger brother and nephew into her parents' bedroom, but Applicant called out to her, demanding, "Come here, bitch." (RR58: 55-56, 77, 80-83, 128-129). While he spoke, Applicant pointed the gun at the family. (RR58: 83). He forced Alfredo and Carlos to sit on

¹ Throughout these findings and conclusions, "RR" refers to the reporter's record on direct appeal. "CR" refers to the clerk's record on direct appeal. "SE" refers to the State's exhibits admitted at trial. "DE" refers to Applicant's exhibits admitted at trial. "WRR" refer to the reporter's record in these writ proceedings. "Application Exh." refers to Applicant's Exhibits numbered 1 through 28 attached to his original writ application (this includes the affidavit of Dr. Julian Davies, filed February 23, 2015, and identified as Exhibit 28). "WRR State's Exh." refers to the State's exhibits 1 through 17 admitted during the writ hearing. "WRR Applicant's Exh." refers to Applicant's exhibits 1 through 15 admitted during the writ hearing. Other reports and affidavits filed by the parties with the court's permission in this proceeding, but not admitted with exhibit numbers, are identified using the author's or affiant's last name.

the sofa, and demanded money and jewelry. (RR58: 77, 79, 82, 130). Yahaira translated Applicant's demands into Spanish for her parents and uncle. (RR58: 83-84, 87, 144). She told Applicant the family did not have any money. (RR58: 130, 132).

Alfredo and Maria's adult son Omar was in his bedroom watching television. (RR58: 39, 42). Omar heard his father speaking in a panicked voice. (RR58: 39). He peeked out, saw the robbery in progress, exited the home through his bedroom window, and sought assistance from the mobile home park security guard. (RR58: 30-31, 39-43, 47, 50-51, 135). The security guard called 911 and reported the robbery. (RR58: 31, 35, 43-44; SE 6, 6A).

Meanwhile inside the home, Yahaira gave Applicant a two-dollar bill from her mother's purse. (RR58: 84, 131). Applicant demanded the men's wallets, and struck both in the face with the gun. (RR58: 85-86, 128-130). At gunpoint, Applicant forced Alfredo and Carlos to lie face down on the living room floor and took their wallets. (RR58: 87-89, 129-130). Applicant herded the family from the living room through the master bedroom and bathroom, forcing them into the master closet. (RR58: 89-90, 93-94, 131-133). He repeatedly asked for money, jewelry, or drugs. (RR58: 90-91, 130, 132, 134). He also asked for the keys to the red truck parked outside the house; Yahaira lied and told him her brother had the keys and was at a party. (RR58: 98; SE 98-99, 134). The family did not have any drugs on the premises. (RR58: 111). Applicant was angry the family did not have any money. (RR58: 132-133).

As they went through the master bedroom, Yahaira handed Applicant a case containing some jewelry; Applicant removed a necklace and two rings. (RR58: 90- 92, 118; SE 20, 21). In the closet, Applicant tied Alfredo's hands with a belt and made Yahaira tie her uncle's hands. (RR58: 94-95, 136). Yahaira believed Applicant was going to kill them. (RR58: 95). While the family was in the closet, they heard Applicant searching the bathroom cabinets and yelling. (RR58: 96-98, 133; SE 19).

Applicant returned, pointed the gun at Maria, and started to take her out of the closet. (RR58: 100-101, 134). When Maria cried and prayed for him not to take her, Applicant pulled on Yahaira instead, starting to remove her from the closet. (RR58: 101, 136). Applicant was angry. (RR58: 136). Maria was hysterical, and he threatened to kill them one-by-one if Maria did not calm down. (RR58: 102, 134- 135, 144-145).

Applicant then pointed the gun at Alfredo and grabbed his shirt, pulling him out of the closet and into the adjacent bathroom. (RR58: 101-103, 136, 148-149). Carlos followed. (RR58: 104, 116, 137). Applicant and Alfredo fell into a large Jacuzzi tub, and Applicant began shooting. (RR58: 102-103, 113-116).

Applicant shot Alfredo first. Yahaira saw Applicant push Alfredo off himself—in disgust—because of the blood. (RR58: 106). Yahaira felt a bullet whiz past her in the closet, and her mother pulled her to the floor. (RR58: 105-106, 137). Applicant continued to shoot, killing Carlos, who had crouched down near the bathroom sink at the first gunshots. (RR58: 104, 107, 116). Yahaira recalled hearing about six gunshots. (RR58: 110). In the courtroom, Yahaira identified Applicant as the assailant who shot her father and uncle. (RR58: 82, 118).

Alfredo sustained two gunshot wounds, to the left side of his face and to his upper left chest. (RR59: 20, 267-269). Carlos also suffered two gunshot wounds, to the left side of his face and left shoulder. (RR59: 291). After shooting the men, Applicant left. (RR58: 107). Yahaira ran from the closet, telling her mother that her father had been killed. (RR58: 137). Maria saw that her husband and brother-in-law were covered in blood. (RR58: 138). As she came out of the closet, Maria heard additional gunfire outside the trailer. (RR58: 139).

The Dallas Police Department responded to the 911 robbery call immediately, while Applicant was still in the house. (RR58: 31, 44, 155). Officers were forming a perimeter around the trailer when Applicant fired the shots inside the home. (RR58: 158-160, 170, 172, 190, 205-206, 208-210). Officer Justin Bowen was positioned

outside at the rear wall of the trailer immediately adjacent to where shots were fired in the bathroom. (RR58: 208-210). Officer Bowen testified that he "heard five gunshots come from the immediate other side of that wall." (RR58: 208). A few moments later, Applicant exited the trailer onto the front porch; Officer Martin Rivera yelled "police" and instructed Applicant to get on the ground. (RR58: 172- 173, 190-191). Applicant fired his weapon at the officers and ran in the opposite direction toward the rear of the trailer, unexpectedly bumping shoulders with Officer Bowen in the dark. (RR58: 166, 173-174, 191-192, 195-197, 211-213; RR59: 31, 33-34). Officer Bowen saw Applicant's gun muffle flash and shot Applicant in the leg and back. (RR58: 213-214, 220-221; RR59: 107, 119-120). Officer David Yzaguirre jumped on Applicant to restrain him. (RR58: 160-161, 175, 215). Applicant struggled, refusing to be handcuffed. (RR58: 161-162, 175-177; RR59: 37-38). At least three officers were required to get Applicant under control. (RR58:161-162, 175-176, 180, 216, 233-234; RR59: 37). Officers recovered Applicant's .40 caliber Glock pistol from the ground near where the struggle occurred. (RR58: 176, 193-194; RR59: 84-85, 90-91; SE 81, 89). The slide was locked back, and all the ammunition in the gun had been fired. (RR58: 193, 236; RR59: 85). Alfredo's wallet and a two-dollar bill were also recovered from the ground. (RR59: 84-85, 92, SE 83, 92). The Court admitted Officer Bowen's in-car video and wireless body microphone recordings into evidence. (RR58: 221-228; SE 149).

Officers entered the trailer and performed CPR on Alfredo. (RR59: 18-22, 24, 39; SE 41). Carlos, who was lying face down on the bathroom floor, had no pulse. (RR59: 18, 41; SE 38). Eventually, the Dallas Fire Department declared both men dead at the scene. (RR59: 42).

Officers subsequently located Applicant's cohort, Anthony Burton, asleep in Applicant's vehicle in the driveway next door. (RR58: 45-46; RR59: 43-44, 48, 171- 178; SE 26, 44-46). Officers recovered a firearm, multiple sets of gloves, and one live round of ammunition from the car. (RR59: 134-141; SE 98-99, 101-102, 104,107, 110, 111A-111D).

DNA found on one of the gloves from the vehicle matched Applicant's DNA. (RR59: 214; SE 111C, 122). DNA test results on biological material from the magazine of Applicant's Glock pistol, State's Exhibit 89, included Applicant, Alfredo, and Carlos as possible contributors. (RR59: 209-211, 227, 229; SE 122). Testing on another swab from the pistol included Alfredo and Carlos as possible contributors. (RR58: 211-212; SE 122).

According to medical examiner Dr. Joni McClain, Alfredo sustained the gunshot to his cheek from a distance of one to three feet. (RR59: 267-268). This bullet traveled through the left side of his face, esophagus, and lung, and penetrated his chest wall. (RR59: 268; SE 132-133, 140). The gunshot to the upper left side of his chest perforated the left side of his trunk and entered the soft tissue surrounding the bladder. (RR59: 269; SE 140). Both gunshots traveled in a downward direction. (RR59: 274, 276-277, 285; SE 140). Dr. McClain removed both bullets during the autopsy. (RR59: 268-269, 278; SE 139-139A, 140).

Dr. Reade Quinton testified that the gunshot wound to Carlos's face entered and exited, causing stippling on Carlos's eyelid, nose, forehead, and cheek. (RR59: 291-292, 294-295; SE 142, 146). Dr. Quinton estimated the range of fire to be close to three feet. (RR59: 296-297). The gunshot to Carlos's left shoulder entered the left chest cavity, traveled through the lung, and grazed the aorta, moving in a downward direction. (RR59: 292, 295-297; SE 144, 146). Dr. Quinton removed the bullet that entered the shoulder. (RR59: 298; SE 145, 146). Carlos also had a laceration over his left eyebrow. (RR59: 293; SE 23, 142, 146). Anne Koettel, a trace evidence examiner, testified that analysis of Carlos's clothing along with range-of-fire testing of Applicant's gun indicated the gun muzzle was more than two feet away from Carlos's clothing when it was fired. (RR59: 247-252; SE 126-128).

Authorities transported Applicant to Baylor Hospital where he underwent surgery for his gunshot wounds and was hospitalized for one month. (RR59: 106, 114, 117; SE 117). The officer who rode with Applicant in the ambulance noticed he was

wearing one red glove, which was removed in the emergency room and retained with his clothing. (RR59: 148-153; SE 115, 117). Officers also recovered Carlos's wallet and the stolen jewelry from Applicant's possessions at the hospital. (RR59: 95-96, 151-154, 167, 177, 181-182; SE 20, 21, 115, 117). The initial toxicology screen done at the hospital indicated Applicant had opiates in his system, which medical personnel had administered for pain; the toxicology did not reveal that he had taken PCP. (RR59: 116-117).

Yahaira was the sole witness Applicant called during the guilt/innocence phase. (RR60: 79). She testified that her father was wearing a white t-shirt when Applicant shot him; the t-shirt apparently was not collected at the scene or retained. (RR60: 80). The State did not offer any rebuttal evidence (RR60: 81), and the jury found Applicant guilty of capital murder for the murder of Alfredo Gallardo in the course of or during a robbery, as charged in the indictment. (RR60: 126).

At the punishment phase of trial, the State presented evidence of multiple extraneous aggravated robberies Applicant committed during the month prior to the capital murder in the case-in-chief. In one of those robberies, Applicant shot three brothers, killing one.

Luis Gonzalez resided in an apartment at 810 Blaylock Street in Dallas. On February 15, 2009, two black males confronted him at his apartment door, forced him into the apartment, put a gun to his head, wrapped a sweatshirt around his head and face, and tied his wrists with speaker cord wires. (RR62: 230-236, 257). One man carried the gun and the other had an unlit cigarette in his mouth. (RR62: 233- 234). The men demanded money. (RR62: 235). They robbed him of his watch, shoes, a set of wheel rims (which were stored in his apartment), a stereo, his wallet containing approximately \$450 in cash, another \$900 from the apartment, and his cell phone. (RR62: 236-240, 256). Gonzalez believed the men were going to kill him. (RR62: 257). They ransacked the apartment. (RR62: 239). Each of the robbers wore one red glove and

one white glove. (RR62: 243). They fled the scene in a 1984 or 1985 white Ford with dark tinted windows. (RR62: 241-242). This description matched the description of Applicant's vehicle. (RR62: 242; SE 274-277). Gonzalez identified Applicant in the courtroom as the robber who pointed the gun to his head. (RR62: 255-256). After pointing to him, Gonzalez said, "It would be impossible for me to forget him." (RR62: 255).

Officers collected a glove and a cigarette butt from the crime scene. (RR62: 253; RR63: 12-16, 27; SE 176). DNA test results on a cutting from the glove included Applicant as a possible contributor. (RR63: 113-116; SE 279-280).

On March 3, 2009, Applicant and two accomplices committed aggravated robbery and capital murder in an apartment complex at 301 North Ewing in Dallas. Three brothers were shot; one died at the scene. (RR63: 147-148).

Margarito Chavez and Karen De La Cruz Espinoza lived in an apartment on the first floor with their five children. (RR63: 188). Espinoza and her son arrived home on March 3, 2009 at 10:30 p.m. and parked in the back parking lot of the complex. (RR63: 190-193). As Espinoza and her son walked through the lot, three black males followed; when she opened her apartment door, the men pushed them into the apartment. (RR63: 196-195). One man, who seemed to be the leader, pointed his gun at close range to the children. (RR63: 196, 200). A child translated what the men were saying into Spanish for his parents. (RR63: 197). The leader demanded that Espinoza turn over her handbag. (RR63: 196, 199). They threatened to kill the family. (RR63: 196-197). The men ransacked the apartment. (RR63: 202-204; SE 201, 203). They stole approximately \$500 in cash, a payroll check for \$380, an Xbox, DVDs, Espinoza's purse, a women's watch, Chavez's wallet, a set of keys, and a collapsible baton Chavez used in his work as a security guard; the men packed the items into the family's suitcases. (RR63: 204-205, 209). Two of the men left the apartment while one remained at the door. (RR63: 204). When the opportunity arose, Espinoza shoved him out the door. (RR63: 206-

207). Chavez viewed a photo lineup with Applicant's photograph in it but did not identify anyone. (RR64: 71-72). In the courtroom, Espinoza identified Applicant as the man who she described as the leader of the three men in her apartment. (RR63: 210-212).

Upstairs, Applicant attempted to enter Roberto Ramos's apartment. Ramos struggled with Applicant in an attempt to keep him from entering. (RR63: 232, 246). Ramos's brother Eustacio Torres Gallegos heard the commotion and went into the living room. (RR63: 234). Applicant shot Eustacio in the chest. (RR63: 234-236, 250). A third brother, Martin Figueroa Torres, walked into the living room and saw his brother struggling with Applicant. (RR63: 243-246). When Martin stepped toward the door, Applicant reached over Ramos's shoulder and shot him in the face. (RR63: 247-250).

Applicant then shot Ramos three times, in the mouth, upper back, and left thigh, killing him. (RR62: 232-235; RR63: 236, 250, 274; RR64: 104-105). A neighbor, Joe Ozuna, witnessed the shooting, which occurred on the landing outside the apartment door. (RR63: 272-278). Martin and Eustacio survived and testified at trial. The first officers at the scene found Ramos's body in the breezeway outside his apartment. (RR63: 153, 158; SE 211).

Ramos's 13-year-old daughter Jasmine Juarez was in a bedroom of the apartment. (RR63: 278). Upon hearing the gunshots, she called 911. (RR36: 288). The Court admitted the recording of her 911 call into evidence. (RR63: 289). A few minutes later, she found her father on the ground outside the apartment door; she kissed him and told him she loved him. (RR63: 293-294).

Martin later identified Applicant in a photo lineup after viewing the lineup for about two-and-a-half minutes. (RR63: 254-255; RR64: 67-75). Applicant challenged the validity of this identification during cross-examination of Martin and a detective who viewed the lineup procedure. (RR63: 256, 261-268; RR64: 72-75). Martin did not identify Applicant in the courtroom. (RR63: 253).

After the upstairs shootings, the two suspects fled toward the rear of the apartment complex, dropping a watch, set of keys, and Chavez's baton. (RR63: 166- 168, 178, 208-209, 313; RR64: 37; SE 232, 234, 243). DNA obtained from biological material on the baton matched Applicant's DNA. (RR64: 93-96; SE 254-255). The DNA analyst testified that one would expect to find that same DNA profile only once in every 8.34 trillion people. (RR64: 96). On March 11, 2009, a surveillance video at Cash Plus Pawn recorded a transaction in which Applicant pawned the Xbox stolen in the robbery; the pawn ticket reflected Applicant's name. (RR63: 296-302; RR64: 44-49; SE 248, 249, 251).

The State offered evidence related to Applicant's youth, including that he was assigned to a behavioral adjustment classroom for disruptive students at Brandenburg Middle School in Garland, Texas. (RR62: 30). A Garland police department school resource officer testified that, when Applicant was 14-years-old, his mother reported him as a run-away, and his Dallas middle school suspended him. During this incident, Applicant became combative. Applicant's mother refused to pick him up, and the school resource officer took him into custody, transferring him to a Dallas facility for run-away children. (RR62: 33-36).

A former assistant principal at Samuel High School in Dallas, where Applicant was a freshman, testified that school personnel found a knife with a six- inch blade hidden in the lining of Applicant's coat in February 2000, and authorities arrested him. (RR62: 74-79, 84-86; SE 166). The following school year, in September 2000, Applicant was arrested at school for possession of marijuana. (RR62: 87-90).

The Court admitted photographs of Applicant's tattoos, a number of which are associated with gangs. (RR62: 150-163). Detective Barrett Nelson, a Dallas police officer assigned to a U.S. Marshall's Task Force at the time of trial and previously assigned to the Dallas Gang Unit, testified as an expert witness. (RR62: 43). At the prosecutor's request, Nelson examined the photographs of Applicant's tattoos. (RR62: 46). He explained that the "STR8"

tattoo on Applicant's right forearm and "HOOD" on his left forearm are meant to be lined up and read "straight hood," which means Applicant comes from the hood, or street, and will handle his business in a hood type of manner. (RR62: 46-47; SE 152-155). He indicated the tattoo "HUSTLA," meaning hustler, on the inside of Applicant's right forearm indicates he is hustling for his money, in life, and to get ahead, including selling narcotics. (RR62: 48-49; SE 156). The witness added that most gang members are selling narcotics or "jacking and robbing people"—i.e. hustling for their money. (RR62: 49).

Detective Nelson explained that Applicant's tattoo, "Fish Trap," references the Fish Trap Bloods criminal street gang in Dallas. (RR62: 50-51; SE 159). This street gang is named after the former Fish Trap projects on Fish Trap Street in West Dallas. (RR62: 50-51). Applicant also has tattoos of "West" and "212." (RR62: 50-52; SE 158). The number 212 is associated with West Dallas, which has the zip code 75212, and is associated with the Fish Trap Bloods. (RR62: 51). The number 3500 on the inside of Applicant's left forearm represents the 3500 block in front of the former Fish Trap projects. (RR62: 52; SE 162). Applicant's star tattoos also mean he is associated with the Bloods. (RR62: 51).

Nelson testified that, in his opinion, the combination of the "Fish Trap," stars, and the numbers 212 and 3500 indicate Applicant is a Fish Trap Bloods gang member. (RR62: 51-53, 64; SE 159-160). Applicant's left forearm also has a tattoo of "Piru," which is the street in Los Angeles where the Bloods were founded. (RR62: 53; SE 163). Applicant has a tattoo, "CK," which Nelson testified means "Crip killer," again indicating Applicant is a Blood member; in West Dallas, the rival gang to the Fish Trap Bloods are the Rupert Circle Crips. (RR62: 53). The officer further testified that the red items Applicant carried at the time of the capital murder—a red cell phone and red key chain—and the red glove he was wearing demonstrate his allegiance to the Bloods and identify him as a gang member. (RR62: 63-64). In closing on direct examination, Nelson testified the Bloods are known as a particularly violent gang; during the witness's time in the Dallas

gang unit, they committed murders, aggravated robberies, narcotics sales, assaults, and home invasion robberies. (RR62: 64). On cross-examination, Nelson explained that Fish Trap Bloods are not an organized gang with an organizational hierarchy or meeting place. (RR62: 65-68). He also testified that Applicant is not listed as a gang member with the Dallas police department's gang unit. (RR62: 68-69).

Christopher Arno testified that he and Applicant were acquaintances in Atlanta, Georgia in 2002. (RR62: 94-99). The two men lived in the same apartment complex. On one occasion, Applicant pulled what appeared to be a handgun (but was a BB gun) on Arno; on another occasion, Arno found Applicant passed out on his front porch early one morning. (RR62: 101-103, 107, 113). Arno called the police, and Applicant was arrested for criminal trespass, a misdemeanor. (RR62: 104-106, 113-115). Because of these interactions, Arno was frightened of Applicant and moved out of the apartments. (RR62: 101, 106).

Several police officers testified that they arrested appellant in Dallas for various offenses: on December 5, 2002, for unauthorized use of a motor vehicle; on December 23, 2003, on warrants for probation violation and burglary; on September 20, 2006, for traffic violations in which he was later charged with felon in possession of a firearm; on April 19, 2007, for unauthorized use of a motor vehicle; and on December 27, 2007, for possession of marijuana. (RR62: 119-131, 166-171, 175-182, 188-194, 197-200; RR63: 125-136; SE 171-172). The jury heard testimony from Applicant's probation officer regarding several probation violations of failure to report and drug use. (RR62: 142-164). The Court admitted into evidence certified judgments reflecting Applicant's prior criminal convictions. (RR62: 208-209; SE 167, 168, 170, 170A, 173, 175).

In his punishment case, Applicant re-called Martin Figueroa Torres to testify about his police interview and photo lineup identification. (RR64: 142-148). Applicant also called an expert, Dr. Charles Weaver III, who testified extensively about eyewitness

identification. (RR64: 155-191, 211-214). Weaver indicated he had never seen a witness view a lineup for two-and-a-half minutes before making an identification. (RR64: 186-187).

Four of Applicant's family members testified in detail about his upbringing, youth, family history, education, and character: his mother, Pamela Maddox; stepfather, Ramon Maddox ("Ramon Sr."); half-brother, Ramon Maddox, Jr. ("Ramon Jr."); and a cousin, Shamy Conley. Applicant's mother was a seventeen-year-old high school dropout when Applicant was born. (RR64: 219). When Applicant was a small child, she went out a lot, left him with other people, smoked marijuana, and drank alcohol. (RR64: 222, 227-228). Applicant's biological father, Eric Propes, was incarcerated much of Applicant's life, had little involvement with him, and used crack cocaine.² (RR64: 218-219, 239, 258). When Applicant was two-years-old, he was in a car accident with his mother, hit his head, and was knocked unconscious; the repercussions of this accident were unknown. (RR64: 230-232).

Pamela married Ramon Sr. when Applicant was three years old. (RR64: 227, 244-45; RR65: 37). Pamela and Ramon Sr. had a volatile relationship; Ramon Sr. was physically abusive. (RR64: 225-226, 263; RR65: 41-42). The children witnessed some of this violence for about ten years.³ (RR64: 227, 261, 263-264). Ramon Sr. was very strict; he disciplined Applicant with a belt and extension cord and struck him. (RR64: 237, 259-260; RR65: 41-42). On one occasion, Ramon Sr. choked Applicant; another time, his mother hit him with a broom (for stealing her car at age 12). (RR64: 260-261). The parents partied, left the children with Applicant in charge at 11 or 12 or 13 years of age, and used alcohol and marijuana in front of the children.⁴ (RR64: 262-263, 280; RR65: 42).

² Eric Propes was incarcerated at the time of Applicant's trial. (RR64: 218)

³ Ramon Jr. testified he never actually saw his parents hit one another, but he saw them arguing while holding a knife and an iron, and he frequently heard them fighting. (RR64: 263-264, 285).

⁴ Ramon Jr. testified, however, that he never saw his parents using illegal drugs. (RR64: 281).

Family members testified Applicant was diagnosed with Attention Deficit Hyperactivity Disorder (ADHD) at age six or seven; he had difficulty in school and was placed in special education in second or third grade. (RR64: 228-229, 286-287; RR65: 42-43). Learning was hard for Applicant. (RR65: 42-43). He continued in special education until he dropped out of school in the tenth or eleventh grade. (RR64: 209, 228, 239). He had a difficult time in school, and other students teased about his special education placement. (RR64: 266). Doctors prescribed Ritalin from age seven through 14. (RR64: 229-230, 264-65). The Ritalin made him lethargic. (RR65: 43). When Applicant was young, he set a back room in the family's house on fire. (RR65: 45).

Evidence indicated Applicant's mother gave him insufficient attention and affection during his upbringing. (RR64: 234). She was emotionally distant. (RR64: 235). She suffers from manic depression, schizophrenia, and bipolar disorder and has a history of multiple mental health hospitalizations, including one for a suicide attempt. (RR64: 237-238; RR65: 47). Ramon Sr.'s testimony indicated Pamela sometimes had auditory and visual hallucinations. (RR65: 46). There is mental illness in Applicant's maternal and paternal families. (RR64: 237-238). Ramon Sr. testified that beginning at age 10, Applicant would become depressed and talk about killing himself. (RR65: 50).

Ramon Jr. was aware that Applicant joined a gang when he was 10 years old. (RR64: 268, 276-277). When Applicant was 11 or 12, he helped take care of his two younger brothers, cleaned house, and cooked. (RR64: 262). He attempted to protect his siblings from his parents' physical violence and fighting. (RR64: 264). Ramon Jr. and Conley (a cousin) testified that they loved Applicant. (RR64: 272; RR65: 100). Conley said he was fun loving as a youth and very protective of her and her sister. (RR65: 91). Applicant began running away from home at age 13, and, due to the physical abuse in his household, began challenging his stepfather at age 15. (RR64: 233-234, 251). He ran away often but returned to check on his brothers. (RR64: 274-275).

Applicant's mother and stepfather's lifestyle changed when he was fifteen years old. (RR64: 226, 235). Ramon Sr. testified that he became a Jehovah's Witness and gave up marijuana and alcohol. (RR64: 54-55). He tried to involve Applicant and his brothers in activities with the church. (RR64: 236, 254).

Family members reported Applicant used alcohol, marijuana, and PCP. (RR64: 269, 273-274; RR65: 59, 94). Ramon Jr. testified Applicant talked to himself and became paranoid when he used drugs. (RR64: 269-270). Applicant's cousin testified he was paranoid and heard voices when he used PCP. (RR65: 94). Ramon Jr. said that Applicant talked to himself and acted strange even when he was not using narcotics; he did not know, however, if Applicant had mental health issues. (RR64: 270-271, 274). Ramon Sr. testified that, when Applicant was older, he called home and talked about people watching him and talking to him. (RR65: 51). At these times, Applicant's mother would sometimes locate Applicant and bring him home. (RR65: 51).

Applicant has three children. (RR64: 239, 272). Ramon Sr. testified Applicant has been more attentive and responsible since being incarcerated for this offense. (RR65: 58). Applicant has expressed remorse for these offenses. (RR65: 59). During his incarceration in Dallas County, Applicant has been taking medications that have helped him. (RR65: 60).

Applicant called additional expert witnesses to testify about the following subject matters: alcohol and drug addiction, including PCP use; Applicant's childhood risk factors for violence, as evidenced during his family members' testimony at trial; the management of inmate populations and the prison system's ability to successfully manage inmate behavior; and the Texas prison system. (RR64: 156-216; RR65: 119-146, 152-233).

Dr. John Roache has a Ph.D. in pharmacology and specializes in clinical pharmacology. (RR65: 119-122, 140). He is a professor of psychiatry and pharmacology and chief of the division of alcohol and drug addiction at the University of Texas

Health Science Center medical school in San Antonio. (RR65: 119-121; DE 23). For over 30 years, he has conducted research with patients to understand the causes and consequences of drug abuse and addiction. (RR65: 121).

Dr. Roache reviewed Dallas County jail records reflecting that in December 2008, Applicant was in the Dallas County jail on a marijuana charge, and a jail physician diagnosed him with Cannabis Dependence, along with an indication to rule out Drug-induced Psychosis and Mood Disorder. (RR65: 137-138, 142-143). Other jail records reflected Applicant had a PCP dependence that included a history of daily PCP use. (RR65: 138-139, 144-145).

Dr. Roache testified at trial that early life risk factors can lead a person to begin using drugs, and repeated use and exposure causes the drugs to act biologically on the brain. (RR65: 124-126). Over time, drugs take control of the reward center of the brain (which is a motivational brain circuit) and other rewards and pleasures in life diminish in importance—life all becomes about drug involvement, seeking and procuring a supply, consuming and using drugs, and recovering from drug effects. (RR65: 124-125). This chronic drug condition affects the frontal lobes of the brain, which involve conscious decision making and planning; ultimately, the drug user has less volitional control and exhibits more impulsive action. (RR65: 125-126). ADHD in early childhood involves the frontal lobes, and the inability to control oneself, by acting impulsively without thought and planning. (RR65: 126). Individuals already driven by impulse and urge, who lack thought and planning, are vulnerable to addiction, leading to a vicious cycle. (RR65: 126-127).

Dr. Roache also testified at trial about the effects of chronic marijuana and PCP use. (RR65: 127-135). PCP, or phencyclidine, affects the neurochemical systems in the brain that are involved in motivational circuitry. (RR65: 128). PCP has both sedative and stimulant properties, which is very unsettling for most people. (RR65: 129-130). It simultaneously causes a dissociative state where nothing matters (dulling sensations and relaxing a person),

while at the same time also agitating and arousing him. (RR65: 130). PCP additionally has a euphoria affect and creates a sense of empowerment, invincibility, and invulnerability. (RR65: 130). PCP can create visual hallucinations and psychotic effects, including paranoia and persecutory delusions. (RR65: 130-133). PCP can in addition rarely cause extreme violence. (RR65: 133-134). Some people are particularly vulnerable to PCP-induced psychosis involving paranoia and violence, and experts do not know why, although bipolar mania and schizophrenia produce risks for PCP-induced mania or psychosis. (RR65: 133-134, 144). Engaging in extreme violence under the influence of PCP, though rare, tends to be associated with individuals who have underlying vulnerabilities, like bipolar and schizophrenia, in their personal or family history. (RR65: 135, 143-144). Dr. Roache testified that once a person is in a setting without PCP, the person would become more clear, more coherent, and more in control. (RR65: 140).

