

No. _____

IN THE
Supreme Court of the United States

LEJAMES NORMAN
Petitioner,
V.
TEXAS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF CRIMINAL APPEALS OF TEXAS

PETITIONER'S APPENDIX

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**LeJames Norman is scheduled
for execution September
16, 2026**

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APPENDIX A



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

NO. WR-74,743-03

EX PARTE LEJAMES NORMAN, Applicant

**ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS
CORPUS AND MOTION TO STAY EXECUTION
FROM CAUSE NO. 06-1-7346 IN THE 24TH DISTRICT COURT
JACKSON COUNTY**

Per curiam.

ORDER

We have before us a subsequent application for a writ of habeas corpus filed pursuant to the provisions of Texas Code of Criminal Procedure Article 11.071 § 5 and a motion to stay Applicant's execution.¹

In December 2008, a jury convicted Applicant of capital murder for the

¹ All references to "articles" in this order refer to the Texas Code of Criminal Procedure unless otherwise specified.

August 2005 murder of three people. *See* TEX. PENAL CODE § 19.03(a). Based on the jury's answers to the special issues submitted under Article 37.071, the trial court sentenced Applicant to death. This Court affirmed Applicant's conviction and sentence on direct appeal. *Norman v. State*, No. AP-76,063 (Tex. Crim. App. Feb. 16, 2011) (not designated for publication).

Norman filed his initial post-conviction application for writ of habeas corpus in the convicting court in 2010, and this Court denied relief in 2012. In the same order, this Court dismissed as an abuse of the writ a subsequent application Norman filed while his initial application was pending. *Ex parte Norman*, Nos. WR-74,743-01 and WR-74,743-02 (Tex. Crim. App. Aug. 22, 2012) (not designated for publication). In August 2026, Applicant asked this Court to reconsider its resolution of a claim he raised in his -01 writ application. We declined to take action on that request.

On August 28, 2026, Applicant filed in the trial court this, his second subsequent writ application. Therein, he raises six claims in which he alleges that the prosecutor misrepresented Applicant's involvement in the case and presented false evidence; his counsel was ineffective for failing to challenge the evidence or the prosecutor's misrepresentation; and the prosecutor committed misconduct by

forcing a crucial defense witness to withdraw from the case.

We have reviewed the application and find that Applicant has failed to show that his allegations satisfy the requirements of Article 11.071 § 5. Accordingly, we dismiss the application as an abuse of the writ without reviewing the merits of his claims. *See* Art. 11.071 § 5(c). We deny Applicant's motion to stay his execution.

IT IS SO ORDERED THIS THE 14th DAY OF SEPTEMBER, 2026.

Do not publish

APPENDIX B

**IN THE 24TH JUDICIAL DISTRICT COURT
OF JACKSON COUNTY, TEXAS
AND
IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS**

Ex parte LeJames Norman

Applicant

)
) **NO. WR-_____**
)
) **TRIAL CAUSE NO.**
) **06-1-7346**
)
)
)

**SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS
SEEKING RELIEF FROM A JUDGMENT IMPOSING DEATH**

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TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

INTRODUCTION

Applicant LeJames Norman's penalty phase trial was marred by pervasive prosecutorial misconduct that undermined the reliability of jury's determinations on both special issues.¹ **First**, the prosecutor violated Mr. Norman's due process rights to a fair and impartial sentencing, and to be protected from the State's presentation of false testimony. The prosecutor presented evidence and argument relating to culpability, future dangerousness, and mitigation that flatly contradicted the evidence and argument that he presented at the trial of co-defendant Ker'sean Ramey. Much of that aggravating evidence and argument was provably false, representing an alternative due process violation. Additionally, trial counsel's failure to expose the prosecutor's dishonesty to the trial court and the jury constituted a violation of Mr. Norman's Sixth Amendment right to counsel.

Second, the prosecutor violated due process, by committing an abuse of process and issuing an egregiously overbroad and invasive subpoena duces tecum upon Mr. Norman's penalty phase expert Dr. Mark Cunningham, that represented a direct threat to the continuation of Dr. Cunningham's professional practice. The

¹ In addition to the claims presented here, Mr. Norman has also concurrently filed a *Suggestion to Reconsider, on the Court's Own Motion, Mr. Norman's First Application for a Writ of Habeas Corpus*, which also raises a claim that the State violated Mr. Norman's due process rights at the penalty phase of his trial by presenting false testimony from its prison expert A.P. Merillat.

duces tecum subpoena drove Dr Cunningham away from Mr. Norman's trial, and following Dr. Cunningham's forced removal from the case, no other expert would consent to endure what Dr. Cunningham refused to endure. Thus, Mr. Norman was consigned to present a thin and disjointed penalty phase defense, touching on none of the robust themes of mitigation that characterized his background, and that Dr. Cunningham would have addressed

Third, the State presented false testimony from a cooperating witness who now admits that he lied when he told the penalty phase jury that he overheard Mr. Norman threatening to kill someone. That evidence was aggravating, and it went un rebutted.

STATEMENT OF THE CASE

PROCEDURAL HISTORY

On January 17, 2006, Mr. Norman was indicted by a Jackson County, Texas grand jury on the charge of capital murder for the murder of Sam Roberts, Tiffany Peacock, and Celso Lopez in the course of committing or attempting to commit a robbery.

On November 20, 2008, Mr. Norman entered a plea of guilty to all the counts in the indictment. Following penalty phase proceedings, on December 10, 2008, the jury rendered its verdict on the special issues in a way that required the Court to

sentence Mr. Norman to death. *Texas v. Norman*, No. 06-1H7346, 24th Judicial District, Jackson County, TX.

Mr. Norman appealed the jury's verdict to the Court of Criminal Appeals, and on February 16, 2011, the Texas Court of Criminal Appeals ("CCA") issued its decision denying his appeal. *Norman v. State*, No. AP-76,063 (Tex. Crim. App. 2011) (unpublished).

Mr. Norman filed a state habeas application, and on June 23, 2011, the trial court issued its Findings of Fact and Conclusions of Law, recommending that the CCA deny Mr. Norman's claims for relief.

On August 24, 2011, the CCA issued an Order remanding Mr. Norman's case to the trial court for further findings pertaining to allegations of false or inaccurate testimony from A.P. Merillat at the penalty phase for Mr. Norman raised in his application for habeas corpus relief.

On October 11, 2011, the State filed additional proposed findings of fact, and on October 18, 2011, the trial court filed Additional Findings of Fact and Conclusions of Law with a recommendation that the CCA deny Mr. Norman relief.

On August 22, 2012, the CCA issued an Order adopting the findings of fact and conclusions of law of the trial court and denied Mr. Norman relief. The CCA also dismissed a subsequent application filed by Mr. Norman *pro se* in the same

order. *Ex Parte Norman*, Nos. WR-74,743-01 and 74,743-02 (Tex. Crim. App. Aug. 22, 2012) (unpublished).

Mr. Norman then unsuccessfully pursued relief in federal court. Mr. Norman is scheduled for execution on September 16, 2026.

RELEVANT FACTUAL HISTORY

LeJames Norman, and his co-defendant Ker'sean Ramey were indicted for murder and related offenses, in an August 24, 2005, incident involving the shooting deaths of Celso Lopez, Tiffany Peacock and Sam Roberts. After his arrest, Mr. Norman cooperated with law enforcement, giving three recorded statements [REDACTED]. He pled guilty, and again at the State's request, testified for the State at the trial of the co-defendant, Ker'sean Ramey.

The criminal incident involved Mr. Norman and co-defendant Ramey breaking into Mr. Roberts' and Ms. Peacock's home, after their tenant, Celso Lopez, answered the door. The men entered the home with the intention of stealing cocaine, which they believed was being stored there. Mr. Norman shot Lopez in the cheek, who then went into a back room. Subsequently Mr. Roberts and Ms. Peacock arrived, and following a brief confrontation, Mr. Norman shot her. He then began struggling with Mr. Roberts, at which point both Ramey and Mr. Norman shot him. Ramey then went into the back room and shot Lopez twice in the head, killing him.

Having found no cocaine, the men then left the house. Ramey later returned to the house, and then shot the victims several more times, ensuring that they were dead.

DR. CUNNINGHAM'S FORCED WITHDRAWAL

Mr. Norman's first trial counsel, Elliott Costas, Esq., quickly determined that Mr. Norman's case would be solely focused on penalty. Early on, Mr. Norman expressed his remorse over the incident and acknowledged his involvement. At the outset Norman committed to speaking openly with law enforcement whenever they asked; [REDACTED]; assisting the State in its prosecution against the co-defendant; and pleading guilty. Mr. Norman, ultimately with his lawyer's knowledge and consent, did all these things.

Additionally, having familiarized himself with Mr. Norman's tragic upbringing, Attorney Costas recognized the imperative of providing expert testimony to explain the significance of that upbringing as it related to Mr. Norman's development. Additionally, considering incidents of prison misconduct in Mr. Norman's history, Costas expected the prosecutor to argue that Mr. Norman was a future danger to other inmates in prison. For these reasons, Costas hired Dr. Mark Cunningham, Ph.D., a nationally regarded expert in these areas, to evaluate Mr. Norman and testify at his penalty phase hearing.

After learning that Dr. Cunningham had been hired by the defense, the prosecutor issued a subpoena that demanded, among other things, critical portions

of Dr. Cunningham's income tax returns for the previous sixteen (16) years; privileged communications between Dr. Cunningham and capital counsel in every case in the United States in which he was retained where he was not called as a witness; and sealed financial information, the disclosure of which was prohibited by law. The subpoena was so overly broad that in lieu of complying with it, Dr. Cunningham withdrew from the case. Costas, unable to find a qualified expert willing to subject him or herself to the treatment Dr. Cunningham had been subjected to, and unwilling to represent a defendant facing death with such a compromised penalty phase defense, withdrew as well.

New counsel was appointed, and the case went to penalty without a defense expert. Anecdotal information about Mr. Norman's background was presented through family and friends. The Fifth Circuit Court of Appeals summarized the full extent of this social history background presented by the defense following Costas' withdrawal:

[Norman's] family was low-income and for a time lived in homeless shelters. His parents fought constantly, including physically, abused drugs and alcohol, sold drugs, associated with gang members, and abused Norman physically. When Norman was young, a police officer shot and killed his father. That incident greatly affected Norman, who was close to his father.

Norman v. Stephens, 817 F.3d 226, 229-30 (5th Cir. 2016). This presentation failed to include a vast amount of critical social history evidence, any explanation of the significance and implications of LeJames Norman's horrific upbringing upon his

development, and any defense to the State's allegation of future dangerousness. That was to be Dr. Cunningham's piece, before he was run off the case.

THE STATE'S INCONSISTENT CHARACTERIZATIONS OF LEJAMES NORMAN

A second pillar of Mr. Norman's penalty phase defense was his acceptance of responsibility, his credible cooperation with the State, and his consistent expression of remorse. *Norman*, 817 F.3d at 229. At the *Ramey* trial, where Mr. Norman testified for the State, the prosecutor lauded Mr. Norman's demonstration of remorse, honesty, acceptance of responsibility, bravery, and cooperation. A year later, at the *Norman* trial, when seeking death for Mr. Norman, ***the very same prosecutor*** described Mr. Norman as remorseless, dishonest, evading responsibility, displaying little courage and argued that his "cooperation" had not been worth much at all. Much of the evidence the prosecutor presented and argued in support of his disparagement of Mr. Norman was false and could not have existed in the same universe as the evidence he argued at the *Ramey* trial.

FUTURE DANGEROUSNESS

A third pillar of Mr. Norman's penalty phase defense was that he would not be a future danger in prison. Had Dr. Cunningham testified, he would have cited a myriad of factors indicating that Mr. Norman would not represent a threat if given a life sentence. Without the testimony of Dr. Cunningham, however, the defense had

no reply to the State's argument that Mr. Norman's prison record, which included acts of misconduct, was predictive of future dangerousness.

PROSECUTORIAL MISCONDUCT AND THE KEVIN CHILDS TESTIMONY

The State called Kevin Childs as a cooperating witness at penalty, in support of its future dangerousness argument. In support of its theory, the State elicited from Childs *inter alia* that during the time he shared a cell with Mr. Norman at the county jail, he heard Mr. Norman on the telephone talking about killing people.

This was a lie. It was material. And the prosecutor helped to perpetuate it. Childs never heard Mr. Norman talking with anyone on the phone about killing people, a fact that he acknowledged in a declaration he gave on October 17, 2017. Appendix (hereafter "A") at 130. The prosecutor intentionally compounded Childs' perjury when he falsely suggested, in response to the defense claim of lack of corroboration, that recordings of such phone calls do not exist.

Separately and in combination, this prosecutorial misconduct infected every significant aspect of Mr. Norman's trial.

CLAIM I. The Prosecutor Intentionally Deceived Mr. Norman's Jury About the Nature of Mr. Norman's Involvement in the Criminal Incident, His Cooperation, and His Acceptance of Responsibility By Offering Evidence and Argument that Contradicted the Evidence and Argument Presented by the State [REDACTED] to Co-Defendant Ker'sean Ramey's Jury.

“Kersean Ramey alone, is guilty of killing Lopez.”
(prosecutor's argument to trial jury at Kersean Ramey trial)

“Do you think for a minute [Norman] didn't tell Kersean to go in there and shoot Celso [Lopez]?”
(same prosecutor's argument to penalty jury at Norman trial)

The prosecutor had no obligation to offer LeJames Norman any consideration in exchange for the substantial assistance Mr. Norman gave him in the prosecution of Ker'sean Ramey. The prosecutor was, however, constitutionally obligated to give Mr. Norman's and Ramey's juries honest and consistent accounts of their respective culpability from one trial to the next. Instead, he flouted that obligation by first arguing to the *Ramey* jury that ***only*** Ramey was guilty of killing Celso Lopez and then two years later obtaining Mr. Norman's death sentence by telling the *Norman* jury that it was Mr. Norman who ordered Ramey to kill Lopez. If this were the only example of the prosecutor's duplicity in obtaining Mr. Norman's death sentence, it alone would have corrupted the process and undermined its integrity. But there was much more. In violation of the Due Process Clause, the prosecutor presented other

evidence and arguments at Mr. Norman's trial that flatly contradicted evidence and arguments he had presented at the earlier *Ramey* trial. The evidence and arguments did not simply go to questions of culpability for the crime. Much of it concerned Mr. Norman's post-incident conduct. At the *Ramey* trial, the prosecutor relied heavily on Mr. Norman's cooperation and testimony. At that earlier trial the prosecutor lauded Mr. Norman's acceptance of responsibility for his role in the offense, especially because, by aiding the State, Mr. Norman placed himself in serious jeopardy. **Indeed, the prosecutor presented evidence to the *Ramey* jury that Mr. Norman was marked for death by Ramey.** Uncontested, Mr. Norman's willingness to take accountability for the wrongs he had committed, at significant personal risk, would have been powerful mitigating evidence for Mr. Norman's jury. However, instead of the prosecutor taking the same position he took at the *Ramey* trial, at Mr. Norman's trial, he fiercely refuted his former position. Now, Mr. Norman had *nothing* to fear and was motivated solely by self-interest. What the prosecutor upheld as mitigating for Mr. Norman at the *Ramey* trial became evidence of aggravation against Mr. Norman at Mr. Norman's trial.

This Court should not ratify such conduct. It should be condemned. The prosecutor did not have to give Mr. Norman anything for the help Mr. Norman provided the State. But he owed Mr. Norman and the State of Texas a guilt and

penalty phase trial (and resultant death verdict) that was based on true evidence and honest argument in support of that evidence. He failed that duty miserably.

A. In Presenting Flatly Contradictory Evidence and Argument from One Defendant’s Trial to the Next, the Prosecutor Violated Due Process.

The State pursued a death sentence for Mr. Norman based on a theory, argument, and evidence that directly contradicted what it presented to obtain a conviction and death sentence against his co-defendant Mr. Ramey. The prosecutor’s dishonesty with Mr. Norman’s jury “so infected [Norman’s] trial with unfairness as to make the resulting [sentence] a denial of due process.” *Donnelly v. DeChristoforo*, 416 U.S. 637, 643 (1974). Such inconsistency “constitute[s] a failure to observe that fundamental fairness essential to the very concept of justice.” *Id.* at 642 (quotation marks and citation omitted). This is because, while the prosecutor must prosecute with earnestness and vigor and ‘may strike hard blows, he is not at liberty to strike foul ones.’” *Berger v. United States*, 295 U.S. 78, 88 (1976).

The State infringes on due process when it manipulates or misrepresents evidence that “was likely to have an important effect on the jury’s determination.” *Donnelly*, 416 U.S. at 646-47; *see also Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (argument that “manipulate[s] or misstate[s] the evidence” or implicates defendant’s constitutional rights violated due process); *see also Renteria v. State*, 206 S.W.3d 689, 697 (Tex. Crim. App. 2006) (trial court violated due process where

it failed to allow Appellant to correct false impression created by State that Appellant was not remorseful). Consequently, “the Due Process Clause prohibits the government from presenting mutually inconsistent theories of the same case against different defendants.” *United States v. Higgs*, 353 F.3d 281, 326 (4th Cir. 2003). Inconsistency rises to the level of a due process violation when it strikes “at the core of the prosecutor’s cases against defendants for the same crime.” *Smith v. Groose*, 205 F.3d 1045, 1051-1052 (8th Cir. 2000) (use of inconsistent theories “renders convictions unreliable, given that the state’s duty to its citizens does not allow it to pursue as many convictions as possible without regard to fairness and the search for truth”) (citations, alterations, and quotation marks omitted).

Such prosecutorial inconsistency violates the Constitution, ethics, and the ideals of fundamental fairness. *Stumpf v. Mitchell*, 367 F.3d 594 (6th Cir. 2004), *rev’d in part, remanded in part*, *Bradshaw v. Stumpf*, 545 U.S. 175 (2005). In *Stumpf*, the prosecutor argued at his trial that Stumpf had killed the victim and later argued at his codefendant’s trial that the Stumpf’s codefendant committed the killing. Although the Supreme Court reversed the Sixth Circuit’s grant of relief on guilt/innocence on the basis that the identity of the triggerman was immaterial to the conviction under an accomplice theory, the Court remanded the case for the Court of Appeals to determine whether the grant of sentencing relief it had ordered was still appropriate. *Id.* at 187-88. On remand, the Sixth Circuit reaffirmed its

conclusion that the government's use of inconsistent theories violated due process and vacated Stumpf's death sentence. *Stumpf v. Houk*, 653 F.3d 426 (6th Cir. Aug. 11, 2011); *see also Drake v. Kemp*, 762 F.2d 1449, 1479 (11th Cir. 1985) (Clark, J., concurring) (the use of inconsistent theories is "inherently unfair").

The Supreme Court and ethics cannons make clear that prosecutors have a duty pursuant to the Fourteenth Amendment to ensure integrity and fairness in criminal proceedings in which they are involved. *See, e.g., Berger*, 295 U.S. at 88. In a death penalty case, arguing conflicting theories of culpability undermines the reliability of any resulting death sentence and creates the unacceptable risk that the death penalty will be administered in an arbitrary or capricious manner in contravention of the Eighth Amendment.

The State subverted due process by presenting evidence and arguments regarding critical mitigating issues in the *Norman* trial that were wholly inconsistent with evidence and argument the same prosecutor made in the earlier proceedings. The prosecutor portrayed Mr. Norman in a despicable light before the *Norman* jury, in direct contradiction to the State's position and evidence presented to [REDACTED] and the *Ramey* jury. The prosecutor's actions in this case were paradigmatic *Berger*, *Darden*, and *Donnelly* violations. Much of the purportedly aggravating evidence the prosecutor pressed upon the *Norman* jury was manipulated

and misstated critical *mitigating evidence* pertaining to Mr. Norman's post-incident conduct that the same prosecutor had previously endorsed as mitigating.

B. The Prosecutor's Actions That Violated Due Process

- i. When the Prosecutor at Mr. Norman's Trial, Told the Jury that Mr. Norman Ordered Ramey to Go Back in the House and "Finish Off" Sam Roberts and Tiffany Peacock, He Flatly Contradicted the Evidence He Presented and Argument He Made to the *Ramey* jury.**

During the *Ramey* trial, the prosecutor presented evidence that after the three victims had been shot, and after Mr. Norman and Ramey had left the residence, they realized that they had left a scanner in the residence. 1/9/07 *Ramey* Tr. 159. Ramey returned to the residence to retrieve the scanner. *Id.* According to State's evidence, when Ramey returned to the residence, he shot victims Lopez and Peacock once more, each in the head. 1/16/07 *Ramey* Tr. 127-32. In closing the prosecutor unequivocally endorsed that Mr. Norman did not even know about Ramey's extra shots. The prosecutor told the *Ramey* trial jury that Mr. Norman told him personally that even though there were three bullet holes in victim Lopez's head, when Mr. Norman watched Ramey go into the room with Lopez he heard only two shots. 1/16/07 *Ramey* Tr. 127-28. So, according to Mr. Norman, Lopez could not have been shot a third time in the head at that time. It dawned on the prosecutor that Mr. Norman was not being dishonest, Mr. Norman just did not know. The prosecutor explained to the jury that Mr. Norman was outside of the house and did not "hear

any of this.” *Id.* at 128. Further supporting Mr. Norman’s account that he did not know Ramey’s intentions, the prosecutor argued to the *Ramey* jury that because the final fatal shot to Lopez (and the two earlier fatal shots Lopez suffered), could only be attributed to Ker’sean Ramey, “Kersean Ramey alone, is guilty of killing Lopez.” *Id.* at 132-33. No prosecutor would endorse the acquittal for an accomplice who ordered a killing. But here, the prosecutor knew that Mr. Norman had not been aware of Ramey’s actions, the prosecutor knew that Mr. Norman was unaware of Ramey’s intentions, and the prosecutor affirmed these points to the *Ramey* jury.

