NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

GARCIA GLENN WHITE,
Petitioner,

VS.

THE STATE OF TEXAS,
Respondent

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

THIS IS A CAPITAL CASE.
EXECUTION IS SET FOR TUESDAY, OCTOBER 1, 2024

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QUESTIONS PRESENTED

1) **Do Articles 11.073 and 11.071, Sec. 5 (a)(3) of the Texas Code of Criminal Procedure create a due process problem because the statutes, as interpreted by the Texas Court of Criminal Appeals, prevent the presentation or development of evidence that might change a death sentence?**

2) **Is Texas still refusing to permit petitioners from developing valid medical evidence of intellectual disability under Texas Code of Criminal Procedure article 11.071 in violation of this Court's rulings in *Moore v. Texas I* and *Moore v. Texas II*, the Eighth Amendment, and the Fourteenth Amendment?**

3) **Did the Texas Court of Criminal Appeals create a new "weighing" scheme for death penalty sentencing when it issued its opinion in *Ex parte Andrus* in defiance of this Court's order on remand in *Andrus v. Texas*? And if so, should petitioner be allowed a new review of sentence under this new standard?**

LIST OF PARTIES

A list of all parties to the proceeding in the court whose judgment is the subject of this petition is as follows:

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RELATED CASES

1. *State of Texas v. Garcia Glenn White*
Cause No. 072384701010
180th District Court of Harris County, Texas (trial)

2. *Garcia Glenn White v. State of Texas*
Cause No. AP – 72, 580
Texas Court of Criminal Appeals (direct appeal, affirmed)

3. *Ex parte Garcia Glenn White*
Cause No. WR-48,152-01
Texas Court of Criminal Appeals (Relief denied 02/21/2001)

Cause No. WR-48,152-02
Texas Court of Criminal Appeals (Dismissed 04/22/2002)

Cause No. WR-48,152-03
Texas Court of Criminal Appeals (Dismissed 05/05/2009)

Cause No. WR-48,152-04
Texas Court of Criminal Appeals (Dismissed as abuse of the writ 05/06/2009)

Cause Nos. WR-48,152-05 – WR-48,152-07
Texas Court of Criminal Appeals (Leave to file denied, 01/08/2015)

Cause No. WR-48,152-08
Texas Court of Criminal Appeals (stay of execution granted, briefing ordered, relief denied -- *Ex parte White*, 506 S.W.3d 39 (Tex. Crim. App. 2016).

Cause No. WR-48,152-09
Texas Court of Criminal Appeals (dismissed as abuse of the writ 09/18/2024)*

Cause No. WR-48,152-10 & 11
Texas Court of Criminal Appeals (Leave to file denied, 09/25/2024)

4. *White v. Thaler*
Cause No. 04:02-CV-01805
Southern District of Texas (relief denied 09/30/2011)

5. *White v. Lumpkin*
Cause Nos. 24-70005 & 24-20428
5th Circuit Court of Appeals (currently pending)

6. *White v. Abbott, et. al*,
Cause No. 1:24-CV-01136-DII
Western District of Texas

*WR-48,152-09 is the judgment the subject of this petition for writ of certiorari

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The Court of Criminal Appeals unpublished opinion issued after its review on the merits appears at Appendix A. A prior published majority opinion along with a concurrence and dissenting opinion from a relating to this case appears at Appendix B.

JURISDICITON

The Court of Criminal Appeals of Texas dismissed Petitioner's subsequent application for writ of habeas corpus on September 18, 2024. Petitioner did not request rehearing from the Court of Criminal Appeals. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Eighth Amendment to the United States Constitution states "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

The Fourteenth Amendment to the United States Constitution provides, "No State shall…deprive any person of life, liberty, or property, without due process of law…"

Texas Code of Criminal Procedure Article 11.073 (b) states in pertinent part,

> "(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted."

Texas Code of Criminal Procedure Article 11.071 §5 (a)(3) states in pertinent part,

"If a subsequent application for a writ of habeas corpus is filed after filing an initial application, a court may not consider the merits of or grant relief based on the subsequent application unless the application contains sufficient specific facts establishing that:

(1) the current claims and issues have not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article or Article 11.07 because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application; or…

(3) by clear and convincing evidence, 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 the applicant's trial under Article 37.071, 37.0711, or 37.072."

Article 37.0711 §3 (a)(1) of the Texas Code of Criminal Procedure states in pertinent part, "If a defendant is tried for a capital offense in which the state seeks the death penalty, on a finding that the defendant is guilty of a capital offense, the court shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment."

Article 37.0711 §3(b) of the Texas Code of Criminal Procedure states in pertinent part,

"On conclusion of the presentation of the evidence, the court shall submit the following three issues to the jury:

(1) Whether the conduct of the defendant that caused the death of the deceased was committed deliberately and with the reasonable expectation that the death of the deceased or another would result;

(2) Whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society…"

Article 64.04 of the Texas Code of Criminal Procedure states,

"After examining the results of testing under Article 64.03 and any comparison of a DNA profile under Article 64.035, the convicting court shall hold a hearing and make a finding as to whether, had the results been available during the trial of the offense, it is reasonably probable that the person would not have been convicted."

STATEMENT OF THE CASE

Mr. White was convicted of capital murder and sentenced to death in Harris County, Texas in 1996 for a multiple homicide that occurred in 1989. The Court of Criminal Appeals affirmed the conviction and sentence on direct appeal and denied relief on his first state habeas.

Petitioner sought federal habeas review. The federal district court for the Southern District of Texas granted abatement and leave to return to develop significant evidence, such as DNA, in state court and to return to federal court after

such matters were exhausted. The federal district court eventually denied relief in 2011.

In 2015, Petitioner filed a subsequent writ in state court after the State sought an execution date. The Court of Criminal Appeals (CCA) granted a stay of execution and ordered briefing on the issue of whether new scientific evidence of cocaine related psychosis could be introduced in the death phase of a capital case under the new Article 11.073 of the Texas Code of Criminal Procedure as "new science" A divided CCA decided it could not. *Ex parte White*, 506 S.W.3d 39 (Tex. Crim. App. 2016).

This Court then decided both *Moore v. Texas I* and *Moore v. Texas II.* In July of 2024, the Court granted a stay of execution to Ruben Gutierrez as he sought to develop the same type of DNA evidence that Mr. White possesses but could not share with a jury. It further remanded the *Andrus v. Texas* case back to the CCA, which promptly defied the Court and denied him relief again in *Ex parte Andrus*, which was sent up for a cert petition again but which was denied over strong dissent by Justice Sotomayor.

Mr. White's case illustrates everything wrong with the current death penalty in Texas – he has evidence that he is intellectually disabled which the CCA refuses to permit him to develop. He has significant evidence that could result in a sentence other than death at punishment but cannot present it or develop it on a new writ.

Finally, he is unable to take advantage of what appears at first glance to be a significant change in the Texas appellate review scheme of the evidence in a death case under *Andrus*. Under Rule 10 this Court should accept certiorari on any one of these questions to once again correct the dysfunction in the Texas death penalty.

REASONS FOR GRANTING THE PETITION

1) Do Articles 11.073 and 11.071, Sec. 5 (a)(3) of the Texas Code of Criminal Procedure create a due process problem because the statutes, as interpreted by the Texas Court of Criminal Appeals, prevent the presentation or development of evidence that might change a death sentence?

Mr. White has obtained DNA evidence of a third party (an unidentified male) at the crime scene. There is also strong post-trial scientific evidence which shows Mr. White was likely suffering from a cocaine induced psychotic break during his actions that could have provided the sentencing jury with a reason to sentence him to life rather than death. The Court of Criminal Appeals in Texas will not permit the defense to develop evidence of these mitigating factors via writ or a new punishment trial. These issues have *never been presented* to a sentencing jury.

Mr. White was granted a stay in 2015 when the Court of Criminal Appeals agreed to hear the matter of the cocaine psychosis under TCCP Article 11.073, a means for bringing new scientific evidence under habeas claims. In its prior case law, the CCA had, in the context of habeas relief, “most often "construed the term 'conviction' to mean a judgment of guilt and the assessment of punishment." *Ex Parte*

Evans, 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). Despite their prior holdings, a majority of the CCA denied Mr. White relief. It based its decision on a narrow interpretation of the word "convicted" in TCCP Article 11.073(b)(2), finding "that a claim under Article 11.073 be one that undermines the verdict or finding of guilt" *Ex parte White*, 506 S.W.3d 39, 43 (Tex. Crim. App. 2016). The majority specifically tied the holding in *White* to its prior decision against Mr. Gutierrez. "In *Ex parte Gutierrez* , we emphasized the word "convicted" in the phrase "would not have been convicted" and held that Chapter 64 "does not authorize testing when exculpatory results might affect only the punishment or sentence."" *Ex parte White*, 506 S.W.3d 39, 43-44 (Tex. Crim. App. 2016). Three judges dissented from the majority and stated this should apply to a death sentenced defendant.

The CCA is currently interpreting both Texas Code of Criminal Procedure Articles 64.04 and Article 11.073 as applying new scientific evidence to ONLY guilt or innocence. That cannot continue nor can it withstand a Fourteenth Amendment due process analysis.

Texas has established a substantive right to bring a subsequent habeas petition for a person convicted of the death penalty when that person can show "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered in the state's favor on or more of the special issues that were submitted to the jury." Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). *In Ex*

Parte Blue, the Court of Criminal Appeals found that "[s]ection 5(a)(3) of Article 11.071 represents the Legislature's attempt to codify something very much like this federal doctrine of 'actual innocence of the death penalty' for purposes of subsequent state writs. By tying the exception to the general prohibition on subsequent state writs specifically to the statutory special issues in Article 37.071 of the Code of Criminal Procedure, the Legislature apparently intended to codify, more or less, the doctrine found in *Sawyer v. Whitley. In re Blue,* 230 S.W.3d 151, 160 (Tex. Crim. App. 2007).

A federal district court in the Southern District of Texas in *Gutierrez v. Saenz* evaluated the contradiction between the CCA's interpretation of "conviction" and the substantive right uniquely created by 11.071 §5(a)(3) for defendants convicted of the death penalty. *Gutierrez v. Saenz,* 565 F. Supp. 3d 892 (S. D. Tex. 2021). It found that requiring Gutierrez to show that the DNA in question would demonstrate his factual innocence (as required based on the CCA's interpretation of "conviction") created an unconstitutional procedural bar to Chapter 64's testing regime. It stated, "[a] bar on Chapter 64 DNA testing to demonstrate innocence of the death penalty renders Article 11.073 Sec. 5(a)(3) illusory." Such a bar would violate due process, both procedural and substantive, in terms of the Eighth Amendment.

The Supreme Court recognized this when it granted Mr. Gutierrez's request for a stay of execution and remanded this case to the 5th Circuit in July of this year. This case has striking similarities to Mr. Gutierrez' case. In his case, Mr. Gutierrez sought the right to DNA testing which could arguably lessen his moral culpability for the death sentence. Mr. Gutierrez's stay illustrates the fact that the Supreme Court has found it likely Mr. Gutierrez would prevail on the underlying merits of his case. one cannot logically deprive Mr. White of the chance to present evidence he already has if one is granting Mr. Gutierrez the chance simply to seek such evidence. Both issues that Mr. White seeks to raise would likely give such a jury a reason to impose a sentence other than death, or in the modern case a plea for a term of less than life imprisonment with the local District Attorney. The time for patience in terms of due process for those who are innocent of the death penalty under *Sawyer v. Whitley* has passed. *Sawyer v. Whitley*, 505 U.S. 333 (1992).

2) Is Texas still refusing to permit petitioners from developing valid medical evidence of intellectual disability under Texas Code of Criminal Procedure article 11.071 in violation of this Court's rulings in *Moore v. Texas I* and *Moore v. Texas II*, the Eighth Amendment, and the Fourteenth Amendment?

In *Ex parte Elizondo*, the seminal Texas case which made actual innocence reviewable under the Fourteenth Amendment, two young boys, after many years, admitted they testified falsely against a relative. It took over a decade for them to recant their lies about sexual abuse and for Elizondo to obtain relief. *Ex parte*

Elizondo, 947 S.W.2d 202 (Tex. Crim. App. 1996). In a similar fashion, gaining the trust of a family who spent decades learning to hide and mask the intellectual disability of their loved one would normally take years. In this case, although the efforts at obtaining the information needed to make a claim of intellectual disability began promptly after the *Moore v. Texas* cases, it took years to obtain the affidavits from family and friends who had spent their whole lives protecting their family member against the stigma of being retarded.

Frankly the State of Texas was the final catalyst for their willingness to come forward by setting a death date for next week, on October 1st, 2024. This overarching reluctance is not simply the advocates' opinion – it is born out in both research and the experienced opinions of forensic psychologists as well as mitigation specialists who have provided affidavits for the same. (See, affidavits of Dr. Hupp, forensic psychologist, Gina Vitale, mitigation specialist, and Nicole Van Toorn, mitigation specialist, attached to 11.071 writ filed in the Texas Court of Criminal Appeals as Appendices) Just as one cannot obtain a recantation until the conscience of the liar finally bears fruit, these affidavits could not have been obtained until and unless the participants were willing to provide them. As such, this is newly discovered factual evidence that meets the requirements of TCCP Article 11.071 §5(a)(1).

The Court of Criminal appeals has previously held that "a state habeas applicant alleging mental retardation for the first time in a subsequent writ

application will be allowed to proceed to the merits of his application under the terms of Section 5(a)(3) — at least so long as he alleges and presents, as a part of his subsequent pleading, evidence of a sufficiently clear and convincing character that we could ultimately conclude, to that level of confidence, that no rational factfinder would fail to find he is in fact mentally retarded." *In re Blue*, 230 S.W.3d 151, 162 (Tex. Crim. App. 2007). Mr. White has met that standard, but the Court of Criminal Appeals has unreasonably denied him the right to proceed on his subsequent writ. See Appendix

However, there remains a simpler and more problematic argument for the Office of the Attorney General and the State of Texas. Intellectual disability is a status. It does not change over time. In that, it is unique even among other exemptions from execution, such as incompetency to be executed or juvenile age. See *Roper v. Simmons*, 543 U.S. 551 (2005); *Panetti v. Quarterman*. 551 U.S. 930 (2007).

When the Supreme Court of the United States decided that the evolving standards of decency required that those who had lessened moral culpability deserved greater protection from the ultimate punishment, they created a categorical exemption for those who suffered from intellectual disability. *Atkins v. Virginia*, 531 U.S. 304 (2002). They did the same for juveniles. *Roper*, 543 U.S. 551 (2005). The presumption that the insane or the incompetent should not be executed as it

would be morally offensive to execute those who did not understand what was happening to them has also existed in our law for some time now. See *Ford v. Wainwright,* 477 U.S. 399 (1986)*; Panetti v. Quarterman*, 551 U.S. 930 (2007). Yet the matter of intellectual disability is strikingly different from all three of those categories.

In both *Moore v. Texas* cases, this Court determined that the state and federal courts must be informed by the prevailing medical opinion as to the best information available to determine when a person has intellectual disability (IDD). See *Moore v. Texas* 581 U.S. ____ (2017) and *Moore v. Texas* 586 U.S. ____ (2019). The CCA has expressed ..strong reluctance.. to take this Court at its word as to the removal of the *Ex parte Briseno* standard and its replacement with actual medical information. They continue that same guerilla resistance today. Their refusal to accept medical evidence and strong factual backing, even if it is simply enough to permit development and testing for this claim, flies directly in the face of the *Moore* decisions by this Court. It is further proof that Texas remains an outlier and defiant of this Court's authority.

3) Did the Texas Court of Criminal Appeals create a new "weighing" scheme for death penalty sentencing when it issued its opinion in *Ex parte Andrus* in defiance of this Court's order on remand in *Andrus v. Texas*? And if so, should petitioner be allowed a new review of sentence under this new standard?

Under *Gregg v. Georgia,* 428 U.S. 153 (1976) and meaningful appellate review, the Court of Criminal Appeals appears to have created a new "weighing" sentencing scheme under its decision in *Ex parte Andrus,* NO. WR-84,438-01 delivered on May 19, 2021 on remand from the Supreme Court in *Andrus v. Texas,* 18-9674 *Andrus v. Texas* (06/15/20). A petition for writ of certiorari was denied over a dissent by Justice Sotomayor.

Petitioner and undersigned counsel do not question the right of any state high criminal court to interpret their death statute as they see fit. However, such a "weighing" system flies in the face of the traditional holdings of the current Texas scheme pursuant to Article 37.071 of the TCCP and the CCA's own prior holdings.

Mr. Andrus was in the process of re-litigating this when he lost hope and took his own life in January of 2023. This is the first case which a defendant requests that federal courts examine this Andrus holding [which the dissenting Justice in *Andrus,* J. Sotomayor, accurately characterized as both a violation of the Supreme Court's order and a "weighing" of the aggravating [future danger evidence] against the mitigating evidence] under the second Special Issue in Texas under Article 37.071. Due to the unusual nature of the litigation and Mr. Andrus loss of life no one has yet answered these questions, which remain ripe for both all newly sentenced individuals on death row and those who remain there from years past.

CONCLUSION

Petitioner has third party DNA evidence of an unidentified male present at the scene of this crime. There is also considerable scientific evidence that he was suffering a psychotic break at the time of this incident. None of this ever saw the light of day with a jury and none of it has been permitted to be developed or presented under Article 11.073 or under 11.071 Sec 5 because the Texas courts believe that new scientific evidence may only be presented to resolve guilt or innocence, not innocence of the death penalty. Under *Sawyer v, Whitley*, this is a due process problem.

The Texas Court of Criminal Appeals was presented with a qualified medical opinion and new evidence in affidavit form that Mr. White, the Petitioner, suffered from intellectual disability. They refused to permit it to be tested and developed in a subsequent writ in violation of both Moore I and II. The Texas Court continues to conduct a guerilla campaign against Moore, and to defy this Court on the issue of using medical information to inform their ID cases. This is a violation of both the Eighth and Fourteenth Amendments.

The CCA in *Ex parte Andrus* defied this Court by conducting a re-weighing of the mitigation versus the aggravating evidence. This, as J. Sotomayor pointed out, was both a defiance of this Court's order AND created a new sentencing scheme requiring all death sentenced individuals to have their evidence "re-weighed" by the

CCA under conforming constitutional guidelines. Mr. White is entitled to that review before he may be lawfully executed.

Respectfully submitted,

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Date: 09/27/2024

APPENDIX A

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-48,152-09

EX PARTE GARCIA GLEN WHITE, Applicant

ON APPLICATION FOR WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION IN CAUSE NO. 723847-F IN THE 180TH DISTRICT COURT HARRIS COUNTY

Per curiam.

O R D E R

Before us is a subsequent application for a writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure Article 11.071, Section 5.[1] Also before us is a motion for stay of execution.

Applicant Garcia Glen White was convicted of capital murder and sentenced to death in July 1996. On direct appeal, we affirmed the trial court's judgment of guilt and

[1] Unless otherwise specified, all mentions of "Articles" and "Chapters" in this opinion refer to the Articles and Chapters of the Texas Code of Criminal Procedure.

sentence of death. *White v. State*, No. AP-72,580 (Tex. Crim. App. Jun. 17, 1998) (not designated for publication).

In December 2000, White filed his initial postconviction habeas application under Article 11.071. We denied relief. *Ex parte White*, No. WR-48,152-01 (Tex. Crim. App. Feb. 22, 2001) (not designated for publication). In March 2002, White filed his first subsequent 11.071 application; we dismissed the application under Article 11.071, Section 5. *Ex parte White*, No. WR-48,152-02 (Tex. Crim. App. Apr. 24, 2002) (not designated for publication). In March 2009, White filed his second and third subsequent 11.071 applications; we dismissed both applications under Section 5. *Ex parte White*, Nos. WR-48,152-03, -04 (Tex. Crim. App. May 6, 2009) (not designated for publication). In January 2015, White filed his fourth subsequent 11.071 application. We filed and set the application to decide whether Article 11.073 "appl[ies] to newly discovered scientific evidence affecting only the punishment stage of trial." *Ex parte White*, No. WR-48,152-08 (Tex. Crim. App. Mar. 23, 2015). We ultimately handed down a published opinion holding that, if a habeas "applicant's proffered scientific evidence relates solely to punishment, his evidence cannot meet" Article 11.073. *Ex parte White*, 506 S.W.3d 39, 52 (Tex. Crim. App. 2016). We therefore dismissed White's fourth subsequent 11.071 application under Section 5. *Id.*

On August 23, 2024, White filed in the convicting court the instant pleading, his fifth subsequent 11.071 application. In it, White raises four claims for habeas corpus relief. In claim one, White alleges that his execution would violate the Eighth and Fourteenth Amendments because he is intellectually disabled. *See Atkins v. Virginia*, 536

U.S. 304 (2002). In claim two, White argues that the federal district court's Memorandum and Order in the case of *Gutierrez v. Saenz*, 565 F.Supp. 892 (S.D. Tex. 2021), should cause this Court to reconsider its 2016 opinion in *Ex parte White*, 506 S.W.3d at 52. In claim three, White alleges that two unenacted bills from the Texas House of Representatives should cause this Court to reconsider *Ex parte White*, 506 S.W.3d at 52. In claim four, White alleges that this Court's opinion in *Ex parte Andrus*, 622 S.W.3d 892 (Tex. Crim. App. 2021), represents new law in contemplation of Article 11.071, Section 5(a)(1). In the same pleading, White also prays for this Court to stay his execution. In an abundance of caution, we shall treat this prayer as a freestanding motion for stay of execution.

Having reviewed White's application, we conclude that the application does not satisfy the requirements of Article 11.071, Section 5. Therefore, we dismiss the application as an abuse of the writ. *See* Art. 11.071, § 5(c). White's motion for stay of execution is denied. The Court shall not reconsider this Order on the Court's own motion or otherwise.

IT IS SO ORDERED THIS THE 18TH DAY OF SEPTEMBER, 2024.

Do Not Publish

APPENDIX B

8/23/2024 6:17 PM
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Cause. WR-_____

THIS IS A CAPITAL CASE
IN THE 180TH DISTRICT COURT

HARRIS COUNTY, TEXAS (Harris Cause 07238470101-F)

AND

IN THE COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS

Ex parte	§	**Trial No. 07238470101**
	§	
GARCIA GLENN WHITE,	§	**Writ No. _____**
	§	
Applicant	§	**Scheduled Execution date:**
	§	**October 1, 2024**

SIXTH SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS PURSUANT TO TEXAS CODE OF CRIM. PROC. ART. 11.071

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PETITIONER REQUESTS AN EVIDENTIARY HEARING

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STATEMENT REGARDING CONFINMENT AND SENTENCE

Garcia Glen White is illegally confined and restrained of his liberty by the State of Texas on death row at the Polunsky Unit of the Texas Department of Criminal Justice – Institutional Division, in Livingston, Texas. Mr. White's confinement and sentence of death are pursuant to a judgment entered by the 180th Judicial District Court of Harris County on July 23, 1996. A copy of that judgment is attached as Appendix A. Mr. White is scheduled to be executed on October 1, 2024. A copy of the order scheduling the execution, and the warrant of execution is attached as Appendix B.

PROCEDURAL HISTORY

On July 23, 1996, in the 180th District Court of Harris County, Texas, a jury convicted Garcia Glen White of the offense of capital murder. Appendix A. The jury answered the special issues set out in Texas Code of Criminal Procedure article 37.071 in a manner requiring the imposition of the death penalty. Appendix B. The Court of Criminal Appeals affirmed the verdict and sentence in an unpublished opinion, *Garcia Glen White v. State of Texas*, cause number AP-72,580, issued on June 17, 1998.

Mr. White filed his first application for writ of habeas corpus on October 16, 1998. The Court of Criminal Appeals denied relief on February 21, 2001. *Ex parte*

White, No. WR–48,152–01 (Tex. Crim. App. Feb. 21, 2001) (not designated for publication). Mr. White filed subsequent writs on January 11, 2002, June 30, 2007, and January 28, 2009. All were dismissed for failing to meet the requirements of Article 11.071 § 5. *Ex parte White*, No. WR–48,152–02 (Tex. Crim. App. Apr. 24, 2002)(not designated for publication) and Nos. WR–48,152–03 and WR–48,152–04 (Tex. Crim. App. May 6, 2009)(not designated for publication).

Mr. White was previously scheduled for execution on January 28, 2015. He filed his fifth subsequent writ on January 20, 2015 making several claims, the most notable of which raised the issue of whether new scientific evidence presented pursuant to Article 11.073 can affect only punishment phase evidence. The Court of Criminal Appeals granted a stay of execution and ordered briefing on the issue. *Ex parte White*, 485 S.W.3d 431, 432 (Tex. Crim. App. 2016). Ultimately, the Court denied Mr. White's subsequent writ, finding "evidence that would have changed only punishment does not satisfy Article 11.073's requirement that the new evidence show that applicant 'would not have been convicted.'" *Ex parte White*, 506 S.W.3d 39, 41 (Tex. Crim. App. 2016).

Mr. White has now been scheduled for execution on October 1, 2024.

CLAIMS FOR RELIEF

I. Under new facts only recently available and the new medical standard for intellectual disability set out by the US Supreme Court in *Moore v. Texas*, and later adopted by the Court of Criminal Appeals in *Petatan v. State*, and further modified by *Ex parte Mays*, Mr. White meets the standard for a diagnosis of intellectual disability. His execution would violate his 8th Amendment right to be free from cruel and unusual punishment.

II. The Applicant is entitled to a new trial because DNA evidence discovered after trial showed the presence of a third-party male at the crime scene. Mr. White should be allowed to raise this issue of newly discovered evidence in a subsequent writ. The Court of Criminal Appeals' refusal to interpret the statute under 11.073 to permit use of the DNA discovered post-trial creates a due process problem like the one in Guttierez v. Texas, recently stayed by the United States Supreme Court. No jury has ever this evidence and this creates a due process problem since the legislature has not resolved this matter.

III. The Applicant is entitled to a new trial to present newly discovered scientific evidence that would have presented compelling mitigation evidence that likely would have changed at least one juror's answer to the special issues. The deference the Court of Criminal Appeals has shown to the legislature in waiting for them to correct their initial version of 11.073 has created a due process problem in a death context, where death must be proven to a jury and no jury has ever heard this evidence. This Honorable Court must now step forward and correct the legislature's failure.

IV. The Court of Criminal Appeals has Texas has created a "weighing" appellate standard for death penalty cases since *Andrus v. Texas*. While they are free to do this, the CCA must comply with basic due process to prevent a violation of the 8th and 14th Amendments. The CCA must send Mr. White back for a new punishment trial in order for a jury to properly weigh the evidence and establish new appellate review standards so that his lawyers can comply with the new standard of review.

ARGUMENT

I. Under the new medical standard for intellectual disability set out by the US Supreme Court in *Moore v. Texas*, and later adopted by the Court of Criminal Appeals in *Petatan v. State*, and further modified by *Ex parte Mays*, Mr. White meets the standard for a diagnosis of intellectual disability. His execution would violate his 8th Amendment right to be free from cruel and unusual punishment.

Executing individuals with intellectual disabilities violates the Eighth Amendment, because such individuals often lack culpability and moral responsibility for their actions that the death penalty is intended to address, making their execution disproportionate and unconstitutional. *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). The Texas Legislature has provided that an Applicant can proceed with a subsequent habeas application raising an *Atkins* claim if he can show, by clear and convincing evidence, that no rational factfinder would fail to recognize his intellectual disability. *Ex parte Blue*, 230 S.W.3d 151, 161 (Tex. Crim. App. 2007).

Recent developments in the law, particularly the decisions in *Moore v. Texas I* (2017) and *Moore v. Texas II* (2019), require further examination of Mr. White's intellectual disability. In *Moore I*, the Supreme Court ruled that the court had used outdated and inappropriate standards to assess Moore's intellectual disability, inconsistent with the medical standards established by *Atkins*. *Id.* In Moore II, the Court again found that the CCA had incorrectly concluded that Moore was not disabled and reiterated its directive to apply medical standards as opposed to

common lay stereotypes. In the *Moore* decisions, the US Supreme Court underscored the evolving understanding of intellectual disability in the context of capital punishment by demanding that state appellate courts adhere to *contemporary* medical standards when evaluating claims of intellectual disabilities. *Moore v. Texas*, 581 U.S. ___ (2017); *Moore v. Texas,* 586 U.S. ___ (2019).

Following the Supreme Court's decisions in *Moore I* and *Moore II*, the Court of Criminal Appeals announced its approach to the Supreme Court's directive to use contemporary medical standards to evaluate intellectual disability claims. In 2021, in *Petatan v. State*, the CCA adopted the approach dictated by the Supreme Court. It announced that it would determine intellectual disability in accordance with contemporary medical standards. Petatan v. State, 622 S.W.3d 321, 330-331 (Tex. Crim. App. 2021). In refining its approach, the CCA referred to the Supreme Court's decision in *Atkins* that "mentioned two sources for determining intellectual disability, one from the American Psychiatric Association (APA) and the other from the American Association on Mental Retardation (now the AAIDD)," the "DSM-5" and the "AAIDD-11." Both sources listed the same three accepted diagnostic criteria -- sub-average intellectual functioning, adaptive deficits, and onset prior to age eighteen. *Id.*

The difference between the two diagnostic manuals was that DSM-5 required that "adaptive deficits must be related to sub-average intellectual functioning" and

the AAIDD-11 did not. *Petetan* at 331. The Court decided that it would adopt the approach described by the DSM-5 and require a showing of "relatedness." *Id.* In 2022, the APA published the "DSM-5-TR" or *Diagnostic and Statistical Manual of Mental Disorders*, Fifth Edition, Text Revision, which is an update to the DSM-5. The DSM-5-TR no longer requires a showing of "relatedness." The CCA noted this change in the contemporary medical standards in its decision in *Ex parte Mays*. *Ex parte Mays*, 686 S.W.3d 745, 746 (Tex. Crim. App. 2024).

The applicant, Mr. White, bears the burden to prove, by a preponderance of the evidence, that he is intellectually disabled. He must prove that he has subaverage intellectual functioning, and significant limitations in adaptive skills such as communication, self-care, and self-direction—both manifest before age eighteen. Mr. White's intellectual disability has been documented during his trial and subsequent proceedings. At his 1996 trial, Dr. Robert Yohman testified that he found that Mr. White's full-scale IQ score was 76. Under the scientific standards of the time, Mr. White would have been considered to have borderline intellectual functioning. In January of 2009, Mr. White filed a subsequent writ, *Ex parte White*, WR-48,152-04, that included evidence that Mr. White's IQ had again been tested, and that he had a full-scale IQ score of 78.

Mr. White's prior test scores are also subject to reconsideration given the "Flynn Effect." The Flynn Effect "is a phenomenon positing that, over time,

standardized IQ test scores tend to increase with the age of the test without a corresponding increase in actual intelligence in the general population. Those who follow the Flynn effect adjust for it by deducting from the IQ score a specified amount for each year since the test was normalized. *Cathey v. Davis (In re Cathey)*, 857 F.3d 221, 227 (5th Cir. 2017). Dr. Gregg Hupp, a neuropsychologist, has evaluated Mr. White's prior testing done by Dr. Patricia Averill (Appendix D) Dr. Hupp found that after a "conservative" application of the Flynn Effect, Mr. White's IQ score would be 75 and "would more likely be much lower than that," possibly as low as 68. (Appendix C)

Admittedly, these scores are higher than the standard "score cutoff" of 70. But in 2014, the U.S. Supreme Court rejected Florida's approach requiring strict adherence to the IQ test score cutoff without taking into account the standard error of measurement. *Hall v. Florida* , 572 U.S. 701 (2014). Current APA guidance advises that an individual with an IQ score somewhat higher than 70 may still be diagnosed as intellectually disabled if their adaptive deficits indicate that the diagnosis is warranted. Dr. Hupp also noted in his affidavit that contemporary standards in the area of adaptive deficits were not met in prior testing.

