CAPITAL CASE
EXECUTION SCHEDULED FOR FEBRUARY 5, 2025, 6:00 PM CST
NO. _____

IN THE
Supreme Court of the United States

STEVEN LAWAYNE NELSON,
Petitioner,

v.

STATE OF TEXAS,
Respondent.

On Petition for a Writ of Certiorari to
The Court of Criminal Appeals of Texas

PETITIONER'S APPENDIX

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IN THE COURT OF CRIMINAL APPEALS OF TEXAS

NO. WR-82,814-02

EX PARTE STEVEN LAWAYNE NELSON, Applicant

ON APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION FROM CAUSE NO. C-485-W012580-1232507-B IN THE 485th CRIMINAL DISTRICT COURT TARRANT COUNTY

Per curiam.

O R D E R

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

In October 2012, a jury convicted Applicant of the March 2011 capital murder of Clinton Dobson. *See* TEX. PENAL CODE § 19.03(a). Based on the jury's answers to the special issues submitted pursuant to Article 37.071, the trial court sentenced Applicant to

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

death. This Court affirmed Applicant's conviction and sentence on direct appeal and denied relief on Applicant's initial habeas application. *Nelson v. State*, No. AP-76,924 (Tex. Crim. App. Apr. 15, 2015) (not designated for publication); *Ex parte Nelson*, No. WR-82,814-01 (Tex. Crim. App. Oct. 14, 2015) (not designated for publication).

The trial court ultimately scheduled Applicant's execution for February 5, 2025. On January 16, 2025, Applicant filed the instant habeas application in which he raises four claims. Specifically, Applicant asserts that trial counsel provided ineffective assistance because they failed to adequately investigate Applicant's secondary role in the offense (claim one) and because they failed to adequately investigate, develop, and present trauma-related mitigating evidence (claim three). He also asserts that his sentence violates *Buck v. Davis* because trial counsel elicited testimony that Applicant was more dangerous because he is Black (claim two) and that he was convicted and sentenced in violation of the Sixth Amendment right, recently recognized in *Smith v. Arizona*, to confront forensic witnesses against him (claim four).

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

IT IS SO ORDERED THIS THE 28th DAY OF JANUARY, 2025.

Do Not Publish

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

Ex parte STEVEN LAWAYNE NELSON,	**§**	**Writ No. _____**
APPLICANT	**§**	**(Trial Cause No. 1232507-D)**
	§	**CAPITAL CASE**

MOTION FOR STAY OF EXECUTION

EXECUTION DATE: February 5, 2025

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MOTION FOR STAY OF EXECUTION

Steven Nelson, by and through undersigned counsel, respectfully moves this Court to stay his execution, which is scheduled for February 5, 2025. A stay of execution is justified to allow for full and fair consideration of issues presented in his First Subsequent Application for Writ of Habeas Corpus Filed in Accordance with Article 11.071, Section 5, Texas Code of Criminal Procedure ("Subsequent Application").

The claims in the Subsequent Application are complex, warrant the utmost attention, and present novel issues. There are four: (1) trial counsel was constitutionally deficient in failing to uncover overwhelming evidence that Nelson wasn't the primary assailant—and that he therefore lacked the culpability necessary for a Texas death sentence;[1] (2) trial counsel violated *Buck v. Davis*, 580 U.S. 100 (2017), when it elicited testimony that Nelson was more dangerous because he was Black; (3) trial counsel was constitutionally deficient in failing to uncover swaths of mitigating evidence that favored a life sentence; and (4) the State violated the Confrontation Clause when it introduced a medical examiner's testimonial hearsay about a crucial autopsy report authored by a different, non-testifying medical examiner, *see Smith v. Arizona*, 602 U.S. 779 (2024). Each of these claims entails

[1] In conjunction with this claim, Nelson also argues that he categorically ineligible for execution under *Tison v. Arizona*, 481 U.S. 137, 158 (1987); *Enmund v. Florida*, 458 U.S. 782, 801 (1982).

arguments about gatekeeping issues and the underlying merits—and some include extensive content urging the Court of Criminal Appeals to reconsider its approach to authorizing subsequent post-conviction litigation in cases where egregious lawyering caused capital litigants to forfeit claims in their initial applications.

In order to ensure fair consideration of his Subsequent Application without the time pressure of a pending execution date, Mr. Nelson respectfully requests that the Court issue a stay of execution.

Dated: January 15, 2025

Respectfully Submitted,

/s/ Lee Kovarsky

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Tex. R. App. P. 9.4. The word count of this document is 308, not including words not included in the word count limit.

_____
Lee B. Kovarsky

CERTIFICATE OF SERVICE

I hereby certify that on January 16, 2025, I served a copy of this motion in person, or by email and/or FedEx on the following:

Ms. Fredericka Sargent
Tarrant County Criminal District Attorney's Office
101 W Nueva St.
San Antonio, TX 78205

Court of Criminal Appeals
201 W. 14th Street
Austin, Texas 78701

_____
Lee B. Kovarsky

IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

Ex parte STEVEN LAWAYNE NELSON,	§	**Writ No. _____**
APPLICANT	§	**(Trial Cause No. 1232507-D)**
	§	**CAPITAL CASE**

FIRST SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO ARTICLE 11.071, § 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

EXECUTION DATE: February 5, 2025

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FIRST SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS FILED PURSUANT TO ARTICLE 11.071, § 5 OF THE TEXAS CODE OF CRIMINAL PROCEDURE

Applicant STEVEN NELSON seeks relief from his conviction and judgment imposing death in violation of the United States Constitution.

INTRODUCTION

Steven Nelson was subject to a death penalty prosecution for his limited role in a robbery that ended in a tragic death. Substantial evidence of Nelson's minimal involvement and lessened culpability existed, and it was readily accessible to his trial counsel. During trial preparation, however, Nelson's lawyers ignored one red flag after another, missing two crucial clusters of evidence capable of persuading the sentencing jury to spare his life. First, trial counsel failed to investigate and develop voluminous evidence that Nelson's participation in the underlying crime was secondary—even though the State was able to secure a death sentence only by proving that Nelson acted alone. Second, and even though sufficient mitigation precludes a Texas death sentence, trial counsel failed to investigate and develop powerful mitigating evidence about childhood abuse and trauma. Trial counsel instead pursued a preposterous sentencing-phase strategy. They decided to present an expert who told them long before trial that she would testify that Nelson was a psychopath, who eventually testified to precisely that, and who attributed the purported psychopathy in part to Nelson's race (he is Black). Because of the

deficient representation, Nelson's trial ended with unanimous jury findings that Nelson was a future danger, that any mitigation was insufficient to spare his life, and that he caused, intended, or sufficiently anticipated the murder.

Ordinarily, state post-conviction proceedings would have exposed the constitutional problems with trial counsel's performance. But not here. State post-conviction counsel John Stickels did virtually nothing. (His law license has been suspended for neglect of post-conviction and death penalty cases.) He performed no meaningful investigation, and he ignored the obvious deficiencies in trial counsel's representation. He filed a cut-and-paste job consisting mostly of frivolous claims, including claims having nothing to do with Nelson. Stickels even left the name of the other client ("Tony") unchanged from the copied briefing. Stickels was more than negligent; his performance was disgraceful (egregiously so), and he constructively abandoned Nelson.

The Court of Criminal Appeals ("CCA") should authorize subsequent litigation of four claims under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, § 5(a). First, trial counsel was constitutionally deficient in failing to uncover overwhelming evidence that Nelson wasn't the primary assailant—and that he therefore lacked the culpability necessary for a Texas death sentence.[1] Second, trial

[1] Whether trial counsel performed deficiently or not, the new evidence of Nelson's minimal participation and culpability discussed here shows that Nelson's death sentence violates the Eighth Amendment constraints on capital punishment for defendants convicted on accomplice liability

counsel violated *Buck v. Davis*, 580 U.S. 100 (2017), when it elicited testimony that Nelson was more dangerous because he was Black. Third, trial counsel was constitutionally deficient in failing to uncover swaths of mitigating evidence that favored a life sentence. Finally, the State violated the Confrontation Clause when it introduced a medical examiner's testimonial hearsay about a crucial autopsy report authored by a different, non-testifying medical examiner. *See Smith v. Arizona*, 602 U.S. 779 (2024).

STATEMENT OF THE CASE

I. TRIAL

On March 3, 2011, Clinton Dobson, the pastor of an Arlington, Texas church, was beaten and killed during a church robbery. Judy Elliott, the church's secretary, was also beaten. The assailants stole a laptop, Dobson's iPhone and credit cards, and Elliott's car. *See Nelson v. State*, No. AP-76,924, 2015 WL 1757144, at *1 (Tex. Crim. App. April 15, 2015). The next day, Morgan Cotter and Allison Cobb reported to police that a man matching Nelson's description approached them at a gas station and asked for help getting out of town, stating that he had an iPhone belonging to a deceased pastor. Ex. 1 at NELSON_00306 (Arlington Police Department, Incident Report). After surveillance footage proved their story false, one of the two women

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theories. *See Tison v. Arizona,* 481 U.S. 137, 158 (1987) (death sentences permitted only for those with "major participation" and "reckless indifference to human life"); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (barring death penalty for non-killers who lack sufficient intent that a death occur).

admitted to withholding information from the police. Both had in fact been hanging out with their friend Anthony "A.G." Springs, as well as Nelson, on the evening of March 3. *Id.* at NELSON_00307. That evening, it was Springs who told the group that he was trying to sell an iPhone that "belonged to the dead Pastor." *Id.* at NELSON_00306-08. Morgan Cotter (Springs's best friend, according to Springs's girlfriend) eventually told the police that she believed Springs was involved in Dobson's death. *Id.* at NELSON_00307; Ex. 2 (Mar. 8, 2011 Police Interview of K. Duffer) at 55:05.[2] According to Cobb, Springs was "laughing" about the murder when it appeared on the news. Ex. 3 at NELSON_00495 (Sept. 25, 2012 Memorandum Re: Interview with Allison Cobb, Trinity Mitigation).

Police arrested Springs and Nelson. Elliott's car keys and Dobson's iPhone were recovered on Springs during the arrest, 34 R.R. 167,[3] and photos taken shortly after the arrest showed "a large bruise on Springs['s] inner left arm at or near his lower biceps/elbow" and extensive bruising and swelling on the knuckles of both his hands, which Springs attributed to a "nervous fidget" of "beating his fists together." Ex. 1 at NELSON_00315; Ex. 4 at NELSON_00327-28. Nelson, who showed no injuries or physical signs of a violent encounter, told police that he was only a lookout during the robbery. He admitted to using the stolen credit cards, but he

[2] Ex. _ refers to a flash-drive of audio files provided to the Court concurrently.
[3] "R.R." refers to the Reporter's Record in the Texas trial court.

maintained that he neither killed anyone nor expected anyone to get hurt. Ex. 1 at NELSON_00312-13.

The Arlington Police Department filed sworn complaints alleging that Springs and Nelson committed capital murder. The investigating officers "were convinced the crime could not have been committed by one person." Ex. 5 at PDF p. 4 (Excerpts of Summary Notes by Dr. J. Randall Price, Ph.D., ABPP). After all, Nelson was accused of subduing two people, including one (Dobson) who was three inches taller and outweighed him by nearly 50 pounds. Ex. 1 at NELSON_00299-300. And although "Springs swore numerous times that he was not there," law enforcement believed that Springs played a role in causing Dobson's death. Ex. 5 at PDF p. 4 (Excerpts of Summary Notes by Dr. J. Randall Price, Ph.D., ABPP). They did not believe his "self preserving statements" maintaining his innocence. Ex. 1 at NELSON_00310; Ex. 6 (Mar. 7, 2011 Police Interview of A. Springs) at 36:25 (Springs caught lying about driving by church after murder). While interviewing Springs in March 2011, the investigating officer told Springs that Elliott said there were two attackers in the church, and that a maintenance worker across the street had seen two people fleeing the scene. Ex. 6 (Mar. 7, 2011 Police Interview of A. Springs) at 13:34, 16:00, 24:55.

Still, Springs avoided grand-jury indictment, Ex. 6 (Excerpts of Summary Notes by Dr. J. Randall Price, Ph.D., ABPP), and the State ultimately charged only

Nelson—on the theory that he had acted as a lone assailant. 1 C.R. 12, 26.[4] An investigating officer later represented that Springs avoided charges because his phone records were inconsistent with his participation in the crime. Those records, however, showed only that his phone "was quiet for a number of hours" during the time of the murder. *See Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *13 (N.D. Tex. Mar. 29, 2017); Ex. 7 (T. Mobile Phone Records for Anthony Springs between Feb. 1 and Mar. 5, 2011); 35 R.R. 61-62. Other evidence, moreover, established that Springs had multiple cell phones, 36 R.R. 85, and that he switched SIM cards between cell phones to which he had access, 34 R.R. 167-68, 173-74; *see also* 35 R.R. 21-22; Ex. 6 (Mar. 7, 2011 Police Interview of A. Springs) at 14:17 (Springs was switching SIM cards on the day of crime)).

On March 14, 2011, the fourth criminal district court in Tarrant County appointed William Ray and Stephen Gordon to represent Nelson ("trial counsel"). 1 C.R. 28-29. Although Nelson insisted that he was not the primary assailant (that was Springs), trial counsel failed to pursue evidence that could have substantiated the offense conduct of more culpable accomplices. Substantial physical and testimonial evidence linked Springs to the crime, including: Morgan Cotter's statements to the police, Springs's possession of Dobson's phone and Elliott's car keys at the time of his arrest, police reports indicating the officers' belief that Springs and his alibi

[4] "C.R." refers to the Clerk's Record filed in the Texas Court of Criminal Appeals.

witnesses were lying, mobile phone records contradicting the alibi's story, and the extensive bruising on Springs's hands and arm at the time of his arrest—clear physical manifestations of a recent physical altercation. Ex. 8 at NELSON_0003-15 (Nov. 6, 2012 Itemized Bill for William "Bill" Ray); Ex. 1 at NELSON_00307-11, NELSON_00314-15; Ex. 4 at NELSON_00327-28; Ex. 9 at NELSON_00482; Ex. 7 (T. Mobile Phone Records for Anthony Springs between Feb. 1 and Mar. 5, 2011). Nevertheless, trial counsel did not interview available witnesses about Springs, including Springs himself. Trial counsel also failed to follow up on record-based inconsistencies with Springs's alibi—that he was in Venus, Texas the night before and the day of the crime, 35 R.R. 14-16, 31-32.

Trial counsel also failed to investigate a second accomplice that Nelson would later identify in sworn testimony, Claude "Twist" Jefferson. 34 R.R. 165-66; 36 R.R. 69-73. Testimony from Jefferson's aunt placed him with Springs and Nelson on the afternoon of the crime, 35 R.R. 132-33; video footage showed Jefferson with Springs and Nelson using the stolen credit cards at a mall, Ex. 1 at NELSON_00309-10; and phone records showed that Jefferson extensively communicated with Springs and Nelson before and after the crime, Ex. 10 at NELSON_00332-95 (AT&T Phone Records for Claude Jefferson between Mar. 1 and Mar. 10, 2011). Records from the State's case file show that Springs called Jefferson from jail following the crime. Ex. 5 at PDF p. 17 (Excerpts of Summary Notes by Dr. J. Randall Price, Ph.D.,

ABPP). As an alibi, Jefferson claimed to be taking an in-class chemistry quiz when the crime took place. But there was no chemistry quiz that day, Ex. 11 at NELSON_00464, and Jefferson's initials on the class sign-in sheet appeared to have been written by another person. *Id.* at NELSON_00459-65 (Jan. 10, 2012 Affidavit of Kelly Davis). Jefferson's phone records also show that he answered a call at precisely the time that he said he was taking the quiz. Ex. 10 at NELSON_00339.

At *voir dire*, the State focused on selecting jurors who were open to a theory of vicarious criminal liability. That is, the State was seeking a capital murder conviction even if Nelson just agreed to participate in the robbery, and even if he neither caused nor intended Dobson's death. *See, e.g.*, 28 R.R. 172-74; 21 R.R. 70-74; 31 R.R. 19. From the outset, then, the State expected that it would have to prove Nelson's guilt by way of an accomplice-liability theory. Under such circumstances, the State could secure a death sentence only if the sentencing-phase jury found that, notwithstanding guilt on an accomplice liability theory, Nelson's *personal* culpability and offense conduct warranted a death sentence. (This finding is the answer to the so-called "anti-parties" instruction, referenced throughout this Application.)

The guilt phase of Nelson's trial began on October 1, 2012. 32 R.R. 1. The State called 38 witnesses, 35 R.R. 10-40, including two alibi witnesses for Springs (the mother of his child and her close friend), 35 R.R. 10-40. Defense counsel did

not cross-examine Springs's alibi witnesses with any of the record information available to them, and they called only Nelson to testify, 35 R.R. 25-29, 35-40; 36 R.R. 47-115. Nelson testified that he served as a lookout for Springs and Jefferson while the two robbed the church, and that he found Dobson and Elliott already wounded when Springs told him to come inside. Consistent with Nelson's testimony, the State's DNA expert confirmed that DNA found on the ligatures used to bind the victims belonged to neither Nelson nor the victims. 36 R.R. 69-76, 86-87, 109; 35 R.R. 205. The State nonetheless emphasized the lone-assailant theory repeatedly during guilt-phase closing arguments. 37 R.R. 7-13, 31.

The trial court instructed the jury that there were two avenues to convict Nelson of capital murder: (1) as Dobson's actual killer; or (2) as a party to a robbery in which a capital murder took place (the "anti-parties instruction"). Giving an anti-parties instruction permitted the jury to find Nelson guilty of capital murder even if he neither intended nor directly caused the murder. *See* TEX. PENAL CODE § 7.02(b) (language establishing that, if, "in the attempt to carry out a conspiracy to commit one felony, another felony is committed by one of the conspirators," then "all conspirators are guilty of the felony actually committed, though having no intent to commit it" when the more aggravated offense "should have been anticipated" as a result of the agreed conspiracy). The practical threshold for Texas parties liability is incredibly low: parties liability requires only that the "the defendant [be] physically

present at the commission of the offense and encourages its commission by words or other agreement." *Ransom v. State*, 920 S.W.2d 288, 302 (Tex. Crim. App. 1994). The anti-parties instruction, in short, permitted the jury to convict based on a theory of accomplice liability—i.e., that Nelson agreed to a robbery in which a capital murder took place. That is the same liability theory that the state telegraphed at *voir dire* and argued at trial. On October 8, 2012, the jury found Nelson guilty of capital murder. *See* 2 C.R. 401.

Before a Texas defendant can be sentenced to death in a case where the guilt finding involves a parties-liability theory, the sentencing-phase jury must unanimously find: (1) the defendant poses "a continuing threat to society" (the "future dangerousness" issue); (2) the defendant "actually caused" the killing, "intended" the death at issue, or actually "anticipated that a human life would be taken" (the anti-parties issue); *and* (3) other mitigating circumstances do not prohibit the death penalty (the "mitigation" issue). TEX. CODE CRIM. PROC. art. 37.071, § 2(b). Because Nelson was convicted under the law of parties, evidence of his limited involvement in the murder was critical to his sentencing-phase defense.

The anti-parties instruction ensures that Texas complies with the Eighth Amendment constraints on death sentences in accomplice liability scenarios, which bar death sentences for defendants who either (1) aren't reckless with respect to the loss of life or (2) aren't "major" participants in the offense. *See Tison v. Arizona*,

481 U.S. 137, 158 (1987) (articulating controlling rule); *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (barring death penalty for non-killers who lack sufficient intent that a death occur); *Johnson v. State*, 853 S.W.2d 527, 535 (Tex. Crim. App. 1992) (explaining that anti-parties rule makes Texas death sentences *Tison* and *Enmund* compliant). That constitutional rule is expressed through the anti-parties instruction because it requires that a defendant have actually caused, intended, or anticipated the capital killing. And to effectuate that constitutional rule, the CCA has emphasized that "anticipat[ion]" is a "highly culpable mental state" that is "at least as culpable as the one involved in *Tison*"—i.e., "[r]eckless disregard for human life" plus "major participation." *Ladd v. State*, 3 S.W.3d 547, 573 (Tex. Crim. App. 1999); *Tison*, 481 U.S. at 158; *see also Walker v. Scott*, 123 F. Supp. 2d 1034, 1043 (E.D. Tex. 2000) (discussing CCA opinion reasoning that anti-parties finding requires "reckless indifference to human life because [defendant] consciously disregarded a known risk of death"). Trial counsel, however, failed to develop and present the available evidence showing that Nelson was merely a lookout, and that he didn't cause, intend, or sufficiently anticipate the capital murder.

Nelson's reduced role was not something that trial counsel had explored before trial, and so they failed to corroborate that position with sentencing-phase evidence. 44 R.R. 20-21. The only evidence trial counsel offered in support of the anti-parties argument—and other arguments based on Nelson's limited

participation—was the testimony of one DNA expert, who found a hair on Dobson's body containing DNA from an unknown third party. 43 R.R. 99-102. Trial counsel neither offered a theory on the source of the hair, nor any other evidence showing Nelson had not, in the State's words, "d[one] it alone." 37 R.R. 10.

In advance of the sentencing phase, trial counsel conducted only a rudimentary investigation into Nelson's background. They hired Mary Burdette, a mitigation specialist, to interview some people who knew Nelson. And they obtained some official documents from the State, including records from schools, hospitals, juvenile detention facilities, and criminal justice institutions. But virtually none of these records were presented at trial. They contained extensive evidence of trauma and abuse that trial counsel never presented, which strongly indicates that trial counsel never actually reviewed them. Trial counsel certainly never explored any red flags with further investigation and expert consultation.

Trial counsel instead retained Dr. Antoinette McGarrahan, a neuropsychologist who regularly worked with trial counsel to make the same sentencing-phase defense.[5] Dr. McGarrahan was retained without a specific purpose

[5] Nelson is one of at least three capitally charged defendants represented by trial counsel who were sentenced to death close in time. In each of these three cases, trial counsel used Dr. McGarrahan to implement the same sentencing phase tactic: that the defendant was incurably psychopathic, but he should be excused because he couldn't control his violent impulses. These other cases were those of Cedric Ricks and Amos Wells. *See* Application for Writ of Habeas Corpus, *Ex parte Ricks*, No. 1361004 (371st Dist. Ct., Tarrant Cnty., Tex.); Application for Writ of Habeas Corpus, *Ex parte Wells*, No. C-432-W011509-1405275-A, at 22 (432nd Dist. Ct., Tarrant Cnty., Tex.). Needless to say, the tactic failed in all three cases.

and given no referral question; trial counsel did little background investigation into Nelson's history before retaining her. Based on the limited records trial counsel did provide, Dr. McGarrahan notified defense counsel before the trial that "[i]f asked on cross . . . [she would] agree that [Nelson] has several traits associated with ***psychopathy.***" Ex. 12 at NELSON_00775 (A. McGarrahan Letter to B. Ray (Aug. 20, 2012)) (emphasis added). Trial counsel called her to testify nevertheless. Dr. McGarrahan indeed testified on cross-examination that Nelson "has many, many psychopathic characteristics"; "meets most of that criteria [for being a psychopath]"; "likes violence" and finds it "emotionally pleasing"; and meets all criteria for psychopathy except "short-term marital relationships," but only because "he's never been out of prison long enough to get married." 43 R.R. 269, 274-75.

On the ultimate question of whether Nelson would pose a future danger to society, Dr. McGarrahan testified that Nelson would prove dangerous "[a]s long as there are other people around him that are preventing him from getting his way." *Id.* at 277. She testified that Nelson's "risk factors," *including his "minority status*," made him "a storm waiting to happen," and a risk of "severe violence" for which "[t]here is no cure." 43 RR. 253-55 (emphasis added). Following all that damaging testimony, the State decided it was no longer necessary to present its own mental health expert, Dr. Randall Price—although Dr. Price had been retained by the State and was waiting in the courtroom to testify. Ex. 13 at NELSON_01279.

To secure a death sentence, the State returned to the theme that "the only person who is responsible for these murders [is] this Defendant." 44 R.R. 10. It told the jury that Nelson "is capable of having been the only person in that church committing that crime. And he was." 44 R.R. 27. The jury indeed made all three findings sufficient to trigger a death sentence, 44 R.R. 32-36; 2 C.R. 417-19, and the trial court sentenced Nelson accordingly. 2 C.R. 424-46.

II. DIRECT APPEAL

Nelson appealed his conviction. Counsel appointed for the direct appeal filed Nelson's opening brief on July 19, 2013, raising fifteen claims not relevant here. On April 15, 2015, the CCA affirmed the judgment. Opinion, *Nelson v. Texas*, No. AP-76,924 (Tex. Crim. App. Apr. 15, 2015). The U.S. Supreme Court denied Nelson's certiorari petition on October 19, 2015. Order, *Nelson v. Texas*, No. 15-5265 (U.S. Oct. 19, 2015).

III. STATE POST-CONVICTION PROCEEDINGS

On October 16, 2012, the trial court appointed John Stickels to represent Nelson in state habeas proceedings. 2 C.R. 432. Stickels, who has since been suspended for negligence in capital case litigation,[6] performed no meaningful

[6] In February 2024, the Texas State Bar suspended Stickels's license for one year for neglecting to perform reasonable services for clients in multiple capital murder and postconviction cases. State Bar of Texas, Profile of John William Stickels, at https://www.texasbar.com/AM/Template.cfm?template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=188387, last accessed January 9, 2025.

investigation to support Nelson's habeas application. In 2012, Stickels completed three hours of work on Nelson's case. Ex. 14 at NELSON_00212. He waited six months to meet with Nelson, and did not request Nelson's files from trial counsel until two months after that first meeting. *Id.* at NELSON_00211-12. After receipt, Stickels spent four-and-a-half hours reviewing them, and he did not conduct any independent investigation into the facts or circumstances of the offense. *See id.* at NELSON_00207-12. Stickels contacted a mitigation specialist, Gerald Byington, who used about half of the court-allotted budget for his services without independently investigating the offense or alleged accomplices. Ex. 15 at NELSON_00206 (May 16, 2014 Service and Expense Summary for G. Byington); Ex. 16 at NELSON_00213-18 (Review of Mitigation Activities in the Trial of Steven Lawayne Nelson). Instead, the mitigation specialist chose to conduct a records-only review. Ex. 15 at NELSON_00206; Ex. 16 at NELSON_00213-18. In March 2014, Nelson wrote a letter to the trial court expressing concern about Stickels's representation and pleading for new counsel. 1 C.R. 131. The court docketed the letter but took no other action.

On April 15, 2014, Stickels filed Nelson's state habeas application, raising 17 claims: 11 boilerplate and non-cognizable challenges to the Texas capital punishment scheme; 4 claims that had already been raised and denied on direct appeal; a claim based on "excessive and prejudicial security measures"; and a pro

forma ineffective assistance of trial counsel ("IATC") claim that vaguely alleged trial counsel's failure to "gather relevant records" relating to "mitigation evidence." Ex. 17 at NELSON_00106-10, NELSON_00139. In drafting this application, Stickels lifted large portions from a different client's briefing, including arguments based on Fetal Alcohol Spectrum Disorder ("FASD") that did not apply to Nelson but nevertheless appeared in *five* separate claims. *Id.* at NELSON_00106-10, NELSON_00138. Stickels repeatedly advanced arguments on behalf of "Tony," the FASD-afflicted client (Mark Anthony Soliz) whose briefing had apparently been pasted wholesale into Nelson's application. *Id.* at NELSON_00136; *see also Soliz v. State*, 432 S.W.3d 895, 903 (Tex. Crim. App. 2014) (adjudicating the Soliz FASD claim).

On January 29, 2015, the trial court entered an order recommending that the CCA adopt the State's proposed findings of fact and conclusions of law and deny all relief. *See Ex parte Steven Lawayne Nelson*, No. C-4-010180-1232507-A (Tex. Crim. Dist. Ct. Jan. 29, 2015). On October 14, 2015, the CCA adopted that recommendation denying relief. *Id.*

IV. FEDERAL HABEAS PROCEEDINGS

Subsequent counsel conducted the investigation that trial counsel and state habeas counsel failed to undertake, although most of that evidence has still never been considered because of restrictions on new evidence in federal habeas

proceedings. After discovering that trial counsel had never investigated Springs's and Jefferson's involvement in the offense, subsequent counsel interviewed people never contacted during pretrial investigation. Subsequent counsel also re-interviewed people from Nelson's childhood and early adulthood, yielding new evidence about Nelson's background. Counsel uncovered records that trial counsel had obtained but neither explored nor presented to the jury—records detailing childhood trauma, severe abuse, neglect, mental illness, and poverty.

On December 22, 2016, Nelson filed his amended federal habeas petition, which included sentencing-phase IATC allegations that trial counsel failed to adequately investigate and litigate the role of accomplices. None of those IATC allegations overlapped with allegations in the initial state post-conviction application. Amended Petition for a Writ of Habeas Corpus, *Nelson v. Davis*, No. 4:16-CV-904-A (N.D. Tex. Mar. 29, 2017), ECF No. 25 at PDF pp. 39-53. The district court denied all relief, deciding that the state post-conviction disposition precluded relitigation of all IATC claims in federal court. *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880 (N.D. Tex. Mar. 29, 2017).

The Fifth Circuit first certified the allegations about accomplice participation as worthy of full review, *Nelson v. Davis*, 952 F.3d 651, 656 (5th Cir. 2020), but eventually determined in a split decision that the state post-conviction judgment precluded merits consideration, *Nelson v. Lumpkin*, 72 F.4th 649, 660 (5th Cir. 2023).

In the alternative, the majority also affirmed summary judgment against Nelson's accomplice allegations on "*Strickland* prejudice" grounds. *Id.* at 661-62. Judge Dennis dissented. The Fifth Circuit denied a petition for rehearing or rehearing en banc on August 11, 2023. Order, *Nelson v. Lumpkin*, No. 17-70012, Dkt. 214. On December 11, 2023, Nelson filed a petition for a writ of certiorari, which the U.S. Supreme Court denied. Order, *Nelson v. Lumpkin*, No. 23-635 (U.S. Apr. 15, 2024).

About a month after the Supreme Court denied Nelson's certiorari petition, the State moved in the 485th District Court (Tarrant County) to set an execution date. State's Mot. For Court to Enter Order Setting Execution Date, No. 1232570D (Tex. Crim. Dist. Ct. May 16, 2024). After a hearing, the court set an execution date of February 5, 2025.

AUTHORIZATION STANDARD

When considering whether to authorize the claims contained in this subsequent application, the CCA inquires only whether the application meets the threshold showing required by TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, § 5(a). Specifically, Nelson seeks authorization for a subsequent application under two different provisions of § 5(a): (1) the gateway for newly available claims, *id.* § 5(a)(1); and (2) the gateway for "actual innocence of the death penalty," *id.*

§ 5(a)(3).[7] Satisfying either exception suffices for this Court to authorize Nelson's claim.

Section 5(a)(1) is, in simple terms, for newly available claims. Nelson must show that: (1) the factual or legal basis for his current claims was unavailable at the time he filed his previous application; and (2) the specific facts alleged, if established, would constitute a constitutional violation. *See Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). A factual basis of a claim is "unavailable" if it was not "ascertainable through the exercise of reasonable diligence on or before" the filing of the initial post-conviction application. TEX. CODE CRIM. PROC. art. 11.071, § 5(e). A claim's legal basis qualifies as "unavailable" if, prior to the filing date of the application, it "was not recognized by or could not have been reasonably formulated from" a Texas or federal appellate decision. TEX. CODE CRIM. PROC. art. 11.071, § 5(d).

Section 5(a)(3) is, also in simple terms, for claims showing that the punishment-phase jury would not have voted for a death sentence but for the applicant's claimed violation. More precisely, § 5(a)(3) requires authorization of

[7] Stickels's egregious post-conviction performance excuses the fact that certain claims were not raised earlier (i.e., they were not available). As explained below, TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, §§ 2(a) ("Representation by Counsel") and 3(a) ("Investigation of Grounds for Application") are also relevant, as they provide part of the legal basis for excusing the effects of Stickels's egregiously deficient performance. That argument is set forth in detail where appropriate. In the interest of simplicity and clarity, however, this Application will refer to them as part of the § 5(a)(1) authorization argument.

further proceedings when a claimant shows, "by clear and convincing evidence, but for a violation of the United States Constitution no rational juror would have answered" any one of three Texas special issues requiring a death sentence affirmatively. TEX. CODE CRIM. PROC. art. 11.071, § 5(a)(3); TEX. CODE CRIM. PROC. art. 37.071, § 2.

When it decides questions of § 5(a) authorization, the CCA draws all inferences in Nelson's favor. *See Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007) (holding that a § 5(a)(3) inquiry entails only a "review [of] the adequacy of the pleading"); *Campbell*, 226 S.W.3d at 421 (holding that § 5(a)(1) inquiry requires the CCA to ask whether "the specific facts alleged, if established, would constitute a constitutional violation"). Nelson need not *prove* the truth of his allegations at the authorization stage; the trial court is the proper forum for evaluating their weight and credibility. "[I]f we were to require that a subsequent application actually *convince* us . . . there would be no need to return the application to the convicting court for further proceedings." *Blue*, 230 S.W.3d at 163 (emphasis in original). Once Nelson presents "a *threshold* showing of evidence that would be at least sufficient to support an ultimate conclusion," remand to the trial court is justified. *Id.* (emphasis in original).

This Application first sets forth the specific factual allegations that support Nelson's constitutional claims (i.e., the merits), and then addresses the unavailability

of the facts upon which those claims are predicated (i.e., the bases for § 5 authorization). The authorization arguments specific to each claim appear just below the corresponding merits arguments.[8]

CLAIMS FOR RELIEF

I. CLAIM 1: TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE NELSON'S SECONDARY ROLE IN THE OFFENSE VIOLATED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL

"[T]he right to counsel is the right to the effective assistance of counsel." *Strickland v. Washington*, 466 U.S. 668, 686 (1984) (quotation marks omitted); *see also Lopez v. State*, 343 S.W.3d 137, 142 (Tex. Crim. App. 2011) ("The right to counsel requires more than the presence of a lawyer; it necessarily requires the right to effective assistance."). An IATC claimant must prove the deficiency of defense counsel and prejudice to a trial outcome. *See Strickland*, 466 U.S. at 687; *Lopez*, 343 S.W.3d at 142. To assess prejudice, the court must cumulate trial counsel's

[8] Rather than order the further litigation authorized under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, § 5, this Court may also, on its own initiative, reconsider its prior order refusing state habeas relief. Texas Rule of Appellate Procedure 79.2 generally bars motions for rehearing in post-conviction cases, but it makes clear that this Court may reconsider a judgment on its own initiative. Specifically, Rule 79.2 states: "A motion for rehearing an order that denies habeas corpus relief under Code of Criminal Procedure, articles 11.07 or 11.071, may not be filed. The Court may *on its own initiative* reconsider the case." (emphasis added). This Court has long exercised this power in capital post-conviction cases, where justice requires. *See*, *e.g.*, *Ex parte Robertson*, 603 S.W.3d 427, 428 (Tex. Crim. App. 2020) (*Batson* claim); *Ex parte Lizcano*, No. WR-68,348-03, 2018 WL 2717035, at *1 (Tex. Crim. App. June 6, 2018) (*Atkins* claim); *Ex parte Moussazadeh*, 361 S.W.3d 684, 687 (Tex. Crim. App. 2012) (involuntary plea resulting from trial counsel's errors); *Ex parte Escobedo*, No. WR-56,818-01, 2012 WL 982907, at *1 (Tex. Crim. App. Mar. 21, 2012) (in response to professional discipline against state *Atkins* expert); *Ex parte Hood*, 304 S.W.3d 397, 409 (Tex. Crim. App. 2010) (*Penry* claim).

mistakes and shortcomings across the sentencing phase and determine whether that cumulative error prejudiced the defendant. *See, e.g.*, *Richards v. Quarterman*, 566 F.3d 553, 571 (5th Cir. 2009) (defendant was prejudiced "considering the cumulative effect of [counsel's] inadequate performance"); *see also Kyles v. Whitle*y, 514 U.S. 419, 436-37 (1995) ("formulation of materiality" for *Brady* violations, which was "later adopted as the test for prejudice in *Strickland*," requires considering "cumulative effect of suppression").

The concept of prejudice includes a sufficient effect on the sentencing phase of a capital case. *See*, *e.g.*, *Rompilla v. Beard*, 545 U.S. 374, 377 (2005); *Porter v. McCollum*, 558 U.S. 30, 31 (2009); *Wiggins v. Smith*, 539 U.S. 510, 514 (2003); *Williams v. Taylor*, 529 U.S. 362, 367 (2000). In a case where Nelson's death-worthiness turned on the State's theory that he was a lone assailant, his trial counsel were constitutionally ineffective for failing to investigate and develop evidence of his secondary participation in the offense. This claim should be authorized for further review pursuant to TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, §§ 5(a)(1) & 5(a)(3).[9]

[9] As explained in note 1, *supra*, Nelson is also alleging that the evidence adduced in this claim makes him constitutionally ineligible for the death penalty under *Tison* and *Enmund*, which elaborate on the Eighth Amendment's constraints on death sentences for defendants whose guilt findings are based on theories of vicarious liability for murder. The Eighth Amendment argument is independent of any deficiency, and the authorization question would be decided under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, § 5(a)(3).

A. Trial Counsel Deficiently Failed To Investigate and Develop Sentencing-Phase Evidence About Nelson's Limited Role In The Offense

Defense counsel's performance is deficient when it is "unreasonable," *Strickland*, 466 U.S. at 690-91, and reasonableness must be evaluated "under prevailing professional norms," *id*. at 688. Reasonable defense counsel must undertake "thorough investigation of . . . facts relevant to plausible options." *Strickland*, 466 U.S. at 690-91; *see also Donald v. State*, 543 S.W.3d 466, 477 (Tex. Ct. App. 2018) ("Trial counsel must make an independent investigation of the facts of the case."). Indeed, the 2003 AMERICAN BAR ASSOCIATION GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES ("GUIDELINES") provide: "Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issue[] of . . . penalty."[10] GUIDELINE 10.7. Trial counsel performed deficiently by failing to investigate and develop accomplice evidence that Nelson was the lookout and not the killer.

When the deficiency alleged is a failure to investigate, the salient question is whether counsel reasonably bypassed investigation—in view of information available at the time that counsel made that decision. That is, "a reviewing court must consider the reasonableness of the investigation" based on "not only the

[10] The GUIDELINES are not "inexorable commands," but are "valuable measures" of "prevailing professional norms." *Padilla v. Kentucky*, 559 U.S. 356, 367 (2010).

quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527; *see also Ex parte Garza*, 620 S.W.3d 801, 824 (Tex. Crim. App. 2021) (quoting passage from *Wiggins*). Once "red flags" indicate the need for further investigation, they "c[annot] reasonably [be] ignored." *Rompilla*, 545 U.S. at 391 n.8; *see also Garza*, 620 S.W.3d at 823 (finding deficiency for failure to investigate "red flags"). In other words, the legal issue is not whether counsel might have reasonably withheld the evidence never developed, but whether the decision not to develop "was *itself reasonable*." *Wiggins*, 539 U.S. at 523 (emphasis in original).

Most relevant here, the Sixth Amendment obligates defense counsel to develop testimonial, documentary, and physical evidence showing a defendant's diminished role in a criminal offense. Reasonable investigation requires "seek[ing] out and interview[ing] potential witnesses," including those casting doubt on the State's version of events. *Ex parte Lilly*, 656 S.W.2d 490, 493 (Tex. Crim. App. 1983).[11] GUIDELINE 10.7 commentary expressly requires counsel to seek out "eye

[11] The CCA has long enforced this aspect of the Sixth Amendment right to effective assistance. *See*, *e.g.*, *Ex parte Bell*, No. WR-82,724-01, 2015 WL 1340399, at *1 (Tex. Crim. App. Mar. 18, 2015) (per curiam) (ordering trial-court factfinding to determine whether "trial counsel was deficient for failing to conduct a thorough investigation and discover [certain] exculpatory evidence"); *Ex parte Imoudu*, 284 S.W.3d 866, 869-70 (Tex. Crim. App. 2009) (counsel's failure to interview jail personnel who had interacted with the applicant was deficient); *Ex parte Briggs* 187 S.W.3d 458, 469 (Tex. Crim. App. 2005) (counsel's failure "to take any steps to subpoena the treating doctor[]" in a felony injury to a child case was deficient); *Ex parte Welborn*, 785 S.W.2d 391, 396 (Tex. Crim. App. 1990) (finding that "[c]ounsel failed to conduct a reasonable investigation of the facts and the law" when, in relevant part, "[h]e did not attempt to interview

witnesses or other witnesses having purported knowledge of events surrounding the alleged offense itself," as well as "alibi witnesses." Counsel's professional duty includes an obligation to develop any "important, credible evidence" that inculpates someone other than the defendant as the primary assailant. *Ex Parte Amezquita*, 223 S.W.3d 363, 368 (Tex. Crim. App. 2006); *see also Bryant v. Scott*, 28 F.3d 1411, 1415 (5th Cir. 1994) (potential accomplices should be first among eyewitnesses investigated). Defense counsel must also develop "physical evidence that tend[s] to undermine the credibility and reliability" of the State's theory of the crime. *Soffar v. Dretke*, 368 F.3d 441, 476 (5th Cir. 2004), *amended on reh'g in part*, 391 F.3d 703 (5th Cir. 2004); *see also Quarterman*, 566 F.3d at 570 (affirming ineffectiveness holding for failure to investigate defendant's medical records showing that he was too feeble to have murdered the victim).