Nevertheless, at Mr. Norman’s trial, absent a shred of evidence, the prosecutor told the jury that Mr. Norman ordered Ramey to return to the residence to “finish off” the victims, and “make sure everybody is dead.” Directly contradicting what he told the *Ramey* jury, the prosecutor presented the following scenario as fact:

[LeJames] turns to [Ramey] and says, [“]hey, Sean, I’m out of bullets. That Mexican dude ain’t dead. Get in there and finish him off. I’m not going to leave any witnesses. [] Get in there and I’m out of bullets.[”] I’ll guarantee you he’s the man. He was planning it. [] Do you think for a minute he didn’t tell Kersean to go in there and shoot Celso? Yeah, right. And the only reason he told Kersean to do it is because he’s out of bullets. [] He’s out of bullets or he’d have been doing it. And I can just hear him when they get to LeJames’ house. Hey, man, I left that police scanner in there. [] Kersean, go get that scanner. Oh, and by the way, make sure everybody is dead.

12/10/08 Tr. 99-100.

The prosecutor violated due process when, after telling the *Ramey* jury that Mr. Norman did not even know about the later shootings, he told Mr. Norman’s jury

that Mr. Norman had ordered them. There was no truth to the prosecutor's new theory, nor was there any evidentiary support for it. Yet, the suggestion that Mr. Norman ordered Ramey to "finish off" the victims added an entirely new and distinct layer of depravity to the incident and to Mr. Norman's actions during it. Consequently, it rendered Mr. Norman's penalty phase fundamentally unfair.

ii. The Prosecutor Argued a False and Prejudicial Account of the Sam Roberts' Killing, that Contradicted the Evidence and Argument He Presented at the *Ramey* Trial.

In the prosecutor's opening statement in the *Ramey* trial, he told the jury that Ramey had twice shot one of the decedents, Sam Roberts, with one of the bullets piercing his neck. 1/4/07 *Ramey* Tr. 62. The prosecutor said that Mr. Norman then shot Mr. Roberts when he was "already, for all practic[al] purposes, dead" 1/4/07 *Ramey* Tr. 63. Consistent with this argument, and according to the medical examiner, Ramey's shot to Roberts' neck severed the carotid artery, fractured the spine, and caused rapid, immediate, death. 1/10/07 *Ramey* Tr. 21-22. The prosecutor reaffirmed this point in closing, describing Mr. Roberts' final moments as "[b]ang, bang, severed his carotid artery. He's dead." 1/16/07 *Ramey* Tr. 127.

However, to increase Mr. Norman's moral culpability during his trial, the prosecutor brought Mr. Roberts back to life following the Ramey shots that he assured the *Ramey* jury had previously rendered Roberts "cold-stone dead." *See also id.* at 126. The prosecutor then posited that the now alive Mr. Roberts must have

been on his knees after hitting the floor when Ramey shot him and presumably begging for his life, when Mr. Norman shot him. 12/5/08 Tr. 34-35. It was a theory, spun from whole cloth, which contradicted the facts the prosecutor had adduced – and argument he made based on those facts – at the *Ramey* trial. But the prejudicial impact of this confabulated evidence cannot be overstated. Now, far from being “already, for all practice[al] purposes, dead,” Mr. Roberts became alive and suppliant just before Mr. Norman shot him. *Id.* In cross-examining Mr. Norman, the prosecutor presented this horrifically prejudicial scenario as a matter of fact:

[Sam Roberts] goes to the ground, boom, on his knees. I can’t do that, but ***just imagine him on his knees.***

And now you fire at him. How do we know that? Because Mr. Norman, there is a bullet in the floor right there close to where his feet are where if he went to his knees it would be, right there. ***And then he puts his hands to the back of his head trying to keep people from shooting him.***

Id. Mr. Norman denied that Mr. Roberts was ever on his knees. *Id.* at 35. However, despite that there was no evidence supporting the prosecutor’s theory, and despite that it conflicted with the medical evidence and prosecutor’s theory and argument from the *Ramey* trial, the prosecutor insisted that Mr. Norman shot Mr. Roberts while he was vulnerable and defenseless on his knees. *See* 12/5/08 Tr. 39.

The prosecutor violated due process when he pressed a theory of the facts that directly contradicted by his position at the *Ramey* trial but that heightened Mr. Norman’s moral culpability in front of his own jury. The image of Mr. Norman

executing a man, presumably begging on his knees – an image without any basis in the evidence – rendered Mr. Norman penalty phase trial fundamentally unfair.

iii. At the *Ramey* Trial, the Prosecutor Characterized Mr. Norman’s Account as Honest; At the *Norman* Trial, He Characterized Mr. Norman as a Liar.

During the *Ramey* trial the prosecutor endorsed the accuracy of Mr. Norman’s account of the incident. In his opening statement, the prosecutor assured the jury that “the ballistics and medical evidence **bears out exactly what LeJames Norman says.**” 1/4/07 *Ramey* Tr. 72. The account the jurors would hear from Mr. Norman would be “**exactly how the triple homicide occurred.**” *Id.* at 75. And again in closings, the prosecutor vouched for Mr. Norman’s testimony, telling the jury, “**I believe LeJames Norman was telling you the truth.**” 1/16/07 *Ramey* Tr. 110-11. He urged the jury to compare “Norman’s testimony” with the “physical facts,” because he wanted to show that it “makes sense.” *Id.* at 111. He took the jurors “through how LeJames Norman said this triple homicide was committed [, and then showed them] how the ballistics and the medical evidence say [Norman’s] right.” *Id.* at 113. The prosecutor argued that “the ballistics and the medical examiner verify every single thing that [LeJames Norman] told to you.” *Id.* at 122. He even ridiculed Ramey’s attorneys’ argument that Mr. Norman was a “self-professed liar.” *Id.* at 70.

Mr. Norman’s testimony at his own penalty phase regarding these issues was identical to his testimony at the *Ramey* trial. 1/9/08 Tr. 159, 174, 196. Despite telling

the *Ramey* jury that “the ballistic and medical evidence says [Norman’s] right,” 1/16/07 *Ramey* Tr. 113, the prosecutor at the *Norman* trial described Mr. Norman’s testimony as inconsistent with the medical and ballistic testimony. 12/10/08 Tr. 104.

Specifically, the prosecutor failed to elicit details from the medical examiner at Mr. Norman’s trial that the same prosecutor had elicited at the *Ramey* trial to corroborate Mr. Norman’s testimony about the range from which two of the victims had been shot. Those additional details supported Mr. Norman’s account of the shooting and proved that it was consistent with the medical evidence. *See* 11/24/08 Tr. 19-22, 12/5/08 Tr. 40-44; 1/4/07 *Ramey* Tr. 74; 1/10/07 *Ramey* Tr. 24; 1/16/07 *Ramey* Tr. 126; 1/16/07 *Ramey* Tr. 130.

In closing to the *Norman* jury, the prosecutor used this distortion of the evidence to argue that Mr. Norman could not tell his jury “that he’s less morally to blame when he still won’t admit how he shot” the decedents. 12/10/09 Tr. 104. The prosecutor then used Mr. Norman’s purported lack of honesty about how the shootings occurred to argue the jury should not believe that Mr. Norman was remorseful: “Don’t you have to be at least honest about how you kill people before you can ask a jury to consider me having remorse or being sorry?” *Id.*

Arguing during the *Ramey* trial that Mr. Norman’s testimony was consistent with the ballistic or medical evidence, allowed the prosecutor to argue at that trial that Mr. Norman’s testimony should be fully credited. When doing so no longer

suiting his interest in obtaining a death sentence for Mr. Norman, the prosecutor made a 180-degree pivot to undermine the credibility of Mr. Norman's expression of remorse. It was contrary to the evidence, contrary to the position that the prosecutor had forcefully argued in the *Ramey* trial, and contrary to his obligation under the due process clause.

iv. [REDACTED]; in Front of Mr. Norman's Jury, the
Prosecutor Denied Ever Having Done So.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Then during his penalty phase closing, Mr. Norman's trial counsel argued Mr. Norman's cooperation as a mitigating circumstance. *See, e.g.*, 12/10/08 Tr. at 37. The extent of his cooperation, as well as the peril in which it placed him, helped to demonstrate the genuineness of Mr. Norman's expressions of remorse and regret. It showed that he was willing to try to right his wrongs even though doing so put him at risk. However, in response to the defense argument, the prosecutor in his closing, told the jury that the "State didn't ask for [Mr. Norman's] cooperation[,]" 12/10/08 Tr. 49. [REDACTED]

[REDACTED].

[REDACTED]

is the type of due process violation condemned in *Berger*, *Donnelly*, and *Darden*.

[REDACTED]

[REDACTED].

v. At Ramey's Trial the Prosecutor Told the Jury that Mr. Norman Intended to Surrender Before He Was Apprehended; At Mr. Norman's, the Same Prosecutor Said that Was "Bull."

A major theme of the defense penalty phase presentation was Mr. Norman's acceptance of responsibility. Following the criminal incident, Mr. Norman fled to Mexico, where he lived with his girlfriend Daisy Torres. 11/24/08 Tr. 123-28. In

Mexico, Mr. Norman was safe from extradition since Mexico would not permit a person to be sent back to the United States to face a death penalty prosecution. Thus, a centerpiece of the defense penalty phase theory was that considering the sanctuary Mexico offered him, Mr. Norman's return to the United States demonstrated both his intention to face the consequences of his actions and to spare Torres the hardship of having to remain in Mexico with him and taking her "life away from her." 12/10/08 Tr. 32. Trial counsel pointed out that Mr. Norman "couldn't deal with [keeping her from coming home], so blank it, [he decided] to go back and deal with what's coming to [him]." *Id.* Trial counsel described such conduct as "acceptance of responsibility." *Id.* During his penalty phase testimony, Mr. Norman confirmed that it was his "intention" to turn himself in. 12/05/08 Tr. 21.

At Ramey's trial Mr. Norman testified for the State. During *that* trial, the prosecutor made the very same argument that Mr. Norman's counsel later made during Mr. Norman's penalty phase trial – that Mr. Norman had every reason to stay in Mexico but instead came back to the United States with the intention of turning himself in. During the *Ramey* trial, when the prosecutor examined Mr. Norman, the prosecutor stressed that had he remained in Mexico, Mr. Norman would have remained a "free man." 1/10/07 *Ramey* Tr. 201. The prosecutor, emphasizing the voluntariness of Mr. Norman's return, provided the jury with a snapshot of the free life that Mr. Norman relinquished by coming back to the United States:

Q: And for that matter, Mr. Norman, when you were in Mexico, and I'm going to put quotes around this, you were a free man, weren't you?

A: Yes, sir.

Q: You could get up in the morning; you could go down to the store; you could buy all the beer you wanted; you could go get you something to eat. Nobody told you when to get up and you weren't incarcerated, were you?

A: No, sir, I was not.

Q: And from the time you got caught coming across the border until today, you've been locked up, haven't you?

A: Yes, sir, I have.

Q: If you really didn't intend to accept responsibility, you remember Mr. Evans[, Mr. Ramey's lawyer] said, well, you say you were going to turn yourself in, but the fact of the matter is you didn't. You got caught. *If you really never intended to turn yourself in, today, what's today – January the 10th, January the 10th of 2007, today you could still be in Mexico.*

A: Yes, sir.

Q: *If you never intended to accept responsibility, you could have stayed there couldn't you?*

A: Yes, sir.

1/10/07 *Ramey* Tr. 202.

Then in closing to the *Ramey* jury the prosecutor personally vouched for Mr. Norman's account, exhorting the jurors to believe Mr. Norman when he testified that he was going to turn himself in. *See* 1/16/07 *Ramey* Tr. 110-11 ("I believe him when

he said I was going to turn myself in. Why? He could have stayed in Mexico.”) The prosecutor’s vouching for Mr. Norman’s honesty and his “accept[ance of] responsibility,” gave the co-defendant’s jury a compelling reason to believe Mr. Norman when he implicated the co-defendant.

Yet, at Mr. Norman’s trial the same prosecutor vehemently denied the evidence and theory he had championed at Ramey’s trial. At Mr. Norman’s trial, instead of exhorting the jurors to believe Mr. Norman when he said he intended to turn himself in, he told the jury Mr. Norman was lying. The prosecutor ridiculed trial counsel’s argument that Mr. Norman was planning to turn himself in – **the same argument the same prosecutor had made to the *Ramey* jury:**

[H]e is coming back from Mexico. He made the statement, [defense counsel] did, that he was going to turn himself in. ***Bull. He was going to turn himself in when we caught him.***

12/10/08 Tr. 79 (emphasis added). Contradicting his argument in the *Ramey* trial, that Mr. Norman had demonstrated his intent to surrender because “[h]e could have stayed in Mexico” (1/16/07 Tr. 110-11), the prosecutor told Mr. Norman’s jury that Mr. Norman never intended to surrender. Indeed, not only did the prosecutor refute the position that he had earlier taken, in doing so, he also made the precise argument that he had urged the *Ramey* jury to reject.

The prosecutor violated due process when, in his quest for a death sentence, he told the co-defendant’s jury, “I believe [Mr. Norman’s testimony] when he says

I was going to turn myself in;” and then at Mr. Norman’s trial characterized that testimony as “bull.” The prosecutor’s reversal of position undermined powerful mitigating evidence that Mr. Norman returned to Texas to take responsibility for his actions and face the serious consequences.

vi. At the *Ramey* Trial, the Prosecutor Elicited Testimony that Mr. Norman’s Coming Forward for the State Made Him a “Snitch,” and Endangered His Life, While at Mr. Norman’s Trial the Prosecutor Assured the Jury that Mr. Norman Had Nothing to Fear From His Cooperation.

At the guilt phase of the *Ramey* trial, the State called Kevin Childs. 1/11/07 *Ramey* Tr. 157. Childs was Ramey’s cellmate following Ramey’s arrest. *Id.* at 159-60. Childs testified that he overheard Ramey accusing Mr. Norman of “snitching” on him. *Id.* at 161-62. At the *Ramey* trial the prosecutor asked Childs if Ramey “was saying [to Mr. Norman] you’re the one that snitched; I have statements to prove it.” *Id.* at 162. Childs answered “[y]es , sir.” *Id.* The prosecutor then asked Childs if he overheard a later telephone conversation between Ramey and a “crazy person” plotting how to “get the person that snitched [i.e., Mr. Norman].” *Id.* Childs testified that Ramey said, “I’ll give you the word.” *Id.* In closing at the guilt phase of the trial, the prosecutor reminded the jury of Ramey’s threat to retaliate against Mr. Norman:

Do you remember that one thing that he said that I think is pretty important? It shows you his intent and it shows you the mark of the man. He was on the phone with a crazy guy. Remember that? And Kersean Ramey told – who wanted to do something right then, the crazy guy – and Kersean said, don’t do anything yet. Let’s see what happens. I’ll give you the word on what to do. Coming from the jail cell. Wow.

1/16/07 *Ramey* Tr. 112-13. At the penalty phase of the *Ramey* trial, the prosecutor again reminded the jury of the peril Mr. Norman faced by coming forward:

How about that telephone conversation as far as killing people? [Ramey's] in jail, waiting to go on trial for capital murder, killing three people, and he's on the phone with a crazy dude who wants to do something to the people who *snitched* him off. And what does Kersean Ramey say? Don't do it yet, not yet. Let's see what happens with you folks. That's what he's waiting to see. You know, if it doesn't go right, I'll give you the word on what to do.

1/23/07 *Ramey* Tr. 42 (emphasis added). Thus, the prosecutor presented evidence and argument that Mr. Norman had reason to fear being killed for his cooperation, since Ramey knew that Mr. Norman had cooperated, and Ramey would “give the word” on what to do with Norman. One of the prosecutor's reasons for emphasizing this point was to show the jury the peril Mr. Norman faced in testifying – peril that would only buttress his credibility before the *Ramey* jury.

Ramey's incentive to retaliate was only heightened by Mr. Norman's testimony against him at both the guilt and penalty phases of the *Ramey* trial. At the guilt phase, Mr. Norman gave a detailed account of Ramey's involvement in the incident, including Ramey's shooting and killing two of the three decedents. 1/9/07 *Ramey* Tr. 158. At the penalty phase of Ramey's trial, Mr. Norman was recalled. 1/22/07 *Ramey* Tr. 9. He testified that Ramey admitted to him that on an earlier, unrelated occasion Ramey had killed someone with a high-powered rifle during a home-invasion robbery. *Id.* 9-10. In closing at the penalty phase of the trial, the

prosecutor relied upon that testimony in seeking a death sentence for Ramey. 1/23/07 *Ramey* Tr. 40.

However, at Mr. Norman's trial, the prosecutor painstakingly disputed what he had presented and argued to the jury at the *Ramey* trial.

During the *Norman* trial, Mr. Norman's trial counsel elicited testimony from the State's prison-expert A.P. Merillat, that cooperation presented a risk to the cooperator's safety, in this case Mr. Norman. 12/9/08 Tr. 111-13. Trial counsel's point was that a person like Mr. Norman who "snitched," would be retaliated against in prison. In fact, that was the term – "snitched" – the prosecutor had elicited from Childs at the earlier *Ramey* trial to describe Ramey's characterization of Mr. Norman and his cooperation. Merillat testified that inmates who cooperate suffer abuse from other inmates and guards and often end up in administrative segregation. *Id.* at 112-13. In administrative segregation an inmate is locked down twenty-three (23) hours a day, and when the inmate leaves his cell, he is handcuffed and escorted. *Id.* at 114. This evidence was mitigating. It not only brought home to the jury that serving a life sentence would be more onerous for a person like Mr. Norman who assisted the State, but that his cooperation demonstrated his courage and integrity, since he must have known what would be in store for him in prison.

But now, when it was Mr. Norman on trial, the prosecutor did another about-face. In front of the *Norman* jury, according to the prosecutor Mr. Norman had

nothing to worry about in prison. On redirect examination of Merillat, the prosecutor set out to refute the favorable testimony trial counsel had elicited (and that the prosecutor had elicited in the *Ramey* trial):

Prosecutor: Let me draw the distinction between a snitch –

Merillat: Yes, sir.

Prosecutor: -- and somebody who testifies against themselves, because we're talking about this defendant now.

Merillat: I didn't know he testified.

Prosecutor: Well, in this case this Defendant testified at a previous trial.

Merillat: Oh.

Prosecutor: Now, let me tell you this. There were three people killed. Okay?

Merillat: Yes, sir.

Prosecutor: This Defendant testified that he murdered two of those three.

Merillat: Oh, okay.

Prosecutor: He's not what you call a snitch, is he?

Merillat: Right. He didn't say somebody else killed them.

Prosecutor: Right. He's not laying it off on somebody else.

Merillat: Okay. That's not a snitch.

Prosecutor: And would that information get out in the prison that he's not somebody who's trying to put it on somebody else, but he accepted his own responsibility?

Merillat: Right. He might be thought of as stupid by the other inmates, like why did you do that.

Prosecutor: Right.

Merillat: But he's not a snitch.

Prosecutor: He's not going to be someone they're going to target to kill?

Merillat: Right.

Prosecutor: And is that distinction made in the prison world?

Merillat: Well, we don't hear much about inmates who testify against themselves. I really can't compare it to anybody.

Prosecutor: But that wouldn't be what they classify as a snitch, would it be?

Merillat: No. That's not a snitch.

Id. at 115-16. However, unbeknownst to Merillat, Mr. Norman had testified that his co-defendant had also been involved in the incident, had shot all the victims, and that it was the shots from his co-defendant that killed two of the three victims. Further, and also unknown to Merillat, the prosecutor presented evidence to the *Ramey* jury that Ramey regarded Mr. Norman as a "snitch" and had even discussed killing Mr. Norman for "snitching."

Merillat's testimony based on incomplete information from the prosecutor, allowed the State to put forth the theory in closing that was opposite to its theory presented at the *Ramey* trial regarding what was in store for Mr. Norman:

Let me tell you what a snitch is so we're all clear about it from the prison people. A snitch isn't somebody who confesses to a crime. He might be called a whole bunch of things in prison, but it isn't a snitch. A snitch is somebody who rats on somebody else to avoid consequences of their own conduct. [Norman] is not for one minute going to be considered a snitch. [] He's not going to be preyed upon.

12/10/08 Tr. 107. The prosecutor understood the power of Mr. Norman's coming forward and assisting the State despite the attendant risks, as mitigating evidence.