Dr. Gilda Kessner, a psychologist, testified based on listening to Applicant's family members' testimony in the courtroom (his stepfather, mother, brother, and cousin) and applying the relevant research and literature to his circumstances. (RR65: 20, 22, 154-156, 163-164). Dr. Kessner did not interview Applicant. (RR65: 20, 154). The defense team used Dr. Kessner's testimony to educate the jury about the risk factors present in Applicant's life from an early age, which research shows correlate with the probability that a child will be violent in the future. (RR65: 20).

Dr. Kessner testified there is research identifying certain commonalities or risk factors in a child's life that correlate with the potential for violence in the future. (RR65: 155-156). She explained that the Department of Justice, Office of Juvenile Justice and Delinquency Prevention, and Office of the Surgeon General have compiled studies and statistics into meta-analysis identifying these risk factors for juveniles. (RR65: 155). The primary goal of this research is to identify the best opportunity to intervene to prevent future delinquency or violence. (RR65: 156, 161).

Dr. Kessner testified that an early risk factor with regard to Applicant that stands out in particular is hyperactivity—which is a primary risk factor for delinquency, disruptive behavior, and violence later in life. (RR65: 155-157). Applicant's parents reported he was identified with hyperactivity in his early school years. (RR65: 156-157). Other risk factors that apply to Applicant involve being born to a young mother who lacked parenting skills:

Being born to a young mother without any parenting skills is another factor. That his mother - - she was pretty clear on describing that she didn't have that ability, that sensibility, when she was 16 or 17 when he was born and, consequently, she still wanted to be a teenager herself so she allowed him to be babysat or watched by a variety of different people. She didn't name them or identify who they were in particular other than her mother, but that she wasn't equipped to parent a newborn or a toddler. . . . And you know, a young child learning - - having the first level of security with the parent and not getting that, is going to have some behavior problems.

(RR65: 157-158). Dr. Kessner testified that the fact Applicant's mother had a difficult time showing affection to him would affect his secure attachment to his primary caretaker, which influenced his emotional development. (RR65: 158). With regard to the State's earlier emphasis on the fact Applicant's brother grew up in the same household but was never violent, Dr. Kessner explained that children are never raised the same or in the same world, and each child is born essentially into a different family, because the family circumstances are different for each child: Applicant was born to a single mother and biological father who was incarcerated when Applicant was young, while his brother was born to a married couple with an older half-sibling (Applicant). (RR65: 158-159, 166-168). Thus, the exposure and the genetics of the siblings was different. (RR65: 159).

Dr. Kessner testified that the risk factors have a multiplicative or cumulative effect. (RR65: 160). For example, a child at age 10 who has six of the risk factors is 10 times more likely to commit an offense or be violent by age 18 or older than a child at age 10 who has only one risk factor. (RR65: 160). Dr. Kessner said it is noteworthy that Applicant met his biological father (who had a history of incarceration) at ages three and 11 and Applicant's mother began having significant mental health problems when he was around age 10 or 11. (RR65: 160-161). Either of these factors alone would be very emotionally disruptive to a child; such circumstances would create chaos in the family and be confusing to a 10 or 11 year old. (RR65: 160-161).

Dr. Kessner explained that the purpose behind the research is to identify not just risk factors but also the protective factors, which may be more difficult to define or identify—for example, poor grades are a risk factor, and good grades are a protective factor. (RR65: 161). She testified that being born into poverty is another risk factor, and having supportive parents is a protective factor, but those are not on a continuum. The research is ongoing on those issues, and regarding the concept of the resilience of the individual. (RR65: 161-162).

In rebuttal, the State offered witness Bobby Moorehead, a Dallas County Sheriff's Deputy, to testify about drawings Applicant made during voir dire. (RR65: 234-235, 238-239; SE 165). Defense counsel cross-examined Deputy Moorehead about an incident during voir dire in which two deputies were escorting Applicant from the jail to voir dire proceedings; the deputies inadvertently left Applicant unsupervised in a courthouse elevator. (RR65: 240-245). Applicant did not leave the elevator. (RR65: 245). The elevator went up and down once, and deputies intercepted it. Applicant was not handcuffed or shackled but was wearing a stun belt at the time. (RR65: 241, 247).

The State called the detective who showed the photographic lineup to Martin Figueroa Torres to testify about the identification. (RR65: 248-258). She said that in his identification, Martin said,

“mas o menos,” which could be translated from Spanish into English as “more or less,” but also means “yes, that is it; that’s the person.” (RR65: 255-256).

Two Dallas County detention officers testified about Applicant’s incarceration in the Dallas County jail since his arrest. One officer testified the jail has received inmate reports that Applicant runs his tank by bullying other inmates and trying to use their commissary funds; jail authorities have moved Applicant from tank to tank as a result. (RR65: 270-277, 282-283). The officer indicated Applicant is very clever and uses his size to intimidate other inmates. (RR65: 275-276).

Five members of the Gallardo family told the jury how their father’s murder has affected the family. (RR65: 285-294). Finally, the State offered and the Court admitted several recorded jail calls, including Applicant’s conversations with his child’s mother, a friend, and his mother. (RR65: 295-303; SE 295-298). In one conversation, the mother of Applicant’s child accused him of not “caring” or he would not have put himself in his current situation. (RR65: 301). Applicant responded that he had “motherfucking bills to pay.” (RR65: 301). In separate conversations with a friend and his mother, Applicant provided different accounts of an altercation he had with another inmate over a pair of shoes; the inmate required medical treatment at the hospital for a gash on his head. (RR65: 301-303; RR66: 12- 18). Finally, in a recorded telephone call with a friend after the guilty verdict issued, Applicant stated that when he gets to prison he will “put bread in his pocket” and continue “the hustle.” (RR65: 18-21; SE 295A, 295B).

Based on the foregoing and other evidence before them, the jury answered the special issues in a manner that required the Court to sentence Applicant to death.

PROCEDURAL HISTORY

Applicant is confined pursuant to the judgment and sentence of the Criminal District Court No. 7 of Dallas County, Texas,

convicting him of the March 17, 2009 capital murder of Alfredo Gallardo committed in the course of a home-invasion robbery. (CR2: 709-711). In accordance with the jury's answers to the special issues, this Court sentenced Applicant to death on May 21, 2012. (CR2: 684-685, 709-711).

Applicant appealed his conviction and sentence. The Texas Court of Criminal Appeals affirmed this Court's judgment on direct appeal. *Harris v. State*, No. AP- 76,810, 2014 WL 2155395 (Tex. Crim. App. May 21, 2014) (not designated for publication). On August 14, 2014, Applicant filed a petition for writ of certiorari on his direct appeal in the United States Supreme Court. On January 12, 2015, the Supreme Court denied his petition. *Harris v. Texas*, 135 S. Ct. 945 (2015).

On June 11, 2014, Applicant filed his original application for writ of habeas corpus under Article 11.071 of the Texas Code of Criminal Procedure, alleging six grounds for relief. The State received a statutorily authorized extension of time and filed its answer on December 10, 2014. On February 6, 2015, this Court entered an Order Designating Issues, which designated Applicant's Claims 1 through 5 for further investigation. The Court conducted an evidentiary hearing on those issues on May 29, 2018 to June 1, 2018; July 16, 2018; and September 10-12, 2018. The Court ordered the parties to file proposed findings of fact and conclusions of law by October 23, 2019.

GENERAL FINDINGS OF FACT

- (1) The Court takes judicial notice of the Court's trial file in cause number F09- 00409-Y.
- (2) The Court takes judicial notice of the clerk's record from the trial in cause number F09-00409-Y.
- (3) The Court takes judicial notice of the entire reporter's record from the trial in cause number F09-00409-Y.

- (4) The Court takes judicial notice of the Court's writ file in cause number W09- 00409-Y(A), with the exception of two of Applicant's filings that the Court has stricken from the record by its prior Order dated July 19, 2019. Those two filings are:

(a) "Bone Lead Test Result and Interpretation" Report for Pamela Maddox by Ferne Nilsa Cummings, M.D., Icahn School of Medicine at Mount Sinai, dated October 24, 2018, attached as Applicant's Exhibit A to Applicant's "Supplemental Bone Lead Evidence - Bone Lead Testing Result for Pamela Maddox," filed December 4, 2018; and

(b) Expert Rebuttal Affidavit of Dr. Julian Davies, dated April 4, 2019, attached as Exhibit C to "Roderick Harris's Submission of Additional Evidence Pursuant to the Court's November 26, 2018 Order," filed June 12, 2019.

The Court finds Applicant filed these two items without permission and in violation of the Court's November 26, 2018 Order, which delineated the only remaining evidence to be allowed in this case. The Court has not considered the contents of those two filings in making these findings of fact and conclusions of law.

- (5) The Court takes judicial notice of the entire reporter's record from the writ proceedings in cause number W09-00409-Y(A).
- (6) At the writ hearing, this Court admitted Exhibit 1 to Applicant's writ application, the Affidavit of Dr. Natalie Novick Brown, only to the extent other experts relied on the affidavit in this writ proceeding. (WRR2: 117-118; WRR7: 6-7). The Court has not considered Dr. Brown's Affidavit and the information contained in it for any other purpose.

- (7) At the writ hearing, this Court admitted Exhibit 4 to Applicant's writ application, the Affidavit of Charles Rotramel, only to the extent other experts relied on the affidavit in this writ proceeding. (WRR2: 116-118; WRR7: 9). The Court has not considered Mr. Rotramel's Affidavit and the information contained in it for any other purpose.
- (8) At the writ hearing, this Court admitted Exhibits 8, 9, 10, 12, 13, 15, 16, and 17 to Applicant's writ application only to the extent an expert relied on these affidavits in this writ proceeding. (WRR7: 5-6). The Court has not considered these affidavits for any other purpose. The Court does not admit these affidavits and the information contained in them for the truth of the matters asserted.

Exhibits 8, 9, 10, 12, 13, 15, 16, and 17 are:

Exhibit 8: the Affidavit of Shirley Cook

Exhibit 9: the Affidavit of Lisa

Escobedo Exhibit 10: the Affidavit of
Michael Harris

Exhibit 12: the Affidavit of Ramon
Maddox, Sr. Exhibit 13: the Affidavit of
Ramon Maddox, Jr. Exhibit 15: the
Affidavit of Eric Propes

Exhibit 16: the Affidavit of Kenneth

Propes Exhibit 17: the Affidavit of Willie
Propes

SPECIFIC FINDINGS OF

FACT GROUND 1

Alleged Ineffective Assistance of Trial Counsel

In Ground 1, Applicant contends trial counsel rendered ineffective assistance by not sufficiently investigating and presenting evidence during the punishment phase of trial that he suffers from a fetal alcohol spectrum disorder and was exposed to

toxic levels of lead as a child. (Application, at 19-41). Applicant further contends in Ground 1 that trial counsel rendered ineffective assistance by not presenting the testimony of a social historian or a school-to-prison-pipeline expert during the punishment phase of trial to explain the mitigating impact of his life history. (Application, at 41-70). In particular, Applicant asserts that trial counsel should have presented the testimony of Laura Sovine, or a similar social worker, to explain Applicant's social history and Dr. Courtney Robinson, or a similar school-to-prison-pipeline expert, to explain Applicant's school-to-prison life trajectory to the jury. (Application, at 43-45). He further asserts that trial counsel should have presented a gang expert to turn the aggravating aspect of Applicant's gang membership into mitigating evidence. (Application, at 42-44, 57-58, 68-69).

The benchmark for judging any claim of ineffective assistance of counsel is whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied upon as having produced a just result. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); *Hernandez v. State*, 726 S.W.2d 53, 57 (Tex. Crim. App. 1986).

An applicant asserting a claim of ineffective assistance of counsel has the burden to prove, by a preponderance of the evidence, that (1) counsel's performance was deficient, falling below an "objective standard of reasonableness," and (2) the deficient performance prejudiced the defense such that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694; *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012).

Strickland's first prong "sets a high bar." *Buck v. Davis*, — U.S. —, 137 S. Ct. 759, 775 (2017). An accused is not entitled to representation that is errorless. *Ex parte Kunkle*, 852 S.W.2d 499, 505 (Tex. Crim. App. 1993). Reviewing courts indulge a strong presumption that counsel's conduct fell within the wide range of reasonable assistance, and that the challenged action might be considered sound trial strategy. *Strickland*, 466 U.S. at 689; see *Ex*

parte McFarland, 163 S.W.3d 743, 753 (Tex. Crim. App. 2005). The mere fact that another attorney might have pursued a different tactic at trial does not suffice to prove a claim of ineffective assistance of counsel. *Ex parte Miller*, 330 S.W.3d 610, 616 (Tex. Crim. App. 2009). The *Strickland* test is judged by the totality of the representation, not by counsel's isolated acts or omissions, and the test is applied from the viewpoint of an attorney at the time he acted, not through hindsight. *Jimenez*, 364 S.W.3d at 883; *McFarland*, 163 S.W.3d at 753.

A record that does not explain trial counsel's decisions will not show deficient performance "unless the challenged conduct was 'so outrageous that no competent attorney would have engaged in it.'" *See Nava v. State*, 415 S.W.3d 289, 308 (Tex. Crim. App. 2013) (quoting *Menefield v. State*, 363 S.W.3d 591, 593 (Tex. Crim. App. 2012)).

Although a reviewing court may refer to standards published by the American Bar Association and other similar sources as guides to determine prevailing professional norms, publications of that sort are only guides because no set of detailed rules can completely dictate how best to represent a criminal defendant. *Strickland*, 466 U.S. at 688-689.

Ineffectiveness claims may not be built on retrospective speculation; the record must affirmatively demonstrate the alleged ineffectiveness. *Bone v. State*, 77 S.W.3d 828, 835 (Tex. Crim. App. 2002). Moreover, if a reviewing court can speculate about the existence of further mitigating evidence, then it just as logically might speculate about the existence of further aggravating evidence. *Id.* at 835-836.

The United States Supreme Court has explained that "[s]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Wiggins v.*

Smith, 539 U.S. 510, 521-522 (2003) (quoting *Strickland*, 466 U.S. at 690-691). Thus, counsel has a duty to make reasonable investigations or to make reasonable decisions regarding further investigations. See *Wright v. State*, 223 S.W.3d 36, 42 (Tex. App.—Houston [1st Dist.] 2006, pet. ref'd). In an ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments. *Id.*

Determining whether prejudice exists in the context of a failure-to-investigate claim relating to the punishment phase requires courts to evaluate the totality of the evidence in determining whether, if the jury had been confronted with the uninvestigated evidence, there is a reasonable probability it would have returned a different sentence. *Ex parte Briggs*, 187 S.W.3d 458, 470 n.37 (Tex. Crim. App. 2005) (citing *Wiggins*, 539 U.S. at 536). An applicant must affirmatively prove prejudice; it is not enough to show that the errors of counsel had some conceivable effect on the outcome of the proceedings. *Strickland*, 466 U.S. at 693.

To render performance that is constitutionally sufficient, counsel should pursue all reasonable leads. *Wiggins*, 539 U.S. at 524. In evaluating counsel, a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Id.* at 527. However, "the duty to investigate does not force defense lawyers to scour the globe on the off chance something will turn up; reasonably diligent counsel may draw a line when they have good reason to think further investigation would be a waste." *Rompilla v. Beard*, 545 U.S. 374, 383 (2005).

Additionally, trial counsel is entitled to rely on their experts. See *Murphy v. Davis*, 901 F.3d 578, 592-593 (5th Cir. 2018) (finding that counsel was entitled to rely upon the objectively reasonable evaluations and opinions of their expert) (citing *Segundo v. Davis*, 831 F.3d 345, 352 (5th Cir. 2016)); *Wilson v. Sirmons*, 536 F.3d 1064, 1089 (10th Cir. 2008) (noting that, to a degree, counsel

should be able to rely on an expert to determine what evidence is necessary to an effective evaluation, and what additional evidence the expert needs to complete testing).

The Defense Team

- (9) The Court appointed Brad Lollar, Doug Parks, and Mike Howard to represent applicant in this capital murder trial. (WRR4: 68; WRR7: 146; WRR8: 16). Mr. Lollar was first-chair counsel; Mr. Parks was second-chair counsel; and, Mr. Howard was third-chair counsel. (WRR4: 71-73; WRR7: 146, 167; WRR8: 16). In June 2011, the Court appointed Mr. Parks to replace the original second-chair, Russell Wilson, who left defense practice to join the District Attorney's Office. (WRR4: 72-73, 123; WRR8: 16, 68). Applicant's family had also retained Calvin Johnson before the State filed its Notice of Intent to Seek Death. Mr. Johnson continued on the case as additional counsel to the appointed attorneys. His role primarily consisting of communicating with Applicant and Applicant's family. (WRR4: 71-73).
- (10) Mr. Lollar and Mr. Parks have very extensive criminal trial experience in death penalty cases.
- (11) Mr. Lollar has tried 14 death penalty cases, beginning in 1987; defendants in at least three of those cases received a life sentence. (WRR4: 68-69; WRR9: 18). In the most recent case that Mr. Lollar tried (prior to his testimony in the writ hearing), Erbie Lee Bowser received a life sentence. (WRR4: 69).
- (12) Mr. Lollar was licensed to practice law in 1977. He was a Dallas County Assistant District Attorney from August 1977 until January 1982. He was a criminal defense attorney in private practice from 1982 to 2005 and 2008 to 2013. He was the appointed Chief Public Defender in Dallas County from 2005 to 2008. Since March 4, 2013, he has been employed in the Capital Murder Division of the Dallas County Public

- Defender's Office. (WRR4: 66-67, 69; WRR State's Exh. 5).
- (13) Mr. Lollar presents at continuing legal education seminars for the Dallas Bar Association, the Dallas Criminal Defense Lawyers Association, and the Center for American and International Law. (WRR4: 70-71; WRR State's Exh. 6).
 - (14) Mr. Parks was licensed to practice law in 1970 and has been in private practice criminal defense since about 1971. (WRR8: 13). He has extensive experience representing capital defendants: at the writ hearing, he testified he was working on his 26th death penalty case. (WRR3: 98-99, 120; WRR8: 13). He tried his first death penalty case in 1978. (WRR8: 14).
 - (15) Mr. Lollar and Mr. Parks have tried three or four death penalty cases together previously. (WRR8: 43-44) Defendants in at least two of those cases received life sentences. (WRR8: 15).
 - (16) Mr. Howard was licensed to practice law in Texas in 2004. (WRR7: 144). This was his first death penalty case, although prior to this trial he worked for approximately five years in the Dallas Public Defender's Office—including two years in felony courts trying jury cases, including murders and capital murders—and worked in private defense practice. (WRR7: 145- 146). Mr. Howard has experience trying two capital murder trials with Mr. Lollar when Mr. Lollar was Dallas County's Chief Public Defender. (WRR4: 124; WRR7: 147).
 - (17) The Court appointed Mr. Howard to the trial team after Mr. Parks, and he began working on the case in September 2011. (WRR7: 146, 170).
 - (18) Mr. Lollar retained Brendan Ross as the trial team's mitigation specialist. (WRR4: 74). Ms. Ross has a Master's Degree in Social Work and has been a mitigation specialist since 2003. (WRR9: 17). She has worked on more than 50 death penalty cases. (WRR9: 17). She attends annual trainings by the Texas Criminal Defense Lawyers

Association, National Association of Criminal Defense Lawyers, and National Association of Social Workers. (WRR9: 17). She has worked on several cases with Mr. Lollar. (WRR9: 18). Mr. Lollar testified he had regular contact with Ms. Ross throughout their representation. (WRR6: 159). Ms. Ross began working on the case in December 2010. (WRR9: 49-50).

- (19) The defense team's themes in the punishment phase included a theme that Applicant is not a future danger when he is in custody and has no access to drugs or PCP—which had made him paranoid and prone to outbursts. (WRR4: 90-91, 96-97; WRR7: 150; WRR8: 39, 41-42). While incarcerated, Applicant exhibited a marked downslide in any misconduct or violence. (WRR4: 90, 96-97; WRR7: 150). The team used expert testimony, by S.O. Woods and James Aiken, to explain the Texas Department of Criminal Justice's (TDCJ's) inmate classification system, TDCJ's ability to professionally manage and control inmate behavior, and prison security and administration—in order to show that the probability of future dangerousness is low. (WRR7: 150-151; RR65: 192-233, 170-192). Additionally to show Applicant was not a future danger, the team used an incident in which deputies were escorting Applicant to a conference room for jury selection and left him alone, unsupervised, in a courthouse elevator (while the elevator traveled up and down), and he was a perfect gentleman; he made no attempts to hurt anyone, escape, or take any inappropriate actions. (WRR4: 106-114; WRR7: 151).
- (20) Mr. Parks noted in his testimony at the writ hearing that the definition of mitigating evidence in Texas is: some evidence that would tend to lessen a person's moral blameworthiness. (WRR8: 42). Mr. Parks explained some jurors might consider Applicant's drug dependence to be mitigating, in addition to being relevant to the future danger special issue, and this evidence could improve Applicant's chances for a favorable answer to the mitigation special issue. (WRR8: 42).

- (21) The trial team's intent in the mitigation case was also to counter the State's theme of personal responsibility and choices and show that Applicant was a child like any other, but a series of choices were made for him that he had no hand in—including that his mother exposed him to marijuana in utero, that she left him to go out and party, that his biological father abandoned him, that his step-father abandoned him by partying until Applicant was a teenager, and that he witnessed domestic violence in the home. (WRR7: 152-153). The team intended to show these circumstances then set Applicant down a path with a predisposition to mental health issues (with onset of mental health issues in his late teens), and drug abuse—all of which resulted in acting out and adult criminal behavior. (WRR7: 153). Defense themes in the mitigation case were also (a) the familial and Applicant's history of mental health issues, (b) Applicant's history of drug abuse, especially PCP, and its interplay with psychosis and schizophrenic symptoms, and (c) the possible neurological damage Applicant received at two years old from a head injury during a car accident. (WRR7: 151-152).
- (22) Of the three attorneys, Mr. Howard was the primary contact with Applicant, and worked at establishing a personal connection with him. (WRR7: 148). Mr. Howard focused too on Applicant's initial criminal offenses as an adult, and thematically tying those back into the larger mitigation case, including the mental health, neurological health, and drug use themes. (WRR7: 148- 149).
- (23) Mr. Howard testified that he did the first half of Applicant's closing arguments in the punishment phase, where he focused on the mitigation special issue. (WRR7: 149). To do that, he reviewed Applicant's personal history, including pre-birth, youth, experience in the home, mental health history, drug use history, and special education issues, and tied those aspects of Applicant's life into the expert testimony of Dr. Gilda Kessner and others. (WRR7: 149). Mr. Howard testified

that Mr. Lollar's focus in the second half of closing arguments in the punishment phase was the death penalty as a whole, conveying the moral objections to the death penalty to the jury, and the future dangerousness special issue. (WRR7: 149).

- (24) The defense team was cognizant of putting the best narrative before the jury while not opening the door for a counter attack. (WRR4: 76; WRR7: 160- 161; WRR9: 20-21).
- (25) Mr. Parks testified that in his opinion and experience, although writs of habeas corpus in death penalty cases tend to focus on the mitigation special issue, there is a better chance at trial of obtaining a death sentence on the future danger special issue. (WRR8: 41-42). He testified the defense team here tried to "work both issues." (WRR8: 41-42).
- (26) The Court admitted the trial team's billing records into evidence at the writ hearing. (WRR Applicant's Exh. 6, 9, 11-13). Mr. Lollar and Ms. Ross were not aware whether their billing records were complete. (WRR6: 145; WRR9: 48). Each team member indicated through their testimony that although their billing records include much of the work they do on a case, not all work is listed. Mr. Lollar testified he does not list all the work he does on a case in his billing records; the admitted records do not list everything he did on this case; a portion of his billing from the beginning of the case may be missing; he may have made visits to Applicant that are not listed in these records; and, he had communications with co-counsel that are not listed. (WRR6: 156-160). Mr. Parks testified he does not list all of the work he does on a case in the billing records, and each description does not include everything he did on a particular date. (WRR8: 16-17, 76-78). Mr. Howard testified that he did not list everything he did on this case in his billing records, and his records do not list every defense team meeting. (WRR7: 186-189, 191). Mr. Howard is cognizant of not breaching confidentiality when completing his pay sheets and of not revealing any information to the State about case

preparation, because the billing records are accessible as public records. (WRR7: 187-188). Ms. Ross indicated she expended a lot more time on this case than reflected in her billing. (WRR9: 25-26).

- (27) Mr. Parks replaced the former second-chair counsel, Mr. Wilson, on this case. (WRR8: 81). Mr. Wilson's billing records were not offered into evidence in these writ proceedings. There is no evidence before the Court regarding the work Mr. Wilson performed on the case.
- (28) The Court finds the billing records do not contain all of the work the trial team undertook in representing Applicant.
- (29) The team met and communicated frequently during their representation—in person, by phone, and by email. (WRR4: 76, 130; WRR6: 160; WRR7: 147-148, 188-189, 191; WRR8: 79-80; WRR9: 20). Mr. Lollar testified that he had many phone conferences with Ms. Ross that are not reflected in his billing records. (WRR6: 159-160). During individual voir dire, the attorneys communicated daily, not just about voir dire but also about other aspects of the case. (WRR7: 148, 191; WRR8: 71). Mr. Parks indicated in his testimony that his billing records do not list all team meetings or communications with the team as "team meetings." (WRR8: 71, 73, 79). Ms. Ross testified she had frequent contact with the attorneys. (WRR9: 20).
- (30) The American Bar Association's (ABA's) Supplementary Guidelines for the Mitigation Function of Defense Teams in Death Penalty Cases recommend that lead counsel assemble a capital defense team that includes one member qualified by training and experience to screen for the presence of mental or psychological disorders or impairments. See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 4.1, 10.4(C), Commentary (2003). Mr. Lollar retained the services of Brendan Ross, a mitigation specialist and social worker, which meets this requirement.

- (31) In addition, counsel retained several experts to assist them in the investigation and development of their punishment case.
- (32) Counsel retained Dr. Antionette McGarrahan, a forensic neuropsychologist, to evaluate Applicant's intellectual, cognitive, and psychological functioning. Dr. McGarrahan received a Ph.D. in clinical psychology from U.T. Southwestern Medical Center in Dallas in 1999 and participated in a fellowship in forensic psychology at the University of Kansas City, Missouri. (WRR7: 77). She is a licensed psychologist in Oklahoma and Texas. (WRR7: 78). Dr. McGarrahan acted as a consulting expert to the trial team. (WRR4: 75). In addition to evaluating Applicant, she reviewed records and provided analysis of Applicant's life history. (WRR4: 75, 77, 80-83; WRR State's Exh. 7). Dr. McGarrahan attended some of the team meetings. (WRR4: 83; WRR6: 151). She ultimately recommended using family members to describe the mitigating aspects of Applicant's life history, along with use of an expert, Dr. Gilda Kessner. (WRR4: 81; WRR State's Exh. 7).
- (33) Trial counsel retained Dr. Gilda Kessner, a licensed psychologist, to testify about childhood risk factors that correlate with violence later in life. (RR65: 155-162; 166-168). She testified that a 10-year-old child with six risk factors is tenfold more likely to engage in violence as an adult than a child with a single risk factor. (RR65: 160). Dr. Kessner's testimony was tied to the mitigation theme that many things Applicant experienced in life were not choices he made, but choices that others made for him. (WRR7: 154).
- (34) Trial counsel retained Dr. John Roache, a clinical pharmacologist, to testify about drug addiction, particularly related to marijuana and PCP. (RR65: 64- 69). Prior to his testimony, Dr. Roache reviewed some of Applicant's Dallas County jail mental health records. (RR65: 137-139, 142-145). Dr. Roache testified about characteristics of brain function and addiction, ADHD as a risk factor for addiction,

- and the possible effects of chronic marijuana and PCP use, including (for PCP) psychosis, paranoia, and even violence. (RR65: 124-144).
- (35) The team implemented a strategy of not having Dr. Kessner and Dr. Roache examine Applicant in person. (WRR7: 156).
- (36) Trial counsel retained three prison experts. (RR65: 11-19, 24-28, 146-149).
Two of these experts testified before the jury about the classification of inmates in TDCJ and a prison system's ability to control inmate behavior. (RR65: 170-233).
- (37) Trial counsel retained an eyewitness identification expert, Dr. Charles Weaver, to testify about a witness's identification in an extraneous double robbery and murder. (WRR4: 98-99; RR64: 155-215). Two men robbed a family in a downstairs apartment, and then one of the assailants went to an upstairs apartment and shot three individuals, killing one. (RR63: 188-209, 232-250). A witness upstairs identified Applicant as the shooter. (RR63: 254-268). Trial counsel used Dr. Weaver to challenge the accuracy of this identification. (WRR4: 98-99).
- (38) The trial team explored calling as a witnesses the two Parkland Hospital physicians who treated Applicant while he was in the Dallas County Jail and provisionally diagnosed him with schizophrenia. (WRR7: 155-156). Although the trial team's position was that a treating physician would not open the door to the State calling its expert, Dr. Christine Reed, who had examined Applicant, the Court made it clear in pre-trial proceedings that calling a treating physician could result in the Court allowing the State to call its examining expert to testify. (WRR7: 155-156). The trial team elected not to call the treating physicians for this reason. (WRR7: 155-156).

- (39) Determining which witnesses to call are strategy decisions. (WRR7: 154).
- (40) Determining the balance and focus of evidence between the two special issues in a death penalty case are strategy decisions.
- (41) Based on their experience and qualifications, Mr. Lollar, Mr. Parks, and Mr. Howard were qualified to formulate and execute effective trial strategies.
- (42) The Court finds the testimony of Mr. Lollar, Mr. Parks, and Mr. Howard is credible and true.

Trial Counsel Did Not Render Ineffective Assistance by Not Investigating and Presenting Fetal-Alcohol-Spectrum-Disorder Evidence in the Punishment Phase of Trial

- (43) Mr. Lollar testified at the writ hearing that he relied on Dr. McGarrahan, his neuropsychological expert, to advise him what issues or impairments Applicant had and how those issues affected his behavior. (WRR4: 136). Dr. McGarrahan advised him that Applicant's deficits were minimal and would not have affected his behavior. (WRR4: 136, 139). Mr. Lollar testified that although Applicant's mother, Pamela Maddox, had told the trial team she drank a couple of glasses of wine on the weekends during the first six or eight weeks of pregnancy, the importance of that type of testimony is affected by the degree to which the witness says she engaged in the behavior. (WRR4: 137). Moreover, Mr. Lollar explained he relied on his expert to explain to him what the issues and areas of concern were with his client. (WRR4: 137).
- (44) Mr. Howard testified at the writ hearing that Ms. Maddox had informed the trial team she drank an occasional glass of wine during the first few—maybe first six—weeks of pregnancy. (WRR7: 162). He reviewed the affidavit Ms. Maddox submitted for this writ, and testified it reflects more alcohol intake than what she told the trial team. (WRR7: 162).