Nelson's trial counsel breached the Sixth Amendment duty to reasonably investigate by failing to develop testimonial, documentary, and physical evidence showing that Nelson had a secondary role in Dobson's murder. Trial counsel, for example, knew or should have known that the crime scene was covered with DNA from an unknown source. 35 R.R. 164-166, 205 (State witness testifying that DNA from the masking tape binding Elliott did not match either of the victims, Springs,

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any of the State's witnesses"); *Butler v. State*, 716 S.W.2d 48 (Tex. Crim. App. 1986) (en banc) (deficient failure to investigate third-party witnesses who could have bolstered alibi and misidentification defenses).

or Nelson); 43 R.R. 53-56 (defense witness testifying same); 43 R.R. 56-58 (defense witness testifying similarly about DNA from electric cord binding Dobson); 43 R.R. 99-107 (similar, DNA from hair on Dobson's body). Trial counsel also knew or should have known that, from his very first documented encounter with police, Nelson insisted that he wasn't the killer and that he wasn't present for the violent assault. Ex. 1 at NELSON_00312-13. After all, Nelson eventually offered guilt-phase testimony as to his secondary involvement. 36 R.R. 69-77, 86-87.

And as detailed below, trial counsel knew or should have known that other evidence substantially corroborated Nelson's defense. *Cf. Butler*, 716 S.W.2d at 55-56 (counsel prejudicially failed to investigate, interview, or call third-party witnesses who could corroborate defendant's version of events). For example, trial counsel knew or should have known that Elliott maintained there were two assailants in the church. Ex. 1 at NELSON_00313 (Elliott confirming to her son that more than one assailant beat her); Ex. 18 at PDF p. 3 (Notes of Dr. Derrick Blanton, Psy. D., BCIAC) (Elliott confirming the same to her doctor). And, from the moment they were appointed, trial counsel knew or should have known that "the clear and obvious defense strategy" was to emphasize Nelson's secondary role in a crime where another committed a fatal assault. *Briggs*, 187 S.W.3d at 467 (trial counsel ineffective for failing to develop evidence of alternative cause of death of victim);

see also Rompilla, 545 U.S. at 386 (deficient failure to "examine[] . . . readily available file" relevant to "sentencing strategy stressing residual doubt").

Start with Springs's role. Trial counsel knew or should have known that the Arlington Police Department believed that Springs was guilty of the murder. The police filed a sworn complaint to precisely that effect, based on voluminous physical evidence and investigators' belief that Springs was not telling the truth. *See* S.H.C.R. 155; Ex. 19 at NELSON_00507 (investigator noted Springs "[n]ot indicted/alibi"). Police recorded two different interrogations of Springs in which he admitted to committing and attempting to commit multiple aggravated robberies—including one in which the victim was violently beaten and where Springs took and sold the victim's phone. Ex. 1 at NELSON_00311; Ex. 20 at PDF p. 3-4 (Mar. 6, 2011 Incident Report No. 10-74380); Ex. 21 at PDF p. 6-7 (Nov. 15, 2010 Incident Report No. 10-74380); Ex. 22 (Mar. 5, 2011 Police Interview of A. Springs) at 2:29 (confessing to armed robbery). Trial counsel knew or should have known that, with respect to Dobson's murder, police did not believe Springs's "self preserving statements" notwithstanding the grand jury's failure to return an indictment. Ex. 5 at PDF p. 4 (Excerpts of Summary Notes by Dr. J. Randall Price, Ph.D., ABPP). The police report captures how intensely the detectives disbelieved Springs:

> Springs continually mixed up his days and paused while trying to explain where he was and what he had been doing in the days leading up to the [i]ncident. We confronted Springs on this behavior for an extended amount of time as he kept skipping over the day in question,

> Thursday. . . . Springs continued his self-preserving statements including his "non involvement" at the mall. . . . We continued this circular conversation with Springs in which he now stated that he did watch the news replay where he learned of the church killing.

Ex. 1 at NELSON_00310. Even in his second police interview, Springs was unable to offer a coherent reason why he drove to the church, which he admitted, in the period after the murders. Ex. 6 (Mar. 7, 2011 Police Interview of A. Springs) at 36:25.

Trial counsel knew or should have known that Springs possessed much of the victims' property after the killing, and that his fingerprints were all over the car stolen from the crime scene. 34 R.R. 163-64; *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *13 (N.D. Tex. Mar. 29, 2017).[12] Based on police records and photographs, they knew or should have known that, when Springs was arrested three days after the crime, he had injuries consistent with an assault—including extensive bruising and swelling on his knuckles and inner left arm near his bicep or elbow, plus discoloration near his feet and toes. Ex. 1 at NELSON_00315; Ex. 4 at NELSON_00327-31. They knew or should have known that one of Springs's best friends, Morgan Cotter, who had falsely reported to police that she encountered

[12] In *Amezquita*, the TCCA held that counsel's similar failure to investigate "evidence connecting the complainant's missing [property]" to someone else constituted prejudicially deficient performance. *Amezquita*, 223 S.W.3d at 365-66. There, trial counsel prejudicially failed to investigate and present evidence that would have identified a different individual as the assailant—specifically, that another individual was "in possession of the [victim]'s cell phone shortly after the [victim] was attacked." 223 S.W.3d at 368.

Nelson at a gas station the day after the crime, herself believed that Springs took part in the murder. Ex. 1 at NELSON_00307; Ex. 2 (Mar. 8, 2011 Police Interview of K. Duffer) at 55:05. Trial counsel actually interviewed the other woman from the gas station encounter (Allison Cobb), who told them that Springs was "laughing" about the murder when it appeared on the news. Ex. 3 at NELSON_00495. And trial counsel knew or should have known that even Springs ultimately admitted to the police that he was with Nelson on the day of the crime. Ex. 1 at NELSON_00310.

Nor did trial counsel do anything to investigate, undermine, or dispute the witness testimony supporting Springs's alibi. That alibi story was grounded on motivated testimony from Kelsey Duffer, Springs's teenage girlfriend and the mother of his child who was preparing to move in with his mother at the time, and Darrian McClain, Duffer's best friend, that Springs was in Venus, Texas with Duffer until 2:30 p.m. on the day of the crime. 35 R.R. 18 ("[I]t had to be 2:30"); Ex. 2 (Mar. 8, 2011 Police Interview of K. Duffer) at 7:40, 20:35. Trial counsel knew or should have known that the police report stated that "Springs was involved in this offense and [that Duffer] may be attempting to cover up his behavior by supplying him an alibi." Ex. 1 at NELSON_00310.

Yet trial counsel never bothered to question Springs, Duffer, or another key witness, Whitley Daniels, who testified both before the grand jury and at the trial's guilt phase that, on the day of the murder between 2:00 and 3:00 p.m. (a window

that overlaps with the period during which Duffer claims she was with Springs), she saw Springs in the stolen vehicle with Nelson. *See*, *e.g.*, Ex. 88 (Excerpt of May 26, 2011 Grand Jury Testimony of W. Daniels) at 18-21; 33 R.R. 193-95, 201. Nor did trial counsel speak to Jefferson's aunt, who eventually offered guilt-phase testimony that Springs was with Nelson at her house *around noon*, long before Springs supposedly left Duffer's house at 2:30 p.m. *See* 35 R.R. 118. Their failure to investigate the biased accounts supporting Springs's alibi is textbook deficiency. *See Ex parte Campos*, No. AP-76,118, 2009 WL 4931883, at *8 (Tex. Crim. App. Dec. 16, 2009) (deficiency for failing to impeach State's witnesses with potential bias); *Ex parte Cain*, No. WR-73,263-01, 2010 WL 455403, at *1 (Tex. Crim. App. Feb. 10, 2010) (ordering deficiency inquiry into failure to investigate witness bias); *see also Ex parte Pete*, No. WR-89,935-01, 2019 WL 2870363 (Tex. Crim. App. July 3, 2019) (same); *Ex parte Guevara*, No. WR-46,493-02, 2007 WL 2852642 (Tex. Crim. App. Oct. 3, 2007) (same).

Finally, trial counsel failed to reasonably investigate cell phone records that undermined Springs's story. Springs told police that phone records would show that he made calls from Venus that were inconsistent with his participation in the murder. Ex. 1 at NELSON_00311. His alibi witness, Duffer, told police that she heard Springs take a call from Nelson just after 11:00 a.m. the morning of the murder, asking Springs to join him in a robbery, and that Springs declined because he was in

Venus. *Id.* at NELSON_00315. But Springs's cell phone activity did not corroborate his story.[13] Cell phone records show no answered call placed from Nelson to Springs at or near that time. Ex. 9 at NELSON_00482 (showing *unanswered* calls from Nelson to Springs at 10:46 a.m. and at 12:12 p.m. on March 3); Ex. 7 (T. Mobile Phone Records for Anthony Springs between Feb. 1 and Mar. 5, 2011). Duffer's story was apparently fabricated to protect Springs.

Available phone records showed multiple calls *later* between Nelson and a phone with Springs's primary SIM card, which he frequently switched among different phones, 34 R.R. 167-68; Ex. 6 (Mar. 7, 2011 Police Interview of A. Springs) at 14:17 (switched SIM cards on day of crime). Some lasted more than a minute. And their frequency and timing strongly implicate Springs. Nelson and Springs spoke thirty times in the hours following the crime at: 12:40 p.m., 12:56 p.m., 3:07 p.m., 3:59 p.m., 4:00 p.m., 4:05 p.m., 4:15 p.m., 4:18 p.m., 4:39 p.m., 4:40 p.m., 5:31 p.m., 5:40 p.m., 5:42 p.m., 5:49 p.m., 7:05 p.m., 8:03 p.m., 8:05 p.m., 8:40 p.m., 8:42 p.m., 8:46 p.m., 8:47 p.m., 8:48 p.m., 8:52 p.m., 8:53 p.m., 8:58 p.m., 9:01 p.m., 9:26 p.m., 9:40 p.m., 10:19 p.m., and 10:38 p.m. *See* Ex. 9 at NELSON_00484 (Nelson's Mar. 3, 2011 records); Ex. 7 (T. Mobile Phone Records for Anthony

[13] The SIM card registered to Springs simply gave no location signals between 10:43 p.m. the night before the murder and 11:43 a.m. on the day of (except for one phone call at 7:51 a.m. from "CAMARILLO, CA"). Ex. 7 (T. Mobile Phone Records for Anthony Springs between Feb. 1 and Mar. 5, 2011).

Springs between Feb. 1 and Mar. 5, 2011); Ex. 23 (Annotated Phone Records of Steven Nelson). And the two spoke several times the day after the crime at: 3:24 p.m., 3:34 p.m., 8:27 p.m., 10:08 p.m., 10:28 p.m., and 10:30 p.m. *See* Ex. 9 at NELSON_00487 (Nelson's Mar. 4, 2011 records); Ex. 7 (T. Mobile Phone Records for Anthony Springs between Feb. 1 and Mar. 5, 2011); Ex. 23 (Annotated Phone Records of Steven Nelson). Notably, *none* of these calls between Springs and Nelson occurred before the crime, contradicting what Duffer had told the police. *See* Ex. 1 at NELSON_00315 (Duffer telling police that Nelson called Springs just after 11:00 a.m. on March 3, 2011, asking to "hit a lick"). Trial counsel had ready access to those records—either from their client or from prosecutors—contradicting Springs's and Duffer's stories.

Trial counsel also had access to the police report by Detective Caleb Blank showing that Springs may have been using multiple phones on the day of the murder, meaning that cell-site location data could not exclude his involvement. *See* Ex. 1 at NELSON_00310-11, NELSON_00315. Detective Blank also testified during the guilt phase of trial that Springs said he had switched SIM cards with Duffer (or Duffer's friend) in Venus. 34. R.R. 173-74. Finally, at the trial's guilt phase, trial counsel *heard Duffer testify* that Springs was switching SIM cards and that he had left his SIM card in her phone (in Venus) on the day of the murder. 35 R.R. 21 ("[H]e also put his SIMs card in my - in my phone."). The SIM card could therefore have

been in Venus without Springs—meaning that the fact that the SIM card didn't ping cell towers near the crime did not actually exculpate Springs. Notwithstanding all of these red flags, trial counsel failed to investigate or develop a sentencing-phase defense based on Springs's involvement. *See* Ex. 8 at NELSON_00003-15 (Nov. 6, 2012 Itemized Bill for William "Bill" Ray).

Trial counsel's investigatory deficiencies, however, weren't limited to Springs: They similarly failed to investigate Jefferson's involvement—including evidence undermining Jefferson's alibi. Nelson would have told trial counsel that Jefferson was with him and Springs on the afternoon of the crime, because he testified to that effect at the guilt phase of the trial. *See* 36 R.R. 69-73. Trial counsel actually interviewed a reporting witness who told them that Jefferson had asked her why she had "snitched on *all of them*." Ex. 3 at NELSON_00496 (emphasis added). And Springs called Jefferson from jail following the crime, asking him "to take care of that thing" (apparently meaning to make sure Nelson was implicated). Ex. 5 at PDF p. 17 (Excerpts of Summary Notes by Dr. J. Randall Price, Ph.D., ABPP).

Jefferson's alibi was that he was taking an in-class chemistry quiz at University of Texas-Arlington from 11:00 a.m. until 12:20 p.m. on the day of the murder. *See* Ex. 11 at NELSON_00465. Trial counsel, however, should have had access to mobile phone records showing that Jefferson participated in a call at 11:08 a.m.—well after the start of an 11:00 class in which a quiz was supposedly

administered. Ex. 10 at NELSON_00339. Trial counsel were also aware of a video recording that could have proved whether Jefferson entered class on March 3, 2011, *see* Ex. 11 at NELSON_00464, and it would have been available had defense counsel sought it before trial. But they never subpoenaed the tape, and it has since been destroyed. Ex. 24 at NELSON_00519-23. Having failed to investigate Jefferson's alibi, trial counsel hardly addressed it. They referenced the UT-Arlington chemistry class only by asking a layperson, Brittany Bursey (Jefferson's aunt), whether it looked like someone had forged Jefferson's initials on the class sign-in sheet that day. *See* 35 R.R. 148-49.

Any reasonable trial counsel would have immediately realized how important secondary participation evidence should have been to Nelson's defense—but Nelson's counsel left such evidence uninvestigated. The State even telegraphed the importance of Nelson's secondary participation during *voir dire*, focusing relentlessly on potential jurors' willingness to convict and death sentence Nelson for a killing committed by another person. *See*, *e.g.*, 21 R.R. 70-74, 28 R.R. 172. The State even cited potential jurors' responses to these legal theories as justification for several peremptory strikes. *See, e.g.*, 31 R.R. 19-20.

All in all, two things were obvious to trial counsel long before trial. First, the State was prosecuting capital murder on an accomplice liability theory, meaning that Nelson's guilt would turn on whether he participated in the robbery and not on

whether he was the killer. Second, and relatedly, the sentencing-phase result would therefore turn largely on whether the defense could prove that Nelson had a secondary role in the offense, negating the special findings necessary for a death sentence. Nevertheless, defense counsel undertook virtually no investigation that might have undercut the State's lone-assassin theory—including investigation into Springs and Jefferson. That representation was deficient.

B. Trial Counsel's Deficiency Prejudiced The Sentencing-Phase Result, Especially On The Anti-Parties Issue

Trial counsel's deficiency prejudiced Nelson's sentencing defense. Prejudice requires "a *reasonable probability* that, but for counsel's unprofessional errors, the result of the proceeding would have been different—i.e., "a probability sufficient to undermine confidence in the outcome." *Wiggins*, 539 U.S. at 534 (emphasis added); *see also Rompilla*, 545 U.S. at 390 (affirming reasonable probability standard). In jurisdictions (like Texas) that require unanimity, a reasonable probability that a single juror would vote to spare a defendant's life constitutes sentencing-phase prejudice. *See Wiggins*, 539 U.S. at 537. In this case, the Sixth Amendment deficiency cut the jury off from substantial evidence about Nelson's lesser participation, thereby prejudicing at least one juror's response to each of the three special sentencing issues—especially the anti-parties finding.

1. Omitted evidence pertaining to Springs and Jefferson

Trial counsel's deficient investigation foreclosed the jury from considering substantial evidence of Spring's participation in the killing—and, by extension, Nelson's diminished role. Specifically, the deficient investigation prevented jury consideration of (1) physical evidence pointing to Springs as the violent assailant, (2) documentary evidence showing that Springs possessed the dead victim's property and disqualifying his alibi, and (3) testimonial evidence indicating Springs' culpability.

The most egregious information kept from the jury was obvious physical evidence that Springs was the primary assailant, most of which was contained in a police report prepared by Detective Caleb Blank. Ex. 1 at NELSON_00314-15. The jury never learned that Springs had physical injuries indicating that he'd been in a substantial physical altercation. Based on police records and photographs taken at the time of his arrest—just three days after the crime—Springs displayed injuries consistent with an assault, including extensive bruising and swelling on his knuckles and inner left arm near his biceps or elbow. *Id.* at NELSON_00315; Ex. 4 at NELSON_00327-28. When detectives asked Springs how he got such extensive bruising and swelling, he told them that he "got th[e] bruise from lying on his arm while in jail" and the bruises and swelling on his knuckles "from beating his fists together" in a "nervous fidget." Ex. 1 at NELSON_00315. Whereas Springs looked

like he'd just undertaken a violent assault, the assistant manager at a gas station testified that, mere hours after the crime, Nelson appeared "clean" and as though he'd not been in a fight. 33 R.R. 171.[14]

The jury never heard about, nor received a coherent accounting of, other physical and documentary evidence pointing to Springs. For example, Springs admitted to committing aggravated robberies, including at least one closely matching the scenario of the Dobson murder where the victim was violently beaten, and where Springs took and sold the victim's phone. Ex. 1 at NELSON_00311; Ex. 20 at PDF p. 3-4 (Mar. 6, 2011 Incident Report No. 10-74380); Ex. 21 at PDF p. 6-7 (Nov. 15, 2010 Incident Report No. 10-74380); Ex. 6 (Mar. 7, 2011 Police Interview of A. Springs) at 2:39:33, 2:46:50. Indeed, Springs had Dobson's iPhone and Elliott's car keys when he was arrested. *See* Ex. 1 at NELSON_00313, NELSON_00317; 34 R.R. 167. Prior to his arrest, Springs had told others that he was trying to sell the iPhone of "the dead Pastor." *See* Ex. 1 at NELSON_00306-08. A key witness reported seeing Springs in the car stolen from the crime scene, 33 R.R. 193, which also contained Springs's fingerprints, 34 R.R. 163-64; *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *13 (N.D. Tex. Mar. 29, 2017). Security footage showed Springs, with Nelson, using the victim's credit card in the

[14] Springs told detectives that "Nelson confessed to Springs he had fought the pastor with his fists…." Ex. 1 at NELSON_00311.

hours after the offense. *See* 2 C.R. 426. And cell phone records detailed many calls from Springs to Nelson on the night of, and the night after, the crime. *See* Ex. 9 at NELSON_00484 (Nelson's Mar. 3, 2011 records), NELSON_00487 (Nelson's Mar. 4, 2011 records); Ex. 7 (T. Mobile Phone Records for Anthony Springs between Feb. 1 and Mar. 5, 2011); 37 R.R. 21.

Trial counsel's deficient investigation kept from the jury other testimonial information implicating Springs. For example, the jury never heard about the obvious bias that undermined the credibility of Springs's alibi testimony. 35 R.R. 10-40. The jury did not hear that Spring's main alibi witness Kelsey Duffer—his girlfriend and mother of his one-year old child—was preparing to move in with Springs's mother at the time that she vouched for Springs (as she told police during an interview). *See* Ex. 2 (Mar. 8, 2011 Police Interview of K. Duffer) at 7:40, 20:35. Nor did the jury learn that police did not believe Duffer's story when she first came forward, as memorialized in report notations that she was "attempting to cover up [Spring's] behavior by supplying him an alibi." Ex. 1 at NELSON_00315. Nor did the jury learn that Duffer's claim to police that Nelson had called Springs at around 11:00 a.m. the morning of the crime asking for help to "hit a lick," Ex. 1 at NELSON_00315, was flatly contradicted by Nelson's and Springs's phone records, which showed no answered calls between the two at or even near that time. *See* Ex. 9 at NELSON_00482; Ex. 7 (T. Mobile Phone Records for Anthony Springs between

Feb. 1 and Mar. 5, 2011); *cf.* 35 R.R. 25 (later guilt-phase testimony of Duffer that she "d[idn't] remember" whether Springs received any phone calls on the morning of March 3). The jury was also never alerted to the fact that multiple witness timelines placed Springs with Nelson just after the murder, contradicting Springs's story that he was 45 miles away in Venus with Duffer. *See*, *e.g.* 33 R.R. 193-95 (guilt-phase testimony of Whitney Daniels that Nelson was with Springs before Nelson took Springs somewhere else); 35 R.R. 118 (guilt-phase testimony of Brittany Bursey that Springs came to her house with Nelson around noon on the day of the murder). The jury never learned that Springs was "laughing" when the news about Dobson's murder appeared on television, Ex. 3 at NELSON_00495, or that one of Springs's best friends (Morgan Cotter) told police that she believed Springs was involved in the killing, Ex. 1 at NELSON_00307. They never heard a witness testify that Springs told Nelson that "the woman at the church couldn't have seen or identified anyone because 'her eyes were swollen shut.'" Ex. 25 at NELSON_00816 (Decl. of Tracey Nixon, ¶ 27 (Oct. 11, 2016)).

Trial counsel also inadequately investigated Jefferson, further distorting the jury's perception of Nelson's culpability and prejudicing his sentencing defense. Jurors did not know, for example, that Jefferson had asked a reporting witness why she had snitched on "all of them." Ex. 3 at NELSON_00496. The jury never saw or heard about surveillance footage showing a third man, presumably Jefferson, with

Springs and Nelson using the stolen credit cards at a mall after the murder. *See* Ex. 1 at NELSON_00308-10, NELSON_00312. Nor did the jury hear sentencing phase argument, based on the guilt-phase testimony of Jefferson's aunt, that Jefferson was with Springs and Nelson at noon on the afternoon of the crime—a timeline inconsistent with the chemistry-quiz story scrutinized below. 35 R.R. 118-19.

Jefferson's involvement would have been even clearer if trial counsel had undertaken an investigation that would have pierced his weak alibi. Recall that Jefferson said that he was taking an in-class chemistry quiz at the time of the murder, pointing to his initials on the day's class sign-in sheet. Ex. 11 at NELSON_00465. But defense counsel was never able to introduce evidence that, per the teacher, there was no in-class quiz in class that day; nor did counsel access or present a video documenting that day's classroom attendees. *Id.* at NELSON_00464. Had trial counsel competently developed evidence, they would have been able to use Jefferson's phone records to show that he answered a call at 11:08—while he said he was in class. *Id.* at NELSON_00459-65. And competent counsel would have retained a handwriting expert to evaluate the veracity of Jefferson's initials on the class sign-in sheet, instead of trying to argue forgery through a hostile witness. *See* 35 R.R. 148-49 (cross examining Bursey about legitimacy of signature). Competent counsel would have realized that Jefferson's own aunt testified under oath that she was with Jefferson at noon, when Jefferson said he was taking a chemistry quiz.

Finally, competent counsel would have alerted the jury that Springs called Jefferson from jail following his arrest, asking him "to take care of that thing" (that is, make sure Nelson was also implicated in the crime). Ex. 5 at PDF p. 17 (Excerpts of Summary Notes by Dr. J. Randall Price, Ph.D., ABPP).

2. The lone-assailant theory and the special issues.

Sealing the jury off from accomplice evidence was decisive, because the State's theory of the case was that Nelson committed the offense alone. His lawyers ignored evidence proving his secondary participation, so Nelson was forced to take the stand to explain that he was a lookout who had entered the church only after others completed the assault. Having Nelson testify without extrinsic corroboration left the door wide open for prosecutors. During guilt-phase closing, there were roughly *twenty-seven* references to their lone-assassin theory, including:

- "One person committed this act, not the other two people he wants to incriminate because he thinks he can con you all into believing something that's not true." 37 R.R. 8.
- "He was alone. He drove in alone and he drove out alone because he is the only killer. He is the only killer." 37 R.R. 9.
- "This Defendant did this, only one person, him. No other person." 37 R.R. 10.
- "Only one person did this, ladies and gentlemen. He's right over there. You've been staring at a murderer for a week." 37 R.R. 10.

Having primed the jury for this theory during the guilt-phase closing, the State emphasized it during sentencing when it told the jury that "the only person who is

responsible for these murders [is] this Defendant." 44 R.R. 10. And they hammered that point again for jurors: "He is capable of having been the only person in that church committing that crime. And he was." 44 R.R. 27.

The State's lone-assailant story worked only because it was able to mislead jurors without resistance. The State argued Springs's non-involvement from the beginning, without any evidentiary pushback from trial counsel. *See, e.g.*, 32 R.R. 27 (the State, during its opening statement, noting that "Anthony Springs was also arrested for this incident *until witnesses came forward to tell police where he was during that time*" (emphasis added)). The State also told the jury (inaccurately) that Nelson possessed all of the victims' property after the crime, even though it was *Springs* who had most of it. *See* 37 R.R. 9-10 ("Consider why on earth two other people would commit a murder and give this Defendant everything. He walks away with everything.... Why does he get everything if he did nothing?"); 37 R.R. 31 ("The other two, the other two are scavengers, Jefferson and Springs. They showed up later in the day.... They're like remoras that attach themselves to a shark. And there's the shark right over there.").

The failure to develop a response to the lone-assailant theory also left the defense unable to capitalize on favorable evidence that *was* in the record, or that *was* accessible to trial counsel. For example, DNA recovered from the ligatures binding Dobson and Elliott matched an unidentified male—not Dobson, Nelson, or Springs.

43 R.R. 53-58. The presence of another DNA profile on the ligatures, moreover, is consistent with multiple statements from the surviving victim, Judy Elliot, insisting that there were multiple assailants. *See* Ex. 1 at NELSON_00313 (Elliott confirming to her son that more than one assailant beat her); Ex. 18 at PDF p. 3 (Notes of Dr. Derrick Blanton, Psy. D., BCIAC) (Elliott confirming the same to her doctor); *see also* 43 R.R. 99-102 (DNA expert testifying at sentencing about a hair on Dobson's body containing DNA from an unknown third party).

The prejudice to the jury findings isn't speculative. The record confirms that jurors were open to a life sentence. During punishment-phase deliberations, for example, the jury sent a note to the court asking whether Nelson had "any chance of parole if the death sentence is not pick[ed]?" 2 C.R. 421. And multiple jurors later indicated that they were open to voting for a life sentence based on evidence of secondary participation, had trial counsel presented any. *See* Ex. 26 at NELSON_00250 (Decl. of Juror James Kirk Vanderbilt) (stating trial counsel appeared to "tr[y] to pin it on other people, but there was no evidence to support that"); Ex. 27 at NELSON_00248 (Decl. of Juror Susan Meares Hickey) (stating "[t]here was still an opportunity after [the State] closed for the defense to raise something new, to persuade me. They didn't do anything really").

The prejudice was given ultimate effect through each of the jury's three special issue findings at sentencing: anti-parties, mitigation, and future danger.

Anti-parties. To ensure that the sentencing phase jury evaluated only Nelson's culpability, the anti-parties special issue required all jurors to find beyond a reasonable doubt that Nelson "actually caused" the killing, "intended" the death at issue, or "anticipated that a human life would be taken." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(2). *Cf. Bullock v. Lucas*, 743 F.2d 244, 247 (5th Cir. 1984) (anti-parties issue ensures that even if "the trier of fact ... impute[s] intent to an aider and abettor for purpose of determining guilt," it does not do so "for the purpose of imposing the death penalty"); *Martinez v. State*, 899 S.W.2d 655, 657 (Tex. Crim. App. 1994) (anti-parties issue "protects the defendant's constitutional rights by ensuring that a jury's punishment-phase deliberations are based solely upon the conduct of that defendant and not that of another party"). The anti-parties finding requires a "highly culpable mental state" that is "at least as culpable as the one involved in *Tison*"—i.e., "reckless disregard for human life" plus "major" participation. *Ladd*, 3 S.W.3d at 573 (referencing *Tison*, 481 U.S. at 158); *see also Walker*, 123 F. Supp. 2d at 1043 (anti-parties finding requires that a defendant "consciously disregard[] a known risk of death"). An adequate investigation would have had a reasonable probability of affecting at least one juror's vote—because the accomplice evidence showed that Nelson's participation was inconsistent with his having sufficiently anticipated, intended, or caused the murder.

Mitigation. The mitigation special issue required all jurors to find, "taking into consideration all of the evidence, including the circumstances of the offense," that "sufficient mitigating circumstance or circumstances" did not require a noncapital sentence. TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1). Mitigating evidence is broadly defined by the Texas statute as "evidence that a juror might regard as reducing the defendant's moral blameworthiness." *Id.* at § 2(f)(4); *see also Mosley v. State*, 983 S.W.2d 249, 263 (Tex. Crim. App. 1998) ("The mitigation issue ... asks whether, after considering all the evidence, sufficient mitigating circumstances exist to warrant imposing a life sentence instead of the death penalty." (emphasis omitted)). Evidence of Nelson's "nontriggerman status" and secondary role would have reduced his blameworthiness: "Society's legitimate desire for retribution is less strong with respect to a defendant who played a minor role in the murder for which he was convicted." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring); *see also Robinson v. State*, 851 S.W.2d 216, 236 (Tex. Crim. App. 1991) (acknowledging mitigating impact of nonkiller status). Had trial counsel adequately developed accomplice evidence, and had they highlighted Nelson's secondary role, it is reasonably probable that at least one juror would have voted for Nelson on the mitigation issue.

Future danger. The future dangerousness special issue required all jurors to find beyond a reasonable doubt that there was "a probability" that Nelson "would

commit criminal acts of violence that would constitute a continuing threat to society." TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1). When determining future dangerousness, the jury may consider a number of factors, including but not limited to: "the circumstances of the capital offense, including the defendant's state of mind and whether he or she was working alone or with other parties;" "the calculated nature of the defendant's acts;" and "the forethought and deliberateness exhibited by the crime's execution[.]" *Keeton v. State*, 724 S.W.2d 58, 61 (Tex. Crim. App. 1987). In view of that law, trial counsel's deficient failure to develop accomplice evidence had a reasonably probable effect on the dangerousness vote of at least one juror. *See Wallace v. State*, 618 S.W.2d 67, 68 (Tex. Crim. App. 1981) (finding insufficient evidence to support future dangerousness, noting that appellant had been convicted as a party and it was "undisputed" that he had not killed the victim).

* * *

Because of trial counsel's deficiency, the State was free to wildly exaggerate Nelson's role in the offense, and the jury never heard evidence about Nelson's secondary participation. Had counsel performed adequately, there is a reasonable probability that at least one juror would have resolved at least one of the sentencing-phase special issues in Nelson's favor.

C. The IATC-Participation Claim Satisfies the Threshold Showing Required For Article 11.071, § 5 Authorization

Under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, § 5(a), a court may consider the merits of a subsequent application for writ of habeas corpus only if the application contains sufficient facts showing that one of three exceptions is met. Nelson meets the exceptions specified in § 5(a)(3) and § 5(a)(1).

1. This Court Should Authorize Consideration Of The IATC-Participation Claim Under § 5(a)(3)

Article 11.071 § 5(a)(3) provides that this Court should authorize full consideration of a claim when, "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[.]" In conducting the § 5(a)(3) inquiry, this Court only "review[s] the adequacy of the [applicant's] pleading." *Blue*, 230 S.W.3d at 163. Indeed, "[i]t would be anomalous to require the applicant to actually *convince* us by clear and convincing evidence at this stage." *Id.* (emphasis in original). As a result, this Court assumes the truth of the evidence in the subsequent application before deciding whether the clear-and-convincing-evidence standard is satisfied. *See id.* The IATC-Participation claim meets the § 5(a)(3) standard because, but for the failure of Nelson's trial counsel to investigate accomplices, no rational juror would have answered the anti-parties issue affirmatively (nor the other special issues). More

specifically, no rational juror would have been able to conclude that Nelson caused, intended, or sufficiently anticipated a capital murder.[15]

2. This Court Should Authorize Consideration Of The IATC-Participation Claim Under § 5(a)(1)

Article 11.071 § 5(a)(1) provides that this Court should authorize full consideration of a claim when it "[has] not been and could not have been presented previously in a timely initial application or in a previously considered application filed under this article … because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" And under § 5(e), "a factual basis of a claim is unavailable on or before a date described by Subsection (a)(1) if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date." This Court should authorize relief because Nelson's state post-conviction counsel did almost nothing on his case, deficiently forfeiting the IATC-Participation claim and thereby making it factually "unavailable" to Nelson.[16]

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[15] As discussed in notes 1 and 9, *supra*, Nelson also satisfies § 5(a)(3) in conjunction with the argument that he is ineligible for the death penalty under *Tison* and *Enmund*.

[16] For simplicity, the headings specifically refer to a § 5(a)(1) argument based on the unavailability of Nelson's claims. As a technical matter, however, because that unavailability stems from the egregious performance of state post-conviction counsel, some arguments about counsel's obligations arise from different parts of Article 11.071. *See also* note 7, *supra*.

a. The CCA should authorize subsequent consideration of a substantial IATC claim where egregious post-conviction representation caused its forfeiture.

The CCA should hold that an IATC claim presented in a subsequent Texas application may be reviewed on its merits when egregious state post-conviction representation caused forfeiture in the initial proceeding—using this case to clarify the scope of *Ex parte Graves*, 70 S.W.3d 103, 104-05 (Tex. Crim. App. 2002). In *Graves* itself, the TCCA refused to authorize subsequent litigation of a claim that *state post-conviction counsel* was ineffective, whereby state post-conviction counsel's ineffectiveness did double duty as both (1) the underlying constitutional claim, and (2) the showing necessary to satisfy Article 11.071 § 5(a). *See* 70 S.W.3d at 104-05. The CCA held: "Because we find that competency of prior habeas counsel *is not a cognizable issue* on habeas corpus review, applicant's allegation cannot fulfill the requirements of article 11.071 section 5 for a subsequent writ." *Id.* at 105. (emphasis added). *Graves* itself doesn't foreclose CCA authorization of Nelson's IATC claim because post-conviction counsel's (Stickels's) performance does not form the underlying claim for relief.

CCA judges have repeatedly questioned the tendency to read *Graves* as a broad rule barring any excuse based on state post-conviction counsel's performance—especially where, as here, state post-conviction counsel's performance is not alleged as the underlying constitutional violation. *See*, *e.g.*, *Ex*

parte Ruiz, 543 S.W.3d 805, 826-32 (Tex. Crim. App. 2016) (across different opinions, all members of the court suggesting that there was "good cause" to revisit *Graves*); *Ex parte Alvarez*, 468 S.W.3d 543, 545 (Tex. Crim. App. 2015) (Yeary, Johnson, & Newell, JJ., concurring) ("[R]ecent developments in federal habeas procedure, as well as, to a certain extent, the rationale underlying those new developments, counsel that the Court should revisit the holdings of *Graves*" in an appropriate case.). This Application is the appropriate vehicle for clarifying that the CCA may authorize subsequent litigation of *trial-counsel* ineffectiveness claims that were forfeited because of deficient state *post-conviction* counsel.

Graves's bar on further litigation should apply only where applicants assert state post-conviction counsel's ineffectiveness as the underlying claim for relief, as the prisoner had alleged in *Graves* itself. *See* 70 S.W.3d at 107. Ineffectiveness of state postconviction counsel is not a cognizable constitutional error, as *Graves* held, *see id.* at 105, so it cannot be the constitutional violation that is the basis for post-conviction relief. And most of the policy concerns addressed in *Graves* were directed at scenarios in which a claimant asserted state post-conviction ineffectiveness as both the underlying substantive claim and the excusing circumstance. *See, e.g.*, 70 S.W.3d at 114-15 (reciting concerns about "perpetual motion machine" if the ineffectiveness of state post-conviction counsel were recognized as a substantive basis for Texas post-conviction relief). But those

concerns do not apply when the underlying claims challenges only trial counsel's ineffectiveness, like Nelson's claim here.

In fact, it is precisely for claims like Nelson's—where the ineffectiveness of state post-conviction counsel represents only the excusing condition, not the underlying claim of substantive error—where the CCA judges been most hesitant to say that state post-conviction counsel's performance is irrelevant to § 5 authorization. For example, in *Ruiz*, every participating member of the CCA questioned the wisdom of applying *Graves*'s bar where state post-conviction counsel's deficient performance was simply asserted as a basis to permit consideration of distinct IATC claims. *See* 543 S.W.3d at 827 (Richardson, J., joined by Keller, P.J., and Meyers, Johnson, Keasler, and Newell, JJ.) (noting "good cause" to consider application of Graves in such cases); *id.* at 827 (Johnson, J., concurring) ("we should revisit *Ex parte Graves*" in the appropriate case); *id.* at 831 (Alcala, J., dissenting) (arguing that a death-sentenced inmate is entitled to merits review when "he received incompetent representation during the initial state habeas proceeding, and when that incompetent representation has resulted in the forfeiture of one or more substantial claims for relief").

In sum, subsequent decisions purporting to "apply *Graves*" have incorrectly extended *Graves* well beyond its original limits. Properly understood, *Graves* held that ineffectiveness of state post-conviction counsel cannot serve as the underlying

basis for relief in a request for § 5 authorization. The CCA, however has come to "apply *Graves*" more broadly, to claims for which the deficiency of state post-conviction counsel is the excusing condition but not the underlying allegation of constitutional error. The increasingly direct calls to reconsider the dramatic expansion of *Graves* are therefore unsurprising. The CCA should cabin *Graves* to its appropriate limits, and it should hold that Stickels's egregious performance excuses Nelson's failure to previously raise his IATC claim.

Permitting subsequent review of IATC claims forfeited by deficient state post-conviction counsel isn't just consistent with *Graves*; it's also sensible policy. For states like Texas, where challenging the effectiveness of trial counsel on direct appeal is formally or functionally foreclosed, state post-conviction proceedings are the crucial forum for enforcing the Sixth Amendment right to effective assistance of trial counsel. Indeed, even though the trial is the "main event"—i.e., the primary forum for determining guilt and innocence—it remains practically impossible to enforce the "bedrock" Sixth Amendment right there, or on direct appeal. *Trevino v. Thaler*, 569 U.S. 413, 422, 428 (2013); *see also Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997) (listing reasons why the Sixth Amendment right to counsel cannot be meaningfully enforced on direct review of the conviction).

The inability to enforce the Sixth Amendment on direct appeal means that the post-conviction proceedings are the "one and only opportunity" to do so. *Ex parte*

Buck, 418 S.W.3d 98, 109 (Tex. Crim. App. 2013) (Alcala, J., dissenting) (explaining that "when the habeas proceeding represents the first meaningful opportunity for a prisoner to raise an ineffective-assistance-of-trial-counsel claim, that proceeding becomes more like a direct appeal as to that claim—it is the prisoner's one and only opportunity to raise that claim with the assistance of counsel"). Accordingly, "the *need* for effective counsel to raise claims that can be raised effectively only in post-conviction proceedings is as great as is the need for counsel to effectively assist on direct appeal." *Alvarez*, 468 S.W.3d at 547 (Yeary, J., concurring) (emphasis in original).

The Texas rule that ineffective state post-conviction counsel does not excuse IATC claim-forfeiture is also predicated on federal doctrine that no longer exists. *Graves*, for example, relied heavily on *Coleman v. Thompson*, 501 U.S. 722 (1991), for the proposition that deficient post-conviction attorney performance could not excuse IATC-claim forfeiture because such forfeiture could be excused *only* if there existed a constitutional right to state post-conviction counsel. *See* 70 S.W.3d at 110 & n.25, 111 n.30 (citing *Coleman*); *Ruiz*, 543 S.W.3d at 826 n.78 (citing *Graves*' citation to *Coleman*). In 2012, however, the Supreme Court invalidated that reading of *Coleman*. Recognizing that "[t]he right to the effective assistance of counsel at trial is a bedrock principle in our justice system," the Court held that inadequate state post-conviction performance *could* excuse forfeiture of an IATC claim and permit

merits review in a federal habeas proceeding. *Martinez v. Ryan*, 566 U.S. 1, 9, 12 (2012). And a year later, *Trevino* expressly held that *Martinez* applied in favor of Texas prisoners. *See* 569 U.S. at 428-29. In other words, *Martinez* and *Trevino* wiped out the basic doctrinal rationale for the expansive reading of *Graves*.

Martinez and *Trevino* actually give rise to a federalism rationale that *favors* the clarification requested here. In general, "[p]rinciples of federalism counsel in favor of Texas making the first determination of the merits of any [IATC] claim, so that federal review will remain as deferential as possible to our judgments." *Alvarez*, 468 S.W.3d at 551 (Yeary, J., concurring). Absent a revision to *Graves*, *Martinez* and *Trevino* empower a federal court to reach forfeited IATC claims before Texas courts ever weigh in. The status quo thereby cedes to federal courts the first word on both state post-conviction counsel's performance and on the underlying IATC claim. *See Ex parte Diaz*, No. WR-55,850-02, 2013 WL 5424971, at *5 (Tex. Crim. App. Sept. 23, 2013) (Price, J., dissenting) ("*Martinez* and *Trevino* have triggered federalism concerns, paving the way for de novo federal review of a number of state claims and concomitantly diluting the control Texas would otherwise exercise over the finality of its own convictions."); *Ex parte McCarthy*, No. WR-50,360-04, 2013 WL 3283148, at *7 (Tex. Crim. App. June 24, 2013) (unpublished) (Alcala, J., dissenting) ("Unless this Court revises its current approach, federal courts will now have the opportunity to decide a vast number of [IAC] claims ... without any prior

consideration of those claims in state court. The State's interest in finality of convictions would be better served by permitting state courts to address these [IATC] claims on the merits.").