Consequently, he repeatedly emphasized to the jury that Mr. Norman faced no risks at all. *See, e.g.*, 12/10/08 Tr. 98 (“He ain’t even considered a snitch.”); 106 (“And, folks, I am here to tell you he is not a snitch.”); 107 (“he is not for one minute going to be considered a snitch.”).

Beyond the fact that the prosecutor’s theory on snitches was contradicted by the evidence he presented through Childs and by his own argument at the *Ramey* trial, it is also unsupported in law, logic, or practice. *See, e.g., Rubalcado v. State*, 424 S.W.3d 560, 578 (Tex. Crim. App. 2014) (involving and citing precedent in which the informant was a cooperating co-defendant); *see also* Simons, Michael A., *Retribution for Rats: Cooperation, Punishment, and Atonement*, Vanderbilt Law Review, Vol. 56, No. 1., Jan. 2003 at 2 (describing as a “rat” or “snitch,” “criminal defendants [who] have received leniency in return for testimony incriminating accomplices . . .”). It was thus nothing more than a false spin, spun to strip Mr. Norman of the benefit of his acceptance of responsibility and the risks he faced by testifying against Ramey.

The prosecutor violated due process when at the *Ramey* trial he presented evidence that Ker’sean Ramey intended to kill Mr. Norman because he “snitched” – when doing so was beneficial to the State – and then at Mr. Norman’s trial insisted that he was not a “snitch” at all when it was served the prosecutor’s interest in

obtaining a death sentence. It served to negate the credible mitigating evidence that, at great personal risk, Mr. Norman assisted the State.

vii. The Prosecutor Told the *Ramey* Jury that Mr. Norman Had Accepted Responsibility for his Criminal Conduct; He Told Mr. Norman's Jury That He Had Not.

During the *Ramey* trial, the prosecutor repeatedly urged the jury to find that Mr. Norman accepted responsibility for his criminal conduct. In his opening statement, the prosecutor told the jury that Mr. Norman was getting nothing out of his testimony, and that he had no expectation that his cooperation would be of any help to him. *See* 1/4/07 *Ramey* Tr. 42 (“LeJames Norman will tell you that he has no deal. [] He’ll tell you that he fully expects when this trial is over to be [] tried for capital murder and facing the same death penalty that Kersean Ramey is facing.”). In the prosecutor’s opening statement in the *Ramey* trial, his promotion of Mr. Norman’s acceptance of responsibility was unequivocal:

I’m going to tell you that the testimony is going to show that from the very moment LeJames Norman was captured, he confessed. He gave a detailed statement, but I will tell you this, each of the statements he gave and this was statements – every one of the statements was enough about his involvement. Of course, when he first gave his statement he minimized his involvement in the triple homicide, but as time progressed he eventually came and told us exactly what happened that night. But I do want you to know that the testimony will show that every statement he gave, even the ones at the beginning minimizing his involvement, were sufficient to convict him for capital murder and face the death penalty, so it wasn’t like he was trying to dump it on Kersean Ramey. That’s not what happened.

1/4/07 *Ramey* Tr. 49-50. The prosecutor then called Mr. Norman as a witness, and offered unsolicited praise for his character, describing his post-incident conduct as “stepp[ing] up to the plate [] and [taking] responsibility” for his role in the offense:

Q: Each step of the way, you’ve accepted more and more responsibility for this triple homicide have you not?

A: Yes, sir.

Q: Did you ever have anybody at your side to give you counsel, to give you counsel, to give you advice, to assist you in this legal maze of statements? Did you have the benefit of that when you were giving these statements?

A: No, sir.

Q: You were accepting responsibility without anybody helping you in the legal process; were you not?

A: Yes, sir.

Q: And you knew when you stepped up to the plate each time and took responsibility, albeit a little at a time, that by accepting that responsibility, you could possibly be facing the death penalty; did you not.

A: Yes, sir.

1/10/07 *Ramey* Tr. 201.

At the conclusion of the prosecutor’s direct examination of Mr. Norman in the *Ramey* trial, the prosecutor elicited from Mr. Norman that he was sorry for what he did. 1/9/07 *Ramey* Tr. 178. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED], the prosecutor elicited and praised Mr. Norman's expression of remorse, acceptance of responsibility, and honesty. But this was all undone when the prosecutor fiercely disputed all of what he had earlier championed.

At his own trial, Mr. Norman again expressed remorse for his role in the criminal incident. 12/4/08 Tr. 107. [REDACTED]

[REDACTED], he now dismissed, derided, and dismantled them. [REDACTED]

[REDACTED]

despite Mr. Norman's similar statements elicited by the same prosecutor at [REDACTED] the *Ramey* trial [REDACTED].

Moreover, the prosecutor misled Mr. Norman's jury about his acceptance of responsibility by describing it as "self-serving." 12/10/08 Tr. 104. He told the jurors that "the only reason [Mr. Norman] testified or gave any statements was only to self-serve, to help himself." 12/10/08 Tr. 49. The prosecutor never disclosed to the *Norman* jurors his exhortation to the *Ramey* jury that Mr. Norman was getting nothing for his testimony even when he knew that he would still face death. 1/4/07 *Ramey* Tr. 42.

The prosecutor violated due process when he presented stark and shockingly different accounts – from one trial to the next – of Mr. Norman's assistance to the State and expression of remorse. The prosecutor's eviscerating the good will that Mr. Norman earned by cooperating [REDACTED] [REDACTED] undermined the fundamental fairness of Mr. Norman's trial, by eliminating powerful mitigation that Mr. Norman had presented during the penalty phase.

viii. The Prosecutor Misrepresented to the Jury Mr. Norman's Statement That He Was "In Pieces" After the Offense.

The prosecutor also misrepresented Mr. Norman's own testimony to undercut his remorse. Mr. Norman testified at the penalty phase. During his testimony, Mr. Norman told the jury that he was "in pieces" after the shooting. 12/04/08 Tr. 151.

However, on cross-examination, the prosecutor alleged that Mr. Norman claimed to have said he “was at peace”. 12/05/08 Tr. 118. Mr. Norman, plainly confused, asked “[d]id I say that,” to which the prosecutor claimed that “[y]eah, you did.” *Id.* In fact, nowhere in his testimony did Mr. Norman say he was at peace after the offense.

The prosecutor’s misrepresentation of Mr. Norman’s statement of being “in pieces” to him being “at peace” turned into a theme of the State’s closing argument:

And what did he testify just a couple of days ago to you? What was his words? He was at peace. Does that sound like remorse? Excuse me. I don’t think that sounds like remorse.

You got to be kidding me. He’s at peace after having executed these beautiful people. And you want to believe he’s not rotten to the core? My goodness.

Well, we know that it didn’t -- it didn’t get under his skin. We know it didn’t bother him. You heard what he did. I didn’t have to keep reiterating. He was at peace. I listened to that and trembled when I heard it. How could you get on that stand after you killed three people in cold blood and say I was in peace.

12/10/08 Tr. 48, 58, 98. This is yet another example of the State misrepresenting to the jury Mr. Norman’s true remorse for the offense in violation of due process.

C. This Claim Meets the Requirements of Article 11.071 § (5)(a)(3).

Pursuant to Tex. Code Crim. Proc. art. 11.071 § 5(a)(3), this Court can authorize Mr. Norman’s claim if he can demonstrate by clear and convincing

evidence, that but for a violation of the United States Constitution no rational juror would have answered in the State's favor one or more of the special issues that were submitted to the jury in his trial under Article 37.071.

As the foregoing demonstrates, in several discrete and prejudicial ways, the prosecutor argued facts and theories to Mr. Norman's jury that the prosecutor knew were untrue because they flatly contradicted the findings he urged upon [REDACTED] the *Ramey* jury.

These falsities included Mr. Norman's acceptance of responsibility for the offense, his cooperation with the State, and the peril Mr. Norman faced for cooperating against Ramey. These facts were uniquely powerful mitigating evidence for Mr. Norman. *See, e.g., State ex rel. Watkins v. Creuzot*, 352 S.W.3d 493, 504 (Tex. Crim. App. 2011) ("Evidence of present rehabilitation, redemption, and remorse may be significantly more powerful mitigation evidence than tales of a troubled childhood some forty to fifty years ago."); *Wells v. State*, 611 S.W.3d 396, 422 (Tex. Crim. App. 2020) ("evidence of remorse is evidence that a fact finder can find mitigating").

The prosecutor then further undermined the fairness of Mr. Norman's penalty phase by espousing theories that saddled Mr. Norman with depraved actions he did not take, thereby further eroding Mr. Norman's mitigation case. But these theories

were contradicted by evidence elicited, and positions taken by the prosecutor at the *Ramey* trial.

Had the jury known that the prosecutor “believe[d Mr. Norman] when he said I was going to turn myself in[,]” and extolled him for coming back to face the charges, even though “[h]e could have stayed in Mexico[,]” 1/16/07 *Ramey* Tr. at 110-111, at least one juror would have found that evidence sufficiently mitigating to reject death. Had the jury known that the prosecutor introduced evidence at the *Ramey* trial that Ramey was scheming to kill Mr. Norman for the courage he demonstrated by cooperating with the State (1/11/07 *Ramey* Tr. at 161-62; 1/16/07 *Ramey* Tr. at 112-113; 1/23/07 *Ramey* Tr. at 42), at least one juror would have found that evidence sufficiently mitigating to reject death. Had the jury known that the prosecutor vouched for Mr. Norman’s acceptance of responsibility and remorse, arguing that Mr. Norman “stepped up to the plate [] and took responsibility” (1/10/07 *Ramey* Tr. at 201), [REDACTED]

[REDACTED], at least one juror would have found that evidence sufficiently mitigating to reject death. Had the jury known that the prosecutor who urged them to find that Mr. Norman ordered Ramey to return to the residence to “finish off” the victims, had in actuality flatly rejected the idea that Mr. Norman knew about Ramey’s intention to return to the residence to shoot the victims, at least

one juror would have found that this alone was reason to reject a death sentence. Had the jurors known that when Mr. Norman shot Sam Roberts, Roberts could not have been on his knees pleading for his life; and the prosecutor who urged them to find that he was, had established (and previously argued) that Roberts was dead on the floor at that moment; at least one juror would have found that this alone was reason to reject a death sentence. And had the jurors known that they were told a lie when the prosecutor urged them to find Mr. Norman's testimony to have been that he was "at peace" with his role in the incident, and that this was an egregious distortion of his testimony, at least one juror would have found that this alone was reason to reject a death sentence.

Considered cumulatively, the overwhelming impact of the false and prejudicial picture of LeJames Norman's incident and post-incident conduct presented to his jury, leads to the inescapable conclusion that but for these due process violations, no rational juror would have answered in the State's favor one or more of the special issues that were submitted to the jury in the applicant's trial under Article 37.071. Absent those due process violations, the jury would have known of the prosecutor's highly favorable assessment of Mr. Norman's character and post-incident conduct, as disclosed to the *Ramey* jury, unimpeded by the prosecutor's subsequent deception. That assessment characterized Mr. Norman as an honest,

remorseful, and courageous cooperator who, according to the prosecutor himself, “stepped up to the plate,” and redeemed himself.

CLAIM II. The Prosecutor Knew that the Evidence and Argument he Presented to the *Norman* Jury Was Untrue Because It Contradicted the Evidence and Argument He Presented [REDACTED] to Co-Defendant Ker’sean Ramey’s Jury.

The prosecutor violated due process by presenting Mr. Norman’s jury with argument and evidence he knew to be false. *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); *Napue v. Illinois*, 360 U.S. 264, 265, 269 (1959) (State violates due process when it fails to correct evidence it knows to be false). Such deliberate deception is incompatible “with rudimentary demands of justice.” *Mooney*, 294 U.S. at 112. The knowing use of false testimony “involves prosecutorial misconduct and a corruption of the truth-seeking function of the trial.” *United States v. Bagley*, 473 U.S. 667, 680 (1985) (quoting *United States v. Agurs*, 427 U.S. 97, 104 (1976)); see also *Banks v. Dretke*, 540 U.S. 668, 694 (2004) (“It has long been established that the prosecution’s ‘deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.’”).

It is equally incompatible when the prosecutor’s deception is accomplished by false representations to the jury. *United States v. Alzate*, 47 F.3d 1103, 1110 (11th Cir. 1995) (“[false] explicit factual representations by the prosecutor at a side bar and [false] implicit factual representations to the jury during cross-examination of

the defendant” “corrupt[ed] the truth-seeking function of the trial”); *United States v. Pariente*, 558 F.2d 1186, 1190 (5th Cir. 1977) (prosecutor’s unsupported representations about a statement by a co-defendant during prosecutor’s cross-examination of defendant violated due process). Thus, when inconsistent theories of culpability are founded on prejudicial false evidence and argument that the State presents at a subsequent penalty phase trial (here the *Norman* trial), contradicting evidence and argument the State relied on during the earlier proceedings, due process is also violated. *See Mooney*, 294 U.S. at 112; *Napue*, 360 U.S. at 269 *Alzate*, 47 F.3d at 1110; *Pariente*, 558 F.2d at 1190.

The prosecutor’s misrepresentations to Mr. Norman’s jury about the sincerity of Mr. Norman’s remorse and his willingness to accept responsibility and cooperate with the State, even when there was no benefit to Mr. Norman—and in fact, he was placing himself in jeopardy—violated due process. Likewise, the prosecutor’s distortions of Mr. Norman’s role and actions in the crime violated due process. Additionally, the prosecutor’s elicitation of testimony, based on incomplete facts, from A.P. Merillat that Mr. Norman was not a snitch whose life would be endangered while incarcerated, 12/9/08 Tr. at 115-16, violated due process. The prosecutor knew that whether a defendant admits his own guilt, if he implicates another, he bears the label of “snitch.” Indeed, the same prosecutor elicited evidence from cooperating jail witness Childs at the *Ramey* trial that Ramey intended to retaliate against Mr.

Norman and kill him. Eliciting testimony from Merillat that Mr. Norman was not a snitch because he only implicated himself in the offense—testimony that was directly contradicted by testimony elicited by the State at the *Ramey* trial that Mr. Norman was considered a snitch by his codefendant—misled Mr. Norman’s jury and, consequently, violated *Mooney*, *Napue*, and their progeny.

The State also violated due process because it presented factually inconsistent testimony from the medical examiner to cast Mr. Norman’s account of the offense as untrue. *Compare* 11/24/08 Tr. 19-22 with 1/10/07 *Ramey* Tr. 24. The prosecutor relied on this inconsistent medical examiner testimony to falsely suggest that Mr. Norman’s testimony was contradicted by the physical evidence. The prosecutor knew this was untrue because the prosecutor relied on the *consistency* of Mr. Norman’s and the medical examiner’s testimony at the *Ramey* trial. The prosecutor then labeled Mr. Norman as a liar before the jury that would decide his fate to undermine Mr. Norman’s credibility regarding his willingness to accept responsibility and his remorse for the wrongs he committed. Thus, here again, the prosecutor violated *Mooney*, *Napue*, and their progeny.

False evidence knowingly presented by the State is material if there is a reasonable likelihood it could have “affected the judgment of the jury.” *Bagley*, 473 U.S. at 678-79 & n.9; *Agurs*, 427 U.S. at 103. This standard is equally applicable where the prosecutor makes false statements to the jury. *Alzate*, 47 F.3d at 1110;

Pariente, 558 F.2d at 1190. The false testimony “materiality standard requires ‘the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Glossip v. Oklahoma*, 604 U.S. 226, 627 (2025) (quoting *Bagley*, 473 U.S. at 680 n.9). Moreover, the “prejudice analysis requires a ‘cumulative evaluation’ of all the evidence, whether or not that evidence is before the Court in the form of an independent claim for relief . . .” *Glossip*, 604 U.S. at 251.

As discussed above, the prosecutor’s inconsistent evidence and argument from one proceeding to the next misled the *Norman* jury by undermining the very evidence and argument that he had pressed upon the *Ramey* jury in support of his then-cooperating-witness, Mr. Norman. This evidence and argument were at the core of Mr. Norman’s case for life—his honesty in his account of his and Ramey’s involvement, his remorse, his cooperation with the State, and his willingness to accept responsibility. There is a reasonable likelihood that, had Mr. Norman’s jury known that even the prosecutor had endorsed Mr. Norman’s account of the incident, [REDACTED], and his acceptance of responsibility (rather than hear the prosecutor dispute it), it would have affected the judgment of the jury. Consequently, Mr. Norman suffered a due process violation through the State’s use of false evidence and argument. The beneficiary of that false testimony—the State—cannot show beyond a reasonable doubt that there is no reasonable likelihood that

the false evidence and argument contributed to Mr. Norman's conviction. *See Glossip*, 604 U.S. at 627; *Napue*, 360 U.S. at 269; *Mooney*, 294 U.S. at 112; *Alzate*, 47 F.3d at 1110; *Pariente*, 558 F.2d at 1190; *Hall v. State*, 283 S.W.3d 137, 156 (Tex. Ct. App. – Austin 2009).

A. This Claim Meets the Requirements of Article 11.071 § (5)(a)(3).

Mr. Norman's Claim challenging the prosecutor's presentation of false evidence and argument meets the strictures of Section 5(a)(3). Considered cumulatively—and for the reason articulated above— but for the overwhelming impact of the false and prejudicial picture of LeJames Norman's incident and post-incident conduct painted by the State, no rational juror would have answered in the State's favor one or more of the special issues that were submitted to the jury in Mr. Norman's trial under Article 37.071.

CLAIM III. Trial Counsel was Ineffective for Failing Alert the Jury to the Prosecutor's Sleight of Hand.

Although the prosecutor's actions violated due process, trial counsel allowing the prosecutor to engage in this misconduct violated Mr. Norman's Sixth Amendment right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668 (1984). The *Ramey* case was tried two years before Mr. Norman's trial.

[REDACTED]. Trial counsel either never read the earlier transcripts, or if they did, they failed to appreciate the critical significance of the prosecutor's eliciting contrary evidence and taking contrary

positions from one trial to the other. Trial counsel failed to act as the reasonably competent attorneys the Sixth Amendment guarantees Mr. Norman, by failing to either object to the prosecutor's conduct, or expose that conduct to the jury by presenting evidence from the *Ramey* proceeding that refuted the false narrative presented by the prosecution at the *Norman* proceeding. Indeed, such evidence would have been admissible before the jury. *See Renteria v. State*, 206 S.W.3d 689, 698 (Tex. Crim. App. 2006) (where prosecutor opened door by presenting evidence and arguing defendant was unremorseful, trial court violated due process by preventing defendant from admitting his out-of-court expression of remorse).

Trial counsel's performance was deficient in several ways. *First*, trial counsel was ineffective for failing object to the prosecutor's improper argument [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

Second, trial counsel was ineffective for failing expose the prosecutor's deceitful argument that Mr. Norman was lying when he testified that he intended to turn himself in, despite the prosecutor's elicitation of and reliance on testimony from Mr. Norman that he returned to the United States because he intended to surrender, and despite the prosecutor's argument endorsing that testimony. 1/10/07 *Ramey* Tr.

202. *See also* 1/16/07 *Ramey* Tr. 110-11 (“I believe him when he said I was going to turn myself in. Why? He could have stayed in Mexico.”)

Third, trial counsel was ineffective for failing to present the earlier evidence from the *Ramey* trial that 1) conclusively established Mr. Norman’s cooperation; 2) the peril he faced as evidenced by Ramey’s statements;² and 3) the prosecutor’s duplicity, essential to undo its impact on the *Norman* jury. Trial counsel was also ineffective for failing to object to the prosecutor’s argument at the *Norman* trial that Mr. Norman had nothing to fear, after eliciting evidence and making argument to the contrary at the *Ramey* trial. Finally, trial counsel was ineffective for failing to object to the prosecutor’s misrepresentations of fact during his redirect of Merillat or to conduct a proper examination on recross examination to disabuse Merillat of the notion that Mr. Norman implicated no one other than himself. Once adequately apprised of the facts, no reasonably ethical and competent prison expert would testify that someone who implicates himself would not be deemed a “snitch” if he implicated someone else as well.

Fourth, trial counsel was ineffective for failing to object to the prosecutor’s presentation of the medical examiner’s testimony—and the prosecutor’s argument about that testimony—both of which contradicted the evidence and argument he

² This would not have been difficult to do, since the witness who offered this evidence at the *Ramey* trial, Kevin Childs, was also a witness at Mr. Norman’s penalty phase hearing. Trial counsel needed only to ask the question.

presented at the *Ramey* trial. Further, trial counsel was ineffective for failing to present the medical examiner testimony that was presented at the *Ramey* trial.

Fifth, trial counsel was ineffective for failing to object to the prosecutor's argument that Mr. Norman only cooperated with the State and accepted responsibility to benefit himself. 12/10/08 Tr. 104 (arguing Mr. Norman's acceptance of responsibility was "self-serving"). These arguments were contradicted by evidence and argument presented by the same prosecutor at the *Ramey* trial. Trial counsel performed deficiently when they failed to point out those contradictions to Mr. Norman's jury.

Sixth, trial counsel was ineffective for failing to object to the prosecutor's argument that when Mr. Norman shot Sam Roberts, Mr. Roberts was on his knees pleading for his life; when that same prosecutor had previously established (and previously argued) that Mr. Roberts was dead at that time.