Mr. White's documented and verifiable history of intellectual disability that traces back to adolescence. He struggled throughout school, lagging noticeably behind his peers, and displayed several early indicators associated with having an

intellectual disability. Mr. White's family members have only very recently overcome their reluctance to discuss Mr. White's deficits with Mr. White's mitigation specialist. (Appendix E) In the attached affidavits, however, family members and friends were able to provide evidence of Mr. White's adaptive deficits as they existed throughout his life and prior to his eighteenth birthday. (Appendices F – M)

In 2024, Randall Mays claimed relief from his death sentence on grounds of intellectual disability. *Id.* The CCA, noting that the latest publication of the DSM-5-TR has shed its 'relationship' requirement, agreed that Mays met the DSM-5-TR standards for an *Atkins* claim and granted relief, reforming his sentence to life imprisonment without parole. *Mays*, 686 S.W.3d at 747. "The criteria for discerning a diagnosis of intellectual disability have changed incrementally with each passing edition of the DSM, " *Ex parte Mays*, 686 S.W.3d 745, 746 n.1 (Tex. Crim. App. 2024). The standard for intellectual disability adapts as science and medical understanding grows. *Mays*, 686 S.W.3d at 747.

Intellectual disability status-- not unlike juvenile status-- is a legal status which cannot be waived. *Atkins*, 536 U.S. 304. In the case of juveniles, science and research into adolescent brain development has advanced, leading courts to hold that juveniles cannot be executed because they necessarily lack the culpability of an adult. (*See Ex parte Ward*, 502 S.W.3d 795 (Tex. Crim. App. 2016)) (Juveniles are

less culpable due to their susceptibility to immature and irresponsible behavior.) Similarly, the reduced culpability of intellectually disabled individuals necessarily disqualifies them from receiving the death penalty. (*See Ex parte Wood*, 568 S.W.3d 678 (Tex. Crim. App. 2018)) (The execution of intellectually disabled individuals does not further the goal of deterrence due to their cognitive and behavioral impairments.)

In *Atkins*, the Court made clear that the Constitution prohibits the execution of intellectually disabled individuals. *Atkins,* 536 U.S. 304. a defect which renders a sentence void may be raised at any time. (*See Ex parte Williams*, 65 S.W.3d 656 (Tex. Crim. App. 2001)). In the years since the *Atkins* decision, the scientific consensus has continued to evolve. Just as scientific advancement has made the detection and identification of DNA more prevalent and accurate, the psychiatric community has advanced in its ability to accurately identify intellectual disability.

Mr. White respectfully requests that the Court order a stay of execution and order further fact finding to develop the record in support of his claim.

II. The Applicant is entitled to a new trial because DNA evidence discovered after trial showed the presence of a third-party male at the crime scene. Mr. White should be allowed to raise this issue of newly discovered evidence in a subsequent writ. The Court of Criminal Appeals' refusal to interpret the statute under 11.073 to permit use of the DNA discovered post-trial creates a due process problem like the one in *Guttierez v. Texas*, recently stayed by the United States Supreme Court. No jury has ever this evidence and this creates a due process problem since the legislature has not resolved this matter.

Mr. White was tried and convicted of capital murder in 1996. (Appendix A) In 2004, DNA testing of a blanket used to cover the bodies of the complainants revealed the presence of male DNA belonging to two contributors. One contributor was Mr. White. The other contributor has not been identified. (Appendix O). The DNA evidence was not available to Mr. White at the time of his trial. Mr. White's trial counsel has stated that if this evidence had been available to him, he would have adjusted his trial strategy as detailed in his affidavit. (Appendix N).

Mr. White raised the issue of the DNA as one of newly discovered scientific evidence in his fifth subsequent writ. The Court did not accept this claim for review. However, in the context of a separate claim of newly discovered scientific mitigating evidence, the CCA determined that "Article 11.073 requires an applicant to show that, "had the scientific evidence been presented at trial, on the preponderance of the evidence the person *would not have been convicted.*"" *Ex parte White*, 506 S.W.3d 39, 42 (Tex. Crim. App. 2016). The Court then defined "convicted" as applying only

to a determination of guilt, or "whether the applicant would have been convicted at all of the charged offense." *Id.* at 43.

In the years since Mr. White first raised the issue of the DNA as newly discovered evidence under TCCP 11.073, the U.S. Supreme Court has granted a stay of execution to Ruben Gutierrez on a very similar claim. Mr. Gutierrez is another of Texas's death row inmates. For many years, he has sought DNA testing of biological evidence taken from the body of the complainant or the scene of the crime under Texas Code of Criminal Procedure Chapter 64. Gutierrez claims that the results of DNA testing would make him "innocent of the death penalty."

In 2011, the CCA denied Gutierrez's motion for DNA testing because, "Chapter 64 deals only with testing evidence that could establish, by a preponderance of the evidence, that the person 'would not have been *convicted* if exculpatory results' were obtained. The statute does not authorize testing when exculpatory testing results might affect only the punishment or sentence that he received." *Ex Parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011). The concurrence in *Ex Parte White* noted that its decision in White's case tracked with the Court's definition of "convicted" in *Gutierrez*.

The federal district court for the Southern District of Texas found that Texas has established a substantive right to bring a subsequent habeas petition for a person convicted of the death penalty when that person can show "by clear and convincing

evidence, 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...." *Gutierrez v. Saenz*, 565 F. Supp. 3d 892, 909 (S.D. Tex. 2021), citing Tex. Code Crim. Proc. art. 11.071 § 5(a)(3). In other words, "Texas grants the substantive right to file a second habeas petition with a clear and convincing showing of innocence *of the death penalty* in Article 11.071. " *Id.* at 910. " a prisoner is actually innocent of the death penalty only if he can "show by clear and convincing evidence that but for constitutional error at his sentencing hearing, no reasonable juror would have found him eligible for the death penalty under [state] law."" *Rocha v. Thaler*, 626 F.3d 815, 823 (5th Cir. 2010). "In *Blue*, the CCA held that § 5(a)(3) necessitates "a threshold showing of evidence that would be at least *sufficient* to support an ultimate conclusion, by clear and convincing evidence, that no rational factfinder would fail to find" that "the applicant is ineligible for the death penalty." *Rocha v. Thaler*, 626 F.3d 815, 822 (5th Cir. 2010)

The federal court then found that if the Gutierrez should be allowed DNA testing so that, if helpful to him, he could then bring that evidence forward in a subsequent writ under 11.071 or 11.073. The Fifth Circuit did not rule on the merits of this argument. Instead, it dismissed Gutierrez's claim on the basis that he lacked standing to pursue the claim. The Supreme Court has now issued a stay of execution pending Gutierrez's petition for writ of certiorari.

Mr. White is in a different posture than Mr. Gutierrez. DNA testing has been completed and the results could have been used in a manner that would have prevented Mr. White from receiving a death sentence. If Mr. Gutierrez is entitled to testing so that he can present new evidence in a subsequent writ, Mr. White is entitled to present his existing, new DNA evidence in a subsequent writ to show that he is innocent of the death penalty. Mr. White respectfully requests that this Court order a stay of execution so that these already existing claims may be resolved. The Applicant also respectfully notes that while this Court has shown deference to the legislature in the past and patiently awaited its attempts to change the statute of 11.073 [See HB 275 from the 2021 session and HB 205 from the 2024 session, attached], the legislature has repeatedly failed to address this, Having punted the ball, it can no longer complain the this Court should have waited to address this important constitutional issue.

> III. The Applicant is entitled to a new trial to present newly discovered scientific evidence that would have presented compelling mitigation evidence that likely would have changed at least one juror's answer to the special issues. The deference the Court of Criminal Appeals has shown to the legislature in waiting for them to correct their initial version of 11.073 has created a due process problem in a death context, where death must be proven to a jury and no jury has ever heard this evidence. This Honorable Court must now step forward and correct the legislature's failure.

"The penalty of death differs from all other forms of criminal punishment, not in degree but in kind. It is unique in its total irrevocability." *See Furman v.*

Georgia, 408 U.S. 238, 92 S. Ct. 2726 (1972). The irreversible nature of the death penalty demands the highest standard of proof and the availability of all possible evidence to avoid a miscarriage of justice.

In his fifth subsequent writ, Mr. White presented evidence that he, like 88.7% of people who are severely dependent on cocaine, had symptoms of psychosis brought on by his substance abuse. (Appendix Q). Although his trial attorney presented extensive evidence of Mr. White's extreme addiction to crack cocaine, he did not have the scientific information available to him to present a connection between Mr. White's substance abuse and his actions at the time of the murders. Mr. White argued that if his attorney had been able to present evidence of drug-induced mental illness as a mitigating factor at trial, the jurors would have answered the special issues differently.

The Court of Criminal Appeals in *White* addressed whether Article 11.073 applied to newly discovered scientific evidence affecting only the punishment stage of trial. *White,* 506 S.W.3d at 39. It held that, until clarified by the Legislature, the plain meaning of 'trial' should be applied. *Id.* This created a conundrum wherein new scientific evidence would only be admitted in instances where it may affect the guilt or innocence phase of a trial, negating the importance of the introduction of mitigating evidence into all phases of a trial. However, the Court also recognized an opportunity for clarification from the Legislature. *Id.* at 44.

In 2021, Representative Joe Moody of El Paso introduced House Bill 275 that clarified that newly discovered scientific evidence should be cognizable under TCCP 11.073 if the evidence might have led to a different punishment. (Appendix R) The bill was not enacted. In 2023, Representative Moody reintroduced this language in House Bill 205. (Appendix S) The Texas House did not successfully address the bill, and the Court's call for clarity continues unanswered. The failure of the Texas legislature to address the question should not prevent the courts from fulfilling their constitutional duty and providing a remedy where the legislature has failed to act. In capital cases, where the consequences are irreversible, the courts must ensure that all information, including newly discovered scientific evidence, is considered before an execution is carried out.

> IV. The Court of Criminal Appeals has Texas has created a "weighing" appellate standard for death penalty cases since *Andrus v. Texas*. While they are free to do this, the CCA must comply with basic due process to prevent a violation of the 8th and 14th Amendments. The CCA must send Mr. White back for a new punishment trial in order for a jury to properly weigh the evidence and establish new appellate review standards so that his lawyers can comply with the new standard of review.

In *Andrus v. Texas I*, the U.S. Supreme Court sent Mr. Andrus back to the Court of Criminal Appeals for an evaluation of prejudice based upon his lawyer's failure to gather and present extensive mitigation evidence. The Court of Criminal Appeals, instead of following the Supreme Court's directions, conducted a complete re-weighing of the future dangerousness evidence vis-à-vis the mitigation evidence

presented to the jury at trial, and then separately, the habeas evidence gathered at the Fort Bend County district court hearing. The Court specifically found that the mitigation evidence would not have outweighed the evidence of future dangerousness, or as Justice Sotomayor called it in her dissent on review, the "aggravating evidence." *Andrus v. Texas II*

The plain language of the special issues in Texas requires that there be "sufficient mitigating evidence to warrant a sentence other than death be imposed." Art. 37.071 Texas has historically held that review of the mitigating evidence is not possible because they interpreted that question to apply to an individual juror's sole conscience as to the weight. Each juror may or may not believe certain evidence is mitigating; however, the constitution only requires that where a juror believes there is relevant mitigating evidence, that juror must have a vehicle to give his or her reasoned moral response to such evidence. *Robertson v. State,* 871 S.W.2d 701, 711-12 (Tex. Crim.App.1993), *cert. denied,* 513 U.S. 853, 115 S.Ct. 155, 130 L.Ed.2d 94 (1994):

In *Andrus*, the Court of Criminal Appeals, in a 5-4 decision, rejected this line of reasoning and inserted its own opinion as to the weight of the mitigating evidence gathered by the habeas attorneys. It has over-ruled its own precedent. The Court has thus created a weighing scheme, like that in federal courts and in other states' courts. While Mr. Andrus died of natural causes not long ago (and thus won his long battle

with the State of Texas) the Court of Criminal Appeals must renounce its decision in *Andrus* or admit that it has fundamentally altered the way both jurors and a reviewing court must examine mitigating evidence. The *Andrus* methodology (as described in detail by Presiding Judge Keller) specifically weighed certain portions of the mitigating evidence and found the evidence wanting. Since by law a Texas jury can only impose death with a unanimous answer to the mitigation question, the Court has now substituted its own judgment as to the importance of every piece of mitigation offered to every juror. It has thus firmly rejected its past line of decisions. See, *Banda v. State,* 890 S.W.2d 42, 54 (Tex.Crim.App.1994), *cert. denied,* ___ U.S. ___, 115 S.Ct. 2253, 132 L.Ed.2d 260 (1995) ("Article 37.071 does not objectively define "mitigating evidence," leaving all such resolutions to the subjective standards of the jury.").

Certainly, the State's highest criminal court has the power to do this. But power without principled guidance is anathema in our system of laws and would be subject to federal restraint on Eighth Amendment, substantive, and procedural due process grounds. The Court can order this back for a punishment retrial and provide appropriate instructions for the trial judge to give to the jury when they conduct their weighing of this evidence and it and clarify what standard it would use to conduct its reviewing evaluation of that mitigation. Without that, the Court has created an unconstitutional scheme on its own that would be subject to federal court review.

The Applicant respectfully prays this court will grant relief and stay the execution and permit argument and briefing on the ancillary issues of what instructions would be appropriate and the standard of review to be used in death penalty cases down the road.

REQUEST FOR HEARING

Mr. White requests a hearing to further develop the factual issues regarding all of his claims, and in particular, his claim of intellectual disability.

CONCLUSION AND PRAYER FOR RELIEF

Wherefore, Mr. White, the Applicant, prays that all grounds for relief be approved for consideration in a subsequent application and order appropriate discovery and fact-findings. Mr. White further prays that, upon review of the issues, this Court recommend that relief be granted in the form of a new trial for punishment so he may present this evidence or be subject to the Court's guidance under its new doctrine in *Andrus*.

Respectfully submitted,

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Attorney for Applicant

CERTFICATE OF SERVICE

The undersigned attorneys do hereby certify that on August 23, 2024, a true and correct copy of the above and foregoing was served on the Harris County District Attorney's Office via the e-filing system in accordance with the Texas Rules of Civil Procedure.

By: _____
Patrick F. McCann
Attorney for Applicant

By: _____
Julia Bella
Attorney for Applicant

CERTFICATE OF COMPLIANCE

The undersigned attorneys to hereby certify that this application for writ of habeas corpus contains approximately 4,917 words and complies with the word limit established by the Texas Rules of Appellate Procedure. This document was created with Microsoft Word 10 and counsel has relied on the word count function of the software in this certificate of compliance.

By: _____
Patrick F. McCann
Attorney for Applicant

By: _____
Julia Bella
Attorney for Applicant

VERIFICATION

STATE OF TEXAS §
§
HARRIS COUNTY §

I, Patrick F. McCann, being duly sworn, under oath, hereby says I am the petitioner in this action and know the contents of the above application for a writ of habeas corpus and, according to my belief, the facts stated in the application are true.

P. F. McCann

Patrick F. McCann
Petitioner

SUBSCRIBED AND SWORN TO before me on the 23rd day of August, 2024.

Patricia Ann Nowak

NOTARY PUBLIC

PATRICIA ANN NOWAK
My Notary ID # 126607126
Expires March 29, 2026

APPENDIX "A"

~~VT898 P0206~~ P2

NO. 723847

THE STATE OF TEXAS
VS.
GARCIA GLEN WHITE

IN THE 180 DISTRICT
COURT OF HARRIS COUNTY, TEXAS

Change of Venue From: N/A

JUDGMENT - DEATH PENALTY

Judge Presiding: D. M. STRICKLIN   Date of Judgment: 7.23.1996

Attorney for State: L. MCLLELAND & J. WATERS   Attorney for Defendant: F. FREED & B. BENKEN

Offense Convicted of: CAPITAL MURDER

RECORDER'S MEMORANDUM:
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

Degree: CAPITAL Punishment Assessed: DEATH Date Offense Committed: 12-2-1989
Charging Instrument: Indictment Plea: Not Guilty

Affirmative Findings: (Circle appropriate selection - N/A not available or not applicable)
DEADLY WEAPON: (Yes) |No |N/A FAMILY VIOLENCE: Yes |No |(N/A) HATE CRIME: Yes |No |(N/A)

The Defendant having been indicted in the above entitled and numbered cause for the felony offense indicated above and this cause being this day called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, and both parties announced ready for trial.

A Jury composed of MARCUS P. OCONOR and eleven others was selected, impanelled, and sworn. The indictment was read to the Jury, and the Defendant entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant and having heard argument of counsels, the Jury retired in charge of the proper officer and returned into open Court on 7-18, 1996, the following verdict, which was received by the Court and is here entered on record upon the minutes:

"WE, THE JURY, FIND THE DEFENDANT, GARCIA GLEN WHITE, GUILTY OF CAPITAL MURDER, AS CHARGED IN THE INDICTMENT.

/S/ MARCUS P. OCONOR
FOREMAN OF THE JURY"

Thereupon, the Jury, in accordance with law, heard further evidence in consideration of punishment, and having been again charged by the Court, the jury retired in charge of the proper officer in consideration of punishment and returned into open Court on the 23 day of July, 1996, the following verdict, which was received by the Court and is here entered of record upon the minutes:
(Special Issues/Verdict/Certification):

Special Issue #1

Was the conduct of the defendant, Garcia Glen White, that caused the death of the deceased, Bernette Edwards, committed deliberately and with the reasonable expectation that the death of the deceased, Bernette Edwards, or another would result?

Answer

We, the Jury, unanimously find and determine beyond a reasonable expectation ~~(S) that the death of the deceased, Bernette Edwards, or another would (S)~~ ~~result~~ to this special issue is "Yes."

/S/ MARCUS P. OCONOR
FOREMAN OF THE JURY

CRM-95 R06-30-94

V 2513 P0754

SPECIAL ISSUE NO. 2

(Special Issues - Continued): IS THERE A PROBABILITY THAT THE DEFENDANT, GARCIA GLEN WHITE, WOULD COMMIT CRIMINAL ACTS OF VIOLENCE THAT WOULD CONSTITUTE A CONTINUING THREAT TO SOCIETY?

ANSWER

WE, THE JURY, UNANIMOUSLY FIND AND DETERMINE BEYOND A REASONABLE DOUBT THAT THE ANSWER TO THIS SPECIAL ISSUE IS "YES". /s/ MARCUS P OCONOR
FOREMAN OF THE JURY

SPECIAL ISSUE NO.3

DO YOU FIND FROM THE EVIDENCE, TAKING INTO CONSIDERATION ALL OF THE EVIDENCE, INCLUDING THE CIRCUMSTANCES OF THE OFFENSE, THE DEFENDANT'S CHARACTER AND BACKGROUND, AND THE PERSONAL MORAL CULPABILITY OF THE DEFENDANT, THAT THERE IS A SUFFICIENT MITIGATING CIRCUMSTANCE OR CIRCUMSTANCES TO WARRANT THAT A SENTENCE OF LIFE IMPRISONMENT RATHER THAN A DEATH SENTENCE BE IMPOSED? YOU ARE INSTRUCTED THAT IN ANSWERING THIS SPECIAL ISSUE" THAT YOU SHALL ANSWER THE ISSUE "YES" OR "NO". YOU MAY NOT ANSWER THIS ISSUE "NO" UNLESS YOU ~~[illegible]~~ AGREE UNANIMOUSLY, AND YOU MAY NOT ANSWER THIS ISSUE "YES" UNLESS TEN (10) OR MORE OF YOU AGREE TO DO SO. YOU SHALL CONSIDER MITIGATING EVIDENCE TO BE EVIDENCE THAT A JUROR MIGHT REGARD AS REDUCING THE DEFENDANT'S MORAL BLAMEWORTHINESS.

ANSWER

WE THE JURY, UNANIMOUSLY FIND AND DETERMINE THAT THE ANSWER TO THIS SPECIAL ISSUE IS "NO." MARCUS P OCONOR
FOREMAN OF THE JURY

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, as found by the verdict of the jury, and that the said Defendant committed the said offense on the date indicated above, and that he be punished as has been determined by the Jury, by death, and that Defendant be remanded to jail to await further orders of this court.

And thereupon, the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof.

Whereupon the Court proceeded, in presence of said Defendant to pronounce sentence against him as follows, to wit, "It is the order of the Court that the Defendant named above, who has been adjudged to be guilty of the offense indicated above and whose punishment has been assessed by the verdict of the jury and the judgment of the Court at Death, shall be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division, Texas Department of Criminal Justice or any other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institutional Division in accordance with the provisions of the law governing the Texas Department of Criminal Justice, Institutional Division until a date of execution of the said Defendant is imposed by this Court after receipt in this Court of mandate of affirmance from the Court of Criminal Appeals of the State of Texas.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence. From which sentence an appeal is taken as a matter of law to the Court of Criminal Appeals of the State of Texas.

Signed and entered on this the 23rd day of July, 1996.

Jeffrey Yanott Shicklin
JUDGE 180TH DISTRICT COURT
Harris County, Texas

04/99/98
LCBT
18/999/98

On this the 7th day of August 1998 Mandate of Affirmance received from the Court of Criminal Appeals.

CRM-95 06-30-94

A 25133 P 0755

A 1050 P 0287

APPENDIX "B"

6/21/2024 4:07 PM
Marilyn Burgess - District Clerk Harris County
Envelope No. 89076581
By: L Hall
Filed: 6/21/2024 4:07 PM

CAUSE NO. 0723847

STATE OF TEXAS	§	180th DISTRICT COURT
V.	§	OF
GARCIA GLEN WHITE	§	HARRIS COUNTY, TEXAS

EXECUTION ORDER

This Court, having received the mandate from the Court of Criminal Appeals affirming the Defendant's conviction in the above-styled and numbered cause, and having received notice that the Court of Criminal Appeals has denied habeas relief in the defendant's initial application for writ of habeas corpus, cause no. 0723847-A, now enters the following Order:

IT IS HEREBY **ORDERED** that the Defendant, GARCIA GLEN WHITE, who has been adjudged to be guilty of Capital Murder as charged in the indictment and whose punishment has been assessed at Death by the verdict of the jury and judgment of the Court, shall be kept in custody by the Director of the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas until **Tuesday, the 1st day of October, 2024**, upon which day, at the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas, at some time after the hour of 6:00 p.m., in a room designated by the Texas Department of Criminal Justice and arranged for the purpose of execution, the said Director, acting by and through the executioner designated by said Director as provided by law, is hereby commanded, ordered and directed to carry out this sentence of death by intravenous injection of a substance or

substances in a lethal quantity sufficient to cause the death of the said GARCIA GLEN WHITE, and until the said GARCIA GLEN WHITE is dead, such execution procedure to be determined and supervised by the said Director of the Correctional Institutions Division of the Texas Department of Criminal Justice.

IT IS HEREBY **ORDERED** that the Clerk of the Court shall today send a paper and electronic copy of the Execution Order and Death Warrant in cause no. 0723847 to the following: Mr. Pat McCann, 700 Louisiana Street, Suite 3950, Houston, Texas 77002, writlawyer@outlook.com; Ms. Julia Bella, 200 S. 10th Street, Richmond, Texas 77469, julia@jbellalaw.com; Mr. Joshua Reiss, Harris County District Attorney, 1201 Franklin Street, Suite 600, Houston, Texas 77002, reiss_josh@dao.hctx.net; Mr. Benjamin Wolff, Office of Capital and Forensic Writs, 1700 N. Congress Ave., Suite 460, Austin, Texas 78701, benjamin.wolff@ocfw.texas.gov; Mr. Jay Clendenin, Office of the Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711, Jay.Clendenin@oag.texas.gov; and Ms. Sian Schilhab, Court of Criminal Appeals, P.O. Box 12308, Austin, Texas 78711, Sian.Schilhab@txcourts.gov.

IT IS FURTHER **ORDERED** that the Clerk of this Court shall issue and deliver to the Sheriff of Harris County, Texas, a Death Warrant in accordance with this Order, directed to the Director of the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas, commanding him, the said Director, to put into execution the Judgment of Death against the said GARCIA GLEN WHITE.

IT IS FURTHER **ORDERED** that the Sheriff of Harris County, upon receipt of said Death Warrant, is to deliver said Death Warrant to the Director of the Texas Department of Criminal Justice – Correctional Institutions Division at Huntsville, Texas and shall take receipt of said Death Warrant and return the receipt to the Clerk of this Court.

SIGNED AND ENTERED this 25th day of June, 2024.

Hon. DaSean Jones
Presiding Judge
180th District Court
Harris County, Texas

DISTRICT COURT OF HARRIS COUNTY, TEXAS

APPENDIX "C"

State of Texas
County of Travis

AFFIDAVIT

Affiant: Greg Hupp, Ph.D.
Date: August 11, 2024

I, Greg Hupp, being duly sworn, depose and say:

1. Introduction and Credentials:

I am a licensed psychologist, specializing in neuropsychology. I have 25 years of experience working with individuals with varying levels of cognitive functioning, including those classified as low-functioning. My expertise includes administering and interpreting intelligence quotient (IQ) tests, formal assessments of adaptive functioning, academic achievement, and comprehensive formal battery neuropsychological tests. I have authored publications on cognitive assessment and intellectual development and traumatic brain injuries in children. I am a qualified mental health expert in the State District Court level in Texas and several other states, at the Federal District Court level, and at the Tribal District Court level. I have testified as a qualified expert witness on numerous occasions in these courts for both the defense and State. I most often serve in the capacity as a Court-appointed mental health expert in several jurisdictions in Texas, Arizona, Ohio, and Washington State for the purposes of advising the court on matters of competency to stand trial and the mental state of defendants at the time of the offense. I have been formally trained in the administration and advanced interpretation of intelligence tests and several formal neuropsychological testing batteries and am a qualified neuropsychologist with additional training in aviation-specific topics per the criteria set forth by the Federal Aviation Administration.

2. Purpose of Affidavit:

The purpose of this affidavit is to provide an informed opinion regarding the intellectual capacity of defendant Glen Garcia White, specifically as to how intelligence quotient (IQ) scores are overestimated in individuals with low cognitive functioning, including a discussion on the impact of the Flynn Effect on these assessments. This affidavit is based on my professional experience, relevant academic literature, and established principles in cognitive assessment.

3. Relevant Background:

Garcia Glen White was convicted in July 1996 for the December 1989 capital murder of two sixteen-year old sisters in Cause Number 723847 in the 180th Judicial District of Harris County, Texas. Mr. White was sentenced to death.

In his appeal, Mr. White requested relief of this sentence on the grounds that he has an IQ of 78 and that his trial counsel failed to discover or present this information to the jury. Such failure deprived Mr. White of the effective assistance of counsel and that new information regarding Mr. White's borderline intellectual disability may have provided essential information to the mitigation of this sentence.

More specifically, as a mental health expert specialized in the development, administration, and interpretation of intelligence tests, there are several areas of concern regarding that intelligence testing that would have significantly impacted Mr. White's score, and thus, his designation as an individual of low intellectual capacity. Such conditions may have resulted in a determination of an Intellectual Disability at the time of the actual testing in 2008, thus making Mr. White initially ineligible for the death penalty under the provisions of *Adkins v. Virginia*[1] and subsequently under the provisions of *Moore v. Texas*[2].

During his developmental period, there was evidence that Mr. White experienced significant adaptive deficits in his communication and verbal comprehension, demonstrated significant academic deficits and was only able to advance based on social promotion because of his football skills, which became evident during his one year of college on a football scholarship during which he failed every course in which he was enrolled. There was also evidence that Mr. White experienced repeated head trauma, with at one instance of extended loss of consciousness during a possible drowning episode, due, at least in part, to his many years of playing football, both formally and informally, in a position known to incur an excessive number of high-speed cranial impacts.

Evidence presented during testimony was that Mr. White was tested by clinical psychologist Patricia M. Averill, Ph.D. on July 24, 2008, when Mr. White was 45 years of age. Dr. Averill administered a standardized comprehensive intelligence test, the Wechsler Adult Intelligence Scale, Third Edition (WAIS-III), and a measure of academic achievement, the Wide Range Achievement Test, Revision (WRAT-R), the Mini Mental Status Exam, and a clinical interview. On the WAIS-III, Mr. White obtained a Full Scale Intelligence Quotient (FSIQ) standard score of 78, which placed him at the 7th percentile. It is standard practice, which was followed by Dr. Averill, to list a statistical range of scores based on standard errors of measurement given a 95% confidence interval of the test itself. An intelligence score is as estimation of the measure of true intellectual ability and not a determinate score due to inherent internal consistency errors of a test of human abilities, which can fluctuate somewhat due to various environment and iatrogenic (aka individual) factors. In fact, Dr. Averill commented that Mr. White's "Full Scale IQ may not be the most accurate reflection of his current intellection [sic] functioning."

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[1] Atkins v. Virginia, 536 U.S. 304 (2002).

[2] Moore v. Texas, 137 U.S. 1039 (2017).

Dr. Averill further wrote that "Mr. White is functioning within the Borderline range of intelligence. Based on his WRAT4 achievement scores and his reported poor grades in school it is doubtful that he has ever functioned at a higher level." It was further written that "Levels of intellectual functioning are on a continuum, with borderline intellectual functioning being just above mild mental retardation (now known as an Intellectual Disability)" and that individuals such as Mr. White "experience difficulties in many domains." As to those "many domains," one's performance collectively is known as "adaptive functioning" and are typically identified as to one's ability to function effectively and independently in social domains, with communication, maintenance of personal hygiene, adherence to basic rules of safety in the home and community, and occupationally such as performing tasks typical of independent daily living with limited or no support. Dr. Averill did not administer a formal measure of adaptive functioning as part of Mr. White's testing but commented that Mr. White "was not able to maintain housing for his family, nor was he able to manage his own finances" but was able to "compensate for other intellectual difficulties" through his interpersonal skills despite his "very low score on the Comprehension subtest, which assesses one's understanding of social mores."[3]

4. IQ Testing and Low Functioning Individuals:

IQ tests are designed to assess cognitive abilities across several domains, such as verbal comprehension, working memory, perceptual reasoning, and processing speed. However, when applied to individuals with low cognitive functioning, several factors can lead to an overestimation of their cognitive abilities.

a. Test Structure and Norming Issues:

IQ tests are typically normed on a general population sample that includes individuals with a wide range of cognitive abilities. However, this norming process may not adequately represent individuals at the lower end of the cognitive spectrum. Consequently, the psychometric properties of these tests, including their reliability and validity, may be compromised when used with low-functioning populations. This can lead to an overestimation of IQ scores, as the tests may not accurately capture the cognitive limitations of these individuals.

b. Floor Effects:

Many IQ tests have a minimum score, known as the "floor," which can present a significant limitation when assessing individuals with severe cognitive impairments. If an individual's true cognitive abilities fall below this floor, the test cannot accurately measure their functioning, often resulting in a score that overestimates their actual abilities.[4]

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[3] Psychological Evaluation report. (12/30/2008). Patricia M. Averill, Ph.D., Clinical Psychologist. Houston, Texas.

[4] Whitaker, Simon. (2010). Error in the estimation of intellectual ability in the low range using the WISC-IV and WAIS-III. *Personality and Individual Differences*, 48(5), 517-521.

c. Adaptive Functioning Discrepancies:

There is often a notable discrepancy between IQ scores and adaptive functioning in low-functioning individuals. For example, an individual might obtain a higher IQ score than expected but still struggle with basic life skills, such as communication, self-care, and social interaction. This discrepancy highlights the limitations of using IQ scores as the sole measure of cognitive ability in these populations. The provisions of *Moore v. Texas* stipulate that a standardized measure to assess one's adaptive functioning must be used in accordance with the evaluator's standards of practice in order to diagnose the presence of an intellectual disability as identified by *Atkins v. Virginia*. To my knowledge based on the court transcripts and subsequent appeals, Mr. White has never been administer nor evaluated on a standardized measure of adaptive functioning.

d. Test Anxiety and Performance Issues:

Low-functioning individuals may experience significant anxiety during testing, leading to inconsistent or rushed responses. This can artificially inflate their IQ scores, as their performance under test conditions may not reflect their true cognitive capacity. Based on the available sources of information, Mr. White's emotional state was not assessed at the time of his intelligence testing.