In fact, the State of Texas has endorsed this exact federalism reasoning in other litigation. In *Trevino*, Texas argued that, if forfeited IATC claims could be litigated on the merits in federal court, then there should be a corresponding change to facilitate prior merits review in state court—precisely the change urged here. Specifically, the State of Texas "submit[ted] that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective assistance-of-trial-counsel claim." *Trevino*, 569 U.S. at 429 (citing Brief for Respondent 58-60); *see* Brief for the Respondent at 58-59, *Trevino v. Thaler*, No. 11-10189, 2013 WL 179940, at *58-*59 (Jan. 14, 2013) ("If this Court changes the [rule against excusing forfeiting IATC claims] now, equity demands at a minimum that the CCA have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's [IAC] claim on the merits."). The CCA should take Texas at its word, and it should ensure that its courts can relieve its own constitutional errors.

Doctrinally, there are four different ways for the CCA to implement the clarification urged here. First, the Court might recognize that the nominally subsequent habeas application is effectively the first application because the initial state post-conviction lawyer did not file a proper application. *See Alvarez*, 468

S.W.3d at 550-51 (citing and expanding on *Ex parte Medina*, 361 S.W.3d 633, 641 (Tex. Crim. App. 2011)).

Second, the CCA might recognize that, in a jurisdiction that provides a statutory guarantee to a competent capital state post-conviction lawyer, an egregious IATC claim forfeiture violates due process. Judges Yeary, Johnson, and Newell endorsed this reasoning in *Alvarez*:

> [T]here is an unequivocal and absolute statutory right to counsel (indeed, "competent counsel") for death row inmates in Texas under Article 11.071. The right to effective assistance of appellate counsel that *Evitts v. Lucey* recognized was a function of the due process "entitlement doctrine". . . . Texas is not required by the federal constitution to provide post-conviction habeas corpus proceedings; nor is it required to provide counsel for those inmates who wish to take advantage of the postconviction habeas corpus proceedings that Texas in fact provides. . . . But in the context of capital cases, Texas has chosen unequivocally to provide both. Having provided those absolute rights, albeit by state law, it may not arbitrarily take them away without impinging on the applicant's due process rights. That is the essence of the Supreme Court's entitlement doctrine. *Evitts v. Lucey*, 469 U.S. at 400-01. It is arguable that the statutory right to counsel to which Article 11.071, Section 2(a), entitles Applicant would be taken from him arbitrarily, in violation of due process, if it does not embrace the right to effective counsel—at least for those claims that can be raised only for the first time in post-conviction proceedings. After all, as *Martinez* now establishes, in that context the need for effective counsel is as great as the need for effective counsel on direct appeal.

468 S.W.3d at 547-48 (Yeary, J., concurring) (emphasis, footnote and citations omitted).

Third, the CCA could recognize that IATC claims are not "available" at the time of the first post-conviction application, within the meaning of article 11.071 § 5(a)(1), when postconviction counsel performs egregiously in filing the initial application. The factual basis for a claim is "unavailable" if it "was not ascertainable through the exercise of reasonable diligence" on or before the date the initial or a previously considered application was filed. TEX. CODE CRIM. PROC. art. 11.071 § 5(e). Under such circumstances, a substantial IATC claim raised in a subsequent application should be recognized as newly available for purposes of § 5(a)(1) and (e). *See Graves*, 70 S.W.3d at 121 (Price, J., dissenting) (the legislature did say that it intended "ineffective assistance of writ counsel to be an exception to the section five bar on subsequent applications," in the language of sections 5(a)(1) and (e)); *see also Ex parte Foster*, No. WR-65,799-02, 2010 WL 5600129, at *2 (Tex. Crim. App. Dec. 30, 2010) (Price, J., dissenting) (suggesting the court examine the issue directly).

Indeed, for an IATC claim to be "available"—meaning that claimants can enforce the underlying Sixth Amendment right—there is a "need for a new lawyer," a "need to expand the trial court record," and a "need ... to develop the claim." *Trevino*, 569 U.S. at 428. If initial state post-conviction counsel performs egregiously, then that IATC claim is not available at the time the initial application is filed. A death-sentenced Texas claimant with egregiously deficient state post-

conviction representation cannot, through the exercise of reasonable diligence, expand the trial court record or meaningfully develop the claim. *See Martinez*, 566 U.S. at 12 ("While confined to prison, the prisoner is in no position to develop the evidentiary basis for a claim of ineffective assistance, which often turns on evidence outside the trial record.").

Fourth, the CCA could revisit the definition of "competent counsel" used in TEXAS CODE OF CRIMINAL PROCEDURE article 11.071. Specifically, a death-sentenced Texas claimant is dependent upon "competent counsel" to "investigate expeditiously ... the factual and legal grounds" for filing a habeas application. TEX. CODE CRIM. PROC. art. 11.071 §§ 2(a), 3(a). In *Graves*, the CCA held state post-conviction counsel's competency only "concerns habeas counsel's qualifications, experience, and abilities at the time of his appointment." 70 S.W.3d at 114. Limiting the statutory definition of "competent" to the mere procedural step of appointment, however, contravenes the plain meaning and legislative purpose of article 11.071.

Section 2(a) of that article, for example, requires that applicants "be represented by" competent counsel. *See Alvarez*, 468 S.W.3d at 548-49 (Yeary, J., concurring) (article 11.071 "mandates that death row applicants actually 'be represented by competent counsel,' which would seem to contemplate an on-going enterprise."). Section 3(a) also indicates that the "competent counsel" guarantee is ongoing, establishing that duties of competent counsel extend beyond mere

appointment to include counsel's responsibility to "investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus." TEX. CODE CRIM. PROC. art. 11.071 § 3(a); *see Alvarez*, 468 S.W.3d at 548-49 (Yeary, J., concurring) ("Article 11.071 as a whole contemplates more than just the appointment of an attorney who is capable of providing competent representation if he chooses to do so." (emphasis omitted)).

By requiring the appointment of "competent" counsel, the legislature intended to ensure that death-sentenced claimants "have one full and fair opportunity to present [their] constitutional or jurisdictional claims in accordance with the procedures of the statute." *Ex parte Kerr*, 64 S.W.3d 414, 419 (Tex. Crim. App. 2002). Accordingly, the legislature adopted Article 11.071 to ensure adequate representation in state post-conviction litigation.[17] It follows that § 2(a)'s requirement that death-sentenced prisoners receive competent post-conviction counsel extends beyond appointment. *See Alvarez*, 468 S.W.3d at 549 (Yeary, J.,

[17] *See Graves*, 70 S.W.3d at 121 (Price., J., dissenting) ("If enacted, C.S.S.B. [Committee Substitute Senate Bill] 440 would streamline the review of capital convictions and significantly reduce the time between conviction and the imposition of a death sentence, while assuring that capital convictions are fully and fairly reviewed.'" (quoting H. Comm. on Juris., Comm. Rep., Apr. 27, 1995, Tex. C.S.S.B. 440, 74th Legis., R.S. (1995)) (emphasis omitted)); *Ex parte Buck*, 418 S.W.3d at 107 (Alcala, J., dissenting) (quoting Deb. on H.B. 440, Tex. H., Second Reading, 74th Legis., R.S. (May 18, 1995), statement of Rep. Gallego (stating that habeas applicants will "get lawyers from day one. They get fully paid investigators. They get all of the investigation ... everyone who is convicted will have a fully paid investigation into ... any claim they can possibly raise.")).

concurring) ("It makes little sense for the Legislature to recognize the need for an attorney who is competent—that is to say, who has the 'qualifications, experience, and ability' to conduct the daunting factual investigation and to navigate the often byzantine law involved in post-conviction habeas corpus representation—with no expectation that he would then actually provide his client with competent post conviction habeas corpus representation." (emphasis omitted)); *Graves*, 70 S.W.3d at 121 (Price, J., dissenting) ("The appointment of counsel is meaningless without the requirement that counsel be competent."); *id.* at 130 (Holcomb, J., dissenting) ("The only sensible interpretation of 'competent counsel' is the traditional one: counsel reasonably likely to render, and rendering, effective assistance.").

Whatever the precise logic, the TCCA should affirm that *Graves* meant only what it originally said: that deficient state post-conviction counsel cannot be alleged as an underlying constitutional violation. But when state post-conviction counsel's egregious performance causes a claimant to forfeit a meritorious *trial-phase* ineffectiveness claim, Texas courts should be able to reach it.

b. Stickels's egregious state post-conviction representation excuses the failure to include the IATC claim in the initial application.

If the CCA has been deferring a revision of *Graves* until a case involved sufficiently egregious post-conviction lawyering, then *Nelson* is that case. "State habeas counsel," like trial counsel, is "subject to the same *Strickland* requirement to

perform some minimum investigation prior to bringing the ... state habeas petition." *Ramey v. Davis*, 942 F.3d 241, 256 (5th Cir. 2019) (quoting *Trevino v. Davis*, 829 F.3d 328, 348 (5th Cir. 2016)). The obligation is reflected in ABA GUIDELINE 10.7, which requires that post-conviction counsel conduct a "thorough and independent" investigation of sentencing-phase issues. State post-conviction counsel's failure to investigate an IATC claim is deficient performance where the "[t]he deficiency in [trial counsel's] investigation would have been evident to any reasonably competent habeas attorney." *Davis*, 829 F.3d at 348-49.

Applying that definition, Stickels's postconviction performance was deficient—in fact, egregiously so. Any reasonably competent post-conviction attorney, receiving this record, would have recognized the significance of trial counsel's failure to investigate Springs and Jefferson, and they would have undertaken the omitted investigation in short order. The accomplice investigation was so important here because the State sought to convict Nelson on a theory of accomplice liability, because the anti-parties question permits a capital sentence only for the defendant's *own* culpability, and because the State relied so heavily on the lone-assailant theory of the capital murder. But Stickels did not just overlook the significance of trial counsel's investigatory deficiencies; he constructively abandoned Nelson at this crucial juncture by doing virtually nothing to advance Nelson's postconviction claims. Stickels's egregious performance in this post-

conviction litigation fits with his overall pattern of neglect and misfeasance in serious criminal cases, which eventually caused the Texas Bar to suspend his law license.[18]

Indications that the accomplice issue was crucial were everywhere in the material that Stickels would have received, including many of the red flags trial counsel ignored. *See supra* Section I.A. For example, Nelson's trial testimony highlighted the importance of the issue in the Reporter's Record. Nelson explained how he acted as a lookout and was not substantially involved in Dobson's death. The inadequacy of trial counsel's investigation into Springs was also evident from the State's attempt to charge Springs with the murder, police reports showing Springs had physical bruising consistent with a violent assault, Springs's possession of the victims' valuable property at the time of his arrest, the obviously biased testimony forming the basis of Springs's alibi, the surviving victim rejecting the State's lone-assailant story, and the tremendous disparity in physical stature between Dobson and Nelson. *See supra* at 4-6, 35-39. The inadequacy of trial counsel's investigation was also evident from the marked inconsistencies in both Springs's and Jefferson's flimsy, but unchallenged, alibis. Despite Nelson's testimony and the considerable

[18] The pattern of neglect included neglect on capital cases. *See* State Bar of Texas, Profile of John William Stickels, at https://www.texasbar.com/AM/Template.cfm?template=/Customsource/MemberDirectory/MemberDirectoryDetail.cfm&ContactID=188387, last accessed January 15, 2025.

evidence corroborating it, there were no records of trial counsel having developed evidence about Jefferson or Springs. *See* Ex. 8 at NELSON_00003-15.

And yet Stickels did nothing to investigate the IATC-Participation Claim. He did not even begin to review trial counsel's records until August 2014—almost one year after he was appointed—and then he spent only approximately four-and-a-half hours reviewing them. *See* Ex. 14 at NELSON_00207-12. And the minimal review Stickels did conduct had nothing to do with the omitted accomplice investigation. For example, the records of Gerald Byington, Stickels's mitigation expert, reveal only a thin investigation into Nelson's psychosocial history. Those records never once mention any efforts by trial counsel to investigate Springs and Jefferson. *See* Ex. 16 at NELSON_00213-18. It is undisputed that neither state post-conviction counsel nor Byington conducted any independent investigation into Jefferson's and Springs's involvement in the offense: Byington reviewed only trial counsel's records and other legal files, *see* Ex. 1 at NELSON_00306; Ex. 16 at NELSON_00213-18; and state post-conviction counsel never issued any subpoenas or interviewed any witnesses.

The initial state application reflected Stickels's shocking investigatory deficiencies on its face—even beyond the failure to include the IATC-Participation Claim. Stickels filed a pro forma state habeas application that accomplished virtually nothing for Nelson, mostly raising claims that were some combination of

woefully underdeveloped, futile, and irrelevant. Stickels's 17-claim application included: 11 boilerplate and non-cognizable challenges to the Texas capital punishment scheme; 4 claims that had already been raised and denied on direct appeal; a claim based on "excessive and prejudicial security measures"; and a cursory ineffective assistance claim that vaguely alleged a failure to gather mitigation records. Ex. 17 at NELSON_00106-10, NELSON_00139. In drafting this application, Stickels lifted large portions from a different client's briefing, including an argument based on Fetal Alcohol Spectrum Disorder ("FASD") appearing in *five* separate claims that does not apply to Nelson. *Id.* at NELSON_00106-10, NELSON_00138. The State, whether represented by the District Attorney or the Attorney General, has never disputed that the "Tony" in Stickels's papers is someone else—Mark Anthony Soliz, whose case *did* present FASD issues—or that FASD is irrelevant to Nelson's case.

Stickels's state postconviction performance was egregious. Because the egregious representation caused Nelson to forfeit the IATC-participation claim, consideration of the claim should be permitted in the posture involved here.

II. CLAIM 2: NELSON'S SENTENCE VIOLATES *BUCK V. DAVIS* BECAUSE TRIAL COUNSEL ELICITED TESTIMONY THAT NELSON WAS MORE DANGEROUS BECAUSE HE IS BLACK

Under the Texas special issues scheme, Nelson couldn't receive a death sentence unless all jurors found that he was a future danger. His death sentence

flagrantly violated *Buck v. Davis* because his defense counsel unconstitutionally elicited expert testimony linking future danger to Nelson's race—testimony that "that the color of [Mr. Nelson's] skin made him more deserving of execution." 580 U.S. 100, 119 (2017). *Buck* was decided while Nelson's federal habeas petition was pending, long after he filed his initial state application, and so the "legal basis" of claim was "unavailable" within the meaning of §§ 5(a)(1) & 5(d).

A. There Was A *Buck* Violation

A *Buck* claim is a species of Sixth Amendment right-to-counsel claim formally analyzed under *Strickland*, meaning a claimant must show (1) that counsel performed deficiently and (2) that the deficiency prejudiced a trial outcome. *See Buck*, 580 U.S. at 118 (citing *Strickland*, 466 U.S. at 686). This claim formally incorporates the law as to both deficiency and prejudice from the pertinent sections under Claim 1, *supra*.

1. Trial Counsel Deficiently Elicited "Patently Unconstitutional" Testimony On Future Dangerousness

Buck established that defense counsel performs deficiently when they elicit testimony linking race and danger. In *Buck*, defense counsel elicited defense expert testimony that "the race factor, black," made the capital defendant more dangerous. 580 U.S. at 108. The Supreme Court's analysis of deficiency was short, categorical, and to the point: "It would be patently unconstitutional for a State to argue that a

defendant is liable to be a future danger because of his race. No competent defense attorney would introduce such evidence about his own client." *Id.* at 119.

In this case, the offending testimony was worse and the deficiency more straightforward. Defense counsel elicited a devastating expert opinion bearing on future dangerousness. Specifically, Dr. McGarrahan testified that Nelson's race made him a "storm waiting to happen":

> What we do know about Mr. Nelson is in addition to the ADHD, he has a number of risk factors. The mother who is working two jobs and absent father, verbal abuse, witnessing domestic violence, *the minority status*, below SCS status, all of those things put an individual at greater risk. We can't pinpoint what it is that made Mr. Nelson go on and do what he did do. We just know that when you look at the risk factors that he had, I mean, it was a storm waiting to happen.

43 R.R. 253 (emphasis added). That "minority status," McGarrahan testified, is among the "factors that if are not gotten under control, will result in severe violence." 43 R.R. 253. "There is no cure." 43 R.R. 255. Under such circumstances, like in *Buck*, defense counsel effectively used their own expert testimony to tell the jury that "the color of [Nelson's] skin made him more deserving of execution." 580 U.S. at 119. Or, to put it more bluntly—that Nelson was more dangerous because he was Black.

2. The Deficiency Prejudiced The Sentencing-Phase Result

Reflecting both the Texas unanimity requirement and the *Strickland* prejudice prong, a *Buck* claim requires only that Nelson show a "reasonable probability that,

without [McGarrahan's] testimony on race, at least one juror" would have voted against a future-danger finding. 580 U.S. at 119-120. In a case where a defense expert uses race to predict danger, however, offending testimony will almost always result in prejudice.

Prejudice is particularly acute in *Buck* cases because the "potent" testimony of experts purports to provide "hard statistical evidence … to guide an otherwise speculative inquiry" into future dangerousness. *Id.* at 121. When defense experts reference race this way, they reinforce a "powerful racial stereotype" that "bear[s] the court's imprimatur." *Id.* The prejudice, *Buck* held, "cannot be measured simply by how much air time it received at trial or how many [transcript] pages" it consumed. *Id.* at 122. As *Buck* memorably put it: "Some toxins can be deadly in small doses." *Id.* The elicitation of testimony on race-based dangerousness required reversal in *Buck* because the effect was not "de minimis." *Id.* at 121.

Here, too, trial counsel's elicitation of race-based dangerousness testimony prejudiced Nelson at sentencing. After McGarrahan testified that Nelson's "minority status" was a "risk factor" for danger, 43 R.R. 253, and that "[i]t's probably too late at this point," 43 R.R. 255, the prejudice only snowballed. On cross examination, McGarrahan testified that "risk factors … put one at risk to -- to commit these types of offenses." 43 R.R. 266. And, based on those factors, the defense expert agreed that Nelson "likes violence" and that it is "emotionally pleasing to him." 43 R.R.

269. Near the end of cross, McGarrahan, relying on the "risk factors" that included "minority status," testified that Nelson was a psychopath, 43 R.R. 253, 274-75; and she agreed both that he was "a very dangerous individual," 43 R.R. 277, and that he was "going to continue to be dangerous" as long as people are "preventing him from getting his way." 43 R.R. 277. McGarrahan's testimony about the effect of "risk factors," including Nelson's "minority status," was so staggering in its self-inflicted damage that the State decided that it didn't need to call its own expert—even though he had "attended the entire punishment phase" of trial and been ready to testify on the State's behalf. Ex. 13 at NELSON_01279.

The damage was done. The State's punishment-phase closing simply invoked McGarrahan as the authoritative word on Nelson's dangerousness, thereby highlighting that the State did not even need to call its own dangerousness expert:

> There is nothing else that we could bring you to show you that that answer should be yes. Even *the Defendant's own expert* told you-all yesterday that he will continue to be a danger. Because that, ladies and gentlemen, is who this Defendant is. He will use manipulation and power to get what he wants. He will manipulate jail guards, other inmates or whoever he needs to do to get what he wants, to exert power and control. And that, ladies and gentlemen, in this type of setting, is a very dangerous individual.

44 R.R. 8 (emphasis added). Each attribute the State mentioned in closing had been linked—in defense-elicited testimony from Dr. McGarrahan—to Nelson's racial identity. And the State emphasized that this race-linked, identity-based dangerousness was immutable, repeatedly telling the sentencing-phase jury some

variation of "[t]his is who the Defendant is." 44 R.R. 10; *see also* 44 R.R. 10 ("This is who Steven Nelson is."); 44 R.R. 11 (same, twice).

Because the unconstitutional reference to Nelson's race was not "*de minimis*," it had a reasonably probable effect on the jury's sentence, *Buck*, 580 U.S. at 121—especially considering the record evidencing jurors' ambivalence about whether death was actually warranted. *See supra* at 43.

B. The *Buck* Claim Satisfies the Threshold Showing Required For Article 11.071, § 5 Authorization

Under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, § 5(a), a court may consider the merits of a subsequent post-conviction application only if the application contains sufficient facts showing that one of three exceptions is met. Section 5(a)(1) provides that a court may consider the merits of a subsequent application when "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 … because the … legal basis for the claim was unavailable on the date the applicant filed the previous application[.]" Section 5(d), in turn, defines a claim having a previously unavailable legal basis as one that "was not recognized by or could not have been reasonably formulated from a final decision of the United States Supreme Court, a court of appeals of the United States, or a court of appellate jurisdiction of this state on or before that date."

Nelson filed his initial state application on April 15, 2014; *Buck* was decided on February 22, 2018. In April 2014, there was no appellate decision in state or federal court recognizing the legal basis of the claim here: that defense counsel performs deficiently if they elicit expert testimony that a defendant's race predicts danger. Nor was there any federal decision otherwise making the legal basis for that claim available to Nelson. The novelty of the *Buck* claim is underscored by the State's refusal to confess error in *Buck* itself, which involved testimony about race-danger linkage elicited from defense expert Dr. Walter Quijano. The State had confessed error in all Texas cases where *the State* introduced Quijano's testimony, but it had refused to do so when *the defense* elicited the offending content. *See Buck*, 580 U.S. at 109-10, 113, 125-26.

Buck ultimately established, for the first time, that relief does not turn on which side elicited the race-danger testimony; a claimant can obtain relief even if the testimony was elicited by the defense. *Cf. Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021) (explaining that a legal basis qualifies as previously unavailable "if subsequent case law makes it easier to establish the claim and renders inapplicable factors that had previously been weighed in evaluating its merits"). Per § 5(d), then, the legal basis for the *Buck* claim was unavailable on the date the initial Texas application was filed.

Although not a textual feature of the statute, the CCA has added a procedural requirement to legal-unavailability authorization under § 5(a)(1). Specifically, it requires that claimants plead legal unavailability *and a prima facie case for relief* on the underlying constitutional claim—"specific, particularized facts which, if proven true, would entitle him to habeas relief." *Ex parte Staley*, 160 S.W.3d 56, 63 (Tex. Crim. App. 2005). The facts forming that *prima facie* case for *Buck* relief are set forth in Subsection A, *supra*, alleging substantial evidence of both deficiency and prejudice.

Because the *Buck* claim was legally unavailable on April 15, 2014, and because this Subsequent Application contains facts forming a *prima facie* case for *Buck* relief, this claim ought to be authorized under §§ 5(a)(1) & 5(d).

III. CLAIM 3: TRIAL COUNSEL'S FAILURE TO ADEQUATELY INVESTIGATE, DEVELOP, AND PRESENT TRAUMA-RELATED MITIGATING EVIDENCE VIOLATED HIS SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF TRIAL COUNSEL.

To recount: "An ineffective assistance claim has two components: (a) "deficiency" that (b) "prejudiced the defense." *Wiggins*, 539 U.S. at 521. Trial "counsel's failure to uncover and present voluminous mitigating evidence at sentencing" violates the Sixth Amendment when it meets those two elements. *Id.* at 522; *see also Williams*, 529 U.S. at 390 (similar). Here, Nelson's trial counsel failed to investigate, develop, and present compelling mitigating evidence related to his history of childhood trauma, neglect, and untreated mental illness. Had that trauma-

related evidence been investigated, developed, and presented, there is a reasonable probability that at least one juror would have voted against a death sentence.

This Court should authorize merits litigation of Nelson's claim arising from this additional deficiency for two reasons: (1) under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071, for the reasons related to Stickels's performance specified in Subsection C of Claim 1, *supra*; and (2) under article 11.071 § 5(a)(3) because, with all inferences drawn in Nelson's favor, no rational juror would have resolved the mitigation issue against him.

A. Trial Counsel Performed Deficiently Under *Wiggins*

Trial counsel's failure to conduct an adequate investigation of possible mitigating evidence constitutes deficient performance. *See Wiggins*, 539 U.S. at 524. That is because capital defense lawyers have "an obligation to conduct a thorough investigation of the defendant's background" to develop viable mitigation defenses. *Porter v. McCollum*, 558 U.S. 30, 39 (2009).[19] The scope of that obligation depends on "not only the quantum of evidence already known to counsel, but also whether

[19] These principles are memorialized in the ABA Guidelines. *See* ABA GUIDELINE 10.7(A) ("Counsel at every stage have an obligation to conduct thorough and independent investigations relating to the issues of both guilt and penalty."); ABA GUIDELINE 10.8 (specifying diligence in identifying and excluding claims, and requiring that asserted claims be "[presented] as forcefully as possible, tailoring the presentation to the particular facts and circumstances in the client's case"); ABA GUIDELINE 10.11.F (providing that the selection of expert witnesses should reflect the expert's ability "to provide medical, psychological, sociological, cultural or other insights into the client's mental and/or emotional state and life history that may explain or lessen the client's culpability for the underlying offense(s)" and "to give a favorable opinion as to the client's capacity for rehabilitation").

the known evidence would lead a reasonable attorney to investigate further." *Wiggins*, 539 U.S. at 527. "When trial counsel does not conduct a complete investigation, his conduct is [un]reasonable" unless some "reasonable professional judgments support the limitations on investigation." *Ex parte Napper*, 322 S.W.3d 202, 246 (Tex. Crim. App. 2010) (quoting *Strickland*, 466 U.S. at 691). The failure to develop mitigating evidence cannot amount to "a reasonable tactical decision where counsel has not [first] fulfilled their obligation to conduct a thorough investigation of the defendant's background." *Garza*, 620 S.W.3d at 824 (internal quotation marks omitted). Nor does counsel's "effort to present *some* mitigation evidence … foreclose an inquiry into" constitutional deficiency; what matters is the reasonableness of investigation omitted. *Sears v. Upton*, 561 U.S. 945, 955 (2010).

Consider *Garza*, where the TCCA found deficiency under circumstances remarkably similar to Nelson's case. *See* 620 S.W.3d at 824. There, two key errors compromised trial counsel's mitigation investigation. First, over-reliance on interested witnesses distorted the already-cursory investigation. Counsel "relied almost exclusively on the assistance of Applicant's mother to locate witnesses, records, and information," filtering the investigation through a witness who was "defend[ing] her own parenting abilities and represented that their household and his childhood had been normal." *Id.* at 823. Counsel didn't independently "interview the witnesses separately or ask them specific questions about sensitive matters …."

Id. Second, counsel ignored many "red flags evident in [Texas Youth Commission] documents in the State's file"—including evidence of prior mental health treatment and substance abuse, persistent depression, PTSD, childhood trauma, suicidal ideation, and anger management—ultimately "declin[ing] to seek any investigative or expert assistance in conducting the mitigation investigation and in assessing Applicant's mental health." *Id.* (internal quotation marks omitted).

Here, Nelson's trial counsel also (a) over-relied on the sanitized information provided by Nelson's mother and (b) made no independent inquiry into known records containing mitigating evidence of childhood trauma and neglect, depression, and suicidal ideation. Their deficient investigation was only exacerbated by their decision to retain and rely upon a mental health expert who never conducted an in-person evaluation and who ultimately presented aggravating testimony.

1. Trial Counsel Failed To Adequately Investigate Nelson's Childhood History Of Abuse, Neglect, And Trauma

Nelson's trial counsel failed to explore readily available information about childhood trauma, mental illness, neglect, institutionalization, and suicidality. Trial counsel, for example, failed to follow up on red flags showing that Nelson experienced seizures and was prescribed phenobarbital, a powerful barbiturate, throughout the first years of his life. 43 R.R. 249, 251. Nor did they explore other evidence indicating a lifelong history of seizures and anti-seizure medication. *See, e.g.*, Ex. 28 at NELSON_00869 (PCC Mental Health/Social Service Encounter

Record (July 16, 1998)) (showing a prescription of seizure drug Divalproex at age 11); Ex. 29 at NELSON_01031 (Tarrant Cnty. Hosp. Dist. Nurses Notes (Mar. 19, 2011)); Ex. 30 at NELSON_01032 (Tarrant Cnty. Sheriff's Office Med. Report (Mar. 19, 2011)).

Trial counsel never followed up on mitigation evidence that they discovered or should have discovered from interviews with Nelson's mother Kathy and sister Kitza, both of whom later testified. From Kitza, they knew or should have known: that Kathy would hit Steven with belts and paddles, sometimes without explanation (43 R.R. 228-229); that Kathy would not pick her children up from school, left them home alone, and made 11-year-old Kitza into Steven's "ongoing" caretaker (43 R.R. 224, 225, 230); and that all of this occurred in front of Steven and his sister (*id*; 43 R.R. 227). From Kathy, they knew or should have known that Steven regularly witnessed violence between his parents; that Nelson's father was a "very abusive … alcoholic" who was frequently "on drugs" (43 R.R. 140, 144); that Nelson's father Tony would "come over," "break [their] door down," and "and beat [Nelson's mother] severely" while she tried to "hit him" (43 R.R. 140); and that Kathy "had to move around from [Steven's] abusive father" about five times during Nelson's childhood, with periodic police involvement (43 R.R. 143). Indeed, the mitigation specialist prepared and sent a memorandum indicating that counsel's only expert witness "felt very strongly" that Nelson had been abused. Ex. 31 at

NELSON_00772 (M. Burdette Conference Memorandum (Aug. 14, 2012)). Still, trial counsel didn't investigate further.

Trial counsel's records included undeveloped and unpresented information that Nelson's early-childhood trauma led to troubling behavior and signs of childhood mental illness, including depression. At six, Nelson would tear up at school, saying that he did not want to have to go home. Ex. 32 at NELSON_00822 (PCC Ambulatory Encounter Record (Jan. 4, 1994)). Medical professionals diagnosed Nelson with depression when he was only eight years old. Ex. 33 at NELSON_00825-44 & Ex. 34 at NELSON_00848-63 (Appointment Records (May - Oct. 1995)). That same year, Nelson's school became so concerned about him that they requested a formal psychiatric evaluation. Ex. 35 at NELSON_00847 (PCC Ambulatory Encounter Record (Oct. 23, 1995)). At the age of ten, Nelson's doctor noted that he was a "very quiet, sad looking young man." Ex. 36 at NELSON_00874 (Appointment Record (Dec. 10, 1998)). Nelson's mental health further suffered as he struggled with bedwetting (enuresis) until he was at least eleven years old. Ex. 37 at NELSON_00877. By this time, Nelson was already medicated for depression.

Trial counsel had other records disclosing that Nelson's depression was accompanied by impulse control issues. He sometimes acted out, with one doctor noting that Nelson "wants to control [his behavior], but can't." Ex. 38 at NELSON_00820 (PCC Ambulatory Encounter Record (Mar. 4, 1993)). At the age

of eight, Nelson kicked a school bus driver and had his bus privileges revoked, making it harder for him to attend school regularly. Ex. 39 at NELSON_00864 (Problem List Update (Nov. 30, 1995)). By age ten, he had been arrested several times for entering homes to steal food and other items. Ex. 40 at NELSON_00868 (Intake Face Sheet (June 4, 1998)); Ex. 41 at NELSON_00884 (Discharge Summary (Jan. 28, 2011)).

Trial counsel also had documents showing that Nelson had a highly unstable adolescence, moving in and out of state-run institutions. Nelson was removed from a youth rehabilitation center in Oklahoma just as he started to make progress, he was placed on parole, and he was then sent to live with his mother in Texas against the advice of staff. Nelson himself requested that he "go back to Oklahoma to Y.H.C." where he had been able "to get help." Ex. 42 at NELSON_00929 (Bedford Police Dept., Handwritten Note by Steven Nelson (Dec. 4, 2001)). Instead Nelson was shuttled among other Texas Youth Commission (TYC) facilities.

Garza formally held that trial counsel is deficient if they fail to explore red flags in TYC records. *See* 620 S.W.3d at 823 (applying red-flags rule to information in TYC documents that counsel actually or should have possessed). No such investigation happened here. Trial counsel's files show that Nelson's symptoms worsened at TYC, often manifesting in suicidal ideation and behavior. In May 2002—only a few months after he was admitted—Mr. Nelson began to exhibit

suicidal tendencies, telling a guard that he wanted to kill himself. Ex. 43 at NELSON_00942-43 (Suicide Alert (May 9, 2002)). These comments were so serious that TYC placed him on "close observation," requiring a guard to check on him every three minutes. *Id*. A year later, in August 2003, records indicate that Nelson again told staff that he wanted to kill himself, although he later said he was "just playing." Ex. 44 at NELSON_00944-45 (Suicide Alert Form (Aug. 4, 2003)). A few months later, on January 19, 2004, it became apparent that Nelson was not "just playing"; he asked for a "self-referral" because he had not eaten for two days. Ex. 45 at NELSON_00952-53 (CCF-225 Incident Report (Jan. 19, 2004)). When the guard refused, Nelson drank half a bottle of Windex. *Id*.; *see also* Ex. 46 at NELSON_00946-50 (Nursing Clinic Note (Jan. 19, 2004)).

A medical professional noted that Nelson was "a danger to self" after the Windex incident, Ex. 47 at NELSON_00951 (Incident Report (Jan. 19, 2004)), and Nelson was again placed on suicide watch. Ex. 48 at NELSON_00954 (Suicide Alert Removal/Change in Observation Level (Jan. 20, 2004)). Follow-up materials also state that Nelson "thinks of death often," and that if he was not at TYC, he would find a way to "shoot himself in the head," even though he had difficulty acknowledging his behavior as "suicidal." Ex. 49 at NELSON_00955-59 (Psychiatric Referral (Jan. 24, 2004)).

Nelson's suicidal ideation did not abate. In June 2004, Nelson was sent to the emergency room after he was found to have taken a handful of pills in a "threat of harm to self." Ex. 50 at NELSON_00962 (CFF-225 Incident Report (June 2, 2004)); Ex. 51 at NELSON_00960-61 (Nursing Assessment Protocol For Altered Level of Consciousness (June 2, 2004)). When left unattended for over an hour and a half with corrosive chemicals and asked to clean a floor, Nelson instead poured these chemicals on his legs and feet, severely burning himself to the point of requiring immediate skin graft surgery. Ex. 52 at NELSON_00964-65 (CFF-225 Incident Report (Apr. 15, 2005). This mitigation evidence was left totally unexplored, undeveloped, and unpresented.

Trial counsel also had access to records indicating that Nelson's mental health struggles continued after his 2006 release from TYC—his suicidal tendencies and depression persisted and worsened. Nelson reported numerous suicide attempts while outside state custody. Ex. 53 at NELSON_01008-13 (Mental Health Evaluation (Jan. 22, 2010)). When he was arrested in 2008, detaining officials reported that Nelson seemed "to be very depressed." Ex. 54 at NELSON_00987 (Mental Health Services Request (Sept. 21, 2008)). Three days later, Nelson reported that "he was going to kill himself" because "his family [was] not visiting him." Ex. 55 at NELSON_00988 (Change of Inmate Housing Assignment (Sept.

24, 2008)); Ex. 56 at NELSON_00989 (Mental Health Services Request (Sept. 24, 2008)); Ex. 57 at NELSON_00991 (Detention Bureau Report (Sept. 24, 2008)).

Available documents further illustrated that, while incarcerated, Nelson was experiencing severe mental health problems, including extreme depression and suicidal ideation. Ex. 58 at NELSON_00995-96 (Inmate Request for Health Servs. (Nov. 17, 2008)) (rating his depression as a "9" on a scale from 1 to 10); Ex. 59 at NELSON_00997 (Progress Notes - Med. (Jan. 14, 2009)). Nelson made multiple requests for a "screening," stating that he was "depressed," "seeing things," and "bi-polar." Ex. 60 at NELSON_01014 (Triage Interview (Apr. 9, 2010)). In September 2010, Nelson once again acted on his suicidal thoughts, swallowing a shaving razor. Ex. 61 at NELSON_01016-17 (Ambulance Incident Report (Oct. 7, 2010)). He was found spitting up blood, and he was rushed to Parkland Memorial Hospital. *Id*. Critically, in December 2010, Nelson was finally diagnosed with PTSD, scoring almost twice as high as the facility average on the PTSD scale, Ex. 62 at NELSON_01025, but nothing was done to treat this condition.

Trial counsel also had records indicating that Nelson's mental health struggles continued up to and after the events underlying his instant conviction. After Nelson was arrested, physicians at Tarrant County recognized that Nelson had "significant mental illness," Ex. 63 at NELSON_01029 (MHMR Written Assessment of Mental Health (Mar. 14, 2011)), notifying the Magistrate's Court that they suspected Nelson

"of having mental illness or mental retardation." Ex. 64 at NELSON_01030 (Email from Tuan M. Tri to Tarrant Cnty. Magistrate Court (Mar. 14, 2011)).

A week after returning to jail, Nelson notified staff that he was again suicidal. Ex. 65 at NELSON_01073 (Tarrant Cnty. MHMR Progress Notes (Mar. 22, 2011)). James Rucker, a licensed counselor, noted that Nelson was experiencing "increased depression." Ex. 66 at NELSON_01034 (Tarrant Cnty. MHMR Servs. Progress Note (Apr. 21, 2011)). Nelson repeatedly asked for help with his depression, but he received little. Ex. 67 at NELSON_01035 (Inmate Request for Health Servs. (June 21, 2011)) ("I'm very Depressed & Stressed out. I Need Help. I Keep putting In Request to talk to MHMR. This Is my 3rd Request."); Ex. 68 at NELSON_01036 (Inmate Request for Health Servs. (June 30, 2011)) ("I Been writing And Requesting every day to Been Seen by MHMR. I'm very Depressed And Stressed out. My Mood changes every Second."); Ex. 69 at NELSON_01039 (Inmate Request for Health Servs. (Oct. 11, 2011)) ("I'm very Depressed. My mood Is up and Down. I'm stressed out All the time. I Got the Shakes. I Need to See a Doctor. ASAP!!"). The continued failure to address Nelson's ongoing mental health problems resulted in Nelson trying to hang himself twice while he awaited trial. Ex. 70 at NELSON_01038 (Health Code Run Sheet (Oct. 5, 2011)); Ex. 71 at NELSON_01204 (Letter from Sgt. T. Wall to Capt. Pilkington and Lt. Black (Dec. 26, 2011)); Ex. 72 at NELSON_01201 (Tarrant Cnty. Jail Mental Health Servs.

Request (Dec. 26, 2011)); Ex. 73 at NELSON_01202-03 (Health Code Run Sheet (Dec. 26, 2011)).

2. Trial Counsel Deficiently Engaged Dr. McGarrahan And Failed To Consult A Trauma Specialist

Trial counsel also perform deficiently if they perfunctorily select experts without paying attention to the specific needs of the case. *See* ABA Guideline 10.111.F (selection of expert witnesses should reflect the expert's ability to provide medical, psychological, sociological, cultural, or other insights into the client's mental or emotional state and life history that may explain or lessen the client's culpability or give a favorable opinion as to the capacity for rehabilitation). Considering Nelson's mitigation profile, reasonable trial counsel would have retained an expert who could evaluate childhood and adolescent trauma, and who could opine on the mitigating impacts thereof. Instead, trial counsel hired neuropsychologist Dr. Antoinette McGarrahan.

The selection of Dr. McGarrahan did not reflect competent representation; it was a cookie-cutter approach divorced from the trauma-centered needs that were or should have been evident from reasonable capital defense lawyering. *See supra* note 5 (explaining how trial counsel regularly retained Dr. McGarrahan to argue that their own defendants were psychopaths). Dr. McGarrahan at one point even told the trial team that she was "just a neuropsychologist," meaning "environmental/social issues" were "not her area of expertise"; and she flagged that she had not devoted

the "considerable amount of time and research" needed to testify about "social" issues. Ex. 31 at NELSON_00773 (M. Burdette Conference Memorandum (Aug. 14, 2012)). Trial counsel gave Dr. McGarrahan no guidance on what her role would be and decided to present her opinion at trial before ever ascertaining its content. In fact, trial counsel committed to calling her as a witness before she ever met or evaluated Nelson in any capacity, explaining to her in a letter that "it [is] best to call you as a witness, even if all we have is a client who is basically disowned by his mother, father, and family, and has had no alternative but to strike out against others violently, just for attention." Ex. 74 at NELSON_00769 (Letter from B. Ray to Dr. McGarrahan (May 22, 2012)).

Worse still, trial counsel unreasonably chose to call Dr. McGarrahan to the stand even after she had made clear that her testimony would *severely damage* their sentencing-phase case. On August 20, 2012, Dr. McGarrahan advised trial counsel that, "if asked on cross ... I will agree that [Mr. Nelson] has several traits associated with psychopathy." Ex. 12 at NELSON_00775-76 (A. McGarrahan Letter to B. Ray (Aug. 20, 2012)). She likewise advised the defense team in advance that she believed Nelson posed a future danger. Ex. 31 at NELSON_00773 (M. Burdette Conference Memorandum (Aug. 14, 2012)). Trial counsel nevertheless called Dr. McGarrahan to testify, thereby introducing what amounted to aggravating testimony

about future danger and psychopathy from the defense expert—the precise scenario Dr. McGarrahan warned trial counsel about before she testified. 43 R.R. 272-73.