Seventh, trial counsel was ineffective for failing to object to the prosecutor's prejudicial distortion of Mr. Norman's testimony from him being "in pieces" over his actions, to his being "at peace" with those actions.

Eighth, trial counsel was ineffective for failing to object to the prosecutor's argument that Mr. Norman ordered Ramey to go back in the house to "finish off" the decedents, 12/10/08 Tr. 99-100, which contradicted both the evidence and the prosecutor's argument from the *Ramey* trial that Mr. Norman was unaware that

Ramey had shot the victims again when he went back into the house to retrieve an item they had left – **and in fact was not guilty of that offense.**

In sum, trial counsel's performance was deficient. All the information to expose the State's misrepresentations was knowable and the State's attempts to mislead the jury could have been prevented by reasonably competent counsel, who was expected to have read [REDACTED] the transcript of the co-defendant's trial. Trial counsel either failed to do so or failed to reasonably comprehend what was going on in front of him.

Counsel's deficient performance prejudiced Mr. Norman. By failing to object or otherwise call the jury's attention to the prosecutor's misrepresentations throughout the trial about Mr. Norman's [REDACTED] accountability, cooperation with the State and the peril in which it placed him, the jury was left to consider the State's characterization of Mr. Norman presented at his trial – a self-serving, callous, remorseless man. The jury was also denied the opportunity to consider evidence that the prosecution had previously agreed that Mr. Norman affirmatively decided to accept responsibility for the offense and that he was genuinely sorry for the harm he caused. Had the jury had this picture of Mr. Norman, there is a reasonable probability that the jury would have answered the special issues in a manner that required imposition of a life sentence. *See Strickland*, 466 U.S. at 694.

A. This Claim Meets the Requirements of Article 11.071 § (5)(a)(3).

But for the Sixth Amendment violation, the jury would have understood that even the State agreed Mr. Norman had been honest about his and Ramey's roles in the offense, [REDACTED], and was willing to take responsibility at significant risk to himself. This is powerful mitigation. It demonstrates by clear and convincing evidence that but for counsel's ineffectiveness no rational juror would have answered in the State's favor one or more of the special issues that were submitted to the jury in Mr. Norman's trial under Article 37.071. Tex. Code Crim. Proc. art. 11.071 § 5(a)(3).

CLAIM IV. The Prosecutor's Misconduct that Forced a Crucial Defense Expert, Dr. Mark Cunningham to Withdraw From the Case Violated Mr. Norman's Sixth and Fourteenth Amendment Rights to Present a Defense and to a Fair and Impartial Sentencing.

A. State Interference with a Defendant's Right to Present Witnesses on his Behalf Violates Due Process.

Both the Sixth and Fourteenth Amendment guarantee a defendant the "right to offer the testimony of witnesses" to present a defense and offer "the defendant's version of the facts" to counter the prosecution's narrative. *Washington v. Texas*, 388 U.S. 14, 19 (1967); *see also Washington v. Schriver*, 255 F.3d 45, 56 (2d Cir. 2001) ("The right to call witnesses in order to present a meaningful defense at a criminal trial is a fundamental constitutional right secured by both the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment."). Whether it be the court or the prosecution, "various types

of governmental interference can deprive the defendant of this right.” *United States v. Hammond*, 598 F.2d 1008, 1012 (5th Cir. 1979); *Webb v. Texas*, 409 U.S. 95, 98 (1972) (“In the circumstances of this case, we conclude that the judge’s threatening remarks, directed only at the single witness for the defense, effectively drove that witness off the stand, and thus deprived the petitioner of due process of law under the Fourteenth Amendment.”); *United States v. Dupre*, 117 F.3d 810, 823 (5th Cir. 1997) (Sixth and Fourteenth Amendments violated when government interferes with defense witnesses); *Dowthitt v. State*, 931 S.W.2d 244, 265-67 (Tex. Crim. App. 1996) (recognizing that State interference with defense witnesses violates due process); *Davis v. State*, 831 S.W.2d 426, 437 (Tex. Ct. App. – Austin 1992) (“Under certain circumstances, a judge’s or prosecutor’s threats or intimidation that dissuade a witness from testifying or persuade a witness to change their testimony may infringe a defendant’s due-process rights.”).

In criminal cases, and capital cases in particular, the due process right to present a defense includes the right to present expert testimony. *See McWilliams v. Dunn*, 582 U.S. 183, 195 (2017) (defendant entitled to expert assistance relevant to mitigating evidence “‘who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense’”) (quoting *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985)); *Ake*, 470 U.S. at 82 (expert assistance enables

a defendant to be “fairly able to present at least enough information to the jury, in a meaningful manner, as to permit it to make a sensible determination”).

The prosecutor at Mr. Norman’s trial “drove [Mr. Norman’s punishment phase expert] witness off the stand” at punishment. *Webb*, 409 U.S. at 98. On November 14, 2007, after *voir dire* had commenced, the State served Dr. Mark Cunningham, Mr. Norman’s retained mental health expert, with an illegal and abusive subpoena *duces tecum* that demanded a breathtakingly broad array of privileged and confidential information that the State was not entitled to. In doing so, “the State literally ran off the defense’s key expert witness whose testimony would provide the best opportunity for Mr. LeJames Norman to receive a life sentence as opposed to the death penalty.” A1 (*Defense Motion to Withdraw, State v. Norman*, No. 06-1-7346, 24th Judicial District). The prosecutor’s issuance of this subpoena, which caused Dr. Cunningham’s withdrawal from the case, violated Mr. Norman’s Sixth and Fourteenth Amendment rights.

The subpoena invaded aspects of Dr. Cunningham’s professional practice and personal life – irrelevant to the Norman proceeding – over the previous sixteen (16) years. A3 (State’s Subpoena Duces Tecum, November 14, 2007). The information demanded included, but was not limited to, critical portions of Dr. Cunningham’s earnings and income tax records for the previous sixteen (16) years; privileged and confidential communications between Dr. Cunningham and non-party capital

counsel and clients in every case in in the United States in which he was retained where he was not called as a witness; and sealed financial information, the disclosure of which would have placed Dr. Cunningham in contempt of court in jurisdictions around the country. It constituted an abuse of process and created a strong presumption that it was purposely issued to bring about the result it did (Dr. Cunningham's removal from the trial). It prompted applications from capital counsel from all over the country seeking to quash the subpoena, to ensure that Dr. Cunningham would not divulge their clients' case information.

It is inconceivable that the prosecutor, in issuing the subpoena duces tecum, was unaware of the ethical rules and Texas and Supreme Court precedent, prohibiting the disclosures he sought. It is equally inconceivable that the prosecutor was oblivious to the constitutional protections that his subpoena duces tecum flouted.

i. The Subpoena's Demands

Among other things, the subpoena duces tecum required Dr. Cunningham to reveal his gross earnings for the past sixteen (16) years and income tax record confirming those gross earnings. A7. It also required Dr. Cunningham to generate work product for the State's use, which required Dr. Cunningham to violate the work product protection of each of the respective defense teams that had hired him. It asked for a list of cases where Dr. Cunningham had been hired but did not testify

after informing other defense teams that there was a probability that the defendant would commit criminal acts of violence while in prison; and required Dr. Cunningham to reveal the lawyers' reasons for deciding that he would not be a testifying expert in any cases in which he did not testify. A5-A6. The subpoena required Dr. Cunningham to reveal this information whether or not the defense teams designated that he would be a testifying expert in the courts in which those cases were being tried. Its demand for this information regarding the mental processes of the defense teams did even not limit its scope to cases in which Dr. Cunningham had been hired as a testifying expert, demanding production in all cases in which he had been hired to "render his opinion" (including presumably to the attorney who had hired him).³

ii. There Was No Basis in Law for the Abusive Subpoena

The subpoena invaded the attorney-client privilege and confidentiality of third-party defense teams, to which Dr. Cunningham was bound, placing him in an untenable position. The attorney-client privilege is one of the oldest and most important privileges in our legal system. The privilege is meant "to encourage full and frank communication between attorneys and their clients and thereby promote

³ In fact, where the subpoena references items demanded when Dr. Cunningham was specifically retained as a consulting expert, it instructs that this demand may be "inclusive" of other cases in which he "rendered his opinion" whether to counsel or the court, apparently including those in which he was never intended to be, or designated as, a testifying expert. A6.

broad public interests in the observance of law and administration of justice.” *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The privilege is generally considered absolute unless waived by the client. *Carmona v. State*, 941 S.W.2d 949, 953 (Tex. Crim. App. 1997) (“the power to waive the attorney-client privilege belongs to the client” and an attorney or agent can only waive the privilege when “acting with the client’s authority”).

The Texas Rules of Evidence provide that privilege covers communications between a client and a representative of the lawyer, including “one employed by the lawyer to assist the lawyer in the rendition of professional legal services.” Tex. R. Evid. 503(a)(4), (b)(1)(B). The Rule specifically provides that, in criminal cases, a client not only has a privilege to refuse disclosure of confidential communication, but also “has a privilege to prevent the lawyer *or lawyer’s representative* from disclosing any other fact which came to the knowledge of the lawyer or the lawyer’s representative by reason of the attorney-client relationship.” Tex. R. Evid. 503(b)(2) (emphasis added).

The work product privilege is distinct from the attorney-client privilege and broader. *Hickman v. Taylor*, 329 U.S. 495, 508-09 (1947). This protection is a practical one that is meant to shield attorneys. It provides a privileged area in which an attorney can work to prepare a client’s case without fear of having to produce the documents or mental impressions that he prepares. *United States v. Nobles*, 422 U.S.

225, 238 (1975). In *Hickman*, the Supreme Court described the work product doctrine's purpose as an effort to preserve the historical and the necessary way in which lawyers act within the framework of our system of jurisprudence to promote justice and to protect their clients' interests. *Hickman*, 329 U.S. at 511. The work product doctrine "belongs to and protects the attorney." *Pope v. State*, 207 S.W.3d 352, 357 (Tex. Crim. App. 2006).

Texas recognizes consulting experts are covered by the work product doctrine and attorney-client privilege. *See Pope v. State*, 207 S.W.3d 352, 359 (Tex. Crim. App. 2006) ("material prepared by a consulting expert appointed by the trial court to assist the defense in developing strategies and theories is protected by the work-product doctrine when that material reflects the expert's thoughts regarding the strength and weaknesses of a defense theory."); *See also id.* at 360 (only when the party "designates a particular person as an expert that he may use as a witness at trial" does the expert lose that status); *Skinner v. State*, 956 S.W.2d 532, 538 (Tex. Crim. App. 1997) ("An expert appointed pursuant to *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), is an agent of defense counsel for purposes of the work product doctrine."); *Morrison v. State*, 575 S.W.3d 1, 26 (Tex. App. – Texarkana 2019) (attorney-client privilege prevented disclosure, *inter alia*, of the defense psychologist's conversations with the client).

Attorney-client privilege and the attorney-work product doctrine therefore squarely applied to Dr. Cunningham as an expert and agent for the numerous other attorneys who hired him. *Pope*, 207 S.W.3d at 358, 360; *Skinner*, 956 S.W.2d at 538; *Morrison*, 575 S.W.3d at 26; Tex. R. Evid. 503. It mattered little to the prosecutor, however, that core work product, the attorney's or the attorney's representative's mental impressions opinions, conclusions, or legal theories are sacrosanct and its protection impermeable and not discoverable. *In re Bexar County Crim. Dist. Attorney's Office*, 224 S.W.3d 182, 187-88 (Tex. 2007). Nor was the prosecutor concerned or deterred by the fact that the attorney-client privilege applies to consulting experts and agents of an attorney. *Ballew v. State*, 640 S.W.2d 237, 239-40 (Tex. Crim. App. 1980); *Carmona v. State*, 941 S.W.2d 949 (Tex. Crim. App. 1997); *In re City of Georgetown*, 53 S.W.3d 328 (Tex. 2001).

To comply with the subpoena duces tecum and disclose the information demanded by Mr. Norman's prosecutor, Dr. Cunningham would have been required to break these privileges that he had no power waive. *See Carmona*, 941 S.W.2d at 953; *Pope*, 207 S.W.3d at 359. The subpoena invaded the right-to-counsel, the right to the assistance of experts, the attorney-client privilege and the attorney work-product doctrine, and the privilege against self-incrimination of non-party capital defendants, whose cases were unrelated to Mr. Norman's, in violation of Texas law,

the Texas Constitution, and the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

For all the foregoing reasons, the subpoena duces tecum was unconstitutional and unlawful. It was a bad faith attempt to circumvent the strict criminal discovery laws outlined in Texas Code of Criminal Procedure. The District Attorney tactics not only harassed Dr. Cunningham to the extent of intimidating him off the case, but also fundamentally harmed the legal community, and the legitimacy of the capital prosecution process in this case and in this State.

iii. The State Successfully Forced Dr. Cunningham Off the Case.

The particular prejudice to Mr. Norman, however, was the pressure it placed on Dr. Cunningham to withdraw from the case, since compliance with the subpoena would violate the rights of unaffiliated defendants. Indeed, even the abusive demands that did not necessarily implicate the rights of other clients, such as revealing irrelevant sensitive personal financial information applied undue and unnecessary pressure upon him in violation of the Compulsory Process Clause of the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment. The State's subpoena served its purpose. It forced Dr. Cunningham's withdrawal because of the ethical, professional, and personal conflict it placed him in.

Predictably, because the State was demanding disclosure of privileged and confidential information about third-party capital defendant's defense strategies,

lawyers in these unrelated cases around the country flooded the trial court with pleadings seeking to preclude Dr. Cunningham's from revealing any information relating to their respective cases.

On November 23, 2007, Dr. Cunningham notified Mr. Costas that he was resigning from the case, since complying with the subpoena would, *inter alia*, put him in conflict with his defendant- and lawyer- clients. On December 1, 2007, Dr. Cunningham wrote Mr. Costas, confirming his withdrawal:

I am frankly intimidated and apprehensive regarding the current and future intentions and conduct of the office of the Jackson County District Attorney. Such apprehension is inconsistent with the objectivity and detached professionalism required to competently and ethically provide evaluation services in this case. I additionally described that as a result of the State's requests, I now have multiple conflicts of interest with the defendant and defense counsel, as well as insurmountable calendar problems in performing work in this case in the face of so much lost time and calendar commitments to other cases. Neither my experience of intimidation and apprehension, nor the conflicts of interest and scheduling impediments are resolvable, even should the court wholly quash[] the State's Subpoena and SDT [subpoena duces tecum]. As I expressed to you, the totality of these factors necessitated my immediate withdrawal.

A8 (Letter from Dr. Mark D. Cunningham to Elliott H. Costas, Esq.).

Dr. Cunningham's withdrawal was required by his ethical and moral responsibilities to his other clients. The prospect of subsequent intrusion into their unrelated cases would render those capital clients at the mercy of the State:

[M]y reputation and practice were held at gunpoint by the abuse of process by the State. Also held at gunpoint were the Constitutional rights of hundreds of capital defendants, to whom I owed a continuing

professional obligation, and whom I continued to perceive were in jeopardy because of the State's assault targeted at me. After a surgeon has been held at gunpoint for an extended period of time – in this case *for a month*, it is absurd to think that the surgeon could regain his professional objectivity and poise, and resume the procedure simply because the gunman (still loitering in the surgical suite) has been instructed to holster his weapon. Although the Court holstered Mr. Bell's gun by quashing the subpoena and SDT, Mr. Bell still lurked in a menacing manner as a result of the Court's failure to admonish or sanction him.

A110-111 (Cunningham Declaration)⁴ (emphasis in the original).

After having earlier learned of the subpoena, trial counsel Costas tried unsuccessfully to convince the trial court to convene a hearing on his claim that the subpoena represented an abuse of process. He made successive requests however, the trial court continued with jury selection. A127. The trial court did not hold a hearing until December 17, 2007, long after Dr. Cunningham had irrevocably decided to withdraw from the case. 12/17/07 Tr. 43. It was only after learning of this development that the trial court quashed the subpoena. *Id.* at 49.

Second, even if Dr. Cunningham could have predicted that the trial court would eventually quash the subpoena, which the trial court agreed to do only after Dr. Cunningham announced his intention to withdraw from the case (12/17/07 Tr. 43, 49), the impact of the subpoena on Dr. Cunningham's ability to continue in the case was devastating and irredeemable. The State's subpoena fundamentally altered

⁴ Subsequent citations to A10 through A125 are to Dr. Cunningham's Declaration.

the assessment context, protocol, and process of Dr. Cunningham's professional involvement in the case.

[R]eliable assessment of sentencing determination factors relies on establishing a context of trust and safety with the defendant, family members, and other close associates of the defendant. This is a standard aspect of my assessment protocol in these cases. The specter of my disclosure of highly sensitive, privileged and confidential information, as demanded in the State's Subpoena, is inconsistent with the establishment of this essential assessment context. This specter fundamentally undermined the pending interviews and the associated reliability of any findings. Further, if my standard professional protocol of evaluation in capital sentencing is fundamentally altered, my ability to accurately interpret the information obtained is compromised. This problem is not resolved by the Court's quashing of the State's requests. The whiplash effect of "now it's safe" – "now it's not" – "now it's safe again - maybe" has profound impact on the experience of trust in any relationship, much less the relationship with a stranger-professional where the most intimate, sensitive, and potentially trauma-related disclosures will be sought. It is analogous to playing emotional Russian Roulette, not knowing whether the next disclosure will cause great harm to themselves or even the death a loved one.

A109.

The trial court's inaction, despite Mr. Costas' requests, created apprehension and a sense of foreboding in Dr Cunningham. He was not only concerned about the looming presence of a subpoena that required him to reveal privileged and confidential communications, but he was equally concerned over the potential for additional invasive State action on his practice. All of this presented him with an ethical imperative that he withdraw from the case:

The whiplash effect and associated sustained distrust of a defense mental health expert, and me in particular, was aggravated by the

looming presence of the State's subpoena for over a month prior to the hearing; the failure of the State to acknowledge at any time, including at the 12/17/07 hearing, that their demand for me to testify on behalf of the State was improper; and the failure of the Court to admonish or sanction the State for its Subpoenas and SDT, leaving open the potential for subsequent similar subpoenas from the State. Quite simply, I could not on 11/23/07 establish the degree of trust with the defendant, defendant's family, or other relevant third parties necessary to obtain reasonable disclosure from them. In the absence of any admonishment of the State by the Court for the subpoenas and subpoena duces tecum, I could not even assure them that a similar or even more onerous subpoena will not be forthcoming. A psychologist, no more than a surgeon, cannot be expected to engage in a procedure when deprived of the instruments and "surgical" context necessary to support a reliable outcome.

A109-110.

The astonishing intrusiveness of the prosecutor's subpoena engendered in Dr. Cunningham a fear of future prosecutorial abuse directed at him personally. It impacted his own perceptions of Mr. Norman's community circumstances, since the prosecutor who issued the subpoena was the senior law enforcement official in that community. Ironically, this perception would have been *mitigating* for Mr. Norman:

[These] observations regarding the motives and willingness of the State to misuse its offices had two effects that were completely incompatible with ethical and reliable participation as a forensic expert in any aspect of *State vs. LeJames Norman* at trial. First, these perceptions colored my view of evaluation-specific issues. For example, my personal belief that Mr. Bell misused his offices markedly impacted my perceptions of the defendant's community circumstances, given that Mr. Bell had been the senior law enforcement official in that community for many years. Similarly, my perceptions of the factors impinging on the defendant's pre-trial confinement and any associated jail misconduct, were markedly influenced by my rank distrust of the office of the Jackson County District Attorney. Second, because I perceived the State's

Subpoena and SDT as so unprecedented in trampling so many rights and privileges, and so foreseeable in their unwarranted life-destructive impact on me and others, I remained apprehensive regarding the potential for future rogue conduct by the State that could create some other jeopardy. As testament to this, I secured the escort of an off-duty uniformed state trooper to and from San Antonio to the 12/17/07 hearing in Victoria. I have never before retained such security escort services. My apprehension regarding the current and future conduct of the State, as well as my concern for the fundamental Constitutional rights of Mr. Norman and hundreds of other capital defendants, and my commitment to uphold numerous ethical and professional imperatives, also compelled me to retain personal counsel at great expense.

A112-A113. Dr. Cunningham’s understandable apprehension and distrust in dealing with the chief law enforcement official in Jackson County precluded any chance that he would ever be involved in Mr. Norman’s case as long as that official – who was also the case prosecutor – was involved in the case:

Given the above considerations and jeopardy flowing from Mr. Bell’s conduct, I could not run the risk of staying involved in Mr. Norman’s case, or re-involving myself in his case, as long as Mr. Bell remained in his office. . . . It is because of his no longer being involved in this case, that I agreed to re-enter it.

A116.

iv. Due to the Action the Prosecutor Took Against Dr. Cunningham, the Defense Was Unable to Retain Another Mental Health Expert.