- (45) Ms. Maddox testified at trial that she drank alcohol and smoked cigarettes and marijuana before she was pregnant and up until the time she learned she was pregnant. (RR64: 222-223). She testified she learned she was pregnant at about six weeks. (RR64: 223). After that, she stopped smoking and drinking. (RR64: 223-224).
- (46) In support of his writ claim, Applicant submitted an affidavit with his writ application by Ms. Maddox, dated May 29, 2014, in which she indicates she learned she was pregnant when she was about two months into the pregnancy. (Applicant's Writ Exh. 11, at 1). She also states she "drank a few glasses of wine on the weekends before [she] found out that [she] was pregnant." (Applicant's Writ Exh. 11, at 1-2). She continues, "I stopped drinking when I learned I was pregnant with Roderick. (Applicant's Writ Exh. 11, at 2).
- (47) Ms. Maddox testified at the writ hearing that when she was 17, before she knew she was pregnant, she did not drink everyday but she drank Thunderbird and Wild Irish Rose on the weekends. (WRR2: 33). Dr. Julian Davies, one of Applicant's experts for this writ, testified that Thunderbird and Wild Iris Rose are wines that are typically fortified with alcohol to a volume content of about 13 to 18 percent. (WRR3: 47). Ms. Maddox also testified at the writ hearing that she learned she was pregnant at about six weeks. (WRR2: 64-65). Ms. Maddox testified that when she found out she was pregnant she stopped drinking completely. (WRR2: 66).
- (48) Mr. Lollar indicated at the writ hearing that Ms. Maddox did not inform the trial team at the time of trial that she drank fortified wines like Thunderbird. (WRR4: 148-149).
- (49) The Court finds that, at these writ proceedings, Ms. Maddox expanded the information she provided about the amount and type of alcohol she drank during pregnancy from what she told the defense team during the pre-trial investigation

and even from what she told Applicant's writ counsel in the writ investigation in 2014, as reflected in her affidavit. (See WRR3: 87). The Court finds Applicant's trial counsel were not aware of this information because Ms. Maddox failed to reveal it until 2018. The Court finds trial counsel could not have been ineffective for failing to act on information that was not provided to them.

- (50) Ms. Ross's billing records reflect more than 30 contacts with Ms. Maddox. (WRR9: 22; WRR Applicant's Exh. 13).
- (51) Both defense attorneys in closing arguments at trial, Mr. Howard and Mr. Lollar, emphasized that Applicant suffered from in utero exposure to harmful substances (alcohol and/or marijuana). (WRR4: 149-150; RR66: 44, 46, 63).
- (52) Julian Davies, M.D., provided an affidavit and testified in support of Applicant's writ. (WRR3: 24-112; Applicant's Writ Exh. 28). Dr. Davies is a pediatrician with specialties in international adoption, foster care, fetal alcohol spectrum disorder, and the impacts of complex trauma. (WRR3: 34, 77; WRR Applicant's Exh. 2). He is a clinical professor of pediatrics at the University of Washington and has a faculty clinic practice where the majority of patients are fostered or adopted. (WRR3: 35). He is also one of two pediatricians at the University of Washington Fetal Alcohol Syndrome Diagnostic Clinic, which provides diagnostic evaluations for children and adults. (WRR3: 35).
- (53) Dr. Davies examined Applicant, reviewed various records, and diagnosed him with Alcohol Related Neurodevelopmental Disorder (ARND), which is one of the Fetal Alcohol Spectrum Disorders (FASD). (WRR3: 42-43, 56, 65, 75; Applicant's Writ Exh. 28, at 11, 14). He based his diagnosis of ARND on the amount and pattern of brain dysfunction Applicant exhibits, the history of prenatal exposure to alcohol (which Dr. Davies describes as "significant first trimester alcohol exposure"), and the results of his differential diagnosis process (of ruling out other etiologies). (WRR3: 76).

- (54) Dr. Davies testified that ARND is a permanent birth defect syndrome caused by maternal alcohol consumption during pregnancy. (WRR3: 37, 78; Applicant's Writ Exh. 28, at 1). He explained that alcohol consumption during pregnancy causes brain injury and neurological impairments. (WRR3: 37). ARND is a diagnosis under the FASD that involves a pattern of brain impairments that have been associated with prenatal alcohol injuries. (WRR3: 38-39).
- (55) Dr. Davies lists the records he reviewed and relied on in his affidavit. (Applicant's Writ Exh. 28, at 2). These included the affidavits of Dr. James Underhill and Dr. Natalie Brown. (Applicant's Writ Exh. 28, at 2; WRR3: 79-80; WRR6: 87).
- (56) In support of his FASD claim, Applicant submitted with his application the affidavit of Dr. Natalie Novick Brown, a psychologist. (Application Exh. 1). Dr. Brown did not testify at the writ hearing; Applicant instead utilized the testimony of psychologist Joan Mayfield. (WRR2: 116). The State moved to strike Dr. Brown's affidavit on the basis she was not appearing to testify (thus there would be no opportunity for cross-examination) and writ counsel had replaced her with another expert. (WRR2: 116). The Court denied the State's request to strike the affidavit but ruled the Court would not consider it for any purpose except to the extent another expert in the hearing relied upon it. (WRR2: 117-118).
- (57) Dr. Davies testified Applicant does not have the facial features necessary for a diagnosis of Fetal Alcohol Syndrome or Partial Fetal Alcohol Syndrome, and he does not exhibit a growth deficiency, which is sometimes present in FASD disorders. (WRR3: 75, 85-86).
- (58) Dr. Davies testified that no amount of alcohol during pregnancy is safe; any amount of alcohol places a fetus at risk of developing FASD. (WRR3: 50, 88-90). Dr. Davies also testified that it is common for mothers to minimize or

- underreport their alcohol consumption. (WRR3: 48-50, 88; Applicant's Writ Exh. 28, at 12). He testified whenever a mother reports prenatal alcohol use, the general direction of error is greater intake than reported, "[s]o it is reasonable to think that whenever you are given a specific alcohol amount that there may have been more." (WRR3: 88). Dr. Davies characterized Ms. Maddox's testimony in the writ hearing as evidencing a "high risk pattern of alcohol exposure." (WRR3: 108).
- (59) Dr. Davies considered and ruled out other possible etiologies in Applicant's life which could account for what he diagnosed as significant neurological damage, including (a) the fetal distress and asphyxia Applicant experienced at birth from the umbilical cord being wrapped around his neck, which required two minutes of resuscitation; (b) the car accident Applicant was in at age two which resulted in facial lacerations and a loss of consciousness; (c) possible childhood lead exposure; and (d) other adverse childhood experiences including his mother being depressed and emotionally distant, being left to be cared for by others early in life while his mother was partying, experiencing parental alcohol and marijuana use in his presence during his early years, witnessing domestic violence, and being subjected to corporal punishment. (WRR3: 51-55, 92-96; Applicant's Writ Exh. 28, at 14).
- (60) Dr. Davies testified that children with FASD have difficulties with behavior and cognitive abilities in childhood. (WRR3: 57). He concluded Applicant exhibited a pattern of behavioral and developmental challenges consistent with what he sees in the fetal alcohol syndrome clinic. (WRR3: 56-57). Dr. Davies noted that Applicant's Attention Deficit Hyperactivity Disorder (ADHD), diagnosed at age seven, represents a significant area of brain dysfunction. (WRR3: 56, 58, 60). Dr. Davies reviewed Dr. James Underhill's neuropsychological test scoring of Dr. McGarrahan's raw test data in order to look at different domains of brain function and possible areas of impairment. (WRR3: 59-60). Dr.

Davies concluded the neuropsychological testing shows Applicant has significant impairment in memory and his executive functioning is an area of concern. (WRR3: 60- 61). He explained that one of the hallmarks of brain injury caused by alcohol is significant variability in test scores, with some in the typical range and others showing significant areas of impairment. (WRR3: 61). Dr. Davies noted that school personnel diagnosed Applicant with a learning disability in math, which is another area of significant impairment. (WRR3: 62). Regarding IQ testing, he testified he often encounters a significant split between the Verbal Comprehension Index and the Perceptual Reasoning Index in FASD patients—like the split evident in Applicant’s testing. (WRR3: 63).

- (61) Dr. Davies testified that during his examination Applicant self-reported a history of significant problems with anger management; mood swings related to feeling neglected by his mother; high levels of impulsivity, inattention, and hyperactivity; symptoms of anxiety like compulsive neatness, hand washing, and checking things; problems with lying; and sensory sensitivities like bright lights and being touched. (WRR3: 69).
- (62) Dr. Davies relied on Dr. Underhill’s score report of Dr. McGarrahan’s raw test data. (WRR3: 80-81). He testified that information regarding malingering, test performance, fatigue during a testing session, distractions, and a person’s current medications and mental health might influence a testing session. (WRR3: 81-82, 91).
- (63) Dr. Davies testified he conducted a Montreal Cognitive Assessment of Applicant, which is a cognitive screening tool. (WRR3: 72-75, 90). He testified Applicant failed the assessment, earning 21 out of 30 points, with a normal score being 26 or above. (WRR3: 73). A portion of the test is a naming task with animal pictures—of a lion, rhinoceros, and camel. (RR3: 74; WRR State’s Exh. 1). Applicant earned two

of the three points in this section because he identified the camel as an emu. (RR3: 74; WRR State's Exh. 1). Applicant also lost one point for not knowing the correct year. (WRR State's Exh. 1). Dr. Davies did not perform any effort testing or tests of malingering, but he emphasized in his testimony that his impression was Applicant was giving full effort. (WRR3: 75, 90-91).

- (64) Dr. Davies stated in his affidavit that prenatal exposure to alcohol can cause lower IQ, ADHD, difficulties with judgment and impulse control, language and social difficulties, learning disabilities, memory problems, and impairments in cognitive skills like flexibility, planning, organization, inhibition, and problem solving. (Applicant's Writ Exh. 28, at 1). He admitted in his testimony, however, that these outcomes could be consistent with a number of disorders or environmental factors. (WRR3: 79).
- (65) Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure (ND- PAE) is a diagnosis contained in the "Conditions for Further Study" portion of the DSM-5.⁵ American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders 798 (5th ed. 2013) (DSM-5). (WRR3: 99-100, 109-110). The proposed criteria for diagnosis includes "more than minimal exposure to alcohol during gestation, including prior to pregnancy recognition." DSM-5, at 798. The discussion of prenatal alcohol use in the DSM-5 manual includes:

Although both animal and human studies have documented adverse effects of lower levels of drinking, identifying how much prenatal exposure is needed to significantly impact neurodevelopmental

⁵ The DSM-5 also includes a disorder called "Neurodevelopmental Disorder Associated with Prenatal Alcohol Exposure," which is included as an "Other Specified Neurodevelopmental Disorder." DSM-5, at 86. This disorder which is in the main body of the DSM-5, however, does not list any specific diagnostic criteria separate from other neurodevelopmental disorders. The only reference in the DSM-5 to the amount of alcohol use relevant to prenatal alcohol exposure is in the diagnosis for "Neurobehavioral Disorder Associated with Prenatal Alcohol Exposure" in the "Conditions for Further Study." DSM-5, at 798-799.

outcomes remains challenging. Data suggest that a history of more than minimal gestational exposure (e.g., more than light drinking) prior to pregnancy recognition and/or following pregnancy recognition may be required. Light drinking is defined as 1-13 drinks per month with no more than two of these drinks consumed on any one drinking occasion.

DSM-5, at 799. (RWW3: 109-110).

- (66) Post-conviction counsel retained Dr. Joan Mayfield in this case to review the reports of Dr. Davies and Dr. Brown and determine if Dr. McGarrahan's testing was consistent with their opinions; she found it was. (WRR6: 15). She disagrees with the opinion that Dr. McGarrahan's testing shows little or no cognitive impairment. (WRR6: 15, 56).
- (67) Dr. Mayfield has a Ph.D. from Texas A&M University; her focus is in child clinical and neuropsychology. (WRR6: 17). From 1996 to 2015, she was a pediatric neuropsychologist at Our Children's House, a pediatric specialty hospital, at Baylor Hospital. (WRR6: 18). She has experience diagnosing children with FASD. (WRR6: 17-19).
- (68) Dr. Mayfield has testified in court about 10 or 12 times. (WRR6: 17). She has never been retained by the State, and she has testified for the defense in a criminal case about five times. (WRR6: 37).
- (69) Dr. Mayfield did not perform any testing of Applicant, meet and evaluate Applicant, or diagnose Applicant. (WRR6: 50-51). She did not review Dr. McGarrahan's raw testing data to prepare for her testimony in the writ hearing. (WRR6: 41).
- (70) Dr. Mayfield examined Applicant's history and testing profile for characteristics consistent with FASD. (WRR6: 39, 69). She concluded his test scores are consistent with an FASD diagnosis, but she cannot say they are conclusory for FASD. (WRR6: 51, 66).

- (71) Dr. Mayfield's testimony at the writ hearing included her opinion that, if she had tested Applicant, she would have conducted a few of Dr. McGarrahan's tests differently and she would have completed some additional testing in the areas of executive functioning, attention and listening, math reasoning, receptive language, and memory. (WRR6: 23, 26-27, 30-31, 34, 51).
- (72) Dr. Mayfield did not perform the additional testing she recommends, and Applicant does not present any evidence the additional testing would have altered the outcome of his testing.
- (73) From Dr. McGarrahan's testing, Dr. Mayfield noted Applicant had substantial attention problems on one of six categories of the Wisconsin Card Sorting Test—and attention problems are consistent with FASD. (WRR6: 24-25, 27-28). She noted that a higher percentage of people diagnosed with FASD have learning disabilities, particularly in math. (WRR6: 29). She explained that Applicant's 15-point discrepancy on the WAIS-IV between his Verbal Comprehension Index of 81 and Perceptual Reasoning Index of 96 is significant because math reasoning is language based; Applicant's lower verbal performance is reflective of a deficiency in math, due to the language component of math reasoning. (WRR6: 29-30, 43, 56-57). She testified that research shows children diagnosed with FASD have a higher propensity to have a split between their verbal IQ score and performance IQ score. (WRR6: 30, 36). She also concluded Applicant's memory testing showed "low average to below average to most of them significantly impaired." (WRR6: 34-35).
- (74) Dr. Mayfield testified that the significant problems she identified in Applicant's testing were the split between his Verbal Comprehension Index of 81 and Perceptual Reasoning Index of 96, his history of learning disabilities, one executive functioning score evidencing attention problems, and memory difficulties exhibited on the Wechsler memory test, California Verbal Learning Test (CVLT), and Rey-Osterrieth test (Rey-

O). (WRR6: 56-57).

- (75) In forming her opinions, she did not consider Applicant's chronic marijuana use, perhaps beginning as early as age 10, or his daily PCP use, from his teens until the time of this offense. (WRR6: 38-39, 44). On cross-examination, she testified that chronic marijuana and PCP use could affect neurocognitive functioning, including causing memory problems and extensive processing problems. (WRR6: 38-39).
- (76) Dr. Mayfield readily admits that conditions other than FASD can cause ADHD; experts do not know if FASD causes ADHD; experts do not know if FASD causes learning disabilities; and many circumstances in a person's childhood could contribute to disabilities like ADHD and learning disabilities. (WRR6: 40).
- (77) Dr. Mayfield did not see any evidence of malingering in Dr. McGarrahan's full neuropsychological battery. (WRR6: 46-47).
- (78) Dr. Mayfield did not know if any of the test scores she considered were influenced by Applicant being fatigued; if fatigue were a factor, it could change some of her opinions. (WRR6: 51-54).
- (79) The trial team retained Dr. McGarrahan to examine and evaluate Applicant prior to trial. (WRR7: 58). Dr. McGarrahan is a licensed psychologist who specializes in forensic and neuropsychology. (WRR7: 57). She examined Applicant on July 5 and October 13, 2011. (WRR7: 86).
- (80) Dr. McGarrahan conducted psychological and cognitive testing of Applicant. (WRR7: 58). She reported to the trial team that her testing showed "very little, if anything, in the way of cognitive impairment;" in other words, Applicant exhibited "mild reductions in performances in some areas at most." (WRR7: 80, 84, 105; WRR State's Exh. 7). At the writ hearing, Dr. McGarrahan explained that the testing did

not show significant cognitive impairment. (WRR7: 85). She also explained that most of Applicant's neuropsychological profile is consistent with his low average intellectual abilities. (WRR7: 80-81). Applicant exhibited some mild problems with respect to memory. (WRR7: 81).

- (81) Dr. McGarrahan's testing revealed Applicant to be in the low average range of intellectual functioning. (WRR7: 103). He had some scattered scores above the low average range and some scattered scores below the low average range: this is to be expected. (WRR7: 103-105).
- (82) Dr. McGarrahan believes the cognitive portion of Applicant's testing was valid; however, he exhibited faking or malingering of psychiatric symptoms. (WRR7: 59-60).
- (83) Applicant's writ counsel, the Office of Capital and Forensic Writs and the law firm of Kirkland & Ellis, retained Dr. McGarrahan for the writ proceeding, in conjunction first with the investigation related to filing the writ and second to consult with counsel and testify at the writ hearing. (WRR6: 167; WRR7: 58).
- (84) Dr. McGarrahan originally scored the raw data she generated from Applicant's testing and created a score sheet. (WRR7: 95; WRR State's Exh. 17). She provided the raw data and score sheet to Dr. Underhill when directed to by the Office of Capital and Forensic Writs. (WRR7: 95-96).
- (85) Applicant called Dr. McGarrahan to testify as a witness at the writ hearing. (WRR7: 57). Dr. McGarrahan testified she has consulted on hundreds—perhaps close to one thousand—criminal cases during her 18 years practicing forensic psychology and neuropsychology. (WRR7: 77).
- (86) Dr. McGarrahan testified that FASD is a neurocognitive condition that neuropsychologists come in contact with on a regular basis; in her examinations, she looks for cognitive impairment related to FASD or any other neurological condition. (WRR7: 60-61). She is qualified to diagnose FASD.

(WRR7: 67). She testified that her cognitive testing of Applicant is consistent with a number of conditions that could be related to brain impairment, including FASD, ADHD, a prenatal developmental issue, head injury, or a variety of other things. (WRR7: 61). Applicant's neuropsychological pattern reflects a pattern that is fairly common in cases of memory impairment; his pattern is not specific to FASD. (WRR7: 61).

- (87) Dr. McGarrahan is aware that any alcohol exposure in utero presents a risk to a fetus. (WRR7: 69-70).
- (88) Dr. McGarrahan testified that prior to her evaluation, the trial team did not have confirmation Ms. Maddox drank alcohol during her pregnancy—because Ms. Maddox was denying alcohol use during pregnancy. (WRR7: 61-62). Dr. McGarrahan explained at the writ hearing that fetal alcohol exposure was a concern in this case; therefore, the team set up additional time for Dr. McGarrahan and Ms. Ross to meet with Ms. Maddox and Applicant's maternal grandmother in order to narrow down whether Ms. Maddox used drugs or alcohol—specifically alcohol—during pregnancy. (WRR7: 66-67; WRR9: 22-23, 42).
- (89) Dr. McGarrahan testified that Ms. Maddox indicated that during the first three months of her pregnancy she may have used some alcohol but not much. (WRR7: 68-69).
- (90) At trial counsel's request, Dr. McGarrahan prepared a memo to Mr. Lollar and Mr. Parks, dated May 14, 2012, explaining the pros and cons of presenting her testimony at trial in Applicant's punishment phase. (WRR4: 77, 138-139; WRR7: 78; WRR State's Exh. 7). The memo was the culmination of many months of ongoing discussions; Mr. Lollar asked Dr. McGarrahan to document her opinion in May 2012, for his records. (WRR4: 75, 82-83; WRR7: 78-79).

- (91) Dr. McGarrahan's opinions from her work on this case included that the results of her neuropsychological exam would not be helpful to Applicant in the punishment phase of his trial because, in part, Applicant exhibited problems with exaggeration and malingering (or faking) of mental illness and psychiatric symptoms. (WRR7: 79, 81; WRR State's Exh. 7). Additionally, although jail personnel had documented a diagnosis of schizoaffective disorder for Applicant, Dr. McGarrahan would have to testify that in her opinion Applicant does not suffer from a severe mental disease, such as schizophrenia spectrum disorder or bipolar disorder. (WRR7: 79-80, 82; WRR8: 49; WRR State's Exh. 7). Dr. McGarrahan would also have to testify if asked that Applicant meets the diagnostic criteria for Antisocial Personality Disorder. (WRR7: 80; WRR State's Exh. 7). Accordingly, Dr. McGarrahan believed her testimony could potentially be more harmful than helpful to Applicant. (WRR7: 82; WRR State's Exh. 7).
- (92) The State's retained psychologist at trial, Dr. Christine Reed, had examined Applicant prior to trial pursuant to the State's *Lagrone*⁶ motion and was ready to testify if Applicant called an expert to the stand who had examined him. (WRR4: 85-87; WRR7: 154-156, 163). Dr. McGarrahan opined at the writ hearing that it would not be beneficial to Applicant for her testimony (particularly in light of the fact Applicant meets the diagnostic criteria for Antisocial Personality Disorder and that he was possibly malingering mental illness during her exam) to open the door for Dr. Reed to testify and bring up not only the information Dr. McGarrahan believed was potentially harmful but a possible determination Applicant was a psychopath or had psychopathic tendencies, which would go toward him being a potential danger to society. (WRR7: 81; WRR State's Exh. 7).

⁶ See *Lagrone v. State*, 942 S.W.2d 602 (Tex. Crim. App. 1997).

- (93) The State's expert, Dr. Reed, was waiting in the wings to testify in the State's punishment rebuttal case at Applicant's trial if his team called an expert to testify who had examined him. (WRR7: 154-156, 163). Calling a defense expert to testify who had examined Applicant would also have placed Dr. Reed's report in the State's hands. (WRR7: 155).
- (94) Dr. McGarrahan is familiar with Dr. Reed's reputation and knows she is well respected. (WRR7: 83).
- (95) The decision whether to call an expert who had examined Applicant in person is a strategy decision. (WRR4: 87-89; WRR7: 81-82, 154-156; WRR8: 51). The trial team must consider not only the benefit received from the testimony of Applicant's examining expert but also the detrimental evidence that may come in through that expert, along with the detrimental evidence that may come in through a competing expert called by the State to testify in rebuttal. (WRR7: 154-156). If Applicant uses an examining expert to present evidence or an expert who has relied on an examining expert, the State may present competing expert testimony.
- (96) The defense team's decision not to call an expert who had examined Applicant was a strategy decision.
- (97) Dr. Underhill created a list of tests Dr. McGarrahan gave Applicant from Dr. McGarrahan's raw data. (Application Exh. 6). Dr. Underhill's list does not include the Structured Interview of Reported Symptoms (SIRS) test that Dr. McGarrahan administered on October 13, 2012; this is an error in his report of Dr. McGarrahan's work. (WRR6: 121; WRR7: 97, 99).
- (98) On July 5, 2011, Dr. McGarrahan did malingering testing of Applicant using the Test of Memory Malingering, the word choice test, the Dot Counting test, and the reliable digit span, which is an imbedded measure (meaning it is part of

- an IQ test, not a separate measure). (WRR7: 97). These tests evaluate performance validity, which is about general effort on cognitive tests. (WRR7: 98).
- (99) On October 13, 2011, Dr. McGarrahan performed additional testing of Applicant to evaluate symptom validity because the trial team had concerns he was malingering. (WRR7: 94, 98). She conducted the SIRS on that date: it showed a high probability of malingering with respect to mental illness. (WRR7: 99).
- (100) Other experts who relied on Dr. Underhill's report, either directly or through another expert, did not have the results of the SIRS test that Dr. McGarrahan performed as part of Applicant's neuropsychological profile; this could have impacted how they viewed the full neuropsychological battery. (WRR6: 122; WRR7: 100-101, 103; Application Exh. 6). This includes Dr. Natalie Brown, Dr. Thomas Dydek, Dr. Courtney Robinson, Charles Rotramel, Laura Sovine, Dr. Julian Davies, Dr. Jeffrey Lewine, and Dr. Joseph Wu. (Application Exh. 1-5, 28; Lewine Report; Wu Report).
- (101) Dr. McGarrahan and the State's writ expert Dr. Jed Falkowski testified at the writ hearing that Applicant exhibited significant indicators of malingering mental illness during his testing, as documented on the SIRS and MFAST. (WRR6: 118-122; WRR7: 100-101).
- (102) Dr. McGarrahan testified it is problematic to explain to a jury that a person can perform satisfactorily on performance validity testing, reflecting effort and motivation to do well, and simultaneously be exaggerating and malingering in other areas. (WRR7: 101). In Dr. McGarrahan's opinion, a jury may view a person who malingers mental illness to be a manipulator. (WRR7: 101-102). Applicant's jail psychiatric records likewise reflected he exaggerated mental illness symptoms to manipulate and for purposes of medication and attention seeking. (WRR7: 102).

- (103) Evidence Applicant was malingering mental illness during his own expert's exam in the pre-trial phase, even if the malingering went to symptom validity as opposed to the cognitive testing, would not have been favorable to Applicant if introduced in the punishment phase of trial. (WRR6: 123; WRR7: 97-101).
- (104) On July 5, 2011, Dr. McGarrahan did not administer the delayed recall portion of the Rey-Osterrieth (Rey-O) test to Applicant because he indicated he was fatigued, was not feeling well, and was essentially done with testing at that point; this was reflected by a note in her raw data. (WRR6: 95-97; WRR7: 106-107). To also indicate this, she marked multiple "Xs" through that line on the score sheet. (WRR7: 106; WRR State's Exh. 17). Because the test was discontinued, Applicant did not receive a score on this test. (WRR6: 54-55; WRR7: 107). Dr. Underhill, however, reported the score as a zero; this is an error. (WRR6: 97; WRR7: 106-107; Application Exh. 6, at 13). A zero on this test, on which a person can score between zero and 36 points, if accurate, would indicate severe impairment in delayed memory. (WRR7: 107-108).
- (105) Other experts who relied on Dr. Underhill's score report of a zero on the delayed recall portion of the Rey-O test as evidence of memory impairment, particularly Dr. Brown and Dr. Davies, relied on incorrect information. (WRR3: 59-61; WRR6: 95-99, 106, 139; WRR7: 108-110; Application Exh. 28, at 6). Relying on this erroneous test score would affect an expert's conclusions. (WRR6: 95-99).
- (106) During Dr. McGarrahan's evaluation, Applicant also exhibited fatigue during the delayed administration portion of the California Verbal Learning Test (CVLT), a test of verbal learning and memory. (WRR6: 98; WRR7: 109). Because Applicant was becoming very sleepy, his effort should be considered at that point, and must be taken into account when analyzing the score. (WRR7: 109-110). Applicant did poorly on this test—reflecting mild to moderate

impairment. (WRR7: 110). Dr. McGarrahan indicated that Applicant's fatigue must be factored into a determination of the degree to which his performance actually reflects significant impairment in memory. (WRR7: 110).

- (107) Other experts who relied on Dr. Underhill's score report for the delayed administration portion of the CVLT as evidence of memory impairment, particularly Dr. Brown and Dr. Davies, relied on a test score that was potentially impacted by Applicant's fatigue during the test administration. (WRR6: 98-99, 106; WRR7: 108-110; Application Exh. 28, at 6-7). Dr. Davies concluded Applicant's performance on this test reflected significant impairment. (Application Exh. 28, at 6-7). Failure to consider the impact of fatigue, which may have reduced Applicant's performance on this test, is problematic and may have resulted in misinterpretation of the test results. (WRR6: 98-99; WRR7: 110).
- (108) Dr. McGarrahan administered a number of tests and subtests that measure executive functioning, or frontal lobe skills. (WRR7: 110-114). Based on all of this testing, Dr. McGarrahan does not believe Applicant has impairment in executive functioning. (WRR7: 114). His score on only one test, the similarities subtest of the WAIS-IV, was lower than what she expected based on his overall functioning, but that might be due to his language difficulties rather than frontal lobe dysfunction. (WRR7: 112, 114-115). After reviewing each test related to executive functioning during her testimony, she concluded that, overall, he did fairly well on executive functioning; she views the results as where she would expect them to be in some instances, given his IQ, and he exhibited some areas of strength within the executive functioning domain. (WRR7: 110-115). She would not characterize his abilities as reflecting significant impairment in executive functioning. (WRR7: 115).
- (109) Regarding her testing of Applicant, Dr. McGarrahan concluded: "Really, the only areas that I saw potential deficits were in complex memory. And both of those tests, the CVLT

and the Rey-O, were the tests that were being administered when [Applicant] was tired and fatigued.” (WRR7: 116).

- (110) Dr. McGarrahan’s testing reflected a 15-point split between Applicant’s Verbal Comprehension Index of 81 and Perceptual Reasoning Index of 96 on the WAIS-IV IQ test. (WRR7: 116; WRR State’s Exh. 17).
- (111) Applicant reported to Dr. McGarrahan that he began using PCP at age 13, and, beginning at age 19, used drugs all day every day, including PCP and marijuana. (WRR7: 92-93). Dr. McGarrahan testified at the writ hearing that Applicant’s history of PCP use could contribute to his attention, concentration, and memory problems. (WRR7: 117-118). His history of PCP use, in its entirety, could also account for the memory problems he exhibited. (WRR7: 119).
- (112) Dr. McGarrahan testified that the pattern of results she saw in Applicant’s testing profile could be attributable to a variety of things, including his ADHD, depression, emotional influences, things he was potentially exposed to in utero, genetic abnormalities, the head injuries he reported, his educational environment, being raised in a disadvantaged environment, or his PCP use. (WRR7: 118-119). She testified “[w]e have no way of really knowing” which of these accounts for Applicant’s profile. (WRR7: 118).
- (113) Dr. McGarrahan testified that PCP is a hallucinogen and is not a soothing drug. (WRR7: 119-120).
- (114) Dr. McGarrahan did not believe Applicant needed additional psychological or medical tests after she completed her seven hours of testing with him. (WRR7: 124). Her examination tests for neurological deficits that are due to a medical neurological condition and tends to encompass all cognitive areas. (WRR7: 124). She did not have a reason to recommend to the trial team that Applicant receive an MRI. (WRR7: 124). Applicant did not have sufficient cognitive impairment on the neuropsychological testing to warrant an MRI. (WRR7: 124-

125).