4. The Flynn Effect and Its Implications:

The Flynn Effect refers to the observed phenomenon that IQ scores have been increasing over time, typically by about three points per decade. While this trend reflects changes in environmental factors, such as improved nutrition, education, and access to information, it also introduces complexities when interpreting IQ scores in low-functioning individuals.

The Flynn Effect means that older IQ tests may overestimate an individual's cognitive abilities when compared to more current norms. This is particularly relevant for low-functioning individuals, where even small increases in scores due to outdated norms can result in significant overestimations of their abilities, sometimes up to 20 points. Furthermore, the Flynn Effect primarily impacts the general population's scores, and its effect on those with low cognitive functioning is less well understood, potentially leading to misleading assessments.[5]

Mr. White was tested using the WAIS-III, which had been published in 1997. At the time he was tested, an updated edition of that intelligence test was being released on the market. The Wechsler Adult Intelligence Scale, Fourth Edition (WAIS-IV) was based on a modified theoretical construct of intelligence compared to the WAIS-III and earlier versions of the test. Research between the two editions suggests that "more weight" should be given to

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[5] Kanaya, T., Scullin, M. H., & Ceci, S. J. (2003). The Flynn Effect and U.S. Policies: The Impact of Rising IQ Scores on American Society Via Mental Retardation Diagnoses. *American Psychologist, 58*(10), 778–790.

the FSIQ obtained by the WAIS-IV that is "considered more valid, reliable, and consistent" with the test publisher's theoretical model.[6]

5. Conclusion:

Based on the factors discussed above, it is my professional opinion that IQ scores for low-functioning individuals, such as Mr. White, are often overestimated. The structural limitations of IQ tests, floor effects, discrepancies between IQ and adaptive functioning, and the influence of outdated norms due to both the Flynn Effect and an outdated edition of the intelligence test, all contribute to this overestimation. Therefore, the IQ score reported by Dr. Averill as part of Mr. White's *Atkins* evaluation was likely an over-estimation of his true intellectual abilities and lacked a formal assessment of Mr. White's adaptive functioning as is now required under the *Moore* decision required in the diagnosis of an Intellectual Disability.

I have examined the scores for Flynn effect and determined that the stated IQ score of 78 is overstated. Even contemporary commentary by the evaluating psychologist included concerns that this score was likely inflated and that Mr. White would likely never score higher. Conservatively, research indicates that a Flynn-adjusted score would be 75, and would more likely be much lower than that, placing Mr. White's IQ score within the range of an intellectual disability. Even a conservatively Flynn-adjusted score of 75 would be within the +/- 7 statistical band for the standard error of measurement on the WAIS-III; possibly placing his IQ score at 68.

The test itself appears to have given higher scores that were justified based upon the research, so I am leaning towards the side of a conservative view. Adaptive deficits in school, in his scores on the ACT, and failing grades were clearly present during his developmental period. The family history provided by the mitigation specialist, based on her long work with them through the COVID pandemic to the present to overcome their shame and fear to discuss Mr. White's problems in daily living and employment, showed significant adaptive difficulties early on despite the apparent social promotion due to Mr. White's football skills. Additionally, the multiple and frequent head trauma during his formative years was very likely harmful to his brain development.

Based on the contemporary concerns expressed by the evaluator during Mr. White's IQ testing regarding the over-estimation of the derived IQ score, evidence of adaptive deficits during his developmental period, and history of multiple head traumas during his developmental period, it is my professional opinion, to a high degree of psychological certainty, that Mr. White would meet the new criteria under the Diagnostic and Statistical Manual – Fifth Edition, Text Revision (DSM-5-TR) and the *Moore* cases for a diagnosis of an Intellectual Developmental Disorder (Intellectual Disability).

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[6] Taub, Gordon and Benson, Nicholas. (2013). Matters of Consequence: An Empirical Investigation of the WAIS-III and WAIS-IV and Implications for Addressing the Atkins Intelligence Criterion. *Journal of Forensic Psychology Practice*, 13, 27-48.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

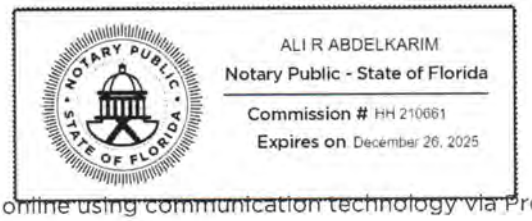
Gregory Scott Hupp

Greg Hupp, Ph.D.
Psychologist – Texas License No. 31593
5900 Balcones Dr., Ste. 13846
Austin, Texas 78731
Ph (512) 893-6337

Sworn to and subscribed before me this 12th day of August, 2024.

Ali R Abdelkarim

Notary Public
My Commission Expires: 12/26/2025



Notarized remotely online using communication technology via Proof.
Florida Broward County Online Notary

APPENDIX "D"

Patricia M. Averill, Ph.D.
Clinical Psychologist
3818 Tartan Lane
Houston, TX 77025
(713) 741-3951

Psychological Evaluation

Name: Garcia Glenn White
Date of Birth: 02/04/1963
Date of Assessment: 07/24/2008
Date of Report: 12/30/2008
Examiner: Patricia M. Averill, Ph.D.
Report Writer: Patricia M. Averill, Ph.D.

Purpose of Assessment: Mr. White is a 45 year old African American male who is curreatly on death row. The purpose of this evaluation is to assess Mr. White's intellectual functioning.

Examiner Information: I have been licensed as a clinical psychologist in the State of Texas since 1994 and have been involved in clinical practice continually since that time. I obtained Master's and Doctoral degrees in Clinical Psychology from the University of Houston. I am involved in teaching and research, as well as direct and supervisory clinical work. Much of my direct clinical work has involved conducting psychological assessments, which have included intellectual, personality, and achievement components. The reasons for these evaluations have varied but have included support for a diagnosis of mental retardation, support for a dementia process, evidence of learning disabilities, support for or against termination of parental rights, and levels of care for children in Children's Protective Services. I have conducted four previous psychological evaluations on inmates for court-related information. I also have conducted many psychological evaluations on inmates who are currently in a psychiatric hospital.

Assessment Instruments:

- Wechsler Adult Intelligence Scale – Third Edition (WAIS-III)
- Wide Range Achievement Test – Revision 4 (WRAT4)
- Mini Mental Status Exam
- Clinical Interview

Materials Reviewed:

To prepare this report I have thoroughly reviewed the following records:
Documents regarding the legal definition of mental retardation
Journal articles on the effects of cocaine abuse

Definition of Mental Retardation: According to the Diagnostic and Statistical Manual of Mental Disorders – Fourth Edition (DSM-IV), Mental Retardation is characterized by "significantly sub-average general intellectual functioning that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social/interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health, and safety." In order to qualify as mental retardation, the onset of these symptoms must occur before age 18. The DSM-IV characterizes sub-average general intellectual functioning as an IQ of about 70 or below. However, the DSM-IV also explains that, due to a measurement error rate of approximately ± 5 points, IQ's between 65 and 75 can be considered sub-average, provided that there is also support for significant deficits in adaptive behavior. The definition of Mental Retardation under the Texas Health and Safety Code is very similar to that described in DSM-IV, in that it states " 'mental retardation' means significantly sub average general intellectual functioning that is concurrent with deficits in adaptive behavior and originates during the developmental period." [Texas Health and Safety Code, Section 591.003(13)]. Thus there is agreement between these two recognized guidelines on what is understood to be mental retardation.

Relevant History:

Mr. Garcia Glenn White is a 45-year-old make who reported that he has been on Death Row since September 13, 1996.

Mr. White said that he grew up in a healthy, single-parent family with 6 siblings (3 brothers and 3 sisters). He said that he was the third child. He said that he got along well with his siblings. He denied any awareness of problems during his delivery or any major illnesses during his childhood or during adulthood. He reported that he did incur a head injury at one time, having been hit with a baseball bat. However, he did not report any ongoing problems associated with the head injury.

Review of School Performance:

No school records were available. However, Mr. White said that he attended Scott Elementary School, Lamar Fleming Junior High School and Phylis Wheatly High school. He said that he attended regular classes and mostly made C's and D's, however, he said that he would not have passed his classes in high school if he had not been on the football team. He reported that he enjoyed history but did not do well in math, spelling, and science. Mr. White said that he had perfect attendance while in school and that he played football and track. He said that his sister helped him with his homework.

Mr. White attended Lubbock Christian College on a football scholarship. However, he hurt his knee and his girlfriend got pregnant, so he dropped out of college.

Note: all of the following information, regarding work, family, daily living, and substance abuse was gathered during a clinical interview with Mr. White.

Work History: Mr. White said that he worked at a company cleaning high-rise building windows from 1983 until 1988. He said that he stopped working for two years and resumed the same work with a different company from 1990 until 1993. Mr. White also said that he tried to sell drugs for a period of time, but then got hooked on them himself, so he stopped selling them. He also reported having worked at Whataburger for a short period of time and he worked for his father's auto mechanic shop.

Family/Relationship History: As mentioned earlier, Mr. White grew up in a single-parent family with six siblings. He said that his childhood was happy, and he had plenty of friends. He said that he has always been able to keep people laughing. He continued to have many friends during high school. He also had a girlfriend starting in 1980, who got pregnant while he was in college. His first son was born in 1982 and there are two additional children. He said that he and his girlfriend were together for thirteen years and they still keep in touch. Reportedly his son just graduated from high school and he is working on an offshore oil rig.

Daily Living: Mr. White said that he was able to maintain his own apartment with his girlfriend for a while when he was working. However, he lost the apartment due to inability to pay his bills, and his girlfriend got public housing. He said that he did not handle money very well and he gave his money to his girlfriend so she could handle it more appropriately. He said that he had a savings account for a little while but was unable to maintain it. He was able to make his own appointments and take care of his personal needs, both at home and within the community.

Substance Use: According to Mr. White, he started using marijuana in the early 1980's and then used used crack cocaine between 1984 and 1989. His employers sent him to Houston Recovery Campus in 1989, where he participated in a drug rehabilitation program. He said that it worked for 8-9 months, but then he started smoking crack cocaine again. He said that he broke up with his girlfriend in 1993, and this was associated with his drug use. He then started living with friends.

Behavioral Observations: Mr. White is a tall, very large and somewhat obese male, who was brought down for the initial assessment wearing prison scrubs. The prison guard informed Mr. White that the examiner had been sent by his lawyers to evaluate him. Mr. White said that his lawyer had already informed him that the examiner was coming and he said that he felt fine about participating in the assessment.

Mr. White arrived for the assessment wearing prison scrubs and his grooming and hygiene appeared to be excellent. At times, he was perspiring rather heavily and he wiped himself on a tissue paper. Mr. White was pleasant and cooperative throughout the

assessment period, and he put forth good effort on all the assigned tasks. He seemed motivated to do well and seemed somewhat concerned when he could not continue with a particular test. Based on his level of effort, it is believed that this is an accurate assessment of Mr. White's current level of functioning.

Mr. White was oriented to person, place and time. His speech was normal in tone and volume, but he tended to talk very quickly and at times he tended to mumble. He seemed to have adequate vocabulary skills. His mood appeared to be euthymic and his affect was congruent with his mood. He denied experiencing auditory, visual, or olfactory hallucinations, as well as mood swings. He said that he feels "OK" most of the time. However, he feels upset whenever one of the inmates is executed, because he has come to know the other inmates quite well.

Intellectual Assessment: On the WAIS-III, Mr. White obtained a Full Scale IQ of 78 (74-83 - 95% confidence interval, 7th percentile). There was a significant difference between his Verbal and Performance scores (75 and 86, respectively) suggesting that his Full Scale IQ may not be the most accurate reflection of his current intellection functioning. Mr. White's subtest scaled scores are listed below (Note: 10 is the average standard score for each subtest).

Verbal	Scaled Score	Performance	Scaled Score
Vocabulary	4	Picture Completion	12
Similarities	7	Digit Symbol	6
Arithmetic	8	Block Design	5
Digit Span	7	Matrix Reasoning	9
Information	7	Picture Arrangement	8
Comprehension	2		

There is some variation in subtest scores within the verbal scales, with Comprehension being an area of significant weakness. This subtest measures ones understanding of social norms. Among the performance subtests, Mr. White obtained a score on Picture Completion that was a significant strength. This subtest measures one's ability to scan and pay attention to detail in familiar objects.

Achievement Assessment: On the WRAT4, Mr. White obtained a Word Reading standard score of 79 (6.5 grade, 8th percentile), a Sentence Comprehension score of 82 (9.2 grade, 12th percentile), a Spelling score of 84 (7.3 grade, 14th percentile), a Math Computation score of 76 (4.6 grade, 5th percentile) and a Reading Composite score of 78 (7th percentile). As can be seen, Mr. White's achievement scores are within the range expected based on his IQ but are well below expectations based on his reported completion of high school and one year of college. These scores are consistent with his reported difficulty achieving in school.

Discussion: As mentioned previously, Mr. Wright worked hard on all the assigned tasks. As such, this is believed to be an accurate reflection of his current intellectual functioning.

Based on the results listed above, it is apparent that Mr. White is functioning within the Borderline range of intelligence. Based on his WRAT4 achievement scores and his reported poor grades in school it is doubtful that he has ever functioned at a higher level.

Levels of intellectual functioning are on a continuum, with borderline intellectual functioning being just above mild mental retardation. Ninety-three percent of the population function at a higher level of intelligence than do those with borderline intellectual functioning. Thus, although, such individuals do not qualify for the MR diagnosis, they do experience difficulties in many domains, and in particular in academics. According to Mr. White, his grades were poor and would even been worse if not for his being on the football team and having his sister help him with his homework. Also, such individuals have difficulty remaining on task and often have behavioral problems, which may stem from frustration and emotional immaturity.

Adaptive Functioning:

Overall, it is difficult to ascertain how Mr. White functioned in many of the domains of adaptive functioning because we only have his self-report and no information from other sources. However, he was able to maintain employment for several years and he had a family. He was not able to maintain housing for his family, nor was he able to manage his own finances, but rather depended upon his girlfriend to take care of the bills. Based on this limited information, it is apparent that Mr. White had some deficiencies in maintaining himself financially. Reportedly, he always got along well with others and had not difficulties with social/interpersonal skills. It is likely that his interpersonal skills helped him to compensate for other intellectual difficulties.

Summary:
Overall, this assessment and Mr. White's records indicate that he is functioning in the borderline range of intelligence and it is highly unlikely that he functioned at a higher level in the past, based on his functional achievement. Mr. White's scores were somewhat inflated by his high score on the Picture Completion task, while most of his subtests scores are significantly below average. Mr. White's results indicate that he is one of those individuals who is ineligible for the MR label and associated protections but who, nonetheless, has intellectual limitations that are likely to result in social vulnerabilities. This vulnerability is supported by his very low score on the Comprehension subtest, which assesses one's understanding of social mores.

Patricia M Averill, Ph.D

Patricia M. Averill, Ph.D.
Licensed Clinical Psychologist

Addendum to psychological report dated 12/30/08

A review of the literature regarding cocaine abuse and its sequelae indicates that chronic cocaine users demonstrate mild impairment on neuropsychological testing and they may develop cerebral atrophy, primarily in the frontal and temporal areas of the brain (see Warner, E.A., 1993). Based on the strong correlation between Mr. White's IQ and achievement standard scores, it is very unlikely that his current low functioning can be attributed entirely to his history of cocaine use. However, it is quite possible that his cocaine use compromised an already compromised brain. The frontal area of the brain is associated with the ability to plan, problem –solve, and inhibit inappropriate behaviors.

In addition to the above, cocaine use has been associated with violent behavior. Most of the literature reveals that victims of homicide, particularly by firearms, and also suicide victims, are significantly more likely to test positive for cocaine upon autopsy. Indeed, in 1989, 40% of all homicide victims in Fulton County, Georgia tested positive for cocaine. Similar findings have been reported for Los Angeles County, California (Budd, R.D., 1989). There is not a similar available literature regarding perpetrators of violent crimes, not surprisingly, since the perpetrators are not often available for testing immediately after the crime. However, it is likely that individuals who are high on cocaine are at increased risk for behaving in a violent manner, since some of the symptoms associated with cocaine use include increased alertness, high energy, talkativeness, and repetitive behavior.

Patricia M. Arnold, Ph.D

APPENDIX "E"

Affidavit of: Gina T Vitale, LMSW

State of: Texas

County of: Harris

On this day, the Affiant below did appear before me and swear and subscribe to the truth of the following:

1. My name is Gina T. Vitale. I am a master level social worker duly licensed to practice in the state of Texas since 1997. I am a member of the National Association of Social Workers, the National Association of Sentencing Advocates and Mitigation Specialists, and the National Association of Public Defenders.

2. I have been an independent contractor providing mitigation investigations and sentencing advocacy throughout the United States since 1999. I have experience working on capital and non-capital cases in both state and federal jurisdictions. I have served as a faculty member in numerous CLE-approved training seminars sponsored by the Texas Defender Service, Texas Criminal Defense Lawyers Association, the Montgomery County Bar Association, and the Texas State Bar Association. I am over 18 and am in all ways qualified to testify to the matters contained herein based on my personal knowledge.

3. I was originally appointed to assist in the defense of Mr. Garcia Glen White on April 18, 2018. My work included reviewing trial transcripts and psychological reports, attempting to obtain historical records of Mr. White's childhood, and meeting with family members, friends, teachers, coaches and acquaintances.

4. Families are typically reluctant to reveal any history which may be painful or embarrassing during the initial phase of the investigation, and are careful not to say anything that they fear might reflect negatively on the defendant. Rapport building with the client and their family is critical to uncovering a thorough and accurate history. However, depending on the level of built-up defenses and mistrust for the system, this can be a lengthy process.

5. In person interviews are critical to relationship building with clients and their families. The inability to meet with family during the pandemic significantly hampered my ability to gain the trust of Mr. White's family.

6. Early on in the investigative process, it became clear that Mr. White's family was protective of his image. Initial interviews yielded only the most positive information about Mr. White's character. While I believe that descriptions of his character were true, they did not paint the full picture of Mr. White's history, and reports of his academic successes were wholly inaccurate.

7. During initial interviews, family members reported that Mr. White passed all of his classes and graduated at the top of his class. Report cards documenting his grades and class standing clearly indicate the opposite.

8. Mr. White is one of seven children, two half-brothers, and more than ten cousins. Other than Mr. White, only one cousin attended college. Mr. White's college career, despite being short-lived and academically unsuccessful, understandably served as the foundation for the family's unwavering view of him as 'the smart one.'

9. It was only through lengthy interviews with the family that their trust increased. However, their instinct to protect their loved one remained strong. It took an extensive knowledge of adaptive deficits and carefully crafted questions to uncover detailed descriptions of how Mr. White truthfully interacted with his environment, his family, and his community.

10. Throughout his childhood and adolescence, Mr. White was surrounded by positive supports including consistent household rules, a large extended family and friend network, and attentive coaches. These supports allowed Glen to mask his deficits and function sufficiently within his community. Because Glen was able to get by without drawing negative attention, his deficits were never recognized as such by friends, teachers and coaches.

I swear the forgoing is true and correct.

Affiant (Signature)

Gina T Vitale, LMSW

Affiant (Print Name)

SWORN AND SUBSCRIBED TO before me, the undersigned notary public on this 21st day

August
of _____ 2024

NOTARY PUBLIC BY AND FOR
THE STATE OF TEXAS

AARTI SIDDOTAM
My Notary ID # 132224074
Expires October 24, 2027

My commission expires
October 24th, 2027

APPENDIX "F"

GARCIA GLEN WHITE ADAPTIVE DEFICITS CHART

CONCEPTUAL DOMAIN LANGUAGE; READING AND WRITING, MONEY, TIME AND NUMBER CONCEPTS		
Area of Adaptive Functioning	Data	Source
Vocabulary: Richness/consistency of expression Organized and coherent vs rambling and disjointed Expressive/Receptive Language	Chose video statement over written @ police dept (due to difficulty writing) Glen had a very difficult time spelling words correctly	Transcripts Interview w/Monica Garrett
Limited vocabulary and understanding of legal terminology	Glen White appears before the judge during a motions hearing. When asked about a letter he wrote, he states "yes, dismissed." His attorney and the Judge have to clarify that he means he wants to withdraw the letter	Hearing Transcript
Inability to express himself clearly. Rambling and disjointed speech	Q: Did you tell Sgt Rudolph or do you recall telling him specifically that you wanted a lawyer present? A: I don't remember telling him nothing Q: okay A: Realizing he wanted to talk to me I think that's the time I know of at the time I asked if I could lay on the floor. I was tired. I don't want to talk to you no more.	Hearing Transcript
Inability to express himself clearly Rambling and disjointed speech	Q: At any point during the conversation with them did you tell them that you had an attorney? A: I told them I had an attorney. I didn't want to say that	Hearing Transcript

	Q: How did you tell them that? What did you say? A: I just told them when he came up and asked me how I was doing, then they did make another statement, they said, "We are going to go back into this room back here and talk." They said they was going…We are going to go back into this room here and talk, Okay?" and then when they said that, I said, "Well, I want to have my attorney here. I have a lawyer."	
Time: Analog and digital? AM/PM concepts Seasonal changes (daylight savings, holidays) Time zones	Glen never wore a watch He never had to tell time because he maintained the same schedule as a large group of friends. He left for school with them and came home with them	Family Interviews
Numerical: Basic mathematics Multi digit? Able to calculate sentence/probation/release	Glen depended on others for help with any mathematics Glen had difficulty adding anything more than single digit numbers	Family interviews
Literature: Reading materials Written communication Job announcement/application	Issues answering questions on rehab paperwork	HRC records
Educational Achievement: Diploma or GED SPED Vocational Training Dropout Behavior/absences Retention	Glen depended on his sister and friends to help with homework. Throughout Jr. High and HS she would write out answers and he would copy them into	Interview w/Monica Garrett

General knowledge	his own handwriting	
Learning difficulties	It was difficult for Glen to catch on to things. His grades remained poor despite help	Trial Transcript (Monica Garrett)
Learning difficulties	Glen would have been held back without help Glen still passed even when his grades were bad Glen needed 1:1 help to complete his homework Monica would look at the work and break it down for him so that it was easier	Family Interviews
Poor reading comprehension	As recently as a few years ago, Glen would call his son and daughter in law for help with his Bible group homework. Glen would read the questions to his daughter in law and she would explain what the question meant. Glen would tell her what he thought and she would help him come up with the words to express his thoughts	Family Interviews
Poor school performance	1976-77: Glen attends 8th grade at Fleming Middle School His grades are C's, D's and F's other than B in PE	School Transcript
Poor school performance	1977-78: Glen attends "C9th" grade at Fleming Middle School His grades are C's, D's F's except B in PE	School Transcript

	F and B in Woodworking Glen fails English and has to take summer school Glen receives 'Good' and 'Excellent' marks in conduct and has limited absences	
Poor school performance	1978-79: Glen attends 10th grade at Wheatley High School His grades are C's, D's and F's except a B in one of three HPE semesters and one of two Reading Lab semesters Glen receives a C in Developmental Reading Conduct marks are 'Good', and he has only 6 absences	School Transcript
Poor school performance	1979-80: Glen attends 11th grade at Wheatley High School Glen receives A's in PE, an A & B in cooking, a C in AB Eng, a D in Eng, and a B & C in History Attendance is only for recorded for four of the six sessions Conduct is 'Excellent' and he has 10 absences	School Transcript
Poor school performance	1980-81: GGW attends 12th grade at Wheatley High School HIs grades are a B in cooking, F in Woodworking, and C's and D's in all other courses	School Transcript
Poor school performance	3/12/81: Glen's class rank is 290 of 301 GPA 1.?535	School Transcript

Poor school performance	Glen "Did not do well academically" at college	Trial Transcript (Robert Yohman)
Poor school performance	Glen's "Achievement Scores in the low avg to mildly impaired range."	Trial Transcript (Robert Yohman)
Poor school performance	Glen "Achieved C's and D's got passed along within the system; probably never did achieve more than a reading, writing arithmetic level above low average to borderline, maybe even into the mildly impaired range."	Trial Transcript (Robert Yohman)
Poor school performance	Glen struggled to complete his homework. He just didn't get it	Family Interviews
Executive Functioning: Concrete approach to Problem Solving Abstract thinking Cognitive Flexibility Planning/Strategizing Priority Setting	Bender "Confirms that there is some sort of organic influence here in terms of neurological functioning. The errors have to do with planning and problem solving."	Trial Testimony (Dennis Nelson)
Cognitive deficits	Glen scored "particularly low in concentration, speed of thinking, attention span"	Trial Transcript (Robert Yohman)
Poor executive functioning	Glen scores were "fairly deficient on most tasks related to (executive functioning)"	Trial Transcript (Robert Yohman)
Cognitive deficits	Scores on cognitive tests showed "fairly low level defenses, and pretty much rigid."	Trial Transcript (Robert Yohman)

	Glen is confused by questions on cross and easily led by the prosecutor's questions. He frequently looks to lawyers for help	Hearing Transcript
SOCIAL DOMAIN Interpersonal skills, social responsibility, self esteem, gullibility, naivete, follows rules/obeys laws, avoids victimization, and social problem solving		
Interpersonal Skills: Friends (ages) Social isolation (bullying) Fights/aggression Dating Fitting In Social Cues Emotion/Behavior Regulation	Glen possesses "Limited Social Skills"	(Trial Transcript (Robert Yohman)
Inequality in dating relationships	DeShonda "ran him"	Family Interviews
Self-Esteem: Fear of rejection by peers Victimized	People sometimes teased him about his size Glen cried easily Glen got his feelings hurt easily	Family Interviews
Rule Following: Games/leisure (age appropriate?) Offense history Comprehension/anticipation of consequences Impulse control Substance abuse (age)	Glen played games with family- Monopoly, Spades, etc- but he always lost. He would cry because he couldn't win. His family could not understand how he lost even at simple games like go fish and pitty pat. Even when he cheated he lost Glen's substance. abuse got bad after his accident at work when he didn't have a football or work schedule to follow.	Family Interviews

	Glen would go and do the very thing you told him not to do	
Social Responsibility: Behavior (school and home) Social conventions/expectations Supports self (parents/spouse)	Glen"s favorite tv shows were Good Times, Jackson 5 and Tom and Jerry Rather than coming home after school, Glen would stay and practice football. He would stay until someone kicked him out.	Family Interview
Gullibility/Naivete/ Vulnerability: Taken advantage of Poor Judgment Butt of Jokes Victimized by peers Easily cheated Follower Comprehends Risk	Glen repeatedly speaks with police seemingly unaware of potential risk to himself On a school field trip to a. Battleship, everyone was pretending to jump off. Back at school, on a dare, Glen jumped off of the balcony into a courtyard below	Family Interviews Transcripts of Police Interrogations
Naivete	Glen didn't have street smarts. He would go along with others	Family Interview
Poor comprehension of risk	Glen was shot after leaving the community center one night. Two groups had gotten into it and someone was badly beaten. When Glen decided to leave, his friends all said don't go because they didn't know what might kick off outside. Glen said he wasn't worried and left. He was shot by a group who came back to retaliate	Family/Friend Interviews
Social Problem Solving: Insight into motive/thinking of others Insight into own behaviors	Glen tells Officer Miller that he doesn't mind talking about the Williams case because he's "already been found	Statement to police

Reciprocity Avoiding problematic situations Anticipating consequences	innocent on that case."	
Poor insight	Glen didn't think ahead. He would do something and think about it later	Family Interviews
Poor insight into motive of others	Glen doesn't believe that his friend would have ratted him out. The detectives have to play him the video	Statement to police
Poor insight	Glen would take whatever you said and not question it	Family Interviews
PRACTICAL DOMAIN Activities of Daily Living, occupational skills, use of money, health care, travel/transportation, adherence to schedule/routines, use of communication (telephone, email)		
ADL's: Developmental milestones Dressing self Hygiene Cooking Cleaning Home maintenance Planning- daily activities Childcare Shopping	Glen was able to do chores (cook and clean), but he had to be taught how. His mom was very strict	Family Interviews
Occupational Skills: Employment Job applications Equipment operations Schedule/Routine- punctuality	Glen worked as cook and doing landscaping before his 1995 arrest Glen worked with is father painting houses and at his mechanic's shop Glen worked cleaning windows Glen worked at KFC and Whataburger Glen was badly injured in an accident at work. Glen was at the top of a forty foot ladder washing windows. The	Trial Transcript Family Interviews

	ladder slipped and he fell to the ground. A Coworker was supposed to be at the bottom holding the ladder. It is unclear whether Glen told him to go do something else or if the man left on his own.	
Safety and Health: Medications MD appointments Medical history Substance Abuse Nutrition	Glen lit a firecracker in a vehicle gas tank. It exploded and burned his hand. Glen's brother yelled, "you so stupid, stupid, stupid." Glen did not apply for worker's compensation after his accident and did not attend follow up medical appointments as directed	Family Interviews
Travel & Transportation: Maps Public transport DL Vehicles Circumstances of long distance travel	Glen never owned a car. Coworkers drove him home from work Glen never got a driver's license Glen took the family car out without permission once. Glen ran the car into an apartment building because he "forgot to turn"	Family Interviews
Money Concepts: Values money Sums/balances/percentages Bank Accounts Budgeting	Glen never had an apartment of his own. He lived with various friends and family	Family Interviews
Limited ability to maintain finances and budgeting	When in a relationship, his girlfriend handled all the financial issues. Glen turned his paycheck over to her, and she managed the bills	Family/Friend Interviews

	Glen was unable to maintain bank account	Family/Friend Interviews
Communication: Telephone Email Keyboarding Social Media	Glen never memorized phone numbers. If he needed to talk to someone he would go to their house.	Family/Friend Interviews

APPENDIX "G"

Affidavit of: Monica Garrett

State of: Texas

County of: Harris

On this day, the Affiant below did appear before me and swear and subscribe to the truth of the following:

My name is Monica Garrett I am over the age of eighteen years old and I am in all ways qualified to testify to the matters contained herein based on my personal knowledge.

Garcia Glen White is my older brother. I am eleven months younger than my brother. Even though I'm younger, I always helped Glen with his homework. Glen always struggled in school, and I helped him with his homework every day. Glen needed one on one help to understand and he got that from me at home. I made him do his homework, but I had to break it down so that stuff was easier to understand. He didn't understand certain things and it was hard for him to do the work. Math and spelling were particularly hard for Glen. Adding more than single digit numbers was difficult for Glen and he had trouble understanding and spelling compound words. Glen was a class clown. When he didn't know the answer, he would make jokes to take everyone's mind off what the teacher was asking. Glen cried when he didn't understand or when I'd make him repeat what I just showed him. The classes Glen did best in were woodworking, metal work and home economics. He liked things he could do with his hands.

Glen was quick to cry. If he told you something and you didn't believe him, he would cry, and he would cry whenever he lost at a game. We played lots of games at home, like Spades and Monopoly. Glen lost every single time. Glen even lost at simple games like go fish. Sometimes he would cheat, and he would still lose.

Glen always wanted to make people smile. He would do anything to get you to smile. He didn't ever get into fights or arguments. He was always giving.

Glen never had to worry about money for lunch at school. I had the money and if he needed anything, he would come to me.

Glen walked to and from school every day with a bunch of friends. He never walked home by himself. Even when it wasn't football season, if his friends played other sports, Glen would stay at school as late as he had to until he could walk home with his friends. The coaches knew him and would let him help out with small stuff while he waited.