To no one’s surprise, when Mr. Costas reached out to other experts “no one would agree to assist[.]” A128. Placed in an unworkable situation by the prosecution-created inability to retain expert assistance necessary to Mr. Norman’s defense, Costas moved to withdraw from the case. A1. In his *Motion to Withdraw*,

Mr. Costas stated that “fairness and candor require any new mitigation expert be apprised of the State’s conduct regarding Dr. Cunningham.” *Id.*

During one of the hearings on Mr. Costas’ *Motion to Withdraw*, it became clear that the prosecutor’s actions against such a highly credentialed and well-regarded expert such as Dr. Cunningham reverberated throughout the community of forensic psychologists. Dr. Jack Greeson, Mr. Costas mitigation specialist, testified to his efforts in attempting to find a replacement for Dr. Cunningham. He and his office manager made attempts to find a replacement expert. 1/22/08 Tr. 12. But considering the circumstances of Dr. Cunningham’s withdrawal other experts were unwilling to get involved. Dr. Mary Connell told Dr. Greeson that “she would not consider taking this case because she felt that [it was] a travesty of justice . . .” *Id.* at 13-14. Dr. Margaret Drake declined to participate after having “read all about it in the San Antonio newspaper.” *Id.* at 15. Dr. Bettina Wright stated “that she was uncomfortable with the legal situation in which Dr. Cunningham faced in this case.” *Id.* at 17. Dr. Gilda Kessner stated:

I have serious concerns based upon the recent subpoena by the district attorney to Dr. Mark Cunningham for his anticipated work on the Norman case. I do not have the resources to litigate the protection of the privacy of those persons in my practice whose files the district attorney might subpoena.

Id. at 31.

Thus, the prosecutor was not only successful in running Dr. Cunningham off the case, but the general knowledge within the forensic psychological community of his egregious conduct toward Dr. Cunningham ensured that the State would not have to worry about a competent forensic mental health expert testifying on Mr. Norman's behalf. None ever did. No prosecutor should be able to wield such illicit power.

At the hearing on December 17, 2007, the trial court addressed both Dr. Cunningham's withdrawal from the case, and defense counsel Costas's request to withdraw. The prosecutor's representations during those proceedings leave little doubt that his subpoena had but one purpose, to eliminate Dr. Cunningham from the proceedings. Dr. Cunningham's own attorney sought to call Dr. Cunningham to place on the record the ethical and professional dilemmas with which the State's subpoena presented him. 12/17/07 Tr. 56-57. Such testimony, at a hearing devoted in part to whether the subpoena should be quashed, would have served several critical purposes in establishing a due process violation, including: the creation of a factual record to properly determine whether the State's request was so out of bounds as to constitute bad faith; assessing the impact of the subpoena on Dr. Cunningham's professional and personal interests, and his ability to act as a defense expert in this case; a proffer of the facts important to his defense that Mr. Norman sought to establish through Dr. Cunningham; and whether the trial court could have fashioned

a remedy to ameliorate the harm inflicted on the expert's ability to continue in the case and facilitate his continued involvement.

But the last thing the prosecutor wanted was a fair assessment of the appropriateness and legality of the subpoena and whether its issuance violated due process. He certainly had no interest in providing Dr. Cunningham with an avenue to come back into the case. According to the prosecutor it was time to move on:

The fact is he's withdrawn. Right or wrong, he's withdrawn. That's a fact. Now, to go into those reasons would be to inquire into reasons that Dr. Cunningham can or cannot withdraw. That's not what's on the table right now and so it's not relevant.

12/17/07 Tr. 59. Unable to conceal his true intent – to kneecap the defense at penalty – the prosecutor might as well have said to Dr. Cunningham, “don't let the door hit you on the way out.”

B. Dr. Cunningham's Testimony Was Imperative Evidence for the Defense.

It has been long established that testimony by mental health experts play a “pivotal role” in criminal cases, and in death penalty cases in particular. *Ake v. Oklahoma*, 470 U.S. 68, 79 (1985). Indeed, under Texas law, experience with the use of mental health expert testimony is a requirement for counsel seeking to qualify for appointment in a capital case. Tex. Code Crim. Proc. § 26.052(d)(2)(F)(i). Consequently, in advance of trial, Costas retained Dr. Cunningham to evaluate Mr. Norman and testify at his penalty phase trial. A126. Costas anticipated presenting to

the jury lay witness testimony about the chronic and horrifying trauma, neglect, and abuse LeJames Norman experienced during his childhood and adolescence. But unless the jury understood the direct connection between the tragic experiences of Mr. Norman's youth and his later adverse development, the jury would never fully comprehend the significance of his background as it related to his moral culpability. Dr. Cunningham was critical to the jury's understanding of those connections. "Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state," mental health experts "can identify the 'elusive and often deceptive' symptoms" of psychological illness and trauma. *Ake*, 470 U.S. at 80. Through a mental health expert's "process of investigation, interpretation, and testimony," they can "assist lay jurors, who generally have no training in psychiatric matters, to make a sensible and educated determination about the mental condition of the defendant" *Id.* at 80-81.

Based on these considerations, Costas understood that there were factors in LeJames Norman's background that a layperson, or even an experienced attorney, might not view as significant, but were in fact significant to his development. This included LeJames' father's strict and brutal tutelage of his son on how to be a criminal; his trans-generational family dysfunction and distress; his hereditary predispositions for alcohol and drug abuse/dependence, psychological disorders and maladaptive personality traits; a family history of criminal behavior and substance

abuse; unstable and conflicted relationships with sequential stepfather figures; recurrent changes in configuration of LeJames' parental figures; his mother's high level of maternal stress during pregnancy; post-birth complications; developmental delays; aggressiveness, including symptoms of Attention Deficit Hyperactivity Disorder and its implications for disturbed peer relationships, academic failure, juvenile delinquency, alcohol and drug abuse, and adult criminal activity; chronic stress in childhood; the nature of juvenile brain development; and his functional abandonment by his mother, Machele.

Attorney Costas also engaged Dr. Cunningham to address Mr. Norman's risk of future dangerousness in prison. He knew that unless the jurors understood why Mr. Norman did not represent a significant risk to other inmates, they would have no basis to assess that question and thus they would err in favor of a death sentence.

As Mr. Costas noted:

Dr. Cunningham spent a good many years researching incidents of future violence committed by Texas defendants sentenced to life imprisonment following a conviction for capital murder. He factored into his research the conditions of confinement for the Texas Department of Criminal Justice, Institutional Division, including the steps taken by the prison system to protect their employees and other inmates. He concluded that the incidents of violence inflicted on other people were very rare for inmates convicted of capital murder but sentenced to life. I thought this evidence was very compelling. Dr. Cunningham would also have been able to place what mitigating evidence we had into the appropriate context, something that I believed to be very important. It's one thing to present anecdotal information to a jury about a person's life but without some psychological context to explain that evidence, juries often misunderstand it.

A126-A127.

Dr. Cunningham has “been recognized as a clinical and forensic psychological expert in testifying regarding capital sentencing determination issues including adverse developmental factors (i.e., ‘mitigation’) and violence risk assessment (i.e., ‘future dangerousness’) in both state and federal courts.” A10-11. As of 2008, he had been qualified as an expert in 165 state capital cases and approximately 55 federal capital cases. A11. His scholarship in this area is extensive and recognized by his peers as among the most comprehensive and distinguished in the field of death penalty mitigation. A12.

However, after the State issued its abusive subpoena that caused both Dr. Cunningham and Attorney Costas to withdraw from the case and ensured that no similarly qualified expert would consent to becoming involved in Mr. Norman’s penalty phase trial, Mr. Norman was unable to present this critical part of his penalty phase defense. Thus, Mr. Norman’s jury heard none of this critical evidence detailed below, which was so consequential to the trajectory of Mr. Norman’s life. Instead, the jury primarily heard superficial, disconnected snippets of life in Norman household during LeJames’ childhood, as follows:

[Norman’s] family was low-income and for a time lived in homeless shelters. His parents fought constantly, including physically, abused drugs and alcohol, sold drugs, associated with gang members, and abused Norman physically. When Norman was young, a police officer

shot and killed his father. That incident greatly affected Norman, who was close to his father.

Norman v. Stephens, 817 F.3d 226, 229-30 (5th Cir. 2016).

In closing, the prosecutor teed off on the tactical advantage he had created by running off the defense expert:

We've heard a lot of evidence about a bad environment growing up with a real bad childhood. That may be true, but those are excuses.

12/10/08 Tr. 43. The prosecution characterized the totality of the mitigation as, “[h]ere it is in a nutshell. Dad’s shot. No excuse. Bad dad, dad shot . . .” *Id.* at 103. Following the prosecutor’s successful removal of Dr. Cunningham, the jury had no basis to receive the evidence in any other way.

Similarly, without expert testimony explaining to the jury why Mr. Norman’s misconduct in the county jail did not mean that he would be a future danger to other inmates, he could not refute the prosecutor’s wholly speculative argument that:

[Mr. Norman will] go into that prison the biggest, baddest rep on the block. He is going to be the biggest, baddest cat on the block. He killed three people in cold blood. That in prison is somebody they fear.

He goes in there with people fearing him, with people recruiting him. He can make people do things just because of that rep. He’s not going to be preyed upon. It’s just the opposite.

12/10/08 Tr. 107.

These were the two most critical questions, reflective of Texas’ two special issues, at Mr. Norman’s penalty phase: the significance of his mitigating evidence

and the likelihood that he represented a future danger to society. Any hope of defense expert evidence addressing these questions was eviscerated by the calculated actions of the prosecutor.

Now that the district attorney who issued the subpoena is no longer in office, Dr. Cunningham has come forward to provide the “expert evaluation of Mr. Norman regarding capital sentencing mitigation and regarding his violence risk assessment for prison that could have been presented to Mr. Norman’s sentencing jury in December 2008[,]” had he not been run off the case. A10. That evaluation, attached at A10 through A125, is an exhaustive proffer of the defense Mr. Norman would have presented had the prosecutor not infringed upon that right. It includes social history evidence, and the significance of a lifetime of emotional and physical assaults on Mr. Norman that the jury never heard. Equally important, to the extent that the jury heard some of that history, Dr. Cunningham’s testimony would explain how Mr. Norman’s life circumstances informed much of the etiology for a host of mental health issues and developmental injuries impacting his life trajectory in ways that profoundly compromised his ability to function effectively in the world.

During Mr. Norman’s penalty phase, trial counsel was only able to present a series of anecdotal and episodic physical, psychological, and emotional assaults that he suffered. Trial counsel could not connect them in any understandable way to his later development. As such, the jury was left with no reason to find that Mr.

Norman's incident-related conduct, his prior criminal activity, and his difficulties in prison, were anything but volitional and the product of evil. This incomplete picture left the jury with no other alternative, than to decide – as the prosecutor urged – that Mr. Norman was simply “the worst of the worst,” and “rotten to the core.” 12/10/08 Tr. 70.

It did not have to be. Had the prosecutor not run Dr. Cunningham off the case, he would have been able to inform the jury about how Mr. Norman's horrific life experiences were critical components of the etiology that informed his development. The question of volition lies at the heart of the capital jury's decision-making process. Common sense tells us that it is directly relevant to the question of moral blame-worthiness. Understanding how Mr. Norman's past trauma influenced his conduct was critical because it would have effectively pushed back against the notion that his conduct was purely volitional.

Dr. Cunningham's work is centered on this paradigm:

The typical theory of the State at capital sentencing is that the defendant's criminal conduct, including the capital offense, is the result of the totally volitional, unfettered, free exercise of choice of the defendant arising solely from his malignantly evil heart. The equally typical and predictable argument by the State at capital sentencing reflects a focus on the depravity of the criminal offenses and/or lack of remorse/conscience, thus providing a clinical characterization of that “evil heart.” This is the story that was presented at Mr. Norman's trial.

During the penalty phase of Mr. Norman's trial, expert testimony was not elicited by the defense that would have demonstrated that prior maladaptive behaviors and the “choices” to engage in the tragic capital

offense followed a myriad of malignant formative influences that he did not choose. Such testimony would have been consistent with and provided evidence to support the primary theory of the defense at capital sentencing.

The theory of an informed defense at capital sentencing is typically that the defendant's choices in the capital offense were limited, shaped, and arose from the interaction of damaging and impairing bio-psycho-social factors and experiences (see Haney, 1995). Unfortunately, in the instant case, the defense did not present or explain the relevance of the damaging developmental experiences that impacted on Mr. Norman's development. Thus, the jury did not hear testimony that would allow them to make an informed test of the role of unfettered volition as opposed to the influence of bio-psycho-social factors in the capital conduct.

A16-17. With Mr. Norman's defense case aborted by the prosecutor's interference with Dr. Cunningham, the jury was left with what the prosecutor described at best as irrelevant "excuses," 12/10/08 Tr. 43, and at worst events that "ruined" Mr. Norman "for his life," and left him unfit to ever be around "others." 12/10/08 Tr. 59.

There was a more truthful narrative that was never presented, due to the prosecutor's actions. Had Dr. Cunningham not been forced to withdraw, the jury would have learned that the United States Department of Justice ("DOJ") researchers working under its auspices, and world-renowned mental health professionals, have studied and identified developmental factors that both increase and decrease the likelihood that a child will exhibit signs of delinquency, violence, and criminality. Mr. Norman was exposed to virtually all the risk factors that increase that

likelihood.⁵ In respect to moral blameworthiness, none of these factors are represented by, or consistent with, volitional conduct. They are imposed upon a child. In his Declaration, Dr. Cunningham identifies these destructive factors, found in LeJames' developmental history.

There was ample available evidence of most of the risk factors identified by the DOJ. Many of them were in the trial record, yet none were connected in any meaningful way by an expert witness to Mr. Norman's development. The expert designated to perform this critical task had been forcibly removed from the case. The circumstances of that removal ensured that no other expert would choose to subject himself such treatment, which further ensured the elimination of this important testimony. Had Dr. Cunningham testified he would have identified the multitude of known risk factors present in LeJames' background and their connection to his development. He would have alerted the jury to the following:

i. Youthfulness

Mr. Norman's jury heard nothing about the developmental bases for considering his youth as mitigating. He was 19 at the time of the offense. Had Dr. Cunningham testified, he would have explained that two critical processes in brain development are not completed until the mid-20s. A60. These tandem processes, synaptic pruning and myelination, occur in the frontal lobe of the brain at the final

⁵ Many of these risk factors, set forth at A20-21, are bolded in the text below.

stages of normal brain development. *Id.* That portion of the brain is “associated with executive functions such as insight, judgement, impulse control, frustration tolerance, recognition and appreciation of the emotional reactions of others, and recognition of consequences.” *Id.* Until this process is complete, the individual is “immature” in brain development, and that neurological immaturity is reflected in limitations in psychological functioning, behavior, impulse control, and decision-making ability. *Id.* In the male brain, those limitations are compounded by the influx of rising levels of testosterone and the aggression-inducing effects of this hormone. *Id.*

Growing up, LeJames also experienced “neurodevelopmental problems [] trauma exposure and distorted socialization at the hands of his parents and stepfather, emotional and supervisory neglect, and early teen onset alcohol and drug abuse.” A62. For such a child, those adverse factors act to further impede the neurobiological development of functional maturity. *Id.*

The jurors may have known, intuitively, that 19-year-olds commit more crimes than older adults. What they did not know, and what the defense would have been able to explain through Dr. Cunningham, is “why” this is so:

The insufficient capacity of 19-year-olds for fully adult roles is also demonstrated in their deficient ability to adhere to the requirements of the law, reflected in crime rates at age 19 that are much higher than will be observed at age 25-30. To explain, adherence to the law among adults variously stems from effective impulse control, a realistic appraisal of apprehension, a recognition of long-term consequences to

personal outcome, identification and empathy with potential victims, a clear identity as a law-abiding and/or moral individual, a sense of obligation to family and others, an identification with the community, an appreciation of the collective good, and/or a mature commitment to a religious or ethical belief system. Quite simply, adolescents (i.e., characterized by incomplete brain development) lack the mental capability and psychological development to fully exercise any of these characteristics, and thus are unable to act with the same level of culpability as “adults.”

A61. Once the role of incomplete brain development is properly understood, then the State’s allegation of permanency of LeJames’ condition (i.e., “rotten to the core;” 12/10/08 Tr. 70) is debunked:

Failure of adolescent behavior to predict enduring adult patterns. Important for prognosis and public safety, adolescent risk-taking often represents a tentative expression of adolescent identity and not an enduring mark of behavior arising from a fully formed personality. Most delinquent adolescents do not engage in violent illegal conduct through adulthood.

A61. Without Dr. Cunningham’s testimony the jurors were left to conclude that conditions that informed LeJames’ conduct before, during, and after the incident were immutable. This was only so because of the prosecutor’s success in eliminating the defense expert.

ii. In utero trauma and its effect on development.

Mr. Norman was unable to present evidence of the **high levels of maternal stress during pregnancy** his mother suffered, due to the chronic verbal, physical and sexual abuse that LeJames’ father inflicted upon her while she carried him. Nor was he able to present the implications of such abuse and other stressors she was

suffering during her pregnancy, upon fetal development. Had Dr. Cunningham not been forced to absent himself from the case, he would have testified that:

[LeJames' father] James began to be verbally, physically, and sexually abusive of her about four months into their relationship, with this occurring every several weeks thereafter. Machelles recalled that she was beaten about monthly during the pregnancy and verbally abused every 1-2 weeks. James drank heavily each day and the beatings were often associated with his being intoxicated. Machelles described that James was also routinely traveling back and forth between Dickinson and Houston during the pregnancy, and she suspected that he was continuing a relationship with Natalie, a past-girlfriend. This prospect caused her much distress as well, though she was afraid to confront him, lest this trigger a beating. James was not employed during the pregnancy, but Machelles worked two jobs: 4-6 hours daily at Burger King and 4-6 hours daily at 4-M Linen. She described that she was constantly exhausted from working 8-12 hours daily and caring for her two young children. Machelles reported she was not in subsidized housing at that time and was financially stressed as well.

A49-50. Mr. Norman would have presented testimony through Dr. Cunningham that the conditions endured by LeJames' mother while pregnant were precursors to the **post-birth complications** and **developmental delays** LeJames experienced. At four (4) weeks, LeJames was admitted to St. John Hospital in Nassau Bay for seven (7) days due to fever, vomiting, and diarrhea. He had developed sepsis and a urinary tract infection and required treatment for a period of 19 days. A50. "Reflecting the history of pregnancy complications, pregnancy stress and neonatal sepsis, LeJames' developmental milestones were markedly delayed." *Id.* He did not sit up unassisted until he was nine (9) months and did not walk until nearly two (2). *Id.* His control of his bladder and bowel was delayed, such that he wore diapers in kindergarten and

first grade. *Id.* LeJames continued to have bowel and bladder accidents up until ten (10) years of age. *Id.* He continued to wet the bed until age twelve (12). His parents would beat him, assuming out of ignorance that LeJames could somehow control the bed-wetting. A51. His older brother Thomas teased him, giving him the nickname “Pissy.” *Id.*

Additionally, there were noted delays the jury never heard in LeJames’ development of coordination, social skills, and language. A51-A52. The defense was unable to present the jury with evidence of LeJames’ difficulties with speech and language up until the age of ten (10). The problems were so pronounced that his siblings developed their own intra-family language with which to communicate with him. A51. He was in speech therapy classes throughout grade school. *Id.*

These developmental delays profoundly affected his ascension into young adulthood; a circumstance the defense was unable to present to the jury. Had he been given the chance, Dr. Cunningham would have explained that:

The developmental delays and language disorder exhibited by LeJames point to broad neurodevelopmental and neuropsychological deficits (i.e., brain dysfunction). The delays had negative impact on LeJames’ self-esteem and social interactions, as he had toileting accidents at school and he was unable to competitively engage in the same physical activities as his peers. His developmental delays also resulted in a greater frequency of negative interactions with his parents, and particularly his father. Neither parent, especially LeJames’ father, understood the etiology of these conditions. Both reacted as if his failures to thrive were volitional. In fact, they were beyond his control. The language disorder also had social impact, as well as representing a

significant source of frustration in trying to communicate information, needs, and feelings.

A52.

The difficulties in learning that LeJames experienced during his schooling is consistent with in utero and developmental issues that he endured. He struggled to read and could not do homework unassisted. *Id.* The implications of LeJames' learning disability were especially dire, considering his dysfunctional and disorganized family unit, which offered none of the necessary supports for a child with such a condition:

Children with learning problems often respond to recurrent frustration and failure by disengaging from school, with an eventual lack of motivation and defensive non-participation. Not uncommonly, these disengaged children gravitate toward a peer group of other disengaged teens. Thus, learning problems in school are a significant risk factor for negative peer identification in adolescence. These negative peer identifications, in turn, promote maladaptive perspectives, dysocial values, and delinquent behavior – including substance abuse. This negative socialization became an enduring feature with, coupled with his substance abuse and dependence, were fundamental to the disturbed life trajectory that [led] to the capital offense.

A53.