- (115) Mr. Lollar testified that if Dr. McGarrahan had recommended further testing, he would have pursued that testing. (WRR4: 83).
- (116) The State retained psychologist Jed Falkowski to testify in this writ proceeding. Dr. Falkowski has a Ph.D. in clinical psychology from U.T. Southwestern Medical Center in Dallas with an emphasis in neuropsychology; he practices forensic psychology in criminal and civil cases. (WRR6: 70-71, 76, 78; WRR State's Exh. 9). He participated in a clinical neuropsychology fellowship at the University of Colorado School of Medicine. (WRR6: 76). He is a licensed psychologist in Texas and Colorado. (WRR6: 76). He reviewed a number of records in this case describing Applicant's history including school, medical, juvenile, and criminal records, along with materials prepared in support of Applicant's writ. (WRR State's Exh. 13).
- (117) Dr. Falkowski reviewed Dr. McGarrahan's testing and raw data in this case and re-scored the tests. (WRR6: 79-81). He testified that Dr. McGarrahan's score report was accurate and was largely consistent with his own scoring. (WRR6: 81). He explained that, generally, the testing reflected Applicant has below average intellectual functioning and academic abilities consistent with his level of functioning. (WRR6: 81). Applicant's full scale IQ score on the WAIS-IV is 84, which is in the "below average" range of intellectual functioning. (WRR6: 81). Applicant had a few scattered low scores, as would be expected, but some of these were attributable to testing factors at the time of the evaluation. (WRR6: 81, 83-85). Dr. Falkowski agrees that the testing reflects little if any cognitive impairment. (WRR6: 81-82).
- (118) The bulk of Applicant's scores are consistent with his overall abilities in the low average IQ range of 80 to 89 and consistent with his educational attainment. (WRR6: 82-83). It is quite common for an individual with low average IQ to

- have some impaired scores. (WRR6: 82-83, 108). The scattered impaired scores do not necessarily mean Applicant has neurological damage. (WRR6: 83-84).
- (119) Dr. Falkowski testified that—setting aside potential issues of fetal alcohol or lead exposure—Dr. McGarrahan’s test results are consistent with Applicant’s history. (WRR6: 86).
 - (120) Dr. Falkowski opined that Dr. McGarrahan’s testing results did not reveal any red flags that Applicant needed further testing. (WRR6: 85-86).
 - (121) Dr. Falkowski testified that a 15-point spread between the Verbal Comprehension Index and Perceptual Reasoning Index on the WAIS-IV is not necessarily indicative of brain dysfunction or neurological damage. (WRR6: 87-88). He explained that this 15-point spread is quite common in the general population: the likelihood of a person having a 15-point spread between these two indices is 20 percent. (WRR6: 88-89). Therefore, of a sample of 100 neurologically healthy individuals, 20 would have a 15-point spread between these indices. (WRR6: 88-89). This data is contained in the manual for the WAIS-IV test and in research studies. (WRR6: 89). Ten to 13 percent of the population, like Applicant, have the specific split where the verbal index is the lower score and the perceptual reasoning index is the higher score. (WRR6: 89-90). The 15-point spread is not specific to FASD and is not necessarily driven by brain dysfunction; there are many etiologies or causes, including the person’s general strengths and weaknesses or the quality of a person’s education. (WRR6: 94).
 - (122) Dr. Falkowski testified that not only was Dr. Underhill’s scoring of the delayed portion of the Rey-O incorrect (when he scored a test which was not administered as a zero), but also an evaluator should consider whether fatigue played a role in Applicant’s score of moderately impaired on the immediate recall portion of the test, since the entire evaluation was discontinued shortly thereafter. (WRR6: 95-

98).

- (123) Dr. Falkowski testified that Dr. Brown and Dr. Davies relied primarily on one low score (which fell below one percentile) on a single subset in the Wisconsin Card Sorting Test as evidence of Applicant's impairment in executive functioning. (WRR6: 100-101). Dr. Falkowski disagrees with Dr. Brown, Dr. Davies, and Dr. Mayfield's interpretation of this subtest because it is an embedded performance validity measure that assesses a person's effort or motivation or task engagement on a particular task. (WRR6: 101). In short, Applicant scored very poorly on a subtest that measures effort, and he did well on the other subcomponents of the Wisconsin Card Sorting Test. (WRR6: 101-102). Therefore, Dr. Falkowski concluded Applicant's low score on the one subtest might not be indicative of neurological dysfunction: it may simply be related to effort or motivation on that particular subtest. (WRR6: 102).
- (124) Dr. Falkowski concluded that, other than the one low score on a subset of the Wisconsin Card Sorting Test, Applicant performed in the average and above average range in executive functioning; because his general abilities are in the low average range, executive functioning is a relative strength for him. (WRR6: 102-105).
- (125) Dr. Falkowski testified that results from both sessions of Dr. McGarrahan's testing showed Applicant was over reporting psychotic-type symptoms, feigning, and malingering. (WRR6: 118-121).
- (126) Dr. Falkowski testified that habitual and extensive drug use could contribute to low test scores, even if a person has abstained from use for a period. (WRR6: 125).
- (127) Dr. Falkowski testified that etiologies other than prenatal alcohol or toxin exposure could produce the pattern of results seen in Applicant's testing, including fatigue in the testing environment, being disengaged from a task during

testing, having poor quality of education, or chronic substance abuse. (WRR6: 125-126).

- (128) The Court admitted into evidence at the writ hearing several research articles supporting Dr. Falkowski's opinions in this case. (WRR6: 90-94; WRR State's Exh. 10-12).
- (129) The State's expert at trial, Dr. Reed, is a clinical and forensic psychologist. (WRR4: 5-6, 9, 13-14; WRR State's Exh. 2). She is a licensed psychologist in California and Texas. (WRR4: 13). She estimated she has been retained in forensic cases several hundred times by the State, court, and defense and has testified in court about 30 times. (WRR4: 10-11).
- (130) Pursuant to the Court's *Lagrone* order, Dr. Reed examined Applicant prior to his trial and administered academic, intelligence, and personality testing along with tests of effort and tests of malingering and exaggeration. (WRR4: 7, 16-17; WRR State's Exh. 3). She conducted a clinical interview. (WRR4: 16, 18). Dr. Reed reviewed a number of records relating to Applicant's history. (WRR4: 8, 17; WRR State's Exh. 3, at 2).
- (131) Dr. Reed diagnosed Applicant with Psychotic Disorder Not Otherwise Specified, Depressive Disorder Not Otherwise Specified, Cannabis Abuse in Remission in a Controlled Environment, Phencyclidine Dependence in Remission in a Controlled Environment, and Antisocial Personality Disorder. (WRR4: 6, 29; WRR State's Exh. 3, at 12). She noted that a diagnosis of Malingering needed to be "ruled out." (WRR4: 6-7; WRR State's Exh. 3, at 12).
- (132) Dr. Reed testified at the writ hearing that Antisocial Personality Disorder is a characterological disorder involving a lifetime pattern of behaviors. (WRR4: 31). The criteria for Antisocial Personality Disorder involves a history of engaging in criminal activities, not abiding by the rules of society, aggressive behavior, irresponsibility, lack of remorse, and deceitfulness. (WRR4: 31). In Dr. Reed's experience,

testimony regarding Antisocial Personality Disorder before a jury is detrimental to the defendant. (WRR4: 33).

- (133) Dr. Reed concluded Applicant may have been malingering during the exam. (WRR4: 6-7). Malingering is the exaggeration, feigning, or overreporting of psychological symptoms or distress. (WRR4: 7, 26, 62-63). Applicant showed as malingering on two screening measures, but not on a comprehensive measure. (WRR4: 7, 26-27).
- (134) Some personality testing of Applicant indicated significant exaggeration and overreporting of symptoms. (WRR4: 27-28).
- (135) Dr. Reed concluded Applicant did not have any gross problems with either attention or memory; he appeared within normal limits in those areas. (WRR4: 23). Applicant did not exhibit a Learning Disability in Dr. Reed's testing. (WRR4: 26).
- (136) Prior to trial, Dr. Reed provided her report to the Court, and it was sealed. (WRR4: 15). The Court ordered Dr. Reed not to discuss the results of her evaluation with either party; the results would only be made available to both sides if Applicant called a witness to testify at trial who had examined Applicant. (WRR4: 15). The parties did not receive a copy of Dr. Reed's report until during this writ proceeding in 2015, pursuant to an order by this Court. (See WRR4: 15-16; WRR State's Exh. 3).
- (137) Post-conviction and prior to her testimony in the writ hearing, Dr. Reed reviewed the affidavits of Applicant's experts in this writ, Dr. McGarrahan's raw test data, and the writ application. (WRR4: 8-9, 64-65).
- (138) In her testimony at the writ hearing, Dr. Reed characterized her testing as consistent with Dr. McGarrahan's testing. (WRR4: 9).

- (139) Dr. Reed received Dr. McGarrahan's raw data (pursuant to a court order) in about 2015; at the same time, she sent her raw data to Dr. Mayfield. (WRR4: 34).
- (140) If Dr. Reed had testified at trial, she could have testified to any information contained in her report, some of which would have been detrimental to Applicant. (See WRR4: 35). Some of the information conflicted with other information put forth at trial or was contrary to defense themes or theories. This includes that: Applicant reported he did not experience abuse or neglect as a child; he reported he had a good relationship with and was close to family members; he reported no substance abuse problems in his family; he had two fire setting incidents as a child, including setting the grass on fire in a wooded area when he was age 11 or 12; he was a member of the "Bloods" gang from age 14 to 18 or 19; he was involved in 3 or 4 gang-related fights as a teen; in Kindergarten or first grade he used razorblades that another child brought to school to cut his and another child's jacket; he was suspended from school a few times; he was under the influence of PCP when he was in possession of marijuana at school in ninth grade; when he dropped out of high school, he hung out with friends who were selling drugs and involved in gangs; he never sought mental health treatment in his teens or adulthood; he inconsistently reported whether his psychiatric problems of paranoia and hallucinations began before or after initiating PCP use; he was stressed and depressed due to financial problems at the time of this offense; he denied symptoms of mental illness like auditory or visual hallucinations or delusions at the time of the offense; his drug use history includes using PCP and tobacco dipped in formaldehyde every day from age 16 until his arrest; at age 14, he took his mother's car and drove to Longview, Texas; jail mental health records indicate he is "medication seeking;" jail records indicate he has been moved a number of times in the jail due to bullying and threatening other inmates; Applicant denied engaging in bullying and threatening other inmates and described himself as the

victim in these incidents; he initially denied having any disciplinary incidents in the jail but later admitted there were several, including altercations with other inmates; and he reported typically receiving \$1500 per month of financial support from various women he had relationships with, and that was how he made his money. (WRR State's Exh. 3, 4).

- (141) During this proceeding, the Court allowed Applicant to undergo MRI testing and for both parties to file expert reports related to the testing. (WRR5: 72- 73). Applicant underwent MRI and Diffusor Tensor Imaging (DTI) on January 10, 2019.
- (142) On June 12, 2019, Applicant filed reports by Jeffrey Lewine, Ph.D., and Joseph Wu, M.D. regarding their analysis of Applicant's MRI and DTI imaging. These reports were attached as Exhibit A and B, respectively, to Applicant's filing titled "Roderick Harris's Submission of Additional Evidence Pursuant to the Court's November 26, 2018 Order."
- (143) Dr. Lewine's and Dr. Wu's reports are not sworn to by affidavit or otherwise. Because the reports are not sworn by affirmation or oath, or verified, the Court does not consider them to carry the same weight as sworn testimony.
- (144) On September 16, 2019, the State filed the affidavit of Joshua Shimony, M.D., Ph.D., along with its attachments A through C. Dr. Shimony has been a full time neuroradiologist at Washington University School of Medicine in St. Louis since 2001. He indicates he is also involved in research in the area of DTI, which includes the parameter of Fractional Anisotropy (FA). (Exh. B, Shimony Report, p. 1).
- (145) Dr. Shimony's September 12, 2019 affidavit and report indicates he reviewed the MRI images of Applicant's brain that Applicant's counsel provided to the State. (Exh. B, Shimony Report, p. 1). He also reviewed the reports by Applicant's experts, Dr. Lewine and Dr. Wu.

- (146) After reviewing Applicant's MRI imaging, Dr. Shimony concluded the "MRI is normal." (Exh. B, Shimony Report, p. 1).
- (147) After reviewing Dr. Lewine's and Dr. Wu's reports, Dr. Shimony noted the two experts reach "different, conflicting conclusions" regarding the volumetrics findings (referring to pages 5, 8, 39, and 47-49 of Applicant's filing). Dr. Shimony stated: "The discrepancy between these two analyses is gaping and belies the fact that the underlying numbers present a false sense of scientific accuracy." Applicant's own two experts reached conflicting conclusions: Dr. Lewine found all regions of interest in the brain to be statistically abnormal and small, while Dr. Wu found no areas of the brain to be significantly smaller with the exception of two areas (although Dr. Shimony disagrees with Dr. Wu's interpretation of the data related to those two areas). (Exh. B, Shimony Report, p. 2).
- (148) Dr. Shimony also concludes there is again a discrepancy between Applicant's two expert reports regarding the DTI data (referring to pages 6, 11, 39, 40-42, and 51-65 of Applicant's filing). (Exh. B, Shimony Report, p. 2-3).
- (149) Regarding findings of the DTI testing, Dr. Shimony reports that Dr. Lewine "presents a picture of widespread abnormality involving 25 of 48 regions [of the brain] with abnormal FA values. On Dr. Wu's interpretation of the DTI testing, Dr. Wu reports a much smaller group of regions with decreased FA, however he also presented regions with increased FA which Dr. Lewine found to have decreased FA. (Exh. B, Shimony Report, p. 2).
- (150) Dr. Shimony concludes:
- [T]he application of Volumetrics and DTI in the individual [traumatic brain injury] patient or litigant is outside of the standard practice of medicine and

neuroradiology and fraught with potential pitfalls. *The large gap in the results presented by Mindset [Dr. Lewine] and by Dr. Wu attest to this fact.* Currently, there are no studies that demonstrate the utility, accuracy or reliability of these methods for the diagnosis in individual patients. Currently DTI is only used in individuals for pre- surgical planning in the case of patients with brain tumors. The error rates of these methods are currently unknown and the variability in equipment, acquisition parameters and analysis software complicates interpretation of these methods in a single individual.

(Exh. B, Shimony Report, p. 5).

- (151) Dr. Shimony reports that the American College of Radiology (ACR), the organization that establishes guidelines for the standards of care in the field of Radiology *“does not endorse DTI or Volumetrics for the diagnosis of [traumatic brain injury] in individuals.”* In fact, the ACR explicitly states that DTI is usually not appropriate for the diagnosis of traumatic brain injury. (Exh. B, Shimony Report, p. 4).
- (152) Dr. Shimony reports that the *“use of DTI and/or Volumetrics is not widely used and is **not** generally accepted in the clinical diagnosis of traumatic brain injury (TBI) for individual patients.* At the majority of Level I Trauma hospitals in this country (including the biggest and best academic centers) these methods are not performed on individuals for the diagnosis of TBI since these methods are not reliable for this purpose. None of these well respected academic institutions provide reports on these techniques for individual patients in traumatic brain injury.” (Exh. B, Shimony Report, p. 4).
- (153) Dr. Shimony concludes that the reported DTI and Volumetric “findings” of Applicant’s experts *“present no evidence of an abnormality and are of no consequence.”* He adds, “Given our

current overall lack of understanding of the application of these methods in individuals, it is difficult to make judgments as to what is normal or abnormal, especially in the setting of litigation.” (Exh. B, Shimony Report, p. 5).

- (154) Dr. Shimony notes in his report that Dr. Wu provides references to extensive DTI literature on brain injury (80 articles); however, all but a few of these articles compare a control group to a group of subjects with brain injury, and not with a single individual, as in the case here. (Exh. B, Shimony Report, p. 3). The few articles that look at individuals are case reports and thus are not considered scientifically valid. (Exh. B, Shimony Report, p. 3). The Court finds that the use of quantitative analysis of volumetrics and DTI on MRI imaging in individual subjects is not a generally accepted practice in the medical community for the clinical diagnosis of brain injury.
- (155) The Court finds Dr. Shimony’s affidavit regarding Applicant’s MRI imaging to be credible and reliable.
- (156) Dr. Shimony attaches in Exhibit C a well-known 2013 published report on guidelines for ethical use of neuroimaging in medical testimony, in which the author stated:

[T]he neuroradiology community has not arrived at a consensus view of the value of DTI in (particularly mild) head trauma. Nonspecific pattern or findings obtained with DTI prohibit the confirmation or diagnosis of mild [traumatic brain injury] with reliability.

C.C. Meltzer et al., *Guidelines for the Ethical Use of Neuroimages in Medical Testimony: Report of a Multidisciplinary Consensus Conference*, Am. J. of Neuroradiology, Aug. 29, 2013.

- (157) The Court finds the quantitative volumetric and DTI analysis performed by Dr. Lewine and his colleagues at Mindset is not persuasive or credible. The Court does not find Dr. Lewine’s

conclusion that Applicant's "set of quantitative MRI evaluations is markedly abnormal" to be persuasive or credible. (See Exh. A, Lewine Report).

- (158) Dr. Wu concluded that Applicant's history and MRI DTI and quantitative volumetrics patterns are consistent with diagnoses of brain damage caused most likely by lead toxicity, traumatic brain injury, and fetal alcohol spectrum disorder, based on review of the clinical records and imaging findings. (Exh. B, Wu Report). In considering Applicant's history, Dr. Wu appears to have accepted prior diagnoses related to exposure to lead and alcohol in utero as conclusive.
- (159) The Court does not find Dr. Wu's conclusion that Applicant's history and MRI DTI and quantitative volumetrics patterns to be likely caused by lead toxicity and fetal alcohol spectrum disorder to be persuasive or credible. Applicant fails to prove by a preponderance of the evidence that trial counsel was deficient by not further investigating a possible fetal alcohol spectrum disorder and by not presenting that diagnosis to the jury.
- (160) There is no single test an expert can give a person to determine if the person has a FASD diagnosis. (WRR3: 84; WRR6: 115; WRR7: 122-123). An FASD diagnosis is based on the clinical judgment of the examiner. (WRR3: 84; WRR6: 115-116; WRR7: 123).
- (161) Dr. Davies formed conclusions and diagnosed Applicant with ARND in part based on incorrect test scoring by Dr. Underhill of Dr. McGarrahan's raw data in two important areas.
- (162) Dr. Davies seemed to conclude that because Applicant had some alcohol exposure in utero, because any alcohol exposure presents a risk, and because Applicant's neuropsychological testing is in his opinion consistent with ARND, that a diagnosis of ARND is appropriate.

- (163) While Dr. Davies addressed other potential etiologies, some of which appeared as significant as Ms. Maddox's prenatal alcohol use, in light of other expert testimony in this proceeding the Court does not find his ready dismissal of those possible etiologies to be credible. (See Application Exh. 28, at 13).
- (164) Dr. McGarrahan testified that confirmation bias in testing occurs when an examiner goes in with a preconceived idea about how a person should perform based on the examiner's experiences or knowledge or what the research says. (WRR7: 121-122). Dr. Falkowski testified confirmation bias is when a person searches for things to confirm a previously held hypothesis or idea—such as when an examiner wants to consider whether a person has FASD and looks for things consistent with FASD. (WRR6: 118). Confirmation bias also encompasses a tendency to ignore information that may be inconsistent with a hypothesis or idea. (WRR6: 118).
- (165) The Court finds both Dr. Davies and Dr. Mayfield are influenced by confirmation bias. Particularly, Dr. Mayfield approached her analysis in this case based on a referral question by post-conviction counsel to examine Applicant to identify evidence consistent with ARND. Based on the testimony of the expert witnesses in the courtroom, the Court finds this is not the usual approach of a neutral examiner—to review a case to look for circumstances and characteristics of a person consistent with a pre-determined diagnosis. For these reasons, the Court finds Dr. Mayfield's testimony is not persuasive in this case.
- (166) At the writ hearing, Applicant presented the testimony of Richard Burr regarding the guidelines for standards of care promulgated by the American Bar Association and Texas Bar Association for practice in a death penalty case, particularly regarding the adequacy of an investigation and reasonableness under the standards. (WRR9: 70).

- (167) Mr. Burr received his law degree from the University of Kentucky in 1976. (WRR9: 72). He began capital defense work in 1979. (WRR9: 72). Since 1984, his focus had been representing inmates in Texas who have been sentenced to death. (WRR9: 73; WRR Applicant's Exh. 15).
- (168) Mr. Burr did not review the record of the pre-trial proceedings in this case; with the exception of small excerpts, he did not review the trial record; he did not review any of the trial attorneys' or mitigation specialist's billing records; he did not interview anyone on Applicant's trial team; and, he did not review the trial attorneys' or mitigation specialist's trial files. (WRR9: 12-13, 125, 133-134).
- (169) To form his opinions in this case, Mr. Burr relied on and reviewed the habeas application, a fact summary of Applicant's writ counsel's investigation in this case, the May 14, 2012 email from Dr. McGarrahan to Mr. Lollar and Mr. Parks, Dr. John Hagedorn's affidavit regarding gang evidence, some excerpts from the punishment phase trial testimony, closing arguments at trial, some of Mr. Lollar's testimony in this writ proceeding, and reports from counsel regarding Mr. Parks' and Mr. Howard's testimony. (WRR9: 10-13).
- (170) Mr. Burr testified that counsel's trial files are the best evidence reflecting an investigation in a death penalty case, particularly because they are the only way to document better than the attorneys' memories what they did or did not do. (WRR9: 132-133). Mr. Burr has often reviewed trial files in other cases where he testified as an expert about the standards of care in a death penalty case. (WRR9: 133). Yet, he did not review the trial attorneys' files before forming his opinions or testifying in this case. The Court finds Mr. Burr formed his opinions on limited information. Particularly, he did not speak to the trial attorneys or review any of the trial team's files. Therefore, he was operating from a deficit of information about the investigation made in this case and the factors affecting trial counsel's decisions.

- (171) To form his opinions, Mr. Burr relied substantially (in part) on the writ application and a summary of the facts provided by Applicant's counsel, which he did not bring with him when he testified at the writ hearing. (WRR9: 9-13, 13). He appeared to be operating on the belief he was "essentially testifying about facts that were known and established in giving his opinion." (WRR9: 134). However, the facts he accepted as "known and established" were compilations prepared by Applicant's counsel, which the witness did not bring with him to court. (WRR9: 9-10, 13, 134).
- (172) Mr. Burr acknowledged it is well established that the ABA and Texas Bar Association guidelines are not law, but guidelines of practice. (WRR9: 126- 127). *See Bobby v. Van Hook*, 130 S. Ct. 13, 17 (2009) (per curiam).
- (173) Mr. Burr expressed no opinions regarding the tactical decisions made in this case or the prejudice prong of *Strickland*. (WRR9: 70, 127).
- (174) Mr. Burr has known Mr. Parks and Mr. Lollar for a long time and has consulted with them on some of their cases. (WRR9: 117). He believes they are very qualified practitioners. (WRR9: 117-118).
- (175) Although Mr. Burr testified he is very familiar with death penalty litigation in the state of Texas, he was not aware that the trial judge in the instant case declared the Texas death penalty scheme unconstitutional. (WRR9: 119- 121, 125).
- (176) Mr. Burr testified that he has tried two death penalty cases during his career: the Timothy McVeigh case in federal court and a re-sentencing case in state court in Florida in the early 1990s. (WRR9: 121-123). He has not tried a death penalty case in Texas. (WRR9: 122). The Court finds Mr. Lollar's and Mr. Park's experience trying death penalty cases far exceeds Mr. Burr's experience. (WRR4: 68-69; WRR8: 13; WRR9: 122-123).

- (177) Mr. Burr has testified or provided affidavits in at least several post- conviction state and federal death penalty proceedings in which he testifies in support of ineffective assistance of counsel claims; he has never provided testimony in this regard on behalf of the State or Government. (WRR9: 123- 124, 127).
- (178) Mr. Burr testified that the standards of care under the ABA and Texas Bar Association guidelines call for a capital trial defense team to have one member who has specialized knowledge about a broad spectrum of mental disorders and can point the team toward an appropriate investigation—although this person is *not* required to be an expert herself. (WRR9: 82, 84- 85, 92, 129-130).
- (179) Mr. Burr acknowledged that adequate investigation does not mean counsel must go down every rabbit hole, but in his own opinion if something suggests additional information could benefit the client, counsel should pursue it. (WRR9: 82-83).
- (180) Mr. Burr testified that if a client has evidence of prenatal exposure to alcohol and evidence of behavioral manifestations consistent with fetal alcohol exposure, even with a current neuropsychological assessment showing only mild deficits in one domain, counsel needs to keep investigating, because in his opinion a neuropsychological assessment resulting in limited impairment does not negate a diagnosis of a fetal alcohol syndrome disorder. (WRR9: 85-90, 92, 95-96). In Mr. Burr's opinion, a neuropsychological exam is not the only way to confirm a diagnosis of fetal alcohol disorder: he testified it is a tool, but it is not the only tool. (WRR9: 89).
- (181) Mr. Burr testified that he took a graduate course in neuropsychology in 1983—35 years ago. (WRR9: 90). He does not, however, conduct neuropsychological testing, have a medical license, or have a psychologist's license that allows him to diagnose an FASD disorder. (WRR9: 91).

- (182) Cross-examination of Mr. Burr revealed that sometimes in reviewing a case and providing opinions relating to ineffective assistance of trial counsel, Mr. Burr testifies as to his own recommendations for practice that go above and beyond those contained in the ABA and Texas Bar Association guidelines. (WRR9: 130-132).
- (183) The Court finds that a determination whether a neuropsychological examination reflecting limited impairment can rule out a fetal alcohol spectrum disorder is beyond the scope of Mr. Burr's expertise as a licensed attorney. Likewise, the Court finds Mr. Burr's opinion that a neuropsychological exam is not the only way to confirm a diagnosis of FASD is beyond the scope of Mr. Burr's expertise as a licensed attorney.
- (184) The Court finds this level of detail in Mr. Burr's testimony regarding an investigation of possible FASD moves beyond the scope of the standards of care recommended by the ABA and Texas Bar Association guidelines in a mitigation investigation to what Mr. Burr's personal recommendations might be under a set of facts.
- (185) Mr. Burr, in fact, testified there were no specific prevailing professional norms applicable to a trial counsel's response to evidence of fetal alcohol exposure in the 2009 to 2012 time period. (WRR9: 92).
- (186) Mr. Burr testified that it is now nearly the standard of practice in post-conviction death penalty writs of habeas corpus to include ineffective assistance of counsel claims. (WRR9: 127-128).
- (187) Mr. Burr acknowledges that when a defendant puts an expert on the stand who has examined him, a State's expert is likely to testify to a diagnosis, such as Antisocial Personality Disorder, that is extremely prejudicial to the defendant. (WRR9: 97-98). He explained that, in his opinion, based on the evolution of the DSM-II to the DSM-5,

Antisocial Personality Disorder is now a diagnosis based on behaviors rather than flawed character (i.e., criminal behaviors, lack of responsibility in relationships, not being truthful, and not respecting other's rights). (WRR9: 98-99). Mr. Burr proposes defense counsel can neutralize the impact of evidence of Antisocial Personality Disorder "by explain[ing] it by virtue of the very mental health problems that . . . are often explanatory of those behaviors," and by helping jurors understand it is not pejorative, and aggravating in and of itself, but simply a classification based on a person's history. (WRR9: 99, 107).

- (188) The Court finds Applicant's symptoms which his experts say are consistent with ARND are also consistent with other causes, conditions, or circumstances. The Court finds that, even if all of the evidence presented in this writ proceeding relating to ARND had been presented at trial, the jury would have concluded at best that fetal alcohol exposure may have caused some of Applicant's conditions or characteristics, such as ADHD or a learning disability, but other etiologies could also explain those conditions.
- (189) The Court finds trial counsel were not deficient by not presenting a diagnosis to the jury that primarily accounts for underlying conditions such as ADHD, a learning disability, and other conditions when the jury received some evidence about those underlying conditions and circumstances, including that Applicant was diagnosed with ADHD at a young age and participated in special education throughout his schooling.
- (190) The Court finds trial counsel are not deficient for not presenting a diagnosis of ARND, which Applicant's experts in this writ allege is based on significant cognitive impairment, when Applicant's neuropsychological expert in the pre-trial phase advised them that based on a full neuropsychological battery, Applicant had little or no cognitive impairment.

- (191) Had Applicant presented evidence of a diagnosis of ARND at trial, the State could have presented a psychologist like Dr. Reed or a similar witness to testify that Applicant's cognitive testing revealed little or no cognitive impairment.
- (192) Had Applicant presented evidence of a diagnosis of ARND at trial, the Court would have required Applicant to release the raw data and notes the ARND expert relied on in forming his opinions—including Dr. McGarrahan's raw data and notes—to the State's expert. The State's expert could have then testified that the State's and Applicant's pre-trial psychological exams were similar, with both showing little or no cognitive impairment. From this, the jury may have concluded the ARND expert had either misinterpreted the data or interpreted it in such a way to support his own theory.
- (193) Evidence Applicant suffered from a permanent neurological condition would have been inconsistent with the defense team's punishment theme that Applicant's violent criminal behavior was due to his PCP use, and such behavior would cease to be a problem in a controlled environment like prison where Applicant would not have access to PCP. (See WRR4: 97; WRR8: 39, 41-43).
- (194) Even assuming counsel's investigation and failure to present evidence relating to fetal alcohol spectrum disorder was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice. Trial counsel's investigation into alcohol exposure in utero and the lack of presentation of an expert in fetal alcohol syndrome did not prejudice applicant's defense.
- (195) The Court finds that even if Applicant's case of ARND had been presented to the jury, the ARND evidence would not have altered the jury's decisions in answering the special issues in the punishment phase.