At Fleming middle school, the buildings were set around courtyards. Each one was at least a story high with a floor of cement. One day, kids were daring Glen to jump, and he did. He jumped right over the railing into the courtyard. He sprained both of his feet.

Once Glen got injured and couldn't play football at Lubbock Christian College, he had to come home. Glen couldn't have made it without the support of coaches and other players.

I swear the forgoing is true and correct.

Monica Garrett
Affiant (Signature)

Monica Garrett
Affiant (Print Name)

SWORN AND SUBSCRIBED TO before me, the undersigned notary public on this 18th day of August 2025

Rodolfo J. Vargas
NOTARY PUBLIC BY AND FOR
THE STATE OF TEXAS

RODOLFO J. VARGAS
Notary Public, State of Texas
Comm. Expires 12-31-2027
Notary ID 10189841

My commission expires

APPENDIX "H"

Affidavit of: Lizzie White

State of: Texas

County of: Harris

On this day, the Affiant below did appear before me and swear and subscribe to the truth of the following:

My name is Lizzie White, I am over the age of eighteen years old, and I am in all ways qualified to testify to the matters contained herein based on my personal knowledge.

Garcia Glen White is my son. I have seven children and he is my third.

Glen always struggled in school and got bad grades, but with help from my daughter he did better.

Glen had the same group of friends from elementary all the way up through high school. They all went to the same schools and lived in the same neighborhood. They did everything together and looked out for each other, so Glen couldn't have gotten into too much trouble.

One time, when I was visiting my family in Louisiana, Glen decided to take my car. Glen had no idea how to drive. He went a couple blocks to pick up a friend and didn't even make it three blocks before he ran the car into the side of an apartment complex. When I asked him what happened, he said he forgot to turn. I can't imagine what made him think to take that car knowing he couldn't drive. The police picked him up and I had to go and get him.

Another time we were visiting Louisiana, Glen set off a firecracker in a gas tank. The explosion knocked him out and his cousins had to carry him back to the house. We had to take him to the hospital to get looked at.

When Glen came back from Lubbock, he was working for Clean America. He had an accident at work and fell when the ladder he was on slipped. He stayed at the hospital for a while. He hurt his arm and his leg and he had to get stitches in his head because his head was caught between the concrete and the ladder.

I swear the forgoing is true and correct.

Lizzie M. White
Affiant (Signature)

Lizzie White
Affiant (Print Name)

SWORN AND SUBSCRIBED TO before me, the undersigned notary public on this 18th day of August 2021

Rodolfo J. Vargas
NOTARY PUBLIC BY AND FOR THE STATE OF TEXAS

RODOLFO J. VARGAS
Notary Public, State of Texas
Comm. Expires 12-31-2027
Notary ID 10189841

My commission expires

APPENDIX "I"

Affidavit of: Angela ~~Drain~~ SWANSON A.D.S

State of: Texas

County of: Harris

On this day, the Affiant below did appear before me and swear and subscribe to the truth of the following:

My name is Angela Drain, I am over the age of eighteen years old, and I am in all ways qualified to testify to the matters contained herein based on my personal knowledge.

Garcia Glen White is my older brother.

Glen always had a hard time with his school work, and my sister had to help him. He had trouble understanding the concepts and would cry easily when he got frustrated.

During summers, Glen and his friends played neighborhood football. They never had any pads or helmets, but played just as hard as they did during the school year.

Glen and his friends knew each other all of their lives. They had the same routine every day, so he didn't have to think too much about schedules. His life revolved around school and football.

When Glen was older, I got him a job working at Whataburger with me. He also worked at KFC.

Glen didn't ever memorize telephone numbers. All of his friends lived within a few blocks and if he wanted something he would just walk over and talk to them.

I swear the forgoing is true and correct.

Affiant (Signature)

Angela SWANSON

Affiant (~~Print~~ Name)

SWORN AND SUBSCRIBED TO before me, the undersigned notary public on this 18th day of August 20 24

NOTARY PUBLIC BY AND FOR THE STATE OF TEXAS

RODOLFO J. VARGAS
Notary Public, State of Texas
Comm. Expires 12-31-2027
Notary ID 10189841

My commission expires

APPENDIX "J"

AFFIDAVIT

STATE OF TEXAS

COUNTY OF HARRIS

ON THIS DAY, THE AFFIANT BELOW DID APPEAR BEFORE ME TO SWEAR AND SUBSCRIBE TO THE TRUTH OF THE FOLLOWING:

My name is Ray Manuel. I live in ~~Humble~~ Spring Texas. I am over eighteen and of sound mind. I first met Glenn in Elementary School. Glenn was one year ahead. My brother Tecumsah was in the same grade as Glenn and they both played defensive end.

Glenn was the kindest person I knew. When Glenn lived with my family, Glenn would walk my mother to the bus stop and then wait for her and walk her back home. Glenn would also meet her after she'd been out drinking and walk her home so that nobody messed with her. Glenn did more around the house than me and Tecumsah did. Glenn cleaned all the time. When my mom was on her death bed, she asked when she would see her son again. I thought she meant me at first, but she said she wanted to see Glenn.

Glenn was a good worker. He always did labor type jobs. He worked as a dishwasher at the Houston Club, worked for a car wash, and worked at Wendy's. When we was done high school, we got work at Clean America where they did window ~~washing.~~ REPAIR

Glenn got hurt on the job when no one was holding his ladder. Glenn was on a 40 ft. ladder and Mo Stevenson was supposed to be holding the bottom. I remembers that Glenn's head hit the pavement and he had several stitches on the right side of his head.

I do not recall if Glenn repeated any grades. We all had trouble picking up on things and I was probably in some of those special classes too. Glenn struggled in school and did not get good grades.

The Fleming and Wheatley coaches were really rough. Some coaches wouldn't hesitate to hit the players if they didn't follow instructions immediately or

sufficiently. The coaches encouraged players to be as rough and tough as possible. With the coaches' support, the team slogan became "knock their dick in the dirt."

On what were considered light days, the players did not wear helmets, but they still played like it was a game. We got our bells rung near every darn day in those days. In addition to football at school, Glenn and me played in a neighborhood league. When playing neighborhood games, we wore no protective gear. Sometimes the neighborhood games were rougher than the school games because of neighborhood rivalries. It wasn't uncommon for someone's finger or shoulder to get knocked out of socket during a neighborhood game. You just popped it back in and kept on going. I recalls Glenn getting knocked out during one football game. They had to carry him to the side. Once they'd looked him over they put him back in the game.

Glenn never had his own apartment. He always lived with somebody who would cook for him and pay bills and such. He lived with my family, a girlfriend, then with me when I was living on his own.

I was around Glenn when he was using drugs, but when my daughter was born I had to make changes. I told Glenn I didn't want my daughter around any negative influences and told Glenn he would have to make a choice. He chose the drugs, and we parted ways.

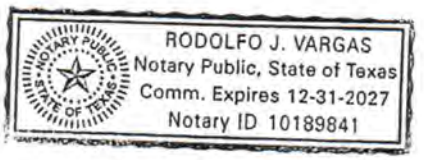
I have visited Glenn and we started corresponding many years ago. He has returned to that sweet guy I knew before he was on drugs. I had a heart attack a few years back and I have been diagnosed with prostate cancer. I got no reason to lie.

I swear this is all true and correct.

Affiant: Ronny Manuel

Date: 8/20/2024

Notary for Texas: Rodolfo J. Vargas



APPENDIX "K"

Affidavit of: Alfred White Jr.

State of: Texas

County of: Harris

On this day, the Affiant below did appear before me and swear and subscribe to the truth of the following:

My name is Alfred White Jr., I am over the age of eighteen years old, and I am in all ways qualified to testify to the matters contained herein based on my personal knowledge.

Garcia Glen White is my younger brother. I am the oldest child and Glen is six years younger than me.

When we were in Louisiana visiting our grandmother, Glen and some of the cousins were out shooting off firecrackers. Glen was near an old gas tank and I told him not to pop the firecrackers near there. Glen lit it anyway and when it didn't go off at first, he got close to see what was wrong. That's when it went off and the flame shot out of the tank and knocked him back. Glen had trouble thinking ahead of what the consequences might be to his behavior. He wouldn't see the consequences until after.

Glen never had a car or driver's license and never had his own apartment or home.

Glen stayed with my wife and I for about six months. I have been down the same road as him, and I got him into recovery twice. He really wanted to change, but it's so hard once the drugs have a hold of you.

I have been in contact with Glen the whole time he's been locked up. We write to each other and he writes to my kids. He tries to use his situation to teach them. Glen is a source of comfort for all my family. He doesn't worry about his own situation; he just tries to make us feel good.

I swear the forgoing is true and correct.

Affiant (Signature)

Alfred J White

Affiant (Print Name)

SWORN AND SUBSCRIBED TO before me, the undersigned notary public on this 21st day of August 2024

NOTARY PUBLIC BY AND FOR THE STATE OF TEXAS

My commission expires

RODOLFO J. VARGAS
Notary Public, State of Texas
Comm. Expires 12-31-2027
Notary ID 10189841

APPENDIX "L"

Affidavit of: Howard Gordon

State of: Texas

County of: Harris

On this day, the Affiant below did appear before me and swear and subscribe to the truth of the following:

My name is Howard Gordon, I am over the age of eighteen years old, and I am in all ways qualified to testify to the matters contained herein based on my personal knowledge.

I have known Garcia Glen White since we were six or seven years old. We went to the same school and were in the same grade from elementary through high school. He is my oldest friend. Glen stayed at my house all the time and we would sleep in the same bed. One of us with our feet one way and the other with his feet opposite.

Glen and I played football together at Fleming Middle School and Wheatley High School. They type of football we played was very competitive and very physical. Glen was a tough guy on the football field. Some people would shy away from contact, but not Glen. He was tough. We got hurt all the time playing football. Glen lost consciousness at least once on the football field, but the message we got was to suck it up and be a man. As we got older, I remember Glen complaining about headaches from all the hits he took in football.

In school, being there to play the game was the most important thing. If you got an F, you couldn't play the game on Friday. Coaches would do whatever they had to to make sure you would be eligible to play, and the teachers went along with it. Coaches would go to the players' teachers and ask what work needed to be done. The coaches would take all the work and then go find another student to complete it. Players were passed to the next class or the next grade all the time. It didn't matter what their grades were. That's just part of football. We gotta win not matter what. One time I got five F's and an F- on my report card and I still made the team and still went on to the next grade.

Glen really struggled in class. Everybody helped him with his homework. One of our friends used to do his homework for him and Glen would turn it in. It was all about being eligible to play.

Glen was a good enough player that the scouts who came to watch him play gave him a bus ticket and asked him to come play at Lubbock Christian College. I don't think he even lasted a whole semester. He came back home quick after he got hurt.

Glen was a big guy with dark skin and looked really intimidating, but he was the biggest whimp you'd ever find. Glen was easily influenced when we were growing up. If I said something was going to be that way, he would go along with it.

Glen would take any dare that someone gave him. Glen thought it was funny, but I remember telling him, that's not funny. You're going to hurt yourself.

Glen did all sorts of foolishness. As kids we used to go to the Fonde Rec Center to play basketball. They had a court where the professionals like Clyde Drexler all played and

another section for amateurs and the kids. We went one day and Glen just walked over to play with the pro's. We tried to tell him that wasn't allowed, but he went on over there anyway.

After Glen got hurt on the job, he didn't have any structure in his life. I could see him changing, and when I saw the guys he was hanging out with, I knew that no good would come of it. I talked to Glen about his addiction. I could tell he was embarrassed and ashamed, but he was like family to me and I wanted to help him. I told him that I would get him into the substance abuse program through my job by telling them we were half-brothers. Glen agreed, but it took a couple of days and when I went back to get him, he was with all of his so-called friends and they said he didn't want to talk to me. Glen was too easily influenced by them and didn't speak up for himself.

It's still hard for me to believe that Glen is in this situation. Until he got hooked on the drugs, there was nothing in him that would ever have done this. I still think about those days and talk about Glen all the time. My kids can't believe that they've never met someone who was such a big part of my life. I keep in contact with Glen even though it's hard for us. Talking about the old days is emotional, but Glen will always be family to me.

I swear the forgoing is true and correct.

Howard Gordon
Howard Gordon (Aug 22, 2024 20:16 CDT)
Affiant (Signature)

Affiant (Print Name)

SWORN AND SUBSCRIBED TO before me, the undersigned notary public on this 23rd day of August 2024

NOTARY PUBLIC BY AND FOR
THE STATE OF TEXAS

My commission expires

PATRICIA ANN NOWAK
My Notary ID # 126607126
Expires March 29, 2026

APPENDIX "M"

Affidavit of: Effron Williams

State of: Texas

County of: Harris

On this day, the Affiant below did appear before me and swear and subscribe to the truth of the following:

My name is Effron Williams, I am over the age of eighteen years old, and I am in all ways qualified to testify to the matters contained herein based on my personal knowledge.

Garcia Glen White is my cousin. I am only three months older than Glen and we grew up together.

I played football, but was on the JV team while Glen was on the Varsity team. Glen was a star in football at our school. In addition to playing football in school, we played neighborhood football. When we played neighborhood football, we played without any pads or helmets. But we played just as hard as if we were, it was hard knocks.

I remember as Glen got older, he would complain about headaches. It might have been from football, but he got other knocks too. When we were about twelve, and swimming in the neighborhood pool, Glen did a flip into the pool trying to show off. He hit the back of his head on the side of the pool and sunk to the bottom. I'm pretty sure he lost consciousness because we rushed in to get him and pull him out. He lay on the side of the pool for a good while before he was able to get up. Another time, we were at our grandparents' in Louisiana. Our uncle worked on cars and there were parts all over the property. We were setting off fireworks in a field where there was a gas tank that had been pulled out of a car. Glen set a firecracker off right at the mouth of the gas tank. It went off like a bomb and blew him backwards. I was standing behind him but it blew him all the way back behind me. I took off running and screaming, but I'm pretty sure it knocked him out 'cause my other cousins had to carry him to the house.

When Glen was with Shonda, his kids' mother, she was in charge of his money. She took any money Glen made. Shonda and her mother even got Glen's tax refund one year. He never could figure out how to get it back.

Glen was always a follower instead of a leader. There was a guy in the neighborhood who was a year younger than Glen who got Glen to do all sorts of stuff for him. Other guys in the neighborhood knew to avoid him and not get involved, but he had Glen to do a lot of stuff he shouldn't have been doing.

I swear the forgoing is true and correct.

Affiant (Signature)

EFFRON WILLIAMS

Affiant (Print Name)

of August 23 2024

NOTARY PUBLIC BY AND FOR
THE STATE OF TEXAS

My commission expires

RODOLFO J. VARGAS
Notary Public, State of Texas
Comm. Expires 12-31-2027
Notary ID 10189841

APPENDIX "N"

BRIAN BENKEN
Lawyer
1545 Heights Blvd., Suite 900
Houston, Texas 77008
(office) 713-223-4051
(fax) 713-223-4052
Brian@Benkenlaw.com

THE STATE OF TEXAS §

§

COUNTY OF HARRIS §

AFFIDAVIT OF BRIAN BENKEN

Before me, the undersigned authority, personally appeared Brian Benken, who, being by me duly sworn, deposed as follows:

"My name is Brian Benken. I was the appointed trial attorney for Mr. White in his capital case out of Harris County. We did not have sophisticated DNA testing at the time of Mr. White's case. I had given a prior affidavit in this case for a prior petition. I stand by that affidavit but I do not believe I fully addressed the issue of how I would have made use of the presence of a third party male's DNA at the tragic death scene in this case to help my client avoid death.

First, I would have insisted that the sample, now still available, be run through the Combined Offender DNA Information System [CODIS] for a potential match. Then I would have asked the HPD investigator Todd Miller if he had run to ground the other suspects who undoubtedly visited this apartment and crack den. Then I would have argued that the presence of another party made it clear that we simply did not know what had happened, and likely never would. I would have sought a plea to a lesser included offense at every opportunity to avoid the dangers of exactly what happened...a huge black man portrayed as a raving monster to a mostly white jury. That is exactly how the prosecutor portrayed him, and to find out years later that there was another party or even a potentially exculpatory witness to rebut Officer Miller or put my client's actions in perspective is frustrating.

Glenn has never gotten a fair shake on this matter. I believe that Miller tricked an apparently simple man into not insisting on a lawyer being present, and I fully believe that the existence of new evidence could have raised reasonable doubt about the death penalty. In our system, the jury must have it proven to them that the person merits death versus life in prison. Glenn has been a model prisoner and has proven he has never ever been a danger inside. He even saved an old inmate's life named Gary Jackson up on the old row back in the 90's before they moved to

Polunsky. This man should not be executed now when there is so much we do not know.

BRIAN BENKEN

SWORN TO AND SUBSCRIBED before me on the 21 day of AUGUST, 2024.

Notary Public in and for the State of Texas

My commission expires: 03-20-2026

CHRISTIAN WENDENBURG
Notary Public, State of Texas
Comm. Expires 03-20-2026
Notary ID 12413352-5

APPENDIX "O"

IDENTIGENE®
Peace of Mind Through DNA Testing

Monday, May 24, 2004

5615 Kirby
Suite 800
Houston, TX 77005
[redacted]
www.identigene.com

FORENSIC REPORT IDENTIGENE CASE NO: [redacted]

Referred by:

Houston Police Department
1200 Travis, 26th Floor
Houston, TX 77002
US

289-13351

Reference: [redacted]

The following items were analyzed:

Item Number	Description	Sample Type	Received From	Received On
138414	Exhibit 46 - beige sheet stain Z	Evidence Sample	In person from J.L. Netherland	1/16/2004
138415/138416	Exhibit 46 - beige sheet stain E	Evidence Sample	In person from J.L. Netherland	1/16/2004
138417/138423	Exhibit 46 - beige sheet stain G	Evidence Sample	In person from J.L. Netherland	1/16/2004
138418/138419	Exhibit 46 - beige sheet stain P	Evidence Sample	In person from J.L. Netherland	1/16/2004
138420/138421	Exhibit 46 - beige sheet stain V	Evidence Sample	In person from J.L. Netherland	1/16/2004
138422	Exhibit 84 - beige sheet cutting	Evidence Sample	In person from J.L. Netherland	1/16/2004
138424	Reference bloodstain labeled "Bernette Edwards"	Reference Sample	In person from J.W. Belk	12/5/2003
138425	Reference bloodstain labeled "Annette Edwards"	Reference Sample	In person from J.W. Belk	12/5/2003
138426	Reference bloodstain labeled "Garcia White"	Reference Sample	In person from J.W. Belk	12/5/2003

For the items listed above, DNA was extracted and amplified at thirteen polymorphic PCR loci (D3S1358, vWA, FGA, D8S1179, D21S11, D18S51, D5S818, D13S317, D7S820, D16S539, TH01, TPOX, and CSF1PO) and Amelogenin. The DNA profiles of the evidence samples were compared to the DNA profiles of the reference samples.

INTERPRETATION

The **reference bloodstain labeled "Bernette Edwards" [138424]** produced a partial female DNA profile with alleles identified in only one locus. No conclusions will be made concerning the inclusion or exclusion of this sample to the evidence samples.

The **reference bloodstain labeled "Annette Edwards" [138425]** and the **reference bloodstain labeled "Garcia White" [138426]** each produced a full DNA profile.

The same full single-source female DNA profile was obtained from **exhibit 46 - beige sheet stain Z [138414]** and **exhibit 84 - beige sheet cutting [138422]**. This profile matches the DNA profile obtained from the **reference bloodstain labeled "Annette Edwards" [138425]** at all thirteen STR loci tested. Therefore, Annette Edwards cannot be excluded as the DNA donor to **exhibit 46 - beige sheet stain Z [138414]** or **exhibit 84 - beige sheet cutting [138422]**. The frequency of this profile from an unrelated individual chosen at random from the population at large is less than 1 in 2.7 x 10^{15} in African American, Caucasian, and Hispanic populations (FBI database). This profile does not match the DNA profile obtained from the **reference bloodstain labeled "Garcia White" [138426]**. Therefore, Garcia White is excluded as the DNA donor to **exhibit 46 - beige sheet stain Z [138414]** and **exhibit 84 - beige sheet cutting [138422]**.

A male DNA profile, with four additional minor alleles whose source cannot be determined, was obtained from the **epithelial cell fraction of exhibit 46 - beige sheet stain E [138415]**. A male DNA profile, with three additional minor alleles whose source cannot be determined, was obtained from the **sperm cell fraction of exhibit 46 - beige sheet stain P [138419]**. The **reference bloodstain labeled "Garcia White" [138426]** is consistent with the major component of each of these two mixtures. Therefore, Garcia White cannot be excluded as the DNA donor to the major component of the mixture obtained from the **epithelial cell fraction of exhibit 46 - beige sheet stain E [138415]** or the major component of the mixture obtained from the **sperm cell fraction of exhibit 46 - beige sheet stain P [138419]**. The frequency of the major component of these two mixtures from an unrelated individual chosen at random from the population at large is less than 1 in 2.8 x 10^{17} in African American, Caucasian and Hispanic populations (FBI database). The major component of these two mixtures does not match the DNA profile obtained from the **reference bloodstain labeled "Annette Edwards" [138425]**. Therefore, Annette Edwards is excluded as the DNA donor to the major component of the mixture obtained from the **epithelial cell fraction of exhibit 46 - beige sheet stain E [138415]** and the major component of the mixture obtained from the **sperm cell fraction of exhibit 46 - beige sheet stain P [138419]**.

APPENDIX "P"

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Board Certification in Adult, Adolescent,
Addiction, and Forensic Psychiatry
E-mail silvermanpa@aol.com

1/11/02

The Honorable Debbie Strickland
180th District Court
The State of Texas
301 San Jacinto
Houston, TX 77002

PURPOSE OF THE REPORT

This examiner was requested by defense counsel to submit a report to the court that would provide information that might assist in its determination as to whether Garcia Glen White's death penalty conviction should be reconsidered. This report includes new research findings on the short- and long-term effects of intoxicants on antisocial behavior. The report also addresses the defendant's deliberateness during his commission of the violent offenses, the contribution of the defendant's compromised intellectual functioning (organicity) towards the antisocial behavior, and the likelihood of the defendant's committing criminal acts of violence in prison or the community.

FORENSIC CONCLUSIONS

After a review of available records, interviews, review of pertinent literature, and examination of the subject Mr. White, it is this examiner's conclusion that Mr. White:

1) Suffered from organic impairment that affected his judgement and made him more susceptible than normal to the effects of intoxicants.
2) Used cocaine over a period of time and at a rate that he would have suffered a loss of memory, decreased intellectual function, and significantly decreased his ability to engage in deliberate thought at the time of the offense for which he was convicted. These conclusions are based on a body of research that has been published since 1998 and not available since the time of his trail.
3) Based upon his life history, medical records, new research findings published since 1998 regarding the likely recidivism rate of capital and other offenders who are released into the community or monitored while incarcerated over long periods of time, and the removal of the affects of cocaine from his system, Mr. White's likelihood of committing criminal acts or violent acts is extremely low.

These summarized findings are explained in detail in the body of this report.

SOURCES OF INFORMATION UTILIZED IN THE PREPARATION OF THIS REPORT

1. Forensic interview of Garcia Glen White (referred to hereafter as "Mr. White") in the Death Row attorney's booth at the Allan P. Polunsky unit of the Texas Department of Corrections (TDC) in Livingston, Texas on 1/3/0
2. "Confession tape" of Mr. White. The tape contains three interviews conducted by an HPD detective while alone with Mr. White in the interview room. Affidavit of a family member
3. Interviews of Mr. White, family members, and individuals familiar with Mr. White by Pat McCann and Rosa Eliades, appellate counsel for the defendant; Rudy Vargas, investigator; and Seth W. Silverman, M.D.
4. Materials supplied by defense counsel, including court transcripts, affidavits, charging and court documents, medical records, school records, jail records, probation records, and psychosocial histories

INFORMATION NOT UTILIZED IN THE PREPARATION OF THIS REPORT THAT MIGHT BE HELPFUL

1. Additional records such as prison medical and disciplinary records (has required a court order)
2. Additional information such as medical, military, prison and work records (obtaining some of these records has required a court order)
3. Opportunity to interview staff and prison personnel to assess defendant's behavior while incarcerated (has required a court order)
4. Interviews with defendant in booth reserved for mental health evaluations on Death Row (has required a court order)
5. Opportunity to broaden literature research
6. Opportunity to interview defendant over longer period of time
7. Opportunity to interview previous defense counsel and District Attorneys (might require a court order)
8. Opportunity to interview detectives and other personnel who were involved in initial and subsequent investigations (has required a court order)

Please note that this examiner's obtaining the additional data might allow for a more verifiable violence risk assessment, assessment of Mr. White's pre-morbid (prior to using drugs and committing antisocial offenses) functioning, and assessment of his mental state at the time of the offenses (deliberateness).

CHEMICAL DEPENDENCY HISTORY

Mr. White and records are consistent in their report of weekend use of marijuana dating back to 1981-82 and the progressive use of crack cocaine starting in 1985 until the time of incarceration in 1995. The defendant indicated that except for a seven-week period of

sobriety in 1993, which occurred while he was treated for his chemical dependency disorder, he almost always smoked cocaine daily and rarely went as long as three days without using. He commented that he supported his habit, which usually cost about $300/day, by working and stealing. Probation records indicate that he has tested positive for cocaine metabolites

Mr. White reported that he sought treatment on one occasion at the Houston Recovery Campus in 1993. He stated that he presented for treatment on his own accord because of his fears that his drug usage was dangerous to his coworkers. During his employ at Clean America, he had almost severed the finger or hand of a coworker while pressure washing after he smoked crack cocaine.

Harris County jail records indicate that Mr. White experienced psychotic symptoms attributed to the effects of illicit drugs. Symptoms consistent with chronic schizophrenia were noted in the jail records.

CRIMINAL HISTORY

Mr. White was charged with and convicted of killing a woman and her two daughters in November 1989. He reportedly killed these three women under circumstances similar to those of an alleged October 1989 murder. In October 1989, he was implicated in another killing, which allegedly resulted from a misunderstanding about how much money Mr. White owed for a sexual act that had transpired between them. Mr. White supplied drugs as part of his payment for sex in the alleged October 1989 offense and in the November 1989 offense. In 1995 he allegedly killed an individual during a convenience store robbery. Mr. White reportedly used the money obtained in the robbery to buy drugs. On all three occasions, he was under the influence of crack cocaine.

Counsel has informed this examiner that the most compelling evidence that links Mr. White to the1 October of 1989 murder was obtained during Mr. White's "confession." Mr. White reported that he "confessed" to that crime despite knowing that he was innocent. He "confessed" because he was allegedly given instructions by the interviewing officers that he would not be held accountable for the murder. Mr. White stated, " I was told ... that it would go better for me if I helped them [the officers]." With some prodding and confronting by the officers, Mr. White identified someone else as the perpetrator of the offense.

Although the majority of the information related to the police during the "confession" was consistent with the physical and circumstantial information, Mr. White did not tell the truth when he reported that a co-conspirator was involved in the commission of the offense. Surprisingly, this examiner found all additional information furnished by the defendant to be consistent with other information reviewed for this report.

Probation records dated 4/25/98 note that Mr. White scored a 3 in Probation's prediction as to whether Mr. White would reoffend. The probation score results indicated that Mr.

White would be placed in a low risk category (minimum risk, 0-7; medium risk, 8-14; and maximum risk, 15+).

Counsel and Mr. White reported that he has maintained the highest level of behavioral responsibility and received no "write-ups" while incarcerated in the TDC. Please note that because this examiner did not have a court order, primary sources of information regarding Mr. White's behavior while incarcerated were not made available to this examiner. These sources include prison records and information obtained from interviews of prison personnel.

JUVENILE HISTORY

Mr. White had one disciplinary offense while attending high school; reportedly because he did not "dress out" for an activity in the gymnasium He also once used his mother's car without permission.

EDUCATION HISTORY

While completing high school, Mr. White worked and was a star football player. He obtained a grant or scholarship to Wheatley College in 1981. He did not return to college after his first year due to poor school performance. Of note, in high school Mr. White appeared to perform scholastically above his intellectual abilities, while his poor college performance was commiserate with his baseline, compromised intellectual functioning. He injured his knee during his first year at college and could no longer play football.

MEDICAL HISTORY

Mr. White and records indicated that he has suffered many traumatic brain injuries and at least two episodes of unconsciousness lasting from ½ hour to two to three hours.

PSYCHOLOGICAL TESTING

The results of tests administered by psychologists Robert Yoham and Denis Nelson in or about 1995 revealed that Mr. White to lack a personality disorder or psychotic illness and to have borderline to low average intellectual functioning, a history consistent with chemical dependency. A personality disorder can be defined as a long-term, maladaptive history of interpersonal relationships where the problems in the relationship are attributed by the patient to the other involved party. That is, the problems are always someone else's fault. Mr. White's test results are not consistent with those of an individual with an antisocial personality disorder, nor do the results demonstrate the presence of significant antisocial traits. Such results are almost unheard of in a criminal situation like the one discussed in this report and have never before been observed by this examiner. Differently stated, Mr. White's core personality is not antisocial. Only when he is under the influence of drugs does he exhibit antisocial behavior.

VOCATIONAL HISTORY

Mr. White reportedly worked consistently while he attended high school. His longest period of employment occurred at Clean America. The owner of Clean America noted that Mr. White was an excellent worker and that despite Mr. White's current situation, the owner would be glad to rehire him. While he was working, Mr. White's left wrist was crushed. This severe injury resulted in residual pain and disability. He attributes part of his difficulty in finding consistent employment to this industrial accident.

In the years prior to his incarceration, Mr. White's work ethic deteriorated when he started using drugs daily.

Mr. White allegedly was rejected from the military. He attributes the rejection to poor performance on the recruitment screening.

FAMILY HISTORY

Mr. White and his six siblings were raised in Houston by his mother. Except for a total of 3-4 years when she received subsistence, his mother allegedly supported the family. Mr. White met his father for the first time when he was age 18 and reported that he has enjoyed a close relationship with him since then. Records and Mr. White indicated that his father was gainfully self-employed as an automobile mechanic.

Substance abuse in the family, including his biological father, was reportedly limited to Mr. White's brother, who had been intermittently sober. Excluding the defendant, no family member has been allegedly involved with antisocial behavior, and all are gainfully employed. Mr. White described his mother endearingly and stated, "She taught us never to take anything off nobody (sic)."

Mr. White and counsel reported that his family members and friends write and visit him regularly and often. Mr. White and other sources of information revealed that he has supported his common law wife and his three children consistently since the time of their birth. This examiner was unable to reach his common law wife, DeShanta Flowers, to confirm or deny this information.

Mr. White and collateral information indicated that he has never been sexually or psychically abused.

MENTAL STATE EXAMINATION DURING THE INTERVIEW OF 1/3/02

Mr. White was interviewed in the attorney's booth of Death Row. A thick, transparent window separated the defendant from this examiner. The interview took place by telephone.

The defendant's mental state was consistent with that of a non-psychotic individual with limited intellectual functioning. He appeared resigned, sad, and withdrawn. He answered

questions designed to elicit information about psychotic or paranoid symptoms. In his answers, he all but denied ever experiencing such symptoms. Mr. White stated he "didn't believe it ... wasn't there ... can't say."

Psychotic symptoms were recorded in Harris County Jail records.

CLINICAL ASSESSMENT

Mr. White has a strong history of a Chemical Dependency Disorder, probably congenital brain organicity as evidenced by his compromised intellectual functioning, and a history of significant head trauma. Tests and interviews indicate no antisocial personality disorder or traits when he is not intoxicated or subject to the longer term (months) influence of elicit drugs

Some data suggest that amphetamines produce long-term changes in brain function, which might result in the increased relapse rates in know abusers. Mr. White's extensive and chronic drug abuse, especially crack cocaine, might have been a result of such long-term changes. That is, some of Mr. White's later usage of illicit substances might have been caused by the side effects of earlier usage, even if he had been sober for weeks to months.