Dr. Cunningham also found that LeJames' social history revealed symptoms consistent with **Attention Deficit Hyperactivity Disorder**, critical information that the jury never learned. Teachers and family members described LeJames' inattention, impulsivity, excess motor activity, and hyperactivity in detailed, corroborated accounts. A53-54. LeJames' cousin Fenton was diagnosed with

ADHD, and his sister Cherish and son Lazon also exhibited symptoms of ADHD, suggesting a genetic predisposition to the condition. *Id.* at 54. ADHD is a broad risk factor for much of the conduct that the State alleged warranted a death sentence in this case, including, “disturbed peer relationships, academic failure, juvenile delinquency, alcohol and drug abuse, and adult criminal activity.” A46, 54. As Dr. Cunningham points out, “LeJames received neither sustained counseling nor psychotropic medication support for his symptoms.” *Id.* at 54. The reactive impulsivity (immediate reaction without pause or reflection) and judgement impulsivity (internal forces driving a decision without adequate consideration of consequences), that characterizes ADHD, were informed by “LeJames’ pregnancy complications and neonatal sepsis ADHD symptoms, childhood onset substance abuse, childhood trauma, and substance ingestion proximate to the offense, [which] impacted on his decision-making, including decisions to engage in criminal activity and the capital offense.” A56. The jury knew none of this. In its absence, the prosecutor had free reign to characterize LeJames’ mother’s observation that as a child LeJames’ could be “out of control” as demonstrating willfulness. 12/4/08 Tr. 35.

iii. Chaos and extreme violence in the family home

When LeJames’ mother gave birth to him, her third child, she was 19 years old. Her youth presented a significant risk of behavioral problems and criminality.

A63-64. It also presented several other developmental issues and subsequent life outcome risks, including: poor health in childhood; a home life lower in emotional support and cognitive stimulation; abuse, abandonment and neglect; poor school performance; and a much greater likelihood of future incarceration. A64. Dr. Cunningham observed the following impacts upon Machelles, all of which directly affected LeJames:

- The normal trajectory of Machelles development was negatively impacted, effecting her personality development, maturity, autonomy, emotional regulation, and intimacy capacity.
- Machelles posture at age 15 of having children to meet *her* dependency needs became a fixed role definition that continued with the children she had in her early adulthood. This reflected a pathological and fragile bonding, such that she felt no compunction to maintain a parenting role as she began to encounter the teen autonomy strivings of LeJames and his older siblings.
- Machelles had no insight into nurturing, protecting, guiding, or supervising the children in ways that would foster *their* development.
- Machelles educational achievement, career attainment, and economic status were permanently stunted by premature parenting.
- Machelles life trajectory was programmed toward greater relationship, social, and financial instability.

These repercussions of Machelles teen onset parenting directly shaped the parameters of LeJames' childhood and affected the quality of parenting that he experienced.

A63. Due to Dr. Cunningham's forced removal, the jury learned none of this.

During their years in California, LeJames' parents were operating a drug distribution business in their home. There was easy **availability of firearms and drugs** within the home. LeJames' father, James, was both a seller and a user of crack cocaine and would use it in the presence of his children. He was also an alcoholic and drank in their presence as well.

[LeJames' older sister] Mokeshua recalled James smoking marijuana and drinking 40-ounce and cans of beer. She recalled him going to sleep after drinking but did not recall him staggering. She described hearing stories about Machelie dragging James out of a crack house.

LeJames recalled that his father smoked weed through the day and drank one or two 32- ounce Budweisers when his friends, brother, or Machelie's brother came over. LeJames reported that his father was smoking crack when they lived in League City or Dickinson, before they moved to California in 1990. LeJames discovered his father smoking crack at age five. His father was in a dope house, and his mother went there with LeJames and his siblings. His mother went in and began pushing furniture around the house looking for James. LeJames reported that his father's eyes were bugged, and he (James) was high.

A65. There are well-recognized, severe consequences of parental substance abuse and dependence, relevant to the child's development that the jury never heard. Had Dr. Cunningham testified, Mr. Norman would have presented evidence that:

Parental substance abuse/dependence has a number of adverse impacts on parental functioning. First, parental substance abuse/dependence, as well as the alcohol and drug abuse of others in his family system, reflects a genetic predisposition for alcohol and drug abuse and dependence for LeJames, markedly increasing his own risk of this disorder. []

Second, parental substance dependence represents a corruptive model of how to cope with life demands and stresses. A substantial aspect of parental socialization of a child occurs through modeling – as the child absorbs behavior patterns from observing the actions of parents, and subsequently imitates these. When this parental modeling is faulty or corruptive, the patterns that have been instilled from early childhood may wreak substantial havoc in the child's own adult behavior, including substance abuse and dependence.

Third, children who grow up in a home characterized by parental substance dependence are at substantially increased risk of psychological injury. For example, a parent who is substance dependent is more likely to be emotionally detached – a parenting characteristic of LeJames' father (James) - a product of both being under the influence and being preoccupied with drug-seeking behavior.

Fourth, the children of an alcohol-abusing parent are more likely to be neglected and inadequately supervised. A substance abusing parent is more likely to physically or emotionally abuse a spouse *and* children of the household, and to fail to protect the children from abuse or neglect perpetrated by the other parent of the household. Again, such family violence, failure to protect, neglect, and abuse were characteristic of the substance abusing households where LeJames spent his childhood. Children in such a home often experience marked inconsistency and unpredictability associated with the wide fluctuations in parental reactions and competency.

Fifth, in the face of the impairment of a substance-abusing parent, the children of a substance dependent parent are frequently compelled to assume roles of premature responsibility. Such demands for precocious maturity are not a benign developmental event.

A review of the literature (West & Prinz, 1987) found a relationship between parental alcoholism and offspring risk for interpersonal relationship deficits, substance abuse, delinquency, and school truancy and dropping out. Drake and Vaillant (1988) reported that by midlife, 28% of the sons of alcoholic men had developed alcohol dependence and 25% were diagnosed with at least one personality disorder. Demonstrating synergistic effects for developmental adversity, alcohol dependence was predicted in the sample by alcoholic relatives, low

SES, and school behavior problems. Personality disorder was predicted by total environmental weaknesses, poor maternal relationships, low IQ, and feelings of inadequacy.

In summary, parental alcoholism or substance dependence is a broad social/psychological risk factor for relationship problems, self-control deficits and behavior disorders, feelings of defectiveness, psychological disorders, and criminal behavior.

A65-66. James' **alcohol and drug dependence** was another toxic influence among the avalanche of risk factors present in LeJames' young life. The jury learned nothing about it, nor of its impact on LeJames' development.

The penalty phase record hinted at **poor family bonding and family conflict**, established through evidence of physical battles between LeJames' mother, Machelle, and James in the presence of the children. 12/3/08 Tr. 9. But the defense was unable to present evidence demonstrating the utter viciousness of those battles and the psychological effects of LeJames' parents' violence on him. According to Dr. Cunningham:

Machelle detailed that during these beatings, James punched her in the head, back, chest, and arms. He would kick her if she fell to the ground. Machelle routinely sustained bruises, knots on her head, swollen ears, busted lip, and bloody nose. She described that James always carried a weapon. On one occasion he struck her with a bag containing his handgun, injuring her finger. On another occasion, he held his gun to her side and threatened that he would kill her if he caught her cheating (though she believed he was involved with other women). On another occasion, she suffered a knife laceration to her forearm.

Machelle reported that the beatings would be accompanied by verbal abuse, where he would "vent everything he had been saving up." She described that as James verbally demeaned and beat her, she would yell

back at him: “Stop!” “Why are you doing this?” “Why do you hate me so much?” “Why don’t you leave?” “Get out!” “I don’t want you no more!”

Machelle reported that after the beatings, James would force her to have sex with him. She described that she had been too frightened to protest. She recalled feeling used and objectified by these sexual assaults: “I felt like he should have just left money.”

Machelle reported that the children were routinely present as these beatings began.

A67. The jury never learned of the implications of chronic family conflict and domestic violence. Had Dr. Cunningham testified, they would have learned that:

Children who are exposed to family violence, even if they are not targets of this violence, have reactions similar to those of children exposed to other forms of child maltreatment – including increased risk of juvenile and adult criminal offending and violent offending (American Psychological Association Presidential Task Force). Research sponsored by the U.S. Department of Justice (Thornberry, 1994), has investigated the relationship of family violence to criminally violent outcome. These findings regarding the association of family violence exposure and subsequent rates of serious youth violence from these families are described in the Rochester Youth Development Study. Three types of family violence exposure were studied: *spouse abuse, abuse of children, climate of violence and hostility*. Among children without a history of family violence, the rate of serious youth violence was 38%. If one type of family violence was present, the rate of serious youth violence was 60%, increasing to 73% and 78% with an exposure history to two and three types of family violence respectively. All three types of family violence exposure were present in the household James and Machelle, reflecting the most formative period of LeJames’ childhood.

Other researchers report similar findings, describing that observation of parental violence is associated with a variety of immediate and long-term psychological symptoms and disorders, lower levels of social competence, increased risk of delinquency, and increased risk of

violent criminal behavior (Hershorn & Rosenbaum, 1985; Jaffe et al., 1986a, b; Jaffe, Hurley, & Wolfe, 1990).

A68.

There was no effective **family management** of such conflict, another risk factor present in LeJames' life, but unknown to his jury. Typically, when James and Machelles went at each other, the children would first gather around the fight and then flee in horror. Often when the fights were over, the children returned to see their mother, injured. LeJames **observed domestic violence** for much of his childhood, a risk factor that informed LeJames' own challenges and difficulties in parenting. Those difficulties were exploited by the prosecutor during the penalty phase hearing. 12/3/08 Tr. 180-83. In the absence of Dr. Cunningham's expertise connecting what LeJames experienced as a child to his deficits as a parent, the defense had no response.

LeJames and his older brother Thomas also suffered **child maltreatment** at the hands of their father, James, who would physically abuse them both. *Id.* at 82. LeJames' mother, Machelles, tried to protect LeJames from these beatings, by putting "him behind me." *Id.* at 82. But he "got whippings" when he "step[ped] out of line." *Id.* 170. The jury never learned the significance of this risk factor.

iv. **Intimate exposure to violence and criminality**

Parental criminality was manifested by James' and Machelles' open involvement in drug distribution. Addicts would routinely come to the family home,

a home filled with illegal firearms and drugs, to purchase drugs. This led to LeJames' exposure to **neighborhood adults involved in crime**, as the other drug dealers in the numerous neighborhoods the family eventually resided in fought with LeJames' parents for a share of the drug market. James regularly exhibited **attitudes favorable toward violence and drug dealing**, including vicious assaults on others, many involving deadly weapons. Machele recalled one incident in which James left a man for dead and schooled his toddler son, who had witnessed the incident, on the code of silence. LeJames recalled one incident to Dr. Cunningham in which:

[T]he "204s" came to the apartment complex, asserting that James and Machele would have to pay "rent" if they wanted to sell drugs. A shootout ensued. His father, James, was firing a 12-gauge shotgun and a .357 revolver. LeJames described that his father and uncle were in a brick stairwell firing at Mexicans. The Mexicans were attacking and shooting. This went on for a while. They took a break. Then it resumed. The police never came. When they heard the shooting, his mother told the children to go to their room and get down. When his mother left the room, LeJames and his brother (Thomas) went to the window to look. They saw a Mexican riding by on a bicycle firing, and the father shot him off the bike with a 12-gauge.

A71.

Criminality was the accepted norm in the household:

Machele reported that she began assisting James in dealing crack cocaine in Torrance, California. Machele described that over time, she became the primary operator of this enterprise. She estimated that at its peak, she was clearing about \$2,000 weekly. This continued for 2-3 years. Machele reported that she realized they had to stop the drug-dealing and move from the area because there was too much violence from the gangs, who were shooting up the house. This was in retaliation

to James' violent responses to gang demands, who saw the area as their territory.

[]

After moving from Torrance to Belhaven and then Hawthorne, James and Machelles discontinued drug sales. Instead, the family was supported primarily through James' strong-arm and armed robberies, supplemented by public assistance and occasional odd jobs held by James or Machelles.

LeJames reported that his father carried a gun with him everywhere he went, and used [it] in robbing people. He took LeJames with him frequently and LeJames saw his father beat up people, point a gun at people, shoot people, and rob people. These are some of LeJames' earliest memories.

To illustrate, LeJames recalled an incident where James, an uncle, and two cousins, Terrance and Branson, went to the store. They saw a man flash a lot of money and put it in his pocket. James reached into the man's pocket and took the money. James and the uncle came running back laughing and talking about it. LeJames recalled hearing stories about what happened when a person did not "pay up." He described overhearing his mother, father, and uncle talking about what they did to a "white dude" who wouldn't pay up.

A69-70. Family members reported numerous instances of Machelles' and James' assaults on rivals. James was especially brutal:

James reacted violently to anyone who crossed him. LeJames once observed his father pistol whip a man who had crossed him, including the pistol handle becoming briefly stuck in the man's head. Mokeshua [LeJames' sister] recalled an incident of her father and uncle being down the street shooting at gang members who they believed had stolen the family's barbeque grill.

A71.

LeJames' parents' conflicts with rivals led to numerous gun and knife battles around the family home, and LeJames' **exposure to violence** at a very young age. LeJames **observed hostility and violence** both within the family unit and directed toward the family unit. Without any testimony regarding the impact on development of parental drug dealing, criminality and violence, the jurors were left to simply reify LeJames, as the prosecutor encouraged them to do, as "rotten to the core." 12/10/08 Tr. 70. Had Dr. Cunningham testified, he would have explained the critically important role of parents in shaping lifelong attitudes and behaviors, at a time when the child has no choice in the matter:

There is extensive empirical research on the role of relationship, modeling, instruction, structure, and reinforcement on socialization and behavior acquisition within the family. Socialization of children and adolescents is integrally influenced by the value system and behavioral modeling of their parents, as well as by the quality of the parent-child relationship. The quality of LeJames' relationships with his mother and father (and subsequent father figures) was inconsistent and often malignant. Further, their modeling was recurrently corruptive. Corruptive parental models contribute to a faulty moral compass in the child, with much increased risk of unethical conduct and criminal outcome. The modeling LeJames received up to his early adolescence was a virtual prep school for criminal utilization of a handgun.

A72.

v. Implications of corruptive guidance

Beyond his exposure within the family to violence and criminality, LeJames was tutored in the ways of being a criminal by his father:

[] LeJames was enmeshed from a very young age in the violence and criminality that characterized James' life. It also meant suffering the consequences when LeJames did not meet his father's expectations of what it means to be a man. James felt it was important to teach LeJames how to be a man. That meant being tough and demanding respect from everyone. If James thought LeJames was being weak, he would beat him.

Machelle characterized that James had an intimidating/threatening posture toward LeJames. She described that James' instruction to LeJames regarding how to be a man was:

Do not tell the truth.
Hide things.
Beat up anybody who "messes" with you.
You better fight if someone starts to fight with you.
You don't tell the police what you have seen.

Machelle recalled James giving LeJames high praise if he managed to steal someone's money that lay unattended.

LeJames reported that at age ten (i.e., May 1996), he was arrested for armed robbery; hardly surprising after a history of his father taking him along on robberies. []

[] He was processed as a juvenile and released that night. LeJames reported that his father gave him a whipping with his belt and his hands. He punched and kicked LeJames the way he did men who had offended him. LeJames recalled that his father did not punish him [for] accessing the handgun or for the robbery, rather [he] *scolded him for not running fast enough and for telling the police where the gun was. His father emphasized to never to talk to the police.* Machelle also did not discipline LeJames for the robbery. LeJames recalled the next day his father robbed somebody.

James also beat LeJames severely when he thought LeJames had walked away from a fight. James stomped him as LeJames lay on the floor.

A74-75. It would be difficult to construct a paradigm in which a child is more acutely exposed to **beliefs and attitudes favorable to deviant or delinquent behaviors and corruptive guidance**, or more starkly **initiated into violent behavior**. LeJames' most powerful role model, his biological father, encouraged and exhorted him to engage in such activity, and disciplined severely when he failed to do so; or worse, when he engaged in ethical conduct. The prevalence and significant ramifications of these risk factors were lost on the jury, at a penalty phase hearing in which the expert who could best explain them had been jettisoned from the trial.

James delivered this malignant guidance to his son on more than one occasion.

Dr. Cunningham recounts another incident of corruptive guidance:

At about age 9, LeJames entered a neighbor's residence and took \$500. He brought the money home and gave it to his parents. They inquired where he had gotten it and he told them. They kept the money and instructed him not to say anything to anyone else.

A80. Absent Dr. Cunningham, the consequence of such "guidance" went unaddressed at the penalty phase. James' physical abuse of LeJames, to shape him in his image, presented the risk factor of **personal violent victimization within the family**.

Similar shaping was underway with LeJames' siblings. His older brother Thomas and younger sister Cherish both have pre-2008 criminal records. This presented yet another risk factor, **delinquency in siblings**. So too did LeJames'

robbery at age 10, committed with a co-defendant peer, and involving the additional risk factor of **delinquent peer**.

The defense's inability – based on the prosecutor forcing Dr. Cunningham off the case – to tie the ongoing devastation of LeJames' upbringing to the disturbed trajectory of his development, was exploited by the prosecutor as evidenced by what he was able to do with robbery for which LeJames' was arrested at ten (10). Had the prosecution not interfered with Dr. Cunningham's retention, Dr. Cunningham would have testified that young LeJames was groomed by his father to engage in such activity, and his failure to comply with his father's demands would have had dire consequences for him. Dr. Cunningham would have been able to explain to the jury how such "parenting" distorts the normal developmental process. It is a process that the child neither initiates nor desires. The child is not even conscious of it, as it is the child's "normal." Without such testimony, the prosecutor was free to present the false narrative of the evil ten-year-old, as simply "mean, violent and capable of armed robberies." 12/10/08 Tr. 64.

vi. Transiency from one dysfunctional community to another

Each of the communities in which the family resided during their years in California had a high level of **community disorganization, with the attendant crime, drug-selling, gangs, and poor housing**. LeJames' experiences as a child in Los Angeles coincided with the Rodney King incident and its aftermath. During the

rioting, his father, James, stabbed a man in the chest, with a long-bladed butcher knife. The **media portrayals** of the King incident, and the violence that followed, presented another risk factor. Dr. Cunningham would have explained that this risk factor helps to solidify in the child's mind the norm of a violent society.

The family's criminal lifestyle made them frequent targets for rival drug dealers, so that the family was forced to move constantly. Including the period the family spent in Texas, LeJames experienced a high degree of residential instability.

He resided in nineteen (19) separate residences:

1. League City, TX
2. Dickinson, TX
3. Homeless shelter and associated apartment in Los Angeles area x 1 year
4. Motel 6 in Los Angeles [] area x a few months
5. Public housing in Pasadena, CA
6. Public housing 83rd and Hoover in Watts, CA
7. Nickerson Gardens with paternal uncle Terry and spouse
8. Torrance, CA
9. Belhaven in Watts, CA
10. Cardane Street in Hawthorne, CA
11. Two blocks down in Hawthorne, CA
12. With maternal grandfather in Edna
13. Apartment with mother and Jerry Blunston
14. House on Sales with mother
15. House on Elm Street with siblings but not mother
16. House on Sales with siblings but not mother
17. Jessica Castro's family
18. With brother Thomas on Oak Terrace
19. House on Sales with siblings, mother, and Tony

A83. He experienced nearly as many school changes. Accordingly, during LeJames' upbringing he suffered two distinct risk factors, **residential instability**, and

frequent school transition. This led to **academic failure, low bonding to school and truancy.** Frequent school transitions are especially problematic for a child with a **learning disability** like LeJames. The family's transient lifestyle deprived LeJames of the consistency required to address his acute academic deficits.

Mr. Norman was unable to present expert testimony about the impact of such transiency. Had Dr. Cunningham testified, the jury would have learned that:

A requirement for healthy psychological development in childhood is stability: stability of relationships, rules, routine, guidance and supervision, residence, and school. The stability of these *external* structures in childhood gradually promote *internal* structures within the child and adolescent that support emotional and behavioral self-control. In the absence of these external structures, internal controls do not adequately develop – resulting in behavioral misconduct and problems in modulation of emotions. LeJames' childhood was deficient in such structures.

LeJames was particularly in need of continuity in school and community interactions because of the domestic conflict and instability, parental neglect, and corruptive chaos of his home. Had LeJames had the benefit of growing up in stable community and school context, there would have been the potential for enduring relationships with neighbors, peers, teachers, or coaches that could have served to compensate for the deficiencies of his mother, father, and stepfather figures, and the corruptive influences of the paternal uncle. The changes in schools blocked the formation of relationships that might have mitigated the limitations of his parents, thus concentrating these pathological family forces.

Second, transitions to different schools may constitute a significant stress and coping challenge. With recurrent transitions, school, rather than a place of predictability, structure, and familiarity, is unpredictable, unfamiliar, and of uncertain structure. This is not a benign experience, particularly when combined with developmental delays and learning problems, transient peer and community

relationships, while residing in a domestically troubled home, and while being neglected.

A85.

vii. Impact of father's death

The penalty phase jury heard evidence of LeJames' father's death, when LeJames was 11 years old. As summarized by Dr. Cunningham:

James was killed by a policeman on April 28, 1997, in Hawthorne, CA. LeJames was 11 years old. The incident started when James got into a confrontation with a neighbor over dogs. The neighbor and his fellow gang members went to the family's house where they were outside barbequing and started shooting at the gathering. LeJames' two-year-old cousin (Terry's son) was shot. James and Terry got guns and started running around the neighborhood looking for the men involved. The police responded and James was shot in the head as he was running away.