- (196) The weight and credibility of ARND evidence, if presented at trial as presented here, would have had diminished value due to the following additional evidence. Applicant exhibited little or no significant brain impairment during pretrial testing by both parties. Dr. Davies' conclusions about significant cognitive impairment were primarily based on two test- scoring problems, an arguable misinterpretation of the executive functioning domain testing, and without him having knowledge of the fatigue Applicant exhibited during the exam. Applicant's own expert Dr. Mayfield did not examine him or diagnose him with ARND. A State's neuroradiologist expert finds Applicant's MRI imaging to be normal. By applying the quantitative DTI and volumetrics analysis to an individual, Applicant's experts are using the technology in a manner not accepted in the general medical community and not used in major medical centers to diagnosis brain impairment, and the medical association publications and standards advise against it. There is evidence that Ms. Maddox drank as little as a few glasses of wine on the weekends during the first six weeks of pregnancy, which—though any exposure presents risk—is in fact minimal exposure under the guidelines describing minimal exposure in the DSM-V. Also, the jury might have believed that the primary deficit Applicant exhibited during his pretrial testing, a memory deficit, was due to his history of extreme PCP use.
- (197) The jury already knew Applicant had a childhood diagnosis of ADHD. The jury already knew Applicant was in special education. The jury already knew Applicant had some childhood mental health problems. The jury already heard evidence of other adverse childhood conditions and circumstances Applicant experienced in addition to these through his family members, Dr. Roache, and Dr. Kessner.
- (198) No expert in this proceeding testified Applicant still has a diagnosis of ADHD or a learning disability. The jury could have concluded, therefore, that if fetal alcohol caused these

impairments, they appear to have resolved prior to Applicant's adult psychological testing.

- (199) There is no direct link between ARND and Applicant's criminal behavior.
- (200) Calling an expert to testify who examined Applicant or relied on another expert's psychological examination would have opened the door to the State gaining access to Dr. Reed's report and to any information Applicant's testifying witness relied on in forming his or her opinion, including Dr. McGarrahan's raw data and notes. Applicant malingered symptoms of mental illness during his exam with Dr. McGarrahan. The trial team had succeeded in placing some evidence Applicant suffered from serious mental illness before the jury, including through family members and Dr. Roache. Juries tend to view a person who fakes mental illness and symptoms of mental illness to be a manipulator. This evidence, though not specifically relevant to the cognitive testing for the ARND testimony, would have been extremely detrimental to the rest of Applicant's case in the punishment phase of trial.
- (201) It is not reasonably likely that the outcome of Applicant's trial would have been different even if counsel had presented evidence of fetal alcohol spectrum disorder or ARND in the punishment phase.
- (202) In assessing prejudice under *Strickland*, the question is whether it is "reasonably likely" the result would have been different. *Harrington v. Richter*, 562 U.S. 86, 111 (2011); *Strickland*, 466 U.S. at 696. The likelihood of a different result must be substantial, not just conceivable. *Richter*, 562 U.S. at 112.
- (203) There is no substantial likelihood that presenting expert testimony like that of Dr. Davies, Dr. Mayfield, Dr. Lewine, or Dr. Wu in support of fetal alcohol spectrum disorder or ARND would have resulted in a different punishment verdict. *See Harrington v. Richter*, 562 U.S. at 111-112;

Strickland, 466 U.S. at 696.

Trial Counsel Did Not Render Ineffective Assistance by Not Investigating and Presenting Childhood-Lead-Exposure Evidence in the Punishment Phase

- (204) Applicant presented an affidavit and the testimony of Dr. Thomas Dydek in this writ proceeding. (Applicant's Writ Exh. 2; WRR3: 125-162).
- (205) Dr. Dydek is a board-certified toxicologist and licensed engineer with a Ph.D. in Environmental Science and Engineering. (Applicant's Writ Exh. 2, at 1; WRR3: 130). Dr. Dydek has operated his own environmental consulting firm since 1994. (Applicant's Writ Exh. 2, at 1; WRR3: 129).
- (206) Dr. Dydek testified that he has been retained as an expert witness in toxicology approximately 250 times, almost always in civil litigation. (WRR3: 132). Dr. Dydek has been deposed fifty times and testified at trial ten times. (WRR3: 133). Dr. Dydek has testified in "one criminal matter" that "was actually kind of a mixture." (WRR3: 125, 154).
- (207) Dr. Dydek has never testified in a death penalty case, and has no expertise in the presentation of mitigation evidence in a death penalty case. In fact, when asked whether he understood that the jury determines what evidence is mitigating, Dr. Dydek testified that he did not "really know the details of those things." (WRR3: 162).
- (208) Dr. Dydek was retained by the Office of Capital and Forensic Writs in 2014 to provide an opinion about Applicant's childhood exposure to lead. (Applicant's Writ Exh. 2, at 1).
- (209) In order to form his opinion, Dr. Dydek reviewed affidavits collected by Applicant's post-conviction counsel from Dr. Brown, Applicant's mother Pamela Maddox, grandmother Shirley Cook, and stepfather Ramon Maddox, and Garland ISD school records from 2003. (WRR3: 127; Applicant's Writ

- Exh. 2, at 3-5). Dr. Dydek also reviewed information related to the RSR Corporation lead smelter located in West Dallas and its history of pollution emissions. (WRR3: 144).
- (210) Dr. Dydek did not interview Applicant or any of Applicant's family, nor did he review any medical records. (WRR3: 127-128). Dr. Dydek did not consult with any of the experts in this case. (WRR3: 127).
- (211) Dr. Dydek presented two primary opinions at the evidentiary hearing: (1) that Applicant more likely than not was exposed to excessive levels of lead in utero and as a small child; and (2) early life lead exposure can result in violent behavior in adults. (WRR3: 126, 144-145).
- (212) Dr. Dydek testified Applicant was exposed to lead via the RSR Corporation smelter both in utero, and as a young child. (WRR3: 145-146). According to Dr. Dydek, Applicant's grandmother, Shirley Cook, who lived on Pueblo Street near the smelter, would have been exposed to lead in the air and soil which she would have passed to Applicant's mother, Pamela Maddox, in utero. (Applicant's Writ Exh. 2, at 4). Dr. Dydek also opines Applicant's mother would have been exposed to lead while she lived on Nomas Street near the smelter, and would have passed lead to Applicant in utero. (Applicant's Writ Exh. 2, at 4). Dr. Dydek testified the RSR Corporation smelter ceased operations several months prior to Applicant's birth. (WRR3: 149). Dr. Dydek opined Applicant would have been exposed to lead in the soil while playing outside at his house on Nomas Street, at his grandmother's house on Pueblo Street, at his elementary school, and in Tipton Park where he played as a child. (WRR3: 145-146, 148-149).
- (213) Dr. Dydek testified that children are more susceptible than adults to lead exposure, and the brain and central nervous system of the child may be affected. (WRR3: 134). Children who are exposed to lead may develop higher incidences of ADHD and lack impulse control. (WRR3: 136).

- (214) Dr. Dydek also noted that there is “quite a large and growing body of scientific evidence that shows that an in utero and/or early childhood exposure to lead can lead to increases in delinquent and violent behavior and rates of criminality when those lead-exposed children grow into teenage and early adult[s].” (WRR3: 136-137). Based on his review of this literature, Dr. Dydek offered the opinion that “it is more likely than not that a child exposed to lead either in utero and/or as a young child is a definite risk factor for later violent, antisocial or delinquent behavior.” (WRR3: 139).
- (215) Dr. Dydek testified that recent exposure to lead is determined via blood testing, whereas historic exposure to lead is determined by measuring bone lead levels.⁷ (WRR3: 141). Bone lead testing is conducted using x-rayfluorescence or “XRF.” (WRR3: 141-142). Measurements are typically done using the tibia. (WRR3: 142).
- (216) No evidence regarding blood lead testing or bone lead testing of Applicant was presented in this proceeding. Dr. Dydek testified that he was not aware of any testing of Applicant’s blood lead levels as a child, or of bone lead testing as an adult. (WRR3: 159).
- (217) In his affidavit, Dr. Dydek states that “[a]s a young child, [Applicant] was diagnosed with dysthymia (mild depression) and with ADHD. He was placed in special education classes because he had behavioral issues and a learning disability.” (Applicant’s Writ Exh. 2, at 5). Dr. Dydek further explained that neuropsychological testing conducted in 2011 revealed Applicant “had an IQ of 84, as well as uncovered evidence of damage to the frontal, temporal, and parietal

⁷ On December 4, 2018, Applicant filed a report from Ferne Nilsa Cummings, M.D., titled “Bone Lead Test Result and Interpretation,” for Applicant’s mother, Pamela Maddox. This Court granted the State’s Motion to Strike this report because it was filed by Applicant in contravention of this Court’s November 26, 2018 Order. Accordingly, the report was not considered by this Court in this writ proceeding.

lobes of his brain.” (Applicant’s Writ Exh. 2, at 5). According to Dr. Dydek, these medical conditions and behavioral traits are “correlated and associated with lead exposure.” (Applicant’s Writ Exh. 2, at 6).

- (218) Dr. Dydek testified that ADHD and learning disabilities are multifactorial, meaning that there are multiple “risk factors” for these diagnoses. (WRR3: 162). Dr. Dydek conceded that childhood lead exposure is only one risk factor that is correlated or associated with ADHD and learning disabilities. (WRR3: 162).
- (219) Dr. Dydek also conceded that he had not reviewed any medical records that reflected Applicant had structural brain damage. (WRR3: 159). Dr. Dydek testified he was relying on Dr. Brown’s affidavit as evidence that Applicant had organic or structural brain damage. (WRR3: 159-160). Dr. Dydek testified he was unaware whether Dr. Brown conducted any psychological testing of Applicant. (WRR3: 160). Dr. Dydek testified he was not aware that the 2011 psychological testing Dr. Brown references in her affidavit was conducted by Dr. McGarrahan, the trial team’s neuropsychologist. (WRR3:160). Dr. Dydek did not consult with Dr. McGarrahan and was unaware of her conclusions in this case. (WRR3: 160-161). Dr. Dydek was also unaware the State’s expert, Dr. Reed, had evaluated Applicant in 2012 and conducted psychological testing of Applicant. (WRR3: 161). Dr. Dydek was not provided with a copy of Dr. Reed’s report and did not consult with her. (WRR3: 161).
- (220) Dr. Dydek testified that if any of the information that he relied on in forming his opinion was incomplete or inaccurate, his opinion could possibly change. (WRR3: 161). However, Dr. Dydek acknowledged that he was not qualified to make judgments about “conflicting neuropsychological effects.” (WRR3: 161).
- (221) There is no specific neurological test which determines absolutely that a person has been exposed to a toxin. (WRR6:

116). A diagnosis that a person has neurological damage from exposure to a toxin like lead is based on clinical judgment. (WRR6: 116).

- (222) The trial team sought the opinion of a respected and credentialed neuropsychologist, Dr. McGarrahan, who examined Applicant and concluded he has little or no neurological impairment. (WRR8: 40-41). Dr. McGarrahan's conclusions are inconsistent with a theory that Applicant was exposed to lead as a child—or, if Applicant were exposed to lead, his neuropsychological exam as an adult shows no evidence of that exposure.
- (223) Because Dr. Dydek was not provided with Dr. McGarrahan's opinion that Applicant has little or no brain impairment, Dr. Dydek's testimony, if any, suggesting Applicant may have brain damage as a result of childhood lead exposure lacks credibility.
- (224) The Court adopts and incorporates the above findings and conclusions related to Applicant's experts Dr. Lewine and Dr. Wu and their analysis of Applicant's brain imaging.
- (225) Applicant fails to prove by a preponderance of the evidence any deficiency in trial counsel's failure to investigate and present mitigating evidence related to childhood exposure to toxic levels of lead.
- (226) Dr. Dydek opines only that Applicant may have received lead exposure—more likely than not—relying primarily on the geographic location of Applicant and his family, along with dubious conclusions by Dr. Brown, a psychologist who did not testify in this proceeding and who, in interpreting the neuropsychological testing, relied on an incorrect score report by Dr. Underhill and testing for which she had no knowledge of relevant environmental factors. At best, Dr. Dydek relies on neuropsychological testing for which there are conflicting interpretations. There is no medical evidence proving lead exposure.

- (227) A Public Health Assessment, from the Agency for Toxic Substances and Disease Registry, that Applicant submits to this Court in support of his claim reflects that not all inhabitants in the neighborhoods surrounding the smelter plant sustained elevated blood lead levels. (Applicant's Writ Exh. 21, at 13- 16). Although counsel could have investigated further and presented evidence to the jury that Applicant and his mother lived close to the smelter plant and more likely than not were exposed to lead, there is no medical evidence to support such a conclusion. Having possibly been exposed—even “more likely than not” having been exposed—is a weak claim to place before a jury. Applicant's own evidence shows that not everyone who lived near the plant sustained lead exposure. The jury likely would have concluded Applicant may—or may not—have been exposed to lead as a child.
- (228) Mr. Howard testified at the writ hearing that a relatively weak claim diminishes the impact of every other claim. (WRR7: 163). A toxicologist's opinion that Applicant more likely than not was exposed to toxic levels of lead as a child is a weak claim. Trial counsel testified at the writ hearing that putting on evidence of such a weak claim runs the risk of the trial team losing credibility with the jury. (WRR7: 161-163; WRR8: 48-49). Accordingly, a toxicologist's opinion that Applicant more likely than not was exposed to toxic levels of lead as a child would have diminished Applicant's and his trial team's credibility in front of jury. (WRR7: 162, WRR8: 48-49).
- (229) Testimony that childhood exposure to toxic levels of lead is correlated and associated with violent behavior in adulthood would have been harmful to the defense punishment case—in regard to the future danger special issue. The jury could have determined that any violent behavior related to Applicant's childhood exposure to toxic levels of lead was a permanent condition—meaning Applicant would continue to be violent in prison. Likewise, such testimony would have been inconsistent with the defense team's punishment

theme that Applicant's violent criminal behavior was due to his PCP use, and such behavior would cease to be a problem in a controlled environment like prison where Applicant would not have access to the drug. (See WRR8: 39, 41-43).

- (230) Applicant fails to prove trial counsel is deficient for not presenting such an unsupported theory during the punishment phase of trial.
- (231) Calling an expert to testify at trial who relied on neuropsychological testing would have opened the door under *Lagrone* for the State to call its expert to testify. Trial counsel testified that based on the information they had from Dr. McGarrahan indicating Applicant had little or no cognitive impairment, Applicant would expect a State's expert to reach a similar conclusion. (WRR8: 48). Dr. Reed's examination was overall consistent with Dr. McGarrahan's examination. Testimony from the State's expert would have placed information before the jury that was damaging to Applicant's case, including that he had little or no cognitive damage, he was potentially exaggerating psychiatric symptoms, and he had a history of exaggerating psychiatric symptoms.
- (232) Based on all of the above findings, even assuming counsel's investigation and failure to present evidence relating to childhood lead exposure was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.
- (233) Trial counsel's investigation into childhood lead exposure and whether Applicant had any resulting significant neurological damage and the lack of presentation of an expert on childhood lead exposure did not prejudice applicant's defense.
- (234) Because the expert testimony would have been, at best, that Applicant may have been (more likely than not) exposed to lead, it is not reasonably likely the outcome of Applicant's

trial would have been different even if counsel had presented evidence of childhood lead exposure in the punishment phase.

- (235) There is no substantial likelihood that presenting an expert like Dr. Dydek in support of a theory that Applicant suffered from the effects of childhood lead exposure would have resulted in a different punishment verdict. *See Harrington v. Richter*, 562 U.S. at 111; *Strickland*, 466 U.S. at 696.

**Trial Counsel Did Not Render Ineffective Assistance by
Not Presenting the Testimony of a Social Historian
like Laura Sovine During the Punishment
Phase of Trial**

- (236) Applicant presented an affidavit⁸ and the testimony of Laura Sovine in this writ proceeding. (Applicant's Writ Exh. 5; WRR2: 105-126; WRR7: 10-56).
- (237) Ms. Sovine has a Master's of Science Degree in Social Work with a Clinical Concentration, and is a Licensed Master's Social Worker with an Advanced Practitioner's license. (Applicant's Writ Exh. 5, at 1).
- (238) Ms. Sovine works as the Executive Director at Austin Recovery, a non-profit alcohol treatment center. (WRR2: 122). Ms. Sovine is also an adjunct faculty member at the University of Texas, School of Social Services. (WRR2: 123).
- (239) Ms. Sovine testified that her area of expertise is in social work with marginalized populations, with most of her direct practice being in jails and prisons. (WRR2: 124).

⁸ At the evidentiary hearing, Ms. Sovine testified that she wrote her affidavit (Applicant's Writ Exh. 5) in partnership with attorney Robert Romig, formerly with the Office of Capital and Forensic Writs. (WRR7: 42). Ms. Sovine testified that she and Mr. Romig co-drafted the document, meaning she would give him input and Mr. Romig would draft the document for her to review. (WRR: 43).

- (240) Ms. Sovine has no formal training in capital litigation, and aside from her work in the instant case, Ms. Sovine has only worked on two other death penalty cases, both post-conviction. (WRR2: 126, WRR7: 40-41). Ms. Sovine has testified in one other Article 11.071 post-conviction writ proceeding. (WRR7: 40). Accordingly, Ms. Sovine has never testified in front of a jury.
- (241) The Office of Capital and Forensic Writs retained Ms. Sovine to “provide an opinion as to the elements of Applicant’s life history that particularly impacted his life trajectory.” (Application Exh. 5, at 2).
- (242) In order to form her opinion, Ms. Sovine reviewed educational, employment, medical, juvenile criminal, and adult criminal records; witness testimony from trial; and thirteen affidavits⁹ collected by Applicant’s post-conviction counsel. (Application Exh. 5, at 31).
- (243) According to her affidavit, Ms. Sovine interviewed Applicant at the Polunsky Unit on May 13, 2014 for five hours. (Application Exh. 5, at 2). At the evidentiary hearing, Ms. Sovine testified that her interview with Applicant was approximately four hours of “face time.” (WRR2: 113).
- (244) Aside from her single interview with Applicant, Ms. Sovine did not interview or consult with any other witness in this case, including those experts whose affidavits she relied on in forming her opinions. (WRR2: 108, 114; WRR7: 39-40). Ms. Sovine testified that she accepted all of the information contained in the affidavits as true and correct. (WRR7: 49).
- (245) Ms. Sovine considered everything that Applicant told her during her interview with him to be truthful. (WRR7: 49-50). Ms. Sovine testified that she had “no reason to believe he

⁹ While Ms. Sovine states in her affidavit that she reviewed the affidavit of Dr. Courtney Robinson in preparing her own affidavit, this assertion lacks credibility. (Applicant’s Exh. 5, at 31). Dr. Robinson signed and notarized her affidavit on June 9, 2014, the same day that Ms. Sovine signed and notarized her own affidavit. (Applicant’s Writ Exh. 3, 5). The Court acknowledges that Ms. Sovine may have had a draft of the affidavit. (See finding number 293 *intra*).

was lying at the time.” (WRR7: 49). Ms. Sovine testified that her opinion would not change based on information that Applicant had malingered or exaggerated symptoms of mental illness during psychological evaluations by Dr. McGarrahan in 2011 and Dr. Reed in 2012, and by medical staff while incarcerated in the Dallas County jail prior to Applicant’s trial. (WRR7: 50).

- (246) Ms. Sovine testified it was her opinion Applicant was a victim for twenty- four years prior to committing this capital murder. (WRR7: 56).
- (247) Ms. Sovine testified that Applicant began building “risk factors” prior to birth due to in utero exposure to alcohol and lead. (WRR7: 11). Applicant also developed an insecure attachment between the ages of zero and three. (WRR7: 11). According to Ms. Sovine:

Parents who themselves have a mental illness, addictions, or are otherwise not sensitive parents tend to raise children with insecure attachments, who have a much lowered capacity for emotional regulation and impulse control, and who seek to control their environment in an unhealthy way to get needs met such as care and belonging. Children with insecure attachments being raised in chaotic and stressful environments, without intervention, will have significant impairments in behavior and general social functioning.

(Application Exh. 5, at 6).

- (248) Ms. Sovine testified that Applicant’s school experience was also not typical. (WRR7: 11-12). Ms. Sovine explained that Applicant “exhibited some very severe behavior issues and was diagnosed very early with major mental health disorders that were also not treated.” (WRR7: 11-12). According to Ms. Sovine, Applicant was “punished rather

than receiving appropriate treatment from any kind of standard in any kind of mental health profession, and that all of this compounded to affect his adverse life outcomes.” (WRR7: 11-12).

- (249) In regard to Applicant’s gang involvement, Ms. Sovine testified to the following:

There was like a youth gang that he was apparently jumped into that was – my understanding was sort of a neighborhood gang of kids, like sort of identified as being from a particular area. That was kind of a way that they grouped up and the way that they found protection and kind of alliances with each other.

(WRR7: 30).

- (250) Ms. Sovine testified that she only spoke briefly with Applicant about his gang membership; Applicant did not tell her the name of the gang was the Fish Trap Bloods. (WRR7: 45). Ms. Sovine testified that she had no familiarity with the Fish Trap Bloods. (WRR7: 45). She testified it was her “understanding that the youth gang did participate in some petty criminal behavior.” (WRR7: 46).
- (251) Ms. Sovine did not read Detective Nelson’s trial testimony, and she did not report any knowledge of Applicant’s gang-related tattoos. (WRR7: 46). Applicant did not tell her about any fights he was in that were gang related. (WRR7: 46).
- (252) Ms. Sovine’s testimony and knowledge concerning Applicant’s gang involvement was very limited with little foundation; therefore, the Court finds it is neither credible nor compelling.
- (253) Concerning Applicant’s drug use, Ms. Sovine testified Applicant began using marijuana when he was thirteen and PCP when he was fourteen. (WRR7: 31). She stated in her affidavit that he was smoking PCP daily by the time he

was in high school. (WRR7: 47). Ms. Sovine testified that Applicant ended up “smoking marijuana that was dipped in PCP, which is known as ‘wet,’ which is pretty—something pretty common with young people that are self-medicating an untreated mental health disorder.” (WRR7: 31). Ms. Sovine testified that, because Applicant had both ADHD and a mental health diagnosis of significant depression with suicidal ideation, he had a “busy brain,” which caused him to turn to marijuana and PCP to “calm and quiet . . . that constant disorder in the brain.” (WRR7: 31- 32).

- (254) Neuropsychologist Dr. McGarrahan, Applicant’s trial expert, testified at the writ hearing that PCP is not a soothing drug; instead, it causes hallucinations. (WRR7: 119-120). She explained that a person would know PCP is not a soothing drug after using it for only a short period. (WRR7: 120). Clinical psychologist Dr. Reed testified at the writ hearing that the effects of PCP are not soothing, “[e]specially at higher doses, they trigger feelings of anxiety, panic, and agitation and restlessness.” (WRR4: 20). Dr. Reed testified that PCP could cause hallucinations and paranoia. (WRR4: 20). Applicant’s expert at trial, Dr. John Roache, a Ph.D. clinical pharmacologist, testified about the agitating and arousing effects of PCP, and explained it could cause psychotic effects including visual hallucinations and paranoia. (RR65: 128-144).
- (255) Based on contrary testimony from the above three experts who have higher levels of clinical training than Ms. Sovine, the Court finds Ms. Sovine’s opinion that Applicant was using PCP to “calm and quiet” his brain is not credible.
- (256) Ms. Sovine testified she reviewed the trial testimony of Applicant’s family members: Pamela Maddox, Ramon Maddox, Sr., Ramon Maddox, Jr., and Shamy Conley. (WRR7: 43; Application Exh. 5, at 31). However, Ms. Sovine did not review the trial testimony of Dr. Kessner and Dr. Roache. (WRR7: 43; Application Exh. 5, at 31).

- (257) Dr. Kessner was present during the testimony of Applicant's family members and testified about the experiences and circumstances in Applicant's childhood that placed him at risk of committing criminal or violent acts in adulthood. (WRR4: 101-102; WRR8: 50-51). Moreover, Dr. Kessner had not interviewed Applicant and her testimony did not present any danger of opening the door to the State's expert testifying under *Lagrone*. (WRR4: 85-87; WRR7: 154-156; RR65: 154).
- (258) Trial counsel elected not to use a social historian such as Ms. Sovine in furtherance of his punishment case. Trial counsel believed the family witnesses were good fact witnesses who could describe Applicant's upbringing and schooling first-hand. (WRR7: 158; WRR8: 44). This strategic decision fell within reasonable professional norms.
- (259) There are disadvantages to using a social historian. Information that the social historian gathers and reviews will become known to the State at some point. As trial counsel explained, the State would have had access to Ms. Sovine's notes from her interview with Applicant under Rule 705 of the Texas Rules of Evidence. (WRR4: 102-103). Ms. Sovine's notes contained information that was unfavorable to the defense, including the following: Applicant began selling drugs at the age of sixteen; Applicant held up drug dealers at gunpoint for money to take care of his baby; Applicant had three children by the age of twenty-four and continued selling drugs and robbing for a living. (WRR4: 103; WRR State's Exh. 14). There was no evidence at trial that Applicant was a drug dealer as a teenager or adult, or that he robbed other drug dealers; and, nothing in the record indicates the State was aware of this information. (WRR4: 103).
- (260) Additionally, Ms. Sovine's interview notes contain her conclusion that Applicant appeared to be suffering from symptoms of PTSD due to his actions in this capital murder, an opinion that would have likely alienated the jury by suggesting Applicant was himself a victim of his own crime. (WRR State's Exh. 14). As noted by trial counsel, while

some jurors could potentially have found this information to reflect remorse, other jurors could have found this information unfavorable. (WRR4: 104). Trial counsel testified, "I don't think a juror is going to reward any defendant for having PTSD for committing the crime that he committed." (WRR4: 104).

- (261) Trial counsel also noted the trial team would have had to contend with hearsay and Sixth Amendment objections from the State if they had a social historian like Ms. Sovine testify about what Applicant and Applicant's family reported to her. (WRR4: 102).
- (262) Moreover, trial counsel recognized that having a social historian testify who had interviewed Applicant would have opened the door to the State presenting the testimony of its expert, Dr. Reed, under *Lagrone*. (WRR4: 85-87, 102; WRR8: 46-47). Dr. Reed would have testified that Applicant was malingering, or exaggerating symptoms of mental illness, and met the diagnostic criteria for Antisocial Personality Disorder. (WRR State's Exh. 7). Accordingly, Dr. Reed's testimony would have been damaging to Applicant's punishment case.
- (263) By opting not to present a social historian, trial counsel necessarily prevented the disclosure of additional aggravating information that the State could have used against him.
- (264) In addition to the risks it posed, Ms. Sovine's testimony would have afforded little benefit to Applicant's punishment case. Ms. Sovine's testimony was not particularly compelling or credible. In short, although she did offer some explanation for how Applicant came to be the person who committed the capital murder of Carlos Gallardo, its mitigating value was questionable and it posed the risk of further harm to Applicant's defense.
- (265) Applicant presents the testimony of Richard Burr in support of his contention that trial counsel was deficient by failing to present a social historian at trial. (WRR9: 106-

111).

- (266) Mr. Burr testified that a number of studies have shown over the years that jurors do not understand and believe experts, particularly defense experts. (WRR9: 107). In his opinion, the lesson from those studies is not to discard experts, but to use social historians to bridge the gap between technical opinions and language and lay understanding. (WRR9: 107).
- (267) Mr. Burr testified that professional standards reflect that a defendant needs a blend of testimony between lay and expert witnesses. (WRR9: 108). Applicant's punishment phase included a blend of lay and expert witnesses.
- (268) Mr. Burr testified that the social historian would need to have access to the defendant, and he conceded that the social historian's notes or records would include information that is not helpful to the defendant's case, but he dismisses it as "rare" that a prosecutor will not know about these things. (WRR9: 109). He added that "very often, the bad things are explainable by what's happened in the client's life that he or she had no control over." (WRR9: 109).
- (269) Mr. Burr did not testify that prevailing professional norms or the American Bar Association or Texas Bar Association guidelines require a trial team to use a social historian in every case; indeed, no such requirement exists. (WRR9: 106-111).
- (270) The ABA guidelines do not require that a trial team use expert testimony to present a defendant's social history to the jury. They provide that "[e]xpert witnesses may be useful for this purpose and may assist the jury in understanding the significance of the observations." See ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Guideline 10.11, Commentary (2003). The guidelines also state that counsel should use lay witnesses as much as possible to provide the factual foundation for the expert's conclusions. *Id.*

- (271) A determination whether to retain a social historian to testify at trial is a strategy decision.
- (272) Applicant fails to demonstrate by a preponderance of the evidence counsel was deficient for choosing not to present a social historian such as Ms. Sovine.
- (273) Even assuming trial counsel's decision not to present a social historian was deficient, Applicant's defense suffered no prejudice from it.
- (274) As set out above, the testimony Ms. Sovine would have proffered was not compelling mitigating evidence. Nothing about Ms. Sovine's testimony is of the type and quality of evidence that would have motivated the jury to alter its answers to one of the special issues.
- (275) Further, her testimony created a risk of disclosure of additional aggravating evidence that would have been detrimental to Applicant's punishment defense. Her testimony further opened the door to aggravating evidence from the State through Dr. Reed. These circumstances would have counter balanced the benefit, if any, of Ms. Sovine's testimony.
- (276) It is not reasonably likely the outcome of Applicant's trial would have been different even if counsel had presented the testimony of a social historian in the punishment phase.
- (277) There is no substantial likelihood that presenting expert testimony from a social historian like Laura Sovine would have resulted in a different punishment verdict. See *Harrington v. Richter*, 562 U.S. at 111; *Strickland*, 466 U.S. at 696.
- (278) Trial counsel's decision not to present a social historian did not prejudice Applicant's punishment case.