Although not specifically identified in the literature reviewed for this report, clearly identifiable stressors are present. A major example is the defendant' self-reported taking on at age eighteen of the primary support for his common law wife and his children. Other stressors are his documented disabling injury and compromised intellectual functioning. These two stressors have been observed by this examiner to predispose some individuals to drug abuse that is amenable to intervention.

REVIEW OF LITERATURE AS IT APPLIES TO MR. WHITE'S LIKLIHOOD OF COMMITING FURTURE VIOLENT ACTS

Precursors of future violent behavior have been demonstrated in the majority of individuals who have suffered from

1. Severe physical or sexual abuse (not applicable to Mr. White)
2. Individual impairment (applicable)
3. Post Traumatic Stress Disorder (not applicable to Mr. White)
4. Severe depression (not applicable to Mr. White)
5. Traumatic Brain Injury (applicable)
6. Community isolation and violence (applicable) Seth—where is community isolation indicated earlier in this report?
7. Institutional failure (not applicable)

If applied to Mr. White's behavior and history, symptoms 2, 5, and 6 would place him in a low risk category to commit future violent behaviors.

In the past five years, a great deal of research has addressed the prediction of violent offenses perpetrated by prior offenders. The research has resulted in the creation of tests that attempt to predict violence. These tests include, among others, the Violent Risk Assessment Guide (VRAG), the Sex Offender Risk Appraisal Guide (SORAG), the Courmier-Lang System for Quantifying Criminal History, and the Iterative Classification Tree (ICT). The most compelling data that validate these tests were not available at the time of trial and have been published since 1998.

In this examiner's opinion, most of these tests would predict that Mr. White would be at a low risk to reoffend.

RECOMMENDATIONS AND SUPPLEMENTAL LITERATURE REVIEW

This examiner recommends that Mr. White be treated for chemical dependency and monitored for relapses as discussed below under *Treatment of addiction*. The probability of success is high because he lacks three negative characteristics: the predictors of institutional aggression, the early onset of juvenile delinquent behavior, and family deviance and disruption experienced before age 11. Factors that indicate the possible success of his rehabilitation include the late onset of drug usage, his forthrightness with this examiner, and his demonstrated work ethic and family support. Statistical studies support the unlikelihood of his committing future violent acts. All of these topics are discussed below.

Treatment of addiction

The daily use of crack cocaine, as was Mr. White's self-admitted habit, is associated with the commission of more illicit activity, especially violence.

Conversely, if Mr. White maintained sobriety or even decreased his usage to less frequently than daily intoxication, his likelihood of committing future violent acts would decrease significantly.

A literature review revealed that indicate that the effect of intoxicants, specifically stimulants such as cocaine, can irreversibly compromise memory. The effects of these drugs have been demonstrated conclusively to contribute to the development of significant antisocial violent behavior. Individuals who use these drugs have been shown to suffer the disinhibiting or aggravating influences after maintaining sobriety for months.

On the other hand, recent research indicates that the diagnosis and treatment of cocaine addiction has become more accepted and successful. Within therapeutic communities, treatment has been shown to result in complete abstinence or significant reduction in the usage of intoxicants by two-thirds of patients. Successfully treated patients are arrested less frequently than their baseline. and are believed to commit significantly fewer antisocial acts when compared to their baseline rates. Boot camp has also been demonstrated to be an effective treatment modality.

Moreover, successfully treated, criminally convicted addicts have been shown to improve their psychosocial functioning and employment histories.

Please note that Mr. White has been treated only once for chemical dependency. His treatment met with limited success. Experience has demonstrated that the fewer treatments a chemically dependent individual has received, the more likely it is that the next treatment will work. Thus, if Mr. White were treated again, he might succeed at maintaining sobriety.

In addition, the likelihood of Mr. White's committing future violent acts could be decreased even further if

1. His behavior could be monitored and interventions made to prevent progression to violence. This modality is well documented in the literature regarding the treatment of chemical dependency and is termed "relapse prevention." In the majority of cases, the prodromal behavior that resulted in a violent act occurs over a period of weeks to months.
2. His behavior could be monitored through frequent urine samples. Should Mr. White relapse, the metabolites of cocaine would be readily detectable in his urine for days. Detection of the metabolites would allow for an early diagnosis of relapse. Early diagnosis would facilitate active intervention that might prevent further usage and the associated incidence of violent acts.
3. Utilizing the monitors named in numbers 1 and 2 should result in an even more significant decrease in the likelihood of Mr. White's committing future violent acts than if either monitor were utilized alone.

Predictors of institutional aggression
Recent research indicates that anger, impulsivity, antisocial underpinnings, and personality style are strong predictors of institutional aggression. These factors outweigh ethnicity or previous violent behavior committed by the prisoner.

Weighed against these research findings, Mr. White's reported exemplary behavior while incarcerated and not intoxicated indicates that the likelihood of his committing future institutional violence is small.

Early onset of juvenile delinquent behavior
The early onset of juvenile delinquent behavior is a strong, positive predictor of future criminal behavior. Mr. White's adolescent history, on the other hand, is characterized by two relatively minor events: not "dressing out" for gym and borrowing his mother's car without permission. By inference, Mr. White's lack of significant, early onset juvenile delinquent behavior would place him at low risk to commit future violent acts.

Family deviance
Family deviance and disruption experienced before age 11 have been significantly associated with crime severity. Mr. White's family history of a consistent income, relatively stable home environment relatively free of drugs and alcohol, and no antisocial

behavior reported in family members decreases the likelihood of his committing future violent acts.

Late onset of drug usage
Late onset drug usage has been shown to more amenable to treatment than early onset usage. Mr. White's self-reported use of drugs starting after high school places him in a group of individuals who might be more successfully treated than those who start taking \drugs at younger ages.

Forthrightness
During the interview with this examiner, Mr. White demonstrated an unexpected level of honesty and reliability. This interviewer believes that Mr. White's forthrightness is an unusual and favorable indicator of his ability to be rehabilitated.

Work ethic and family support
Mr. White demonstrated a responsible work ethic in high school and afterward at Clean America until his wrist injury and drug use prevailed. He has also showed a strong commitment to supporting his common law wife and three children. His motivation is a mitigating risk factor. If rehabilitated, he might return to work.

In addition, his favorable family history and the ongoing support of his family are unusual in murderers and could contribute to his ability to be rehabilitated.

Statistical studies of recidivism
The studies illustrated in the appendix to this report clearly indicate that

1. Capitol murders that are released into the community are at a decreased likelihood to reoffend when compared to non-capitol murderers and individuals who are placed in the prison general population. See Figure 1.
2. Aging significantly decreases the likelihood that individuals will commit future antisocial acts either in the community or while imprisoned. This means that it less likely that Mr. White would reoffend if he were released today, six years after committing the alleged offense, and the risk would decrease even further if he were kept in prison longer and then released. See Figures 2, 3, and 4.
3. There are fewer serious, violent, prison rule violations among death row releasees than among other prisoners. See Figure 5.

The majority of the research reviewed for this report indicates that should Mr. White remain sober, the likelihood of his committing future violent acts would be greatly decreased when compared to his baseline. The baseline is other convicts convicted of capitol or less than capitol crimes.

DELIBERATENESS

Mr. White's ability to deliberate or engage in deliberative thought at the time of this offense would have been seriously compromised due to the high likelihood of organic impairment and decreased thought function caused by his heavy cocaine use.

FUTURE DANGEROUSNESS

The fact that he is older and the decreased likelihood that he would use drugs, if his behavior and urine were monitored, would in all medical probability, decrease the likelihood that he would commit a violent act.

In addition, without the use of intoxicants, the likelihood of Mr. White committing future violent acts would be decreased even further because he would not be subject to the long term effect of intoxicants as well as the short term effects.

CONTRIBUTION OF ORGANICITY TOWARD MR. WHITE'S CRIMINAL BEHAVIOR

It is the clinical experience of this examiner, confirmed by some research findings not available until the past few years, that Mr. White's compromised intellectual functioning increases his risk of being effected by illicit substances. He would have been more likely to be effected than a person without such impairment. Whether the compromised functioning was present at birth or caused by traumatic brain injuries is irrelevant.

FORENSIC CAVEATS AND CONCLUSIONS

Please note that violent behavior predictors are reliable for groups of individuals who share similar histories. The prediction of behavior for any one individual is either unreliable or fraught many false positives. Otherwise stated, the prediction of violent behavior for any individual is highly inaccurate if cognitive tests are the sole source of the prediction. The examination of Mr. White by this examiner relied, in part, on cognitive tests.

The likelihood that Mr. White will reoffend and commit a serious crime or violent act, is in all medical probability, significant less likely than the rate at which he committed violent acts prior to his incarceration. Moreover, the longer he remains in prison, the less likely it is that he will commit future violent acts and present an ongoing threat. He is also less likely than other released or incarcerated convicts to commit future violent acts.

These medically based opinions apply if the factors identified in this report are accurate, if this examiner's clinical experiences are applicable to Mr. White, and if the interventions suggested by this examiner are instituted.

Please note that due to constraints placed on this examiner by the court, the majority of information presented in this report concentrates on mitigating factors and excludes

aggravating factors. Should the court decide that a hearing or more information would be helpful in its determination of the likelihood that Mr. White will commit future dangerous acts and present an ongoing threat to society, a more complete review of the literature and additional clinical data will be supplied.

It is the hope of this examiner that the information contained in this report assists the court in its determination of Mr. White's future dangerous behavior, his ability to deliberate at the time of his offense, and the potential mitigation offered by the organic damage to his brain functions caused by prolonged cocaine use.

This examiner defers to the court for the ultimate answer to the likelihood of the defendant's committing criminal acts of violence that would constitute a continuing threat to society if he were released into the community, and to the determination of the legal consequences of these facts.

Please call 713-528-1188 with questions regarding this report.

Seth W. Silverman, M.D.

APPENDIX

All illustrations are from "Integrating Base Rate Data in Violence Risk Assessments in Capital Sentencing" by Mark D. Cunningham, Ph.D., and Thomas J. Reidy, Ph.D. Their article was published in *Behavioral Sciences and the Law*, Vol. 16, pages 71-95, (1998). Permission to reproduce the illustrations has been requested.

The illustrations have been renumbered below to correspond to the order in which they are referred to in this examiner's report.

- Figure 1. Base rates of parole recidivism of capitol murderers, murderers, and general population inmates (Cunningham and Reidy, p.81)
- Figure 2. Community prevalence of violent behavior by age (Cunningham and Reidy, p. 85)
- Figure 3. Age distribution of criminal offenders in the general population of the United States 1977 (Cunningham and Reidy, p. 84)
- Figure 4. Incidence of prison infractions in NY, 1975, by age (Cunningham and Reidy, p. 86)
- Figure 5. Reported serious violent prison rule violations (Cunningham and Reidy, p. 78)

FURTHER, AFFIANT SAYETH NAUGHT.

SETH W. SILVERMAN, M.D.

SWORN TO AND SUBSCRIBED BEFORE ME THIS 11th DAY OF JANUARY, 2002.

NOTARY PUBLIC

X Personally known to me, or
___ Produced identification:

Nicole M Cotton
My Commission CC785385
Expires October 25, 2002

Type of Identification Produced:

N/A

Figure 1. Base rates of parole recidivism of capitol murderers, murderers, and general population inmates

Study	Sample	Follow-up Interval	N	Recidivism Rate	New Murder Rate
Capitol Murderers					
Marquart & Sorensen (1989)	National Sample	1972–87	188	.20-prison/.10-new felony	.005
Bedau (1964)	NJ	1907–60	31	.03 new felony	0
Bedau (1965)	OR	1903–64	15	.20 return to prison	0
Vito & Wilson (1988)	KY	1972–85	17	.29 return to prison, 6 jailed	0
Wagner (1988)	TX	1924–88	84	.08 new felony	0
Stanton (1969)	NY	1930–61	63	.05 return to prison	0
Non-Capitol Murderers					
Donnelly & Bala (1984)	NY	1977, 5 yr post-release	66	.27 return to prison	—
Bedau (1982)	12 States	1900–76, 4–53 yr post-release	2646	.03 new felonies	.006
Bedau (1982)	Nationwide	1968–69, 74–75, 1st yr of release	11,404	.015 major violations	.003
Bedau (1982)	Nationwide	males, 1st yr of release	6094	.01 new felony	.002
		females, 1st yr of release	756	.004 new felony	.001
Stanton (1969)	NY	1945–61	514	.22-prison/.03-new felony	.004
Beck & Shipley (1989)	11 States	1983, 3 yr post-release	506	.21 return to prison	.07 rearrested
Eisenberg (1991)	TX	1986, 5 yr post-release	56	.45-return to prison	—
Perkins (1994)	29 States	parole discharge 1992	5371	.33 return to prison	—
Canestrini (1996)	NY	1985–91, 3 yr post-release	5054	.24 return to prison	.024
General Prison Population					
Beck & Shipley (1989)	11 States	1983, 3 yr post-release	16,355	41.4 return to prison	.03 rearrested
Perkins (1994)	29 States	parole discharge 1992	209,995	.46 return to prison	—
Eisenberg (1991)	TX	1986, 5 yr post-release	1539	.48 return to prison	—
Canestrini (1996)	NY	1985–91, 3 yr post-release	121,555	.44 return to prison	.004

Figure 2. Community prevalence of violent behavior by age

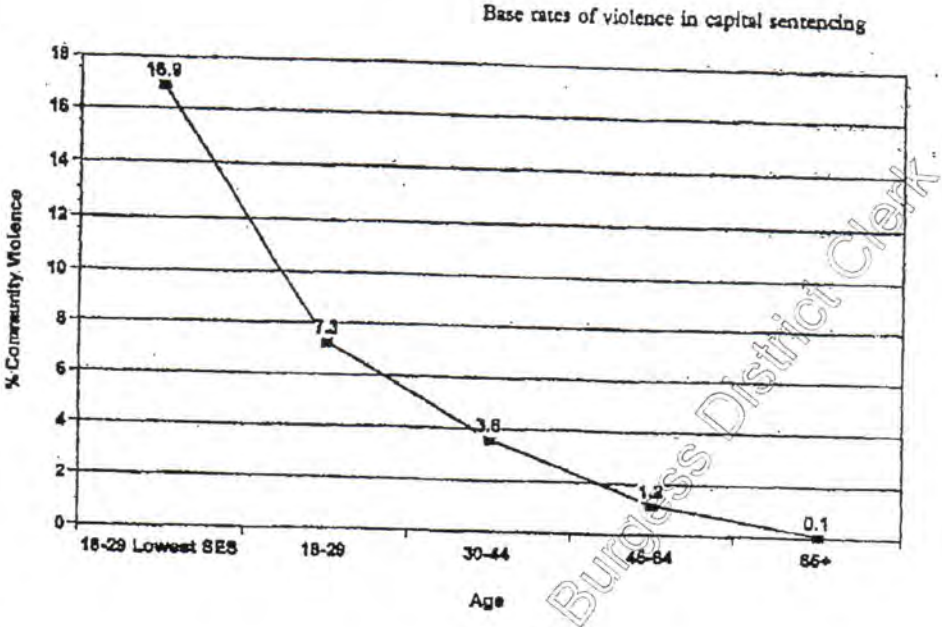


Figure 3. Age distribution of criminal offenders in the general population of the United States 1977

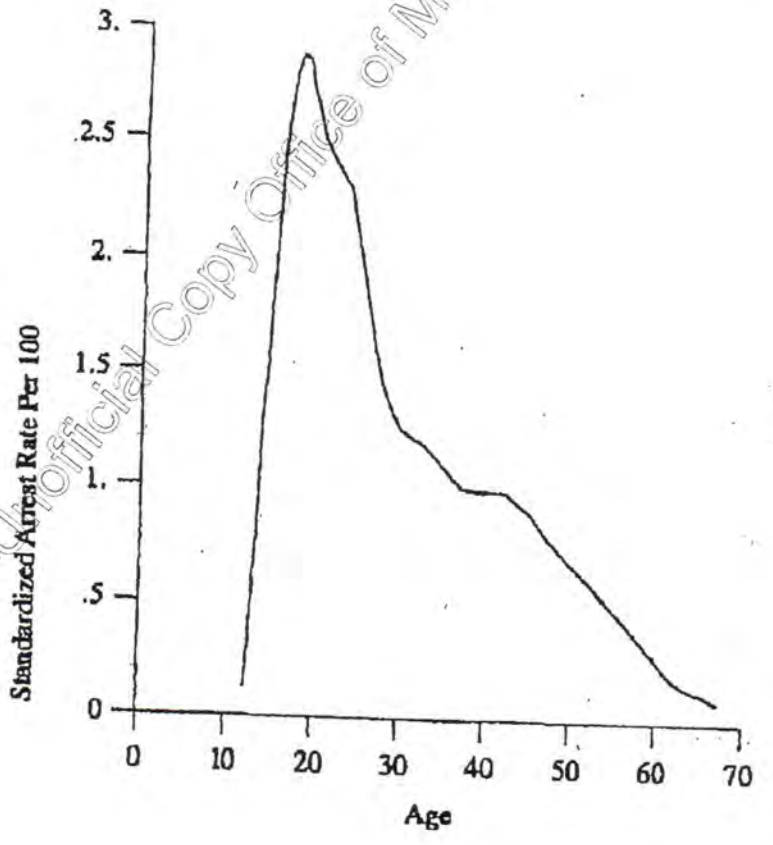


Figure 4. Incidence of prison infractions in New York, 1975, by age

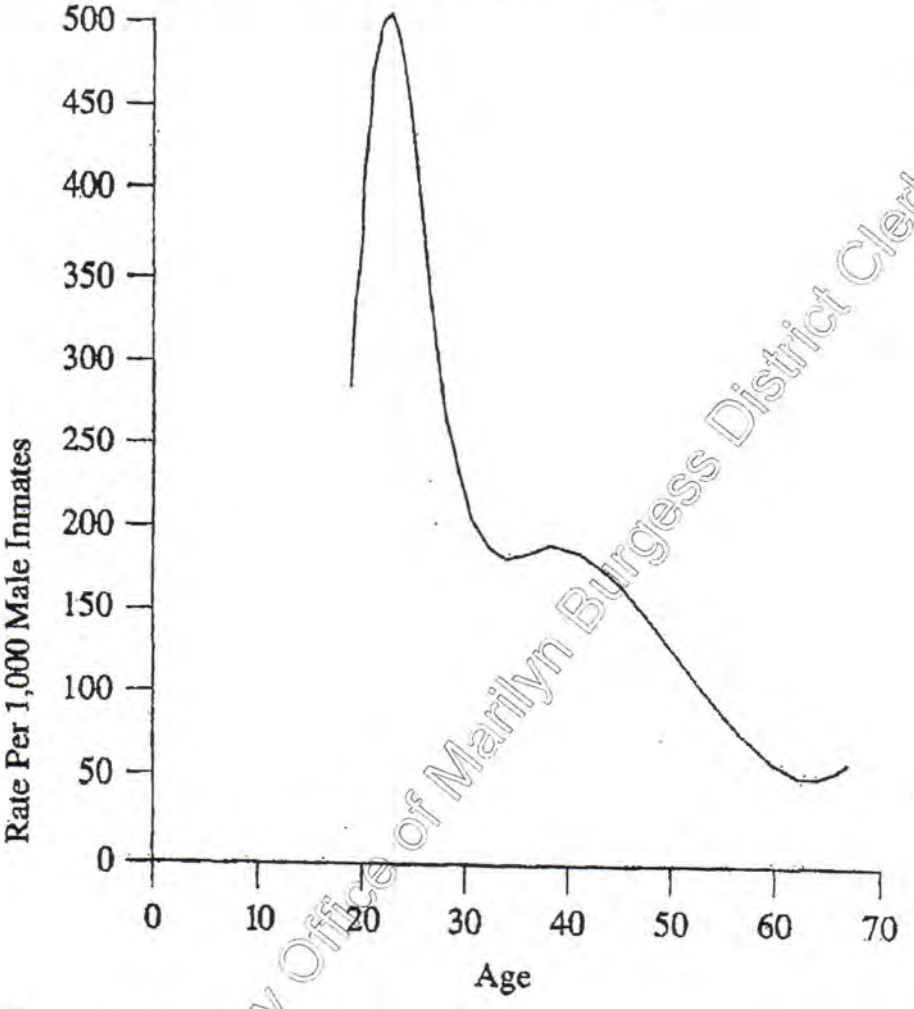
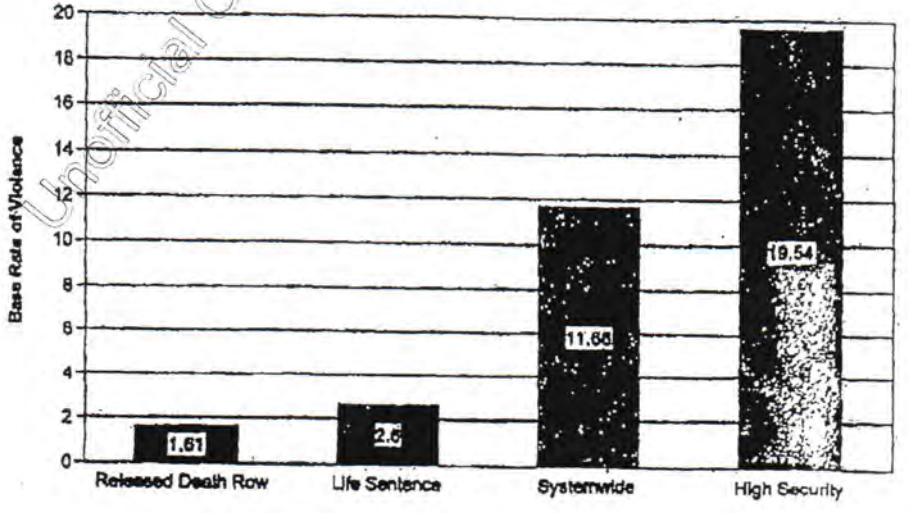


Figure 5. Reported serious violent prison rule violations



SETH W. SILVERMAN, M.D., P.A.
BOARD CERTIFIED IN FORENSIC, ADDICTION,
ADOLESCENT AND ADULT PSYCHIATRY

4/27/02

The Honorable John D. Rainey
515 Rusk
Houston, TX 77002

PURPOSE OF THE REPORT

This examiner was requested by defense counsel to submit a report to the court that would provide information that might assist in its determination as to whether Garcia Glen White's death penalty conviction should be reversed. This report includes new research findings on the short- and long-term effects of intoxicants on antisocial behavior. The report also addresses the defendant's deliberateness during his commission of the violent offenses, the contribution of the defendant's compromised intellectual functioning (organicity) towards the antisocial behavior, and the likelihood of the defendant's committing criminal acts of violence in prison or the community.

FORENSIC CONCLUSIONS

After a review of available records, interviews, review of pertinent literature, and examination of the subject Mr. White, it is this examiner's conclusion that Mr. White:

1) suffered from an organic impairment that affected his judgement and made him more susceptible than normal to the effects of intoxicants.
2) used cocaine over a period of time and at a rate that he would have suffered a loss of memory, decreased intellectual function, and significantly decreased his ability to engage in deliberate thought at the time of the offense for which he was convicted. These conclusions are based on a body of research that has been published since 1998 and not available since the time of his trial.
3) based upon his life history, medical records, new research findings published since 1998 regarding the likely recidivism rate of capital and other offenders who are released into the community or monitored while incarcerated over long periods of time, and the removal of the affects of cocaine from his system, Mr. White's likelihood of committing future criminal or violent acts is extremely low, particularly, if he were to remain drug free.

These summarized findings are explained in detail in the body of this report.

3614 STONEHAM STREET, HOUSTON, TEXAS 77047
TELEPHONE: 713.528.1188 FACSIMILE: 713.522.3764
EMAIL: SILVERMANPA@AOL.COM

SOURCES OF INFORMATION UTILIZED IN THE PREPARATION OF THIS REPORT

1. Forensic interview of Garcia Glen White (referred to hereafter as "Mr. White") in the Death Row attorney's booth at the Allan P. Polunsky unit of the Texas Department of Corrections (TDC) in Livingston, Texas on 1/3/0
2. "Confession tape" of Mr. White. The tape contains three interviews of Mr. White conducted by an HPD detective
3. Interviews of DeShanta Flowers (Mr. White's common law wife and mother of his three children), Pat McCann and Rosa Eliades, appellate counsel for the defendant and Rudy Vargas, investigator
4. Materials supplied by defense counsel, including court transcripts, affidavits, charging and court documents, medical records, school records, jail records, probation records, and psychosocial histories
5. Literature search pertaining to the short- and long-term effects of cocaine on mental status and behavior, violence prediction in criminal offenders and treatment of addiction in criminal offenders

INFORMATION NOT UTILIZED IN THE PREPARATION OF THIS REPORT THAT MIGHT BE HELPFUL

1. Additional records such as prison medical and disciplinary records prior to his incarceration on Death Row (has required a court order)
2. Additional information such as military records (when he allegedly rejected from the military due to his low test grades), employment records and work records (obtaining some of these records has required a court order)
3. Opportunity to interview staff and prison personnel to assess defendant's behavior while incarcerated (has required a court order)
4. Interviews with defendant in booth reserved for mental health evaluations on Death Row (has required a court order)
5. Opportunity to interview previous defense counsel and District Attorneys (might require a court order)
6. Opportunity to interview detectives and other personnel who were involved in initial and subsequent investigations (has required a court order)

Please note that obtaining the additional data might allow for a more accurate assessment of Mr. White's pre-morbid functioning (prior to using drugs and prior to committing antisocial offenses), assessment of his mental state at the time of the offenses (deliberateness) and prediction of future violent behaviors.

CHEMICAL DEPENDENCY HISTORY

Mr. White and records are consistent in their report of his weekend use of marijuana dating back to 1981-82 and his progressive use of crack cocaine starting in 1985 until the time of his incarceration in 1995. The defendant indicated that except for a seven-week period of sobriety in 1993, which occurred while he was treated for his chemical dependency disorder, he almost always smoked cocaine daily and rarely went as long as three days without using. He commented that he supported his habit, which usually cost

about $300/day, by working and stealing. Probation records indicate that he has tested positive for cocaine metabolites

Mr. White reported that he sought treatment on one occasion at the Houston Recovery Campus in 1993. He stated that he presented for treatment on his own accord because of his fears that his drug usage was dangerous to his coworkers. He reported that on one occasion, he used the pressure washer at work after he smoked cocaine and almost severed the finger or hand of a coworker. It was this incident, according to Mr. White, that prompted him to seek treatment.

Harris County jail records indicated that Mr. White experienced psychotic symptoms while intoxicated which were attributed to the effects of illicit drugs on his cognition. Symptoms consistent with chronic schizophrenia were also noted in the jail records.

CRIMINAL HISTORY

Mr. White was charged with and convicted of killing a woman and her two daughters in November 1989. He reportedly killed these three women under circumstances similar to those of an alleged October 1989 murder. In October 1989, he was implicated in another killing, which allegedly resulted from a misunderstanding about how much money Mr. White owed for a sexual act that had transpired between them. Mr. White supplied drugs as part of his payment for sex in the alleged October 1989 offense and in the November 1989 offense. In 1995, he allegedly killed an individual during a convenience store robbery. Mr. White reportedly used the money obtained in the robbery to buy drugs. On all three occasions, he was allegedly under the influence of crack cocaine.

Counsel informed this examiner that the most compelling evidence that linked Mr. White to the October 1989 murder was obtained during Mr. White's confession. Mr. White reported that he confessed to that crime despite knowing that he was innocent. He "confessed" because he was allegedly given instructions by the interviewing officers that he would not be held accountable for the murder. Mr. White stated, " I was told ... that it would go better for me if I helped them [the officers]."

Probation records dated 4/25/98 indicated that Mr. White scored a 3 in a test designed to predict whether he would reoffend. The probation score results placed him in a low risk category (minimum risk, 0-7; medium risk, 8-14; and maximum risk, 15+).

Counsel and Mr. White reported that he has maintained the highest level of behavioral responsibility and received no "write-ups" while incarcerated in the TDC. Additional sources of information regarding Mr. White's prison behavior including prison records and interview of prison personnel were not available to this interviewer. *How long has he been incarcerated?*

JUVENILE HISTORY

Records, Mr. White's mother and the defendant indicated that Mr. White had one disciplinary offense while attending high school: he did not "dress out" for an activity in the gymnasium. He reportedly used his mother's car without permission on one occasion.

EDUCATION HISTORY

During high school Mr. White worked and played football. He obtained a grant or scholarship to Wheatley College in 1981. He injured his knee during his first year at college and could no longer play football. He did not return to college after his first year due to poor grades. Of note, in high school Mr. White appeared to perform scholastically above his intellectual abilities, while his poor college performance was commiserate with his baseline, compromised intellectual functioning.

MEDICAL HISTORY

Witnesses and records are consistent with Mr. White's report that he that he suffered many traumatic brain injuries and at least two episodes of unconsciousness lasting from one-half to two to three hours. He reported no history of physical or sexual abuse.

PSYCHOLOGICAL TESTING

The results of tests administered by psychologists Robert Yoham and Denis Nelson in or about 1995 revealed that Mr. White had borderline to low average intellectual functioning, a history of chemical dependency and did not suffer from an Antisocial Personality Disorder (ASPD).

Mr. White's test results are statistically unusual for a defendant when compared to other defendants who have similar criminal histories. The test results were obtained when he was incarcerated and probably sober for months. He has obviously demonstrated antisocial behavior, however, considering the fact that he tested negative for this disorder, the most logical explanation to explain the discrepancy is that that his antisocial or aggressive behavior surfaced only when he was intoxicated: without drugs, he is not likely to become aggressive. This hypothesis is substantiated by Mr. White's model behavior during his ___ years of incarceration when he has probably not used cocaine and his lack of antisocial behavior prior to using drugs.

VOCATIONAL HISTORY

Mr. White reportedly worked throughout high school. His longest period of employment was for three years at Clean America. The owner of Clean America noted that Mr. White was an excellent worker and would be glad to rehire him in spite of his current situation. While he was working at Clean America, Mr. White's left wrist was crushed. The injury resulted in residual pain and disability. He attributed part of his difficulty in finding consistent employment after working at Clean America to the industrial accident.

Mr. White reported that in the years prior to his incarceration, his work ethic deteriorated when he started using drugs daily.

He indicated that he was rejected from the military. He attributed the rejection to poor performance on the recruitment screening.

FAMILY HISTORY

Mr. White was raised in Houston by his mother, as were his six siblings. Except for a total of 3-4 years when she received government assistance, his mother reportedly worked. Mr. White met his father for the first time when he was age 18 and reported that he has enjoyed a close relationship with him since then. Records and Mr. White indicated that his father was gainfully self-employed as an automobile mechanic.

The only family member reported to abuse substances, other than the defendant, was his brother. There are no reports of antisocial behavior in the family other than Mr. White's.

Mr. White revealed that he had supported his common-law wife and his three children by that union. Ms. DeShanta Flowers confirmed Mr. White's report. She indicated that Mr. White lived with her and their dependent children (currently ages 9,10 and 19) from 1989 until the time of Mr. White's incarceration in 1995. She added that during that time, Mr. White was the sole financial support of the family and was a devoted father who was actively involved with her and child rearing. Ms. Flowers denied any awareness of Mr. White's criminal behaviors during that time.

MENTAL STATE EXAMINATION DURING THE INTERVIEW OF 1/3/02

Mr. White was interviewed in the attorney's booth of Death Row. A thick, transparent window separated the defendant from this examiner. The interview took place by telephone.