B. Trial Counsel's Deficiency Prejudiced Nelson's Sentencing-Phase Defense

Prejudice means that trial counsel's deficiency had a reasonable probability of affecting the sentencing jury's mitigation finding. *See Rompilla*, 545 U.S. at 390.[20] The reasonable-probability threshold is lower than a preponderance standard. *See Strickland*, 466 U.S. at 694. Putting the prejudice standard together with the Texas unanimity requirement, prejudice exists when there is a reasonable probability that one juror might have voted for a life sentence. To analyze prejudice, a court compares the (1) totality of what trial counsel would have discovered had they undertaken a reasonable investigation with (2) the sentencing case actually presented. *See Rompilla*, 545 U.S. at 390-91 & n.8. Here, Nelson's trial counsel told the jury a confused story about how Nelson was raised by a good mother who did "what she could" with a difficult child. 43 R.R. 187, 199-208. Had the jury heard a competently investigated and trauma-centered mitigation case, there is a reasonable probability that a single juror would have voted against a death sentence.

[20] As noted in Section I, *supra* at 21-22, the prejudice inquiry requires that prejudice be cumulated across deficiencies, which means that a court should add the effect on the sentencing outcome from the deficiencies discussed here to the effect on the outcome from the deficiencies in other claims. The prejudice inquiry is resolved by reference to the *total* effect of deficiencies on the sentence.

1. Omitted Mitigation Evidence

At the most general level, the failure to develop and present evidence connected to childhood abuse and trauma deprived the jury of profound mitigating evidence. Trial counsel posed superficial questions about Nelson's background to a few witnesses (*supra* at 75), but barely explored the physical abuse, neglect, and violence Nelson experienced as a child. Counsel did not link Nelson's behavior to his childhood trauma, but they instead gave an impression of inexplicable violence undertaken by someone who had life's advantages. Not only did trial counsel fail to competently develop mitigation evidence, but they also failed to present much of the evidence that they actually possessed.

Because of trial counsel's deficiency, the jury never heard compelling testimony from witnesses establishing the violent atmosphere that pervaded Nelson's early childhood home: his sister, Kitza Nelson; his paternal uncle, Anthony Luckey; and his cousin, Britany Beal. (Trial counsel never contacted Luckey at all.[21]) If counsel had developed testimony from these witnesses, then the jury would have learned that Nelson's father (Tony Nelson) routinely came home drunk or on drugs. Ex. 75 at NELSON_00790 (Declaration of Kitza Nelson (Oct. 9, 2016) ("K. Nelson Decl.") ¶¶ 25, 27, 29). Nelson's mother Kathy was notoriously short-tempered and violent. Ex. 76 at NELSON_00786 (Declaration of Anthony Luckey

[21] Subsequent postconviction counsel later interviewed these witnesses.

(Oct. 9, 2016) ("A. Luckey Decl.") ¶ 4); Ex. 77 at NELSON_00783 (Declaration of Britany Beal (Oct. 8, 2016) ("Beal Decl.") ¶ 9). Nelson saw his parents fight violently, and he was there when his mother stabbed his father in the groin with a large knife. K. Nelson Decl. ¶ 30 at NELSON_00790; A. Luckey Decl. ¶ 4 at NELSON_00786. The fighting only stopped after Nelson's father left the home permanently, spending the remainder of Nelson's childhood intermittently incarcerated.

Nor did the jury ever learn that Nelson experienced severe abuse and neglect from his mother during childhood. Kathy Nelson physically abused him, often beating him multiple times a day. K. Nelson Decl. ¶¶ 39-41 at NELSON_00791. She hit Nelson with a wooden paddle, leaving Nelson with red welts on his body and head, and she then recorded the date of each beating on the paddle after she finished. *Id.* at NELSON_00791-92. Nelson's mother frequently left him home alone to fend for himself at a very young age, sometimes leaving him without food, water, or electricity. Ex. 78 at NELSON_00805-6 (Declaration of Terry Luckey (Oct. 10, 2016) ("T. Luckey Decl.") ¶¶ 8-9, 17; Ex. 79 at NELSON_00795 (Declaration of Linda Whelchel (Oct. 9, 2016) ("Whelchel Decl.") ¶ 12); Ex. 80 at NELSON_00808-09 (Declaration of Gregory Burns (Oct. 11, 2016) ("Burns Decl.") ¶¶ 5, 23); K. Nelson Decl. ¶¶ 35-37, 51 at NELSON_00791, NELSON_00793; Ex. 81 at NELSON_00778 (Declaration of Cora Lee (Oct. 6, 2016) ("Lee Decl.") ¶ 11).

Because Nelson's father abandoned him when Nelson was three, there was no one to protect him from his mother's abuse or to care for him during frequent periods of parental absence and neglect.

The jury never learned that the pattern of neglect was so severe that it was readily visible to those outside the Nelson home. Peripheral family members repeatedly found young Nelson riding his bike alone late at night on busy streets. T. Luckey Decl. ¶ 8 at NELSON_00805; A. Luckey Decl. ¶ 8 at NELSON_00786. Others recall instances where Kathy was indifferent to Nelson's whereabouts. *See* Ex. 82 at NELSON_00800 (Declaration of Martha Kay Blevins (Oct. 9, 2016) ("Blevins Decl.") ¶ 15). When people from outside the family would bring Nelson home, Kathy was usually nowhere to be found. T. Luckey Decl. ¶ 8 at NELSON_00805. And when she finally did come home, she was frequently accompanied by male strangers and would host parties in her home, with Nelson confined to his room. A. Luckey Decl. ¶ 7 at NELSON_00786; T. Luckey Decl. ¶ 13 at NELSON 806; K. Nelson Decl. ¶¶ 12-14, 17 at NELSON_00788-89. Some of Kathy's friends had a ready explanation for this behavior: Kathy simply did not want to be a mother. Whelchel Decl. ¶ 6 at NELSON_00795; T. Luckey Decl. ¶ 7 at NELSON_00805. Others more frankly called her a "hustler." Beal Decl. ¶ 11 at NELSON_00783; Ex. 83 at NELSON_00781 (Declaration of Joaine Gibson (Oct. 6, 2016) ("Gibson Decl.") ¶ 13). In keeping with this assessment, Kathy admitted

that she wanted Nelson out of her home when he was barely a teenager. Ex. 84 at NELSON_00921 (Email from James Eakins to Ronnie Meeks (Oct. 24, 2001)). One close friend noted that Kathy "preferred when Steven was locked up because she didn't have to acknowledge him." Burns Decl. ¶ 24 at NELSON_00809.

The jury was never presented with evidence showing that, because his parents never prioritized his wellbeing, Nelson's young life was marked by material deprivation and food scarcity. While Nelson's mother Kathy often had clothes, shoes, and spending money to support her social life, K. Nelson Decl. ¶ 53 at NELSON_00793; A. Luckey Decl. ¶ 7 at NELSON_00786; T. Luckey Decl. ¶ 15 at NELSON_00806; Lee Decl. ¶ 10 at NELSON_00778, Nelson did not always have food to eat, and home utilities were often turned off. K. Nelson Decl. ¶¶ 37, 51 at NELSON_00791-93; T. Luckey Decl. ¶ 17 at NELSON_00806; Lee Decl. ¶ 10 at NELSON_00778. Nelson's sister Kitza described how Nelson would hoard food under his bed, only to be chastised and punished by his mother when she found it. K. Nelson Decl. ¶¶ 33-34 at NELSON_00791; *see also* Ex. 85 at NELSON_01422-23 (describing "emotional abuse" by Nelson's mother). Kathy's inability to pay rent and utilities led the family to move among at least seven different residences in his first thirteen years of life (not counting state institutions). K. Nelson Decl. ¶ 32 at NELSON_00791; Ex. 86 at NELSON_00797 (Declaration of Maggie Nelson Luckey (Oct. 9, 2016) ("M. Luckey Decl.") ¶ 4). Texas Youth Commission records

note that Steven suffered from "CHRONIC POVERTY" and "FREQUENT FAMILY OR SCHOOL MOVES." Ex. 87 at NELSON_01287 (Correctional Care System, Family History (undated)); *see also* Whelchel Decl. ¶ 9 at NELSON_00795.

Scant evidence of this abuse, neglect, and violence made it before the sentencing jury. Without evidence that captured the trauma of Nelson's childhood and the imprint it left on his life, the jury lacked crucial information necessary to assess his true culpability. Instead, trial counsel suggested that Nelson's behavior might have been caused by Ritalin consumption. 43 R.R. 145-46 (Kathy James testimony that Nelson had no issues "until he got on Ritalin"); *id*. at 188 (medications made Nelson "spacey"). And because trial counsel unreasonably relied on Kathy as the primary source of all information about Nelson's home life, the sentencing jury heard a distorted account of Nelson's upbringing—biased to make Kathy appear to have adequately parented him. *See id*. at 187 (testimony that Kathy did not leave Nelson alone, and "was a pretty good mom"); *id*. at 199-200 (testimony that Kathy "did as good as she could ... under the circumstances" raising Nelson).

2. Effects of Deficiency On Expert Testimony

The downstream effects of the deficient investigation weren't limited to omitted records and layperson evidence. The deficient preparation also caused counsel to use and elicit testimony from the wrong expert—one with no expertise in childhood trauma—and that approach backfired spectacularly. As a result of

counsel's deficient mitigation investigation, no childhood trauma expert ever told the jury how Nelson's experience affected his blameworthiness. Ex. 85 at NELSON_01408, NELSON_01425-27 (Preliminary Report of Dr. Bekh Bradley, Ph.D. (Oct. 3, 2016)). Instead, symptoms of trauma were presented to jury as evidence of incurable psychopathy.

To illustrate: Consulting with a childhood-trauma expert would have uncovered Nelson's previously unnoticed PTSD and mood disorders. That information, in turn, would have facilitated further diagnostic review and more mitigating evidence. A testifying expert would have described the physical and sexual abuse that Nelson sustained during his childhood, and they would have helped the jury understand how that abuse affected him. *Id.* at NELSON_01423-24. That expert would have been able to explain how the "combination of [Mr. Nelson's] multiple exposures to trauma made the likelihood that he would develop adverse psychological consequences extremely high." *Id.* at NELSON_01425.

Had trial counsel investigated mitigation competently, they would not have presented expert testimony that Nelson's observed behavior was psychopathy because they would have consulted with and presented testimony from someone like Dr. Bekh Bradley. Dr. Bradley is a doctor and professor of psychiatry and behavioral sciences, and he is an expert in childhood trauma who evaluated Nelson after the

first round of state post-conviction proceedings ended. He ultimately performed other analyses that trial counsel never pursued.

Dr. Bradley's report confirms that, with a proper mitigation investigation, the jury would have heard not that Nelson was incurably psychopathic, but that he suffered from severe PTSD and several substantial mood disorders. Per Dr. Bradley, Nelson suffered "extreme childhood trauma and adversity, which has likely resulted in unrecognized and untreated trauma-related symptoms including symptoms of posttraumatic stress disorder (PTSD)." *Id.* at NELSON_01408. Dr. Bradley also would have explained to the jury that Nelson had been subjected to "severe physical abuse." *Id*. at NELSON_01422. Dr. Bradley would have also told the jury that Nelson suffers from dissociative behavior, bipolar disorder, and other mood disorders, *id.* at NELSON_01408, and that Nelson should be further evaluated for the mental-health effects of near constant institutionalization, *id.* at NELSON_01427-28.

Dr. Bradley's findings would have been supported by evidence trial counsel already possessed, but they would have also been bolstered by the social-historic traumas Dr. Bradley's diagnostic process later brought to light. These traumas include beatings by Nelson's stepfather Romero Fernando and one of his mother's boyfriends, plus multiple instances of sexual abuse by his mother's friend, beginning when Nelson was eight years old. *Id.* at NELSON_01410, NELSON_01423-24.

Finally, Dr. Bradley would have explained how Nelson's childhood trauma affected his present condition, as "traumatic and adverse experiences and circumstances exert a deleterious impact on the developing brain and negatively disrupt of psychosocial development and functioning." *Id.* at NELSON_01425-26.

The defense expert testimony actually presented at sentencing—that Nelson was an incurable psychopath—looked nothing like what could have followed a competent trauma investigation. The words "trauma," "traumatized," or "traumatic" were not uttered during the sentencing phase. The only time the jury ever heard anything about Nelson's suicidal behavior was when the *State* cross-examined Dr. McGarrahan, who spoke only of Nelson's most recent episodes as a ruse to "manipulate his cell location," 43 R.R. 270. Instead of hearing how Nelson struggled with untreated mental illness for years, Dr. McGarrahan offered diagnostically uninformed testimony that Nelson was "psychopathic," 43 R.R. 274-75, and that he had many "risk factors" that "put him on the track for permanent derailment." 44 R.R. 23; *see also* 43 R.R. 253 (testimony regarding seven risk factors). *See supra* at 12-13, 67-68. As a result, on cross-examination, prosecutors were able to walk Dr. McGarrahan through a long list of "psychopathic characteristics"—including "need for stimulation"; "parasitic life style"; a "prefer[ence] to cheat, lie, and steal,"; "lack of realistic long-term goals,"; "[p]romiscuous sexual behavior,"; "[c]riminal versatility,"; "impulsive,"

"irresponsible," and "poor behavioral controls"; and "pathological lying, conning, manipulative, lack of remorse or guilt"—with Dr. McGarrahan ultimately agreeing that all these "describe Steven Nelson." 43 R.R. 272-74. According to Nelson's own witness, the only criteria Nelson did not meet, "short-term marital relationships" was explained by the fact that he had "pretty much" never "been out of prison long enough to get married." 43 R.R. 275.

* * *

Trial counsel had a professional obligation to conduct a thorough investigation regarding potential mitigating factors, to reasonably develop a forceful mitigation case, and to work with appropriate experts. ABA GUIDELINES 10.7(a), 10.8, 10.11.F. Counsel failed in each instance, resulting in (1) a sentencing-phase case that kept evidence about profound trauma and abuse from the jury, and (2) defense expert testimony that helped the State. There is a reasonable probability that the available-yet-undeveloped mitigating evidence would have convinced at least one juror to vote differently on the mitigation issue.

C. The IATC-mitigation Claim Satisfies the Threshold Showing Required For Article 11.071, § 5 Authorization

Merits consideration of the claim should be authorized (1) under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071 § 5(a)(1) for the reasons related to Stickels's performance, which are specified in Subsection C of Claim 1, *supra*; and (2) under § 5(a)(3) because, with all inferences drawn in Nelson's favor, no rational juror

would have resolved the mitigation issue against him but for the Sixth Amendment violation.

First, under § 5(a)(1), Stickels's deficient performance justifies authorization of all of Nelson's IATC claims. *See* Section I.C, *supra*. Stickles failed to investigate anything, reprinted irrelevant portions of appellate briefing from other clients' cases, generally failed to litigate with the standard of care expected of post-conviction counsel in a capital case, and had his bar license suspended for his post-conviction lawyering in serious criminal cases—including capital cases. *See supra* at 14 & n.6.

With respect to the *Wiggins* claim specifically, the investigator that state post-conviction counsel hired, Gerald Byington, did not investigate Nelson's mitigation. Over the course of nine months, from August 2013 through May 2014, Byington did less than 30 hours of work, spending about half of the $5,000 budget the court had allotted to him and Stickels. *See* Ex. 15 at NELSON_00206 (May 16, 2014 Service and Expense Summary for G. Byington). Most of that time was spent reviewing legal files, not investigating mitigation. *Id.* Byington and Stickels did not, for example, interview any witnesses, or hire other experts. Ultimately, Byington's work amounted to a simple report summarizing trial counsel's approach and the trial record, without any original analysis or fact development. *See id.*; Ex. 16 at NELSON_00213-18. Upon receiving trial counsel's files showing that they hadn't

competently investigated nor developed a mitigation case, Stickels did virtually nothing to cure that deficiency.

Second, the *Wiggins* claim also meets the § 5(a)(3) criteria for CCA authorization. But for the failure of Nelson's trial counsel to adequately investigate and develop a mitigation defense, and drawing inferences in Nelson's favor, no rational juror would have resolved the mitigation issue against Nelson. The trauma-based evidence counsel failed to present contains a powerful narrative against Nelson's moral blameworthiness, which could have been supported by expert testimony from a trauma specialist.

IV. CLAIM 4: NELSON WAS CONVICTED AND SENTENCED IN VIOLATION OF THE SIXTH AMENDMENT RIGHT, RECENTLY RECOGNIZED IN *SMITH V. ARIZONA*, TO CONFRONT FORENSIC WITNESSES AGAINST HIM

"The Sixth Amendment's Confrontation Clause guarantees a criminal defendant the right to confront the witnesses against him," and *Smith v. Arizona* recently held that those rights apply "in full to forensic evidence." 602 U.S. 779, 783-84 (2024). Under *Smith*, Nelson's Confrontation Clause rights were violated when the State elicited crucial hearsay testimony from the state's chief medical examiner, Dr. Nizam Peerwani. The Supreme Court decided *Smith* on June 24, 2024—long after Nelson filed his initial Texas post-conviction application—and so the legal basis of the claim was, within the meaning of article 11.071 §§ 5(a)(1) & 5(d), unavailable during the first round of state post-conviction proceedings.

A. *Smith* Was Violated When The State Elicited Crucial Hearsay Testimony About The Victim's Cause of Death

The Confrontation Clause prohibits the admission of "testimonial statements" from an out-of-court declarant introduced for the truth of the matter asserted ("testimonial hearsay"), unless such witness is "unavailable to testify, and the defendant ha[s] had a prior opportunity" to cross-examine her. *Smith*, 602 U.S. at 783 (quoting *Crawford v. Washington*, 541 U.S. 36, 53-54 (2004)). The U.S. Supreme Court recently held that this "prohibition applies in full to forensic evidence," such as "an absent laboratory analyst's testimonial out-of-court statements to prove the results of forensic testing," or "a case in which an expert witness restates an absent lab analyst's factual assertions to support his own opinion testimony." *Id.* (citations omitted). A Confrontation Clause violation has two elements: introduction of (1) testimonial content that is (2) hearsay. *See id.* at 784.

Smith illustrates how these concepts operate within the Confrontation Clause analysis. In that case, a state analyst (Rast) tested substances seized from the defendant (Smith), and Rast wrote a report identifying the substances as illicit drugs. *See id.* at 790. Rast stopped working for the state before trial, and the state called a different analyst (Longoni) as its expert witness at trial. *See id.* Longoni testified to the "same conclusion"—the seized substances were illicit drugs—"in reliance on Rast's records," which he reviewed to "prepare[] for trial" because "he had not participated in the Smith case" otherwise. *Id.* at 791. After telling the jury what

Rast's records conveyed about her testing of the items, Longoni offered a purportedly "independent opinion" that they were drugs. *Id.* (internal quotation marks omitted). Longoni's testimony thereby introduced hearsay statements from Rast's records:

> Rast's statements thus came in for their truth, and no less because they were admitted to show the basis of Longoni's expert opinions. All those opinions were predicated on the truth of Rast's factual statements. Longoni could opine that the tested substances were marijuana, methamphetamine, and cannabis only because he accepted the truth of what Rast had reported about her work in the lab—that she had performed certain tests according to certain protocols and gotten certain results. And likewise, the jury could credit Longoni's opinions identifying the substances only because it too accepted the truth of what Rast reported about her lab work (as conveyed by Longoni). If Rast had lied about all those matters, Longoni's expert opinion would have counted for nothing, and the jury would have been in no position to convict. … But the maker of those statements was not in the courtroom, and Smith could not ask her any questions.

Id. at 798.[22] In short, "the State used Longoni to relay what Rast wrote down," and "Longoni thus effectively became Rast's mouthpiece." *Id*. at 800. And to the extent Rast's written statements were testimonial, Longoni's testimony violated the Confrontation Clause because the defendant "had a right to confront the person who actually did the lab work, not a surrogate merely reading from her records." *Id.*

The facts here closely track those in *Smith*. Here, Dr. Peerwani was the medical examiner's office chief, and he didn't perform the primary examination of

[22] *Smith* did not reach the second Confrontation Clause element—whether Rast's hearsay statements are testimonial. *See id.* at 800.

the dead victim. The primary examination was instead performed by Dr. Sisler, who left the office before the State needed an expert to testify to cause of death. Dr. Peerwani was the one who testified as to crucial information about the victim's cause of death—information meant to tell the jury that Nelson might have been acting alone. During that testimony, Dr. Peerwani relied heavily on Dr. Sisler's out-of-court statements to prove the crucial matters that those statements asserted.

1. Dr. Sisler's Autopsy Report Content Was Testimonial

"Testimonial" statements are those "made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial." *Crawford*, 541 U.S. at 52. Under these standards and consistent with the ordinary treatment of statements by primary autopsy examiners, Dr. Sisler's statements—contained in the autopsy and diagrams about which Dr. Peerwani later testified—are "testimonial."

The "testimonial" character of a hearsay statement turns on the statement's "primary purpose," and "in particular on how it relates to a future criminal proceeding." *Smith*, 602 U.S. at 800. The key question is whether, "given all the relevant circumstances, the principal reason [the statement] was made," *id.* at 801, was to "prov[e] past events potentially relevant to later criminal prosecution." *Michigan v. Bryant*, 562 U.S. 344, 361 (2011) (internal quotation marks omitted). Autopsy reports are "testimonial if the medical examiner would reasonably expect

the statements in the report to be used prosecutorially"—for example, when the Texas Code of Criminal Procedure requires an autopsy because a person has "die[d] under circumstances warranting the suspicion that unlawful means caused the death." *Herrera v. State*, No. 07-09-00335-CR, 2011 WL 3802231, at *2 (Tex. Ct. App. Aug. 26, 2011) (citing TEX. CODE CRIM. PROC. art. 49.25, § 6(a)(4)). Autopsy reports may therefore be testimonial even if they contain just "sterile recitations of objective facts," or "are routine, descriptive, and nonanalytical, and [do] not relate subjective narratives pertaining to [the defendant's] guilt or innocence." *Grey v. State*, 299 S.W.3d 902, 909-10 (Tex. Ct. App. 2009) (internal quotation marks omitted).

Here, "an objective analysis of the circumstances" confirms that the primary purpose of Dr. Sisler's autopsy report and the accompanying diagrams was to "prov[e] past events potentially relevant to later criminal prosecution." *Bryant*, 562 U.S. at 360-61. At the time of the autopsy, Dr. Sisler would have known that the victim died in a "violent altercation"—that is, it was clear that his wounds and death were the result of a crime, and the autopsy was conducted pursuant to TEXAS CODE OF CRIMINAL PROCEDURE, article 49.25. 36 R.R. 17, 38 (Dr. Peerwani testifying that manner of death was ruled as "homicide"); *id.* at 38 (Article 49.25 required autopsy here). Thus, it was objectively "reasonable for [Dr. Sisler] to expect any statements or reports made would be used in a criminal prosecution." *Herrera*, 2011 WL

3802231, at *3; *see also Bryant*, 562 U.S. at 360-61 (emphasizing objective evaluation). Texas courts consistently hold that, when a victim dies under suspicious circumstances that indicate potential homicide, it is objectively reasonable to assume that medical examiners know that their statements and autopsy reports will be used in future criminal prosecutions. *See*, *e.g.*, *Henriquez v. State*, 580 S.W.3d 421, 427-28 (Tex. Ct. App. 2019); *Martinez v. State*, 311 S.W.3d 104, 111 (Tex. Ct. App. 2010); *Wood v. State* , 299 S.W.3d 200, 210 (Tex. Ct. App. 2009); *Herrera*, 2011 WL 3802231, at *3. "The autopsy report here thus fell within the 'core class of testimonial statements' as described in the Supreme Court's recent Confrontation Clause decisions." *Herrera*, 2011 WL 3802231, at *3 (quoting *Crawford*, 541 U.S. at 51-52).

2. Dr. Sisler's Report-Content Was Hearsay, Admitted Through Dr. Peerwani's Testimony

Hearsay refers to a non-testifying declarant's "out-of-court statements offered to prove the truth of the matter asserted." *Smith*, 602 U.S. at 785 (internal quotation marks omitted). *Smith* clarifies that hearsay means the same thing for forensic expert testimony as it means for testimony of other kinds: "When an expert conveys an absent analyst's statements in support of his opinion, and the statements provide that support only if true, then the statements [are hearsay]"—for example, "when an expert relays an absent lab analyst's statements as part of offering his opinion." *Id.* at 783.

Dr. Peerwani's testimony on Dobson's injuries and cause of death were hearsay statements made by Dr. Sisler. Dr. Sisler "actually performed" Dobson's forensic autopsy and completed the report, but he retired shortly thereafter and did not testify at Nelson's trial.[23] 36 R.R. 8, 11-12. Instead, Dr. Peerwani testified about the results of Dr. Sisler's autopsy—opining on the nature of Dobson's injuries and the ultimate cause of Dobson's death. Just as the testifying expert in *Smith* formed an opinion "in reliance on [absent-expert] Rast's records," 602 U.S. at 791, Dr. Peerwani prepared his testimony by "review[ing] the autopsy report" and "diagrams" that "Dr. Sisler prepare[d]." 36 R.R. 12, 18. And Dr. Peerwani then "recreate[d] those diagrams so that [he] could testify to them" at the sentencing trial. 36 R.R. 18.

Dr. Peerwani relied heavily on the diagrams he copied from Dr. Sisler, and he then recounted Dr. Sisler's descriptions as to the nature and severity of the 21 external wounds on Dobson's body. He testified, for example:

> [A.] …. The first wound that was described by Dr. Sisler and documented in these diagrams, as well as in photographs, was a small linear abrasion. It's just a small scrape, superficial abrasion. An abrasion is nothing but the outer part of the skin is torn off or crushed because of a blunt injury.

[23] Dr. Peerwani testified that he "overs[aw]" Dr. Sisler in conducting Dobson's autopsy and was "present at the inception of the exam" but was only present "for part of the autopsy" (though it is unclear exactly which part). 36 R.R. 11-12.

36 R.R. 20; *see also* 36 R.R. 20-27 (describing certain wounds). Dr. Peerwani also testified that he "concur[red]," presumably with "Dr. Sisler's autopsy," that the cause of Dobson's death was suffocation:

> Q. Now, based upon all of your observations and based upon all the facts you were able to learn from Dr. Sisler's autopsy and your observations of the photographs, your review of the forensic death investigator's report and your noting of Officer Parrish's testimony, do you have an opinion as to the cause of death of Pastor Dobson?
>
> A. Yes, sir, I do.
>
> Q. And what is that opinion?
>
> A. *I totally concur* that Mr. Dobson died as a result of suffocation due to placement of a plastic bag over his head.

36 R.R. 37-38 (emphasis added).

The relationship between the trial testimony and the underlying statements from the autopsy report here mirrors that between the testifying and non-testifying experts in *Smith*. Like the non-testifying analyst who actually tested the substance and authored the primary report in *Smith*, Dr. Sisler actually conducted the victim's autopsy, then diagrammed and reported the wounds and cause of death in an autopsy report. *Smith*, 602 U.S. at 790. Then, as was the case in *Smith*, a different expert from the county examiner's office, Dr. Peerwani, testified at trial because Dr. Sisler no longer worked at the office. *See id.* at 791. Dr. Peerwani prepared for trial by reviewing Dr. Sisler's reports and diagrams, even "recreat[ing]" those diagrams for use during testimony. *See id.* (noting that "Longoni prepared for trial by reviewing Rast's report and notes").

Dr. Peerwani then "effectively became [Dr. Sisler's] mouthpiece" at trial. *Smith*, 602 U.S. at 800. Dr. Peerwani testified about: the methods and "standards" Dr. Sisler would have followed, 36 R.R. 10-11 (describing "two stages" in which "an autopsy is performed"); the "results" that Dr. Sisler diagrammed, 36 R.R. 18; and the accuracy of the ultimate conclusion reached on cause of death, 36 R.R. 37-38. And Dr. Peerwani's testimony about Dr. Sisler's testing, diagrams, and conclusions was "offered up … for its truth," so that "the jury would believe it." *Smith*, 602 U.S. at 800. "If [Dr. Sisler] had lied about all those matters, [Dr. Peerwani's] expert opinion would have counted for nothing…. But the maker of those statements" in the diagrams and autopsy report "was not in the courtroom, and [Nelson] could not ask h[im] any questions." *Id.* at 798. Under the Confrontation Clause, Nelson "had a right to confront the person who actually did the [autopsy] work, not a surrogate." *Id.* at 800.

B. No Harm Showing Is Required, But There Was Harm Nonetheless

To meet the ordinary standard for harm in a Texas post-conviction proceeding, Nelson would have to show that "the error did in fact contribute to his conviction or punishment." *Ex parte Dutchover*, 779 S.W.2d 76, 78 (Tex. Crim. App. 1989). In a case like this, however, the standard isn't even that high. Where a claim was unavailable at trial and direct appeal, a post-conviction harm showing is unnecessary. *See*, *e.g*, *Ex parte Ghahremani*, 332 S.W.3d 470, 483 (Tex. Crim. App.

2011) (false testimony claim that was unavailable at trial); *see also Ex Parte Chavez*, 371 S.W.3d 200, 214 (Tex. Crim. App. 2012) (Keller, P.J., dissenting) ("It has become apparent from our caselaw that the habeas harm standard applies only to claims that could have been raised in an earlier proceeding. … Applicants … who are not responsible for failing to raise their claims earlier, are generally allowed a more favorable harm standard than the preponderance standard.").

No harm analysis is necessary because the *Smith* claim was unavailable at trial, but Nelson would satisfy the harm requirement anyways. Whether a Confrontation Clause violation was harmless "depends upon a host of factors … includ[ing] the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, … and, of course, the overall strength of the prosecution's case." *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986); *see also Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007) (similar).[24] The inquiry is not about "the propriety of the outcome of the trial," but rather "the likelihood that the constitutional error was actually a

[24] *Van Arsdall* considered "constitutionally improper denial of a defendant's opportunity to impeach a witness for bias," and therefore, listed a fifth factor: "the extent of cross-examination otherwise permitted." 475 U.S. at 684. Here, Dr. Sisler did not testify and therefore, no cross examination was permitted at all. *See Davis v. State*, 203 S.W.3d 845, 851-52 n.29 (Tex. Crim. App. 2006) ("The fourth *Van Arsdall* factor—the extent of cross-examination otherwise permitted—is, like the initial assumption, inapplicable in the context of Crawford-barred hearsay statements which, by definition, were subject to no cross-examination.").

contributing factor in the jury's deliberations in arriving at that verdict …." *Scott*, 227 S.W.3d at 690 (quoting *Harris v. State*, 790 S.W.2d 568, 587 (Tex. Crim. App. 1989)). In this case, the factors weigh in Nelson's favor. Dr. Peerwani's testimony was a lynchpin of the State's lone-assassin story, and so it had an obvious effect on the anti-parties finding. But the State also used the testimony to emphasize the brutality of the assault, and so the constitutional violation also affected the mitigation and future danger findings.

Dr. Sisler's statements describing Dobson's injuries and identifying suffocation as the cause of death were central to the theory that Nelson acted alone, and the lone-assassin theory featured prominently in the State's sentencing-phase case. *See*, *e.g.*, 44 R.R. 27 (State's punishment-phase closing: "[Nelson] is capable of having been the only person in that church committing that crime. And he was.") Dr. Sisler's findings, channeled through Dr. Peerwani's testimony, were pivotal on the anti-parties issue, but they also affected answers on the danger and mitigation issues. That's because Dr. Peerwani, as conduit for Dr. Sisler's analysis and conclusions, was the State's sole witness as to Dobson's injuries and cause of death. And that means that he was the sole witness lending expert credence to the State's overarching narrative of the crime—that Nelson, acting alone, brutally beat and then suffocated Dobson to death.

In both its opening and closing arguments, for example, the State linked the putative cause of death (suffocation) to the idea that Nelson could have committed the crime alone. 37 R.R. 30; *see also, e.g.*, 32 R.R. 25 (State's opening argument: "Then as if to add insult to injury, [Nelson] stole the trash can liner out of Clint Dobson's trash can and put it over Clint Dobson's head to suffocate him to death."); 37 R.R. 30 (State's closing argument: "That face right over there is the last thing Clint Dobson ever saw on this earth as this man was suffocating the life out of him."). And the State leveraged Dr. Peerwani's cause-of-death testimony about suffocation to argue Nelson must have committed the fatal assault because a stud from his belt was found on Dobson's leg: "One black and white belt. That's what was on him at the time of his arrest. And one of those studs was right up on Clint Dobson's leg. Surprise, surprise. Because you know what? Someone had to be riding Clint Dobson that morning shoving that paper bag and that plastic bag into his mouth and making *him suffocate on it*." *See* 37 R.R. 29-30 (emphasis added). But if Nelson did *not* suffocate Dobson by "riding" him, then the presence of the belt stud was more likely explained by the scenario recounted in Nelson's testimony: that he entered the church to take property and found the victims already injured by someone else. 36 R.R. 73. Dr. Peerwani's impermissible testimony thereby validated the State's major theory of death-worthiness. *See, e.g.*, 36 R.R. 39-40 (Peerwani: "I can't tell you whether it was one or two [assailants], but certainly one can easily have done that.").

Dr. Sisler's statements as to Dobson's injuries and cause of death were not cumulative of other evidence, and nothing other than Dr. Peerwani's testimony corroborated Dr. Sisler's report and conclusions. The State introduced autopsy photographs, *see* 35 R.R. 238, but those photographs did not indicate that Dobson died by suffocation. The photographs instead showed that Dobson sustained injuries to his head, back, side body, arms, legs, foot, hands and wrists—injuries consistent with wrist binding and blunt force trauma from multiple assailants rather than with suffocation by one. *See* 36 R.R. 27-35. Nor did other testimonial evidence establish that Dobson died by suffocation. Detective Jessie Parrish, the first police officer on the scene, testified that she found Dobson with a bag over his head and that she took photographs of his face "[t]o show any indications of possible smothering or suffocation," but she did not testify that Dobson's cause of death was, in fact, suffocation. 32 R.R. 195. Only Dr. Peerwani, "totally concur[ring]" with Dr. Sisler's autopsy report, opined that the cause of Dobson's death was suffocation. 36 R.R. 37-38.

The offending testimony was particularly harmful because it came from a doctor. Medical expert testimony is uniquely potent and persuasive to a jury; it cannot simply be replaced by lay testimony or circumstantial evidence. *See Coble v. State*, 330 S.W.3d 253, 281 (Tex. Crim. App. 2010) (noting the "high persuasive value of 'scientific' expert testimony," and that there is "some evidence that jurors

value medical expertise higher than other scientific expertise"); *Walker v. State*, Nos. PD-1429-14 & PD-1430-14, 2016 WL 6092523, at *16 (Tex. Crim. App. Oct. 19, 2016) (studies "point generally to a jury's potential to 'irrationally' credit an expert's testimony without considering whether the expert's opinion is fully supported"); *cf. Buck*, 580 U.S. at 121 (prejudicial "effect was heightened due to the source of the testimony," i.e., "a "medical expert").[25]

The rest of the State's anti-parties case against Nelson was "largely circumstantial," lacking evidence proving that Nelson caused, intended, or anticipated Dobson's death. *Cuadros-Fernandez v. State*, 316 S.W.3d 645, 664 (Tex. Ct. App. 2009) (Confrontation Clause violation not harmless). Here, as in *Cuadros*, the State expressly relied on Dr. Sisler's testimonial hearsay to "physically link[]" Nelson to the fatal act of suffocation by referring to Nelson's belt studs. *Id.*; *see also* 37 R.R. 29-30 (explaining physical linkage here). And if the jury could not find that *Nelson* inflicted the brutal injuries recited in the offending testimony, then it would necessarily be unable to assign to Nelson the same estimates of danger and moral responsibility.

[25] The harms were also magnified because Dr. Peerwani effectively vouched for Dr. Sisler's qualifications, testifying extensively as to Dr. Sisler's background and credentials and "large number of years" of experience, 36. R.R. 7-9—bolstering the credibility of Dr. Sisler's out-of-court statements. *Cf. Coble*, 330 S.W.3d at 281 (noting "some studies have shown that juror reliance on an expert's credentials is directly proportional to the complexity of the information represented: the more complex the information, the more the jury looks to the background, experience, and status of the expert himself rather than to the content of his testimony").

C. The Confrontation Clause Claim Satisfies the Threshold Showing Required For Article 11.071, § 5 Authorization

The CCA should authorize merits consideration of the *Smith* claim under both TEXAS CODE OF CRIMINAL PROCEDURE article 11.071 § 5(a)(1) (unavailable legal basis) and § 5(a)(3) (death ineligibility). For the purposes of § 5(a)(1) analysis, Subsection C of the *Buck* claim details the authorization standards that apply when the legal basis for a claim was unavailable when the claimant filed the initial state application. Nelson filed his initial state application on April 15, 2014; *Smith* was decided on June 21, 2024. The facts forming that *prima facie* case for *Smith* relief, moreover, are set forth in Subsection A, *supra*.

For the purposes of § 5(a)(3) analysis, Subsection I.C.a of the IATC-participation claim details the authorization standards that apply when a claimant alleges that, but for the constitutional violation, a jury wouldn't have resolved a special issue to permit a death sentence. Nelson alleges that, but for the *Smith* violation, no rational juror would have answered the anti-parties issue in the State's favor.

CONCLUSION AND PRAYER FOR RELIEF

For the foregoing reasons and those presented in any/all submissions accompanying this Application, Nelson prays:

1. That the Court of Criminal Appeals find that his Application complies with article 11.071, § 5 of the Texas Code of Criminal Procedure;

2. That summary relief be granted on his claims which are clear from the facts set forth in this pleading and the record;

3. That any remaining claims be remanded to the trial court for an evidentiary hearing and any and all disputed issues of fact be granted;

4. That discovery as may be necessary to a full and fair resolution herein be allowed;

5. That his conviction and judgment imposing death be vacated.

Date: January 15, 2025

/s/ Lee B. Kovarsky

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Attorneys for Applicant

County of Travis, §
Texas §

VERIFICATION

BEFORE ME, the undersigned authority, on this day personally appeared Lee Kovarsky, who being duly sown by me testified as follows;

1. I am a member of the State Bar of Texas in good standing.

2. I am the duly authorized attorney for Steven Lawayne Nelson, having the authority to prepare and to verify Mr. Nelson's application of a writ of habeas corpus.

3. I have prepared and read the foregoing application and I believe all allegations in it to be true to the best of my knowledge.

Signed under penalty of perjury:

Lee Kovarsky

SUBSCRIBED AND SWORN TO BEFORE ME, THE UNDERSIGNED AUTHORITY, UNDER PENALTY OF PERJURY, ON THIS THE 15th DAY OF January, A.D. 2025:

Notary Public, State of Texas

ELIZABETH T BANGS
NOTARY PUBLIC
STATE OF TEXAS
MY COMM. EXP. 05/10/25
NOTARY ID 13038976-5

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Tex. R. App. P. 9.4. The word count of this document is 23,313, not including words not included in the word count limit.

/s/ Lee B. Kovarsky
Lee B. Kovarsky

CERTIFICATE OF SERVICE

I hereby certify that on January 15, 2025, I served a copy of this application by e-file, email and/or FedEx on the following:

Ms. Fredericka Sargent
Tarrant County Criminal District Attorney's Office
101 W Nueva St.
San Antonio, TX 78205

Court of Criminal Appeals
201 W. 14th Street
Austin, Texas 78701

/s/ Lee B. Kovarsky
Lee B. Kovarsky

W012580

No. C-485-1232507-W012580-B

IN THE COURT OF CRIMINAL APPEALS OF TEXAS (WR-82,814-02)
AND
IN THE 485th DISTRICT COURT OF TARRANT COUNTY, TEXAS

EX PARTE STEVEN LAWAYNE NELSON

STATE'S RESPONSE TO APPLICANT'S SUBSEQUENT APPLICATION FOR POST-CONVICTION WRIT OF HABEAS CORPUS AND MOTION FOR STAY OF EXECUTION

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TO THE HONORABLE COURT OF CRIMINAL APPEALS OF TEXAS AND JUDGE OF THE DISTRICT COURT:

Over 12 years ago, Steven Lawayne Nelson was convicted and sentenced to death for the brutal murder of 28-year-old Pastor Clinton "Clint" Dobson. Since then, the constitutionality of that conviction and sentence has been repeatedly affirmed by both this Court and the federal courts.

Now, a mere 22 days before his execution date, Nelson has asked this Court to grant a stay and allow him to litigate two claims that have been rejected by both this Court and the federal courts and two entirely new claims, meritless as they are, that could have been brought years ago. The State generally denies the allegations in Nelson's subsequent application for writ of habeas corpus.

I. Procedural History

Nelson was convicted by a jury of capital murder on October 8, 2012, for intentionally causing the death of Pastor Dobson during a robbery. *See*

Capital Judgment, No. 1232507D; Indictment No. 1232507D.[1] On October 16, 2012, the jury returned an affirmative answer to the future-dangerousness special issue, an affirmative answer to the anti-parties issue, and a negative answer to the mitigation special issue. *See* Capital Judgment, No. 1232507D. Nelson was sentenced to death by lethal injection.