**Trial Counsel Did Not Render Ineffective Assistance by
Not Presenting the Testimony of a School-to-Prison-
Pipeline Expert like Dr. Courtney Robinson during the
Punishment Phase of Trial**

- (279) Applicant presented an affidavit and testimony of Dr. Courtney Robinson in this writ proceeding. (WRR5: 5-70; Application Exh. 3).
- (280) Dr. Robinson has a Ph.D. in Cultural Studies and Education. (WRR5: 7). She is not a licensed psychologist. (WRR5: 7-8). She completed a dissertation and has developed expertise in the school-to-prison-pipeline phenomena, which applies to African American students. (WRR5: 9; Application Exh. 3, at 1). She runs a non-profit community organization devoted to combatting the school-to-prison pipeline phenomena through prevention, intervention, and advocacy. (WRR5: 13).
- (281) Dr. Robinson has never testified before a jury, in a death penalty case, or even in a criminal case. (WRR5: 6, 38). She generally works in juvenile court, and she has no knowledge or expertise relating to the presentation of mitigation evidence in a death penalty case. (WRR5: 38). She was not available to testify in May 2012 in Applicant's trial, although other school- to-prison-pipeline experts would have been available. (WRR5: 38-39, 68).
- (282) Dr. Robinson states in her affidavit that to form her opinions she reviewed educational, employment, medical, juvenile criminal, and adult criminal records; witness testimony from trial; and affidavits collected by Applicant's post-conviction counsel. (WRR5: 6-7; Application Exh. 3, at 2). A list of specific materials she reviewed, attached to her affidavit, however, lists no employment or medical records. (Application Exh. 3, at 16). Additionally, at one point in her testimony, Dr. Robinson stated that the only records she reviewed were school records. (WRR5: 19). Dr. Robinson did

not interview or conduct an evaluation of Applicant. (WRR5: 7, 69-70).

- (283) Dr. Robinson explained that the “school-to-prison pipeline is a phenomena that we understand [that] through school discipline children end up in our criminal justice system.” (WRR5: 10). She testified, “This process starts really, really early, as early as four years old. And what we see is that . . . African-American children are disproportionately disciplined in our schools.” (WRR5: 10). This results in the children becoming disengaged in school and entangled in the criminal justice system. (WRR5: 11).
- (284) Dr. Robinson testified that when a student acts out, a teacher has a choice to refer that student for services or discipline; she stated it is more likely educators will refer an African American student for discipline rather than services. (WRR5: 14-15).
- (285) Dr. Robinson testified research shows that, in about the third grade, teachers begin to observe African American males as older and more aggressive than they are. (WRR5: 20-21). Dr. Robinson also testified African American children receive more out-of-school suspensions than in-school suspensions compared to their peers. (WRR5: 31).
- (286) Dr. Robinson testified the school district did not provide Applicant with the services or treatment he needed at a young age. (WRR: 26-27). She stated there were moments Applicant was having a mental health crisis but school personnel disciplined him instead of providing services or treatment. (WRR5: 24). Dr. Robinson testified that if Applicant had received the services he needed at age six, “we wouldn’t be sitting right here.” (WRR5: 36).
- (287) Based on indications in Applicant’s school records that he had a desire to learn, Dr. Robinson concluded he had an organic brain problem. (WRR5:28-30). Her testimony,

however, failed to provide adequate support or explanation for this conclusion.

- (288) Dr. Robinson's affidavit and testimony presents two primary theories about the school-to-prison-pipeline phenomena: that the school-to-prison-pipeline is a "system of misidentified [need for] special education and over use of school discipline." (Application Exh. 3, at 6). Dr. Robinson applies both theories to Applicant in her affidavit. She states that "research suggests that African American students are more often referred to special education for behavioral reasons rather than learning disability." (Application Exh. 3, at 7). After discussing how cultural biases affect the potential for greater special education and disciplinary referrals for African American boys, she states, "[Applicant's] experience of being assigned to special education mirrors the finding of this research," and he was assigned to a special education program in 1991 "because of behavioral issues." (WRR5: 39; Application Exh. 3, at 7-8). During her testimony at the writ hearing, Dr. Robinson initially indicated the school misidentified Applicant as a special education student. (WRR5: 39). She could not pinpoint, however, the source of the information in her affidavit that Applicant was placed in special education due to behavioral difficulties; and then, she seemed to contradict the conclusion in her affidavit by testifying, "I'm not suggesting he should not have been in special education." (WRR5: 41-43). The school records that exist do not identify the reason for Applicant's initial placement in special education. (WRR5: 43-44; See WRR Applicant's Exh. 8). Because Applicant's elementary school special education records do not exist, Dr. Robinson should have recognized that the reason for his referral to special education is unknown (with the exception of what family may recall), rather than seemingly working to fit Applicant into one of the theories she researches and supports. (See WRR Applicant's Exh. 8).

- (289) Although Dr. Robinson asserts in her testimony and affidavit that the educational system failed to provide sufficient services and meet Applicant's needs, particularly at a young age, Dr. Robinson's testimony lacks credibility because Applicant's special education records for elementary and middle school are not available; therefore, it is not known what services he received. (WRR5: 19, 26-27, 44, 46-50; see WRR Applicant's Exh. 8).
- (290) Dr. Robinson expressed an opinion that school officials improperly handled one situation where Applicant returned to Brandenburg Middle School—a school he was not attending at that time. (WRR5: 32-33). Dr. Robinson had not, however, reviewed any written reports or the trial testimony about the incident and admitted she did not know specifically what occurred. Because substantial material existed about the incident that she had not reviewed, this Court finds she lacked sufficient information to form an opinion about the incident, and finds Dr. Robinson's conclusion to be not credible. (WRR5: 32-33, 56; RR62: 27-38).
- (291) Dr. Robinson testified that school authorities should treat a school fight as non-criminal behavior, but would warrant discipline. (WRR5: 53). She testified that a six or seven year old who brings razor blades to school and cuts his and another child's clothing, or even cuts another child, should receive discipline and treatment, without anyone labeling the behavior as a criminal act. (WRR5: 54-55). She agreed that possession of a knife with a six-inch blade by a high school student, drug possession, and selling drugs are criminal acts. (WRR5: 55). Accordingly, the jury could have concluded from her testimony that at least some behaviors Applicant engaged in as a youth warranted at least discipline in some instances, and was properly treated as criminal in other instances.

- (292) Dr. Robinson testified that research shows school authorities disproportionately discipline African American children and special needs children in the school system, and she opined Applicant was over-disciplined beginning in kindergarten; yet, she did not identify a single, specific incident from Applicant's history where this occurred. (WRR: 10- 12, 14, 18, 21-22, 23-24, 36-37, 54).
- (293) During her testimony, Dr. Robinson acknowledged that her affidavit contains a conclusion about Applicant's juvenile gang association that was identical verbatim to a statement in Ms. Sovine's affidavit:

These gangs were not the violent adult street gangs of popular TV culture, but were more just groups of youth self-identifying as being in a gang to feel like they belonged to something and were with people that cared about them.

(WRR5: 57-58; Application Exh. 3, at 11). Dr. Robinson reviewed Ms. Sovine's affidavit to prepare her own affidavit. (Application Exh. 3, at 16). In response to being confronted with the fact that she and another expert included the same word-for-word conclusion, she commented, "We looked at it in the same way." (WRR5: 56-58). This highly unusual response indicates to the Court that Dr. Robinson copied this statement from Ms. Sovine's affidavit. This plagiaristic element of Dr. Robinson's work greatly reduces her credibility in this proceeding.

- (294) Dr. Robinson indicated that Applicant's drug use, including his PCP use, was likely a way to self-medicate. (Application Exh. 3, at 15; WRR5: 51- 52). Dr. Robinson testified that any drug, including PCP, can be used to self-medicate. (WRR5: 52). Other experts in this proceeding reached contrary conclusions—that PCP, unlike some drugs, is not used to self-medicate. (WRR4: 20; WRR7: 119-120). The Court finds Dr. Robinson's opinion regarding PCP use to be not credible.

- (295) Dr. Robinson's testimony and affidavit repeatedly reveal credibility problems that would not have presented well to a jury and would have negatively affected the overall value of her testimony.
- (296) Counsel elected not to use a school-to-prison pipeline expert such as Dr. Courtney Robinson in furtherance of his punishment case. This strategic decision fell within reasonable professional norms.
- (297) Applicant fails to rebut the presumption that his trial counsel acted consistent with reasonable trial strategy.
- (298) The defense team believed the family witnesses were good fact witnesses who could describe Applicant's upbringing and schooling first-hand. (WRR7: 158). Based on information learned from jurors in individual voir dire, the team was wary of presenting what the jury might perceive as excuses for Applicant having committed the offense, including through use of an expert. (WRR7: 159). The attorneys tailored closing arguments to these concerns. (WRR7: 149, 159). Mr. Howard's testimony indicates the team utilized a strategy, in part, of presenting evidence of Roderick's upbringing through fact witnesses and contextualizing it in closing arguments. (WRR7: 149, 158-160).
- (299) The selection of experts, if any, to explain Applicant's upbringing and history is a strategy decision.
- (300) The trial attorneys presented two experts in punishment, Dr. Gilda Kessner and Dr. John Roache, who provided testimony to assist the jury in understanding portions of Applicant's life history. These experts, like Dr. Robinson, did not interview or evaluate him.
- (301) After presenting facts of Applicant's upbringing through lay witnesses, trial counsel then presented the testimony of Dr. Gilda Kessner, a licensed psychologist, to point to experiences and circumstances in Applicant's childhood that

placed him at risk of committing criminal or violent acts in adulthood. (WRR4: 101-102; WRR8: 50-51; RR65: 155-162). Dr. Kessner did not interview Applicant. (RR65: 20, 154). She observed the testimony of Applicant's family members in the courtroom and testified about risk factors in a child's life and Applicant's life that correlated with the potential for violence in the future. (RR65: 155-162). Risk factors Dr. Kessner identified for Applicant included his ADHD, being born to a young mother with no parenting skills, being left as a young child to be cared for by other people, his mother not being affectionate, lacking a secure attachment to a primary caretaker, his biological father being incarcerated, only meeting his biological father at ages three and 11, and his mother's significant mental illness. (RR65: 155-162).

- (302) Trial counsel also presented the testimony of John Roache, a Ph.D. pharmacologist, who specializes in clinical pharmacology, performs research on the causes and consequences of drug addiction, and has 30 years of clinical experience working with patients. (RR65: 119-122, 140). Dr. Roache reviewed Dallas County jail records reflecting that in December 2008, Applicant was in the Dallas County jail on a marijuana charge, and a jail physician diagnosed him with Cannabis Dependence, along with an indication to rule out Drug-induced Psychosis and Mood Disorder. (RR65: 137-138, 142-143). Other jail records reflected Applicant had a PCP dependence that included a history of daily PCP use. (RR65: 138-139, 144- 145).
- (303) Dr. Roache testified at trial that early life risk factors can lead a person to begin using drugs, and repeated use and exposure causes the drugs to act biologically on the brain. (RR65: 124-126). Over time, drugs take control of the reward center of the brain (which is a motivational brain circuit) and other rewards and pleasures in life diminish in importance—life all becomes about drug involvement, seeking and procuring a supply, consuming and using drugs, and recovering from drug effects. (RR65: 124-125). This chronic drug condition affects the frontal lobes of the

brain, which involve conscious decision making and planning; ultimately, the drug user has less volitional control and exhibits more impulsive action. (RR65: 125-126). ADHD in early childhood involves the frontal lobes, and the inability to control oneself, by acting impulsively without thought and planning. (RR65: 126). Individuals already driven by impulse and urge, who lack thought and planning, are vulnerable to addiction, leading to a vicious cycle. (RR65: 126-127).

- (304) Dr. Roache also testified at trial about the effects of chronic marijuana and PCP use. (RR65: 127-135). PCP, or phencyclidine, affects the neurochemical systems in the brain that are involved in motivational circuitry. (RR65: 128). PCP has both sedative and stimulant properties, which is very unsettling for most people. (RR65: 129-130). It simultaneously causes a dissociative state where nothing matters (dulling sensations and relaxing a person), while at the same time also agitating and arousing him. (RR65: 130). PCP additionally has a euphoria affect and creates a sense of empowerment, invincibility, and invulnerability. (RR65: 130). PCP can create visual hallucinations and psychotic effects, including paranoia and persecutory delusions. (RR65: 130-133). PCP can in addition rarely cause extreme violence. (RR65: 133-134). Some people are particularly vulnerable to PCP-induced psychosis involving paranoia and violence, and experts do not know why, although bipolar mania and schizophrenia produce risks for PCP-induced mania or psychosis. (RR65: 133-134, 144). Engaging in extreme violence under the influence of PCP, though rare, tends to be associated with individuals who have underlying vulnerabilities, like bipolar and schizophrenia, in their personal or family history. (RR65: 135, 143-144). Dr. Roache testified that once a person is in a setting without PCP, the person would become more clear, more coherent, and more in control. (RR65: 140).

- (305) From Dr. Roache's testimony, the jury could have concluded that: Applicant's early childhood ADHD was a

risk factor for drug addiction; drug addiction is based on chemical processes in the brain, which Applicant could not control; and Applicant's drug addiction spurred poor decision making and impulsive acts. The jury could have concluded Applicant's criminal behavior followed from his drug use—to obtain funds to support a daily PCP habit—and that the dissociative state and euphoria caused by PCP impacted his judgment. The jury could have concluded Applicant was vulnerable to PCP-induced psychosis and violence, based on his own and his mother's significant mental illness, which could explain some of the violent acts they heard evidence about in the punishment phase.

- (306) One of the themes the defense team implemented in the punishment phase of trial was that Applicant's most violent behavior occurred as a result of his PCP use, and because he was incarcerated, no longer on PCP, and would not have access to PCP in prison, he would not be a future danger. (WRR8: 39, 41-43).
- (307) The Court finds Dr. Roache's trial testimony encompasses information the jury could have applied to both special issues. (See WRR8: 42).
- (308) Applicant does not prove by a preponderance of the evidence counsel that was deficient for choosing not to present the testimony of a school-to-prison- pipeline expert such as Dr. Robinson.
- (309) Even assuming counsel's decision not to present a school-to-prison-pipeline expert were deficient, Applicant's defense suffered no prejudice from it.
- (310) The testimony Dr. Robinson proffered was not compelling mitigating evidence. She frequently failed to tie her primarily didactic testimony regarding the school-to-prison-pipeline phenomena to specific instances in Applicant's life. Some of her testimony was contradictory and lacked support. She appeared to have copied a conclusion from another expert's report, which negated her credibility. Having never testified

in a criminal case or before a jury, she did not seem prepared to withstand the cross-examination expected in a contested criminal proceeding.

- (311) The extent of Applicant's criminal activity, including an extraneous capital murder and multiple robberies of innocent victims in their homes in the weeks prior to the case-in-chief capital murder, constituted strong and persuasive evidence in the punishment phase.
- (312) It is not reasonably likely the outcome of Applicant's trial would have been different even if counsel had presented the testimony of a school-to-prison-pipeline expert.
- (313) Dr. Robinson did not discover any significant aspect of Applicant's school experience of which trial counsel were unaware.
- (314) There is no substantial likelihood that presenting expert testimony from a school-to-prison-pipeline expert like Dr. Courtney Robinson would have resulted in a different punishment verdict. *See Harrington v. Richter*, 562 U.S. at 111; *Strickland*, 466 U.S. at 696.
- (315) Counsel's decision not to present a school-to-prison-pipeline expert did not prejudice Applicant's punishment case.

**Trial Counsel Did Not Render Ineffective
Assistance by Not Presenting the
Testimony of a Gang Expert to
Contextualize Applicant's Gang
Membership as Mitigating**

- (316) The Court incorporates its findings of fact and conclusions of law for Ground 2 below into its findings and conclusions for this claim; both allege trial counsel rendered ineffective assistance for failing to present a gang expert in his defense.

- (317) Applicant has not proven counsel was deficient for not calling a gang expert to testify at trial in order to contextualize Applicant's gang membership as mitigating.
- (318) Applicant fails to prove that not presenting the testimony of a gang expert to contextualize Applicant's gang membership as mitigating prejudiced his defense.
- (319) Applicant has not proven counsel rendered ineffective assistance by not calling a gang expert to testify in his case in the punishment phase.

Conclusions – Ground 1

- (320) Applicant has failed to prove by a preponderance of the evidence that: trial counsel rendered ineffective assistance by not sufficiently investigating and presenting evidence during the punishment phase of trial that he suffers from a fetal alcohol spectrum disorder and was exposed to toxic levels of lead as a child; trial counsel rendered ineffective assistance by not presenting the testimony of a social historian or a school-to-prison-pipeline expert during the punishment phase of trial; and trial counsel rendered ineffective assistance by not presenting a gang expert to contextualize Applicant's gang membership as mitigating.
- (321) Applicant's claims in Ground 1 are without merit. The Court recommends that Ground 1 be denied.

GROUND

2

Gang-Related Evidence

In Ground Two, Applicant contends trial counsel rendered ineffective assistance during the punishment phase of trial for not offering the testimony of his own gang expert to rebut the State's gang expert and to rebut evidence of Applicant's association with a West Dallas street gang. (Application at 70-75).

The Court incorporates into the below findings on Ground 2 its findings of fact and conclusions of law related to Applicant's allegations in Ground 1 that trial counsel rendered ineffective assistance by not presenting the testimony of a gang expert to contextualize Applicant's gang membership as mitigating.

- (322) Prior to trial, Applicant requested a Rule 705 hearing to challenge the admissibility of the expert testimony of Detective Barrett Nelson, a Dallas police officer who was previously assigned to the Dallas Gang Unit. (WRR8: 18-19; RR62: 43). The Court conducted the hearing on May 11, 2012, pursuant to *Menno v. State*, 970 S.W.2d 549 (Tex. Crim. App. 1998). (RR61: 5-40). Applicant's counsel challenged the admissibility of Detective Nelson's testimony because there was no evidence of a direct connection between Applicant and any actions by the Fish Trap Bloods (or any other Bloods). (RR61: 34). Trial counsel urged the evidence violated Applicant's rights under the First and Fourteenth Amendments, was inadmissible as improper character evidence, was not relevant, and was more prejudicial than probative under Texas Rules of Evidence 401, 402, and 403. (RR61: 34-35). The Court overruled Applicant's objections. (RR61: 35-36).
- (323) An investigator with the Dallas County District Attorney's office took photos of Applicant's tattoos approximately three weeks prior to trial. (WRR8: 18; RR62: 40-42; SE 150-163).
- (324) Detective Nelson testified that Applicant's tattoos indicate he is a member of the Fish Trap Bloods, a criminal street gang in Dallas. (RR62: 51-53, 64; SE 159-160). This street gang is named after the former Fish Trap projects on Fish Trap Street in West Dallas. (RR62: 50-51).
- (325) Particularly, Applicant has tattoos of "Fish Trap," "West," "212," and "3500." (RR62: 50-52; SE 158-159). Barrett testified the number 212 is associated with West Dallas, which has the zip code 75212, and is associated with the Fish

Trap Bloods. (RR62: 51). The number 3500 represents the 3500 block in front of the former Fish Trap projects. (RR62: 52; SE 162). Barrett testified Applicant's star tattoos also mean he is associated with the Bloods. (RR62: 51).

- (326) Applicant also has tattoos of "STR8" "HOOD," meaning "straight hood," and "HUSTLA." (RR62: 46-49; SE 152-156). Barrett testified that "straight hood" means Applicant comes from the hood, or street, and will handle his business in a hood-type manner. (RR62: 46-47). Barrett testified "HUSTLA," means "hustler" and indicates Applicant is hustling for his money—in life and to get ahead—and includes selling narcotics. (RR62: 48-49).
- (327) Applicant's left forearm also has a tattoo of "Piru," which is the street in Los Angeles where the Bloods were founded. (RR62: 53; SE 163). According to Detective Barrett, the tattoo of "CK," means "Crip killer," again indicating Applicant is a Blood member; in West Dallas, the rival gang to the Fish Trap Bloods are the Rupert Circle Crips. (RR62: 53).
- (328) On cross-examination, Nelson explained that the Fish Trap Bloods are not an organized gang with a leader, an organizational hierarchy, or a meeting place. (RR62: 65-68). His testimony included that the Fish Trap Bloods do not engage in criminal activity as a group. (RR62: 65-66). He indicated Applicant is not identified as a gang member in the DPD Gang Unit's files. (RR62: 68-69). Mr. Parks suggested during cross-examination that the "CK" tattoo Detective Nelson identified was actually "CO." (RR62:68). Regardless, Detective Barrett testified there is no evidence Applicant had ever killed a Crip. (RR62: 68).
- (329) Mr. Parks testified at the writ hearing that he believes the defense got what they needed from Detective Nelson on cross-examination. (WRR8: 25). When the witness left the stand, the jury knew Applicant was in a juvenile gang that was generally identified by the neighborhood where they lived— and that neighborhood no longer exists because the

Fish Trap projects had been torn down. (WRR8: 25). Applicant's tattoos also indicate the gang was associated with a particular neighborhood. (WRR8: 25). Mr. Parks recalled that Detective Nelson's testimony indicated he knew of no crime Applicant committed while he was in the juvenile gang; and, importantly, Detective Nelson testified Applicant's name was not among those identified by the Dallas Police Department as a gang member. (WRR8: 26). Prior to the testimony, trial counsel believed that if Detective Nelson testified truthfully, they would get all of this information from him—and they did. (WRR8: 26).

- (330) Trial counsel sought and the Court granted a limiting instruction on Detective Nelson's testimony and the gang-related evidence. (WRR8: 19- 20; RR62: 56-57, 60-62, 70-71). The Court gave the limiting instruction orally at the conclusion of Detective Nelson's testimony and included a written instruction in the punishment charge. (WRR8: 20; RR61: 70-71; CR: 682).
- (331) Applicant reported to his expert, Dr. McGarrahan, that he began his involvement in a gang at around age 13 or 14 and left the gang at age 19 or 20. (WRR7: 126).
- (332) Applicant alleges a defense gang expert could have informed the jurors Applicant was only a former member of a juvenile gang and that certain sociological, environmental, and developmental factors led to Applicant's gang affiliation. (Application, at 70).
- (333) With his application, Applicant filed the affidavit of Charles Rotramel in support of his claim that trial counsel should have presented a gang expert to turn the aggravating aspect of Applicant's gang membership into mitigating evidence and to challenge the meaning of Applicant's gang affiliation. (Application, at 44, 56-58, 68-69, 70-75; Application Exh. 4).

- (334) Charles Rotramel did not testify at the writ hearing. (WRR2: 116). The State moved to strike Mr. Rotramel's affidavit on the basis he was not appearing to testify and Applicant was replacing him with a different gang expert. (WRR2: 116; WRR6: 7-8; WRR7: 6-9). The Court denied the State's request to strike the affidavit but ruled the Court would not consider it for any purpose except to the extent another expert in the proceeding relied upon it. (WRR2: 116-118; WRR7: 6-9).
- (335) Dr. Robinson testified briefly during her direct-examination in the writ hearing regarding gang issues. (WRR 5: 34-36). She testified that her work with school systems intersects with the study of gang behavior and gang membership. (WRR 5: 34). She opined that the schools assign children with a gang affiliation without the child actually participating in an actual gang; she takes a role in educating teachers about this phenomena by advocating that children who have known each other their whole lives, who hang out together, and who may get in fights together, are not a gang. (WRR 5: 34- 36). She explained that when the school system attaches a gang label to a referral, this in turn affects the child's treatment in the court system. (WRR 5: 34-35).
- (336) Applicant has not alleged in this proceeding that the schools identified him as a gang member. There is no evidence his schools identified him as a gang member. Dr. Robinson did not testify Applicant's schools misidentified him as a gang member—merely that the phenomena exists. Dr. Robinson's testimony regarding school systems who misidentify students as gang members is irrelevant to this proceeding.
- (337) Dr. Robinson recalled reading in the materials she reviewed in this case that Applicant's gang membership was "just a group of people that he connected with and cared about." (WRR 5: 36). She testified she did not read anything about true gang activity. (WRR 5: 36).

- (338) When asked about Applicant's teenage gang membership, Dr. Robinson's testimony included "I do remember reading about it . . ." and "this other person [referring to an expert in this proceeding] suggested that the gang involvement was not unusual for youth in the neighborhoods where [Applicant] grew up." (WRR5: 57). Based on her testimony and affidavit, Dr. Robinson appears to have adopted her opinions specific to Applicant and gang issues entirely from Ms. Sovine's or Mr. Rotramel's work. (WRR5: 56-58; Application Exh. 3, at 11; See Application Exh. 4-5).
- (339) Dr. Robinson did not review Dr. Hagedorn's affidavit. Dr. Hagedorn completed his affidavit after Dr. Robinson testified.
- (340) The Court finds Dr. Robinson's testimony regarding gang issues in its entirety to be irrelevant or not credible. Although her research on the school- to-prison pipeline phenomena has centered on the Dallas area, she does not have any specialized knowledge regarding Dallas juvenile street gangs or the Fish Trap Bloods street gang.
- (341) Ms. Sovine's testimony, too, indicates she primarily received her information about Applicant's gang association from her review of Mr. Rotramel's affidavit. (WRR7: 30). Describing the "information in the record related to [Applicant's] involvement in any sort of gang activity," she testified:

There was like a youth gang that he was apparently jumped into that was - - my understanding was sort of a neighborhood gang of friends, like sort of identified as being from a particular area. That was kind of a way that they grouped up and the way that they found protection and kind of alliance with each other.

(WRR7: 30).

- (342) Ms. Sovine did not review Dr. Hagedorn's affidavit.

- (343) Ms. Sovine admitted she has no familiarity with the Fish Trap Bloods. (WRR7: 45).
- (344) Applicant told Ms. Sovine during her interview with him that he was initiated into the gang—by being “jumped in”—at age 8. (WRR7: 45; RR State’s Exh. 14).
- (345) Ms. Sovine’s limited testimony and knowledge about Applicant’s gang membership and the Fish Trap Bloods does not support Applicant’s contention his trial counsel were ineffective for failing to present a gang expert to contextualize his gang membership as mitigating.
- (346) At the writ hearing, Mr. Burr explained his opinions about prevailing professional norms for investigating gang-related evidence. (WRR9: 112- 114). Applicant has no allegation in his writ, however, that trial counsel was ineffective for failing to conduct an investigation related to gang evidence.
- (347) Mr. Burr testified that, if a defendant acquires gang tattoos after an arrest while he is awaiting trial, it could mean he was not involved or was only minimally involved in gang activity prior to his arrest and that his gang activity likely had nothing to do with his offense. (WRR9: 114-115). Mr. Burr opined that if a defendant acquires gang tattoos while he is in jail, it may reflect he is a vulnerable inmate who is trying to protect himself by aligning with a gang, because he is scared. (WRR9: 115).
- (348) Based on all of the gang-related evidence in this proceeding, this Court does not find Mr. Burr’s opinions regarding the gang issues to be persuasive.
- (349) On September 19, 2019, Applicant filed the affidavit of Dr. John M. Hagedorn, along with Exhibits A through O attached to the affidavit, in support of his claims that trial counsel should have used a gang expert to rebut the State’s gang expert and to contextualize Applicant’s gang membership as mitigating.

- (350) Dr. Hagedorn explains in his affidavit that society and the criminal justice system have a prejudice against gang association which is often rooted in misleading stereotypes. (Hagedorn Affidavit, at 2-5). He further explains that juvenile gang membership is transitory—or of a short duration—for most youth, and is not a permanent identity. (Hagedorn Affidavit, at 5-6). Further, he opined youth gang membership is not a predictor of long-term gang affiliation. (Hagedorn Affidavit, at 7).
- (351) Dr. Hagedorn indicated in his affidavit that a gang is “a unit of individuals with traditions, solidarity, and attachment to local territory,” and membership is “a means for an individual to assert his or her identity as a member of a neighborhood community” and “a source of self-identity and stability,” but is not a “reliable indicator of the type of adult a young person will become.” (Hagedorn Affidavit, at 5-7).
- (352) Dr. Hagedorn’s opinion that youth gang membership does not reliably indicate the type of adult a person will become stands in contrast to the facts here—that Applicant was a member of a juvenile gang and, regardless of whether that gang membership extended into his adulthood, Applicant committed multiple violent robberies, shootings, and murders as an adult, and then exhibited a demeanor and attitude reflecting little or no remorse or empathy for his victims.
- (353) Dr. Hagedorn did not conduct an interview of Applicant. He did not meet with him and ask him about his gang affiliation. Dr. Hagedorn’s affidavit does not reflect he has specialized knowledge of Dallas juvenile street gangs or conducted any research on the Fish Trap Bloods. In response to Dr. Hagedorn’s Affidavit, the State filed the Affidavit of Assistant District Attorney Justin Lord. Mr. Lord was the attorney at trial who handled the direct examination of Detective Nelson.

- (354) Mr. Lord stated in his affidavit that based on his research relating to Dr. Hagedorn and his work, if Applicant had called Dr. Hagedorn at trial, Mr. Lord's cross-examination would have included the following topics: whether Dr. Hagedorn was aware that after Applicant committed this capital murder on March 17, 2009, an officer in the emergency room with him noticed he was wearing one red glove (RR59: 150-153; SE 115), whether wearing red gloves might indicate a continuing desire to be associated with the Bloods, and whether this evidence might influence Dr. Hagedorn's opinion about Applicant's gang affiliation at the time of the offense; whether Dr. Hagedorn was aware that Applicant committed an extraneous aggravated robbery of Luis Gonzalez on February 15, 2009 and that Applicant and a second robber each wore one red glove and one white glove during that offense (RR62: 230, 243; SE 176); whether—even if it were true that Applicant only acquired his tattoos while awaiting trial—this might indicate Applicant was either a gang member at the time of trial or had a continuing desire to be associated with a gang; that Dr. Hagedorn's gang research primarily has been conducted in Chicago and Milwaukee; that Dr. Hagedorn has not conducted research or published materials relating to Dallas area gangs or the Fish Trap Bloods; that the Bloods, whether referring to a juvenile or adult gang, is one of the two most well-known gangs; and that juvenile street gang members—not just adult gang members—commit crimes and engage in violence, including robbery, murder, sex assault, and selling drugs. (Lord Affidavit, at 3-4).
- (355) By examining two photos and an "AIS report" listing identifying information, Dr. Hagedorn concluded Applicant appeared not to have his gang-related tattoos when he committed the capital murder of Carlos Gallardo. (Hagedorn Affidavit, at 9-10, 14; Exh. B, C). On this basis, he alleges Detective Nelson's testimony misled the jury about Applicant's status as a gang member. (Hagedorn Affidavit, at 10).