The defendant's mental state was consistent with that of a non-psychotic individual with limited intellectual functioning. He appeared resigned, sad and withdrawn. He denied or minimized the accuracy of the report of psychotic symptoms that were contained in the Harris County Jail records. When asked to clarify some of the statements that clearly indicated that he was hallucinating in jail he stated that he, "...didn't believe it ... wasn't there ... can't say." His ability to store, recall and abstract information was impaired and consistent with an individual with low average intellectual functioning. He reported that at times, his thoughts would somehow be transmitted by the radio and that he was uncertain whether individuals could control his mind.

CLINICAL ASSESSMENT

Mr. White has a strong history of a Chemical Dependency Disorder, compromised intellectual functioning, possibly a psychotic disorder and a history of significant head trauma and loss of consciousness. Tests and interviews revealed that he has no antisocial personality traits when he is not intoxicated.

RELAPSE RESEARCH

Some data suggests that after cocaine users stop using; the cognitive effects of the drug can produce short- term (weeks) and longer-term effects (months) on brain functioning. Memory deficits may persist for months and may become irreversible. Cocaine abusers have impairments in visuospatial abilities, concentration and disruptions in neural

pathways. These factors have recently been demonstrated to be associated with an increased risk for cocaine users to relapse. even when they have been sober for months.

FUTURE VIOLENT ACTS RESEARCH

Research into the prediction of violence by criminal offenders has resulted in a number of predictive tools or tests. These tests include, among others, the Violent Risk Assessment Guide (VRAG), the Sex Offender Risk Appraisal Guide (SORAG), the Courmier-Lang System for Quantifying Criminal History, and the Iterative Classification Tree (ICT). The most compelling data that validate these tests were not available at the time of trial and have been published since 1998.

In this examiner's opinion, most of these tests would predict that Mr. White would be at a low to very low risk to reoffend.

RECOMMENDATIONS AND SUPPLEMENTAL LITERATURE REVIEW

This examiner recommends that Mr. White be treated for chemical dependency and monitored for relapses as discussed below under *Treatment of addiction*. The probability of success is higher because he lacks three negative characteristics: the predictors of institutional aggression, the early onset of juvenile delinquent behavior, and family deviance and disruption experienced before age 11.

Factors that make successful rehabilitation more likely include the late onset of the defendant's drug usage. The accuracy of his report to this examiner was consistent with information contained in his records. Statistical studies strongly support the unlikelihood of his committing future violent acts if her were to maintain sobriety. All of these topics are discussed below.

Treatment of addiction

The frequent use of crack cocaine, consistent with Mr. White's records and self-report, is associated with the commission of more illicit activity, especially violence.

The diagnosis and treatment of cocaine addiction has become more successful. Treatment in therapeutic communities has resulted in complete abstinence or a significant reduction in the usage of intoxicants by two-thirds of patients. Successfully treated patients are arrested less frequently when compared to their baseline rates. Boot camp has also been demonstrated to be an effective treatment modality.

Moreover, successfully treated, criminally convicted addicts have been shown to improve their psychosocial functioning and employment histories.

As Mr. White's history is consistent with an individual who does not commit aggressive acts unless under the influence of cocaine, should he maintain sobriety, the likelihood that he will commit future violent acts would be significantly decreased, when compared to his baseline rate of aggressive behavior.

In addition, the likelihood of Mr. White's committing future violent acts could be decreased even further if:

1. his behavior could be monitored and interventions made to prevent progression to violence. This modality is well documented in the literature regarding the treatment of chemical dependency and is termed "relapse prevention." In the majority of cases, the prodromal behavior that resulted in a violent act occurs over a period of weeks to months.
2. his urine could be tested to monitor the use of cocaine. Should Mr. White relapse, the metabolites of cocaine would be detectable in his urine for days. Detection of the metabolites would allow for an early diagnosis of relapse. Early diagnosis would facilitate active intervention that might prevent further usage and its influence on Mr. White's behavior

Utilizing the monitors named in the preceding points should result in an even more significant decrease in the likelihood of Mr. White's committing future violent acts than if either monitor were utilized alone.

Predictors of institutional aggression

Research indicates that Mr. White's reported lack of offensive behavior while incarcerated, decreases the likelihood that he will commit future institutional violence.

Early onset of juvenile delinquent behavior

The early onset of juvenile delinquent behavior is a strong, positive predictor of future criminal behavior. In fact the diagnosis of an ASPD cannot be made unless the individuals manifests significant aggressive behavior prior the age 15. Mr. White's adolescent history, on the other hand, is characterized by two relatively minor events: not "dressing out" for gym and borrowing his mother's car without permission. By inference, Mr. White's lack of significant, early onset juvenile delinquent behavior would place him at low risk to commit future violent acts.

Family deviance

Family deviance and disruption experienced before age 11 have been significantly associated with crime severity. Mr. White's family history of a consistent income, relatively stable home environment relatively free of drugs and alcohol, and no antisocial behavior reported in family members decreases the likelihood of his committing future violent acts. Mr. White's history of consistent financial support and ongoing family involvement betweem the years 1989-1995, as related by him and his common-law wife, are in this examiner's opinion very unusual and statistically unlikely. Prognostically, his ability to support and stayed involved with his family makes it more likely that he could maintain sobriety.

Late onset of drug usage

Late onset drug usage has been shown to be more amenable to treatment than early onset usage. Mr. White's reported use of drugs starting after high school places him in a group of individuals who might be more successfully treated than those who start taking drugs at younger ages.

Accuracy of self-report to this examiner
During the interview with this examiner, Mr. White demonstrated an unexpected level of accuracy and consistency. This examiner believes that responding in this manner is a statistically unusual and clinically favorable indicator of his ability to be rehabilitated.

Work ethic and family support
Mr. White demonstrated a responsible work ethic in high school and afterward at Clean America. His motivation is a mitigating risk factor. If rehabilitated, he might return to work. *Can put the family support back in if it is confirmed by another source.*

In addition, his favorable family history and the ongoing support of his family are unusual in murderers and could contribute to the likelihood of a successful rehabilitation. *Is it accurate to say that it is unusual for family members to support murderers?*

Statistical studies of recidivism
The studies illustrated in the appendix to this report clearly indicate that:

1. Capitol murders that are released into the community are at a decreased likelihood to reoffend when compared to non-capitol murderers and individuals who are placed in the prison general population. See Figure 1.
2. Aging significantly decreases the likelihood that individuals will commit future antisocial acts either in the community or while imprisoned: it less likely that Mr. White would reoffend if he were released today, six years after committing the alleged offense, and the risk would decrease even further if he were kept in prison longer and then released. See Figures 2, 3, and 4.
3. There are fewer serious, violent, prison rule violations among death row releasees than among other prisoners. See Figure 5.

DELIBERATENESS
Given Mr. White's chemical dependency history, his ability to deliberate or engage in deliberative thought at the time of this offense would have been seriously compromised due to the high likelihood of organic impairment and decreased ability to think caused by his heavy cocaine use.

FUTURE DANGEROUSNESS
The fact that he is older in addition to the decreased likelihood that he would use drugs if his behavior and urine were monitored, would in all medical probability, decrease the likelihood that he would commit future violent acts. The decreased likelihood is compared to Mr. White's baseline offense rate and those of other capitol and non-capitol offenders.

CONTRIBUTION OF ORGANICITY TOWARD MR. WHITE'S CRIMINAL BEHAVIOR
It is the clinical experience of this examiner, confirmed by some research findings not available until the past few years, that Mr. White's compromised intellectual functioning

increases his risk of being effected by illicit substances. He would have been more likely to be effected than a person without such impairment.

FORENSIC CAVEATS AND CONCLUSIONS

Please note that violent behavior predictors are reliable for groups of individuals who share similar histories. The prediction of behavior for any one individual is either unreliable or fraught with many false positives. Otherwise stated, the prediction of violent behavior for any individual is highly inaccurate if cognitive tests are the sole source of the prediction.

However, what is clear is that a prediction of violence with a greater than 50 per cent likelihood, will be wrong at least 10 per cent of the time. Differently stated, if a prediction of violence was accurate for five individuals, more that one other individual would have been incorrectly predicted to reoffend.

FORENSIC CONCLUSIONS

The likelihood that Mr. White will reoffend and commit a serious crime or violent act, is in all medical probability, less likely than the rate at which he committed violent acts prior to his incarceration. This conclusion is based on the fact that Mr. White is older than when he committed the violent acts and the likelihood of his committing future violent acts would be significantly decreased even further if he maintains sobriety. Moreover, the longer he remains in prison without committing a violent incident, the less likely it is that he will commit future violent acts and present an ongoing threat if he were to be released into the community. He is also less likely to commit future violent acts than non-death row inmates who continue to be incarcerated or are released into the community.

These medically based opinions apply if the factors identified in this report are accurate, if this examiner's clinical experiences are applicable to Mr. White, and if the interventions suggested by this examiner are instituted.

It is the hope of this examiner that the information contained in this report assists the court in its determination of Mr. White's future dangerous behavior, his ability to deliberate at the time of his offense, and the potential mitigation offered by the organic damage to his brain caused by prolonged cocaine use.

This examiner defers to the court for the ultimate answer to the likelihood of the defendant's committing criminal acts of violence that would constitute a continuing threat to society if he were released into the community, and to the determination of the legal consequences of these facts.

Please call 713-528-1188 with questions regarding this report.

Seth W. Silverman, M.D.

APPENDIX

All illustrations are from "Integrating Base Rate Data in Violence Risk Assessments in Capital Sentencing" by Mark D. Cunningham, Ph.D., and Thomas J. Reidy, Ph.D. Their article was published in *Behavioral Sciences and the Law*, Vol. 16, pages 71-95, (1998). Permission to reproduce the illustrations has been requested.

The illustrations have been renumbered below to correspond to the order in which they are referred to in this examiner's report.

- Figure 1. Base rates of parole recidivism of capitol murderers, murderers, and general population inmates (Cunningham and Reidy, p.81)
- Figure 2. Community prevalence of violent behavior by age (Cunningham and Reidy, p. 85)
- Figure 3. Age distribution of criminal offenders in the general population of the United States 1977 (Cunningham and Reidy, p. 84)
- Figure 4. Incidence of prison infractions in NY, 1975, by age (Cunningham and Reidy, p. 86)
- Figure 5. Reported serious violent prison rule violations (Cunningham and Reidy, p. 78)

FURTHER, AFFIANT SAYETH NAUGHT.

SETH W. SILVERMAN, M.D.

SWORN TO AND SUBSCRIBED BEFORE
ME THIS 3 DAY OF MAY, 2002.

NOTARY PUBLIC

ZULEIMA PLATA
NOTARY PUBLIC STATE OF TEXAS
COMMISSION EXPIRES:
JANUARY 6, 2004

___ Personally known to me, or
✓ Produced identification:

Type of Identification Produced:

TDL

Figure 1. Base rates of parole recidivism of capitol murderers, murderers, and general population inmates

Study	Sample	Follow-up Interval	N	Recidivism Rate	New Murder Rate
Capitol Murderers					
Marquart & Sorensen (1989)	National Sample	1972–87	188	.20-prison/.10-new felony	.005
Bedau (1964)	NJ	1907–60	31	.03 new felony	0
Bedau (1965)	OR	1903–64	15	.20 return to prison	0
Vito & Wilson (1988)	KY	1972–85	17	.29 return to prison, 6 jailed	0
Wagner (1988)	TX	1924–88	84	.08 new felony	0
Stanton (1969)	NY	1930–61	63	.05 return to prison	0
Non-Capitol Murderers					
Donnelly & Bela (1984)	NY	1977, 5 yr post-release	66	.27 return to prison	—
Bedau (1982)	12 States	1900–76, 4–53 yr post-release	2646	.03 new felonies	.006
Bedau (1982)	Nationwide	1965–69, 74–75, 1st yr of release	11,404	.015 major violations	.003
Bedau (1982)	Nationwide	males, 1st yr of release	6094	.01 new felony	.002
		females, 1st yr of release	756	.004 new felony	.001
Stanton (1969)	NY	1945–61	514	.22-prison/.03-new felony	.004
Beck & Shipley (1989)	11 States	1983, 3 yr post-release	506	.21 return to prison	.07 rearrested
Eisenberg (1991)	TX	1986, 5 yr post-release	56	.45 return to prison	—
Perkins (1994)	29 States	parole discharge 1992	5371	.33 return to prison	—
Cancelmi (1996)	NY	1985–91, 3 yr post-release	5054	.24 return to prison	.024
General Prison Population					
Beck & Shipley (1989)	11 States	1983, 3 yr post-release	16,355	41.4 return to prison	.03 rearrested
Perkins (1994)	29 States	parole discharge 1992	209,995	.46 return to prison	—
Eisenberg (1991)	TX	1986, 5 yr post-release	1539	.48 return to prison	—
Cancelmi (1996)	NY	1985–91, 3 yr post-release	121,555	.44 return to prison	.004

Base rates of violence in capital sentencing

Figure 2. Community prevalence of violent behavior by age

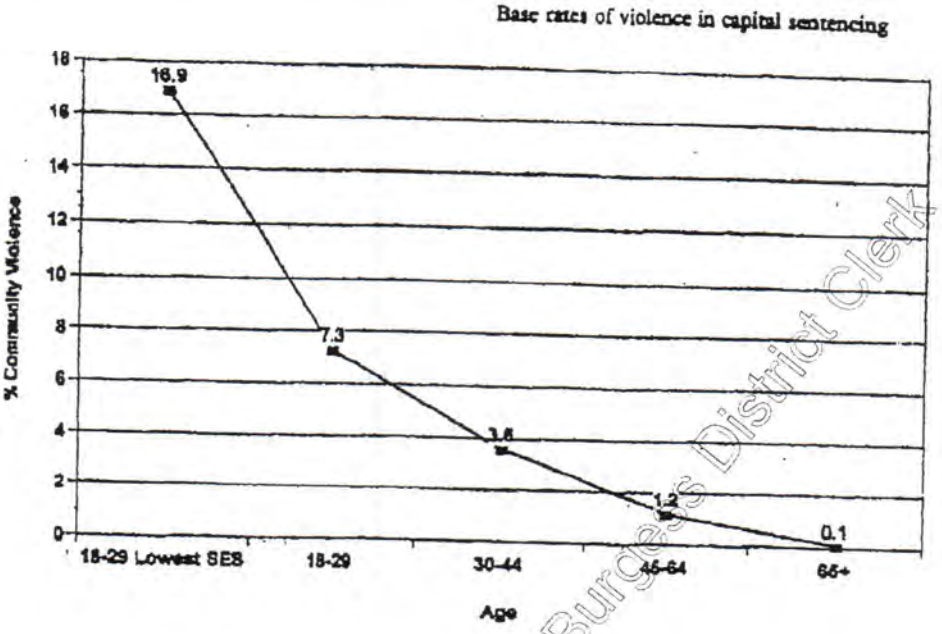


Figure 3. Age distribution of criminal offenders in the general population of the United States 1977

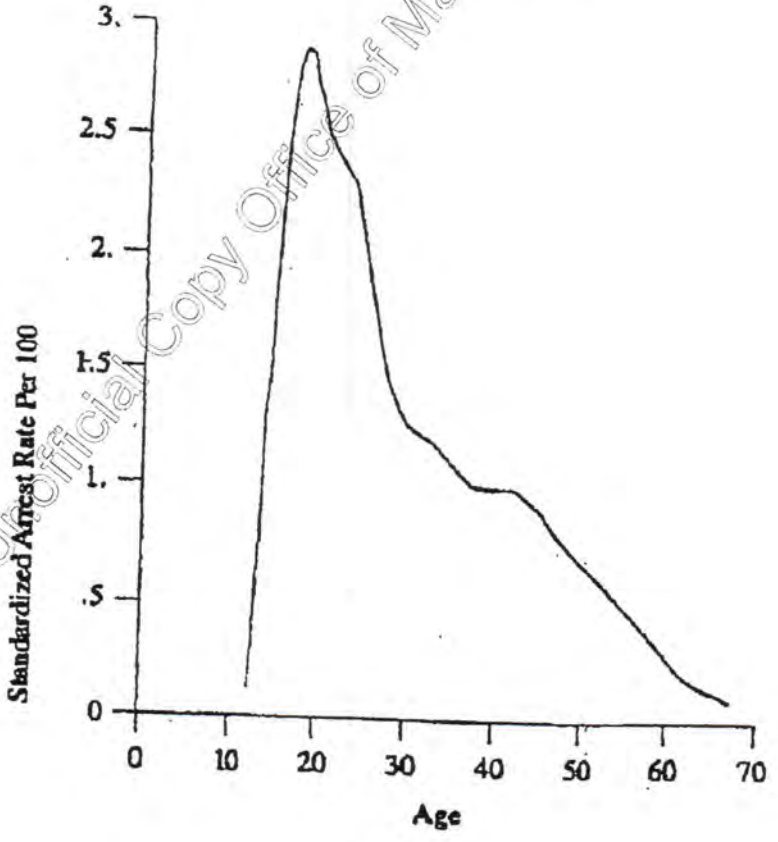


Figure 4. Incidence of prison infractions in New York, 1975, by age

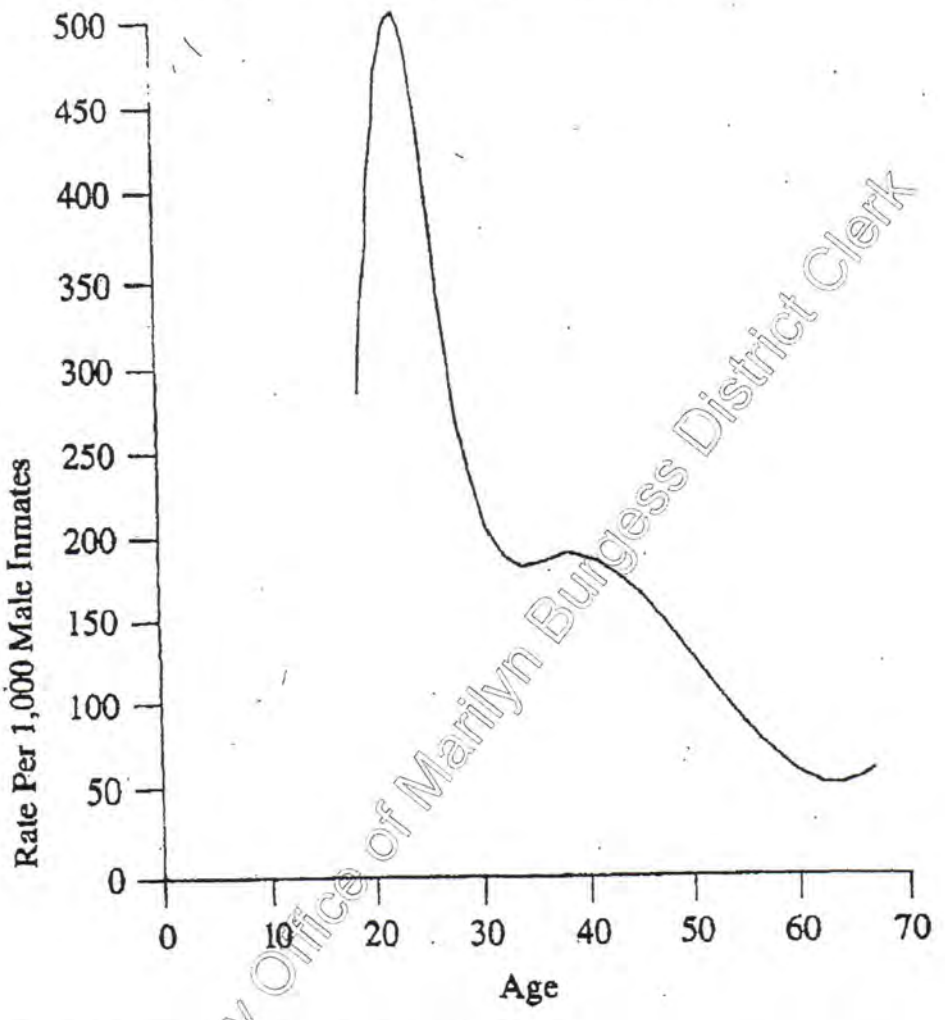
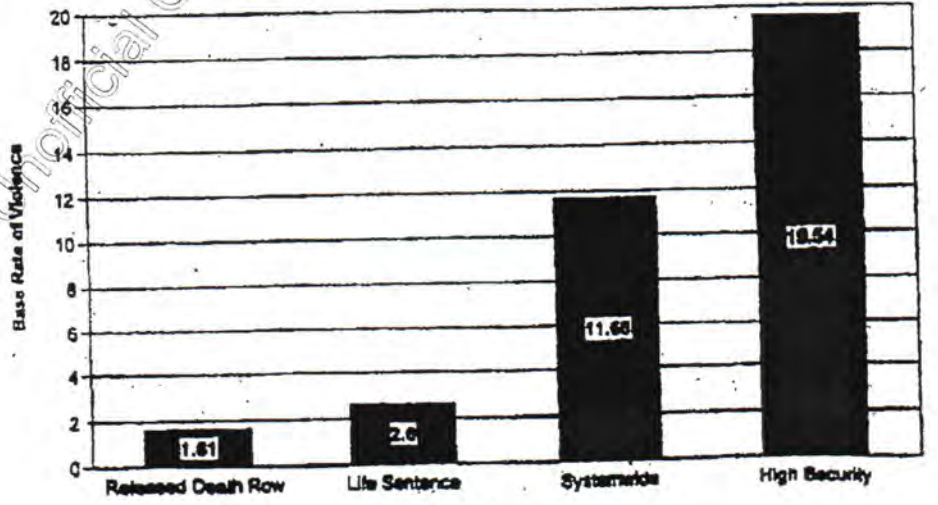


Figure 5. Reported serious violent prison rule violations



AFFIDAVIT

THE STATE OF TEXAS § **KNOWN ALL MEN BY THESE**

§ **PRESENT**

COUNTY OF HARRIS §

BEFORE ME, the undersigned authority on this day personally appeared SETH W. SILVERMAN, M.D., of 3614 Stoneham, Houston, Texas, known to me to be the person whose name is subscribed below, who, after having first been duly sworn by me, on oath deposes and says:

1. My name is Seth W. Silverman, M.D., and I am of sound mind and I capable of making this affidavit.
2. I am a licensed practicing physician who is Board Certified in Adult, Adolescent, Addiction, and Forensic Psychiatry.
3. I have been requested by habeas counsel to consult in the case of *State of Texas v. Garcia Glen White.*
4. I have reviewed the trial transcripts and the reports from the psychiatrist who testified at trial.
5. I have interviewed Mr. White and talked to his family members.
6. Mr. White has a significant history of multiple head traumas, multiple episodes of unconsciousness secondary to head trauma, impaired cognitive and intellectual functioning and possibly a thought disorder. (His thought disorder is evidenced by his responses that someone might be able to control his mind. Mr. White also reported that the TV could predict the future.)
7. The definitive tests to determine the extent of his psychiatric and neurological disorders are the Rorschach Test and Halsted-Reitan Test.
8. Based upon the information I have reviewed, Mr. White also requires a complete neurological examination that would include additional diagnostic tests as determined by the results of the examination.
9. Further neurological testing could also verify and explain Mr. White's organic impairment. His impairment is in part, responsible for Mr. White's unusual susceptibility to pharmacologically induced psychosis.
10. It is my opinion that this evidence is highly relevant to predicting Mr. White's future violent behavior.
11. I have not been compelled, threatened, or coerced to sign this affidavit in any manner. Furthermore, I have not been offered any bribe or improper inducement as a benefit or reward for signing this affidavit. My action in signing this affidavit is knowingly, voluntarily, and freely undertaken on my part.

"Further Deponeth sayeth not."

SETH W. SILVERMAN, M.D.

STATE OF TEXAS
COUNTY OF HARRIS

BEFORE ME, the undersigned authority, on this day personally appeared SETH W. SILVERMAN, M.D., known to me to be the person whose name is subscribed to the foregoing instrument an acknowledged to me that he executed the same for the purpose and consideration therein expresses.

GIVEN UNDER MY HAND AND SEAL OF OFFICE, on this the 03 day of May, 2002.

ZULEIMA PLATA
NOTARY PUBLIC STATE OF TEXAS
COMMISSION EXPIRES:
JANUARY 6, 2004

NOTARY PUBLIC IN AND FOR THE
STATE OF TEXAS
MY COMMISSION EXPIRES:
Jan 6, 2004.

APPENDIX “Q”

Wilkie A. Wilson, PhD
302 Watts St.
Durham, NC 27701
January 19, 2015

Patrick F. McCann
Law Offices of Patrick F. McCann
909 Texas Ave, Ste. 205
Houston, Texas 77002

Mandy Miller
Mandy Miller Legal, PLLC
2910 Commercial Center Blvd.,
Ste. 103-201
Katy, TX 77494

Dear Mr. McCann and Ms. Miller:

This letter is in reference to the case of Garcia Glen White. You asked me to review this case from the standpoint of the effects that the recreational drugs cocaine and marijuana could have had on Mr. White at the time of the crimes for which he is accused. In particular you asked that I consider what scientific findings have emerged since he was examined by the psychiatrist, Dr. Silverman, in 2002 and the psychologist Dr. Averill in 2008.

I am a neuropharmacologist at Duke University in Durham, North Carolina and a Professor of Prevention Science in the Social Sciences Research Institute. I hold a B.S.E.E. from Louisiana State University and a Ph.D. from Duke University. Until 2009, I was a Research Professor of Pharmacology at Duke University Medical School, and an Associate Professor of Medicine until 2010. Additionally, until December 31, 2010, I served as a Research Career Scientist for the Veterans Health Service at the VA Medical Center in Durham, North Carolina. I still serve the VA in a "without compensation" position.

I continue to conduct scientific research concerning the effects of drugs on brain function in collaboration with other scientists. I am currently funded by the National Institute of Health through grants to study alcohol and nicotine. As of July 1, 2012, I, along with colleagues, have funding from the United States Department of Education Institute of Educational Sciences to develop brain-related educational programs for high school students. I have written numerous research papers. In addition, I have co-authored three books that explain the effects of recreational drugs to members of the public who are not scientists. The lead book of the series is *Buzzed: The straight facts about the most used and abused drugs from alcohol to ecstasy* (WW Norton, 1998, 2003, 2008, 2014). In this book we discuss the effects of cocaine and marijuana on the brain and behavior.

I also teach members of the criminal justice community, about neuropharmacology, addiction, and recreational drugs at the School of Government at the University of North Carolina. I have testified in criminal proceedings as an

expert in neuropharmacology in North Carolina, Louisiana, Texas, and Florida. I have consulted on other cases in Tennessee, Georgia, and Virginia.

Sources of Information about this case

- Two reports from Dr. Silverman in 2002
- A report of a psychological examination by Dr. Averill
- A report of a psychological examination by Dr. Brown

The issue of cocaine and psychosis following its use

First you asked that I consider whether Mr. White could have suffered from cocaine-induced psychosis that far outlasted his last dose of cocaine. The report of Dr. Silverman indicates that Mr. White showed symptoms of psychosis while he was incarcerated after arrest, but that these symptoms had abated by the time he was examined by Dr. Silverman in 2002. At the time of the reports by Dr. Silverman (2002) and Dr. Averill (2008), there was a literature that discussed some association of cocaine with psychosis and violence. However at that time the medical community did not know the *probability* of cocaine inducing psychosis.

In 2009, a paper entitled "Prevalence of psychotic symptoms in substance users: a comparison across substances was published by MJ Smith, et.al. (Comprehensive Psychiatry 50 (2009) 245-250). In the introduction to that paper they write:

To our knowledge, no study has reported the prevalence of psychotic symptoms in relation to the use of specific substances among an out-of-treatment sample of substance users. Thus, our study examines (1) the rate of substance abuse and dependence in the sample; (2) the prevalence of psychotic symptoms among users of specific substances; and (3) the risk of psychotic symptoms as a consequence of amphetamines, cannabis, cocaine, and opioids.

They found, as shown in their Table 2, that in their study population, 77.7% of cocaine users with moderate dependence experienced psychotic symptoms, and 88.7% of those with severe dependence experienced psychotic symptoms. In Table 3 they calculated the odds of psychosis associated with moderate and severe dependence, and they found moderate dependence produced and odds ratio of 47 and an odds ratio of 114 for severe dependence. Taken together these data indicate that it is highly probable that a regular user of cocaine will experience psychotic episodes.

The authors also evaluated cannabis users in a like manner. Table 2 shows that 48% of mildly dependent users, 78.6% of moderately dependent users, and 80% of severely dependent users experienced psychotic symptoms.
According to these authors, this is the first research to quantitate these effects of cocaine and marijuana. These levels of probability were almost certainly not known in 2002 or in 2008.

The issue of marijuana use by Mr. White

Mr. White indicated that he initiated marijuana use before his use of cocaine. While Dr. Silverman and Dr. Averill noted this, they paid little attention to it and apparently did not probe Mr. White to discuss his marijuana use. That is unfortunate, because, as described above, in 2009 research showed that marijuana use is strongly associated with psychosis.

Marijuana (cannabis) is a complicated drug, and particularly in ways that were not familiar to the general medical community in 2002 or in 2008. It has a reputation for making people mellow and reducing aggression during acute intoxication, so perhaps Mr. White and the clinicians likely thought it was not a significant contributor to his violent behavior.

However, in the years since that period, a new understanding of the effects of cannabis has occurred—*the importance of cannabis withdrawal.* The active component of cannabis is the well-known compound, THC. THC has a very long half-life in humans and this leads to the development of tolerance in regular users. When a person is tolerant to a drug, and that drug is withdrawn, then the person experiences withdrawal effects that can be extremely unpleasant, and that will produce behaviors essentially the opposite of those that occur during intoxication. For example, when an alcoholic withdraws from alcohol acutely, he/she will experience remarkable excitation of the central nervous system that can result in epileptic seizures and death if untreated.

With marijuana, neither intoxication nor withdrawal is fatal, but the withdrawal phase can activate aggression and other unpleasant sensations. These effects were not noted in the DSM series until the publication of the DSM-V in 2013.

There have been were two papers published in the journal Psychiatric Times that address the timing of the general acceptance of this issue. The first, "*Does Marijuana Withdrawal Syndrome Exist?* (Psychiatric Times, February 1, 2002) opens the discussion of this issue. The second, published in 2011, is entitled, *"Marijuana Withdrawal Syndrome: Should Cannabis Withdrawal Disorder Be Included in DSM-5?"* (Psychiatric Times, April, 28, 2011). In fact, the DSM-V finally does include marijuana withdrawal.

Leading up to this were a number of publications that slowly revealed the importance of this phenomenon. The state of the literature in 2002 was made clear with a review article by Neil Smith entitled *"A Review of the Published Literature Into Cannabis Withdrawal Symptoms in Human Users"* (Addiction, 97, 621-632) concluded:

"It is concluded that more controlled research might uncover a diagnosable withdrawal syndrome in human users and that there may be a precedent for the introduction of a cannabis withdrawal syndrome before the exact root is known."

Thus in 2002, there was no professional guidance for Dr. Silverman. By 2008 the literature was evolving, but there was no consensus about withdrawal. A paper published by DS Hasin, et. al. entitled, *" Cannabis Withdrawal in the United States: A general Population Study"* (Journal of Clinical Psychiatry, 2008 September; 69 (9): 1354-1363) introduced the issue with:

"Although cannabis is the most widely abused illicit drug, little is known about the prevalence of cannabis withdrawal, its factor structure, clinical validity and psychiatric correlates in the general population."

And concluded:

"Cannabis withdrawal was prevalent and clinically significant among a representative sample of frequent cannabis users. Similar results in the subset without polysubstance abuse confirmed the specificity of symptoms to cannabis. Cannabis withdrawal should be added to DSM- V and the etiology and treatment implications of cannabis withdrawal symptoms investigated."