Nelson's conviction and sentence were affirmed on direct appeal. *See Nelson v. State*, No. AP-76,924, 2015 WL 1757144 (Tex. Crim. App. April 15, 2015), *cert*. *denied*, 577 U.S. 940 (2015). His state application for writ of habeas corpus was denied. *See Ex parte Nelson*, No. WR-82,814-01, 2015 WL 6689512 (Tex Crim. App. Oct. 14, 2015) (unpublished order).

Thereafter, Nelson filed a petition for federal habeas relief in the federal district court; that petition was denied. *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880 (N.D. Tex. March 29, 2017) (unpublished). The United States Court of Appeals for the Fifth Circuit granted Nelson's application for a certificate of appealability, *Nelson v. Davis*, 952 F.3d 651, but

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[1] Nelson was convicted and sentenced by Tarrant County Criminal District Court No. 4. However, on April 25, 2023, Judge Andy Porter recused himself from "all remaining proceedings," *see* Order of Recusal, and the case was transferred to the 485th District Court, *see* Order of Transfer Due to Recusal (April 26, 2023).

ultimately affirmed the district court's judgment. *Nelson v. Lumpkin*, 72 F.4th 651 (5th Cir. 2023), *cert. denied*, 144 S. Ct. 1344 (2024).

On May 17, 2024, the State filed a motion asking the trial court to enter an order setting an execution date. *See* State's Motion for Court to Enter Order Setting Execution Date, Cause No. 1232507D. After a hearing on June 4, 2024, Nelson's execution date was set for February 5, 2025. *See* Order Setting Execution Date, Cause No. 1232507D (June 11, 2024).

II. Statement of Facts

A. The facts of the crime

The Court of Criminal Appeals summarized the facts of this case in its opinion on direct appeal as follows:

> **[1.] Discovery of the victims**
>
> Members of the NorthPointe Baptist Church described the events surrounding the discovery of [Pastor] Clint Dobson and Judy Elliot. Church member Dale Harwell had plans to meet Dobson for lunch. When [Pastor] Dobson did not arrive at the appointed time, Harwell tried unsuccessfully to contact him. Debra Jenkins went to NorthPointe around 12:40, where she saw [Pastor] Dobson's and [Judy]'s cars in the parking lot. Jenkins rang the doorbell and called the church office but received no answer, so she left after about five minutes. She returned fifteen minutes later, and [Judy]'s car, a Galant, was no longer in the

parking lot. At 1:00 p.m., another church member, Suzanne Richards, arrived for a meeting with [Pastor] Dobson. His car was in the parking lot, but [Judy]'s was not. Richards waited for half of an hour, ringing the doorbell, calling, and texting [Pastor] Dobson.

Meanwhile, [Pastor] Dobson's wife, Laura, called Jake Turner, the part-time music minister, because she had been unable to reach her husband by phone. Turner agreed to go to the church, and he called Judy Elliot's husband John, who promptly drove to the church. John entered the church using his passcode and called out [Pastor] Dobson's name. John saw [Pastor] Dobson's office in disarray and saw a severely beaten woman, whom he did not immediately recognize as his wife, lying on the ground. He did not notice [Pastor] Dobson lying on the other side of the desk. John called the police.

Arlington [P]olice [O]fficer Jesse Parrish responded to the call. She noticed signs of a struggle, including blood and what appeared to be the grip plate of a pistol. [Judy] was lying on her back with her hands bound behind her. John recognized his wife by her clothing. Parrish found [Pastor] Dobson lying face up with his hands bound behind his back. A bloody plastic bag was covering his head and sucked into his mouth. Upon lifting the plastic bag off of his head, Parrish knew that [Pastor] Dobson was dead.

[Judy] was taken to the hospital in critical condition. She had a heart attack while there and neither the physicians nor John believed she would survive. She had traumatic injuries to her face, head, arms, legs, and back and internal bleeding in her brain. She was in the hospital for two weeks and underwent five months of therapy and rehabilitation. A permanent fixture of mesh, screws, and other metal holds her face together. At the

time of trial, [Judy] still had physical and mental impairments from the attack.

Doctor Nizam Peerwani, [M]edical [E]xaminer for Tarrant County, testified that the manner of [Pastor] Dobson's death was homicide. [His] injuries indicated a violent altercation during which he attempted to shield himself from blows from an object such as the butt of a firearm. Two wounds to his forehead appeared to be from the computer monitor stand in the office. According to Dr. Peerwani, the injuries indicated that [Pastor] Dobson was standing when he was first struck in the head and that he struck the back of his head as he fell. After he had fallen to the ground and lost consciousness, his hands were tied behind his back, and the bag was placed over his head. With the bag over his head, he suffocated and died.

[2.] [Nelson's] actions after the murder

[Nelson] texted Whitley Daniels at 1:24 p.m., and Daniels told him to bring her a cigar. After stopping at his apartment, [Nelson] drove [Judy]'s car to a Tire King store, where a customer bought [Pastor] Dobson's laptop and case out the trunk of the Galant. At around 2:00 p.m., [Nelson] drove to a Tetco convenience store, where he used [Judy]'s credit card to buy gas, a drink, and a cigar. Anthony "AG" Springs'[s] girlfriend brought AG to the Tetco. When [Nelson] tried to buy gas for her car, the card was declined. [Nelson] and AG drove in [Judy]'s car to the apartment of Claude "Twist" Jefferson and Jefferson's aunt Brittany Bursey.

Daniels testified that [Nelson] and AG arrived at her house with the cigar sometime after 3:00 p.m. [Nelson] and AG soon left, but [Nelson] returned alone fifteen or twenty minutes later. [Nelson]

asked Daniels to go to the mall and use her identification with the credit cards. She declined to do so, and [Nelson] left.

[Nelson] went to The Parks at Arlington mall. Using [Judy]'s credit cards at Sheikh Shoes, he purchased a t-shirt featuring the Sesame Street character Oscar the Grouch and Air Max shoes. He also used the cards to buy costume jewelry at Jewelry Hut and Silver Gallery. [Nelson] later returned to Sheikh Shoes with two companions, but a second attempt to use the credit card was not approved.

[Nelson] returned to Bursey's apartment that evening with AG and Twist. [Nelson] was wearing the shirt, jewelry, and shoes that he had bought with [Judy]'s cards. While taking pills and smoking, he told Bursey that he had stolen the Galant from a pastor. [Nelson] left Bursey's apartment the next morning.

The next day, [Nelson] sent a series of text messages. One asked to see the recipient because "[i]t might be the last time." Another said, "Say, I might need to come up there and stay. I did some shit the other day, Cuz." A third said, "I fucked up bad, Cuz, real bad."

Tracey Nixon, who had dated [Nelson] off and on, picked him up the day after the murder at a gas station on Brown Boulevard. [Nelson] wore the t-shirt and some of the jewelry that he had bought with [Judy]'s cards. After going to a Dallas nightclub, [Nelson] spent the night with Nixon, who returned [Nelson] to Brown Boulevard the next morning.

[3.] Investigation and arrest

Officers obtained an arrest warrant and arrested [Nelson] at Nixon's apartment on March 5[th]. At the time of his arrest,

[Nelson] was wearing the tennis shoes and some of the jewelry he bought with [Judy]'s stolen credit cards. He was also wearing a black belt with metal studs. The shoes, belt, phone, and jewelry were all seized during [Nelson's] jail book-in.

Officers seized other items from [Nelson's] apartment pursuant to a search warrant. They recovered a pair of black and green Nike Air Jordan tennis shoes that appeared to match a bloody shoe print at NorthPointe, the New Orleans Saints jersey seen on the mall surveillance videos, a gold chain necklace, a pair of men's silver earrings with diamond-like stones, a Nike Air Max shoe box, a Sheikh Shoes shopping bag, a Sesame Street price tag, a Jimmy Jazz business card, and receipts dated March 3[rd] from several of the stores. Officers found [Pastor] Dobson's identification cards, insurance cards, and credit cards in [Judy]'s car.

DNA from [Pastor] Dobson and from [Judy] was discovered in a stain on [Nelson's] shoe. [Nelson's] fingerprints were lifted from the wrist rest on [Pastor] Dobson's desk, from receipts, and from some of the items from the mall.

A trace evidence analyst detected similarities between [Nelson's] shoe and a bloody shoe print on an envelope in [Pastor] Dobson's office. [Nelson's] belt appeared to be missing studs, and similar studs were recovered from the office. According to a firearms expert, the plastic grip panel found in [Pastor] Dobson's office came from a 15XT Daisy air gun, which is a CO_2-charged semiautomatic BB gun modeled on a Colt firearm. The jury saw a BB gun manufactured from the master mold and heard from a text message read into the record that [Nelson] was seeking to buy a gun just days before the killing.

[4.] Defense testimony

[Nelson] testified on his own behalf. According to him, from around 11:30 p.m. on March 2[nd] until 6:00 or 7:00 a.m. on March 3[rd], he and three companions were looking for people to rob. They had firearms. [Nelson] went home for a while in the morning but later joined up with AG and Twist. [Nelson] claimed that he waited outside the church while AG and Twist went in. Twenty[-]five minutes later, he went inside and saw the victims on the ground. They were bleeding from the backs of their heads, but they were still alive. [Nelson] took the laptop and the case. According to [Nelson], AG gave him the keys and the credit cards. [Nelson] waited in [Judy]'s car for a while and then returned to [Pastor] Dobson's office. By that time, the man was dead. [Nelson] could not stand the smell, so he returned to [Judy]'s car. He drove the group to his apartment, retrieved a CD and his New Orleans Saints jersey, and continued to Bursey's apartment, where they smoked marijuana. [Nelson] then left Bursey's apartment in [Judy]'s car.

[Nelson] testified that he knew people were inside the church and that he agreed to rob them. He claimed that he did not intend to hurt anyone and had no part in what happened inside of the church. He also acknowledged making the purchases at Tetco and buying the items at the mall.

Nelson v. State, 2015 WL 17557144, at *1–*3.

B. Future dangerousness and mitigation

The court summarized the punishment evidence as follows:

[1.] Youth history in Oklahoma

[Nelson] began getting into trouble with Oklahoma juvenile authorities when he was six years old. His juvenile career included property crimes, burglaries, and thefts. Despite efforts by Oklahoma authorities to place him in counseling and on probation, [Nelson] was incarcerated in that state at a young age because he continued to commit felonies. According to Ronnie Meeks, an Oklahoma Juvenile Affairs employee who worked with [Nelson], this was "quite alarming."

[Nelson] was sent to a detention center in Oklahoma for high-risk juveniles. On one occasion, while Meeks was driving [Nelson] to the facility for diagnostic services, [Nelson] fled from Meeks'[s] pickup truck. He was apprehended a few minutes later. At the facility, [Nelson] was disruptive and tried to escape. After a few weeks, [Nelson] was sent to a group home in Norman, Oklahoma, for counseling. There, [Nelson] did not fare well. He was disruptive and did not try to make any improvements.

When Meeks needed cooperation from [Nelson's] mother, she was available. [Nelson] never appeared to Meeks to be in need of anything; his mother appeared to be providing enough.

Meeks testified that, in addition to being uncooperative with the efforts in Oklahoma to provide services and to rehabilitate [Nelson], [Nelson] never exhibited any remorse about any of his actions.

[2.] Youth offenses in Texas

[Nelson] was also involved in the Texas juvenile justice system through the Tarrant County probation office. Mary Kelleher, of that office, first had contact with [Nelson] in April 2000, when he was thirteen years old. The police referred [Nelson] to her for having committed aggravated assault with a deadly weapon. Kelleher worked with [Nelson] during a time when he was pulling fire alarms, was truant, and was declining in school performance. In December 2001, the police department again referred [Nelson] to Kelleher for multiple charges, including burglaries of a habitation, criminal trespass of a habitation, and unauthorized use of a motor vehicle. After the department was notified that [Nelson] was a runaway, the juvenile court detained him until all of the charges were disposed.

The Tarrant County juvenile court adjudicated [Nelson] then fourteen years old, for burglary of a habitation and unauthorized use of a motor vehicle. He was committed to the Texas Youth Commission (TYC) for an indeterminate period. According to Kelleher, it is unusual for a juvenile to be committed to TYC for property crimes at that age, but [Nelson's] history made him a rare case.

Kelleher testified that [Nelson] had family support from his mother but none from his father. [Nelson's] mother was neither abusive nor neglectful. According to [Nelson's] mother, his two siblings went to college and did not get into trouble. [Nelson] indicated to Kelleher that he knew his actions were wrong, but he acted out of impulse and boredom, without an exact reason.

[Nelson] was a "chronic serious offender." While in TYC, [Nelson] had four of the highest-level disciplinary hearings and was repeatedly placed in the behavior-management plan.

[Nelson] was originally sent to TYC for nine months, but he spent over three and a half years confined because of his infractions. This sentence for burglary adjudication was an extraordinarily lengthy time to spend in TYC. He eventually made parole, had his parole revoked, and returned to TYC.

[Nelson] was paroled from TYC a second time. On his second parole, when [Nelson] was twenty years old, he again did not comply with the terms, even after counseling. His parole officer issued a directive to apprehend [Nelson] for these violations, but he "aged out" of the juvenile system before he could be picked up, allowing him to remain unapprehended.

[3.] Adult arrests and convictions

In 2005, [Nelson], then eighteen years old, was stopped while driving a stolen car. The officer who arrested him concluded that [Nelson] was a "compulsive liar."

Video evidence and testimony from November 30, 2007, showed [Nelson] in a Wal-Mart stock room posing as an associate from a different store. [Nelson] put a laptop computer down his pants and then walked to the exit. The following week, [Nelson] was apprehended at a separate Arlington Wal-Mart for putting on new boots off the shelf and leaving the store without paying.

After being released from state jail in 2010, [Nelson] assaulted his live-in girlfriend, Sarina Daniels. When Sarina ran outside after an argument, [Nelson] caught her and dragged her inside. When she tried to call 9-1-1, he broke her telephone. [Nelson] bound Sarina with duct tape and tried to have her stand on a trash bag so her blood would not get on the carpet. He held a knife to her throat while holding her by the hair and made her apologize for talking to another man while [Nelson] was

incarcerated. [Nelson] pulled the knife away and told Sarina that he was not going to kill her. He then grabbed her by the throat, pushed her onto a dresser, and said, "But if you do it again, then I will." [Nelson] then choked Sarina. Sarina filed charges, and [Nelson] was arrested.

For this aggravated assault with a deadly weapon, [Nelson] was placed on probation and sent to a ninety-day program at the Intermediate Sanction Facility (ISF) in Burnet. Sherry Price, a Dallas County probation officer, told [Nelson] to report as soon as he was released from the program, which [Nelson] failed to do. After [Nelson] failed to report as directed, Price told him to report to her on March 3[rd]. He did not report, and hours later, he killed [Pastor] Clint Dobson.

[4.] Early jail infractions

[Nelson] was classified as an assaultive inmate in the Tarrant County Jail while awaiting trial. For a time, he was in restrictive housing, but he nevertheless committed numerous serious disciplinary infractions. Among other things, [Nelson] broke a telephone in the visitation booth and then threatened the responding officer. After one altercation with a guard, it took three officers to subdue [Nelson]. One officer's foot was fractured. In another incident, [Nelson] refused to return to his cell. Three officers tried to escort him to his cell, but [Nelson] stood in his cell door to prevent it shutting. When [O]fficer Kent Williams reached in to slide the door shut, [Nelson] grabbed him, struck him in the face, pulled him into his cell, and threw him on the desk and into a wall.

[Nelson] was also combative with other inmates and, on at least one occasion, was complicit in arranging for a bag filled with feces and urine to be placed in another inmate's cell. After

[Nelson] was assigned to a tank for problematic inmates, he broke the lights in his cell.

On February 12, 2012, [Nelson] broke multiple fire-sprinkler heads and flooded the day room. The jury saw photographs and video of this, including [Nelson] dancing in the water. Six officers restrained him. Breaking the sprinkler heads triggered the fire alarm in the whole jail.

[5.] Killing of Jonathan Holden

On March 19, 2012, while [Nelson] was in the Tarrant County [J]ail awaiting trial in this case, he killed Jonathan Holden, a mentally challenged inmate. According to a fellow inmate who witnessed the incident, Holden had angered inmates when he mentioned "the N word under his voice." [Nelson] was in the day room of the holding area, and he talked Holden into faking a suicide attempt to cause Holden to be moved to a different part of the jail. Holden came to the cell bars, and [Nelson] looped a blanket around Holden's neck. [Nelson] tightened the blanket by placing his feet on the bars and pulling with both hands on the blanket. Holden's back was against the bars[,] and he was being pulled up almost off his feet. It took four minutes for Holden to die. Afterwards, [Nelson] did a "celebration dance" in the style of Chuck Berry, "where he hops on one foot and plays the guitar." [Nelson] used a broom stick, which he had previously used to poke another mentally challenged inmate in the eye, as a guitar.

[6.] Jail infractions while segregated

Following Holden's death, [Nelson] was assigned to a single-man, self-contained cell for dangerous and violent inmates. On April 22, 2012, officers found contraband, such as a broom

handle and extra rolls of toilet tissue, in [Nelson's] cell. In May 2012, a search of [Nelson's] cell yielded a bag of prescription drugs.

On July 12, 2012, a few weeks before trial, [Nelson] damaged jail property in a two-hour long incident, [about] which the jury saw security footage and heard testimony. While in a segregation cell, [Nelson] blocked the window with wet toilet paper. He then flooded his cell. Ultimately, the officers had to use pepper spray to subdue [Nelson]. Officers in protective gear restrained [Nelson] and took him to the decontamination shower. During this time, [Nelson] rapped and sang. While his own cell was decontaminated, [Nelson] flooded the toilet in the holdover cell. He brandished a shank made from a plastic spoon. When he was being returned to his cell, [Nelson] fought and threatened the officers. They ultimately placed him in a restraint chair, a process that took eight officers. This disturbance took about seventy percent of the jail's manpower. Sergeant Kevin Chambliss, who testified about the incident, had to request backup personnel from another facility.

On August 23, 2012, on a day of voir dire proceedings, [Nelson] cracked one of the jail's windows and chipped off paint with his belly chain while in the jail gym. He showed no remorse. [Nelson's] dangerous activity continued after the guilt phase of trial. After the jury's verdict was read, while [Nelson] was in a holdover cell, he ripped the stun cuff off of his leg. Again, he showed no remorse. During the trial, while [Nelson] was being escorted from the jail to the courtroom, he tried to move his cuffs from behind his back multiple times. During the punishment phase, officers found three razor blades inside letters addressed to [Nelson], along with other contraband items.

[7.] Prior convictions

[Nelson's] prior convictions comprised failure to identify, unauthorized use of a motor vehicle, burglary of a building, and numerous thefts.

[8.] The defense's case in mitigation

The defense put on a forensic psychologist, Doctor Antoinette McGarrahan. She testified that, although [Nelson] had no current learning disability or cognitive impairment, he had a past history of learning disabilities. Dr. McGarrahan explained that, when, as a three-year-old, [Nelson] set fire to his mother's bed with intent to cause harm, it was essentially a cry for attention and security. She believed that there was "something significantly wrong with [Nelson's] brain being wired in a different way, being predisposed to this severe aggression and violence from a very early age." She testified that, by the time [Nelson] was six years old, he had had at least three EEGs, meaning that people were already "looking to the brain for an explanation of his behavior." The test results did not indicate a seizure disorder, but Dr. McGarrahan said they did not rule out [Nelson] having one. Risk factors present in [Nelson's] life included having ADHD, a mother who worked two jobs, an absent father, verbal abuse, and witnessing domestic abuse.

[Nelson] spoke about two alter egos, "Tank" and "Rico." Dr. McGarrahan did not believe that [Nelson] had dissociative-identity disorder; rather, these alter egos were a way to avoid taking responsibility for his actions.

Dr. McGarrahan acknowledged on cross-examination that [Nelson] likes violence and has a thrill for violence and that it is emotionally pleasing to him. She said he is "criminally

> versatile," and she agreed that characteristics of antisocial personality disorder describe him. According to her, people with antisocial personality disorder have trouble following the rules of society and repeatedly engage in behavior that is grounds for arrest. They are consistently and persistently irresponsible and impulsive; they tend to lie, steal, and cheat. [Nelson] has many characteristics of a psychopath—including a grandiose sense of self, a lack of empathy, and a failure to take responsibility. Generally, such a person prefers to lie, cheat, and steal to get by.

Nelson v. State, 2015 WL 17557144, at *4–*8.

III. Nelson's Subsequent Writ Application Should Be Dismissed.

Texas has long prohibited successive or abusive writs challenging the same conviction except in specifically defined circumstances.[2] *Ex parte Campbell*, 226 S.W.3d 418, 421 (Tex. Crim. App. 2007). The purpose of this subsequent writ bar is to give the convicted person "one full and fair opportunity to present any claims that may entitle him to relief from his judgment and sentence." *Ex parte Barbee*, 616 S.W.3d 836, 837 (Tex. Crim. App. 2021) (citing *Ex parte Kerr*, 64 S.W.3d 414, 418—89 (Tex. Crim. App. 2002)). "'[E]verything you can possibly raise the first time, we expect you to

[2] A "successive writ" is a subsequent writ raising issues raised in a previous writ; an "abusive writ" is a subsequent writ raising issues that were available, but not raised, when the previous writ was filed. *Ex parte Blue*, 230 S.W.3d 151, 155 (Tex. Crim. App. 2007).

raise it initially, one bite of the apple, one shot.'" *Ex parte Kerr*, 64 S.W.3d at 818—19 (citation omitted); *see also Ex parte Whiteside*, 12 S.W.3d 819, 821 (Tex. Crim. App. 2000) (purpose of the subsequent writ bar is to "limit a convicted person to 'one bite at the apple.'") (citation omitted).

To that end, Code of Criminal Procedure Article 11.071, Section 5(a)(1) provides that a court may not consider the merits of a subsequent writ application unless the application contains "sufficient specific facts" establishing that the current claim was not, and could not have, been presented in a previously considered application "because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." This requires an applicant to assert a valid legal claim, supported by sufficient specific facts "that, if proven, establish a federal constitutional violation sufficiently serious as to likely require relief from his conviction or sentence." *Ex parte Campbell*, 226 S.W.3d at 422 (citing *Ex parte Brooks*, 219 S.W.3d 396, 400–01 (Tex. Crim. App. 2007); *Ex parte O'Brien*, 190 S.W.3d 677, 680–83 (Tex. Crim. App. 2006) (Cochran, J., concurring statement)). This is a very high bar, and Nelson cannot meet it.

IV. Both of Nelson's Ineffective Assistance of Counsel Claims Have Been Rejected by this Court and the Federal Courts; Therefore, They Are Barred from Review by Section 5.[3]

In two separate claims, Nelson attacks both trial counsel and state habeas counsel, arguing they were ineffective with the respect to their handling of his "participation" defense and the mitigation case. *Application* at 21–64 ("participation" defense), 71–95 (mitigation case). Both claims, however, have been raised in and rejected by this Court and the federal courts. *See Ex parte Nelson*, 2015 WL 6689512; *Nelson v. Davis*, 2017 WL 1187880, at *10–*16; *Nelson v. Lumpkin*, 72 F.4th at 653–666. Nelson gives this Court no reason to revisit them now.

V. Nelson's *Buck* Claim Is an Abuse of the Writ and Wholly Without Merit.

In the first of two new claims, Nelson next alleges that because the defense's expert made a passing reference to "minority status," he is entitled

[3] For these claims, in addition to Section 5(a)(1), Nelson also relies on Section 5(a)(3), which requires him to establish—by clear and convincing evidence—that, "but for a Constitutional violation, no rational juror" would have answered the special issues in the State's favor. This, too, is a very high bar, one which Nelson simply cannot meet.

to relief. *Application* at 64–71 (citing *Buck v. Davis*, 580 U.S. 100 (2017)). He is not.

As an initial matter, this claim does not make it over the hurdle of Section 5. The legal basis for it was previously available because "it 'could have been rationally fashioned' from relevant precedent." *Ex parte Barbee*, 616 S.W.3d at 839 (quoting *Ex parte Navarro*, 538 S.W.3d 608, 615 (Tex. Crim. App. 2018)). *Barbee* rejected an ineffective assistance of counsel claim based on *McCoy v. Louisiana*,[4] explaining that "the legal basis for [the] claim could have been reasonably formulated from existing precedent because *McCoy* was the logical extension of *Florida v. Nixon*, 543 U.S. 175 [] (2004), based on *factual distinctions—not legal ones*—between the two cases." 616 S.W.3d at 839 (emphasis added). Likewise, *Buck* is merely an extension of *Saldano v. Texas*[5] based on factual distinctions, not legal ones. But even if this claim was

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[4] 584 U.S. 414 (2018).

[5] 530 U.S. 1212 (2000) (granting certiorari, vacating judgment, and remanding in light of Texas Attorney General's confession of error); *see also Saldano v. Cockrell*, 267 F.Supp.3d 635, 639 (E.D. Tex. 2003); *Avalos-Alba v. Johnson,* No. 00–40194 (5th Cir. Aug. 24, 2000); *Garcia v. Johnson,* No. 99cv134 (E.D. Tex. Sept. 7, 2000); *Blue v. Johnson,* No. H–99–0350 (S.D. Tex. Oct. 2, 2000); *Broxton v. Johnson,* No. H–00cv1034 (S.D. Tex. March 28, 2001).

previously unavailable, Nelson has not alleged facts that would entitle him to relief.

The mere mention of a defendant's minority status is not what the *Buck* Court found troubling. Rather, the Court found it troubling that the defendant's minority status was *by itself* linked to an increased risk of violence, something that the jury was told *repeatedly*.

First, in determining whether Buck was a future danger, Dr. Walter Quijano considered seven "statistical factors," the fourth was his race; of this, he concluded that Buck's race (Black) increased the probability that he would be a future danger because "[t]here is an overrepresentation of Blacks among the violent offenders." *Buck*, 580 U.S. at 107 (citation omitted). Second, and even more troubling, was the testimony elicited at trial that race was "*know[n]* to predict future dangerousness." *Id*. (emphasis added; citation and internal quotation marks omitted). Dr. Quijano explained "that minorities, Hispanics and [B]lack people, are overrepresented in the Criminal Justice System." *Id*. (citation and internal quotation marks omitted). The State then reiterated that "the race factor, [B]lack, increases the future

dangerousness for various complicated reasons." *Id*. at 108 (citation and internal quotation marks omitted). Third, in closing argument, the State emphasized "the crime's brutal nature and Buck's lack of remorse, along with the inability of Buck's own experts to guarantee that he would not act violently in the future—a point it supported by reference to Dr. Quijano's testimony." *Id*. (citation omitted). Finally, during deliberations, the jury asked for, and were given, the "'psychology reports' that had been admitted into evidence," including that of Dr. Quijano. *Id*. (citation omitted).

By contrast, Dr. McGarrahan did not tie Nelson's race *by itself* to his future dangerousness; she did not make race an issue *at all*:

> Q. People that - - just because somebody has got ADHD, that doesn't mean they're going to commit crimes.
>
> A. Absolutely not.
>
> Q. Okay. It's just one of those things, like you said earlier, just makes them a little higher risk?
>
> A. It does make them a higher risk for engaging - - especially if you add that to the fire setting and the aggression and the stealing and lying. When you add those problems in addition to ADHD, you have a significantly increased risk for engaging in criminal offenses, juvenile delinquency, and violent behavior.

> Q. What is it - - and there may not be an answer to this, what is it that steers people towards committing crimes as opposed to yelling at the teacher, which is - - maybe is a crime initially, but what is in a person's psyche if they start developing these problems, what makes them go commit crime? Is there anything that you can put your finger on or does it just happen that way or is it unexplained, tell us about that.
>
> A. I think if we could figure that out, that would be very positive for our society. But I think there are individual differences from the individual who has ADHD and goes on to commit violent offenses and those who don't.
>
> What we do know about Mr. Nelson is in addition to the ADHD, he has a number of risk factors. The mother who is working two jobs and absent father, verbal abuse, witnessing domestic violence, the minority status, below SCS status, all of those things put an individual at greater risk. We can't pinpoint what it is that made Mr. Nelson go on and do what he did do. We just know that when you look at the risk factors that he had, I mean, it was storm waiting to happen.

43 RR 252–53. Then on cross-examination, the State asked Dr. McGarrahan to define "risk factor," which she explained as "conditions, issues, factors that put an individual at a greater likelihood to develop a mental illness or condition." 43 RR 265. This was the sum total of any discussion about "minority status."

The State's closing that Nelson points to is equally without consequence:

> I am not sure what other evidence we could bring you to show you that this Defendant is a future danger. We brought you another murder. We brought you continuous assaults in the jail on the jailers and other assaults by this Defendant in his victims, on people he perceives as weak, as people he perceives as somehow less than himself.
>
> We also brought you his extensive and versatile criminal history. The answer to Special Issue No. 1 should be yes. There nothing else that we could bring you to show that that answer should be yes. Even the Defendant's own expert told you-all yesterday that he will continue to be a danger.
>
> Because that, ladies and gentlemen, is who this Defendant is. He will use manipulation and power to get what he wants. He will manipulate jail guards, other inmates or whoever he needs to do to get what he wants, to exert power and control. And that, ladies and gentlemen, in this type of setting, is a very dangerous individual.

44 RR 7–8. Although the State does remind the jury that Dr. McGarrahan agreed Nelson would be a future danger, the State did not dwell on this fact. Instead, the focus was on Nelson, his criminal history, and his manipulative behavior.

Race played no role in either Dr. McGarrahan's report or her testimony. In this last-minute hail Mary, Nelson has blown the single mention of "minority status" completely out of proportion. And he has wholly failed to establish that any of Dr. McGarrahan's conclusions

regarding Nelson's future dangerousness were based on race. Indeed, the record establishes quite the opposite. Dr. McGarrahan told the jury that Nelson's actions that day were the product of his *choices*—he made the *choice* not to report to his probation officer. He made the *choice* to walk into NorthPointe Baptist Church and brutally attack Judy and Pastor Dobson. He made the *choice* to steal Judy's car and use her credit cards to go on a shopping spree. 43 RR 265—66, 267.

VI. Nelson's *Smith* Claim is Abuse of the Writ and Wholly Without Merit.

Finally, relying on a one-year-old case from the United States Supreme Court, Nelson raises yet another new claim for relief: his Sixth Amendment right of confrontation was violated when Dr. Peerwani (who observed the autopsy), rather than Dr. Sisler (who performed the autopsy), testified about the autopsy and the cause of death. *Application* at 95–109 (citing *Smith v. Arizona*, 602 U.S. 779 (2024)).

As with the *Buck* claim, this claim does not make it over the hurdle of Section 5. The legal basis for it was previously available because "it 'could have been rationally fashioned' from relevant precedent." *Ex parte Barbee*,

616 S.W.3d at 839. The rule regarding testimonial evidence was first established in *Crawford v. Washington*,[6] and while the Court has not gone so far as to declare autopsy reports testimonial, it has continued to grapple with what evidence qualifies or does not qualify as testimonial.[7] *Smith* is merely an extension of *Crawford* based on factual distinctions, not legal ones. But even if this claim was previously unavailable, Nelson has not alleged facts that would entitle him to relief.

First, there was no factual dispute about the cause of death—the jury had already heard testimony about how Pastor Dobson had been found with

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[6] 541 U.S. 36 (2004).

[7] So far, no court has dared to hold autopsy reports testimonial. *See Thomas v. Davis*, No. 19-21859, 2023 WL 2596891, at * 11 (D. N.J. March 22, 2023) ("As there is no 'clearly established Federal law, as determined by the Supreme Court of the United States,' as to whether the Confrontation Clause applies to autopsy reports, Petitioner cannot rely on the Confrontation Clause as a basis for habeas relief."); *King v. Brown*, No. 20-2074, 2021 WL 3417921, at *2 (6th Cir. April 20, 2021) ("[N]either the Supreme Court nor this Court has held that an autopsy report or an anatomical sketch is testimonial for Sixth Amendment purposes" or that "an expert may not testify about her own opinions if she reached them using an autopsy and related materials she did not author.") (citation omitted); *Mitchell v. Kelly*, 620 Fed. App'x 329, 331 (6th Cir. 2013) (upholding denial of Confrontation Clause claim because "[n]o Supreme Court precedent clearly established that an autopsy report constitutes testimonial evidence"); *Nardi v. Pepe*, 662 F.3d 107, 111—12 (1st Cir. 2011) (affirming denial of habeas relief because "an autopsy report can be distinguished from, or assimilated to, the sworn documents in" other Supreme Court cases); *Meras v. Sisto*, 676 F.3d 1184, 1188—190 (9th Cir. 2012) (explaining that *Crawford* did not clearly establish autopsy reports are testimonial).

a bag over his head. *See* 32 RR 105. The jurors also knew that Pastor Dobson had (likely) suffocated because Officer Parrish told them that the plastic bag was "bloody and covering his face," and that his "mouth was open and his - - the plastic was sucked into his mouth" "[a]s if his last breath was taken with the plastic." 32 RR 105.

Second, Dr. Peerwani was present "at the inception of the exam" and "for part of the autopsy." 36 RR 12. In addition to the report, he reviewed the photographs taken during the autopsy. 4 RR 12. The bulk of Dr. Peerwani's testimony was based on *personal observation*, something Nelson does not acknowledge. 36 RR 15–17; *see Application* at 95—109. He also testified about the autopsy photographs, which again Nelson does not acknowledge. 36 RR 27–35; SX 73–95; *see Application at* 95—109. Autopsy photos are not testimonial. *United States v. Lopez-Moreno*, 420 F.3d 420, 436 (5th Cir. 2005).

Putting the merits of this claim aside, no objection of any kind to Dr. Peerwani's testimony was made at trial. 36 RR 6—38. So, Nelson has waived this claim because an objection could have been made based on then-existing

precedent. Tex. R. App. Proc. 33.1(a)(1)(A). Under these circumstances, Nelson must establish harm beyond a reasonable doubt. Tex. R. App. Proc. 44.2(a); *see Langham v. State*, 305 S.W.3d 568, 582 (Tex. Crim. App. 2010) (alleged violation of Confrontation Clause is not structural error, only error of "constitutional dimension"). On this record, he cannot.

VII. Conclusion

In his eleventh-hour writ application, Nelson has recycled two claims that have rejected by both this Court and the federal courts. To those claims, he has added two new claims that, under no circumstances, establish that but for the constitutional violations alleged, the outcome of either the guilt/innocence trial or the punishment trial would have been different. For these reasons, the State asks that this Court dismiss or deny Nelson's second subsequent application for writ of habeas corpus and deny his request to stay his February 5, 2025 execution.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A true copy of the State's Response to Nelson 's Subsequent Application for Post-Conviction Writ for Habeas Corpus and Motion for Stay of Execution has been e-served on: (1) Nelson through his attorney of record, Lee Kovarsky, l.kovarsky@phillipsblack.org;(2) Benjamin Wolff, Director, Office of Capital and Forensic Writs, Benjamin.Wolff@ocfw.texas.gov; and (3) Stephen Hoffman, Assistant Attorney General, Stephen.Hoffman@oag.texas.gov, on January 22, 2025.

/s/ Fredericka Sargent
FREDERICKA SARGENT

CERTIFICATE OF COMPLIANCE

This document complies with the typeface requirements and word-count limitations because it has been prepared in a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains 6,621 words, as computed by the computer software used to prepare the document.

/s/ *Fredericka Sargent*
FREDERICKA SARGENT

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DISTRICT CLERK

IN THE 485th DISTRICT COURT
TARRANT COUNTY, TEXAS

Ex parte STEVEN LAWAYNE NELSON, APPLICANT	§	**Writ No. Writ No. W012580 (Trial Cause No. 1232507-D)**
	§	**CAPITAL CASE**

REPLY IN SUPPORT OF FIRST SUBSEQUENT APPLICATION FOR WRIT OF HABEAS CORPUS

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INTRODUCTION

The State's Opposition is remarkable for what it doesn't say. It implicitly concedes authorization arguments by ignoring one after another, and it doesn't even address § 5(a)(3) authorization of the *Smith* claim. It doesn't address Nelson's argument that the egregious performance of state post-conviction counsel rendered his two IATC claims unavailable. And of § 5(a)(3) authorization on the IATC-participation and *Wiggins* claims, the Opposition offers only an empty conclusion—simply asserting that § 5(a)(3) "is a very high bar, one which Nelson simply cannot meet." Opp. 19 n.3. Because the State cannot muster plausible arguments against authorization, and because there is serious uncertainty about Nelson's role in the offense and the role race played in his sentence, the CCA should authorize merits consideration of the claims and stay Nelson's impending execution.[1]

I. CLAIMS 1 AND 3: NELSON IS ENTITLED TO RELIEF ON HIS IATC-PARTICIPATION AND WIGGINS CLAIMS

The State devotes only two short sentences to the IATC-participation claim

[1] The State remarks that Nelson's claims "could have been brought years ago." Opp. 2. There is no formal time bar for claims in this posture, but the State's remark is still deeply misleading. As set forth in the Subsequent Application, none of those claims were available for the prior round of litigation. Counsel moved to stay the federal proceedings so that he could return to state court with new claims, but that request was not granted. *Nelson v. Davis*, No. 4:16-CV-904-A, 2017 WL 1187880, at *23 (N.D. Tex. Mar. 29, 2017). Without such a stay, the CCA would have dismissed the litigation under a "two-forum rule" that bars collateral Texas litigation undertaken while a federal habeas petition is pending. *See Ex parte Soffar*, 143 S.W.3d 804, 805 (Tex. Crim. App. 2004). Nelson returned to state court after his certiorari petition was denied in 2024, and after he was able to ascertain and develop the precise claims that he needed to litigate here. Nelson has been exceptionally diligent.

(Claim 1) and *Wiggins* claim (Claim 3), stating only that they "have been raised in and rejected by this Court and the federal courts" and there is "no reason to revisit them now." Opp. 19. The State's conclusory response thus forfeits all objections to these claims other than the suggestion that prior state or federal proceedings are formally preclusive, and that suggestion is incorrect for the reasons discussed below.

A. The IATC-Participation Claim Was Not "Raised In And Rejected By This Court And The Federal Courts"

1. The IATC-Participation Claim In The Subsequent Application Was Not Rejected By The CCA

The IATC-participation claim was not rejected "in this Court" (the CCA). In fact, it was never even *presented* to the CCA, nor to any other Texas court. The CCA can scour every single filing on every single Texas docket, and it will see exactly zero references to trial counsel having ineffectively investigated Nelson's secondary role in the offense. There are no allegations forming such a claim, no evidence introduced to support it, and no ruling addressing it. And even in the imagined world in which such a claim had been adjudicated, there is *still* a mountain of new evidence supporting authorization under article 11.071 § 5(a)(3)—an argument to which the State, for whatever reason, doesn't respond.[2]

[2] Nor does the State answer the claim that the evidence of secondary participation makes Nelson categorically ineligible for the death penalty under the Eighth Amendment. *See* Pet. 2 n.1, 22 n.9.

2. Federal Adjudication Of The IATC-Participation Claim Is Irrelevant To The CCA's Authorization Decision

The federal court's prior adjudication has no bearing on whether the CCA should authorize Nelson's now-pending claims for plenary consideration. That is doubly so when the federal court did not have before it the evidence that Texas courts do. The Fifth Circuit primarily held that federal merits consideration of Nelson's IATC-participation claim was barred by § 2254(d)'s state-federal preclusion rule: "Because … Nelson's [IATC-participation] claim was 'adjudicated on the merits in State court proceedings,' this court's review is constrained by the limitations articulated in [*Cullen v.*] *Pinholster* and § 2254(d)." *Nelson v. Lumpkin*, 72 F.4th 649, 660 (5th Cir. 2023). The § 2254(d) preclusion finding is not merits review, by definition. The whole purpose of § 2254 is to *prohibit* merits review; it is a stringent preclusion bar. *See Harrington v. Richter*, 562 U.S. 86, 98 ("[Section] 2254(d) bars relitigation of any claim 'adjudicated on the merits' in state court, subject only to [narrow exceptions]."). And to overcome the federal preclusion rule, applicants must establish that *every single fairminded state-court jurist* would have granted relief under federal law, considering only the record before the state court. *See Richter*, 562 U.S. at 101 (fairminded-jurist standard); *Cullen v. Pinholster*, 563 U.S. 170, 181 (2011) (state-record-only rule). The federal court never even reached the fairminded-jurist question because Nelson didn't argue it. He had argued—ultimately, without success—only that the absence of a state merits adjudication

made the preclusion rule inapplicable. *See* 28 U.S.C. § 2254(d) ("[A habeas application] shall not be granted with respect to any claim that was *adjudicated on the merits in State court proceedings*," subject to two exceptions) (emphasis added).

The Fifth Circuit followed its § 2254(d) discussion with an alternative holding that Nelson couldn't meet *Strickland*'s prejudice prong. *See* 72 F.4th at 660. There can be no argument, however, that Fifth Circuit's alternative holding is issue preclusive or otherwise binding here. First, the federal courts refused fact development and a hearing. *Nelson*, 2017 WL 1187880, at *22, *aff'd*, *sub nom. Nelson v. Lumpkin*, 72 F.4th 649 (5th Cir. 2023). Second, and more importantly, the Fifth Circuit didn't consider *a single piece of evidence outside the preexisting state record*. *See Nelson*, 72 F.4th at 660 ("[T]his court's review is limited to the record before the state court.").[3] Even if a federal habeas judgment could be issue preclusive in an authorization posture—something CCA has never endorsed because habeas corpus is a "traditional exception to res judicata," *Allen v. McCurry*, 449 U.S. 90, 98 n.12 (1980)—the alternative holding couldn't preclude merits consideration here. That's because issue preclusion is limited to claims that were "fully and fairly litigated in the previous action and [were] essential to the judgment in the previous action." *Quinney Elec., Inc. v. Kondos Ent., Inc.*, 988 S.W.2d 212, 213 (Tex. 1999).