LeJames reported that his father had a prior street fight with police. Subsequently, one of the officers did not like his father and would drive slowly past the house. On April 28, the police saw Terry and James. The police jumped out of the car and started shooting. Terry stood still, but James ran and was shot. LeJames reported his father was struck by gunfire in the buttocks and the back of the head. LeJames saw the crime scene police Polaroid photo, as well as news report video of his father being put in the hearse.

A76. Trial counsel argued that the grief LeJames suffered because of his father's death merited him a life sentence. 12/10/08 Tr. 39-41. Trial counsel argued that following that event, LeJames could not have been "okay." *Id.* 41. But trial counsel did not have the expertise, nor the evidence, to explain why. Indeed, the prosecutor ridiculed the argument, reducing it to "Bad dad, dad shot" 12/10/08 Tr. 103. Dr. Cunningham would have addressed the constellation of effects known within the

mental health community and found in LeJames, of a parent's death, and its implications for LeJames' future development:

LeJames reported that for about a month he slept close against his brother, as he couldn't sleep alone. LeJames described that his maternal uncle, Darnell, had never liked LeJames, because he thought he was favored. Darnell began to treat LeJames "real bad" now that James was absent. LeJames recalled his mother cried the night of his father's death, at the wake, and at the funeral. He characterized, though, that very quickly she had another man. LeJames reported after his father died, it was like, "I was by myself." He reported that he was not close to his brother, Thomas, until after his brother got out of college.

The impacts of the death of his father on LeJames' development were multi-faceted. This observation is consistent with research summarized by Finkelstein (1988), identifying parental death in childhood as not so much a single stressful event, but as a series of events that pervade almost all aspects of the child's life. Parental death in childhood is identified as reaching to the core of the way the child makes sense of the world around him. For LeJames, this redefined world was not only one where abandonment is eminent, but also where other human beings can have fatally malevolent agendas. This was a world that he was finding his way in alone. Machel's inability to acknowledge her own feelings or draw out those of others meant that no one discussed James or his death with LeJames. Rather, LeJames was left with the limited resources of a child to make sense of this.

Research identifies the death of a parent as one of the most distressing and damaging events a child can sustain. Vulnerabilities and deficits such children already suffered prior to the death of a parent can be expected to aggravate and complicate their grief responses. LeJames already had numerous vulnerabilities that would be expected to complicate his attempts to incorporate this loss into his life in a healthy fashion. Machel struggled to find her own identity and create a life structure – in addition to having limited abilities to engage feelings. Neither the extended maternal nor paternal families were psychologically-minded or sensitive to the needs and feelings of children. The paternal extended family was coping both with James'

death and with the unraveling lives of his sisters and the children they abandoned.

To further explain, a longstanding body of research identifies that parental death in childhood has a number of immediate and potentially enduring impacts. Silverman & Worden (1992) found that even several months after the death of a parent a significant percentage of 6-17 year old children continued to experience marked distress, with symptoms such as frequent crying, sleep disturbance, headaches, difficulty concentrating in school, conversations with the deceased, frightening perceptions of being watched by the deceased, and/or behavior problems.

Samuels (1988) found that parental death during childhood resulted in multiple immediate effects:

sleep disturbance	phobic responses	angry outbursts
regressive behaviors	confusion	loss of resiliency
nightmares	separation reactions	increased tension
depression		

Samuels further identified serious psychological vulnerabilities that were still present 18 months later:

lessened resiliency	preoccupation with illness
uncertainty about the future	separation problems
lowered self-esteem	worry about growing up

The research indicates that children whose parents die are at long-term increased risk for physical and mental illness, inability to cope with later life stresses, depression, alcoholism, suicide, problems with intimacy and autonomy, problems with sexual identity and behavior, marital difficulties, delinquency, and criminal activity.

A76-78. In lieu of responding to “bad dad, dad shot,” with expert testimony and empirically-based findings, the defense could offer only the rhetorical question “[h]ow does that affect somebody?” 12/10/08 Tr. 47. But in Dr. Cunningham’s

absence, the defense could provide no answer. By running Dr. Cunningham off the case, the prosecutor's cynical, false narrative – “dad shot, bad dad” won the day.

viii. Functional abandonment from preadolescence until adulthood

When Machelles moved her family back to Texas after James' death, LeJames was eleven years old. During this time, LeJames was often left without a responsible adult in the house. He and his siblings were left to fend for themselves. This became permanent when LeJames turned 14. LeJames' older sister Mokeshua recalls that at that point their mother moved out of the house to live with her paramour Tony, leaving the children without an adult-in-residence. A87. Neither LeJames nor his siblings had any supervision or support. *Id.*

Mokeshua recalled she saw her mother if she walked down the street to Tony's residence to seek contact with her or needed something. She described feeling unwanted in this household – so she “got in and got out.” Mokeshua explained that all of the children knew that Tony did not like them.

[] Mokeshua recalled that LeJames would awaken for school or one of his siblings would awaken him. They rode the bus to and from school. There was no supervision or curfew in the household. Mokeshua simply requested that her siblings tell each other where they were going. Mokeshua might assist[] her younger siblings with homework on occasion, but this was infrequent and “in passing.” She did not sit down and study with them.

Mokeshua reported that their mother was not involved in attending LeJames' teacher conferences or school activities.

A87.

Even before the permanent separation, when Machelles first returned to Edna she would leave the house (often to be with her first Edna paramour, Jerry Blunston), for several days at a time. A79. The children would be forced to fend for themselves, while she and Blunston would go out-of-town. At the time LeJames was 11. The removal of Dr. Cunningham eliminated his expert testimony about the effects of such abandonment. If Dr. Cunningham had testified, the jurors would have learned that:

After James' death, Machelles effectively checked out of parenting, moving on with her life and dating, leaving the children to fend for themselves. This culminated in Machelles moving out to the residence of a boyfriend when LeJames was age 14-15, leaving him and his siblings without adult care/supervision in the home for the next three years. Her functional posture toward her children at the time was not unlike as if they were pet dogs or cats, i.e., that if she provided food and shelter, they could otherwise fend for themselves.

A39. Machelles had a number of failed relationships with stepfather figures. This presented LeJames with a series of toxic influences that further disrupted his development in adolescence. These included **unstable and conflicted relationships with sequential stepfather figures, recurrent changes in configuration of parent figures, and functional abandonment by his mother.** Starting when LeJames was 11 years old, Machelles took up with a series of "stepfather" figures, none of whom played a significant role in LeJames' life:

Stepfather figures:

Jerry Blunston had been a high school classmate of Machelles. They began a romantic relationship in 1997 after Machelles moved back to Edna from Hawthorne, California. Within a few months of James' death, Jerry had joined Machelles and the children in the Edna household of Donald Sr. (maternal grandfather). They subsequently moved out together to an apartment with her children and were together about three years. Machelles described that Jerry got intoxicated at clubs each weekend, with or without her. At one point, Machelles caught Jerry choking LeJames.

Felton "Butch" Hopes became involved with Machelles after she broke up with Jerry Blunston. LeJames characterized Butch as "quiet and cool" - "He didn't try to be my daddy." LeJames reported that Butch "smoked a little marijuana." Machelles described Butch as a heavy drinker. He snorted powder cocaine as well. She described that during her relationship with Butch, he was living with another woman, Willie. The relationship of Butch and Machelles ended in a violent confrontation described below.

Earl "Kool-Aid" [last name unknown] was involved with Machelles while she was seeing Butch. LeJames characterized Earl as "a crack head" who was periodically in and out of jail. Machelles described him as a "bad alcoholic". She denied a romantic relationship with Earl but acknowledged that he would "come by and lay on the bed". Butch came to the residence unexpectedly and discovered Machelles and Earl in the bedroom together. LeJames detailed that Butch beat up Earl and then broke up with Machelles. Machelles recalled that Butch confronted Earl, who ran. Butch grabbed her and she hit him. Their romantic relationship then ended. LeJames reported that he got in trouble with his mother for not re-locking the front door when he had come in (thus allowing Butch to walk in the door and back to the bedroom) and for not warning her that Butch had come to the house.

Tony Arnolds lived down the street from Machelles and the children. LeJames reported that he had historically purchased marijuana from Tony. Tony and Machelles became romantically involved after her relationship with Butch ended. Machelles recalled that she moved in with Tony in late 2001. She described that he was not physically abusive to her but was very verbally abusive. LeJames reported that he and Tony got in several fights because Tony talked bad to LeJames'

sisters. On one occasion, Tony pulled and swung a knife on LeJames. Machelles reported that she provided the primary support for the household when she was with Tony, as he spent his income on marijuana. LeJames characterized that Tony lived with Machelles off and on but didn't pay any bills: "He was doing nothing around the house."

Machelles moved into Tony's residence for three years, with the children remaining alone in a different residence. She explained that this arrangement occurred because Tony did not like children. Machelles's priority in having a relationship with Tony over providing direct care and supervision for her children again illustrates the primacy of her dependency needs. For the subsequent five years, various combinations of her children resided with Tony and Machelles.

Horace was a "friend" of Machelles that she saw simultaneous with her relationship with Tony. LeJames reported that his mother made him act like Horace was there to see him rather than her, thereby placing LeJames in the middle. Machelles characterized that Horace was only a "friend". She described ending their relationship because he was leaving the impression with others that they were sleeping together.

A40-41.

Machelles's abandonment of LeJames occurred as he was approaching puberty and left him to his own devices. In her penalty phase testimony, Machelles romanticized this period of LeJames' life, suggesting, falsely, that she was always available to him, even though, by her own testimony, at times she had no idea where he lived or who was caring for him. 12/3/08 Tr. 102. She described her children's wandering back to her home searching for sustenance as "shopping:"

Sometimes they would say, mama, I'm shopping in the bathroom. That would mean they needed soap and tissue and shampoo sometimes. Mama, I'm shopping in the kitchen, meaning they needed food, you know. [Mama], I'm going to the deep freeze if they needed meat, you

know. Mama, I'm going to your bedroom. Maybe the girls needed personal items, perfumes and stuff like that.

Id. There was nothing romantic about these pre-adolescent and adolescent years of LeJames' life. At age eleven (11) and twelve (12) he was ill equipped to live on his own. Machele's **low level of parental involvement** presented a further risk factor negating any chance LeJames had for normal development. In LeJames' case, following the devastation of his young childhood, he had no chance to thrive after being cast aside by his mother.

There were also serious implications – unknown to his jury – for LeJames' development, stemming from the unstable and conflicted relationships LeJames had with his stepfather figures and mother's other paramours:

Strong positive male role models and relationships are a particularly important part of male child development. In adolescence this assumes additional significance as the teenage male is creating a more adult identity and as the presence of an older male to whom the male teen is well bonded provides limit-setting guidance. In LeJames' case, up to his pre-teens, he had an ambivalent relationship with his extraordinarily corruptive father. As a teen, his mother's boyfriends were either transient father figures, substance abusing, and/or disengaged from a father/mentor role. LeJames was left in his most vulnerable teens with no well-bonded relationship to a constructive father figure.

A83. Without Dr. Cunningham's testimony, the jury learned none of this. Nor did the jury learn about the serious implications of the recurrent changes in configuration of parental figures, as well as the **parent-child separation**, that began for LeJames

at four-and-a-half years of age (when he was taken from his drug-addicted, abusive, father) and then recurred six years later (when his father was killed):

Thornberry et al. (1999), in longitudinal research sponsored by the U.S. Department of Justice, examined the impact of parent figure transitions during adolescence on rates of teenage male drug abuse and delinquency. They found that as the number of transitions increased, so did the rates of drug abuse and delinquency. For those teens who had experienced five or more transitions from age 13-17, *such as experienced by LeJames*, 60% were involved in drug abuse and 90% were delinquent.

A86. Additionally, without Dr. Cunningham's testimony, the defense was unable to present expert testimony about the dire consequences for a young teen abandoned by his mother:

Though Machelles had initially heavily looked to her children to meet her dependency needs, this was less satisfying as the children grew into middle childhood and their teens and were less enamored with her. Finding parenting less emotionally satisfying, Machelles sought her dependency supports from romantic relationships and sought to minimize the energies directed to her children. Tragically, though she had tired of being a parent, her children were still very much in need of one.

Mokeshua recalled that at the time her mother moved out of the house, she thought it was "cool" to be a teen without parental supervision. Now, however, she views her mother's abdication of on-site parenting as a form of neglect and a reflection that "something is wrong mentally" with a parent who would do this. Mokeshua characterized that, unlike her mother, she places her children above her own needs. She described that Machelles "could not be alone" and "chose the wrong ones". LeJames was also acutely aware that his mother was choosing her romantic relationships over the welfare of her children. He characterized: "She chose him [Tony] over us."

LeJames was at grave risk for teen substance abuse, delinquency, and violence as a result of the catastrophic accumulations of the other adverse developmental factors[.] Added to these, he was effectively set adrift, without adult supervision or guidance, in his teens. The likelihood that he would constructively structure his own life, given the depleted resources available to him from his family and childhood, was virtually nil.

A88-89.

LeJames was effectively emancipated at 14-15-years-of-age. The implications of his emancipation were dire:

There are few, if any, 15-year-olds who are prepared to structure their own lives in a responsible and constructive fashion. Because of neurodevelopmental delays and deficits, as well as childhood traumas and corruptive models, LeJames was far less capable of such constructive judgment and self-discipline than a normally-situated 15-year-old. Predictably, his school attendance was less consistent, his substance abuse increased, and he sought family structure with a girlfriend – introducing premature paternity.

A100. Without an expert, trial counsel was unable to present this critical information to the jury. Absent this crucial contextualization, the prosecution was able to simplify and magnify the certain shortcomings and failings that any teenager, when faced with the tsunami of hardships LeJames endured, would bring to parenthood.

ix. Coalescence of stressors on LeJames as a Child

Dr. Cunningham identifies the stressors LeJames experienced in his childhood:

- Physical and emotional abuse
- Neglect

- Observed domestic violence
- Mother's infidelity
- Corruptive guidance
- Parental drug dealing and criminality
- Learning problems in school
- Recurrent changes in residence, schools, and parent figures
- Community disorganization and criminality
- Community violence
- Personal gunshot victimization
- Father's community violence
- Gunshot death of father by police
- Large chaotic households
- Sexual abuse⁶
- Premature emancipation

A57. **Chronic stress in childhood** has a destructive and multifaced impact on the developing brain of a child. After Dr. Cunningham's departure from the case, there was no witness available to explain this to the jury, or to relate LeJames' developmental impairment to his conduct. Had Dr. Cunningham testified, he would have explained that:

[C]hronic stress in childhood does more than create bad memories. Rather it alters the reaction patterns (i.e., psycho-physiologic effects), the chemistry (i.e., neuro-hormonal effects), and the architecture (neuro-anatomical effects) of the brain (van der Kolk, 1996). Such changes may increase the likelihood of aggressive reactivity, particularly in the face of substance abuse.

A58.

⁶ Dr. Cunningham noted two "pre-puberty" "sexually-abusive" incidents, when LeJames was four to five and when he was nine to ten, involving minor females several years older than him. A89.

LeJames' parents' modeling and influence, their substance abuse, and their brutality, both in California and Texas, were precursors to LeJames' early substance abuse:

Primary risk factors for alcohol and/or drug dependence include genetic predisposition, Attention Deficit Hyperactivity Disorder (ADHD), mood disorder, modeling of substance abuse, and developmental trauma. All of these risk factors for alcohol and drug abuse are present in LeJames' history – placing him at markedly increased risk to become alcohol and/or drug dependent. [M]ultiple relatives on both sides of his family system were alcohol and/or drug abusing/dependent, representing a significant genetic predisposition for his own development of substance abuse. Extended family and community members provided modeling of substance abuse. Among individuals with histories of developmental trauma such as that experienced by LeJames, substance abuse can be conceptualized as an attempt at analgesic self-medication of the associated anxiety and mood disorder spectrum symptoms.

LeJames was thus impacted by redundant substance abuse risk factors in childhood and adolescence that subsequently disrupted a healthy developmental trajectory and markedly increased his risk of criminal violence.

A99. He began smoking marijuana regularly at age 8-9, and in his early teen years, began abusing cocaine, ecstasy, and Hydrocodone. A56. Dr. Cunningham would have explained the adverse neurodevelopmental implications of childhood onset alcohol and drug abuse, and its influence on behavior. Quoting Elliott (1989), he notes that:

It is during adolescence that the higher-level cognitive attributes of planning, evaluation, flexibility, internalized behavioral controls, higher-level abstracting skills and ethical awareness are developing (Golden, 1985). Use of drugs during this period could interfere with

development of one or more of these attributes and have long-term ramifications for personality functions sub-served by the frontal and pre-frontal regions of the neocortex. (p. 311)[.]

A57.

x. Mr. Norman was denied his right to present critical mitigation.

In sum, without expert testimony regarding the impact of critical risk factors upon his development, Mr. Norman was unable to present to his jury evidence that would provide a meaningful opportunity to properly assess moral blameworthiness.

As Dr. Cunningham concluded:

LeJames had a catastrophic concentration of transgenerational, neurodevelopmental, family and parenting, community, and disturbed trajectory factors in his background. These had a powerful formative effect, acting to singly and cumulatively increase his likelihood of criminality and criminal violence. Most of these factors he had no choice in.

A102. Because of the State's interference, Mr. Norman was prevented from giving his jury the tools to make a proper assessment of the life-or-death question.

xi. Mr. Norman was denied his right to present Dr. Cunningham's testimony that he posed little risk for future dangerousness in prison.

A critical prong of the State's argument for death was that Mr. Norman represented a future danger in prison. The prosecutor also argued that based on the nature of his crime, Mr. Norman would be a malevolent, dangerous presence in any prison:

You know he's going to go into prison? This is why I tell you cannot give him life unless you just don't care about that society. He's going

to go into that prison the biggest, baddest rep on the block. He is going to be the biggest, baddest cat on the block. He killed three people in cold blood. That in prison is somebody they fear.

12/10/08 Tr. 107.

The State called A.P. Merillat to testify to the horrors of the Texas prison system. 12/9/08 Tr. 56. Merillat testified to an apocalyptic system where murders, assaults, rapes, and escapes were commonplace, and where inmates had much to fear from the capital offender. The prosecutor capitalized on the Merillat evidence, applying it to his notion of what Mr. Norman represented:

Folks, this isn't only a desperate man. What is going to happen to him and what is going to happen to the people around him? Well, you can say, well, that's not my concern. I don't have anything to do with those prison people. That's why I brought evidence that guards get killed, female guards get stabbed, chaplains get their arms -- will he do it? I don't know. But these are real people who if you put him in prison population -- don't buy that ad seg stuff. That's a bunch of bull.

12/10/08 Tr. 98.

In the face of such evidence and argument, it was imperative that trial counsel present the readily available expert testimony that Mr. Norman did not represent a future danger in prison. Mr. Norman's attorney Mr. Costas was aware of the necessity of such evidence and retained Dr. Cunningham for this purpose. Dr. Cunningham was up to the task, and ready to address the issue. The prosecutor's abuse of process that forced Dr. Cunningham's withdrawal from the case prevented this from happening and left a yawning gap in the penalty phase defense.

Had Dr. Cunningham testified, he would have directed the jury to research-based predictive factors indicating that Mr. Norman would not be involved in future acts of violence in prison.

At 22, Mr. Norman was nearing the end of the brain maturation process and approaching a chronological milestone that statistically indicated a lessened likelihood for prison violence. Research has demonstrated that among capital offenders sentenced to life terms, as inmates age they have progressively lower rates of misconduct, and lower rates of violence. A104. These findings boded well for Mr. Norman as he continued to age within the prison system.

The capital inmate's on-going visitation with others is another factor that minimizes risk of prison violence. A105. In LeJames' case, there was a wide variety of family members who had maintained contact with him and who intended to continue to do so. In addition to telephone contact with numerous relatives, Mr. Norman was in regular visitation contact with the mother of three of his children, his brother Thomas, and his mother Machele. He would remain in contact with all of them during a life sentence. As Dr. Cunningham observes, "[s]uch interactions with community members provide a pro-social influence and associated incentive to maintain good conduct so as to facilitate visitation and telephone access and thus contribute to better inmate adjustment." *Id.*

The risk of violence in prison is correlated to gang affiliation. A.P. Merillat identified the various gangs for the jury, as well as their initiation rites and ethnic affiliations. 12/9/08 Tr. 91. These were outside gangs with affiliation within the Texas prison system. *Id.* Upon admission to the prison, gang members would affiliate with the same gangs they belonged to on the outside. *Id.* Merillat rated the gangs based on their ability to be “brutal, vicious [and] cold blooded.” *Id.* at 109-10. He talked about the gangs’ willingness to kill, even under contract from outside the penitentiary. *Id.* at 110. He testified to gang members sending “package bomb[s] in the mail” (*id.* at 60), murdering an inmate by cutting his throat “right there on the floor of the chow hall,” with “a knife [made] out of popsicle sticks and razor blades” (*id.* at 82) and another gang killing by “strangulation to try to make it look like a suicide[,]” *Id.* at 116. He told the jury that gang members are gang members for life and can never resign from a gang. *Id.*

The prosecutor capitalized on this testimony in closing, suggesting that LeJames would be the “biggest, baddest rep” in the prison. 12/10/08 Tr. 107. Had Dr. Cunningham not been ousted from the case, he would have informed the jury that Mr. Norman’s lack of prior gang involvement and his eschewing gang involvement while in custody was a predictive factor for good conduct in prison. A105. As Merillat’s testimony demonstrated, because so much of the prison violence

was gang-informed, an inmate who had managed to steer clear of gangs, was more likely to steer clear of violence.