- (356) Dr. Hagedorn attaches two photographs to his affidavit, one depicting Applicant in a hospital bed and the other of Applicant holding a child; both show an exposed left forearm. (Hagedorn Affidavit, at 9). Dr. Hagedorn also relies on a photo of a Dallas County Adult Information System profile for Applicant with the “scars/marks/tattoos/piercings/amputations” section of the form left blank. (Hagedorn Affidavit, at 9).
- (357) The Court finds it is difficult to ascertain, due to the quality of the photos, what tattoos Applicant had when the photos were taken. Some writing on his left forearm is evident in at least one photo—but is unclear what it is. The date of the photo of Applicant holding the child is unknown.
- (358) Regardless, there is evidence contrary to Dr. Hagedorn’s theory that Applicant had no tattoos associated with the Fish Trap Bloods at the time of this capital murder and that he only acquired his gang-related tattoos while incarcerated and awaiting trial.
- (359) Mr. Lord attached various records to his affidavit that refute a theory Applicant acquired his tattoos while incarcerated prior to trial. If Applicant had proffered this theory at trial, the State could have offered the following evidence in rebuttal:

A Garland Police Department Incident/Investigation Report for the May 9, 2003 burglary of a building which indicates Applicant had the tattoo “Dallas” on his right forearm, “Piru, tx” on his right upper arm, “Texas” and “3500” on his left forearm, and “West Dallas” on his left upper arm.

A Garland Police Department Arrest Report for the December 23, 2003 arrest of Applicant for the offense of burglary of a building and unauthorized use of a motor vehicle which indicates Applicant had the tattoo “Dallas” on his right forearm, and

"Piru, tx" on his right upper arm.

A DPD Arrest Report for the April 19, 2007 arrest of Applicant for the offense of unauthorized use of a motor vehicle which indicates Applicant had the tattoo of "West Dallas" on his left arm.

A DPD Arrest Report for the December 27, 2008 arrest of Applicant for the offense of possession of marijuana which indicates Applicant had tattoos on both arms.

A Dallas Adult Information System Identification Information page printed April 8, 2009 which indicates Applicant had tattoos on his right shoulder, right forearm, left shoulder, and left forearm.

A Justice Exchange Person Summary report printed April 8, 2009 which indicates Applicant had tattoos on his upper left arm, left forearm, right forearm, and right shoulder.

- (360) The Court finds this evidence indicates Applicant had some tattoos related to a gang affiliation (primarily "Piru" and "3500") as early as 2003.
- (361) The Court finds it is unclear when Applicant acquired many of the tattoos that were the subject of Detective Nelson's testimony.
- (362) Even if the jury believed Applicant acquired some of his gang-related tattoos while awaiting trial, evidence he had at least some other gang-related tattoos, including "Piru," "3500," and "West Dallas" as early as 2003, negates Hagedorn's theory.
- (363) Dr. Hagedorn reviewed over 500 pages of Applicant's Dallas County Juvenile Department criminal and probation records and concluded the records repeatedly reflect either

that Applicant was not a gang member or that Applicant and his parents did not report any gang affiliation for Applicant, with a single exception of one indication of gang affiliation (specifically that Applicant hung out with the Fish Trap Bloods). (Hagedorn Affidavit, at 10-13).

- (364) Dr. Hagedorn reviewed Applicant's criminal records from the Dallas Police Department (DPD) (which Applicant's writ counsel obtained by subpoena during this writ proceeding) and noted those records do not mention any involvement in a gang or reflect that Applicant's offenses were gang-related. (Hagedorn Affidavit, at 13).
- (365) Dr. Hagedorn concluded the Dallas County Juvenile Department and DPD records do not support a conclusion Applicant was a gang member at the time of the capital murder of Carlos Gallardo. (Hagedorn Affidavit, at 14).
- (366) Dr. Hagedorn concluded that, if Applicant had an association with a gang as a youth (as he reported one time in the juvenile records in 2000), that association was likely a loose and transitory affiliation. (Hagedorn Affidavit, at 14).
- (367) Based on the records, it appears that to form his opinions Dr. Hagedorn reviewed all DPD offense reports associated with Applicant's name. Although the jury heard evidence in the punishment phase about a number of extraneous offenses, there was no evidence at trial about the following four offenses that were included in those DPD records: (1) 04/25/2006 Assault of Pamela Reese, the mother of Applicant's children; (2) 05/25/2007 Aggravated Assault (shooting) of Reginald Stanley; (3) 08/18/2008 Aggravated Assault (shooting) of Rodrigo Martinez; and (4) 03/14/2009 Aggravated Robbery of Wilbur Morgan.
- (368) An expert's review of information to form an opinion opens the door to that information being admitted into evidence before the jury. Evidence Applicant was involved in four additional, alleged extraneous offenses would have been

detrimental to Applicant's case.

- (369) Dr. Hagedorn noted that school and juvenile records regularly describe Applicant as a loner, which is uncommon for a gang-involved youth. (Hagedorn Affidavit, at 13-14). He expressed an opinion Applicant must not have been "an involved gang member" because his juvenile and school records reflect he mostly kept to himself, had few friends, and had significant difficulties in interpersonal relationships. (Hagedorn Affidavit, at 14-15).
- (370) Evidence that Applicant participated in numerous cliques with other Dallas County jail inmates, however, strongly refutes evidence Applicant would not participate in a gang because he was a loner. Also, Dr. Hagedorn's hypothesis is strongly refuted by evidence admitted at trial related to the Luis Gonzalez extraneous robbery and Roberto Ramos capital murder, which Applicant committed with other assailants. If Dr. Hagedorn or a similar expert had expressed an opinion to the jury that Applicant was likely not an involved gang member because he had a tendency to be a loner, the State likely would have refuted that opinion in closing arguments with these obvious, contradictory facts.
- (371) Dr. Hagedorn believes Applicant may have acquired his gang-related tattoos while incarcerated and awaiting trial. (Hagedorn Affidavit, at 14-15).
- (372) Dr. Hagedorn concluded that if Applicant acquired his gang-related tattoos while awaiting trial, "it is highly likely that he did so as a matter of survival in prison." (Although Dr. Hagedorn refers to "prison," Applicant was detained in the Dallas County jail, not prison, prior to trial.) Dr. Hagedorn continues, "This would be consistent with [gang] research that inmates join gangs during their incarceration as a means of protection and security in a dangerous environment." (Hagedorn Affidavit, at 15).

- (373) An expert's opinion that Applicant acquired his gang-related tattoos while awaiting trial would have done far more harm than good to his punishment case. (See Hagedorn Affidavit, at 9-10, 13-15).
- (374) Mr. Parks testified the trial team would not have proffered a theory or evidence that Applicant acquired his gang-related tattoos after the offense and while he was incarcerated in the Dallas County jail awaiting trial because this theory would "torpedo our suggestion to the jury at least that his gang days were long over after he left the juvenile gang." (WRR8: 35). Applicant's brother had testified Applicant entered the gang at age ten. Evidence Applicant acquired gang tattoos shortly before trial would convey to the jury that Applicant was in a gang from age ten until the time of trial. (See WRR8: 35).
- (375) Evidence Applicant acquired gang-related tattoos while incarcerated prior to trial could have led the jury to believe Applicant was a current, active gang member.
- (376) If trial counsel had presented a theory that Applicant acquired gang-related tattoos while awaiting trial, the jury could have concluded this was clear evidence of Applicant's continuing intent to be associated with a gang, which supported a "yes" answer to the future-danger special issue.
- (377) Dr. Hagedorn's suggestion Applicant may have acquired his tattoos as a means of self-protection while awaiting trial tends to portray Applicant as a person who was at risk of being victimized while in jail. This would have invited the State to offer additional, more detailed rebuttal evidence of Applicant's bad acts in the Dallas County jail and would have been incredibly harmful to Applicant's case.
- (378) At trial, the State introduced rebuttal evidence through Sergeant Curfey Henderson, commander of the Dallas Sheriff's Office's Special Response Team division, that Applicant had disciplinary problems with fellow inmates in

the Dallas County jail due to "running" his tank, bullying other inmates, and attempting to use other inmates' commissary accounts. (RR65: 268, 270-278, 282-283). These incidents resulted in Applicant repeatedly being moved to new housing locations within the jail. (RR65: 270-274, 282-283). Sergeant Henderson further testified Applicant is very clever and used his size to intimidate other inmates. (RR65: 275-276). He explained that Applicant formed cliques with other inmates in order to "run" a tank. (RR65: 276).

- (379) Sergeant Henderson's testimony conflicts directly with Dr. Hagedorn's theory that Applicant needed to acquire tattoos in order to protect himself while incarcerated.
- (380) The State utilized only two Sheriff's Office employees to testify generally about Applicant's inappropriate behavior while in the Dallas County jail. Mr. Lord attached a number of jail incident reports to his Affidavit containing details of numerous incidents involving Applicant in the jail. (Lord Affidavit, Exh. C). If Dr. Hagedorn or a similar witness had testified in Applicant's punishment case, the State likely would have called additional rebuttal witnesses (jailers and/or inmates) who were directly involved and would have testified about the following incidents in which Applicant was often reported to be a bully and aggressor:

On October 14, 2009, an inmate in Tank 4E04 gave a detention officer a kite [i.e. note] stating that Applicant was causing problems in the tank. As a result, jail authorities transferred Applicant to another housing location.

On February 20, 2010, an inmate reported Applicant and two other inmates were causing problems by harassing him and others. The inmate reported Applicant and his two cohorts threatened the inmates who had television privileges. Additional inmates confirmed Applicant and two others were bullying the occupants of the tank. Applicant and

the two inmates were transferred to new housing locations as a result.

On March 25, 2010, an inmate in Tank 7W09 reported that Applicant and another inmate had stolen his commissary. Officers investigated. Several other inmates confirmed the first inmate's report. Officers learned that inmates in Tank 7W10 had been picking the lock and entering Tank 7W09. Applicant and the other inmate were transferred to a new housing location.

On April 27, 2010, three inmates including Applicant were observed to be boxing (horse-playing) in the dayroom. Officers had previously addressed the inmates' disruptive behavior in the tank and toward officers. Officers were aware the three inmates had formed a clique and were running the tank. Officers moved Applicant and the other two inmates to new housing locations and instituted procedures to keep Applicant and the two inmates separate from one another in the future.

On June 21, 2010, an inmate in Tank 6W07 gave a kite to an officer with a written note indicating Applicant was causing problems in the tank with other inmates and taking their food. Several inmates had signed the kite. Applicant was transferred to administrative custody.

On January 11, 2011, an inmate reported he was being threatened by Applicant and another inmate in Tank 2W02. Officers spoke to other inmates in the tank and learned Applicant was "trying to control the tank." Officers transferred Applicant to another location and instituted procedures to keep Applicant separate in the future from all other inmates housed in that tank.

On March 21, 2011, several inmates in Tank 5W06 reported Applicant was bullying them and they were afraid of him. They reported that several of them had to purchase commissary items for him the prior week; he threatened that if they told anyone he would "handle them." Officers confirmed the report with several individuals. As a result, officers transferred Applicant to another housing location.

On April 6, 2011, an inmate reported that he was fearful of Applicant and two other inmates in Tank 4E08 who were threatening him if he did not buy them commissary items. Applicant and the two other inmates were transferred for running a clique in the tank, and the reporting inmate was separated for his safety.

On May 2, 2011, a jail employee observed Applicant collecting another inmate's commissary items. Applicant reported that he was on commissary restriction but that a family member had contributed money to the other inmate's account. As a result, Applicant was transferred to administrative custody.

On August 31, 2011, officers observed two inmates in a verbal confrontation. After investigation, officers concluded Applicant was "trying to run the tank." Applicant was transferred in order to reduce problems in the tank.

On September 30, 2011, several inmates reported Applicant was causing problems in Tank 3E06 by "running" the television. Applicant was transferred to another location.

On April 14, 2012, an inmate in Tank 5W05 told an officer the inmates in the tank were "living in fear of" Applicant. The inmate gave the officer a kite explaining that Applicant was using his size to get

what he wanted, had been very physically and verbally aggressive, and controlled the television. Upon investigation, another inmate in the same tank indicated Applicant caused racial tension, the other inmates were "fed up" with Applicant, and physical altercations might result. Officers moved Applicant to a new housing location as a result.

(Lord Affidavit, Exhibit C).

- (381) Additional evidence that Applicant was known for forming cliques in the Dallas County jail, running his tank, bullying other inmates, and using other inmates' commissary funds, would have demonstrated to the jury Applicant would be an aggressor in prison rather than a victim.
- (382) There is no evidence in this writ proceeding consistent with Dr. Hagedorn's theory that Applicant may have been a vulnerable inmate. The evidence, in fact, reflected quite the opposite.
- (383) An expert theory that is so contrary to evidence already before the jury and which would invite additional evidence harmful to Applicant would not have been favorable to Applicant in any way and would have invited distrust of Applicant's case by the jury.
- (384) Dr. Hagedorn opines in his affidavit that Detective Nelson's testimony misled the jury due to "the fact that the tattoos at issue do not appear to accurately reflect Mr. Harris's gang affiliation at the time of the crime." (Hagedorn Affidavit, at 10).
- (385) Applicant's gang affiliation at the time of the offense was not a primary issue at trial. There were no specific allegations that the case-in-chief robbery and capital murder was a gang-motivated offense. The victims had no association with gangs. The evidence indicated Applicant committed

robberies as his way of making a living, as opposed to furthering some gang agenda.

- (386) Although it was not the focus of the State's case, there was some collateral evidence at trial Applicant had a continuing association with a gang as an adult—by wearing a red glove during the capital murder, by his handwritten drawings made during the voir dire proceedings (SX 164), by the fact he carried red items at the time of the offense (red cell phone and red key chain) (RR59: 154-155 SX 116), and by wearing one red glove and one white glove during an extraneous robbery shortly before the capital murder. Ramon Maddox, Sr., also seemed to indicate he heard Applicant was in the Bloods, although the timing of that association was unclear.
- (387) Having a testifying expert review all of Applicant's juvenile and adult criminal records and rely on them to form an opinion would have opened the door for all of this information to be admitted into evidence. (See WRR8: 33). No competent counsel would purposefully undertake such a strategy. Particularly, the adult criminal records included a case in which Applicant was a suspect in a non-charged aggravated assault for the May 25, 2007 shooting of Reginald Stanley, who suffered four gunshot wounds and was rendered a paraplegic. (Lord Affidavit, Exh. A).¹⁰
- (388) Immediately prior to trial, the State gave Applicant notice of intent to introduce this aggravated assault, or attempted capital murder, as an extraneous offense in the punishment phase. (RR54: 4-16). Applicant's trial team objected to insufficient notice and succeeded in keeping this case out of evidence. The Court warned Applicant, however, that if the defense team opened the door, the case could

¹⁰ Mr. Lord stated in a footnote in his affidavit that the State provided the offense report to Applicant's trial counsel prior to trial. (Lord Affidavit, at 6). (RR54: 7-8, 12-14). In this writ proceeding, Applicant originally filed un-redacted DPD records with Dr. Hagedorn's affidavit. (WRR8: 5-9). The State asked the Court to require Applicant to redact confidential information in the records; Applicant agreed. (WRR8: 5-9). In the amended filing of Dr. Hagedorn's affidavit, Applicant redacted the report for the May 25, 2007 shooting of Reginald Stanley in its entirety

come in as rebuttal evidence. (RR54: 16). Having an expert testify who reviewed those records would have been directly contrary to the Court's warning and to the trial team's efforts to keep that information from being admitted into evidence.

- (389) Evidence of this May 2007 shooting would have provided evidence at trial that Applicant had shot and nearly killed a man almost two years prior to the February/March 2009 robberies and shootings, thus indicating Applicant's history of extreme violence was quite lengthy.
- (390) Placing documentation of Applicant's entire juvenile and adult criminal history before the jury, including every Dallas Police Department offense and prosecution report associated with Applicant's name, would have been profoundly detrimental to his case.
- (391) The defense team's credibility with the jury would have been substantially diminished if they called a gang-expert to testify to an opinion that Applicant was not in fact a gang member because DPD records did not mention a gang association and juvenile records only mentioned a gang association once.
- (392) Dr. Hagedorn's proffered testimony, as set out in his affidavit, would not have provided effective rebuttal at trial because it does nothing to demonstrate that Detective Nelson's testimony—that Applicant had tattoos reflecting a gang-association—was in fact wrong.
- (393) Applicant admitted to his trial team, to his own experts at trial and in this writ, and to the State's expert that he was a member of the Fish Trap Bloods. (WRR8: 22, 32).
- (394) Applicant's brother, Ramon Maddox, Jr. testified at trial Applicant joined a gang when he was about 10 years old. (WRR8: 23-24; RR64: 267-268, 276- 277). The jury also heard testimony from Applicant's step-father, Ramon Maddox, Sr., during the State's cross-examination, that Mr. Maddox heard Applicant was in a gang when Applicant lived

in the Highland Hills area; it was unclear when this was. (RR65: 78-79).

- (395) There was no valid evidence Applicant was not in a gang. (WRR8: 22, 24).
- (396) Trial counsel could not have proffered Dr. Hagedorn's testimony at trial that he reviewed a discrete set of records and concluded there was no evidence Applicant was a gang member. This testimony would have been highly improper: trial counsel could not support false testimony. Also, such expert testimony would have been contrary on its face to Applicant's own brother's testimony at trial acknowledging Applicant's gang membership.
- (397) Dr. Hagedorn authored an essay titled "Gang Stereotypes in Court," in the January 2013 edition of the "Chronicle," which is published by the International Association of Youth and Family Judges and Magistrates. (Lord Affidavit, Exh. D). In this essay, Dr. Hagedorn admits that gangs do real harm, that research shows gang members are typically more violent and criminal than non-gang members, "and this should be kept in mind by judges and juries." (Lord Affidavit, Exh. D).
- (398) The Court finds that, if asked, Dr. Hagedorn would have likely admitted in his testimony that some gangs do real harm in society and some gang members are typically more violent and criminal than non-gang members.
- (399) Dr. Hagedorn has testified in court in other cases that gang members often do not admit their membership, gang members can be violent and dangerous, gang members commit crimes or violent acts for personal reasons at times and to help the gang at other times, gangs vary from location to location, and to know how a gang operates in an area one must conduct research by speaking with law enforcement, gang members, and local schools. (Lord Affidavit, at 16).

- (400) Mr. Parks indicated he believes a defense team would have a "steep hill to climb" to flip gang evidence into mitigating evidence, and such an attempt might not be effective with some jurors. (WRR8: 37-38). In his opinion based on trying cases in Dallas County for many years, Mr. Parks believes some jurors would reject a theory that gang involvement could be mitigating. (WRR8: 38).
- (401) Even juvenile street gangs, like the Fish Trap Bloods, commit crimes, and a defense gang expert would be expected to make this admission if asked. (WRR8: 21-22, 24).
- (402) If the defense team had brought their own gang expert to trial, the State may have chosen to place greater emphasis on evidence of Applicant's possible ongoing participation in a gang. (WRR8: 29).
- (403) If Dr. Hagedorn or a similar gang expert had testified in Applicant's punishment case that his DPD and Dallas County Juvenile Department records do not support a conclusion he was a gang member (Hagedorn Affidavit, at 14), the State could have pointed out in its closing arguments that this opinion is illogical in the face of testimony from Applicant's own brother that Applicant was a member of a gang. (RR64: 267-268, 276-277).
- (404) Mr. Parks testified he believes there is a risk that calling a defense gang expert would serve to emphasize the gang evidence before the jury. (WRR8: 24). Mr. Parks believes it made no sense to drag out the testimony about gang membership, particularly because Applicant was no longer a juvenile. (WRR8: 24). Mr. Parks view was to not keep hammering on the issue, rather "[g]et it out the door and move on." (WRR8: 27).
- (405) Gang crime was not the focus of this case. The case-in-chief murder did not involve gang-on-gang violence or any direct evidence of gang involvement. (WRR8: 27). There was evidence at trial that Applicant was stealing for personal

gain, to support himself and his family. (WRR8: 27-28). The State did not allege at trial Applicant's robberies were committed with fellow gang members. Applicant's gang affiliation was a collateral issue in the case. There was some innuendo in the record, however, that Applicant had an ongoing affiliation with the gang—based on his tattoos, that he wore one white glove and one red glove (representing the Bloods) when he committed robberies, that he carried a red cell phone, and that he made some drawings containing gang symbols on his legal pad during voir dire. (WRR8: 28-29). The evidence Applicant was not on the Dallas gang roster stood in contrast to this evidence. (WRR8: 28-29).

- (406) Dr. Hagedorn's testimony, as presented in his affidavit, presents two contradictory, irreconcilable opinions: first that Applicant's gang affiliation, if any, was a loose and transitory affiliation at a young age (based on a single report in the juvenile records), but second that Applicant only recently acquired his gang tattoos in the Dallas County jail, indicating a recent gang- affiliation. (See Hagedorn Affidavit, at 14).
- (407) Counsel's decision to challenge the State's gang expert in a 702 hearing, to cross-examine the State's gang expert, and not to elaborate and emphasize the gang evidence through an additional expert fell within reasonable professional norms.
- (408) Based on all of the Court's findings related to Ground 2, the lack of presentation of a defense gang expert like Dr. Hagedorn was not deficient and, alternatively, did not prejudice Applicant's defense in the punishment phase.
- (409) "*Strickland* does not enact Newton's third law for the presentation of evidence, requiring for every prosecution expert an equal and opposite expert from the defense." *Harrington v. Richter*, 562 U.S. 86, 111 (2011).
- (410) Applicant suffered no prejudice when trial counsel did not present a gang expert in Applicant's punishment phase case

to counter the State's expert or to contextualize Applicant's association with the gang.

- (411) Dr. Hagedorn's suggestion that an expert could review juvenile and adult criminal records and testify those records contain little evidence of gang membership would have opened the door to the State putting on extraneous offense evidence that had been excluded from evidence. No competent attorney would have undertaken such an action.
- (412) Dr. Hagedorn's testimony in Applicant's case would not have altered the outcome of the case.
- (413) Applicant fails to prove by a preponderance of the evidence that counsel's decision not to present the testimony of his own gang expert in the punishment phase constituted deficient representation or that it prejudiced his defense. See *Thompson*, 9 S.W.3d at 812 (explaining the standard under *Strickland*).
- (414) The State's rebuttal to a defense gang expert would have strongly supported the jury's answer of "yes" to the future-danger special issue. The evidence Applicant presents in this writ proceeding in support of his claim that trial counsel should have presented a gang expert to rebut the State's gang expert is not the type or quality of evidence which would have altered the jury's answers to the special issues.
- (415) The evidence Applicant presents in this writ proceeding for his contention that trial counsel should have used a defense gang expert to contextualize Applicant's gang membership as mitigating, when considered along with the whole of the trial evidence, is not evidence which would have changed the jury's answer to the mitigation special issue.
- (416) The jury was presented with mitigating evidence about Applicant's difficult childhood, that he was exposed to alcohol and marijuana in utero, that his mother was an inattentive teen parent who frequently left him with others,

that he suffered from ADHD from an early age, that he participated in special education throughout his schooling, that his mother suffered from serious mental illness, that Applicant and his siblings were exposed to violence between their parents at an early age, including witnessing an incident in which one parent wielded a knife and the other an iron, that in his late teens Applicant spent time on the streets, and that Applicant suffered from addiction to PCP and marijuana. The evidence Applicant now claims should have been added to his case—including that his gang membership was a juvenile, short term, and primarily non-violent association which may have substituted for what he was lacking in other areas of his life—is simply insufficient to persuade the jury to change an answer to either of the special issues.

(417) Ground 2 should be denied.

GROUND 3
Counsel's Decision not to Object to
Evidence Applicant Wore a Restraint
Device During Voir Dire

Applicant contends trial counsel rendered ineffective assistance by not objecting to a State witness's testimony in the punishment phase during cross-examination by the defense attorney that informed the jury Applicant was restrained during trial by a custody control device, or stun belt, and by then eliciting further testimony from the witness about the stun belt. (Application, at 75-83).

Review of a trial counsel's performance is highly deferential, as there is a "strong presumption that counsel's conduct [fell] within the wide range of reasonable professional assistance; that is, [applicant] must overcome the presumption that, under the circumstances, the challenged action might be considered sound trial strategy." *Strickland*, 466 U.S. at 689.

To establish ineffective assistance of counsel based on a failure to object, an applicant must show the trial court would have committed harmful error in overruling such an objection. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011); *Vaughn v. State*, 931 S.W.2d 564, 566 (Tex. Crim. App. 1996) (en banc) (per curiam). An applicant bears the burden of proving by a preponderance of the evidence that counsel was ineffective, and any allegations of ineffectiveness must be firmly founded in the record. *Thompson*, 9 S.W.3d at 813.

(418) At trial, the State called Bobby Moorehead, a deputy sheriff with the Dallas County Sheriff's Department, who acted as a bailiff during the individual voir dire proceedings in this case. (RR65: 234). Deputy Moorehead identified two drawings Applicant made during the voir dire proceedings. (RR65: 235; SE 164-165). On cross-examination, Mr. Lollar elicited the following information from the witness:

- The bailiffs, defendant, and the parties saw each other daily for a 12-week period during voir dire.
- Voir dire sometimes took place in a courtroom, but if no courtroom was available, it was held in the judges' conference room on the second floor.
- Everyone got to know each other well. Deputy Moorehead and Applicant spoke to each other all the time. Applicant was never disrespectful to Deputy Moorehead.
- Applicant did not give Deputy Moorehead "one minute of trouble" during the 12 weeks.
- Applicant made the drawings while sitting through 12 weeks of "stultifyingly boring" jury selection.
- Applicant knew Deputy Moorehead's first name was Bobby and that he had worked for the Garland Police Department.

- One of Applicant's drawings reflects two people holding guns, one person is labeled "GPD" for Garland Police Department and the other "FWPD." One individual is saying, "Neal [another bailiff for this case] go and get that scumbag. Do you feel lucky, punk? . . . I'm Bobby, the great." A third figure, wearing a Tommy Hilfiger shirt, is saying, "Please don't bust a cap in my ass, Sir Bobby."
- Applicant certainly never tried to assault Deputy Moorehead and was never any trouble to supervise.

(RR65: 236-240).

Trial counsel then elicited testimony regarding an "elevator incident" in which the bailiffs supervising Applicant accidentally left him unattended on the judges' elevator one day on the way to individual voir dire. In describing this incident, Deputy Moorehead spontaneously told the jury Applicant was wearing a stun belt. (RR65: 240-241). Counsel did not object, allowed the witness to explain what the stun belt was, and continued inquiring about the incident, in which both bailiffs stepped off the elevator, the doors closed, and Applicant—through no fault of his own—was left on the elevator alone. (RR65: 241-242). Applicant was not wearing handcuffs or leg irons—only the stun belt. (RR65: 242-243). Applicant did not try to leave the elevator or escape. (RR65: 245). If he had pushed the button, the elevator would have gone to the judicial parking level and opened. (RR65: 244-245). After the elevator traveled up, two court reporters got on the elevator with Applicant; he did not threaten them or anyone else or take anyone hostage. (RR65: 245).

- (419) Relying on caselaw that a due process violation may occur if a jury sees or has knowledge a defendant is wearing shackles in the courtroom, Applicant alleges defense counsel has a duty to object when a jury is informed about a defendant's

restraints or shackles. (Application, at 78-80).

- (420) At the writ hearing, Mr. Lollar testified that if the State had not planned to call Deputy Moorehead as a witness, he had planned to call him to testify about the January 9, 2012 incident in which the bailiffs inadvertently left Applicant on the elevator, allowing him to ride the elevator unattended. (WRR4: 107-109). Applicant was dressed in a suit, wearing no handcuffs or leg irons. (WRR4: 110). He rode the elevator to the seventh floor (and did not get off). (WRR4: 110). Without recognizing Applicant, two court reporters got on the elevator; when one of them mentioned this case, Applicant, standing behind them, told them he was the defendant. (WRR4: 110-111). Applicant made no attempt to escape. (WRR4: 111).
- (421) Mr. Lollar explained at the writ hearing that the defense team “felt that was, again, powerful evidence to show a jury that he would not be a future danger once he’s off of PCP, and like he had been for three years waiting to go to trial. We thought that was evidence that he could be trusted in that type of a situation.” (WRR4: 111).
- (422) Mr. Lollar testified that when Deputy Moorehead interjected the information about the RACC, or stun belt, into the description of what happened, he made a strategy decision at that point. (WRR4: 111-112). He believed the information being conveyed to the jury—describing what could have been a very bad situation that turned out positively—outweighed the jury learning that Applicant was wearing a stun belt. (WRR4: 113).
- (423) The complained-of testimony occurred during the punishment phase of trial. (RR65: 240-245; WRR4: 113). Thus, the presumption-of-innocence concerns connected to circumstances in which a jury observes a defendant wearing restraints during the guilt/innocence phase of trial do not apply here.