[3] The Subsequent Application includes considerable information and evidence not argued or presented to the state court, including many hours of recorded interrogation by Detective Caleb Blank and content in mobile phone records.

The prejudice allegations in the Subsequent Application, however, weren't "fully and fairly" litigated in the federal proceeding because the federal courts refused to consider most supporting facts, refused fact development, and conducted no hearing. That abridged process also resulted in a prejudice holding that wasn't "essential to the judgment," as required for issue-preclusive effect, because it was denominated as an alternative to the § 2254(d) finding. *Cf.* RESTATEMENT (SECOND) OF JUDGMENTS § 27, comment (i) (1982) ("If a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone.").

Nor should Texas courts imbue the Fifth Circuit's prejudice finding with any persuasive value. It recited trial evidence linking Nelson to the robbery, generally asserting that such evidence indicated a level of involvement that "would have made [no] difference in how the jury answered the anti-parties question." 72 F.4th at 661. Reflecting its abridged consideration, however, the Fifth Circuit got basic facts wrong. It was simply not true that "Nelson alone used Elliott's credit card in the ensuing days to make purchases" or that "no physical evidence linked Springs or Jefferson with Dobson's murder." *Id. But see* Pet. 36-41 (detailing credit card usage and physical evidence pertaining to accomplices). Nor does the other evidence recited—Nelson's fingerprint on Dobson's desk, broken belt studs, and drops of

blood on a shoe—disprove *anything* about Nelson's account, which fits the totality of evidence much better: that Nelson was a lookout, came into the church after the murder, and crawled around the desk to retrieve Dobson's computer.

In addition to its inaccurate grasp of the facts, the Fifth Circuit's opinion also reflects a profound *legal* misunderstanding of parties liability in Texas. It believed that the anti-parties finding was insensitive to the distinction between Nelson as the lookout and Nelson as the murderer. *See* 72 F.4th at 662. The Fifth Circuit reasoned that, because the guilt-phase jury necessarily believed that Nelson was either the killer or that "he *should have anticipated* that a death was likely to occur" during the robbery, the sentencing-phase jury would necessarily make an anti-finding parties finding against him. *Id.* (emphasis added). Of course, this reasoning is utterly inconsistent with the longstanding construction of the anti-parties issue, which exists to enforce basic Eighth Amendment law limiting the death penalty to only the most culpable. *The whole point* of the anti-parties instruction is that Nelson cannot receive a death sentence because he *should have but did not actually* anticipate that a death would occur in the course of the robbery. That is, the anti-parties finding exists to exclude the very theory of negligence-based sentencing that the Fifth Circuit made the centerpiece of its prejudice discussion. *See* Pet. 44 (collecting authority).[4]

[4] The Fifth Circuit also offered glancing observations about the absence of prejudice on mitigation and dangerousness findings. Speaking generally, the it reasoned that the evidence overwhelmingly

B. The *Wiggins* Claim Was Not "Raised In And Rejected By This Court And The Federal Courts"

1. The *Wiggins* Claim In The Subsequent Application Was Not Rejected By The CCA

In contrast to the IATC-participation claim, the initial state application at least nominally contained a claim based on *Wiggins*. But that does not bar the *Wiggins* claim raised in this Subsequent Application, for two reasons.

First, even if the *Wiggins* claim in the Subsequent Application and the *Wiggins* claim in the initial application were "the same claim," that still wouldn't be enough to preclude § 5(a)(1) authorization because the *issues raised within the claims* are different. The plain text of article 11.071 § 5(a)(1) permits subsequent litigation of a claim when "the claims *and issues*" were not, or could not have been, presented in the prior application (emphasis added). Second, an IATC claim consisting of totally distinct factual allegations, like the *Wiggins* claim in the Subsequent Application, is best understood as a different claim entirely—not the same perfunctory *Wiggins* "claim" adjudicated in the prior application. In fact, and in a closely related context, the CCA treats IATC claims comprised of different allegations as distinct claims.

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favored the State on both questions. *See* 72 F.4th at 662. Nelson answers the future dangerousness argument under the *Buck* claim heading. *See* Section II, *infra*. The idea that Nelson would have lost the mitigation question derives exclusively from the presence of Dr. McGarrahan's testimony, *see* 72 F.4th at 662, which was itself the result of trial counsel's deficiency—and, for that reason, cannot be weighed in the manner the Fifth Circuit suggests. *See* Pet. 21-22 (courts must cumulate sentencing-phase prejudice across sentencing-phase IATC allegations).

When an IATC claim is raised on direct review "without the benefit of an adequate record," adjudication of that claim will "not bar relitigation" of a related but distinct cluster of IATC allegations in a later state post-conviction proceeding. *Ex parte Nailor*, 149 S.W.3d 125, 130-31 (Tex. Crim. App. 2004).

The *Wiggins* claim in the initial state post-conviction application was largely incoherent and barely developed, and it certainly didn't consist of allegations about trial counsel's failure (1) to develop trauma evidence and (2) about their decision to put Dr. McGarrahan on the stand as a mitigation expert. That original *Wiggins* claim instead consisted mostly of generic legal recitations, puzzling and boilerplate arguments about the lack of "visual aids," and inexplicable allegations about fetal alcohol syndrome disorder ("FASD")—allegations cut-and-pasted wholesale from Mark Anthony Soliz's pleadings, without the name changed. *See* Pet. 15-16 (describing content of claim in initial application). The only *Wiggins* allegation specific to Nelson's case was that trial counsel should have supplemented Dr. McGarrahan's testimony with lay witnesses, without specifying anything about what those witnesses would have said on the stand. Pet. Ex. 17 at NELSON_00135.

The Texas trial court's findings reflect the incoherence of the claim. It found that the allegations were "unsupported and conclusory," Pet. Ex. 13 at NELSON_01257, and that Stickels "fail[ed] to identify a single undiscovered or uncalled witness, to set forth what testimony such a witness could have provided, or

to demonstrate how such witness's testimony would have benefitted him," Pet. Ex. 13 at NELSON_01252. Absent some allegations about what witnesses might have said, the trial court found that it could not "presume that there were available witnesses whose testimony would have benefitted Applicant." Pet. Ex. 13 at NELSON_01261. The CCA adopted the recommendation to deny relief "[b]ased upon" the trial court's findings. *Ex parte Nelson*, No. WR-82,814-01, 2015 WL 6689512, at *1 (Tex. Crim. App. Oct. 14, 2015).

Even if one were to indulge the fiction that the *Wiggins* claim had been presented in the initial application, that still wouldn't foreclose authorization. Per the Subsequent Application, Stickels's egregious performance would permit authorization, regardless of whether some shell of the *Wiggins* claim had been presented before or not. *See* Pet. 48-64 (unaddressed argument that egregious state post-conviction representation permits authorization). The same is true of authorization under § 5(a)(3), which is dependent on new evidence and not whether the claim it supports was presented at a prior point in time.

2. Nothing About The Federal Courts' Adjudication Of The *Wiggins* Claim Influences This Proceeding

The Fifth Circuit did not certify appeal of the district court disposition of the *Wiggins* claim, *Nelson v. Davis*, 952 F.3d 651, 666 (5th Cir. 2020), meaning that the operative decision on the claim came from the federal district court. *Nelson v. Davis*, 2017 WL 1187880 (N.D. Tex. Mar. 29, 2017). That court disposed of the *Wiggins*

claim in much the same way that the Fifth Circuit disposed of the IATC-participation claim—without permitting fact development or a hearing, barring relitigation under § 2254(d) and, in the alternative, finding that the underlying claim was non-meritorious. *See id.* at *9-*10, *15-*16. The district court's disposition of the *Wiggins* claim isn't issue preclusive for the same reasons that the Fifth Circuit's disposition of the IATC-participation isn't; the disposition wasn't full and fair, and the alternative merits holding isn't essential to the judgment.

Nor should the federal district court's short, summative findings on the merits of the *Wiggins* claim receive informal weight. They are materially incomplete in many places and involve straightforward factual errors in many others. For example, the district court falsely stated that Nelson never made specific citation to the giant tranche of institutional records introduced to prove trauma, abuse, and suicidal ideation. *Nelson*, 2017 WL 1187880, at *15. Its opinion doesn't discuss trial counsel's decision to call Dr. McGarrahan after she told them that she would call Nelson a psychopath, nor does it address the fact that Dr. McGarrahan was herself was part of a prefabricated, cookie-cutter defense that trial counsel deployed indiscriminately across cases. *See* Pet. 12 n.5. It falsely states that Nelson's "real complaint is that Dr. McGarrahan independently reviewed the records and interviewed petitioner, disbelieving much of what he told her." *Nelson*, 2017 WL 1187880, at *15. And it declared that "[t]he record makes abundantly clear that

petitioner has no redeeming qualities[,]" *id.*, as though such a record wasn't precisely the problem with trial counsel's representation.[5] There is no legal or practical reason to defer to the district court's faulty opinion here.

II. CLAIM 2: NELSON'S SENTENCE VIOLATES *BUCK V. DAVIS* BECAUSE TRIAL COUNSEL ELICITED TESTIMONY THAT NELSON WAS MORE DANGEROUS BECAUSE HE IS BLACK

A. The *Buck* Claim Satisfies the Threshold Showing Required For Article 11.071, § 5 Authorization

The CCA should authorize merits consideration of the *Buck* claim, which was legally unavailable under TEXAS CODE OF CRIMINAL PROCEDURE article 11.071 § 5(a)(1) when Nelson filed his initial application. Pet. 69-71.

The State argues Nelson's *Buck* claim "'could have been rationally fashioned' from relevant precedent" several years before *Buck* was decided, based on *Saldano v. Texas*, 530 U.S. 1212 (2000). Opp. 20 & n.5 (quoting *Ex parte Barbee*, 616 S.W.3d 836, 839 (Tex. Crim. App. 2021))). The State's argument fails several times over.

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[5] At sentencing, the prosecution made a longshot attempt to prove that Nelson had killed another prisoner, Jonathan Holden, while Nelson awaited trial. Holden was deeply unstable and had attempted suicide three weeks before he was arrested. He was placed in a suicide prevention cell. On March 19, he was found hanging from his blanket, which had been shared by several prisoners. A prisoner in the cell block, Charles Bailey, indicated to investigators that Holden had killed himself. The facility's failure to adequately respond to Holden's ongoing suicide risk was an obvious source of embarrassment, and there was no arrest or prosecution for Holden's death. Seven months later, Tarrant County prosecutors nevertheless used Nelson's sentencing hearing to suggest that Nelson murdered Holden. The prosecutor offered testimony from one person who claimed to have witnessed the episode—prisoner Rick Seely. Seely was facing four felony charges and had given the testimony in expectation of receiving help in his parole proceeding. Amended Petition for a Writ of Habeas Corpus, *Nelson v. Davis*, No. 4:16-CV-904-A (N.D. Tex. Mar. 29, 2017), ECF No. 25 at PDF pp. 29-30. In closing, the state relied on the Holden incident as evidence that Nelson was death-worthy.

First, the rule from *Saldano* is altogether distinct from the rule in *Buck*—and therefore from the legal basis for Nelson's *Buck* claim—so *Saldano* could not have predicated Nelson's *Buck* claim in 2014. In *Saldano*, it was the *State* that introduced expert testimony that Saldano's Hispanic "ethnicity" correlated with increased risk of "future dangerousness." *Saldano v. Roach*, 363 F.3d 545, 549 (5th Cir. 2004) (discussing procedural history); *see also Saldano v. Cockrell*, 267 F. Supp. 2d 635, 639 (E.D. Tex. 2003) (same). Saldano "claim[ed] that he had been denied due process of law because his race and ethnicity were improperly used," by the State, "to support a finding of future dangerousness during the punishment phase of his trial." *Roach*, 363 F.3d at 549. In contrast, in *Buck*, *defense counsel* elicited expert testimony that the defendant's race "carried with it an [i]ncreased probability of future violence," in violation of the Sixth Amendment "right to the effective assistance of counsel." *Buck v. Davis*, 580 U.S. 100, 118, 121 (2017) (citations and quotation marks omitted). The claims in *Buck* and *Saldano* are not just legally distinct—they arise under two completely different constitutional provisions. Nelson's claim, like Buck's, arose under the Sixth Amendment right to counsel, not the due process clause, and was therefore not "available" based on *Saldano*. *See* Pet. 65.[6]

[6] The cases the State cites (at 20 n.5) are inapposite for the same reason: the State confessed error on the part of *the prosecution* in eliciting references to race in each one. *Alba v. Johnson*, 232 F.3d

Because *Saldano* and *Buck* involved two separate legal issues—the due-process constraints on prosecutors, and the Sixth Amendment effective-assistance duty of defense counsel, respectively—*Barbee* does not apply. In *Barbee*, the CCA held that a *McCoy* claim (a violation of the Sixth Amendment "right to insist that [defense] counsel refrain from admitting guilt") could have "been rationally fashioned" from the Supreme Court's earlier decision in *Nixon v. Florida*, which permitted defense counsel to strategically concede guilt at sentencing, under certain circumstances, without violating the Sixth Amendment. *See Ex parte Barbee*, 616 S.W.3d at 844 ("*McCoy* was the logical extension of *Florida v. Nixon*"); *see also Florida. v. Nixon*, 543 U.S. 175, 178 (2004) ("[W]hen a defendant, informed by counsel, neither consents nor objects to the course counsel describes as the most promising means to avert a sentence of death, counsel is not automatically barred from pursuing that course."); *McCoy v. Louisiana*, 584 U.S. 414, 417 (2018) ("a defendant has the [Sixth Amendment] right to insist that counsel refrain from admitting guilt, even when counsel's experienced-based view is that confessing guilt offers the defendant the best chance to avoid the death penalty."). *Barbee* simply recognized that the defendant's Sixth Amendment right to assert innocence against the advice of counsel (a *McCoy* claim) stemmed from a more abstract Sixth

208 (5th Cir. 2000); *Garcia v. Johnson*, No. 99cv134 (E.D. Tex. Sept. 7, 2000); *Blue v. Johnson*, No. H–99–0350 (S.D. Tex. Oct. 2, 2000); *Broxton v. Johnson*, No. H–00cv1034 (S.D. Tex. March 28, 2001).

Amendment right of the defendant to decide whether to plead guilty or to reject assistance of counsel generally. *See Ex parte Barbee*, 616 S.W.3d at 839.

The *McCoy* claim raised in *Barbee* and the Supreme Court's analysis in *Nixon* were both founded on "familiar legal principles" from Sixth Amendment jurisprudence. *Id*. at 844 (collecting Sixth Amendment cases). In contrast, *Saldano* and *Buck* address legal principles arising from two distinct doctrines—due process and effective assistance of counsel. Nelson's right to effective assistance of trial counsel does not originate from the prosecutor's obligation to avoid violating a defendant's due process rights.

Second, the State's contention that *Saldano* made a *Buck* claim available fails for another fundamental reason—as the State notes, the Supreme Court did not render any opinion in *Saldano* at all, but instead "grant[ed] certiorari, vacat[ed] judgment, and remand[ed] in light of Texas Attorney General's confession of error." Opp. 20 n.5. An order granting, vacating, and remanding ("GVR") does not carry any "precedential weight." *Mitchell v. United States*, No. CR-08-571-CAS, CV-25-4743-CAS, 2015 WL 729658, at *5 (C.D. Cal. Feb. 19, 2015) (GVR "is merely a device that allows a lower court that had rendered its decision without the benefit of an intervening clarification to have an opportunity to reconsider that decision," and "should not be treat[ed] ... as a thinly veiled direction to alter course." (quoting *Gonzalez v. Justices of Mun. Ct.*, 420 F.3d 5, 7 (1st Cir. 2005) (quotation marks and

alterations omitted)); *see also Velez v. Balazar*, No. 1:15-CV-00075, 2017 WL 3910903, at *4 (M.D. Pa. May 5, 2017) (GVR is "not a substantive decision, and the issuance of a GVR order has no precedential value.") (collecting cases), *report and recommendation adopted*, 2017 WL 3894887 (M.D. Pa. Sept. 6, 2017). The Supreme Court's non-disposition in *Saldano* did not make Nelson's Sixth Amendment claim available; only *Buck* did.

B. There Was A *Buck* Violation

Because *Buck* applied the Sixth Amendment right to effective assistance of counsel, *Buck* claims are formally analyzed under *Strickland*. *See* Pet. 65. Nelson's *Buck* claim thus requires two showings: (1) that counsel performed deficiently by introducing testimony that Nelson's race evidenced future dangerousness; and (2) that the deficiency prejudiced a trial outcome. *See Buck*, 580 U.S. at 118 (citing *Strickland v. Washington*, 466 U.S. 668, 686 (1984)).

The State does not contest deficiency. Opp. 19-25. Instead, the State contests prejudice, effectively contending that Dr. McGarrahan's reference to Nelson's race as evidence of future danger was "*de minimis*." *Buck*, 580 U.S. at 122; *see also* Opp. 21 ("The mere mention of a defendant's minority status is not what the *Buck* Court found troubling."); *id.* at 24 ("Race played no role in either Dr. McGarrahan's report or her testimony."). But as the Supreme Court noted in *Buck*, the prejudice from experts testifying in reliance on racial stereotypes "cannot be measured simply by

how much air time it received at trial." *Buck*, 580 U.S. at 121-22 (refusing to accept that "only two references to race" was "*de minimis*"). "[T]oxins" like racial stereotypes "can be deadly in small doses." *Id*. The prejudicial effect of that toxin is especially heightened here, given that Nelson was sentenced before an all-white jury. Amended Petition for a Writ of Habeas Corpus, *Nelson v. Davis*, No. 4:16-CV-904-A (N.D. Tex. Mar. 29, 2017), ECF No. 25 at PDF p. 93. The State's arguments fail to negate prejudice from Dr. McGarrahan's expert testimony, which expressly included Nelson's "minority status" among the "factors that if are not gotten under control, will result in severe violence." 43 R.R. 253.

First, the State attempts to distinguish *Buck* by claiming "Dr. McGarrahan did not tie Nelson's race *by itself* to his future dangerousness; she did not make race an issue *at all*." Opp. 22. The State's block quotation of Dr. McGarrahan's testimony directly refutes that contention:

> Q. What is it - - and there may not be an answer to this, what is it that steers people towards committing crimes as opposed to yelling at the teacher….
>
> A. … I think there are individual differences from the individual who has ADHD and goes on to commit violent offenses and those who don't. What we do know about Mr. Nelson is in addition to the ADHD, he has a *number of risk factors*. The mother who is working two jobs and absent father, verbal abuse, witnessing domestic violence, the *minority status*, below SCS status, all of those *things put an individual at greater risk*. We can't pinpoint what it is that made Mr. Nelson go on and do what he did do. We just know that when you look at the risk factors that he had, I mean, it was *storm waiting to happen.*

Opp. 23 (quoting 43 R.R. 252–53 (emphases added)).

Like the expert in *Buck*, Dr. McGarrahan included race among a list of several other factors that supposedly "predict future dangerousness," in her expert opinion. *Compare Buck*, 580 U.S. at 107 (race "know[n] to predict future dangerousness") *with* 43 R.R. 252-53 (Dr. McGarrahan: "minority status" is a risk factor making Nelson a "storm waiting to happen."). And the prejudice from Dr. McGarrahan's risk-factor testimony was magnified when she linked those factors not only to future dangerousness, but *also* to an inaccurate psychopathy diagnosis, 43 R.R. 253, 274-75, testifying that Nelson "likes violence," finds it "emotionally pleasing," 43 R.R. 269, and is "a very dangerous individual" who was "going to continue to be dangerous." 43 R.R. 277; *see also* Pet. 91-92 (illustrating how Dr. McGarrahan's testimony that Nelson was "psychopathic" was diagnostically uninformed).

Second, the State attempts to distinguish *Buck* by minimizing the prosecution's reliance on McGarrahan's testimony in its sentencing-phase closing. Opp. 23-24. And again, the State's own block-quotation of the closing transcript belies its contention that McGarrahan's testimony linking "minority status" to future danger was non-prejudicial:

> The answer to Special Issue No. 1 should be yes. There nothing else that we could bring you to show that that answer should be yes. *Even the Defendant's own expert told you-all yesterday that he will continue to be a danger*.
> Because *that, ladies and gentlemen, is who this Defendant is*.

Opp. 24 (quoting 44 R.R. 7-8 (prosecution's sentencing closing (emphases added))). In other words, like in *Buck*, the prosecution's closing emphasized "the inability of [Nelson's] own experts to guarantee that he would not act violently in the future—a point it supported by reference to Dr. [McGarrahan's] testimony." *Buck*, 580 U.S. at 108. The State must and does concede that the prosecution's closing "remind[ed] the jury that Dr. McGarrahan agreed Nelson would be a future danger," Opp. 24, just as the prosecution had referred to the expert testimony in *Buck*. And here, the prosecution's closing further exploited McGarrahan's damaging testimony about "risk factors," including "minority status," to hammer its theme that Nelson's immutable characteristics made him irredeemably dangerous—i.e., danger is "who this Defendant is." 44 R.R. 10; see also 44 R.R. 10 ("This is who Steven Nelson is."); 44 R.R. 11 (same, twice).

Indeed, the prosecution's own litigation conduct following McGarrahan's race-linked testimony confirms the prejudicial impact of the testimony. For example, after Dr. McGarrahan testified, the prosecution decided that it didn't even need to call its own expert, who had "attended the entire punishment phase" of trial and been ready to testify on the prosecution's behalf. Pet. 68 (quoting Ex. 13 at NELSON_01279)). Likewise, the prosecution again underscored Dr. McGarrahan's reference to race as a reason why other deficiencies couldn't have prejudiced the sentencing outcome—that is, they argued that the reference to race had an

overwhelming effect on the verdict. *See* 1 S.H.C.R. 309 (State's Proposed Findings of Fact) (arguing that there could not be prejudice because of Dr. McGarrahan's testimony about risk factors including "minority status").

In short, the prejudice from Dr. McGarrahan's unconstitutional reference to Nelson's race far exceeded the standard set in *Buck*, 580 U.S. at 121 (indicating that only "*de minimis*" effects might be non-prejudicial). The prejudicial effects of McGarrahan's expert testimony were particularly "potent," given the "speculative" nature of the future dangerousness inquiry under Texas law and the evidence that even Nelson's all-white jury was ambivalent about a death sentence. *Id.*; Pet. 43, 69. The State cannot downplay the prejudice stemming from Dr. McGarrahan's testimony by arguing about "how much air time" or "how many pages" of the record it occupied—*Buck* explicitly rejected any such attempt to negate the potent "toxin" of racial stereotypes, especially when introduced through expert testimony. *Id*. at 121-22.

III. CLAIM 4: NELSON WAS CONVICTED AND SENTENCED IN VIOLATION OF THE SIXTH AMENDMENT RIGHT, RECENTLY RECOGNIZED IN *SMITH V. ARIZONA*, TO CONFRONT FORENSIC WITNESSES AGAINST HIM

A. The Confrontation Clause Claim Satisfies the Threshold Showing Required For Article 11.071, § 5 Authorization

The CCA should authorize merits consideration of the *Smith* claim under both TEXAS CODE OF CRIMINAL PROCEDURE article 11.071 § 5(a)(1) (unavailable legal

basis) and § 5(a)(3) (death ineligibility). Satisfaction of either provision is sufficient for authorization.

To start, the State does not meaningfully respond to Nelson's argument that § 5(a)(3) requires authorization because, but for the *Smith* violation, no rational juror would have answered the anti-parties issue in the State's favor. Pet. 109; *see* Opp. 19 n.3 (conclusory footnote that Claims 1 and 3 do not satisfy §5(a)(3)). Satisfaction of § 5(a)(3) is alone sufficient to authorize further litigation.

For all intents and purposes, the State's opposition to authorization contests only Nelson's arguments under § 5(a)(1). Even though *Smith v. Arizona*, 602 U.S. 779 (2024), was decided a decade after Nelson filed his initial application, Pet. 95, the State argues that the existence of *Crawford v. Washington*, 541 U.S. 36 (2004), means that Nelson's *Smith* claim was "available" in 2014. According to the State, *Crawford* had already established a "rule regarding testimonial evidence," and Nelson's *Smith* claim "'could have been rationally fashioned' from [that] precedent." Opp. 25-26 (quoting *Ex parte Barbee*, 616 S.W.3d at 839). The State's description of the "relevant precedent" on the Confrontation Clause before *Smith* is wrong.

First, *Crawford*'s "rule regarding testimonial evidence" was not the same legal issue addressed in *Smith*. As the Supreme Court explained in *Smith*, a Confrontation Clause claim has two elements: "a statement must be hearsay ('for the truth') and it must be testimonial—and those two issues are separate from each other." 602 U.S.

at 800. *Smith* addressed only the first element—whether an absent expert's out of-court-statements about "the results of forensic testing" constitute "hearsay." *Id.* at 783. Contrary to the State's argument, *Smith* is not a case about the meaning of the "testimonial" element. *See id.* at 800-01 (the testimonial "issue [was] not now fit for … resolution [in *Smith*]. The question presented in Smith's petition for certiorari did not ask whether [the] out-of-court statements were testimonial.").

Second, the distinction between *Smith* and *Crawford* is legal, not merely factual. *Contra* Opp. 26. *Crawford* held that the Confrontation Clause prohibited introduction of a *percipient fact witness*'s testimonial out-of-court statements without an opportunity for cross-examination. 541 U.S. at 38, 68. *Smith* addressed a different legal question, i.e., whether a forensic *expert witness's* out-of-court statements constituted hearsay, or instead "came into evidence not for their truth, but … to 'show the basis' of the in-court expert's independent opinion" under Rule of Evidence 703 (and state analogues). *See Smith*, 602 U.S. at 793 (describing State's argument that expert's statements were not "for their truth"). And in *Smith*, the Supreme Court held for the first time that such out-of-court expert statements constitute hearsay because they are introduced "for their truth," not merely as "basis" testimony.

Third, before 2024, when *Smith* definitively held that such out-of-court forensic-expert statements were hearsay, the "relevant precedent" did not permit

Nelson to "rationally fashion[]" his Confrontation Clause claim. *Barbee*, 616 S.W.3d at 839. The "relevant precedent" certainly afforded no such opportunity in 2014, when Nelson filed his first Texas post-conviction application. In fact, *Smith* abrogated the then-leading precedent, the plurality opinion in *Williams v. Illinois*, which held that "this form of expert testimony does not violate the Confrontation Clause" because the expert's "out-of-court statements that are not offered to prove the truth of the matter asserted." 567 U.S. 50, 57-58 (2012) (plurality op., Alito, J.). At best, the relevant Confrontation Clause precedent was hopelessly confused when Nelson filed his initial Texas application.

That's because *Williams* had generated three opinions, with none "produc[ing] a majority." *Smith*, 602 U.S. at 788; *see also, e.g.*, *State v. Michaels,* 95 A.3d 648, 666 (N.J. 2014) (noting that *Williams*'s divergent approaches made its precedential force unclear at best). First, Justice Alito's plurality opinion in *Williams* (which *Smith* abrogated last year) rejected the same Confrontation Clause claim Nelson raises, holding that the relevant testimony was not hearsay because it was not introduced for its truth. Second, Justice Thomas authored a solo concurrence in the judgment only, disagreeing with the plurality's "not for truth" reasoning on the hearsay element, but nevertheless rejecting the Confrontation Clause claim for other reasons. Justice Thomas reached the plurality's same result "solely because [the underlying] statements lacked the requisite 'formality and solemnity' to be

considered 'testimonial' for purposes of the Confrontation Clause," even if they did constitute hearsay in his view. *Id.* at 103-04, 111 (Thomas, J., concurring in judgment). And third, four Justices dissented, applying the hearsay test eventually adopted in *Smith* over ten years later, *id.* at 129-30, 133-34, and concluding that the statements underlying the expert's testimony were testimonial. (Kagan, J., dissenting).

Until *Smith* overruled the plurality, the divergent opinions in *Williams* had "'sown confusion in courts across the country' about the Confrontation Clause's application to expert opinion testimony." *Smith*, 602 U.S. at 789. "Some courts … [were] appl[ying] the *Williams* plurality's 'not for the truth' reasoning to basis testimony, while others ha[d] adopted the opposed" view of Justice Thomas's concurrence, shared by the four dissenting Justices. *Id.* Only after *Smith* affirmatively answered the legal question whether forensic-expert "basis testimony" constituted hearsay could Nelson have rationally fashioned his Confrontation Clause Claim. The CCA should authorize it.

B. *Smith* Was Violated When The State Elicited Crucial Hearsay Testimony About The Victim's Cause Of Death

As explained in Nelson's Subsequent Application (at 96) a *Smith* violation has two elements: introduction of (1) testimonial content that is (2) hearsay. *See Smith*, 602 U.S. at 784. Nelson satisfies both.

First, Dr. Sisler prepared an autopsy report and accompanying diagrams that were "testimonial"—i.e., their primary purpose was to "prov[e] past events potentially relevant to later criminal prosecution." *Michigan v. Bryant*, 562 U.S. 344, 360-61 (2011); Pet. 98-99. And second, Dr. Peerwani's testimony introduced hearsay from Dr. Sisler—i.e., the out-of-court statements in the autopsy report and diagrams Dr. Sisler created—when opining on the nature of Dobson's injuries and the ultimate cause of Dobson's death. Pet. 101-03. Dr. Peerwani's testimony about Dr. Sisler's testing, diagrams, and conclusions was "offered … for its truth," so that "the jury would believe it." *Smith*, 602 U.S. at 800. That violated Nelson's rights under *Smith*, because Dr. Sisler was not available for cross-examination; he was replaced by a surrogate, Dr. Peerwani, at trial. Pet. 101-03.*Id.*

The State's attempts to negate Nelson's prima facie showing of these elements claim all fail.

1. The State Cannot Contest the "Testimonial" Nature of Dr. Sisler's Statements

To start, the State cannot dispute that Dr. Sisler's "autopsy report," and the "diagrams" that "Dr. Sisler prepare[d]," contained testimonial statements. 36 R.R. 12, 18; Pet. 112. The State does not dispute or otherwise respond to the cases Nelson cited establishing that autopsy reports are "testimonial if the medical examiner" conducting them "would reasonably expect the statements in the report to be used prosecutorially"—including where (as here) the Texas Code of Criminal Procedure

required the autopsy to occur. *Herrera v. State*, No. 07-09-00335-CR, 2011 WL 3802231, at *2 (Tex. Ct. App. Aug. 26, 2011) (citing TEX. CODE CRIM. PROC. art. 49.25, § 6(a)(4)); Pet. 100 (collecting additional cases treating autopsy reports as testimonial). Nor does the State dispute that under "an objective analysis of the circumstances," including the fact that article 49.25 applied to Dobson's autopsy, Dr. Sisler would have anticipated that the primary purpose of his report and diagrams was future criminal prosecution. 36 R.R. 17, 38; Pet. 99.

Because Texas courts treat such autopsy reports as testimonial, *e.g., Herrera*, 2011 WL 3802231, at *2 (holding "admission of the autopsy report and Dr. Parsons' testimony based on the report violated the Confrontation Clause"), the State's claim that "no court has dared to hold autopsy reports testimonial" is incorrect and apparently ignores Texas law. Opp. 27 n.7. And the pre-*Smith* federal cases the State relies on do not support its position either. Instead, they merely observed that "Federal law" was not "clearly established" by Supreme Court precedent for the purposes of analyzing exceptions to the federal habeas preclusion rule, *see id.* (quoting *Thomas v. Davis*, No. 19-21859, 2023 WL 2596891, at * 11 (D. N.J. March 22, 2023); citing additional federal cases from 2011-2023), which "permits relief only when a state court acts contrary to or unreasonably applies [the U.S. Supreme Court's] preexisting and clearly established rules…." *Brown v. Davenport*, 596 U.S.

118, 144 (2022) (discussing 28 U.S.C. § 2254(d)(1)).[7]

The State's observation that Dr. Peerwani testified about "autopsy photographs" that are not themselves "testimonial" is also irrelevant. Opp. 27. The fact that Dr. Peerwani's testimony was partly based on his review of autopsy photographs, which may not contain testimonial "statements,"[8] does not change the fact that he *also* testified to the statements in Dr. Sisler's testimonial autopsy report. That is why Nelson's Subsequent Application acknowledges the photographs, Pet. 107; *contra* Opp. 27, but does not analyze whether they are testimonial—Dr. Peerwani's testimony based on his review of the autopsy photographs does not render his testimony about the statements in the autopsy report non-testimonial.

2. The State Fails To Negate The Existence of Hearsay in Dr. Peerwani's Testimony

Next, the State contends that "the bulk of Dr. Peerwani's testimony was based on *personal observation*," apparently attempting to dispute that his cause-of-death testimony introduced hearsay statements from Dr. Sisler. Opp. 27. The record,

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[7] *Meras v. Sisto* (cited by Opp. 26 n.7) does not address autopsy reports at all, but rather considers whether federal law clearly established that "forensic lab reports" were testimonial. 676 F.3d 1184, 1188-190 (9th Cir. 2012).

[8] The State cites *United States v. Lopez-Moreno* for the proposition that autopsy photographs are not "testimonial," but that case did not address the admissibility of photographs, let alone *autopsy* photographs. *Lopez-Moreno* expressly refused to "address the admissibility of the passengers' booking photographs." 420 F.3d 420, 435 (5th Cir. 2005). Instead, it held that a "photocopy" of a "voter identification card did not violate the rule against hearsay or the Confrontation Clause," and upheld admission of certain "computer printouts" as business records exempted from the federal rule against hearsay, Fed. R. Evid. 803(8). *Id.* at 436.

however, does not support the State's claim that the "bulk" of Dr. Peerwani's testimony was based on personal observation, rather than Dr. Sisler's statements in his report and accompanying diagrams. As the State and Nelson agree, Opp. 27; Pet. 101 n.23, Dr. Peerwani was "present at the inception of the exam" and "for part of the autopsy," 36 R.R. 11-12; but when Dr. Peerwani is supposedly testifying based on "personal observation" (Opp. 27 (citing 36 R.R. 15-17)), he is describing *only* how "Mr. Dobson presented to [them]," 35 R.R. 15—that is, Dr. Peerwani's personal-observation testimony is apparently limited to how Dobson presented at the "inception" of the autopsy, not throughout the autopsy procedure Dr. Sisler eventually conducted. 36 R.R. 11-12.

Dr. Peerwani's presence at the start of the autopsy, however, does not plausibly establish that the "bulk" of his testimony was based on personal observation, as the State now contends. To the contrary, the record indicates the "bulk" of his testimony was based on "review[ing] the autopsy report" and "diagrams" that "Dr. Sisler prepare[d]." 36 R.R. 12, 18. At this stage, if there were any doubt about whether Dr. Peerwani, who was present for just "part of the autopsy," 36 R.R. 11-12, was testifying permissibly based on personal observation or as an impermissible "mouthpiece" for Dr. Sisler's out-of-court statements, *see Smith*, 602 U.S. at 800, then the Court must draw the inference in Nelson's favor. *See Ex parte Blue*, 230 S.W.3d 151, 163 (Tex. Crim. App. 2007).

Finally, the State contends that Dobson's cause of death was not factually disputed at trial. Opp. 26. That argument is a non sequitur. The absence of a "factual dispute" is not an element of Nelson's *Smith* claim, which requires allegations of that the State introduced (1) testimonial statements (2) that constituted hearsay. Whether Dr. Peerwani's unconstitutional testimony about Dr. Sisler's statement was cumulative of other evidence is, at best, relevant to harmless error analysis, *see* Pet. 104-07, not the merits of the claim. And harmless error does not apply anyway, as explained below.

3. No Harm Showing Is Required, But There Was Harm Nonetheless

The State falls back on harmless error analysis to defend Dr. Peerwani's testimony. According to the State, harmless error governs because Nelson "waived" his Confrontation Clause claim by failing to make any "objection … to Dr. Peerwani's testimony … at trial." Opp. 27. That argument fails many times over.

To start, the State's argument that waiver triggers harmless error analysis presupposes that Nelson's *Smith* claim was available when Dr. Peerwani testified in October 2012—just four months after the *Williams* plurality rejected the *Smith* argument Nelson makes here (as revived by the Supreme Court last June). *Williams*, 567 U.S. 50, 57-58; *see* Section III.A, *supra*. Nelson could not have waived an unavailable claim. *See Black v. State*, 816 S.W.2d 350, 364 (Tex. Crim. App. 1991) (no waiver where "it would have been futile" to object "under the law as established

by this Court at the time of trial"); *id.* at 367-70 (Campbell, J., concurring) (no waiver under "right not recognized" doctrine where "claim was so novel that the basis of the claim was not reasonably available at the time of trial"). And as explained in the Subsequent Application, the unavailability of Nelson's claim during his trial and on direct appeal obviates any requirement to show "harm" for post-conviction relief. *See*, *e.g*, *Ex parte Ghahremani*, 332 S.W.3d 470, 483 (Tex. Crim. App. 2011) (false testimony claim that was unavailable at trial); Pet. 103-04.

Nor does the State respond to Nelson's explanation of how Dr. Peerwani's unconstitutional testimony was harmful—so even if a harmless error rule applied, it wouldn't defeat Nelson's Confrontation Clause claim. To establish harm, Nelson must show that Dr. Peerwani's unconstitutional testimony was a "contributing factor in the jury's deliberations in arriving at that verdict…." *Scott v. State*, 227 S.W.3d 670, 690 (Tex. Crim. App. 2007). As Nelson's Subsequent Application explains, the State needed Dr. Sisler's statements describing Dobson's injuries and identifying suffocation as the cause of death to establish that Nelson acted alone at sentencing. *See, e.g.*, 44 R.R. 27 (State's punishment-phase closing). And only Dr. Peerwani, by "totally concur[ring]" with Dr. Sisler's autopsy report, testified that the cause of Dobson's death was suffocation. 36 R.R. 37-38. The State's argument that additional circumstantial or non-expert testimony from Officer Parrish could have permitted a similar inference on cause of death does not make Dr. Peerwani's

unconstitutional testimony harmless. Opp. 26-27. Cause-of-death testimony from a medical expert is particularly likely to influence the jury's deliberations. *See Coble v. State*, 330 S.W.3d 253, 281 (Tex. Crim. App. 2010). The State's conclusory assertion that Nelson "cannot" overcome harmless error analysis fails.[9]

CONCLUSION

For the foregoing reasons and those presented in Nelson's Subsequent Application, Nelson prays that the CCA authorize merits consideration of his claims and that all other relief requested in the Subsequent Application be ordered.

Respectfully submitted,

Date: January 24, 2025

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[9] Pursuant to Texas Rule of Appellate Procedure 9.4(i)(4), Nelson hereby moves to extend any applicable word limits, although he believes such extension is unnecessary under the rules as he understands them.

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with Tex. R. App. P. 9.4. The word count of this document is 7,452, not including words not included in the word count limit.

/s/ Lee Kovarsky
Lee B. Kovarsky

CERTIFICATE OF SERVICE

I hereby certify that on January 24, 2025, I served a copy of this application by e-file, email and/or FedEx on the following:

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/s/ Lee B. Kovarsky
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REPORTER'S RECORD

VOLUME 43 OF 47 VOLUMES

TRIAL COURT CAUSE NO. 1232507D

COURT OF CRIMINAL APPEALS NO. AP-76,924

THE STATE OF TEXAS	)(	IN THE CRIMINAL
	)(	
VS.	)(	DISTRICT COURT NO. 4
	)(	
STEVEN LAWAYNE NELSON	)(	TARRANT COUNTY, TEXAS

PUNISHMENT PHASE

On the 15th day of October 2012, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Mike Thomas, Judge Presiding, held in Fort Worth, Tarrant County, Texas:

Proceedings reported by Machine Shorthand.

seconds.

THE COURT: Well, let's do the other one.

MR. RAY: Do Dr. McGarahan?

THE COURT: Yes, uh-huh.

MR. RAY: Okay.

(End of bench conference.)

MR. RAY: Call Antoinette McGarahan.

(Witness sworn.)

THE COURT: Thank you. Just state your name.

THE WITNESS: Antoinette McGarahan.

DR. ANTOINETTE MCGARAHAN,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILL:

Q. How are you employed?

A. I'm a forensic psychologist.

Q. What kind of education do you have?

A. I have a bachelor's degree in psychology from Colorado State University, a master's degree in psychology with a specialization in neuropsychology from the University of Northern Colorado. And I have a PhD in clinical psychology from UT Southwestern Medical Center. And then I went on to do a one-year post doctoral fellowship in forensic psychology at the University of Missouri, Kansas City.

Q. And what do you do for a living, specifically?

start developing these problems, what makes them go commit crime? Is there anything that you can put your finger on or does it just happen that way or is it unexplained, tell us about that.

A. I think if we could figure that out, that would be very positive for our society. But I think there are individual differences from the individual who has ADHD and goes on to commit violent offenses and those who don't.

What we do know about Mr. Nelson is in addition to the ADHD, he has a number of risk factors. The mother who is working two jobs and absent father, verbal abuse, witnessing domestic violence, the minority status, below SCS status, all of those things put an individual at greater risk. We can't pinpoint what it is that made Mr. Nelson go on and do what he did do. We just know that when you look at the risk factors that he had, I mean, it was a storm waiting to happen.