The prosecutor also urged the jury in its penalty assessment to consider the charged offense in this case. He suggested that Mr. Norman's participation in capital murders made it more likely that he would be a danger to others in prison. *See* 12/10/08 Tr. 97-98 ("These were precious lives that Lejames (*sic*) Norman made the decision to take . . . [] What is going to happen to him and what is going to happen to the people around him?"). Research and experience demonstrate, however, that the prosecutor's supposition was wrong. Dr. Cunningham's testimony would have enabled the defense to inform the jury of demographic evidence regarding capital inmates demonstrating that Mr. Norman as a capital inmate was *less likely* to be a problem in state prison:

Multiple group statistical studies indicate that the majority of individuals convicted of capital murder are not cited for serious violent misconduct in prison. These studies include retrospective examinations of the records of former death-sentenced inmates in Texas (Marquart, Ekland-Olsen, & Sorensen, 1989), see also Cuningham & Reidy, 1998), federal capital offenders serving life sentences in the Bureau of Prisons (Cunningham, Reidy, & Sorensen, 2008), and mainstreamed death-sentenced inmates in Missouri (Cunningham, Reidy, & Sorensen, 2005). Similarly, group statistical data point to capital offenders representing better institutional assault risks than inmates serving shorter sentences (Cunningham et al., 2005).

A105. Thus, the jury never learned that the prosecutor got it wrong when he suggested that the nature of Mr. Norman's offense made him more likely to be

dangerous in prison. Had the prosecutor's misconduct not driven Dr Cunningham from the case, the jury would have learned that the opposite was true.

Dr Cunningham's expert testimony would have also rebutted the exaggerated and prejudicial testimony of A.P. Merillat. Merillat presented the jury with an ominous narrative of life within the Texas prison system, discussing ongoing acts of egregious violence as the norm. His testimony, unchallenged, would have led any reasonable juror to conclude that the TDCJ is unable to effectively manage the inmates in its custody. Dr. Cunningham was prepared to refute Merillat's testimony, with hard evidence. He would have informed the jury that:

TDCJ is very effective in limiting the occurrence of serious violence in an inmate population having histories of violence in the community and recurrent criminality. To illustrate, In TDCJ in 2005, the following rates of inmate misconduct were reported (i.e., bases for probabilities):

Offender assault	93	per 10,000 inmates
Serious offender assault	65	per 10,000 inmates
Staff assault	30	per 10,000 inmates
Serious staff assault	3.4	per 10,000 inmates
Homicide of inmate	2	per 100,000 inmates
Homicide of staff	0	per 100,000 inmates

Regarding prison homicides, when standardized to match the demographic of the state prison population, the resident (i.e., non-incarcerated) U.S. population had a homicide rate of 35 per 100,000 annually (Mumola, 2005).

A106. Yet by forcing Dr. Cunningham to withdraw, the prosecutor eliminated Mr. Norman's ability to rebut the State's false narrative.

Finally, Dr. Cunningham would have been able to make risk assessments based on actuarial models that are reliant on actual data. First, Dr. Cunningham would have testified that utilizing data from 13,341 inmates entering state prison, inmates who shared Mr. Norman's predictive characteristics were at the lowest risk for engaging in assaultive conduct. A106. In the more rarefied group of inmates least likely to engage in violence, i.e., capital offenders, Mr. Norman placed within the middle risk sector (of three sectors). *Id.*

Thus:

[T]here is a very low likelihood that Mr. Norman would perpetrate serious violence if confined for life in TDCJ. As the severity of the projected violence increases (i.e., assaults resulting in more serious injury), the likelihood that Mr. Norman would perpetrate this level of violence becomes increasingly remote.

A106. The jurors heard none of this. Instead, they were misled by the Merillat testimony and exhorted by the prosecutor to find future dangerousness based on suppositions that (without basis) contradicted hard data they never received.

Through the misconduct of the prosecutor, LeJames Norman was deprived of the opportunity to present critical expert testimony that would have enabled jurors to understand the etiology, scope, and relevance of the substantial and wide-ranging mitigating evidence. That evidence, in combination with the additional expert testimony debunking the notion that Mr. Norman represented a future danger, would have soundly rebutted the State's case for a death sentence and convinced any

rational juror to answer at least one of the special questions favorably for Mr. Norman.

C. This Claim Meets the Requirements of Article 11.071 §§ 5 (a)(1) & (3).

This claim meets the dictates of Section 5(a)(1) because new evidence, both about the effects of the prosecutor's subpoena and about the defense Mr. Norman would have presented had the prosecutor not forced Dr. Cunningham to withdraw, was not available at the time of Mr. Norman's last state habeas application. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1), (e). Mr. Norman's last state habeas application was filed in 2012. However, Dr. Cunningham was previously unwilling to "risk [] staying involved in Mr. Norman's case, or re-involving [himself] in his case, as long as [the prosecutor] remained in his office." A116. It was only more recently that he agreed to re-enter the case and provide evidence, both about his withdrawal and the evidence he would have presented had he not withdrew, after the Jackson County District Attorney, who issued the subpoena, left office. Consequently, the current claim – dependent upon Dr. Cunningham's proffered testimony– could not have been presented in a previous application. Tex. Code Crim. Proc. art. 11.071 § 5(a)(1).

Alternatively, the prosecutor's conduct abridged and denuded the defense presentation of the most critical defense witness and violated Mr. Norman's due process rights. Just one of many examples of the powerful evidence that the

prosecutor was able to trivialize in Dr. Cunningham’s absence, was the killing of the young LeJames’ father, which the prosecutor characterized as “bad dad, dad shot.” Dr. Cunningham’s scientifically supported expert opinion about the devastating and enduring impact of this experience on a child would have debunked that unfair characterization. Without Dr. Cunningham, the false and unfair characterization endured. Had Mr. Norman been able to present all the mitigating evidence uncovered by Dr. Cunningham and his explanations of how the horrific circumstances impacted him, no rational juror would have answered the mitigation special issue in a way that required imposition of the death penalty. Tex. Code Crim. Proc. art. 11.071 § 5(a)(3); *see also Ex parte Speer*, No. WR-59,101-06, 2025 WL 2151382 (Tex. Crim. App. July 30, 2025). Likewise, had Mr. Norman not been prevented by the State from presenting his evidence from Dr. Cunningham that rebutted the State’s case for future dangerousness, no rational juror would have answered the special issues in a way that required imposition of the death penalty. Tex. Code Crim. Proc. art. 11.071 § 5(a)(3).

CLAIM V. The Prosecutor’s Misconduct that Forced Crucial Defense Expert Dr. Mark Cunningham to Withdraw From the Case Violated Mr. Norman’s Eighth Amendment Right to Individualized Sentencing.

A. The Prosecutor Precluded Mr. Norman’s Jury from Considering All Relevant Mitigating Circumstances.

The Eighth Amendment requires that when the State seeks the death penalty, triers of fact must “not be precluded from considering, *as a mitigating factor*, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.” *Lockett v. Ohio*, 483 U.S. 586, 604 (1978) (emphasis in the original); *see also Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (Eighth and Fourteenth Amendments require defendant be permitted to introduce any evidence that “might serve ‘as a basis for a sentence less than death’” (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986))). The ability to present any relevant mitigating evidence is necessary to ensure “the need for individualized consideration as a constitutional requirement in imposing the death sentence” is met. *Lockett*, 483 U.S. at 605; *Jurek v. Texas*, 428 U.S. 262, 271 (1976) (Eighth Amendment individualized sentencing requirement mandates that capital juries “must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed”).

This right includes that “that sentencing juries must be able to give meaningful consideration and effect to all mitigating evidence that might provide a basis for refusing to impose the death penalty on a particular individual, notwithstanding the severity of his crime or his potential to commit similar offenses in the future.” *Abdul-Kabir v. Quarterman*, 550 U.S. 233, 241 (2007) (Eighth Amendment violation where

jury was precluded from considering expert testimony that tended to prove defendant's "violent propensities were caused by factors beyond his control—namely, neurological damage and childhood neglect and abandonment"). Moreover, it has been long recognized that evidence from expert mental health witnesses is critical to a capital defendant's mitigation case. *See McWilliams v. Dunn*, 582 U.S. 183, 195 (2017); *Ake v. Oklahoma*, 470 U.S. 68, 82 (1985).

The prosecutor's harassment of Dr. Cunningham prevented Mr. Norman from presenting relevant and critical mitigation evidence. Because Dr. Cunningham did not testify, Mr. Norman's jury was precluded from hearing evidence about his father's strict and brutal tutelage of his son on how to be a criminal; Mr. Norman's trans-generational family dysfunction and distress; his hereditary predispositions for alcohol and drug abuse/dependence, psychological disorders and maladaptive personality traits; a family history of criminal behavior and substance abuse; unstable and conflicted relationships with sequential stepfather figures; recurrent changes in configuration of Mr. Norman's parental figures; his mother's high level of maternal stress during pregnancy; post-birth complications; developmental delays; aggressiveness, including symptoms of Attention Deficit Hyperactivity Disorder and its implications for disturbed peer relationships, academic failure, juvenile delinquency, alcohol and drug abuse, and adult criminal activity; his chronic stress in childhood; the nature of juvenile brain development; and Mr. Norman's

functional abandonment by his mother, Machelie. Mr. Norman's jurors were precluded from considering how his life circumstances were the etiology for a host of mental health issues and how his developmental injuries had a formative impact on his developmental trajectory and his ability to function effectively in the world. They also never heard the research-supported evidence indicating that Mr. Norman would likely not be a future danger in prison.

Because of the State's egregious actions, Mr. Norman could not secure the assistance of a similarly qualified expert. Consequently, the prosecutor's actions violated Mr. Norman's Eighth and Fourteenth Amendment rights to present all relevant mitigating evidence to his jury.

B. This Claim Meets the Requirements of Article 11.071 §§ 5 (a)(1) and 5 (a)(3).

This claim meets the dictates of Section 5(a)(1) because new evidence about the mitigation that Dr. Cunningham would have presented to Mr. Norman's jury was not available at the time of Mr. Norman's last state habeas application. Tex. Code Crim. Proc. art. 11.071§ 5(a)(1), (e). Mr. Norman's last state habeas application was filed in 2012. Dr. Cunningham was previously unwilling to "risk [] staying involved in Mr. Norman's case, or re-involving myself in his case, as long as [the prosecutor] remained in his office." A116. It was only more recently that he agreed to re-enter the case and provide evidence the evidence that he would have presented had he not withdrawn, after the Jackson County District Attorney, who issued the subpoena,

left office. Consequently, the current claim – dependent upon Dr. Cunningham’s proffered testimony– could not have been presented in a previous application. Tex. Code Crim. Proc. art. 11.071§ 5(a)(1).

Alternatively, had Dr. Cunningham’s testimony – including his explanation of how the horrific circumstances of Mr. Norman’s childhood impacted him – been presented, no rational juror would have answered the mitigation special issue in a way that required imposition of the death penalty. Tex. Code Crim. Proc. art. 11.071 § 5(a)(3); *see also Ex parte Speer*, No. WR-59,101-06, 2025 WL 2151382 (Tex. Crim. App. July 30, 2025). Likewise, had Mr. Norman not been prevented by the State from presenting his evidence from Dr. Cunningham that rebutted the State’s case for future dangerousness, no rational juror would have answered the special issues in a way that required imposition of the death penalty. Tex. Code Crim. Proc. art. 11.071 § 5(a)(3).

CLAIM VI. The Prosecution Presented False Testimony From Cooperating Witness Kevin Childs About a Critical Aggravating Fact

During the penalty phase of Mr. Norman's trial, the State called Kevin Childs as a cooperating witness. 12/2/08 Tr. 90-112. Childs had been incarcerated with Mr. Norman in the Jackson County jail, where he had been both Mr. Norman's and Ramey's cellmate at different points in time. He was offered in support of the State's claim that Mr. Norman represented a future danger. A portion of Childs' testimony was that he overheard Mr. Norman talk about "killing people." *See* 12/2/08 Tr. 92, 107-108 (Childs' testifying that during the period he shared a cell with Mr. Norman, he overheard Mr. Norman on the telephone talking to his girlfriend Jessica "about killing people.") According to Childs, Mr. Norman uttered these threats "all the time." *Id.* at 100. This testimony, as Childs now admits, is false.

A. The State Violated Due Process When It Presented Childs' False Testimony that Mr. Norman Threatened to Kill People While He Was Incarcerated in the Jackson County Jail.

Childs has disavowed his trial testimony and has admitted that he never heard Mr. Norman talk to his girlfriend Jessica, or anyone else, about killing people. Childs now declares that:

I knew of LeJames' kids and I knew of Jessica. He had the kids' pictures on the cell wall. We were cellmates for about 3-4 months. I never heard him talk on the phone with Jessica about killing people, or wanting to kill people, or thinking about killing people. I never heard him talking on the phone with anyone in that way (i.e., killing people). I am certain about this, and would have remembered if that had happened.

The person who I heard talking in this way on the phone was Ramey. After the incident with the jailer, they put Ramey in the cell with me for about two months. It was just the two of us. Ramey was talking to someone about the fact that a snitch had come forward and given a statement against Ramey. Ramey told the person on the phone, don't do anything until he gets word from Ramey.

A131(Declaration of Kevin Childs, October 10, 2017).

By presenting Childs' testimony that Mr. Norman was making threats over the phone to kill people while he was incarcerated, the State violated Mr. Norman's right to due process. "It has long been established that the prosecution's 'deliberate deception of a court and jurors by the presentation of known false evidence is incompatible with rudimentary demands of justice.'" *Banks v. Dretke*, 540 U.S. 668, 694 (2004) (quoting *Giglio v. United States*, 405 U.S. 150, 153 (1972) (in turn quoting *Mooney v. Holohan*, 294 U.S. 103, 112 (1935)); *Napue v. Illinois*, 360 U.S. 264, 265, 269 (1959) (State violates due process when it fails to correct evidence it knows to be false); *Ex Parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014) (emphasis omitted) ("The State's use of material false testimony violates a defendant's due process rights under the Fifth and Fourteenth Amendments to the United States Constitution.").

Trial counsel established through cross-examination of the Jackson County Sheriff that the inmates are explicitly informed that "***all*** their conversations are monitored." 12/2/07 at 124 (emphasis added). If Mr. Norman had made threats of

violence over monitored calls, the prosecution would have presented that evidence against him. No such calls were presented. On redirect examination the prosecutor, seeking to avoid that obvious inference, elicited testimony from the Sheriff that he had not done “any monitoring” of Mr. Norman’s calls as the prosecutor had not made a specific request that he do so. *Id.* at 125. The prosecutor’s redirect examination begged the question why, if “all” conversations are monitored, it would make a difference if he had not made a specific request. Additionally, it is a dubious proposition that, even if a request had been required, *this* prosecutor would not have made one, considering the nature of this case. There was no evidence of the calls for one simple reason – they never occurred.

Further, even if the State somehow did not know of the falsity of Childs’ testimony, the testimony still violated due process. Under Court of Criminal Appeals’ precedent, an applicant is not required to prove that the State had knowledge that the testimony at issue was false to establish a due process violation. *Ex parte Chabot*, 300 S.W.3d 768, 771 (Tex. Cr. App. 2009). False evidence is material if there is a reasonable likelihood it could have “affected the judgment of the jury.” *Bagley*, 473 U.S. at 678–79 & n.9; *United States v. Agurs*, 427 U.S. 97, 103 (1976). This “materiality standard requires ‘the beneficiary of [the] constitutional error to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained.’” *Glossip v. Oklahoma*, 604 U.S. 226, 627

(2025) (quoting *Bagley*, 473 U.S. at 680 n.9). Considering the critical nature of his testimony, Childs’ reliability may have been determinative of the death verdict. The false testimony Childs offered, that Mr. Norman talked about killing people, was powerful future dangerousness testimony for the State. It cast Mr. Norman as highly dangerous because it suggested that, even while incarcerated, Mr. Norman represented a danger to the lives of others. It served to demonstrate that incarcerating Mr. Norman would not be an effective way of incapacitating him, since *while in custody* he had demonstrated a willingness and desire to kill. It allowed the prosecutor to urge the jury to take Mr. Norman at this (false) word, that he wanted to kill. And since the only place Mr. Norman would be able to kill in the future was prison, the only way to protect other inmates and prison staff would be to execute him. The testimony was devastatingly prejudicial at the penalty phase. Under *Napue*, *Giglio*, *Bagley*, and *Chabot* relief is required

B. This Court Should Reconsider *Ex Parte Graves* and Authorize This Claim Based on State Habeas Counsel’s Ineffectiveness.

Article 11.071 entitles habeas applicants under a death sentence to competent counsel who “shall investigate expeditiously” “the factual and legal grounds for the filing of an application for a writ of habeas corpus.” Tex. Code Crim. Proc. art. 11.071 §§ 2(a) and 3. Mr. Norman’s initial state habeas counsel failed to effectively investigate the State’s misconduct at his trial, including the State’s presentation of false testimony by Childs. Despite the clear indications that Childs was willing to lie

on the stand, *see* 12/2/08 Tr. 82-83, 93-95, 103, 105-06, Mr. Norman’s state habeas counsel did not investigate Childs to determine whether his damaging testimony about Mr. Norman’s alleged threats was false.

This Court should reconsider and overturn *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002) and hold that ineffectiveness of initial state habeas counsel provides grounds to authorize a subsequent application. Doing so would be consistent with the legislative intent to provide capital habeas applicants “a full and fair review of the merits of [applicants’] claims.” *Graves*, 70 S.W.3d at 121 (Price, J., dissenting); *see also id.* at 129 (Holcomb, J., dissenting (Article 11.071 “should be interpreted to afford a death row inmate one full and fair opportunity to present whatever claims he may have *with the effective assistance of counsel.*”) (emphasis in the original)).

Since *Graves* was issued, many members of this Court have pointed out *Graves*’ shortcomings and indicated that this Court should revisit *Graves* in the appropriate case. *See, e.g., Ex parte Ruiz*, 543 S.W.3d 805, 827 (Tex. Crim. App. 2016) (recognizing that “the consequences resulting from the poor performance of Ruiz’s habeas counsel . . . may highlight the need to revisit our holding in *Graves*” but finding the opportunity to do so in applicant’s case had passed); *Ex parte Alvarez*, 468 S.W.3d 543 (Tex. Crim. App. 2015) (Yeary, J., concurring); *Ex parte Buck*, 418 S.W.3d 98, 109 (Tex. Crim. App. 2013) (Alcala, J., dissenting) (“I would . . . hold

that, when an applicant can demonstrate that initial habeas counsel's performance fell below the minimum standards for representation set forth in Article 11.071, and when an applicant can demonstrate that, as a result of counsel's incompetence, a substantial claim for relief was forfeited, this Court may properly exercise its habeas jurisdiction to consider the merits of the underlying claim."'). The present application is Mr. Norman's first opportunity to present this false testimony claim with competent counsel. This Court should overturn *Graves* and authorize and remand Mr. Norman's claim for review on the merits.

PRAYER FOR RELIEF

Both separately and in combination, the foregoing claims of error, warrant relief. Mr. Norman respectfully requests that the Application be granted. Mr. Norman further requests that his execution be stayed; that the Court file and set any claims or issues upon which further briefing would be helpful to resolve; that the Court authorize and remand claims for consideration on the merits by the convicting court; and that the Court grant any other relief which law or justice requires.

Respectfully Submitted,

/s/ Karl Schwartz

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VERIFICATION

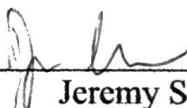
STATE OF COLORADO

COUNTY OF JEFFERSON

BEFORE ME, the undersigned authority, on this day personally appeared Jeremy Schepers, who upon being duly sworn by me testified as follows:

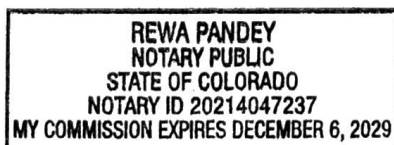
1. I am a member of the State Bar of Texas in good standing.
2. I am the duly authorized attorney for LeJames Norman, having the authority to prepare and to verify Mr. Norman's subsequent application for a writ of habeas corpus.
3. I have prepared and read the foregoing application, and I believe all allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury:



Jeremy Schepers

Subscribed and sworn before me on August 26, 2026.





Notary Public, State of Colorado

CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 31,559 words, except for the parts excluded by Tex. R. App. Proc. 9.4(i)(2)(A).

/s/ Jeremy Schepers
Jeremy Schepers

CERTIFICATE OF SERVICE

I hereby certify that on August 28, 2026, I filed the foregoing Application in the electronic filing system, which will serve this document on counsel for the State.

/s/ Jeremy Schepers
Jeremy Schepers