Thus between 2002 and 2008, there was little knowledge and acceptance of the problem of marijuana withdrawal and little understanding of the consequences of an interaction of marijuana withdrawal

However, by 2013 cannabis withdrawal was in the DSM-V. Also, in 2013, PH Smith, et.al, published a paper entitled *"Marijuana Withdrawal and Aggression Among a Representative Sample of U.S. Marijuana Users."*(Drug and Alcohol Dependence 132 (2013) 63-68).

They concluded:

"The findings from this study support the notion that laboratory-based increases in aggression due to marijuana withdrawal extend to the general population of marijuana users who have a previous history of aggression."

That is, if a person is in a state in which he/she is potentially aggressive, and, if that person is in marijuana withdrawal, then that aggression may be expressed.

The Issue of Cocaine and Marijuana Withdrawal

As discussed above, cocaine makes individuals aggressive, possibly violent, and leads to psychosis. Adding marijuana withdrawal to this state might well make the difference between experiencing feelings of aggression and actually expressing them.

It is clear that Mr. White was abusing cocaine and according to Dr. Silverman, the jail noted residual psychosis. It is also clear that he used marijuana. Thus, with hindsight, both Dr. Silverman and Dr. Averill could have investigated Mr. White's use of marijuana, his tendency to go into withdrawal, and the behaviors he exhibited in the state of cocaine intoxication and marijuana withdrawal. Unfortunately the need for this investigation was not clear to either doctor. Neither the DSM-IV nor the current medical literature to which they had access guided them in this direction.

Sincerely yours,

Wilkie A. Wilson, PhD
Neuropharmacologist and
Professor of Prevention Science
Duke University Social Sciences Research Institute

APPENDIX "R"

87R3224 AJZ-D

By: Moody, Thompson of Harris, Collier, Leach, Murr, et al. H.B. No. 275

A BILL TO BE ENTITLED

AN ACT

relating to an application for a writ of habeas corpus based on certain relevant scientific evidence that was not available at the applicant's trial.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 11.073(b), Code of Criminal Procedure, is amended to read as follows:

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of

the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted or would have received a different punishment.

SECTION 2. Article 11.073, Code of Criminal Procedure, as amended by this Act, applies only to an application for a writ of habeas corpus filed on or after the effective date of this Act. An application filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect December 1, 2021.

APPENDIX "S"

88R11979 AJZ-D

By: Moody H.B. No. 205

A BILL TO BE ENTITLED

AN ACT

relating to an application for a writ of habeas corpus based on certain relevant scientific evidence that was not available at the applicant's trial.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Article 11.073(b), Code of Criminal Procedure, is amended to read as follows:

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application, in the manner provided by Article 11.07, 11.071, or 11.072, containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at a trial held on the date of

the application; and

(2) the court makes the findings described by Subdivisions (1)(A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted or would have received a different punishment.

SECTION 2. Article 11.073, Code of Criminal Procedure, as amended by this Act, applies only to an application for a writ of habeas corpus filed on or after the effective date of this Act. An application filed before the effective date of this Act is governed by the law in effect when the application was filed, and the former law is continued in effect for that purpose.

SECTION 3. This Act takes effect December 1, 2023.

Automated Certificate of eService

This automated certificate of service was created by the efiling system. The filer served this document via email generated by the efiling system on the date and to the persons listed below. The rules governing certificates of service have not changed. Filers must still provide a certificate of service that complies with all applicable rules.

Julia Bella
Bar No. 24035099
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Envelope ID: 91285500
Filing Code Description: Writs
Filing Description: 11.071 Application for WHC 6th
Status as of 8/26/2024 10:05 AM CST

Case Contacts

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State of Texas
County of Travis

AFFIDAVIT

Affiant: Greg Hupp, Ph.D.
Date: September 2, 2024

On this day, the Affiant below appeared before me and sworn and subscribed to the following:

My name is Greg Hupp, Ph.D. I am a licensed neuropsychologist in Texas. I am over eighteen and competent to make this affidavit. I have extensive experience in diagnosing instances of intellectual disability outside of capital cases, both in forensic and other settings, such as disability determinations. I have doing this for about twenty-five years.

In my experience, one of the most challenging aspects of discussing family history of an individual's mental health or mental disability is that it is often regarded as a shameful thing, and something that one should hide or cover up. It is a condition viewed with fear by many lay people, and they often believe that revealing that information would harm their loved one because it would be used against them. Peer-reviewed research has shown that "guilt, ambivalence, disappointment, frustration, anger, shame, and sorrow" are often exhibited by parents (Schild, 1971)[1]. Thus, the attitude of parents may cause hindrance in the process as well as outcome of adaptive functioning in the children with Intellectual Developmental Disorders (IDD aka Intellectual Disabilities ne: mental retardation).
The family's reluctance to reveal that information has been well-documented in research, and in fact, the research itself often ignored the needs of this invisible culture (Harkness, 1980)[2]. Often their desire to protect and help makes them extremely reticent in speaking to people outside the family. In terms of evaluating and diagnosing intellectual disabilities among minorities and those of lower socio-economic status, especially among those in involved in the criminal justice system, there have been severe methodological problems. "Most studies reviewed used less than adequate ascertainment methods" in identifying and diagnosing intellectual disabilities among population and have left unanswered questions as to "which offenders have intellectual disabilities" (McBrien, 2003).[3] I have had many experiences that make it plain that it can take years to break down communication

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[1] Schild. (1971). Parental attitude towards children: a comparative study of parents of normal children and parents of mentally retarded children. *Journal of Community Guidance and Research*, 9, 117–122.

[2] Harkess, S. (1980). The cultural context of child development. New Directions for Child Development, 8, 7-13.

[3] McBrien, J. (2003), The Intellectually Disabled Offender: Methodological Problems in Identification. Journal of Applied Research in Intellectual Disabilities, 16: 95-105.

barriers to get families to cross barriers of fear, misunderstanding, culture, class, race, and simple lack of trust.

This research has demonstrated that IQ scores for low-functioning individuals of minority race and low socio-economic status, such as Mr. White, are often overestimated. The structural limitations of IQ tests, floor effects, discrepancies between IQ and adaptive functioning, and the influence of outdated norms due to both the Flynn Effect and an outdated edition of the intelligence test, all contribute to this overestimation. Therefore, it my professional position that the IQ score reported by Dr. Averill as part of Mr. White's *Atkins* evaluation was an over-estimation of his true intellectual abilities and lacked a formal assessment of Mr. White's adaptive functioning. The requirements under the provisions of *Moore v. Texas*[4] and the subsequent *Moore II* decision demand a review of Mr. White's intellectual capabilities.

As to Mr. White's adaptive functioning, which is a formal review of his abilities and required to diagnose an intellectual developmental disorder, such a review was never completed. A retrospective review of these capabilities is necessary under the *Moore* decisions and is required to determine whether or not an individual has an IDD.

Intellectual retardation is not something that changes or improves or suddenly disappears. If one was showing signs of problems in early childhood and then later tests as subnormal, that is not a recent occurrence. The fact that we have new tests and methods determining deficits does not mean we take leave of the common sense notion that if someone is suffering from deficits as a child, they probably had disability as a child. IDD is a status that does not change.

I swear the foregoing is true and correct.

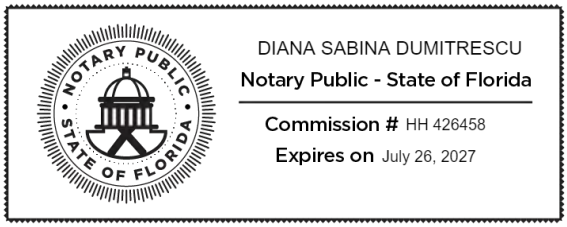
Affiant: Gregory Scott Hupp

Greg Hupp, Ph.D.
Psychologist – Texas License No. 31593
5900 Balcones Dr., Ste. 13846
Austin, Texas 78731
Ph (512) 893-6337

Sworn to and subscribed before me this 2nd day of September, 2024.

Diana Sabina Dumitrescu

Notary Public
My Commission Expires: 07/26/2027



[4] Moore v. Texas, 137 U.S. 1039 (2017).

Notarized remotely online using communication technology via Proof.

Affidavit

State of Texas

County of Harris

On this day, the Affiant below appeared before me and sworn and subscribed to the following:

My name is Nicole VanToorn. I am a licensed investigator and mitigation specialist in the State of Texas. I am over eighteen and competent to make this affidavit. I have extensive experience in compiling social history information for intellectually disabled defendants in capital cases. I have been involved in these investigations in the capital arena since 1998.

Much of the information needed to determine an individual's ability to function in our society is learned through collateral witness interviews. These witnesses hold relevant knowledge gained through observation and experiences shared with the individual. They can speak to that person's ability, or inability, to perform tasks necessary to live independently and function generally throughout life. However, the level of difficulty encountered in actually gathering this information can be great, for a variety of reasons.

Almost without exception, those facing capital murder charges were raised in a dysfunctional family. It can take an extreme event to motivate a collateral witness to finally be forthcoming and share the most important details previously hidden from investigators considered intrusive, strangers to the family. Thus, it is not surprising when the announcement of an execution date is the catalyst for family members or other relevant witnesses with sensitive information to reluctantly come forward and at long last share honest answers to previously asked questions.

I swear the foregoing is true and correct.

Affiant:

Date: 9/2/24

Notary Public: Patricia Ann Nowak

PATRICIA ANN NOWAK
My Notary ID # 126607126
Expires March 29, 2026

APPENDIX C

NO. WR-48,152-08
COURT OF CRIMINAL APPEALS OF TEXAS

Ex parte White

506 S.W.3d 39 (Tex. Crim. App. 2016)
Decided Nov 2, 2016

NO. WR-48,152-08

11-02-2016

EX PARTE Garcia Glen WHITE, Applicant

Patrick F. McCann, Attorney at Law, Houston, TX, for Appellant. Lynn Hardaway, Assistant District Attorney, Houston, TX, Lisa C. McMinn, State's Attorney, Austin, for the State.

KELLER, P.J.

Patrick F. McCann, Attorney at Law, Houston, TX, for Appellant.

Lynn Hardaway, Assistant District Attorney, Houston, TX, Lisa C. McMinn, State's Attorney, Austin, for the State.

KELLER, P.J., delivered the opinion of the Court in which KEASLER, HERVEY, RICHARDSON, YEARY and NEWELL, JJ., joined.

In this death-penalty case, in a subsequent habeas application, applicant claims that, if certain newly discovered scientific evidence had been available at trial, it would likely have changed the jury's answers to the special issues. Applicant claims that this new evidence entitles him to relief under Article 11.073.[1] We conclude that it does not, because evidence that would have changed only punishment does not satisfy Article 11.073's requirement that the new evidence show that applicant "would not have been convicted." Consequently, we dismiss the application.

[1] Tex. Code Crim. Proc.Art. 11.073.

I. BACKGROUND

Applicant filed a previous application in January 2009, and he filed the current application in January 2015. He now alleges that a scientific paper written in 2009 indicates that a regular user of cocaine has a high probability of developing or experiencing psychotic symptoms.[2] He contends that this evidence would have changed the jury's or a juror's answers to one of the special issues. In our file-and-set order, we said, "By its plain language, Article 11.073 does not seem to apply to newly discovered scientific evidence affecting only the punishment stage of trial."[3] Concluding that we needed to address this issue before ordering other proceedings on applicant's claim, we filed and set the application and ordered the parties to file briefs on "whether new scientific evidence presented pursuant to Article 11.073 can affect only punishment phase evidence."[4] Applicant, the State, and two amici on behalf of applicant[5] have filed briefs.*42

42

II. ANALYSIS

[2] We have already decided that applicant's first two claims are barred by the subsequent-application prohibition in the capital-habeas statute. *Ex parte White*, 485 S.W.3d 431, 432 (Tex. Crim. App. 2016). *See* Tex. Code Crim. Proc.Art. 11.071, § 5.

[3] *White*, 485 S.W.3d at 432.

[4] *Id.*

[5] One amicus brief is sponsored by the Texas Criminal Defense Lawyers Association (TCDLA), the Harris County Criminal Lawyers Association, and the Harris

County Public Defender's Office; the other amicus brief is sponsored by the Office of Capital and Forensic Writs (OCFW). When referring to individual amicus briefs, we will designate them as "TCDLA" and "OCFW" respectively.

A. Meaning of the Statute

1. *The Statutory Language and General Principles of Construction*

Among other things, Article 11.073 requires an applicant to show that, "had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted."[6] Applicant concedes that, "by its plain language, article 11.073 does not appear to apply to newly discovered evidence that would affect the punishment phase of a capital trial." He argues, though, that we are constitutionally required to allow challenges, under the statute, to punishment in a death-penalty case. The amici claim that the pertinent language of the statute can be construed to apply to death-penalty punishment determinations.

6 Tex. Code Crim. Proc.Art. 11.073(b)(2).

In construing a statute, we give effect to the plain meaning of its text unless the text is ambiguous or the plain meaning leads to absurd results that the legislature could not have possibly intended.[7] In determining plain meaning, we consult dictionary definitions, apply the rules of grammar, and consider words in context.[8] If the statutory language is ambiguous or leads to absurd results, we can consider extratextual factors such as the object sought to be attained, the legislative history, and the consequences of a particular construction.[9]

7 *Ex parte Perry*, 483 S.W.3d 884, 902 (Tex. Crim. App. 2016) ; *Boykin v. State*, 818 S.W.2d 782, 785 (Tex. Crim. App. 1991).

8 *Perry*, 483 S.W.3d at 902.

9 *Id.* at 903 ; Tex. Gov't Code§ 311.023.

2. *"Would Not Have Been Convicted" versus "Would Have Received Different Punishment"*

TCDLA amicus contends that the word "convicted" in Article 11.073 should be interpreted in light of the meaning that we have given to the word "conviction" and that the word "conviction" was construed in the habeas context in *Ex parte Evans* [10] to include both the judgment of guilt and the assessment of punishment. OCFW amicus contends that "convicted" must be interpreted in light of the meaning of the word "conviction" as it appears in Articles 11.07 and 11.071 and that, in those contexts, the word is construed as encompassing both guilt and punishment.[11] It is true that legal dictionaries have sometimes referred to "convicted" by saying "See Conviction,"[12] and definitions of "conviction," though generally referring to guilt, sometimes include the assessment of punishment.[13] It is also true, though, that the *43 word "convicted" is more likely to refer solely to guilt than the word "conviction" is.[14]

43

10 964 S.W.2d 643 (Tex. Crim. App. 1998).

11 *See* Tex. Code Crim. Proc.Arts. 11.07, §§ 3(c) & 4(a) & 11.071, §§ 5(b)(2) & 6(b)(2).

12 *See Convicted*, Black's Law Dictionary(5th ed. 1979).

13 *See Conviction*, Ballentine's Law Dictionary(LexisNexis 2010) ("An adjudication that a person is guilty of a crime based upon a verdict or, in a proper case, the ascertainment of guilt by a plea of guilty or nolo contendere. ... Such is the primary and usual meaning of the term 'conviction' but it is possible that it may be used in such a connection and under such circumstances as to have a secondary or unusual meaning, which would include the final judgment of the court."); *Conviction*, Black's Law Dictionary(10th ed. 2014) ("1. The act or process of judicially finding someone guilty of a crime; the state of

having been proved guilty. 2. The judgment (as by a jury verdict) that a person is guilty of a crime."); *Conviction*, Black's Law Dictionary(5th ed. 1979) ("In a general sense, the result of a criminal trial which ends in a judgment or sentence that the accused is guilty as charged."). *See also Conviction*, The Compact Edition of the Oxford English Dictionary(1971) ("The proving or finding a person guilty of an offence with which he is charged, before a legal tribunal: legal proof or declaration of guilt : the fact or condition of being convicted : sometimes including the passing of sentence.").

14 *Contrast Conviction*, Oxford, *supra* (see above) *with Convicted*, Oxford, *supra* ("Proved or found guilty; condemned.").

But even if the term "convicted" includes the assessment of punishment, the amici's claims fail because of the context in which the word "convicted" is used in the statute. *Evans* was concerned with statutory language that referred to a challenge to an existing conviction.[15] Likewise, Articles 11.07 and 11.071 are concerned with seeking relief from an existing conviction.[16] A challenge to a sentence would necessarily be a challenge to an existing conviction.[17] But the language in the statute before us—"would not have been convicted"—plainly refers to any possible conviction on the charges. That is, the question is whether the applicant would have been convicted at all of the charged offense. Even if an applicant proves that he would have received a different punishment for the charged offense, he has failed to establish that he "would not have been convicted." From the language and context of the statute alone, we conclude that the statute is unambiguous in requiring that a claim under Article 11.073 be one that undermines the verdict or finding of guilt.[18]

15 *See Evans*, 964 S.W.2d at 646–47.

16 *See* Tex. Code Crim. Proc.Arts. 11.07, § 1 ("This article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a felony judgment imposing a penalty other than death.") & 11.071, § 1 ("[T]his article establishes the procedures for an application for writ of habeas corpus in which the applicant seeks relief from a judgment imposing a penalty of death.").

17 *See Evans*, 964 S.W.2d at 647 ("[T]his Court has most often construed the term 'conviction' to mean a judgment of guilt and the assessment of punishment.").

18 The dissent cites *United Sav. Ass'n v. Timbers of Inwood Forest Assocs.*, 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988), for the proposition that the meaning of a word should be evaluated in light of the statute as a whole, but that case actually supports our analysis and undermines the analysis of the dissent. *Timbers* explained, "A provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme," and terminology can be used "in a context that makes its meaning clear." *Timbers*, 484 U.S. at 371, 108 S.Ct. 626. The dissent construes the word "convicted" in isolation, without assessing its meaning in the context of the phrase "would not have been convicted." By contrast, our construction properly considers the word "convicted" within the context in which it appears.

We reached the same conclusion regarding identical language in the DNA statute.[19] To obtain DNA testing under Chapter 64, a person must show, among other things, "by a preponderance of the evidence that ... the person *would not have been convicted* if exculpatory results had been obtained through DNA testing."[20] In *Ex parte Gutierrez* , we emphasized the word "convicted" in the phrase "would not have been convicted" and held that Chapter 64 "does not authorize testing

44 when exculpatory results might affect only the *44 punishment or sentence."[21] A prior construction of an identical phrase in another statute is evidence that the phrases mean the same thing.[22]

19 *Ex parte Gutierrez*, 337 S.W.3d 883, 901 (Tex. Crim. App. 2011).

20 Tex. Code Crim. Proc.Art. 64.03(a)(2)(A) (emphasis added).

21 337 S.W.3d at 901.

22 *See Sanchez v. State*, 138 S.W.3d 324, 329–30 (Tex. Crim. App. 2004) (Construction of the phrase "trial on the merits" in other statutes was in fact a construction that the language "means what it says.").

Gutierrez 's construction of Chapter 64 occurred two years before Article 11.073 was enacted, so the legislature had notice of that construction when it chose to use identical wording.[23] Both Chapter 64 and Article 11.073 are remedial statutes that concern scientific evidence, and the presence of identical standards of proof in both statutes suggests that the legislature contemplated that these statutes would sometimes work together. A showing by a mere preponderance of the evidence that an applicant would not have been convicted if exculpatory DNA results are obtained is not sufficient to warrant relief under this Court's more onerous actual-innocence jurisprudence.[24] But Article 11.073 affords an avenue for relief under the preponderance standard.[25] The fact that these statutes are not only similar in purpose and operation, but also appear designed to work together, with the identical phrase accomplishing that cooperation, strongly supports interpreting the
45 same phrase to mean the same thing.[26] *45 **3. *Community Supervision and Deferred Adjudication***

23 *Cf. Ex parte Rieck*, 144 S.W.3d 510, 520–21 (Tex. Crim. App. 2004) (Texas statute was passed before Mississippi statute or any Mississippi Supreme Court decision construing Mississippi statute, "so, the Texas Legislature could not have been charged with notice of the parallel provision or of the Mississippi Supreme Court's implied construction of that provision.").

24 *See Ex parte Harleston*, 431 S.W.3d 67, 70 (Tex. Crim. App. 2014) ("To prevail in a freestanding claim of actual innocence, an applicant must prove by clear and convincing evidence that, despite the evidence of guilt that supports the conviction, no reasonable juror could have found the applicant guilty in light of the new evidence.") (internal quotation marks omitted). *See also Ex parte Robbins*, 478 S.W.3d 678, 690 (Tex. Crim. App. 2014) ("Prior to the enactment of article 11.073, newly available scientific evidence per se generally was not recognized as a basis for habeas corpus relief and could not have been reasonably formulated from a final decision of this Court or the United States Supreme Court, unless it supported a claim of 'actual innocence' or 'false testimony.' ").

25 *Compare* Tex. Code Crim. Proc.Art. 11.073(b)(2)*with id.* art. 64.03(a)(2)(A).

26 *See Ex parte Benson*, 459 S.W.3d 67, 87 (Tex. Crim. App. 2015) (treatment of DWI enhancements consistent with the treatment of similar theft provisions); *Scott v. State*, 55 S.W.3d 593, 596 (Tex. Crim. App. 2001) (Language of savings clause was "substantively identical to savings clauses in past amendments that added new enhancement provisions" and should thus be construed the same.).*See also Phillips v. State*, 463 S.W.3d 59, 69–71 (Tex. Crim. App. 2015) (concurring opinions by Keller, P.J. & Newell, J.) (Parallel language of accomplice-witness statute and the jailhouse-informant statute indicates that the latter statute was designed to operate like the former.).

In claiming that extratextual factors support a conclusion that Article 11.073

applies to both guilt and punishment in a capital case, the dissent claims that the holding in *Gutierrez* regarding the identically worded phrase in the DNA testing statute does not control because the DNA testing statute is not a habeas statute governed by the command in Article 11.04 that habeas statutes be most favorably construed to effect a remedy. However, even if the statutory language at issue here were ambiguous, the existence of the holding in *Gutierrez* at the time the legislature enacted Article 11.073, with the identical language, is far more persuasive evidence of the legislature's intent than the general notion (relied upon by the dissent) that the legislature was concerned about the accuracy of determinations made in criminal proceedings. *See also infra* at parts II.A.5 & II.A.6.

TCDLA also claims that the word "convicted" must be accorded a broad meaning to account for the fact that Article 11.073 provides a remedy for Article 11.072 filers, which include individuals on regular community supervision and deferred adjudication.[27] TCDLA claims that neither type of 11.072 filer has a final conviction. While not considered a final conviction for the purpose of Article 11.07[28] and many enhancement statutes, a judgment imposing regular community supervision is in fact a conviction with an assessed sentence, though that sentence is not imposed, and such a conviction is final for some purposes.[29] Consequently, nothing in our construction today prevents a person on regular community supervision from seeking relief under Article 11.073 as long as the new scientific evidence undermines the verdict or finding of guilt.[30]

27 *See* Tex. Code Crim. Proc.Art. 11.073(b)(1) (referring to a person who has filed an application under Article 11.07, 11.071, or 11.072).

28 *Ex parte Renier*, 734 S.W.2d 349, 351 (Tex. Crim. App. 1987) ("[B]ecause applicant was granted probation, there is no final conviction.").

29 *Yazdchi v. State*, 428 S.W.3d 831, 838, 844 (Tex. Crim. App. 2014) (Person whose felony probation is terminated in the usual manner remains "convicted of a felony, although it may not be a final conviction for use as an enhancement offense to elevate the punishment range in a future criminal proceeding," but "that person has been convicted of a felony, even though he never went to prison and, for some purposes, it is not a 'final' felony conviction.") (quoting *Cuellar v. State*, 70 S.W.3d 815, 818 (Tex. Crim. App. 2002)) (internal quotation marks omitted). *See* Tex. Code Crim. Proc.Art. 42.12, §§ 2(B) (Definition of regular community supervision includes a specified period during which "a sentence of imprisonment or confinement, imprisonment and fine, or confinement and fine, is probated and the imposition of sentence is suspended in whole or in part."), 23 (On revocation of regular community supervision, "the judge may proceed to dispose of the case as if there had been no community supervision" or may reduce the term of confinement if determined to be in the best interest of society and the defendant.).

30 Deferred adjudication, on the other hand, is not a conviction. *Ex parte Smith*, 296 S.W.3d 78, 80 (Tex. Crim. App. 2009) ; *Ex parte Welch*, 981 S.W.2d 183, 185 (Tex. Crim. App. 1998). *See* Tex. Code Crim. Proc.Art. 42.12, §§ 2(A) (Deferred adjudication occurs when "criminal proceedings are deferred without an adjudication of guilt."), 5(b) (On revocation of deferred adjudication, "all proceedings, including the assessment of punishment, the pronouncement of sentence, granting of community supervision, and defendant's appeal continue as if the adjudication of guilt had not been deferred."). However, in some situations, it is deemed one for limited purposes. *See Ex parte Cooke*, 471 S.W.3d

827, 830–31 (Tex. Crim. App. 2015) ; *Scott*, 55 S.W.3d at 595–96. At least one court of appeals has held that a person on deferred adjudication is *not* a convicted person under Chapter 64 and cannot use its procedures to obtain DNA testing. *State v. Young*, 242 S.W.3d 926, 927–29 (Tex. App.–Dallas 2008, no pet.) ("Young, however, has not been convicted of a crime. Rather, his finding of guilt was deferred, and he successfully completed his deferred adjudication probation. Because chapter 64 specifically provides that a convicted person may seek post-conviction DNA testing, it follows that a person who has not been convicted is not entitled to seek relief under chapter 64."). This holding would be consistent with a holding that a person on deferred adjudication does not qualify as a convicted person eligible for relief under Article 11.073. We need not decide that question today or the one addressed in *Young*.

And even if the meaning of the word "convicted" did include defendants who were given regular community supervision or deferred adjudication, their new scientific evidence would still need to pertain to the verdict or finding of guilt in order
46 for the statute to apply. The words "would not *46 have been convicted" would prohibit challenges to a sentence, a fine,[31] the term of community supervision, and a condition of supervision.[32]

31 A defendant can be placed on regular community supervision or deferred adjudication without the fine being probated. *See* Tex. Code Crim. Proc.Art. 42.12 §§ 3(a) (Judge may "impose a fine applicable to the offense and place the defendant on community supervision."), 5(a) ("The judge may impose a fine applicable to the offense.").

32 *Compare id.* art. 11.072, § 2(b)(1) (authorizing challenges to "the conviction for which or order in which community supervision was imposed") *with id.* § 2(b)(2) (authorizing challenges to "the conditions of community supervision").

4. *Lesser-Included Offenses versus Punishment Mitigating Issues*

TCDLA also contends that restricting Article 11.073's application to the guilt phase of trial "would draw an arbitrary distinction between new forensic evidence which is relevant to a lesser-included offense and new forensic evidence which is relevant to a mitigation issue or aggravating factor." But the legislature is vested with broad power to classify crimes and punishments and can choose whether to define something as an element of the crime or as a punishment issue.[33] The issue of "sudden passion" illustrates how designating an issue as a punishment mitigator instead of as an element of an offense can cause an issue that would have otherwise existed to disappear altogether in a particular prosecution. Sudden passion used to be an element that distinguished a lesser-included offense of voluntary manslaughter from murder (and capital murder), but now it is a punishment mitigator for murder.[34] Under the old law, if evidence at the guilt phase of a capital-murder trial raised sudden passion, then the lesser-included offense of voluntary manslaughter could be submitted to the jury at that phase of trial.[35] Under current law, however, sudden passion would never be an issue in the guilt phase of any prosecution,[36] and sudden passion is not an issue submitted at the punishment phase of a capital-murder case,[37] so a defendant on trial for capital murder could not use the sudden passion issue at either guilt or punishment. So, in capital murder cases, the change in law eliminated the ability of defendants at trial to use the sudden-passion issue to secure a jury finding that would reduce what would otherwise be a capital felony to a felony of the second degree.[38] We have rejected claims that the legislature did not or could not have caused such a result.[39]

33 *Mays v. State*, 318 S.W.3d 368, 387 n.67, 388 n.72 (Tex. Crim. App. 2010) (quoting *Wesbrook v. State*, 29 S.W.3d 103, 112–13 (Tex. Crim. App. 2000)).

34 *See id.* at 387–88.

35 *See Moore v. State*, 969 S.W.2d 4, 8–11 (Tex. Crim. App. 1998).

36 *See* Tex. Penal Code§ 19.02(d) ("At the punishment stage of trial, the defendant may raise the issue as to whether he caused the death under the immediate influence of sudden passion arising from an adequate cause.").

37 *See* Tex. Code Crim. Proc.Art. 37.071, *passim*.

38 *See Mays*, 318 S.W.3d at 387–88.

39 *Id.*

5. *Accuracy versus Finality*

TCDLA also suggests that Article 11.073 should be interpreted broadly "as a matter of public policy and express legislative intent" because the statute "embodies a strong legislative desire to choose accuracy in the results of a case over
47 finality." *47 But this "accuracy over finality" policy rationale is irrelevant if the statutory language is unambiguous and the plain meaning does not lead to absurd results. We have already held that the language is unambiguous, and it is obvious that the plain meaning does not lead to absurd results: the legislature could have rationally decided that it wanted to limit Article 11.073's incursion against finality interests to situations that brought into question the defendant's guilt. In fact, we have held that that was the legislature's intent in connection with the DNA testing statute.[40]

40 *Gutierrez*, 337 S.W.3d at 901 n.59 (citing *Kutzner v. State*, 75 S.W.3d 427 (Tex. Crim. App. 2002)).

TCDLA cites Article 11.04's requirement that habeas provisions be "most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it,"[41] but nothing is cited that specifically supports the notion that the legislature intended for accuracy considerations to trump finality considerations in every case. The habeas statutes are littered with evidence to the contrary, with, for example, prohibitions against subsequent applications unless exceptional circumstances are shown.[42] Article 11.073 itself contains other limitations on its truth-seeking remedy aside from the one at issue here: that the new evidence was unavailable at the applicant's trial and would be admissible at any current trial.[43]

41 Tex. Code Crim. Proc.Art. 11.04.

42 *See id.* arts. 11.07, § 4 ; 11.071, § 5 ; 11.072, § 9; 11.073(c).

43 *See id.* art. 11.073(b)(1).

6. *"Innocence of the Death Penalty"*

OCFW contends that, if Article 11.073 provides a remedy only when evidence calls guilt into question, it would still provide a remedy for punishment claims that allege "innocence of the death penalty." OCFW contends that this would be the case if, with the new scientific evidence, the jury would not have answered one of the special issues in the State's favor. OCFW offers as an example evidence that would show that the defendant was in fact a non-triggerman who did not have the culpability necessary to allow the imposition of the death penalty.

The phrase "innocence of the death penalty" is derived from federal habeas jurisprudence and is a description of a particular application of a narrow exception to the rule that requires a showing of cause and prejudice for failing to raise a claim in an earlier proceeding.[44] The exception is sometimes known as the "actual innocence" exception and sometimes known as the

"miscarriage of justice" exception.[45] This exception is not a claim by itself, but a gateway that allows the assertion of an otherwise defaulted constitutional claim.[46] Where the defendant is asserting that he is actually innocent of committing the crime, the miscarriage of justice exception is straightforward, with a concept of "actual innocence" that is "easy to grasp."[47]

44 *Sawyer v. Whitley*, 505 U.S. 333, 338–41, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992).

45 *See id.* at 339, 112 S.Ct. 2514.

46 *Herrera v. Collins*, 506 U.S. 390, 404, 113 S.Ct. 853, 122 L.Ed.2d 203 (1993) ; *Ex parte Fournier*, 473 S.W.3d 789, 791 (Tex. Crim. App. 2015).

47 *Sawyer*, 505 U.S. at 340–41, 112 S.Ct. 2514.