Q. When you say "a storm waiting to happen," is that because he's got anger issues that are rolled into this that are capable of an outburst, essentially, without warning?

A. It's a storm waiting to happen because we have severe fire setting occurring at the age of 3, very early indicators of severe violence. Even when he goes to Chickasaw Nation, they are making statements in their records about if we don't get this under control now, he will go on

to be a burden to society. He will go on to hurt others.

There is clearly something wrong with this young man. And so it's -- he's got conduct problems, the fire setting, the lying, the stealing, he's got ADHD, he's got depression, which is clearly indicated in his records. He's wetting the bed after having already achieved potty training, which means that there had been regression back to bed wetting. He is in speech therapy before the age of 6 because he has language issues. He's learning disabled and he's on three medications, psychiatric medications by the time he's 6.

And what all the research shows is that you have this combination of factors that if are not gotten under control, will result in severe violence.

Q. Also there was an incident early on, 5, 6 years old when he locked one of his teachers in the closet; is that right?

A. Yes.

Q. You got a kid that is 6 years old now, okay, and he's got these issues, is there a cure for something like that and what do you do and how is it done and what happens when you don't?

A. I think we see what happens when treatment is either not to its fullest, where things happen like they did with Mr. Nelson where he was pulled out of one school and

moved to another, where he was pulled out of the Oklahoma juvenile system before he was ready, before the treatment team said he should go. But when his mom moved to Texas, she took him with her and then initially tried to send him back because she didn't want him any longer. He was too much trouble.

There is no cure. There's preventative measures that we can do with kids at risk. He was in a Head Start program, that's a good start for kids who are at risk. There's things you can do to prevent the difficulties, but once we are at where we are now, there's certainly no cure.

The treatment that was offered to him early on was medication, but mom didn't think he needed it. Mom was having difficulties of her own trying to get him to treatment. They repeatedly told Mr. Nelson's mother that he could not have the medication if he was not in counseling, so they tried. But then she wouldn't bring him to counseling. There's no cure, there's only band-aids of treatment.

Q. So, I mean, really, the time that a guy gets to be 20 years old, they're essentially treating the symptoms and not the problem itself?

A. It's probably too late at that point.

Q. Now, so the normally-developed individual compared to where Steven is by the time he was 10 or 12 years old, and the -- and the two ideals, normal versus Steven, they parted,

Q. Mr. Nelson has what we might call a thrill for violence; isn't that correct?

A. Yes.

Q. He likes violence, right?

A. Yes.

Q. It is emotionally pleasing to him; isn't that right?

A. Yes.

Q. He likes to engage in violence; isn't that right?

A. Yes.

Q. He likes -- he belongs to -- when he was one of his brief periods of time out on the street, he belonged to a fight club, didn't he?

A. I don't recall that.

Q. You don't recall him reporting to you that he belonged in a -- that he belonged to a fight club?

A. It wouldn't surprise me. I don't recall off the top of my head.

Q. Mr. Ray gave me a copy of your notes a couple of days ago. These are your notes, aren't they?

A. Yes.

Q. Okay. And you recognize them?

A. Yes.

Q. Do you know that -- well, let's see if I can find it very quickly. Somewhere past the point where he was in a

Q. They have early behavioral problems?
A. Yes.
Q. Lack of realistic long-term goals?
A. Yes.
Q. You said they're impulsive?
A. Yes.
Q. Irresponsible?
A. Yes.
Q. They have history of juvenile delinquency?
A. Yes.
Q. They have, in the past, been revoked on some type of supervised release, whether probation or parole?
A. Yes.
Q. Promiscuous sexual behavior?
A. Yes.
Q. Criminal versatility?
A. Yes.
Q. Let's see, we covered pathological lying, conning, manipulative, lack of remorse or guilt?
A. Yes.
Q. These are all things that describe Steven Nelson, aren't they?
A. Yes.
Q. Steven Nelson is a psychopath, isn't he?
A. He has many, many psychopathic characteristics,

yes.

Q. He is one, isn't he?

A. Well, I didn't score the PCLR that you have in front of you, but I imagine that he meets most of that criteria, yes.

Q. Is there anything that you can think of that he doesn't meet? I'll help you out, I can think of one, many short-term marital relationships?

A. That's the one I was thinking of.

Q. Yeah. Just because he's never been out of prison long enough to get married, has he?

A. Pretty much.

Q. Pretty much. Other than that, if he had a little more free time, we might have covered that base, too, right?

A. Yes.

Q. Okay. So you talked about this disassociative identity disorder?

A. Yes.

Q. We talked about that a little bit earlier. And you said that's a way that an individual might remove themselves emotionally from their bad acts?

A. No, that was separate. I said that the depersonalization is a way that somebody might remove themselves emotionally from a bad act. But disassociative identity disorder is something completely different.

today is Mr. Nelson is a very dangerous individual; isn't that right?

A. I don't think I put it in those terms, but, essentially, yes.

Q. And he's going to continue to be dangerous, isn't he?

A. Yes, for some period of time.

Q. As long as there are other people around that are preventing him from getting his way, he is going to continue to be dangerous, isn't he?

A. Yes.

Q. Because isn't that what his life is all about, is getting what he wants and getting what he wants exactly when he wants it?

A. Essentially, yes.

Q. And these are the choices he's made; isn't that right?

A. Yes.

MR. GILL: We pass the witness.

MR. RAY: Nothing further.

THE COURT: May she be excused?

MR. RAY: She can be.

MR. GILL: She may.

THE COURT: Yes. Okay. Thank you.

THE WITNESS: Thank you, Your Honor.

REPORTER'S RECORD

VOLUME 36 OF 47 VOLUMES

TRIAL COURT CAUSE NO. 1232507D

COURT OF CRIMINAL APPEALS NO. AP-76,924

THE STATE OF TEXAS	)(	IN THE CRIMINAL
	)(	
VS.	)(	DISTRICT COURT NO. 4
	)(	
STEVEN LAWAYNE NELSON	)(	TARRANT COUNTY, TEXAS

TRIAL ON THE MERITS

On the 5th day of October 2012, the following proceedings came on to be heard in the above-entitled and numbered cause before the Honorable Mike Thomas, Judge Presiding, held in Fort Worth, Tarrant County, Texas:

Proceedings reported by Machine Shorthand.

P R O C E E D I N G S

(Jury in at 8:57 a.m.)

(Open court, Defendant and jury present.)

THE COURT: Thank you, you can be seated.

If you would come up, please. Doctor, come on up and I'll swear you in.

(Witness sworn.)

THE COURT: Thank you. Make yourself comfortable and just state your name in the microphone, please.

THE WITNESS: All right. I am Nizam Peerwani, P, as in Paul, E-e-r-w-a-n-i.

MR. GILL: May I proceed, Your Honor?

THE COURT: Yes.

DR. NIZAM PEERWANI,

having been first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. GILL:

Q. And it's Dr. Peerwani; is that correct?

A. Yes, sir.

Q. And, Doctor, how are you employed or occupied?

A. I'm employed as the medical examiner for the Counties of Tarrant, Parker, Denton and Johnson in the State of Texas.

Q. And how long have you been employed as a medical

that work for you in that forensic autopsy section?

A. Correct, sir.

Q. Is one of those doctors a Dr. Gary Sisler?

A. Yes, sir.

Q. Is Dr. Sisler still employed with you?

A. No, sir.

Q. What has become of Dr. Sisler?

A. Dr. Sisler has retired. He lives in Killeen, Texas.

Q. Okay. How long was Dr. Sisler with you?

A. About 20 years, sir.

Q. And what were Dr. Sisler's qualifications as a deputy medical examiner?

A. Dr. Sisler was also a medical doctor and he had done his training in the mid west. And then he did his residency training in pathology, was board certified also in anatomic and clinical pathology. He had served as the chief of staff at the Army Hospital in San Antonio and also as a professor of pathology at UNT Health Science Center for a number of years before he came to us as a medical examiner.

Q. So Dr. Sisler also has a large number of years of experience in pathology?

A. Yes, sir, more than nine, sir.

Q. Now, in addition to your post as chief medical examiner of Tarrant County, Denton County, Parker County, do

And then the organs are removed one at a time. Each organ is weighed, dissected and any trauma or pathology is reported and recorded in a similar fashion and an examination of the brain is given. And, of course, it's two parts of the external exam and the internal exam then helps the medical examiner to decide on the cause of death.

Q. So the ultimate mission of the autopsy is to decide the cause and manner of death?

A. Yes, sir.

Q. Now, did your office happen to conduct an autopsy into the death -- and inquest and autopsy into the death of a person by the name of Clinton Dobson on March the 4th of 2011?

A. Yes, sir.

Q. And was that particular autopsy and inquest assigned a unique case number?

A. Yes, sir.

Q. And are you familiar with that case number?

A. Yes, sir.

Q. And what is the case number?

A. The case number is 1102887.

Q. And which of your deputy medical examiners actually performed the autopsy into the death of Clinton Dobson?

A. Dr. Gary Sisler.

Q. And did you oversee Dr. Gary Sisler in conducting

that autopsy?

A. Yes, sir. I was present at the inception of the exam. I was present when the trace evidence was collected. And I also was present for part of the autopsy. And subsequently when the case is brought to a critical case review, I was present.

Q. When you say you were present when the body was subjected to a trace examination, were you present then to observe how the body arrived at the Tarrant County Medical Examiner's Office?

A. Yes, sir.

Q. And in your preparation for testimony today and, in fact, in your preparation for your critical case review, did you review a number of different types of documents and different types of evidence?

A. I did, sir.

Q. And what all have you reviewed for your critical case review and testimony today?

A. I obviously reviewed the autopsy report, investigative report prepared by my investigator. I also looked at the report prepared by the trace analyst, Ms. Eddings and Ms. Kelly Belcher. I reviewed the toxicology report as well as all photographs that were taken at the time of autopsy and the diagrams that were prepared by Dr. Sisler.

Q. Do you also employ medical investigators?

incurred them as he fell.

Although none of these injuries were fatal injuries or injuries that were life threatening, but they did paint a picture of a violent altercation that had taken place. He had blows to the head, as I mentioned, and he had defensive wounds of his hands and then he had small scrapes and injuries to his lower extremities.

Q. And when you use the term "defensive wounds," what do you mean by that?

A. Defensive wound is incurred by a victim as he is trying to defend himself from injuries to his most vital organs that includes, of course, his face, his chest, and abdominal area. He may put up his arms in defensive posture, and in so -- so doing so, he may incur blows to his hands or his wrists or his forearms. Sometimes a person may curl up in a fetal position so that he sustains those blows to his back. So clearly Mr. Dobson had those injuries.

He had very profound blue and purple contusion of his left hand along the small digit and the -- and the edge of the hand. He had abrasions of his wrist area. And he had multiple blows to his back.

Q. When you say he had -- he had the bruising to his outer hand, is that kind of a classic place where you see defensive wounds on the outside surfaces of the arms and hands?

A. Yes, sir. The first physiological response of a person being assaulted is to put up the hand in a defensive posture. So frequently he or she would sustain injuries to the edge of the hand or the outer surface of the hand or to wrists. So this was a very classical location of the defensive wounds. And that implies that Mr. Dobson was alive when he was being assaulted and also he was cognizant and aware that he was being attacked.

Q. Because he took defensive measures?

A. Correct, sir.

Q. Now, did Dr. Sisler prepare some diagrams which illustrated the 21 external wounds to Mr. Dobson?

A. Yes, sir.

Q. And did you, in fact, recreate those diagrams so that you could testify to them today?

A. Yes, sir.

Q. Let me show you what have been marked as State's Exhibits 424, 425 and 426 and ask if you recognize each of those diagrams?

A. Yes, sir, I do, sir.

Q. And were they diagrams created by you?

A. Yes, sir.

Q. Were they diagrams that you created to illustrate for the jury what you observed on Mr. Dobson's body on March the 4th of 2011?

death.

Q. And when you describe that particular mechanism of death, does the fact that Pastor Dobson's arms were bound behind him affect his ability to overcome that?

A. Yes, sir. As you know, respiratory motions produce the compressions that allow you to breathe every breath that you take. The air is gushing in because of the pressure differences in the chest cavity and the outside atmosphere. So the chest has to heave up, out and back each time and the diaphragm is to push down and up to allow this bellows effect that brings the air into the lung.

When you tie somebody's hands behind, it reduces the incursion and excursion of the chest walls, so it certainly impedes respiratory motions and then it aggravates the problem. And -- and, of course, that is part and parcel of his respiratory death process.

Q. Now, based upon all of your observations and based upon all the facts you were able to learn from Dr. Sisler's autopsy and your observations of the photographs, your review of the forensic death investigator's report and your noting of Officer Parrish's testimony, do you have an opinion as to the cause of death of Pastor Dobson?

A. Yes, sir, I do.

Q. And what is that opinion?

A. I totally concur that Mr. Dobson died as a result

of suffocation due to placement of a plastic bag over his head.

Q. And do you have an opinion as to his manner of death?

A. Yes, sir.

Q. And what is that?

A. The manner of death is ruled as homicide.

MR. GILL: Okay. We pass the witness.

CROSS-EXAMINATION

BY MR. RAY:

Q. Mr. Peerwani, I want to direct your attention to the three wounds, I think you numbered three, four and five that were on Pastor Dobson's head.

A. Yes, sir.

Q. Four and five on the front and then I think number -- you called number three, the one in the rear, correct?

A. Yes.

Q. Okay. And what you said was any one of those three could have been sufficient to cause him to lose consciousness, correct?

A. Yes, sir.

Q. Okay. But you can't say for sure if that happened?

A. That's right, sir.

Q. If he lost consciousness, obviously he would have

fallen down, correct?

A. I'm sorry, sir?

Q. If he lost consciousness, obviously he would have fallen down unless he was in a chair or laying down for some reason, correct?

A. That's correct, sir.

Q. Can you tell whether or not when those three wounds, three, four and five -- and you can't say which one happened first, right, first of all, correct?

A. That's right, sir.

Q. Okay. Can you tell whether or not he was standing up or laying down when those wounds occurred?

A. Obviously, one can't say from an autopsy with absolute certainty, but one can give a predictive value. I would predict that the distribution of the injury implies that he was clearly upright when he was struck. And I would predict that the -- the front injuries were first and then the back as he began to tumble and fall down, he was struck in the back of the head.

Q. So, I mean, in other words, someone struck him in the front of the head twice, he turned around and he got struck in the back of the head?

A. Yes, sir.

Q. It could have been two people striking him from both ends?

A. Obviously from the autopsy report, I can't tell you whether it was one or two, but certainly one can easily have done that, sir.

Q. Right. It could have been one, could have been two?

A. I -- I can't say from autopsy, sir.

Q. And the wound -- and I think, let's see, talking about the wound on the -- you called it wound number eight, which is on his left hand down around the -- wound number eight?

A. Yes, sir.

Q. Okay. Did that wound occur before his hands were tied?

A. Yes, sir.

Q. Most likely, because what you said was that was like a defensive wound, he's holding his hands up here?

A. Absolutely correct, sir.

Q. So that wound would have occurred, then somebody tied his hands, correct?

A. Yes, sir. I am -- if -- if you were to ask me the sequence, I would say that those injuries that he sustained to the back and the upper extremities and all of that, they occurred first and then he was struck in the sequence. And then as he tumbled and lost consciousness, his hands were tied and then a plastic bag was placed on his head and he

Incident Report
ARLINGTON, TEXAS POLICE DEPARTMENT

11-12894 DRAFT

Supplement No 0012

P.O. Box 1065
620 W. Division St.
Arlington, TX 76004-1065
817-459-5700
817-459-5682 FAX

Reported Date 03/07/2011
Nature of Call MURDER
Officer BLANK,C

Administrative Information

Agency	Report No	Supplement No	Reported Date	Reported Time
ARLINGTON, TEXAS POLICE DEPARTMENT	11-12894	0012	03/07/2011	20:09

Call Number	Status
110620861	SIGNIFICANT OFFENSE REPORT OR SUPPLEMENT

Nature of Call: MURDER AND NON-NEGLIGENT MANSLAUGHTER

Location	City	ZIP Code	PRA
2001 BROWN BV	ARLINGTON	76006	0073

Division	Beat	From Date	From Time	Officer
N	220	03/03/2011	16:12	2043/BLANK,C

Assignment	Entered by	Assignment	Prop Trans Stat
CRIMES AGAINST PERSONS	2043	CRIMES AGAINST PERSONS	Successful

Approving Officer	Approval Date	Approval Time

# Offenses	Offense	Description	Complaint Type
1	CAPITAL MURDER	CAPITAL MURDER	I

Link	Involvement	Invl No	Name	Race	Sex	DOB
VIC	VIC	1	DOBSON,CLINTON RODERICK	W	M	[redacted]/1982
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]'1987
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]'1991
FCN	FCN	1	TURNER,JAKE	W	M	[redacted]/1982
FCN	FCN	2	BERTRAND,TERRY	W	M	[redacted]/1951
FCN	FCN	3	WILES,DENNIS	W	M	[redacted]/1959
HOM	HOM	1	DOBSON,EMILY ROSEMAN	W	F	[redacted]/1981
FCN	FCN	4	HARWELL,DALE	W	M	[redacted]/1962
FCN	FCN	5	COTTER,MORGAN	W	F	[redacted]/1990
FCN	FCN	6	COBB,ALLISON JODIE	W	F	[redacted]/1991
FCN	FCN	7	MCINTOSH,SAMUEL	B	M	[redacted]/1991
FCN	FCN	8	DUFFER,KELSEY	W	F	[redacted]/1992
WIT	WIT	1	HOLYFIELD,TORIANO TERRELL	B	M	[redacted]/1976
WIT	WIT	2	AUSTIN,RONIKA JANEE	B	F	[redacted]/1986

# Offenses	Offense	Description	Complaint Type
2	CA CAP MURDER	CRIMINAL ATTEMPT - C	I

Link	Involvement	Invl No	Name	Race	Sex	DOB
VIC	VIC	2	ELLIOTT,JUDY	W	F	[redacted]/1964
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]/1987
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]/1991
FCN	FCN	1	TURNER,JAKE	W	M	[redacted]/1982
FCN	FCN	2	BERTRAND,TERRY	W	M	[redacted]/1951

NELSON_00297

17-70012.2143

Incident Report

ARLINGTON, TEXAS POLICE DEPARTMENT

11-12894 DRAFT

Supplement No 0012

Link	Involvement	Invl No	Name	Race	Sex	DOB
FCN	FCN	3	WILES,DENNIS	W	M	[redacted]/1959
FCN	FCN	4	HARWELL,DALE	W	M	[redacted]/1962
FCN	FCN	5	COTTER,MORGAN	W	F	[redacted]/1990
FCN	FCN	6	COBB,ALLISON JODIE	W	F	[redacted]/1991
FCN	FCN	7	MCINTOSH,SAMUEL	B	M	[redacted]/1991
FCN	FCN	8	DUFFER,KELSEY	W	F	[redacted]/1992
WIT	WIT	1	HOLYFIELD,TORIANO TERRELL	B	M	[redacted]/1976
WIT	WIT	2	AUSTIN,RONIKA JANEE	B	F	[redacted]/1986

Summary Narrative

See Narrative

FIELD CONTACT 1: TURNER,JAKE

Involvement	Invl No	Type	Name	MNI
FIELD CONTACT	1	INDIVIDUAL	TURNER,JAKE	3615661

Race	Sex	DOB	Age	Juvenile?
WHITE OR HISPANIC	MALE	[redacted]1982	28	No

Type	Address	City	State
HOME	1727 SADDLE CREEK DR #2434	ARLINGTON	TEXAS

ZIP Code: 76015

Phone Type	Phone No
CELL	(214)543-3081

FIELD CONTACT 2: BERTRAND,TERRY

Involvement	Invl No	Type	Name	MNI
FIELD CONTACT	2	INDIVIDUAL	BERTRAND,TERRY	179405

Race	Sex	DOB	Age	Juvenile?
WHITE OR HISPANIC	MALE	[redacted]1951	59	No

Type	Address	City	State
WORK/BUSINESS	301 S. CENTER ST #500	ARLINGTON	TEXAS

ZIP Code: 76010

Phone Type	Phone No	Phone Type	Phone No
BUSINESS	(817)276-6410	CELL	(817)944-0316

FIELD CONTACT 3: WILES,DENNIS

Involvement	Invl No	Type	Name	MNI
FIELD CONTACT	3	INDIVIDUAL	WILES,DENNIS	2795929

Race	Sex	DOB	Age	Juvenile?	Height	Weight	Hair Color
WHITE OR HISPANIC	MALE	[redacted]1959	51	No	6'03"	190#	BROWN

Phone Type	Phone No	Phone Type	Phone No
BUSINESS	(817)276-6410	CELL	(817)917-3385

FIELD CONTACT 4: HARWELL,DALE

Involvement	Invl No	Type	Name	MNI
FIELD CONTACT	4	INDIVIDUAL	HARWELL,DALE	73609

Race	Sex	DOB	Age	Juvenile?	Height	Weight	Hair Color
WHITE OR HISPANIC	MALE	[redacted]1962	48	No	5'09"	165#	BROWN

Type	Address	City	State
HOME	3808 BRIDLE PATCH	ARLINGTON	TEXAS

ZIP Code: 76016

Phone Type	Phone No
CELL	(817)528-6907

FIELD CONTACT 5: COTTER,MORGAN

Involvement	Invl No	Type	Name	MNI
FIELD CONTACT	5	INDIVIDUAL	COTTER,MORGAN	3383050

Race	Sex	DOB	Age	Juvenile?
WHITE OR HISPANIC	FEMALE	[redacted]/1990	20	No

Incident Report
ARLINGTON, TEXAS POLICE DEPARTMENT

11-12894 DRAFT

Supplement No 0012

Type	Address	City	State
HOME	2008 VAN BUREN DR	ARLINGTON	TEXAS

ZIP Code
76011

Phone Type	Phone No	Phone Type	Phone No
CELL	(214)622-1674	RELATIVE	(817)308-2924

FIELD CONTACT 6: COBB,ALLISON JODIE

Involvement	Invl No	Type	Name	MNI
FIELD CONTACT	6	INDIVIDUAL	COBB,ALLISON JODIE	3648483

Race	Sex	DOB	Age	Juvenile?
WHITE OR HISPANIC	FEMALE	[redacted]/1991	19	No

Type	Address	City	State
HOME	4313 LAMBETH LN	FORT WORTH	TEXAS

ZIP Code
76103

Phone Type	Phone No
CELL	(817)917-6041

FIELD CONTACT 7: MCINTOSH,SAMUEL

Involvement	Invl No	Type	Name	MNI	Race
FIELD CONTACT	7	INDIVIDUAL	MCINTOSH,SAMUEL	3038670	BLACK

Sex	DOB	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
MALE	[redacted]1991	19	No	5'10"	150#	BLACK	BROWN

Type	Address	City	State
HOME	808 THARPE ST #121	ARLINGTON	TEXAS

Phone Type	Phone No
CELL	(817)350-0132

FIELD CONTACT 8: DUFFER,KELSEY

Involvement	Invl No	Type	Name	MNI
FIELD CONTACT	8	INDIVIDUAL	DUFFER,KELSEY	3648485

Race	Sex	DOB	Age	Juvenile?
WHITE OR HISPANIC	FEMALE	[redacted]1992	19	No

Type	Address	City	State
ADDITIONAL	1600 SOUTH DR	VENUS	TEXAS
HOME	304 NEWFIELD ST	VENUS	TEXAS

Type	ID No	OLS
DRIVER LICENSE/STATE ID	27267885	TEXAS

Phone Type	Phone No
CELL	(214)718-0625

HOUSEHOLD/FAMILY MEMBER 1: DOBSON,EMILY ROSEMAN

Involvement	Invl No	Type	Name
HOUSEHOLD/FAMILY MEMBER	1	INDIVIDUAL	DOBSON,EMILY ROSEMAN

MNI	Race	Sex	DOB	Age	Juvenile?	Height	Weight	Hair Color
3410038	WHITE OR HISPANIC	FEMALE	[redacted]1981	29	No	5'01"	105#	BROWN

Type	Address	City	State
HOME	2004 BROADLEAF	ARLINGTON	TEXAS

ZIP Code
76001

Phone Type	Phone No
CELL	(817)240-6648

Alias Name	Race	Sex	DOB	Height
LAURA DOBSON	WHITE OR HISPANIC	FEMALE	[redacted]1981	5'01"

Weight	Hair Color
105#	BROWN

SUSPECT--UNKNOWN TO VICTIM 1: NELSON,STEVEN LAWAYNE

Involvement	Invl No	Type	Name
SUSPECT--UNKNOWN TO VICTIM	1	INDIVIDUAL	NELSON,STEVEN LAWAYNE

MNI	Race	Sex	DOB	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
2338363	BLACK	MALE	[redacted]1987	24	No	5'09"	170#	BLACK	BROWN

Type	Address	City	State
HOME	2405 BROWN BLVD #2201	ARLINGTON	TEXAS

ZIP Code
76006

Incident Report

11-12894 Supplement No 0012

ARLINGTON, TEXAS POLICE DEPARTMENT

DRAFT

Phone Type	Phone No
CELL	(214)290-2632

SUSPECT--UNKNOWN TO VICTIM 2: SPRINGS,ANTHONY GREGORY

Involvement	Invl No	Type	Name
SUSPECT--UNKNOWN TO VICTIM	2	INDIVIDUAL	SPRINGS,ANTHONY GREGORY

MNI	Race	Sex	DOB	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
3575756	WHITE OR HISPANIC	MALE	[redacted]1991	19	No	5'07"	175#	BLACK	BROWN

VICTIM 1: DOBSON,CLINTON RODERICK

Involvement	Invl No	Type	Name	MNI
VICTIM	1	INDIVIDUAL	DOBSON,CLINTON RODERICK	3322112

Race	Sex	DOB	Age	Juvenile?	Height	Weight	Hair Color
WHITE OR HISPANIC	MALE	[redacted]1982	28	No	6'00"	215#	BROWN

Means of Attack	Extent of Injury	Dom Violence
HANDS, FIST, AND FEET (PERSONAL WEAPONS)/OTHER	DEATH	NO

VICTIM 2: ELLIOTT,JUDY

Involvement	Invl No	Type	Name	MNI
VICTIM	2	INDIVIDUAL	ELLIOTT,JUDY	3643885

Race	Sex	DOB	Age	Juvenile?
WHITE OR HISPANIC	FEMALE	[redacted]1964	46	No

Means of Attack	Extent of Injury	Dom Violence
HANDS, FIST, AND FEET (PERSONAL WEAPONS)	SEVERE BEATING	NO

WITNESS 1: HOLYFIELD,TORIANO TERRELL

Involvement	Invl No	Type	Name	MNI	Race	Sex
WITNESS	1	INDIVIDUAL	HOLYFIELD,TORIANO TERRELL	16181	BLACK	MALE

DOB	Age	Juvenile?	Height	Weight	Hair Color	Eye Color
[redacted]1976	34	No	5'06"	230#	BLACK	BROWN

Type	Address	City	State
HOME	825 GREEN HEATH AVE	FORT WORTH	TEXAS

ZIP Code
76120

Type	Address	City	State
WORK/BUSINESS	3811 S. COOPER ST #1096	ARLINGTON	TEXAS

ZIP Code
76015

Type	ID No	OLS
DRIVER LICENSE/STATE ID	09982417	TEXAS

WITNESS 2: AUSTIN,RONIKA JANEE

Involvement	Invl No	Type	Name	MNI	Race
WITNESS	2	INDIVIDUAL	AUSTIN,RONIKA JANEE	3648488	BLACK

Sex	DOB	Age	Juvenile?
FEMALE	[redacted]1986	24	No

Type	Address	City	State
HOME	9515 E. VALLEY RANCH PKWY #2048	IRVING	TEXAS

ZIP Code
75063

Type	ID No	OLS
DRIVER LICENSE/STATE ID	22105442	TEXAS

Phone Type	Phone No
CELL	(682)234-0305

Property

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
1	EVIDENCE	Yes	110003575	7	CLB-07

Description	Typ
1-DVD interview w/Cotter & Cobb	A

Cat	Article	# Pieces
DATA PROCESSING EQUIPMENT (BUS OR HOME)	VIDEO DISK (CED/LV/DVD/CD)	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
VIC	VIC	1	DOBSON,CLINTON RODERICK	W	M	[redacted]1982

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
2	EVIDENCE	Yes	110003575	8	CLB-08

Description	Typ
1-DVD interview w/Spring (#1)	A

Cat	Article	# Pieces
DATA PROCESSING EQUIPMENT (BUS OR HOME)	VIDEO DISK (CED/LV/DVD/CD)	1

Incident Report
ARLINGTON, TEXAS POLICE DEPARTMENT

11-12894 DRAFT

Supplement No 0012

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]1991

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
3	EVIDENCE	Yes	110003575	9	CLB-09

Description: 1-DVD interview w/Nelson — Typ: A

Cat	Article	# Pieces
DATA PROCESSING EQUIPMENT (BUS OR HOME)	VIDEO DISK (CED/LV/DVD/CD)	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]'1987

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
4	EVIDENCE	Yes	110003575	12	CLB-12

Description: surveillance video from Tire King — Typ: A

Cat	Article	# Pieces
DATA PROCESSING EQUIPMENT (BUS OR HOME)	VIDEO DISK (CED/LV/DVD/CD)	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
VIC	VIC	1	DOBSON,CLINTON RODERICK	W	M	[redacted]'1982

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
5	EVIDENCE	Yes	110003575	14	CLB-14

Description: 1-DVD w/search warrant results (from phones) — Typ: A

Cat	Article	# Pieces
DATA PROCESSING EQUIPMENT (BUS OR HOME)	VIDEO DISK (CED/LV/DVD/CD)	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted].987
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]'1991

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
6	EVIDENCE	Yes	110003575	11	CLB-11

Description: 1-DVD interview w/Kelsey Duffer — Typ: A

Cat	Article	# Pieces
DATA PROCESSING EQUIPMENT (BUS OR HOME)	VIDEO DISK (CED/LV/DVD/CD)	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]'1991

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
7	EVIDENCE	Yes	110003575	10	CLB-10

Description: 1-DVD interview w/Spring (#2) — Typ: A

Cat	Article	# Pieces
DATA PROCESSING EQUIPMENT (BUS OR HOME)	VIDEO DISK (CED/LV/DVD/CD)	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]'1991

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
8	EVIDENCE	Yes	110003575	5	CLB-05

Description: 6 pieces of silver metal jewelry — Typ: A

Cat	Article	# Pieces
PERSONAL ACCESSORIES (INCL SERIAL JEWELRY)	JEWELRY (ALL)	6

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]'1987

Item	Involvement	In Custody?	Tag No	Item No	Serial/OAN	Bag Id Number
9	EVIDENCE	Yes	110003575	13	XE9MAB1010605798	CLB-13

Description: 1-Gold & Black cell phone (Nelson) — Typ: A

Cat	Article	Brand	Model	# Pieces
ELECTRONIC/AUDIO/STEREO/TV	TELEPHONE (PHONE)	HUAWAI	M750	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]'1987

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
10	EVIDENCE	Yes	110003575	2	CLB-02

Description: 1-pair of Nike mens shoes sz 10.5 black in color — Typ: A — Cat: CLOTHING ITEMS

Article	Brand	# Pieces
SHOES/BOOTS	NIKE	2

Incident Report

ARLINGTON, TEXAS POLICE DEPARTMENT

11-12894 DRAFT

Supplement No 0012

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]'1991

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
11	EVIDENCE	Yes	110003575	3	CLB-03

Description: 1-pair of Nike mens shoes sz 10 white in color | Typ: A | Cat: CLOTHING ITEMS

Article	Brand	Model	# Pieces
SHOES/BOOTS	NIKE	AIR MAX	2

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]'1987

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
12	EVIDENCE	Yes	110003575	4	CLB-04

Description: 1-black belt w/white metal studs | Typ: A | Cat: CLOTHING ITEMS

Article	# Pieces
BELT	1

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]'1987

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
13	EVIDENCE	Yes	110003575	1	CLB-01

Description: 2-sets of buccal swabs (Spring) | Typ: A

Cat	Article	# Pieces
OTHER ITEMS NOT LISTED	OTHER	2

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]'1991

Item	Involvement	In Custody?	Tag No	Item No	Bag Id Number
14	EVIDENCE	Yes	110003575	6	CLB-06

Description: 2-sets of buccal swabs (Nelson) | Typ: A

Cat	Article	# Pieces
OTHER ITEMS NOT LISTED	OTHER	2

Link	Involvement	Invl No	Name	Race	Sex	DOB
SUS	SUS	1	NELSON,STEVEN LAWAYNE	B	M	[redacted]'1987

Item	Involvement	In Custody?	Bag Id Number
15	STOLEN AND RECOVERED	No	CLB-15

Description: 1-black iPhone | Typ: A

Cat	Article	Brand	Model	# Pieces
ELECTRONIC/AUDIO/STEREO/TV	TELEPHONE (PHONE)	APPLE	IPHONE	1

Recv Value: $100.00

Link	Involvement	Invl No	Name	Race	Sex	DOB
OWN	VIC	1	DOBSON,CLINTON RODERICK	W	M	[redacted]'1982
SUS	SUS	2	SPRINGS,ANTHONY GREGORY	W	M	[redacted]1991

Narrative

Arlington Police Department
Investigative Case Report
Detective C. Blank #2043 - Homicide Unit

- Victim #1: Clinton Roderick Dobson
- Offense #1: Capital Murder
- Victim #2: Judy Elliott
- Offense #2: Criminal Attempt Capital Murder
- Suspect(s): Nelson, Steven Lawayne R/B S/M D/[redacted]1987
- Springs, Anthony Gregory R/W S/M D/[redacted]1991
- Offense Location: 2001 Brown Blvd. Arlington, Tarrant County, Texas

Incident Report **11-12894** Supplement No 0012
ARLINGTON, TEXAS POLICE DEPARTMENT **DRAFT**

Narrative

- **Date of Offense: March 3, 2011**
- **Time of Offense: 11:00-13:00 hrs.**
- **Day of Week: Thursday**

Related Cases: 11-13184 (Springs arrest), 11-13281 (Nelson arrest)

Day #1: 03/03/2011

At 16:13 hours, Officers J. Parrish #2422, K. Ruppert #2341 and others were dispatched to an assault in progress call at the Northpoint Baptist Church located at 2001 Brown Blvd. The call text stated someone was lying on the floor of the office and that the pastor and the complainant's wife were missing. The wife's vehicle was missing from the parking lot.

When Officer Parrish arrived at the Church, she and the complainant, John Elliott, made entry into the church through the front main door via the master key. John Elliott led Officer Parrish to the Pastor's inner office. They entered this office and Officer Parrish observed it in complete disarray as if a struggle had recently occurred in this room. Officer Parrish first observed a white male lying near the desk in the office. This male appeared to have his hands bound behind him and plastic wrapped around his head and face. Officer Parrish went to the male and removed the plastic in order to see the male's condition. It was clear to Officer Parrish the male was deceased. John Elliott saw this male and identified him as the Pastor, Clinton Dobson.

Officer Parrish then located a second body of a severely beaten white female whose hands were also bound behind her back. John Elliott initially looked at this female and did not recognize her. He looked closer and soon realized the female was his wife, Judy Elliott. John could only identify her by the clothes she wore. Officer Parrish checked on Judy's condition, and found her still alive. Officer Parrish immediately requested EMS personnel to be enroute to the church.

Other Officers arrived onscene soon thereafter and cleared the rest of the church without locating any other victims. Two other persons were located in the upstairs portion of the building and removed. They were not related to the offense and told Officers they did not witness anything. Emergency medical personal arrived at the scene and transported Judy Elliott to John Peter Smith Hospital for her injuries. Judy Elliott's husband, John Elliott accompanied her in the ambulance.

Judy Elliott's injuries were described at the hospital as "a severe beating with multiple broken bones in the face and a stunned heart". Elliott was immediately taken into surgery and later ICU for recovery for these injuries.

Dobson was pronounced deceased at the scene.

Several Officers immediately set up a perimeter while others searched the surrounding area looking for the possible suspect(s) both with negative results. Once the church was deemed secure, Officers contacted our Crime Scene Unit and Sgt. K. Fryer #1456 for follow up investigation.

At 16:45 hours, I, Detective C. Blank #2043 was notified about the incident from my supervisor, Sgt. K. Fryer #1456. After being briefed about the initial discovery, Detective B. Lopez #1459 and I drove to the scene. Upon our arrival, I spoke with Officer Parrish who briefed me about her discovery and actions taken inside the church. Other Officers also arrived and briefed me about where they had initially searched for the possible suspects. A secondary canvass of the area was started via members of our Gang Unit and Officer Szatkowski #1599.

During this secondary canvass, Officers noted that Clinton's green Ford Explorer was still parked in the parking lot while Judy's 2007 cream colored Mitsubishi Galant was missing. It was believed this vehicle was stolen by the suspect(s) of this offense. I therefore requested that it be listed as stolen. Patrol researched this vehicle and listed it stolen per my request with our CIC Department.

At 17:20 hours, I contacted the supervisors for Dobson identified as Dennis Wiles W/M [redacted]59 and Terry Bertrand W/M [redacted]51. Both Wiles and Bertrand provided me with a list of valuable items which should be

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located within Dobson's office. Neither Wiles nor Bertrand could think of why anyone would want to hurt either victim. Bertrand told me the location of the church's safe and estimated it would contain less than $1,500 from last night's service offerings.

Both were already aware of Elliott's injuries and asked if Dobson was in fact dead as they had overheard. I confirmed this with them, and asked if Dobson's family lived nearby. I was informed his wife was currently onscene, but she was too distressed currently to be interviewed. She too had overheard about her husband's death.

At 17:30 hours, I spoke with the Assistant Pastor for the church identified as Jake Turner W/M [redacted]82. Turner told me he last spoke with Judy Elliott via a text message at 10:09 hours. At around 15:30 hours, he started receiving phone calls from Laura Dobson (Clint's wife) telling him she hadn't been able to reach either Clint or Judy and asked him when he last spoke to them. Turner told her about the text and said he would go over to the church after finishing up a few errands. At 16:15 hours, Turner arrived at the church and was told by John Elliott what he observed inside the church.

At 17:45 hours, Detective Lopez, Crime Scene Investigators (CSI) S. Wyatt and D. Wiseman, and I signed the crime scene log and entered into the church for a preliminary walk through. Everyone wore latex gloves during this initial walk through. We entered the church and noted several inner doors appeared to have forced entry damage. I was told this occurred during the initial search of the building by Officers as they did not have time to wait for the master key in all circumstances. I located the outer office that contained the church's safe. This room appeared to be undisturbed. A further search was conducted on other rooms in the church and they were located in the same unaffected manner. It appeared the only rooms of interest would be Judy Elliott's office, Clinton Dobson's office, and the bathrooms located in the front entry to the church.

I first entered into Judy Elliott's office and noticed it appeared to be undisturbed. Elliott's cell phone was located on her office chair. I was unable to locate Elliott's purse, but all other items appeared to be undisturbed.

I next entered into Clinton Dobson's office and immediately noted the signs of a disturbance. There was blood throughout the office including on the floor, walls, and other items. One half of a pistol grip was lying in the doorway. I was told that EMS had moved Dobson's desk and several of the chairs within the office during their medical intervention. Dobson was observed in the southwest corner of the room lying on his back. Dobson's hands appeared to be bound behind him using both black plastic computer cords and masking tape. There was also some masking tape wrapped around both of his ankles (which were cut by EMS). A clear plastic bag was observed wrapped around his neck and upper head thus reflecting Officer Parrish's initial actions. A large amount of blood appeared to coming from the back of Dobson's head and pooled in and around the plastic bag. A second bloody plastic shopping bag was seen lying on Dobson's chest.

I quickly scanned the office and noticed multiple items from the list of valuables provided to me by Bertrand were missing including: Dobson's wallet, cell phone, and laptop computer. After this initial walk through, I exited the church so as to allow CSIs Wyatt and Wiseman to begin processing the scene.

Upon exiting the church, I was made aware of some damage observed on a rear storage shed which was located during the second canvass. I researched this further and located a previous burglary report #100055182 on August 25, 2010 taken by Officer Crimmings #1810. Officer Crimmings later came to the scene and examined the damage. He determined it was old damage and doubted it was related to this event.

While I was investigating the damage to the storage shed, Detective Lopez interviewed the two persons located within the church during the protective sweep now identified as Pakon Chan A/M [redacted]56 and Waichun Li A/F [redacted]57. Chan told Detective Lopez he arrived at the church at about 10:45 hours and noted both Dobson's and Elliott's vehicles in the parking lot. When he entered the church, he noticed Elliott on her office phone. Chan continued upstairs to his office where he stayed until about 13:00 hours. Chan came back downstairs in order to leave for lunch and noticed the lights were now dark in Elliott's office. When Chan exited the church, he also noticed Elliott's vehicle was now missing. Chan did not think much about this and figured they too must have left for lunch. Chan returned to the office at around 14:00 hours and found the church the same way he left it.

Chan said soon after he returned to the church, his appointment, Li, arrived at the church. The two stayed

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upstairs in his office until Officers arrived and asked them to leave. Chan said he didn't hear a disturbance from downstairs nor did he see anything unusual.