- (424) The testimony indicated Applicant wore the stun belt during the 12 weeks of individual voir dire, when voir dire was sometimes held in a conference room instead of a courtroom. (RR65: 240). Neither the prosecutor, the defense attorney, nor Deputy Moorehead indicated Applicant was wearing the stun belt during the jury trial portion of the proceedings. (RR65: 240- 248; WRR4: 113-114). Moreover, there was a substantial lapse in time between the individual voir dire and the jury proceedings. (WRR4: 113). Individual voir dire was held from January 9, 2012 through February 29, 2012. (RR9 – RR38). The jury trial did not begin until May 8, 2012. (RR58).
- (425) Applicant fails to demonstrate by a preponderance of the evidence that counsel's decision not to object to this evidence or by soliciting further evidence to explain the circumstances to the jury was deficient or that it prejudiced his defense.
- (426) To prove counsel was deficient, an applicant must rebut the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. *Thompson*, 9 S.W.3d at 812-13. Applicant fails to rebut this presumption.
- (427) Evidence of the elevator incident strongly supported Applicant's trial theory that he was not a danger when he was detained and had no access to PCP.
- (428) Mr. Lollar solicited the description of the elevator incident for a strategic reason—to demonstrate Applicant was neither a danger nor a flight risk while in custody. In a highly unusual incident, Applicant traveled up and down an elevator in the courthouse unattended. He proved himself not to be opportunistic in the face of someone else's vulnerability. He could have stepped off the elevator when the court reporters got on or potentially accessed a parking garage and fled. From Applicant's perspective, this was valuable evidence to offer to the jury in Applicant's favor.

- (429) Importantly, the parties did not inform the jury that Applicant was wearing the stun belt during the jury trial proceeding. (WRR4: 113-114). Nothing in the record affirmatively indicates the jurors knew Applicant wore the stun belt before the jury. The jurors may have reasonably believed the stun belt was utilized due to the close quarters in the conference room for voir dire. Further, the issue of the stun belt was raised in evidence during the punishment phase of trial, not the guilt/innocence phase of trial, when the presumption of innocence is key.
- (430) Counsel's decision to solicit testimony from Deputy Moorehead about the elevator incident, even if at the same time the Court allowed evidence about the stun belt, was a strategy decision.
- (431) Counsel's decision not to object to Deputy Moorehead's reference to the fact Applicant wore a restraint device during voir dire was based on reasonable trial strategy.
- (432) Even assuming trial counsel's decision not to object was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.
- (433) Regarding the future dangerousness special issue, when general evidence that Applicant wore a stun belt during some court proceedings is balanced with the information of Applicant's favorable behavior during the elevator incident, at worst for Applicant's case, the favorable behavior weighed evenly in the jury's consideration to cancel out the negative factor of the stun belt, and Applicant did not suffer any prejudice.
- (434) It is highly unlikely that the jury's knowledge of the stun belt, which at worst countered the favorable evidence of the elevator incident, weighed so strongly that without it, the jury would have answered one of the special issues in Applicant's favor.

- (435) Knowledge of the stun belt would have been irrelevant to the mitigation special issue; however, the favorable evidence of the elevator incident might have influenced a juror to answer “yes” to the mitigation special issue.
- (436) Applicant fails to demonstrate a reasonable probability that, but for counsel’s decision not to object to evidence regarding the stun belt, the result of Applicant’s proceeding would have been different.
- (437) Additionally, Applicant has not met his burden to show the trial court would have committed harmful error in overruling the objection had trial counsel objected. *See Vaughn*, 931 S.W.2d at 566.
- (438) Ground 3 should be denied.

GROUND 4
Admission of Medical Examiner’s Testimony and
Forensic Evidence Related to the Death of Carlos
Gallardo

In Ground 4 of his writ application, Applicant contends he was denied due process because the Court erred in overruling trial counsel’s pre-trial objections to the admission of Carlos Gallardo’s autopsy photos and because trial counsel rendered ineffective assistance in the guilt/innocence phase of trial by failing to object to the admissibility of the medical examiner’s testimony about Carlos Gallardo—which was allegedly unduly graphic and prejudicial. (Application, at 84- 95).

Applicant contends the murder of Carlos Gallardo was an extraneous offense, and subject to Texas Rules of Evidence 401 (relevance), 403 (prejudice), and 404(b) (extraneous offense exceptions). (Application, at 86-88).

- (439) To demonstrate ineffective assistance of counsel for failure to object to the admission of testimony, an applicant must identify the specific objection and prove that it would have been successful. *Ortiz v. State*, 93 S.W.3d 79, 93 (Tex. Crim.

App. 2002). An isolated failure to object does not amount to deficient representation because whether “counsel provides a defendant adequate assistance is to be judged by the totality of the representation rather than by isolated acts or omissions.” *Vasquez v. State*, 819 S.W.2d 932, 938 (Tex. App.—Corpus Christi 1991, pet. ref’d) (finding counsel’s performance was not deficient, given the totality of the circumstances, though he made the wrong objection to a jury argument).

- (440) Defense counsel’s failure to object to admissible evidence does not constitute ineffective assistance of counsel. *Lee v. State*, 29 S.W.3d 570, 579–580 (Tex. App.—Dallas 2000, no pet.); see *Ex parte Jimenez*, 364 S.W.3d 866, 887 (Tex. Crim. App. 2012) (“The failure to object to proper questions and admissible testimony . . . is not ineffective assistance.”).
- (441) Applicant shot and killed Carlos Gallardo immediately after killing Alfredo Gallardo, the named complainant in this capital murder case. (RR58: 82, 104, 107, 110, 116, 118). The two murders were so intertwined that excluding evidence of Carlos Gallardo’s murder would have made the State’s case incomplete.
- (442) The autopsy photos and medical examiner’s testimony related to Carlos Gallardo were relevant and admissible as same-transaction contextual evidence.
- (443) At the writ hearing, Mr. Lollar indicated that he believed evidence related to the killing of Carlos Gallardo, such as the autopsy photos and medical examiner’s testimony, was admissible as same-transaction contextual evidence. (WRR4: 115-117).
- (444) Extraneous-offense evidence may be admissible as same-transaction contextual evidence when several offenses are so intermixed, blended, or connected as to form a single, indivisible criminal transaction, such that in narrating the one, it is impracticable to avoid describing the other. *Prible v. State*, 175 S.W.3d 724, 731 (Tex. Crim. App. 2005); *McDonald*

v. State, 179 S.W.3d 571, 577 (Tex. Crim. App. 2005); *Rogers v. State*, 853 S.W.2d 29, 33–34 (Tex. Crim. App. 1993). For extraneous evidence to fall into this category, the extraneous matter must be so intertwined with the charged crime that avoiding reference to it would make the State's case incomplete or difficult to understand. *Prible*, 175 S.W.3d at 732.

- (445) An offense is not tried in a vacuum; the jury is entitled to know all relevant surrounding facts and circumstances of the charged offense. *Prible*, 175 S.W.3d at 732; *Wyatt v. State*, 23 S.W.3d 18, 25–26 (Tex. Crim. App. 2000) (holding evidence that defendant sexually assaulted child before smothering the child constituted same-transaction contextual evidence); *Wesbrook v. State*, 29 S.W.3d 103, 114–15 (Tex. Crim. App. 2000) (holding evidence that defendant committed three other homicides on night of charged homicide constituted same-transaction contextual evidence).
- (446) It was reasonable for trial counsel to believe the murder of Carlos Gallardo was sufficiently intertwined with the charged offense to be same-transaction contextual evidence.
- (447) Defense counsel's performance was not deficient. He did not object based on his reasonable belief that evidence of Carlos Gallardo's murder was admissible as same-transaction contextual evidence.
- (448) During the home invasion robbery, Applicant forced the family from the living room through the master bedroom and bathroom and into the master bedroom closet. (RR58: 89–90, 93–94, 131–133). While the family was in the closet, they heard Applicant ransacking the house. (RR58: 96–98, 133; SE 19). Applicant started to remove first the mother and then the daughter from the closet. (RR58: 100–101, 134, 136). Applicant then pointed the gun at Alfredo and grabbed his shirt, pulling him out of the closet and into the adjacent bathroom. (RR58: 101–103, 136, 148–149). Carlos followed.

- (RR58: 104, 116, 137). Applicant and Alfredo fell into a large Jacuzzi tub, and Applicant began shooting. (RR58: 102-103, 113-116). Applicant shot Alfredo first. (RR58: 106). He continued to shoot, killing Carlos, who had crouched down near the bathroom sink at the first gunshots. (RR58: 104, 107, 116). After shooting the men, Applicant left. (RR58: 107).
- (449) In addition, Applicant has failed to demonstrate that the Court would have abused its discretion by overruling a Rule 401, Rule 402, Rule 403, or Rule 404(b) objection to the medical examiner's testimony. (See Application, at 89-94).
- (450) Because this evidence was admissible, Applicant cannot demonstrate the Court would have committed error in admitting the medical examiner's testimony over objection.
- (451) As to the medical examiner's testimony, Applicant has failed to meet the first prong of *Strickland* to establish deficient performance.
- (452) Moreover, Applicant cannot show prejudice. He fails to show that even if trial counsel had objected and the Court had sustained the objection, the outcome of the guilt/innocence phase would have been any different.
- (453) Applicant seems to incorporate in this complaint an allegation that the Court erred by overruling his pre-trial objections to the autopsy photos of Carlos Gallardo. Such a claim, however, is based on the rules of evidence, or state statutory law. Violations of state statutory law are not cognizable in a habeas application. See *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002). Habeas corpus is available only to review jurisdictional defects or denials of fundamental or constitutional rights. See *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). Accordingly, Applicant's complaints regarding the Court's denial of his objections to the autopsy photos are not cognizable on habeas review and should be denied.

- (454) Applicant fails to demonstrate a denial of due process based on this Court overruling his evidentiary objections to the admission of Carlos Gallardo's autopsy photos.
- (455) Applicant has not demonstrated trial counsel rendered ineffective assistance by not objecting to the admissibility of the medical examiner's testimony about Carlos Gallardo's autopsy.
- (456) Trial counsel rendered effective assistance.
- (457) Applicant very briefly asserts in this issue that appellate counsel was ineffective for failing to raise the admissibility of the medical examiner's testimony on appeal. (Application, at 84, 88). Appellate counsel was not deficient, however, for failing to raise a frivolous issue on appeal. Because the medical examiner's testimony was admissible, was relevant, and was not subject to exclusion under Rules 404(b) or 403, appellate counsel was not deficient for not raising the issue.
- (458) Appellate counsel did not render ineffective assistance related to this claim.
- (459) Ground 4 should be denied.

GROUND 5
Counsel's Alleged Failure to Object to Certain Evidence
During the Guilt/Innocence Phase of Trial

In Ground 5, Applicant contends trial counsel rendered ineffective assistance and he was denied due process when counsel did not raise guilt/innocence phase complaints about the admission of (a) crime scene photographs and testimony by police officers regarding their attempts to save Alfredo Gallardo's life at the scene, (b) recurrent references in other police officers' testimony that Applicant shot at the officers when he exited the Gallardo's trailer, (c) a gun, ammunition, and gloves seized from Applicant's vehicle, which authorities found parked in the driveway next door, and (d) a jail book-in sheet which identified Applicant's vehicle.

(Application, at 96-102).

- (460) To prove counsel was deficient, Applicant must rebut the strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. See *Thompson*, 9 S.W.3d at 812-13. Applicant fails to rebut this presumption.
- (461) To establish ineffective assistance of counsel based on a failure to object, an applicant must show the trial court would have committed harmful error in overruling such an objection. *Martinez*, 330 S.W.3d at 901.
- (462) Applicant complains of trial counsel's failure to object to the admission of Officer Bronc McCoy's and Officer Daniel Fogle's descriptions of their efforts to save Alfredo Gallardo's life under Texas Rule of Evidence 403, and to State's Exhibits 31-42 (crime scene photos). (Application, at 98-100).
- (463) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's failure to object to crime scene photos and first-responder testimony about attempts to save Alfredo Gallardo's life, much less any resulting prejudice.
- (464) Evidence of Applicant's guilt for the capital murder of Alfredo Gallardo was strong. He was the only assailant who entered the home. Multiple witnesses saw and interacted with him during the robbery. Police officers surrounded the trailer while he was still inside it. He exchanged gunfire with police upon exiting the trailer, was shot, and was apprehended at the scene. In the guilt/innocence phase, he challenged the evidence of his intent to kill Alfredo Gallardo.
- (465) Because evidence of Applicant's guilt was strong, Applicant fails to demonstrate a reasonable probability that, but for counsel's failure to object to crime scene photos and first-responder testimony about attempts to save Alfredo Gallardo's life, the result of the proceeding would have been

different.

- (466) Applicant complains of trial counsel's failure to object to the admission of testimony by five officers from the scene to Applicant's attempts to shoot at them when he exited the Gallardo's trailer, on the basis the testimony was prejudicial, minimally relevant to culpability, and cumulative. (Application, at 100-101).
- (467) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's failure to object to recurrent references by police officers that Applicant shot at them when he exited the Gallardo's trailer, much less any resulting prejudice.
- (468) Applicant fails to demonstrate a reasonable probability that, but for counsel's decision not to object to recurrent references by police officers that Applicant shot at them when he exited the Gallardo's trailer, the result of the proceeding would have been different.
- (469) Applicant complains of trial counsel's failure to object to the admission of evidence seized from the Ford Crown Victoria, including a .22 caliber submachine gun, ammunition, and gloves, on the bases of Rules 401, 403, and 404(b). (Application, at 101-102). Applicant drove the car to the scene that night and parked it in the driveway next door.
- (470) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his counsel's failure to object to evidence regarding a gun, ammunition, and gloves seized from his vehicle, which authorities found parked in the driveway next door, much less any resulting prejudice.
- (471) Applicant fails to demonstrate a reasonable probability that, but for counsel's failure to object to evidence regarding a gun, ammunition, and gloves seized from Applicant's vehicle, which authorities found parked in the driveway next door, the result of the proceeding would have been different.

- (472) Applicant complains of trial counsel's failure to object to the admission of State's Exhibit 46, Applicant's book-in sheet for the Dallas County jail because it was "the only link between [Applicant] and the vehicle next door." (Application, at 102). Applicant alleges trial counsel should have objected on the basis of hearsay and Texas Rule of Evidence 901. (Application, at 102-103). Applicant alleges that if the book-in sheet had not been admitted, the State could not have laid the proper foundation for admission of the items from the vehicle. (Application, at 102).
- (473) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in his trial counsel's failure to object to evidence of a jail book-in sheet which identified Applicant's vehicle, much less any resulting prejudice. Mr. Lollar testified at the writ hearing that the links between Applicant and the vehicle in the driveway next door included that, not only had Applicant driven it to the scene and planned to drive it home that night, but also the police discovered a person hiding in the vehicle who had been waiting for Applicant. (WRR4: 122-123).
- (474) Applicant also fails to demonstrate a reasonable probability that, but for trial counsel's failure to object to admission of the jail book-in sheet, the result of the proceeding would have been different.
- (475) In his complaints in Ground 5, Applicant fails to show the trial court would have committed harmful error in overruling the proposed objections.
- (476) The allegations in Ground 5 did not collectively prejudice Applicant's case.
- (477) Applicant raises a claim that, to the extent the claims in Ground 5 should have been raised on appeal, appellate counsel was ineffective for failing to present them. (Application, at 95, 103-104). The Court denies this claim; Applicant fails to prove deficient performance or prejudice under *Strickland*.

(478) Ground 5 should be denied.

GROUND 6

“As Applied” Challenge to Article 37.071’s Mandate Not to Tell Jurors that Failure to Reach a Verdict Results in a Life Sentence

Applicant’s Ground 6 is based on his pre-trial request for a jury instruction that a life sentence would result if the jury were unable to answer one of the special issues in accordance with the parameters set out in the Court’s instructions. The Court denied Applicant’s request because such an instruction is directly contrary to Article 37.071 of the Texas Code of Criminal Procedure.

In Ground 6, Applicant alleges the statutorily-mandated instructions violate the Eighth and Fourteenth Amendments and that Article 37.071 “as applied” to him deprived him of a fair sentencing hearing. (Application at 85-89, 104, 106-109). In support of his claim, he submitted an affidavit by Juror Gail Mackey describing the jury’s deliberations in this case. (Application Exh. 14).

In *Saldano v. State*, 232 S.W.3d 77 (Tex. Crim. App. 2007), Saldano complained the trial court erred in not informing the jury that failure to unanimously agree on the special issue would have the same legal effect as an answer in the defendant’s favor. *Id.* at 106. Saldano further alleged the court’s instruction requiring 10 jurors to agree in order to answer the future-dangerousness special issue “no” was a misrepresentation. *Id.* The Court of Criminal Appeals rejected Saldano’s challenges. *Id.* at 107.

Article 37.071, Section 2(a)(1) of the Texas Code of Criminal Procedure provides that “[t]he court, the attorney representing the state, the defendant, or the defendant’s counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted [under this Article].” The constitutionality of this provision has been repeatedly upheld. *See*,

e.g., *Freeman v. State*, 340 S.W.3d 717, 731 (Tex. Crim. App. 2011) (noting the court had previously rejected complaints that the Texas death penalty scheme is unconstitutional because jurors cannot be told of the effect of even one life vote); *Busby v. State*, 990 S.W.2d 263, 272 (Tex. Crim. App. 1999) (rejecting claim that the failure to inform a jury that a holdout vote or hung jury results in the automatic imposition of a life sentence violates the Eighth and Fourteenth Amendments to the United States Constitution). In the punishment phase, the Court charged the jury pursuant to Texas's statutorily-mandated instructions in death penalty cases. See Tex. Code of Crim. Proc. Ann. art. 37.071, § 2(a)(1), (b)(1), (e)(1).

- (479) In accordance with Article 37.071, the Court submitted two special issues to the jury, the first concerning whether Applicant is a future danger and the second regarding mitigating circumstances:

Special Issue No. 1: Do you find from the evidence beyond a reasonable doubt that there is a probability that the Defendant, Roderick Harris, would commit criminal acts of violence that would constitute a continuing threat to society?

Special Issue No. 2: Do you find, 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, Roderick Harris, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed?

(CR2: 678-679).

- (480) The Court also instructed the jury, as required by Texas law, that to answer the issues in such a way as to result in a death sentence, all twelve jurors must answer "yes" to the

- future dangerousness special issue and “no” to the mitigation special issue. (CR2: 679-680). To answer either issue in the defendant’s favor (a “no” to the future dangerousness issue or a “yes” to the mitigation issue), at least ten jurors had to agree, as required by Texas law. (CR2: 679-680). This is generally referred to as the “10/12 rule.”
- (481) The Court correctly overruled Applicant’s request to inform the jury that failure to respond to one of the special issues in accordance with the Court’s punishment phase instructions would result in a life sentence. *See, e.g., Freeman*, 340 S.W.3d at 731.
- (482) Both state and federal courts have repeatedly rejected constitutional challenges to the 10/12 rule even when a claim is based on *Mills v. Maryland*, 486 U.S. 367 (1988). (See Application, at 109-110). *Allen v. Stephens*, 805 F.3d 617, 631-32 (5th Cir. 2015), *abrogated in part on other grounds by Ayestas v. Davis*, 138 S. Ct. 1080 (2018); *Turner v. Quarterman*, 481 F.3d 292, 300 (5th Cir. 2007) (federal precedent forecloses argument that Eighth Amendment and due process require death penalty jury to be informed of consequence of deadlock); *Jones v. United States*, 527 U.S. 373, 381 (1999) (Eighth Amendment does not require death penalty jury to be instructed on the consequence of a deadlock); *Soliz v. State*, 432 S.W.3d 895, 904 (Tex. Crim. App. 2014); *Rousseau v. State*, 171 S.W.3d 871, 886 (Tex. Crim. App. 2005).
- (483) Applicant alleges that because the Texas statutory scheme “misinforms the jury and brings outside considerations that impermissibly bear on the jury’s verdict, the Texas statute [“as applied” to him violated] the principles of the Eighth and Fourteenth Amendments, depriving [him] of a fair sentencing trial.” (Application, at 106). The outside influences Applicant refers to are the 10-12 rule itself and juror discussions during deliberations whether failure to reach a unanimous verdict would result in a mistrial. (Application, at 107-109, 111-112).

- (484) In addition to his “as applied” claim, which is based on Juror Mackey’s affidavit, Applicant asserts (in a footnote) that Article 37.071 is facially unconstitutional due to the improper inhibitive effects of the 10/12 rule on juror deliberations and the statutorily mandated sentencing instructions regarding the number of votes required for a life sentence. (Application, at 112).
- (485) On direct appeal, Applicant alleged both that (a) the Court erred in not allowing him to inform jurors that the judge would assess a life sentence if the jury was unable to reach a verdict on either of the special issues and (b) the 10/12 rule is unconstitutional. The Court of Criminal Appeals rejected these complaints. *See Harris*, 2014 WL 2155395, at *18.
- (486) Habeas corpus is not to be used to re-litigate matters that were addressed on appeal. *See Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994); *Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).
- (487) Because Applicant’s facial constitutional challenge was raised and rejected on direct appeal, it is not cognizable in this habeas proceeding.
- (488) Further, to the extent Applicant raises any new facial claims to the 10/12 rule, if any, these claims are procedurally barred. *See Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (indicating that the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal); *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974).
- (489) Applicant briefly alleges that the 10/12 rule and the provision that jurors may not be told of the result of a failure to answer the special issues violate state statutory law and state case law. (Application, at 104). Violations of state statutory law, however, are not cognizable in a habeas application. *See Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002). Habeas corpus is available only to review jurisdictional defects or denials of fundamental or

constitutional rights. See *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989). Accordingly, Applicant's statutory complaints about Article 37.071 are not cognizable on habeas review and should be denied.

- (490) In support of his "as applied" challenge to Article 37.071, Applicant presents an affidavit from Juror Mackey, describing the jury's deliberations. (Application Exh. 14).
- (491) Juror Mackey's affidavit describes her individual deliberation process and the group's deliberation process. It conveys numerous statements by other jurors during deliberations and provides analysis of the deliberations. Juror Mackey describes her own thought processes and the reasons she changed her vote. She states in her affidavit that she believed there were mitigating circumstances and she wanted Applicant to receive a sentence of life without parole. She explains that two other jurors also initially voted for life without parole with her but ultimately all three changed their votes. Juror Mackey indicates that, of the three, she was the second person to change her vote. Juror Mackey states the jury foreman wanted the vote to be unanimous; so, although she would have been happy to continue deliberating, she changed her vote. (Application Exh. 14).
- (492) Juror Mackey's affidavit is not admissible in this proceeding. With very few exceptions which are inapplicable here, the Supreme Court's ruling in *Pena- Rodriguez v. Colorado*¹¹ and Texas Rule of Evidence 606(b) preclude the use of juror testimony about deliberations to challenge a judgment.

¹¹ 137 S. Ct. 855 (2017).

- (493) Texas Rule of Evidence 606(b)(1) provides that juror deliberations cannot be used to challenge a judgment:

During an inquiry into the validity of a verdict or indictment, a juror may not testify about any statement made or incident that occurred during the jury's deliberations; the effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment. The court may not receive a juror's affidavit or evidence of a juror's statement on these matters.

Tex. R. Evid. 606(b)(1).

- (494) There are only two statutory exceptions to this rule. A juror may testify "about whether an outside influence was improperly brought to bear on any juror," and "to rebut a claim that the juror was not qualified to serve." Tex. R. Evid. 606(b)(2)(A), (B).
- (495) The Court finds neither exception in Rule 606(b) applies here.
- (496) Generally, unless allowed by statute, a party cannot go behind the verdict to question jurors regarding their deliberations. See *Tanner v. United States*, 483 U.S. 107, 127 (1987) (rejecting a Sixth Amendment exception for evidence that some jurors were under the influence of drugs and alcohol during the trial).
- (497) Also, in *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 862 (2017), the Supreme Court recognized the general rule of substantial protection of verdict finality: once a verdict has been entered, it cannot be questioned later based on comments or conclusions jurors expressed during their deliberations. *Pena-Rodriguez*, 137 S. Ct. at 861. The Court did, however, establish a narrow non-statutory exception to the "no impeachment" rule for deliberations involving racial animus. *Pena-Rodriguez*, 137 S. Ct. at 869. The *Pena-*

Rodriguez exception does not apply here.

- (498) Without mentioning Rule 606(b), Applicant proffers Juror Mackey's testimony under the outside influence exception. Applicant claims Juror Mackey's affidavit demonstrates that the 10/12 rule allowed the jury to consider outside influences during jury deliberations because the Court misled the jurors as to the result of their failure to reach a unanimous or 10-person agreement and the jury was coerced "into [a] death sentence[] on the basis of stimuli divorced from the merits of the case." (Application, at 108). The Court finds this contention is without merit.
- (499) An outside influence is something originating from a source outside the jury room and from other than the jurors themselves—in other words, other than from the jurors' own personal knowledge and experience (although an outside influence does not include influences or information not related to the trial issues). *Colyer v. State*, 428 S.W.3d 117, 125, 127 (Tex. Crim. App. 2014). Furthermore, an outside influence must be "improperly brought to bear" with an intent to influence the jury. *Id.* at 128-129; Tex. R. Evid. 606(b).
- (500) Examples of outside influences include (1) internet research on the effects of a date rape drug at issue in the case, (2) factual or legal information conveyed to the jury through court personnel or an unauthorized person who intends to affect the deliberations, or (3) a threat made against the safety of a juror's family member. *Colyer*, 428 S.W.3d at 125. Examples of information or events that do not amount to outside influences under Rule 606(b) include hearing a weather report of an approaching storm that causes pressure to hasten deliberations, coercion by a fellow juror, discussion of a juror's own personal knowledge, or a call from the juror's doctor about an ill child that induces the juror to agree with the verdict. *Id.* at 125, 128-129.
- (501) The Court finds Juror Mackey's affidavit is not competent, admissible evidence, and the Court is not considering it in

this proceeding. See Tex. R. Evid. 606(b)(1); *Hicks v. State*, 15 S.W.3d 626, 631 (Tex. App.—Houston [14th Dist.] 2000, pet. ref'd) (upholding trial court's finding that juror affidavit describing jury deliberations was inadmissible under 606(b)); *Sanders v. State*, 1 S.W.3d 885, 886, 888 (Tex. App.—Austin 1999, no pet.) (jurors could not testify about their misinterpretation of the trial court's statutory instructions under Rule 606(b)).

- (502) Alternatively even if the Court were to consider Juror Mackey's affidavit, nothing in the affidavit indicates an outside influence impacted this jury. An outside influence is something outside of both the jury room and the juror: it refers to a force external to the jury and its deliberations. *White v. State*, 225 S.W.3d 571, 574 (Tex. Crim. App. 2007). What Juror Mackey describes in her affidavit was merely the deliberative process in this case. Pressure from other jurors in the jury room to wrap up deliberations is not an outside influence and is not the proper subject of a writ. See *Franks v. State*, 90 S.W.3d 771, 800 (Tex. App.—Fort Worth 2002, no pet.) (holding that a juror's claim the other jurors forced her to change her vote is not an outside influence).
- (503) Applicant alleges the 10/12 rule and Juror Mackey's or the jury's misunderstanding of the 10/12 rule acted as an outside influence rather than as a proper incentive to reach a verdict. (Application, at 109).
- (504) This Court finds the 10/12 rule and Juror Mackey's—or the jury's— misunderstanding, if any, of the 10/12 rule did not act as an outside influence. See *Franks*, 90 S.W.3d at 800-802 (trial court's instruction was not an outside influence).
- (505) The jury's consideration and debate regarding the court's instructions emanated from within the jury and did not amount to an outside influence. Juror Mackey's recollection that at least one juror voiced an opinion that a non-unanimous vote would result in a mistrial was not an outside influence. The comment or belief, though mistaken, originated from a juror in the jury room and emanated from

the juror's own personal knowledge and experience. This opinion was not an outside influence, and Rule 606(b) does not allow testimony that the jury decided a case based on a juror's incorrect interpretation of the law. *See Hines v. State*, 3 S.W.3d 618, 621 (Tex. App.—Texarkana 1999, pet. ref'd).

- (506) Nothing in Juror Mackey's affidavit originated from sources outside of information from the Court (i.e. the Court's instructions) or the jury's deliberations; the affidavit, though improper evidence here, arises from the jurors' understanding, opinions, and thoughts regarding the Court's instructions.
- (507) The complained-of statutorily-mandated instructions in Article 37.071 do not violate the Eighth and Fourteenth Amendments, and Article 37.071 "as applied" to Applicant did not deprive him of a fair sentencing hearing.
- (508) Ground 6 should be denied.

CONCLUSION

- (509) Applicant has not been denied any rights guaranteed him by the United States and Texas Constitutions.
- (510) Applicant's Application for Writ of Habeas Corpus is without merit. The Court recommends that all relief requested be denied.

THE CLERK IS **ORDERED** to prepare a transcript of all papers in cause number W09-00409-Y(A) and to transmit the same to the Texas 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. Applicant's Original Application for Writ of Habeas Corpus and all other pleadings filed by Applicant, including any exhibits, excepting:

- (a) Applicant's "Supplemental Bone Lead Evidence – Bone Lead Testing Result for Pamela Maddox," filed December 4, 2018; and
 - (b) Expert Rebuttal Affidavit of Dr. Julian Davies, dated April 4, 2019, attached as Exhibit C to "Roderick Harris's Submission of Additional Evidence Pursuant to the Court's November 26, 2018 Order," filed June 12, 2019.
2. The State's Answer to Applicant's Original Writ Application and all other pleadings filed by the State;
 3. The proposed findings of fact and conclusions of law filed by the State and Applicant;
 5. This Court's findings of fact and conclusions of law, and order;
 6. Any and all orders issued by the Court; and
 7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number F09-00409-Y, unless they have been previously forwarded to the Court of Criminal Appeals.

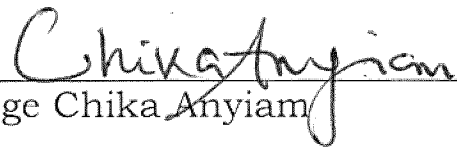
THE CLERK IS FURTHER **ORDERED** to send a copy of this Court's signed findings of fact and conclusions of law to the following counsel:

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SIGNED the 31st day of March, 2020.



Judge Chika Anyiam

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1/27/2021

HARRIS, RODERICK

Tr. Ct. No. F09-00409

WR-80,923-01

This is to advise that the applicant's suggestion for reconsideration has been denied without written order.

Deana Williamson, Clerk

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