The Supreme Court has developed "an analogous framework" for certain challenges *48 to death sentences.[48] But the Supreme Court has acknowledged that actual innocence "does not translate easily into the context of an alleged error at the sentencing phase of a trial on a capital offense"[49] and that the phrase "innocent of death" is "not a natural usage of those words."[50] Despite the occasional use of this unnatural phrase, the Supreme Court has not treated a jury's answers to the punishment issues as the equivalent of a guilt determination. Although the Court held in *Ring v. Arizona* that the constitutional right to a jury trial attaches to a determination regarding the existence of an aggravating factor necessary to impose the death penalty,[51] in *Kansas v. Marsh* , the Court upheld a sentencing system that imposed death if the jury found that the aggravating and mitigating circumstances are in equipoise.[52] In response to an argument made by the dissent in the latter case regarding DNA testing, the Supreme Court remarked, "[T]he availability of DNA testing, and the questions it might raise about the accuracy of the guilt-phase determinations in capital cases, is simply irrelevant to the question before the Court today, namely, the constitutionality of Kansas' capital *sentencing* system."[53]

48 *Id.* at 341, 112 S.Ct. 2514.

49 *Id.* at 340, 112 S.Ct. 2514.

50 *Id.* at 341, 112 S.Ct. 2514.

51 536 U.S. 584, 609, 122 S.Ct. 2428, 153 L.Ed.2d 556 (2002).

52 548 U.S. 163, 181, 126 S.Ct. 2516, 165 L.Ed.2d 429 (2006).

53 *Id.* at 180, 126 S.Ct. 2516 (emphasis in original).

In our own "actual innocence" jurisprudence, we have restricted the use of the term "actual innocence" to refer only to circumstances "in which an accused did not, in fact, commit the charged offense or any of the lesser-included offenses."[54] Although we have granted relief on punishment claims on a rationale that somewhat parallels our actual-innocence jurisprudence, we have expressly eschewed the "actual innocence" label.[55] So even though some punishment claims, including some that relate to capital punishment, may be analogous to claims of innocence, the caselaw from the Supreme Court and this Court acknowledge that such analogous punishment claims are not really about innocence.

54 *Fournier*, 473 S.W.3d at 792.

55 *See Ex parte Rich*, 194 S.W.3d 508, 515 (Tex.Crim.App. 2006) (Although the applicant's claim that his enhancement was untrue "is similar to those advanced in actual innocence cases," it is "incorrect to treat this case as if it involves such a claim.").

Moreover, the federal miscarriage-of-justice exception for death-penalty determinations (i.e. "innocence of the death penalty" exception) imposes a higher burden of proof than mere preponderance of the evidence: "*clear and*

convincing evidence that, but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[56] In Article 11.071, the legislature modeled an exception to the subsequent-application prohibition on the federal standard, incorporating the "clear and convincing
49 *49 evidence" burden of proof for whether "no rational juror would have answered in the state's favor one or more of the special issues."[57] By contrast, a separate exception imposes the lower "preponderance of the evidence" burden of proof for whether "no rational juror could have found the applicant guilty beyond a reasonable doubt."[58] This contrast shows that, in Article 11.071, the legislature intended for the higher "clear and convincing" burden of proof to apply to "innocence of the death penalty" determinations while the lower "preponderance" burden of proof would apply to a determination of innocence of the crime charged. The fact that the legislature used only the "preponderance" burden of proof in Article 11.073 is a further indication that the phrase "would not have been convicted" was not intended to encompass death-penalty determinations.[59]

56 *Sawyer*, 505 U.S. at 335, 112 S.Ct. 2514 (emphasis added).

57 *See* Tex. Code Crim. Proc.Art. 11.071, § 5(a)(3).

58 *Id.* § 5(a)(2).

59 Arguably, standard of proof aside, applicant's claim would fail to satisfy the requirements of the Supreme Court's "innocence of the death penalty" exception because his proffered evidence would not negate his eligibility for the death penalty. The Supreme Court has rejected the notion that the exception encompasses "the existence of additional mitigating evidence" and has limited the exception to evidence that negates the existence of "an aggravating circumstance or ... some other condition of eligibility" for the death penalty. *Sawyer*, 505 U.S. at 345, 112 S.Ct. 2514. *See also Bell v. Thompson*, 545 U.S. 794, 812, 125 S.Ct. 2825, 162 L.Ed.2d 693 (2005) (discussing *Sawyer*).

Further, in *Gutierrez* , we explicitly rejected the notion that the words "would not have been convicted" in Chapter 64 encompassed the punishment in a capital case.[60] Not only does the *Gutierrez* decision speak to the common understanding of what the phrase "would not have been convicted" means, but, as we have explained, *Gutierrez* existed at the time the legislature enacted Article 11.073, so the legislature was on notice of how the words "would not have been convicted" were being construed by this Court in a closely related context.[61]

60 337 S.W.3d at 901.

61 *See also supra* at n.26. The dissent claims that our construction of the statute means that applicants who cannot make out a cognizable constitutional claim will have no avenue of collateral attack on flawed scientific evidence used in the punishment phase of a capital murder prosecution. That just means, however, that an applicant would have to allege a cognizable constitutional violation, as is typically required to obtain relief on habeas corpus. *See Ex parte Ramey*, 382 S.W.3d 396, 397 (Tex. Crim. App. 2012) ("Habeas corpus is available only for jurisdictional defects and violations of constitutional or fundamental rights.").

B. Constitutionality of the Statute

Applicant contends that restricting the application of Article 11.073 to claims that undermine the verdict or finding of guilt violates the Separation of Powers Clause of the Texas Constitution and violates due process principles. In support of his separation of powers contention, applicant argues that "death is different" and that the legislature "cannot restrict this Court from carrying out its

duty by limiting the manner and means in which it reviews the legality of a sentence of death." Applicant also argues that "death is different" in support of his due process contention, and he claims that juries ought to be given information that lessens a defendant's moral culpability by showing, for example, that he was not the triggerman or had some lessened mental capacity. In a third argument, applicant claims that Article 11.073 must apply to new scientific evidence that would affect only the punishment phase of a capital murder trial "because the content and scope of mitigating evidence cannot be limited." In this third argument, he relies upon Eighth Amendment jurisprudence from the Supreme Court that indicates that a jury's consideration of mitigating evidence in a death-penalty trial should not be
50 restricted.*50 The Texas Separation of Powers Clause provides:

> The powers of the Government of the State of Texas shall be divided into three distinct departments, each of which shall be confided to a separate body of magistracy, to wit: Those which are Legislative to one; those which are Executive to another, and those which are Judicial to another; and no person, or collection of persons, being of one of these departments, shall exercise any power properly attached to either of the others, except in the instances herein expressly permitted.[62]

62 Tex. Const.Art. II, § 1.

This provision is violated when (1) one branch of government assumes or is delegated a power "more properly attached" to another branch, or (2) one branch unduly interferes with another branch so that the other branch cannot effectively exercise its constitutionally assigned powers.[63] With respect to the writ of habeas corpus, the Texas Constitution authorizes the legislature to "enact laws to render the remedy speedy and effectual."[64]

63 *Ex parte Lo*, 424 S.W.3d 10, 28 (Tex. Crim. App. 2014).

64 Tex. Const.Art. I, § 12.

Applicant appears to be claiming that the legislature, by limiting the application of Article 11.073 to guilt claims, has unduly interfered with a power assigned to this Court in reviewing death-penalty cases. But when a remedy derives solely from legislative enactment, the legislature has the power to place limitations on the remedy, even when those limitations govern how courts consider claims. In *Rushing v. State* , we rejected a separation of powers challenge to Article 4.18,[65] which imposed a preservation-of-error rule for certain jurisdictional claims based on juvenile status.[66] With respect to the effect of Article 4.18 on the right to appeal, we explained that "[t]he Legislature could have denied entirely any right to appeal the absence of a juvenile court waiver of jurisdiction. It therefore follows that the Legislature could, instead of denying an appeal in its entirety, place limitations upon the ability to raise this type of claim on appeal."[67] Further upholding Article 4.18 with respect to other remedies such as habeas corpus, we explained, "It is the Legislature, after all, that established the juvenile court system, and ultimately it is up to that body to determine what procedures guide the movement of cases from that system to the adult criminal court system."[68] High courts in other states have agreed with the rather common-sense assessment that legislatively created remedies can constitutionally include legislatively created
51 restrictions.[69] *51 In *State v. Patrick* , involving the DNA testing statute (Chapter 64), we granted mandamus relief against a trial court that ordered testing under the statute when one of the statutory requirements was not met.[70] The lead opinion in that case explained that, once a conviction has been affirmed on appeal and mandate has issued, "general jurisdiction is not restored to the trial court," but the trial court retains "special or limited jurisdiction to ensure that a higher court's mandate is carried out and to perform other functions specified by statute."[71] A statute such as Chapter 64 confers authority on the trial court to

act in some situations but does not confer authority to act when the statute's requirements are not satisfied, and a trial court that purports to act under such a statute when its requirements are not satisfied acts without jurisdiction.[72] Other cases have followed the pronouncements in *Patrick* 's lead opinion, holding that various "post-conviction statutes define the scope of the trial court's jurisdiction"[73] and that "Chapter 64 expanded the jurisdiction of the trial court, *but only to the extent prescribed by the statute* ."[74] *Patrick* and its progeny further contradict the notion that a court can be required by constitutional principles to consider claims under a remedial statute that are not authorized by the language of that statute. Quite the opposite: if the statute is what creates the remedy, and the claim at issue does not qualify under the statute, then the court is prohibited from granting relief under the statute.

65 Tex. Code Crim. Proc.Art. 4.18.

66 *Rushing v. State*, 85 S.W.3d 283 (Tex. Crim. App. 2002).

67 *Id.* at 286.

68 *Id.* at 286–87.

69 *In re Estate of Olson*, 181 So.2d 642, 643 (Fla. 1966) (upholding the attestation requirements for probate: "The right of testamentary disposition of property does not emanate from the organic law but is a creature of law derived solely from statute without constitutional limitation and is at all times subject to regulation and control by legislative authority."); *Sears, Roebuck, & Co. v. City of Portland*, 144 Me. 250, 254, 68 A.2d 12, 14 (1949) (addressing a right to review by bill of exceptions: "But for the statute there would be no right of exception and no Law Court. ... While the statute grants the right to defeated litigants to bring their grievances to the Law Court for review, that is not a constitutional, nor even a common law right. The legislature has authority to repeal that statute, and withhold the right of an appeal ... and compel suitors to be content with results reached in the trial courts. Or the right may be granted subject to such restrictions, limitations and conditions as the legislature may annex."); *Arkansas Utilities Co. v. City of Paragould*, 200 Ark. 1051, 1054, 143 S.W.2d 11, 13 (1940) (rejecting a constitutional challenge to a provision of a statute that required the approval of the Arkansas State Department before a city could construct an electric grid outside the city limits because a municipality's right to do so "is dependent upon the statute and, but for the statute in question, a municipality would have no right to construct and operate such a system outside the city limits, even with the consent of the Department"); *Murray Motor Co. v. Overby*, 217 Ky. 198, 201, 289 S.W. 307, 308 (1926) ("The Declaratory Judgment Act provided an entirely new remedy, and in doing so it was competent for the legislature to withhold altogether the right of appeal, or to enact such restrictions and qualifications thereon as a prerequisite to the right as it saw proper."); *Board of County Commissioners v. Story*, 26 Mont. 517, 522–23, 69 P. 56, 58 (1902) (Supreme Court of Montana refused to rule unconstitutional a statute of limitations provision that applied to a statutory remedy for enforcing the payment of taxes: "[B]ut for the statute creating it, the remedy would not exist. The lawmaking power, having authority to prescribe or withhold altogether a particular remedy, may, in its enactment, invest it with such restrictions as will, in its judgment, best subserve the public good.").

70 86 S.W.3d 592 (Tex. Crim. App. 2002).

71 *Id.* at 594 (plurality op.).

72 *Id.* at 595.

73 *Staley v. State*, 420 S.W.3d 785, 795 (Tex. Crim. App. 2013) (reciting the *Patrick* plurality's statement regarding "general

jurisdiction").

74 *Wolfe v. State*, 120 S.W.3d 368, 372 (Tex. Crim. App. 2003) (emphasis added).

This analysis answers not only applicant's separation of powers claim, but also his claims based on due process and cruel and unusual punishment. The cases upon which applicant relies for the latter two claims discuss what evidence should be available at trial before a jury. Those cases do not address what evidence must be considered in a postconviction proceeding involving a remedy created solely by statute. The Supreme Court has explained, "When a state chooses to offer help to those seeking relief from convictions, due process does not dictate the exact
52 form *52 such assistance must assume."[75]

75 *District Attorney's Office v. Osborne*, 557 U.S. 52, 69, 129 S.Ct. 2308, 174 L.Ed.2d 38 (2009).

Applicant's contention also appears to run counter to our principles of statutory construction. When the meaning of a statute is plain, "the courts should not add to or subtract from it."[76] In fact, "the Legislature is constitutionally entitled to expect that the judiciary will faithfully follow the specific text that was adopted."[77] Applicant's claim is essentially a request for *this Court* to violate separation of powers by failing to faithfully effectuate the actual wording of Article 11.073.

76 *Ex parte Vela*, 460 S.W.3d 610, 612 (Tex. Crim. App. 2015).

77 *Boykin*, 818 S.W.2d at 785.

Like Chapter 64, Article 11.073 is a statute that created a remedy that did not exist, and was not required to exist, prior to the enactment of the statute.[78] Because the legislature was not required to create the remedy at all, it had the power to restrict the scope of the remedy that it did create. As a result, courts are not authorized to grant relief under Article 11.073 on claims that do not meet the statute's requirements. One of those requirements is that the applicant's proffered new scientific evidence show, by a preponderance of the evidence, that the applicant "would not have been convicted." Because applicant's proffered scientific evidence relates solely to punishment, his evidence cannot meet that requirement.

78 *Robbins*, 478 S.W.3d at 690 ("Article 11.073 provides a new legal basis for habeas relief.")

We dismiss the application pursuant to Article 11.071, § 5.

RICHARDSON, J., filed a concurring opinion in which HERVEY and NEWELL, JJ., joined.

ALCALA, J., filed a dissenting opinion in which MEYERS and JOHNSON, JJ., joined.

CONCURRING OPINION

RICHARDSON, J., filed a concurring opinion in which HERVEY and NEWELL, JJ., joined.

I agree with the Court's interpretation of the statutory language in question. It would seem that the plain language of Article 11.073 restricts the meaning of the phrase, "would not have been convicted," to apply only to the verdict of guilt and not to the assessment of punishment. This is consistent with the Court's interpretation of this exact phrase in *Ex parte Gutierrez* , 337 S.W.3d 883, 901 (Tex. Crim. App. 2011). And, as noted by the majority, *Gutierrez* was decided two years before Article 11.073 was enacted. The Legislature was aware of how the phrase, "would not have been convicted," would be interpreted by this Court. Had the Legislature intended Article 11.073 to apply to punishment, it could have explicitly said so. Therefore, I join the majority.

However, this is a harsh result, particularly in a death penalty case where the jury is often asked to evaluate expert scientific testimony and scientific evidence in assessing whether the death penalty is the proper punishment. The points made by the dissenting opinion are valid. In my opinion,

Article 11.073 should have been written to apply to both the guilt and punishment phases of a trial —at least a death penalty trial.

53 *53

DISSENTING OPINION

ALCALA, J., filed a dissenting opinion in which MEYERS and JOHNSON, JJ., joined.

In his habeas application challenging his death sentence, Garcia Glen White, applicant, contends that the new-science statute, Article 11.073 of the Code of Criminal Procedure, applies to the evidence admitted in the sentencing phase of his death-penalty trial. *See* TEX. CODE CRIM. PROC. Art. 11.073. More specifically, applicant alleges that he is "entitled to a new trial because newly discovered scientific evidence would have provided compelling mitigating evidence that would have likely changed the jury's answers to the special issues." This Court dismisses applicant's habeas application on the basis that the new-science statute is inapplicable to the sentencing phase of his death-penalty trial. I, however, conclude that the word "convicted" as it is used in Article 11.073 is ambiguous and that extra-textual statutory analysis favors interpreting the word to include the sentencing phase of a death-penalty trial. I conclude that applicant may assert a complaint under Article 11.073 about the scientific evidence introduced in the punishment phase of his trial at which he was sentenced to death. I would remand this case for an evidentiary hearing and factual findings by the habeas court. I, therefore, respectfully dissent from this Court's dismissal of this habeas application.

I. Analysis

Article 11.073 permits a convicted person to obtain relief based on new scientific evidence showing that the person would not have been convicted if the newly available evidence had been presented at trial. *Id.* ; *see also Ex parte Robbins* , 478 S.W.3d 678, 690 (Tex. Crim. App. 2014). The statute applies to an offense for which a defendant was "convicted," which is a word that could be interpreted narrowly by limiting the statute's applicability to the guilt phase of trial, or it could be interpreted more broadly to include its application to the punishment phase of a death-penalty trial. As I explain below, because the statutory language is ambiguous, it is necessary to consider extra-textual factors, and those factors suggest a legislative intent to apply a broader definition for the word "convicted." By more broadly construing the word "convicted" as it is used in Article 11.073 to include a death sentence, an applicant would be permitted to specifically challenge discredited scientific evidence that was used in the punishment phase of a death-penalty trial.

A. Statutory Language Is Ambiguous

The statute states,

PROCEDURE RELATED TO CERTAIN SCIENTIFIC EVIDENCE.

(a) This article applies to relevant scientific evidence that:

(1) was not available to be offered by a convicted person at the convicted person's trial; or

(2) contradicts scientific evidence relied on by the state at trial.

(b) A court may grant a convicted person relief on an application for a writ of habeas corpus if:

(1) the convicted person files an application ... containing specific facts indicating that:

(A) relevant scientific evidence is currently available and was not available at the time of the convicted person's trial because the evidence was not ascertainable through the exercise of reasonable diligence by the convicted person before the date of or during the convicted person's trial; and

54 *54

(B) the scientific evidence would be admissible under the Texas Rules of Evidence at trial held on the date of the application; and

(2) the court makes the findings described by Subdivisions (1) (A) and (B) and also finds that, had the scientific evidence been presented at trial, on the preponderance of the evidence the person would not have been convicted.

TEX CODE CRIM. PROC. Art. 11.073.

To determine whether applicant may obtain relief on the basis of new scientific evidence under Article 11.073 based on a complaint relating to the punishment phase of his death-penalty trial, it is necessary to determine whether the word "convicted" limits the statute's application to evidence relevant to the guilt phase of trial only. *See id.* art. 11.073(b)(2). Thus, the availability of the habeas relief applicant seeks under Article 11.073 depends on the meaning of the phrase "would not have been convicted." *See id.*

This Court uses rules of statutory interpretation to discern the Legislature's intent. Statutory interpretation seeks to "effectuate the ‘collective’ intent or purpose of the legislators who enacted the legislation." *Boykin v. State* , 818 S.W.2d 782, 785 (Tex. Crim. App. 1991). Discerning this collective legislative intent or purpose requires focusing on the literal text of the statute in question to "discern the fair, objective meaning of that text at the time of its enactment." *Id* . If the plain language of a statute would lead to absurd results or is ambiguous, a court may consider certain extra-textual factors to ascertain the Legislature's intent. *Id* . ; *see also* TEX. CODE CRIM. PROC. Art. 3.01.

With respect to the statutory language at issue in this case, I note that the word "convicted" is defined neither in Article 11.073 nor elsewhere in the Code of Criminal Procedure. In the absence of a specific definition for the word, it is necessary to examine whether its meaning can be discerned from the context in which it is used in the particular statute.

If a word's meaning can vary depending on its usage, a contextual analysis that focuses on the plain wording of the statute as a whole is used. *See Ramos v. State* , 934 S.W.2d 358, 364 (Tex. Crim. App. 1996) ; *United Sav. Assn of Tex. v. Timbers of Inwood Forest Associates, Ltd.* , 484 U.S. 365, 371, 108 S.Ct. 626, 98 L.Ed.2d 740 (1988) ("Statutory construction ... is a holistic endeavor. A provision that may seem ambiguous in isolation

is often clarified by the remainder of the statutory scheme—because the same terminology is used elsewhere in a context that makes the meaning clear, or because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law.") (internal citations omitted).

Here, an examination of this Court's precedent reveals that the word "convicted" can vary depending on its usage, but this Court has more often than not assigned a meaning to the word that includes the punishment phase of trial. In particular, this Court's precedent has determined that the word "conviction" can be ambiguous and mean different things in different statutes. *See Ex parte Evans* , 964 S.W.2d 643, 647 (Tex. Crim. App. 1998). Most often, however, this Court has opted for the broader view of the meaning of the word in that we have "construed the term 'conviction' to mean the judgment of guilt and the assessment of punishment." *Id.*

Because the word "convicted" can vary depending on its usage, it is necessary to examine how it is used in the particular statute to determine whether that sheds light on its plain meaning. Here, the statute, when examined as a whole, does not
55 specify whether the Legislature intended *55 to limit the statute's applicability to only the guilt phase or to include the sentencing phase of a death-penalty trial, but it appears more likely that the Legislature intended the word to have the broader meaning. The Legislature enacted Article 11.073 to address the problem of bad science that was used in criminal cases that affected their outcome. *See* Bill Analysis, Tex. S.B. 344, 83d Leg., R.S. (July 3, 2013). In light of that problem, the Legislature would likely have intended for a broader application of the statute to include the sentencing phase of a death-penalty trial. This view that the Legislature intended a broader application of the statute is supported by Article 11.04, which mandates construing the statutory language in Article 11.073 in a manner that would most favorably provide for habeas relief. *See* TEX. CODE CRIM. PROC. Art. 11.04, 11.073. Attributing "convicted" a meaning of either a judgment of guilt or an assessment of punishment in a death-penalty case accords with this mandate, and thus supports the broader view of the word "convicted."

I disagree that it is appropriate to treat the word "convicted" as being limited to the guilt phase of trial merely because the DNA statute has been interpreted by this Court as being limited in that way. The DNA statute is not a statute that itself provides habeas relief to an applicant. An applicant may use DNA evidence as part of his habeas application, but the DNA statute is itself not a habeas statute. Moreover, Article 11.04's requirement that "[e]very provision relating to the writ of habeas corpus shall be most favorably construed in order to give effect to the remedy, and protect the rights of the person seeking relief under it" is inapplicable to the DNA statute. TEX. CODE CRIM. PROC. Art. 11.04. But it is applicable to Article 11.073. Thus, the Legislature has specifically required this Court to interpret the meaning of the language in Article 11.073 in a light that would be most likely to effect the remedy and protect the rights of the person seeking relief. *See id* . Given that this Court has used "convicted" to include the punishment phase of a trial in other contexts besides the DNA statute, and given that Article 11.04 requires us to examine the statutory language in a light that favors the availability of relief for an applicant, the statutory language appears to favor the broader use of the term.[1]

[1] This Court's majority opinion holds that, because of the way in which this Court has interpreted the word "convicted" in the context of the DNA statute, that word has the same meaning in this statute, and thus the statutory-analysis question before us in the instant case may be resolved based on the statute's plain language. I have discussed the DNA statute in the course of analyzing the statutory language in Article

> 11.073, but arguably that comparison is more appropriate as an extra-textual consideration that takes into account how other statutes treat the same word. Although I have included a discussion of the DNA statute in my assessment of the statutory language, that discussion more likely belongs as an extra-textual consideration.

This Court's majority opinion sets forth a plausible explanation for why the word "convicted" may be reasonably limited to the guilt phase of trial, and, as I have explained above, that word may also be reasonably read as applying to the punishment phase of a death-penalty case. Because the word "convicted" may be reasonably understood in common language to include only the guilt phase or to also include the sentencing phase of trial, and because the words when examined in context of the statute as a whole would appear to support the broader view of the term in light of Article 11.04's requirement for construing habeas statutes most favorably for granting relief, I conclude that the
56 statute is ambiguous.*56 **B. Extra-Textual Analysis Reveals Legislative Intent to Use Broader Meaning**

Having determined that it is necessary to look beyond the plain language in Article 11.073, I consider extra-textual factors to discern the Legislature's intent. These factors include, among other matters, (1) the object sought to be attained; (2) circumstances under which the statute was enacted; (3) legislative history; (4) common law or former statutory provisions, including laws on the same or similar subjects; (5) consequences of a particular construction; (6) administrative construction of the statute; and (7) title (caption), preamble, and emergency provision. TEX. GOV'T CODE § 311.023 ; *Jordan v. State* , 36 S.W.3d 871, 873 (Tex. Crim. App. 2001).

In considering the object sought to be attained, the circumstances under which the statute was enacted, and the consequences of a particular construction, as explained above, the article was enacted to address the problem of bad science, which applies with equal force in guilt or punishment. In considering the administrative construction of the statute, I note that in other places, the Code recognizes "conviction" to refer to both the determination of guilt and the assessment of punishment. The use of the broader view of the term in other places in the Code also supports a conclusion that the Legislature would have anticipated this same construction and thus would have intended to include the punishment phase of a death-penalty trial within the statute's scope.

With particular respect to the punishment phase in death-penalty cases, I observe that, because the State must prove some of the special issues beyond a reasonable doubt, the jury's affirmative answer to those special issues is, functionally speaking, a determination that the defendant should be "convicted" of the death penalty. *See* TEX. CODE CRIM. PROC. Art. 37.071, § 2(a)(1) (in death-penalty cases, after the finding of guilt, the court "shall conduct a separate sentencing proceeding to determine whether the defendant shall be sentenced to death or life imprisonment without parole"), (b) (describing future-dangerousness and party-liability special issues that must be submitted to jury), (c) (State must prove special issues in Subsection (b) beyond a reasonable doubt; jury must return a "special verdict" on those special issues). The requirement that the State prove some of the special issues beyond a reasonable doubt distinguishes death-penalty sentencing determinations from other types of punishment determinations, which do not require that the State satisfy such a heightened burden of proof. In this sense, because the burden of proof at the punishment phase of a death-penalty case is the same as in the guilt phase, the resulting verdict that a defendant should be sentenced to death is in reality a determination that he is guilty of, and should be convicted of, the death penalty. I note that this Court and other courts have suggested as much by indicating that,

in some cases, a defendant might present evidence showing that he is actually innocent of the death penalty. *See Ex parte Blue,* 230 S.W.3d 151, 167 (Tex. Crim. App. 2007) ; *see also Sawyer v. Whitley* , 505 U.S. 333, 349, 112 S.Ct. 2514, 120 L.Ed.2d 269 (1992). Given the functional and procedural similarities between a determination of guilt and a determination that a defendant should be sentenced to death, it makes little practical sense to treat a death sentence as an ordinary punishment rather than as a "conviction" of that penalty.

The legislative history is informative of the Legislature's intent. Article 11.073 was enacted in the wake of a series of opinions that cast doubt on
57 the role and weight of *57 scientific evidence in criminal trials. The legislative history of Article 11.073"indicates that the intent of this statute is to provide relief to those who were convicted on science or scientific methodology that is now known to be unsound." *Robbins* , 478 S.W.3d at 692 (Johnson, J., concurring). In short, the Texas Legislature chose to enact Article 11.073 to ensure accuracy in the criminal-justice system rather than endorse finality. *See id.* at 704 (Cochran, J., concurring). In this view, the phrase "would not have been convicted" within the meaning of Article 11.073 envisions determinations of both guilt and punishment because the concerns surrounding accuracy that the Legislature sought to codify would apply to both wrongful verdicts and wrongful punishments in capital murder cases in which the death penalty is imposed.

I also note that if Article 11.073 is deemed to apply only to guilt determinations, applicants who cannot make out a cognizable constitutional claim will have no avenue of collateral attack on flawed scientific evidence used only in the punishment phase and no forum to introduce newly discovered scientific evidence that militates against death but does not bear on guilt.[2] That narrower view of the new-science statute would appear to be inconsistent with the Legislature's intent to keep flawed scientific evidence from infecting criminal cases. It is similarly inconsistent with its intent to ensure certainty in criminal convictions by providing relief based on exonerating evidence that was not available at the time of trial. *See* TEX. CODE CRIM. PROC. Art. 11.073(a)(1).

[2] I acknowledge that, even without utilizing the statutory basis in Article 11.073, a defendant who can establish a due-process violation on the basis that false scientific evidence was presented at the punishment phase of his capital-murder trial would be entitled to relief on that basis. *See* Tex. Code Crim. Proc.Art. 11.071 ; *Estrada v. State,* 313 S.W.3d 274, 288 (Tex. Crim. App. 2010). But not all new-science claims will give rise to a constitutional violation. In some cases, for example, there may have been no scientific evidence presented in the punishment phase at all; in those situations, under the majority opinion's construction of Article 11.073, even if a litigant were to present new scientific evidence that would persuasively show that the jury's conclusion on punishment was in error, he likely would not be entitled to relief because he could not show any constitutional violation stemming from the introduction of materially false evidence at the punishment phase. In short, some, but not all, new-science claims will also give rise to a constitutional violation that may be litigated through the traditional vehicle of Article 11.071. For those claims that do not rise to the level of establishing a constitutional violation, the majority's construction of Article 11.073 will preclude relief, even in situations in which the new scientific evidence clearly calls the correctness of the jury's punishment determination into question. A suggestion that Article 11.073 does not apply to the punishment phase of a death-penalty trial because there is another habeas statute that could possibly provide relief for constitutional or jurisdictional violations entirely misses the point that the Legislature enacted Article 11.073 to more

broadly provide relief on the basis of new scientific evidence.

Furthermore, interpreting conviction or "convicted" to encompass both the guilt and punishment phases of a capital-murder trial comports with the Supreme Court's death-penalty jurisprudence. The Supreme Court has held that certain defendants are categorically ineligible for death sentences due to age, intellectual disability, or deficient criminal culpability. *See Roper v. Simmons* , 543 U.S. 551, 575, 125 S.Ct. 1183, 161 L.Ed.2d 1 (2005) ; *Atkins v. Virginia* , 536 U.S. 304, 321, 122 S.Ct. 2242, 153 L.Ed.2d 335 (2002) ; *Tison v. Arizona* , 481 U.S. 137, 158, 107 S.Ct. 1676, 95 L.Ed.2d 127 (1987). To the extent that such individuals, though actually guilty of the
58 capital offense, are, in fact, ineligible *58 for death sentences based on new science, interpreting "conviction" to include the punishment phase adheres to the Supreme Court's restrictions placed on capital punishment. For example, a death sentence may be erroneously imposed after a jury concludes beyond a reasonable doubt that the Article 37.071 special issues are met based on flawed science. *See* TEX. CODE CRIM. PROC. Art. 37.01, § 2(b), (c). If later-discovered scientific evidence weighs against those conclusions by showing that the defendant was intellectually disabled, posed no future threat to society, or that mitigating circumstances were present, habeas relief could be granted to an applicant if Article 11.073 were to apply to the punishment phase of a death-penalty trial. Based on this view shared by the Supreme Court and this Court that a capital-offense conviction includes the penalty phase of a death-penalty trial, it reasonably suggests that the Legislature would have known that the use of that word likewise would include the penalty phase of a death-penalty trial.

In applying the new-science statute to a "conviction," the Legislature likely intended it to apply to the penalty phase of a capital-murder trial because the Supreme Court and this Court have discussed the death penalty as part of a defendant's conviction for capital murder. The Legislature's apparent intent to curb the use of flawed science and achieve greater accuracy in criminal cases is best achieved by a broader view of the word "conviction" that encompasses both the guilt phase and punishment phase of a death-penalty trial.

II. Conclusion

The plain language in the new-science statute in Article 11.073 is ambiguous because the word "conviction" has been used to include both the determination of guilt and death sentence in a death-penalty trial. Consideration of all the relevant extra-textual factors shows that the Legislature intended for Article 11.073 to apply to both the guilt and penalty phases of a death-penalty trial. For the foregoing reasons, I respectfully dissent.