Detective Lopez also spoke to Li who didn't have much to elaborate on. Li corroborated Chan's statement from the time she arrived until the time they were asked to leave.

At 19:00 hours, I spoke with a member of the church identified as Tommy Whiteman W/M [redacted]80. Whiteman told me he had been asking around with other church members to see when they last spoke to either Clinton or Judy. Whiteman spoke with another church member identified as Suzane Richards. Richards told Whiteman she was supposed to have a meeting with Clinton at 13:00 hours, but when she arrived no one answered the door. Richards saw Clinton's Ford Explorer in the parking lot, but noted Judy's was missing. Whiteman provided me with a phone number for Richards.

At 19:45 hours, I was told that Clinton Dobson's wife, identified as Emily "Laura" Dobson W/F [redacted]81, was now able to talk to me. I met with Laura and confirmed Clinton's death. Laura told me she last spoke to her husband that morning in their home at around 07:50-08:00 hours. Laura said she then went to work as usual. She next called Clinton's cell phone at both 10:56 hours and 12:35 hours and only received his voice mail. She thought this was odd, but was busy at work and couldn't follow up with it at the time.

She again called his cell phone at 13:26 (twice), 14:26, and 14:27 hours each time receiving his voice mail. She then called Judy's cell phone at 14:28 and again at 15:21 hours with similar results. Finally, she called the church at 15:22, 15:32 and 15:51 hours each time receiving the general voice mail box. At this point she became very concerned about both Clinton and Judy's welfare. She started calling John Elliott, Turner, and other members of the church to see if anyone else had heard from them. She decided to drive to the church to check for herself and discovered the news of Clinton's death from John Elliott.

Laura could not think of anyone who would want to hurt Clinton. Laura advised she would attempt to obtain credit card information for me as well as any cell phone records. I left Laura with our Victim Assistance Unit as well as her father for further comfort.

I next spoke with a church member/friend of Dobson's who was identified as Dale Harwell W/M [redacted]62. Harwell told me he was supposed to have lunch with Dobson on this date at noon. Harwell said he received a phone call from Dobson at 11:11 hours who confirmed they were still meeting and the two agreed to meet at a restaurant on N. Collins Street. Harwell said he went to the restaurant, but Dobson didn't show. At 12:08 hours, he called Dobson's cell phone and received his voice mail.

At 22:16 hours, I received a phone call from Judy Elliott's son, identified as Brad Elliott W/M. Brad was already aware of his mother's condition and said he was enroute to JPS Hospital to be with his father. I requested Brad to check with his father about any possible credit cards or other traceable items which may have been within his mother's purse. Brad said he would do so and get back with me later with any information.

We then waited at the church while CSIs Wyatt and Wiseman processed the scene. I was told CSI Rhodes was enroute to JPS to collect Judy Elliott's clothing and to take pictures of her injuries.

Day #2: 03/04/2011

At 02:27 hours, I contacted the Tarrant County Medical Examiner's Office (TCME) and informed them of this offense. At 03:07 hours, TCME Investigator Greenwell arrived at the church. After completing his preliminary investigation, Investigator Greenwell examined the body and determined there to be no gunshot wounds or apparent skull fractures. Investigator Greenwell moved the body so as to allow our CSIs to photograph it fully. During this moving of the body, I observed Dobson's pockets to be all empty with the left rear pocket being pulled out. The exact cause of death could not be determined from this initial examination.

Once this was completed (04:20 hours), Detective Lopez and I cleared the scene leaving Patrol Officers behind to maintain the crime scene until the CSIs were completed with their processing. Upon arrival at the Main Police Station, we completed several miscellaneous administrative duties before leaving for home.

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ARLINGTON, TEXAS POLICE DEPARTMENT **DRAFT**

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At 10:00 hours, I arrived back at the Main Police Station. I immediately left again for the Northpoint Church so as to conduct a walk through with both Wiles and Bertrand to establish if any other items were missing from Dobson's office. At 10:25 hours, I met with Wiles and Bertrand at the church. We completed a walk through of the church with no immediate other items noticed missing. I had previously informed Bertrand of Dobson's missing laptop computer (which was owned by the church) and Bertrand provided me with a print out for the computer's purchase. Bertrand also informed me he had checked on the church credit cards and did not believe they had been used. He cancelled the cards after this search.

During this meeting with Wiles and Bertrand I was alerted of a 911 phone call our East Side Patrol was currently working (APD CS #110630410). Cpl. B. Watson #2082 and his recruit Officer J. Rangel #2691 were currently speaking with two white females who claimed to have spoken with someone who had property belonging to Dobson.

At 11:30 hours, I arrived at the call address of 808 Tharp St. #121 and met with Cpl. Watson. Cpl. Watson told me the two females, identified as Morgan Cotter W/F [redacted]90 and Allison Cobb W/F [redacted]91, said they were at the QuickTrip located at 901 E. Division St. last night (03-03-11) at around 21:30 hours buying drinks. The girls parked on the west side of the QuickTrip near the pay phone.

When they began walking toward the front doors of the business, they noticed a shorter, athletically built, light skinned black male with short hair, light colored eyes, who was heavily tattooed including $ signs on each eyelid and three tear drops near his right eye. This male was wearing a green "Cookie Monster" shirt, blue jean shorts, and black shoes. The male was also wearing a large amount of jewelry including a thick diamond looking bracelet.

The male walked to them from the pay phone and asked for a ride to Dallas. When the two refused this request the first time, he offered them money for the ride. When they refused for a second time, he produced a black iPhone and told the girls the phone belonged to the dead Pastor and he needed to get out of town quickly. The girls didn't initially believe him but again declined his request for a ride. Upon this last denial, the male immediately began running west bound across Collins Street. The girls continued into the store.

I contacted the two females who again told me the same series of events as previously provided to Cpl. Watson. Cotter told me she delayed calling 911 last night because she didn't initially believe this male, but after thinking on it over night she felt she needed to tell someone about it. Cotter consulted with her father on the matter and he finally persuaded her to come forward with her information. Cobb corroborated Cotter's entire statement including the reason for the delayed report.

At the end of this interview, I drove over to the QuickTrip in order to view their closed circuit surveillance video. At 11:50 hours, I met with the on-duty manager identified as Elizabeth Wilson W/F [redacted]86. I reviewed this video on their system in an angle that captured the front door and the immediate parking lot near the pay phone. I observed Cotter and Cobb enter the store from what appeared the center of the parking lot and not from the area near the pay phone as they previously reported. They purchased some drinks and exited the business. At no time did I see anyone matching the description they provided near the pay phone. Based on this video, I believed Cotter and Cobb were not being completely honest with me. I downloaded the video onto a DVD and returned to the Main Police Station.

I relayed my beliefs to both Detectives Lopez and Shinpaugh. I requested both of them to go and re-interview Cotter and Cobb for me while I completed other tasks.

I began researching Judy Elliott's recent credit card transaction history which was obtained earlier by Detective Shinpaugh via Judy Elliott's son, Brad Elliott. I located several transactions which occurred on March 3, 2011 at a Tetco gas station, several jewelry kiosks at the Park's Mall at Arlington, and Shiekh (a shoe store inside the Park's Mall at Arlington). These transactions occurred prior to or close after the 911 phone call had been made by John Elliott. I requested Detective Wade #1989 follow up with these transactions.

At 14:55 hours, I contacted Suzanne Richards W/F [redacted]69, via the phone number provided for her. Richards confirmed to me she was scheduled to have an appointment with Dobson at 13:00. When she arrived at 13:02, Richards noticed Elliott's car was not in the parking lot, but Dobson's was still there. Richards went to the front

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door and noticed it locked. Richards rang the doorbell, but received no answer. Richards could see into Elliott's office and noticed it was dark.

Richards went around to the back of the church and found the set of double doors were also locked. Richards looked into the windows of Dobson's office, but could not see anything other than the couch due to the tint on the windows. Richards knocked on the windows, but still did not receive a response. Richards waited at the church until 13:30 hours before leaving. Richards said she had heard through other church members that another individual, identified as Debra Jenkins, was at the church just prior to her arrival. Richards provided me with a phone number to another church member, Lea Cowart, who had Jenkins' cell phone number. This conversation was audio recorded.

I contacted Lea Cowart W/F [redacted]74, who said she had also spoken with Debra Jenkins about Jenkins' observations. Cowart provided me with another church member who had Jenkins' phone number as she did not have it herself. Cowart said she would try to locate it with other church members and provide it to me when located. This conversation was audio recorded.

Before I was able to contact Jenkins, I received a phone call from Detective Lopez in reference to the second interview with both Cotter and Cobb. Detective Lopez told me they admitted to withholding information to me earlier. They provided Detective Lopez with the names of the two suspects: Anthony Gregory Springs and Steven Nelson. Detective Lopez said both Cotter and Cobb agreed to meet with me at the Main Police Station in order to view photos of the two suspects as well as to provide a more accurate statement.

I began researching the two names provided to me in our computerized RMS database and located the most recent jail booking photo of Springs. As Nelson did not have a jail booking photo with our agency, I researched him in an online database, TDEX, and located a recent Dallas County Jail booking photo. I requested a copy of this photo through the Dallas Police Department's Fusion Unit. The photo was provided to me via e-mail. I printed out copies of both photos to be shown to Cotter and Cobb.

Detectives Lopez and Shinpaugh escorted Cotter and Cobb to the third floor of the Main Police Station where I met with them again. Both apologized to me for our last conversation and agreed to not leave anything out this time. At 16:13 hours, Detective Lopez and I escorted Cotter to the third floor interview room. I explained to Cotter our need to clarify her statement and she agreed to do so. This interview as well as Cobb's interview was recorded by both audio and visual means. Both interviews were later downloaded onto a DVD and booked in as evidence (item CLB-07).

Cotter told me she believes two of her friends, identified by Cotter as Anthony Gregory Springs aka "AG" H/M 18 yoa and Steven Nelson aka "Tank" or "Romeo" B/M 24 yoa, are responsible for the death of the Pastor (i.e. Dobson). Cotter knows both of these individuals from when they used to go to school together. Cotter provided me with accurate descriptions for the two males. Cotter viewed photos of both and positively identified them. Cotter added she knows Nelson and Springs to commit aggravated robberies together and said they were recently trying to rob people within the past couple of days in Irving.

Cotter explained she and Cobb were at a mutual friend's apartment, identified as Samuel McIntosh aka "Sun Dun", hanging out the night of the murder. Cotter received a phone call from the two asking her what she was doing. Cotter told them she was hanging out at "Sun Dun's" apartment and the two said they would come over. Springs and Nelson pulled up to the apartment with another female known to her as "Dex". The two immediately walked into the apartment and they all started talking/hanging out. Cotter said Nelson was wearing the jewelry and a green "Cookie Monster" shirt as previously described while Springs was wearing a white tank top and shorts. Cotter also remembered she saw Nelson with what looked like a brushed nickel and black colored handgun tucked into his waistband.

Later that evening, while watching television, a news story about the incident played before the group. Both Nelson and Springs began laughing and making inappropriate comments about Dobson's death. When confronted about this behavior by Cotter, both told her that they didn't care because they weren't related to the Pastor. Cotter told them they were acting disrespectful, but they didn't seem to care. Cotter then asked Springs what he would be doing later and was told by Springs he was trying to sell an iPhone. Cotter thought this was odd as she had never seen him with an iPhone before. Cotter asked him where he got the phone and was told by

Narrative

Springs that it belonged to the dead Pastor. This upset both Cotter and Cobb.

After this revelation, Nelson and Springs left the residence with "Dax". Cotter said she spoke briefly with Nelson on the phone later that night, but felt too disturbed to talk at length with him. She said she asked him via text message if Nelson had really killed the Pastor to which he responded, "I didn't rob him." She pressed him on this issue, but he continued with the same response.

At approximately 04:00 hours, Springs returned to "Sun Dun's" apartment. He didn't stay long before calling his mother for a ride back to her house. He left soon thereafter. Cotter said they didn't discuss the issue any further.

At 17:00 hours, we interviewed Cobb in the same manner as Cotter. Cobb corroborated Cotter's new statement fully. Cobb said after the news story about the Pastor's death, Nelson and Springs started laughing. Soon after this news story, Cobb saw Springs with a black iPhone. Cobb told Springs he didn't have money for an iPhone and asked him where he got it. Springs told her the phone belonged to the Pastor. Cobb said from the tone of his voice and how he said that phrase, she didn't think he was joking. Soon after this statement was made, Springs, Nelson, and the female "Jordan" left the apartment.

Cobb viewed pictures of both Springs and Nelson and positively identified each from their respective jail booking photos. Cobb also knew the two to go out and commit robberies and burglaries together.

After both interviews were concluded, Cotter allowed me access into her Facebook account. Using her password and username, I entered onto her main page and was directed to Cotter's friends section. I searched for the name Steven Nelson and located him on her page. I printed a screen still with this discovery. Because the two are mutual friends, this allowed me access to Nelson's Facebook page. I printed off still copies of this main page as well as several recent photos of Nelson he had posted.

Finally, I had Cotter sign a Metro PCS consent form for her phone records. This was later faxed to Metro PCS. Both Cotter and Cobb were then escorted down to the front lobby and released without further.

Using the photos for each suspect from their respective jail booking entries, I created several six person photo lineups inclusive of each suspect for their respective lineup. The photos were varied in each lineup.

I contacted Detective Wade who informed me she had spoken with the on duty store clerk for the Tetco gas Station located at 3394 S. Watson Road. This clerk told Detective Wade they do have video inside the store, but she would need to contact the manager at a later time to collect it. Detective Wade then went to the Park's Mall and contacted the on duty manager for the Sheikh Shoe store where the credit card was used twice. The manager, identified as Toriano Holyfield, said he handled both transactions and remembered them vividly. Holyfield provided Detective Wade with a copy of the receipt for the transactions as well as a copy of the store's surveillance video for the time around the transactions.

Detective Wade continued throughout the mall and met with representatives for each of the jewelry kiosks (i.e. Jewelry Hut and Silver Gallery). Each kiosk provided Detective Wade with the receipts for their respective transactions, but neither remembered the person responsible for them. Neither kiosk had surveillance video for their work spaces, but advised the mall's surveillance video may have captured the transactions.

At 21:15 hours, Detective Lopez and I met with Holyfield at Shiekh Shoes. Holyfield confirmed he still remembered the transactions and would be able to identify the person(s) responsible for them. As a blind administrator was not available at the time of the lineup viewing, I administered the lineup to Holyfield. Holyfield was read the lineup instructions from off of the City of Arlington Lineup Instructions form. Holyfield stated he understood the instructions as provided and viewed the first lineup which was inclusive of Springs' photo. Holyfield did not identify anyone from this lineup. Holyfield next viewed a lineup inclusive of Nelson's photo. Holyfield identified Nelson as the primary person who presented the credit card. Holyfield then completed a confidence for this selections process. This process was audio recorded.

Detective Lopez and I continued inside the mall to the security office in order to meet up with Detective Wade. Once there, we reviewed the surveillance video she had collected from Holyfield. On the first video we could clearly see suspect Nelson purchasing a white pair of shoes and a green Oscar the Grouch t-shirt. Nelson was

alone during the first transaction which occurred at approximately 16:48 hours. On the second video, we could again clearly see Nelson, but this time he was with two other person one of which was clearly Springs. The identity of the third person was unknown to us at this time. This second transaction shows both Nelson and Springs selecting items to purchase, but the card was declined. This second transaction took place at approximately 17:31 hours.

We then contacted Security Officer Powell of Valor Security who was currently searching their camera database looking for the three inside the mall. From this preliminary search, we only saw Nelson walking southbound from the area near Sheikh toward the center lower level court. Nelson then preceded up the center main escalators into the food court. Nelson is then seen stopping at the Silver Gallery kiosk located near the food court. Security Officer Powell said he would continue his search for more angles of the suspect as well as to attempt to track the suspects throughout the mall during their shopping sprees. I also requested he look for any vehicles associated with them.

We returned to the Main Police Station where I updated our Fugitive Unit of our progress and the forthcoming warrants for arrest for the two suspects, Nelson and Springs. Fugitive Detective Shinpaugh told me he believed he knew where Springs was currently and would attempt to arrest him on his outstanding misdemeanor warrants prior to my arrest warrant. He would contact me as soon as Springs was in custody.

At 23:50 hours, I am told Springs is taken into custody for his warrants by members of our North Heat Unit. Springs had in his possession two cell phones and a set of Mitsubishi car keys. I requested these to be seized pending further investigation.

Day #3: 03/05/2011

At 00:45 hours, Detective Lopez and I went down to the City of Arlington Jail in order to meet with Officer Baird in order to observe the keys found on Springs. Officer Baird was outside the jail in the property booking in room where he was completing the seized property process. I looked at the keys and confirmed they did in fact belong to a Mitsubishi vehicle. I also confirmed with Officer Baird that the two cell phones were turned off.

We then continued on to the City of Arlington Jail. We met with Springs who agreed to be interviewed. Springs was handcuffed and escorted from the jail to the third floor interview room. Springs was read his adult Miranda warnings which he verbally stated he understood as given and would voluntarily waive in order to continue our interview. This interview was recorded by both video audio means. It was later downloaded onto a DVD and booked in as evidence (item CLB-08).

Springs initially told us he couldn't think of why detectives would want to talk to him. When asked if any of his friends may have done something wrong recently, Springs said his friend "Romeo" had told him he had done something bad. Springs added that the keys found in his pocket belonged to "Romeo". Springs said he had just met "Romeo" within the last three or four days and that he met "Romeo" through a mutual friend named Morgan Cotter. Springs said he has known Cotter since high school.

Springs said he met "Romeo" over at a friend's (who he identified as Claude) aunt's house at around 02:00 - 03:00 hours on Friday morning. "Romeo" was driving in a white Mitsubishi Galant. Springs said "Romeo" was acting weird and initially thought it was just because "Romeo" was on an ecstasy pill. When Springs asked what was wrong, "Romeo" told him he had done something bad. "Romeo" told Springs he didn't want to talk about it. Springs later left this apartment and went back to another friend's apartment before finally ending up at his mother's home.

We then attempted to establish a time line with Springs as he couldn't tell us when exactly this meeting took place. Springs again stated this conversation took place at about 02:00 hours Friday morning. Springs added he had previously met with "Romeo" the night before over at a friend's house with Cotter. That night, they dispersed and Springs went over to his "baby mother's" house. The next day, "Romeo" called him and asked if Springs would meet him. Springs said he met "Romeo" at a Chevron gas station located at Mayfield and SH 360. Springs' "baby mamma" drove him to the Chevron and dropped him off there in her red Chrysler PT Cruiser. Springs estimated this took place at around 14:00 hours.

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Springs said they left the gas station and went over to a girl's house to hang out for awhile before finally driving over to Twist's (i.e. Claude) aunt's house. Springs identified Twist's aunt as "Jordan". Once there, Springs claimed he got out of the white Galant and into "Jordan's" vehicle which he described as a red Chevy Malibu with large rims and a "system" (stereo + large speakers). From there, "Romeo" followed them wherever they went. Springs initially said this took place on Thursday, but then acted as if he didn't remember the day. He later clarified he believed this took place on Wednesday.

Springs said they all then drove to the Park's Mall in Arlington and parked in the JC Penny parking lot. They entered the mall and went into the Footaction Shoe store. They didn't buy anything there. They continued walking around the mall and stopped at various jewelry kiosks. Springs could not describe anything purchased during this trip, but said he believed "Romeo" bought a pair of shoes. It should be noted Springs later said he believed they went to the mall both Wednesday and Thursday evenings, but both accounts appeared to be identical except for the date and times.

After they left the mall, they went over to another friend's house known as "Sun Dun" who he later identified as Samuel McIntosh. Springs said McIntosh is currently on parole for a robbery charge and on an ankle monitor. Springs named the people at this gathering as: himself, "Romeo", "Jordan", McIntosh, and another female. After this visit, he, "Romeo", and "Jordan" drove back to "Jordan's" apartment off of Trinity and SH360. Springs later ended up at his mom's home where he slept until around 11:00 hours on Friday.

When Springs woke up, Springs received a phone call by a friend he identified as Cordelle Hood. Hood drove over to Springs' mother's home and picked him up so they can go and get their hair cut. Springs said they again meet up at McIntosh's apartment in order to hang out. "Twist" met them at the apartment. At some point prior to getting arrested, Springs realized he forgot his lighter and borrowed Hood's car in order to run to the store in order to buy another one. Springs and "Twist" drove off in Hood's car and were stopped by Officers. Springs was arrested for his warrants at that time.

During this lengthy conversation, we tried to distinguish which exact day(s) Springs was talking about. Springs continuously mixed up his days and paused while trying to explain where he was and what he had been doing in the days leading up to and after the incident. We confronted Springs on this behavior for an extended amount of time as he kept skipping over the critical day in question, Thursday.

Springs again stated he had just met "Romeo" as previously described. I presented Springs with the photo lineup inclusive of Nelson's photo and he immediately identified Nelson as the person he knows as "Romeo". Springs said he knows Nelson to "hit licks" and further knew him to have killed someone. Springs again went into the story about his conversation with Nelson while Nelson was under the influence of an ecstasy pill. During this conversation, Nelson told Springs he had recently killed someone, but still did not give too many details. Springs then admitted to being with Nelson on Thursday and said he, Nelson, Jordan, and "Twist" went to the mall on that day with Nelson following the other three in the white Galant. Springs again claimed to have only been in the car once, but said the car ride with Nelson took place on Wednesday.

We again confronted Springs on this point and he said he must still have his days confused. Springs then went on unprovoked to state he had heard something from his friends Morgan and Kelsey about the pastor of the church being killed. Springs continued his self preserving statements including his "non involvement" at the mall. We again confronted him on this which he stated the only reason he didn't buy anything at the mall was because the credit card was declined.

We continued this circular conversation with Springs in which he now stated he did watch the news replay where he learned of the church killing. Springs continued saying he did not kill anyone. When pressed on this issue, Springs gave more details on his conversation with Nelson. Nelson told Springs there were a male pastor and female secretary inside the church. Nelson said he had smothered the pastor and also thought he killed the secretary. Springs said Nelson didn't elaborate on how each killing occurred.

When asked why he thought Nelson would do this at a church, Springs speculated it was because he got a car and the credit cards. I asked Springs what stolen items from the church he received from Nelson. Springs told us he was given a black iPhone which he was told by Nelson belonged to the pastor. Springs said he traded the

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iPhone to a female friend of his named Ranika for the G-1 phone Officer Baird had previously seized. Springs said he traded the phone because he couldn't unlock it so he could use it for himself. Springs knew the phone was stolen, and claimed Nelson gave it to him for free. Springs provided a phone number for Ranika.

Nelson confessed to Springs he had fought the pastor with his fists before also using a black BB gun. Springs has seen this BB gun in the past and told us it could pass for a real firearm. Springs knows Nelson still has the BB gun at his apartment. Springs said Nelson has used this BB gun in the past while attempting to rob other individuals.

Springs continued to state he wasn't with Nelson during the time of the murder. Springs said he was with the mother of his child, Kelsey Duffer, at her home in Venus, TX. Springs said all of his phone calls should show him to be in Venus and not in Arlington at the time of the offense.

Springs then told us he was offered a car by Nelson which he believed to be a Ford because that was the brand name on the keys. Springs said he threw the keys away soon after he was given them, but he could not provide us the exact location. When confronted on this, Springs said he threw the keys out on his way to trade for the G-1 phone in Irving near the intersection of 161 and Beltline.

We then took a lengthy break in the interview so I could consult with CSI Kasson for the progress of the evidence processing. CSI Kasson informed me as far as the murder was concerned; very few items had been processed or looked at for latent fingerprint examination. However, CSI Kasson told me she remembered Springs name from an AFIS fingerprint hit related to an aggravated robbery from last November. CSI Kasson reviewed this tentative hit and informed me it was linked to report #10-74380 in which I was lead detective. I requested CSI Kasson immediately to validate this AFIS hit to either rule Springs in or out as a suspect in that offense.

When we returned to the interview room, I asked Springs if he committed any other crimes in Arlington. Springs said he had not. When asked if he had many white male friends, Springs stated he did not. I then confronted Springs on the facts of that robbery case. Springs remembered the incident and admitted he did actively participate in the robbery by opening up the victim's driver side door and taking his property. Springs validated this by saying the victim was dealing marijuana and therefore was lying about the incident. Springs admitted his friend, Chris James, was the person with the gun in that offense.

Toward the end of our interview, I requested a sample of Springs' DNA. Springs was presented consent to search form which he voluntarily signed. While using gloves, I collected two buccal swabs which were immediately placed in an evidence envelope for safekeeping until they could be booked in as evidence (item CLB-01).

The last thing we discussed was the current location of the Galant. Springs told us the Galant should still be parked in "Jordan's" apartment complex which he verbally identified to us as The Arbors. I later directed Patrol Officers to this location where the vehicle was verified to belong to Judy Elliott and recovered. At the conclusion of our interview, Springs was escorted back down to the jail and released into jail staff's custody without incident. Springs' shoes were seized pending further investigation (item CLB-02).

Based on the information thus far, I prepared a Capital Murder arrest warrant for Nelson. I presented this warrant before the Honorable Municipal Judge Milner. Judge Milner reviewed the warrant and issued it warrant #02-11060 with a $750,000 bond. I completed all necessary warrant packet information and forwarded a copy to our Fugitive Unit. After this was completed, Detective Lopez and I cleared the office for rest.

At approximately 13:30 hours, I was alerted by Fugitive Detective T. Medina #0800 that Nelson had been arrested at his mother's apartment located at 2405 Brown Blvd #2201, in The Woodbridge Townhomes. Upon my return to the Main Police Station, I prepared a search warrant for the location and presented it before the Honorable Municipal Judge Milner. Judge Milner reviewed the warrant and issued it search warrant #02-11009A-SW.

At 19:10 hours, Detective Lopez and I arrived at Nelson's mother's apartment with CSI Wyatt. We searched the location and located clothing and jewelry purchased by Nelson at the Park's Mall using Judy Elliott's stolen credit card. This jewelry was seized as evidence. We also located a pair of black/green men's Nike Air Jordan's with a red substance believed to be blood droplets throughout the exterior of the shoes. These shoes were believed to be worn during the commission of the offense and seized for further testing.

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After completion of the search, we returned to the City of Arlington Jail in order to view the clothing/items in Nelson's jail property. Inside his property we located a pair of white Nike men's tennis shoes (item CLB-03), and the last of the jewelry purchased at the Park's Mall using the stolen credit cards (item CLB-05). We also located a belt that was missing four, small, white metallic "studs" from its design. I saw this design and instantly remembered seeing two of the four missing "studs" within our crime scene. The belt was also seized (item CLB-04). Finally, Nelson's cell phone was seized pending a future search warrant (item CLB-13).

Day #4: 03/06/2011

At 00:45 hours, Detective Lopez and I made contact with Nelson in our jail who agreed to answer questions pertaining to the case. Nelson was handcuffed and escorted to the third floor interview room. Nelson was read his adult Miranda warnings which he said he understood as given and voluntarily waived. This interview was recorded by both audio and video means. The interview was later downloaded onto a DVD and booked in as evidence (item CLB-09)

Nelson initially denied being involved in the offense. Nelson started by walking us through his last couple of days so as to establish a timeline. Nelson claimed to have been a club in Downtown Dallas Friday night with his girlfriend, Tracy Nixon, until they left for her house in Forney, TX at around 02:00 hours Saturday morning. He stayed there until 11:00 hours when he returned to his mother's apartment. Nelson claimed to have been at his mother's apartment all day Friday.

Continuing backward, Nelson claimed he spent Thursday night and early Friday morning with his friends, "AG" and "Twist". Nelson said he met up with "AG" at around 16:00 hours at a car was near SH360 and Brown Blvd. "AG" picked him up in his girlfriend's red PT Cruiser. Prior to this meeting, Nelson said he was at his mother's apartment.

Nelson and "AG" drove around looking for "XO's" (i.e. ecstasy pills). When they finally located some pills, they drove over to "Twist's" house in south Arlington at around 20:00 hours. They stayed there until around 01:00 hours when they drove to another person's apartment off of SH360. Nelson spent the night at this unknown person's apartment. Nelson denied going any other places.

I confronted Nelson on his jewelry which he stated he had owned for some time. Nelson finally admitted to buying the jewelry at the Park's Mall in Arlington on Thursday. Nelson admitted to using the stolen credit cards, but said he had found them on the side of the road near the Kroger's Grocery store on Brown. Nelson said after finding them, he, "AG" and "Twist", went to the Park's Mall where he purchased some jewelry, shoes, and clothing. He believed they arrived at the Mall at around 15:00 hours in "Twist's" truck. Nelson admitted to signing the receipts for all of his transactions. Nelson said "Twist" also had a credit card, but he didn't know if "Twist" used it or not. Nelson claimed he threw the credit card out of the window of "Twist's" truck while being driven home from the mall. Nelson believed the card was a Discover card with a red flag design. He later added there was a second QuickTrip credit card found with this Discover card. Nelson denied using this second card.

Nelson further denied stopping by the Chevron gas station and making a purchase with the Discover card. We confronted Nelson on this and he admitted to driving to the gas station. However he would not give us a description of the car he was driving other than it wasn't his car. When pressed further on the car, Nelson interjected that he didn't kill anyone. He told us he was given the car to use by someone he didn't want to identify.

Nelson became briefly defensive on the issue to which we confronted him with Springs account of the offense as well as our locating part of his belt inside the crime scene. Nelson continued stating he wasn't at the church at the time of the offense before finally relenting. Nelson changed his story to reflect a more accurate series of events. Nelson said he was contacted by Springs and asked if he would go with Springs to the church and act as a lookout while Springs robbed the church. Nelson said Springs was armed with a real looking black BB gun. Nelson agreed to this and the two walked from his mother's apartment to the church.

Once there, Nelson stayed near the large bushes directly in front of the church so as to act as the lookout while Springs went to the front door of the church and waived at someone inside. The person inside opened the front door and allowed Springs in. Nelson said he last saw Springs and this person walking toward away from the front

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door. Nelson knew Springs to be committing the robbery during this time and decided to walk around the front sidewalk of the church so as to not look too suspicious.

Approximately 45 minutes later, Springs re-appeared at the front door and waived Nelson inside the church. Nelson described the layout of the church accurately including the location of both Elliott and Dobson's offices. Nelson said he was led by Springs to Dobson's office where he saw the two bodies. Nelson thought both were dead and said he could just "smell it". Nelson asked Springs what happened to which Springs replied, "I took care of it." Nelson knew this to mean that Springs had killed the two people.

Nelson continued to say he never entered into the pastor's office. When told we found part of his belt on the pastor's body, Nelson changes his story to state he entered the office and stood near both bodies. Nelson continued to say he never touched anything inside the inner office.

After knowing that a robbery was going to occur, and seeing that a death had occurred, Nelson said he still voluntarily accepted the stolen credit cards as compensation for acting as a lookout. Springs also selected various pieces of property including a cell phone which he placed in a black backpack. They then collected the car keys to both vehicles outside (i.e. Elliott's and Dobson's). He and Springs walked outside with the intention to steal both cars, but soon saw a worker across the street and became scared. Nelson said they were afraid if they took both cars at one time that this would look suspicious. They therefore elected to just steal Elliott's vehicle with the intentions of coming back later for Dobson's.

Nelson said they drove back to his mother's apartment where "AG" meets with the mother of his child. He and she leave together leaving Nelson with the car. Nelson is later contacted by Springs and agrees to meet back up with Springs at the Chevron gas station off of SH360/Mayfield. Springs is dropped off by his baby's mother in the red PT Cruiser. Nelson said they came back to the church for the car, but saw a lady in the parking lot wearing a bright pink shirt. They felt they could not steal the car without being seen and decided to abandon the second theft. They instead drove back to Mayfield and stop somewhere to purchase some ecstasy pills.

We continued to speak at length about the incident, but Nelson would not provide us with any other details. I asked Nelson for consent to obtain a sample of his DNA, but was refused. I then explained to Nelson even though he didn't believe so, he had admitted to knowingly participating in a capital murder. Nelson disagreed with me before ending the interview. Nelson was escorted back to the jail where he was released back to jail staff without incident.

Investigation reveals the suspects (i.e. Nelson and Springs) did while in the course of committing robbery intentionally cause the death of an individual (i.e. Dobson) through suffocation. Investigation further reveals that the suspects (i.e. Nelson and Springs) did while in the course of committing robbery intentionally attempted to cause the death of a second individual (i.e. Elliott) through a severe beating.

03/7/2011

I contacted Brad Elliott in order to check on his mother's welfare. Brad told me she was doing better, but she was still in bad shape. I requested an interview with Judy so as to clarify how many suspects participated in the offense. Brad told me he didn't know if his mother was up to answering questions at this time, but told me he would speak with her personally about the issue in order to feel her out.

Brad called me back later and told me he asked his mother if there was more than one person who committed this crime against her and Dobson. Judy shook her head distinctly "yes". Brad said this was witnesses by medical staff. Brad said he couldn't ask her any in depth questions due to her jaw being wired shut, but felt confident this was her true feeling on the matter. A more in depth interview will occur upon Judy Elliott's medical condition improving.

I learned that Officer Freeland recovered Dobson's stolen laptop computer. Officer Freeland was approached by an individual identified as Zorie Johnson B/M [redacted]81. Johnson said he was at the Tire King located at 1217 E. Abram St. at approximately 13:48 hours when he was approached by another black male who offered to sell him a laptop computer for $200. Johnson asked this male if the computer was "hot" (i.e. stolen) and was told it wasn't. The male walked back to a white Mitsubishi Galant and retrieved the computer contained in a black bag. The male turned the computer on for Johnson to show it worked. Johnson ultimately bought the computer, but forgot

to write down the password for the computer.

Johnson later looked at some paperwork in the bag and noted the name of Clinton Dobson. Johnson assumed this was the name of the person who sold him the computer. As Johnson could not re-unlock the computer, he took it to a computer store in order to have its memory wiped clean. On Sunday morning, Johnson woke up and heard Dobson's name on the morning news. Johnson said he immediately gathered the computer and brought it in so as to avoid any connection to the murder.

Officer Freeland went to the Tire King in order to view surveillance video. Officer Freeland observed the incident on video which slightly contradicted Johnson's statement in that the other black male never approached anyone other than Johnson. She was unable to download the video at that time. Officer Freeland spoke with the owner of the Tire King, Arshad Aljabri W/M [redacted]77 about the incident. Aljabri said he remembered Johnson being at his store and further remembered Johnson being approached by another black male with a black bag. Aljabri was told by Johnson that the other male "is with me". Aljabri said he saw this other male driving a white Mitsubishi.

At 12:15 hours, I drove to the Chevron gas station located on Mayfield/SH 360. I spoke with the on duty clerk, Mary, who advised the manager who had access to the surveillance video would not be back until tomorrow morning.

At 13:10 hours, Detective Lopez and I drove to JPS Hospital in order to contact John Elliott. John told us he was at work until around 14:00 hours before he left for their home. John called Judy's cell phone as well as the church's phone line several times without receiving an answer between 14:00 - 15:00 hours. John thought this as odd, but believed Judy may be busy and couldn't get to the phone. Soon afterward, John received a phone call from Turner. Turner told John, Laura Dobson had also been calling the church and Clinton without receiving an answer.

Because no one had been able to reach either Clinton or Judy, John decided to go up to the church. He arrived at the church a little bit after 16:00 hours and found the church to be locked up and the lights turned off. John entered the church through a side door that has a pass code lock. Once inside, he found the door to Judy and Clinton's offices locked. John went over to the lock box that contains the master key and entered in the pass code thus allowing him access to the master key. John then unlocked the doors and entered into Clinton's office.

John heard a voice he didn't recognize say something to the affect, "Whoever that is, please help me." John looked over and saw a male body in the corner of the office with a plastic bag wrapped around his face and head. John immediately exited the church and called 911. Several minutes later, a female Officer arrived at the church. John escorted this officer back into the Pastor's office. The female Officer walked over to Dobson's body and removed the plastic bag. John was able to identify him at that time. John believed him to be dead. The female Officer then walked over to the second person. Johnson looked at this person, but didn't recognize her at first. He looked closer at her clothing before finally recognizing this person as his wife, Judy.

John said other Officers arrived soon thereafter, but he stayed with his wife all the way to JPS Hospital. John was emotional during this interview. I requested to meet with John at a later date in order to obtain an official statement from him at that time. I also requested he keep me informed of his wife's condition.

After this meeting, I contacted the Tarrant County DA's Office who agreed to meet with me for a consultation in regards to what charges to file against both Nelson and Springs. At the conclusion of this meeting, it was decided to charge both for their parts in the capital murder of Clinton Dobson as well as the criminal attempt capital murder of Judy Elliott.

I returned to the Main Police Station in order to re-interview Springs with the assistance of Detective Lopez. We again met with Springs at the City of Arlington Jail. Springs agreed to speak with us for a second time and was again handcuffed. Springs was escorted to the third floor interview room. Springs was re-read his adult Miranda warnings which he again verbally stated he understood as read to him and voluntarily waived in order to be interviewed. This second interview was also recorded by both video and audio means. It was later downloaded onto a DVD and booked in as evidence (item CLB-10).

We started the interview by again establishing Springs claimed to have been with the mother of his child, Kelsey Davis, in Venus, TX during the time of the offense. Springs again said the first time he came to Arlington on the

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third was at around 14:00 hours when he met up with "Romeo" at the gas station. Springs said they did not make any other stops in Arlington. I questioned Springs about possibly stopping at the Tire King, to which he responded that was "Romeo". Springs said he was called by "Romeo" and told by "Romeo" he was selling a laptop computer.

Springs continued to say he wasn't at the church and he had nothing to do with the pastor's death. During this second interview, Detective Lopez observed a large bruise on Springs inner left arm at or near his lower biceps/elbow. Springs said he got this bruise from lying on his arm while in the jail. I looked at the rest of Springs arms and hands and noticed he had extensive bruising and swelling on his knuckles of both hands. Springs said he obtained these bruises from beating his fists together. Springs later explained this as some sort of nervous fidget.

The only other thing Springs added was that a day or two after the incident, he drove by the church on his way to his grandmother's home at Davis/Division. As this is not close to the church, I questioned this statement. Springs said he was with his female friend, Kelsey, and he couldn't recall exactly why they drove by the church other than it was on his way. I explained to Springs this would not have been on the route to his grandmother's house. Springs did not have an explanation for his reasoning. Springs denied he did this drive by with "Romeo" after the murder and further denied his intentions were to steal the Ford Explorer.

Soon after this statement, Springs ended the interview. I contacted CSI Wiseman and requested her to photograph Springs' injuries. After the photos were taken, Springs was escorted again to the jail and released back to jail staff without incident. The additional charges were added to Springs while still in our custody.

During this interview, I had Detective Wade go back to the Chevron gas station in order to meet with the manager and obtain a copy of their surveillance video. Detective Wade met with me after my interview with Springs and provided me a copy of the video in a VHS format. I viewed this video and observed Nelson inside the store purchasing a drink and a cigar. The video was later changed into a digital format and stills were taken of Nelson. Detective Wade also obtained the surveillance video from the neighboring Whataburger, but nothing was observed on this video.

03/08/2011

At 10:05 hours, I was notified by the front desk Officer that a Kelsey Duffer wanted to speak to me about this case and was waiting in the front lobby of the Main Police Station. I went to the lobby and made contact with Duffer. Duffer was escorted to the third floor interview room where we were met by Detective Wade. Duffer confirmed she is the mother of Springs' child. Duffer said she was coming forward on her own accord because she felt we needed to know Springs did not commit this offense. Duffer said that Springs came out to her home in Venus on Wednesday evening where the two celebrated her birthday. Springs spent the night with her and the two slept in the next morning.

Duffer said at around 11:00 hours, Springs received a phone call from Nelson which he placed on speaker. Duffer claimed she heard Nelson ask Springs if he could help him "hit a lick". Springs told Nelson he could not because he was in Venus. The two talked for a little while longer before Springs ended the conversation. Duffer said two of her friends, Darion McLean and Robin Harkins showed up at her home at around noon. Duffer said these two friends could also tell us Springs was at her home during that time and not in Arlington. Duffer said at approximately 13:30-13:40 hours she and Springs started back to Arlington with her two friends in order to drop him back off. During this drive, Springs received a second call from Nelson who asked Springs if he wanted to hang out. Springs said he did and the two agreed to meet at the Chevron gas station on SH360 and Mayfield. Duffer said this was the last time she saw Springs.

Duffer blamed Cotter for getting Springs caught up in this offense. However Duffer couldn't give a reasonable explanation as to why Cotter would be trying to get Springs in trouble if he wasn't involved. At the end of our conversation, I explained to Duffer I believed Springs was involved in this offense and further believed she may be attempting to cover up his behavior by supplying him an alibi. Duffer remained adamant that she was telling the truth. I had Duffer swear and affirm to her verbal statement. At the conclusion of our interview, Duffer was escorted back to the front lobby. The interview, which was recorded by both video and audio means, was later downloaded onto a DVD and later booked in as evidence (item CLB-11).

At 11:05 hours, I called Ronika at the phone number provided to me for her by Springs. This phone call was audio recorded. Ronika further identified herself by providing a last name of Austin. Ronika was hesitant to speak with me over the phone about the incident, but did lend she knew Springs. She further added she did trade Springs a black G-1 cell phone for an iPhone. Ronika agreed to meet with me in person in order to give me the iPhone, view a photo lineup of Springs, as well as to provide me with a more in depth statement. We agreed to meet at Northlake College in Irving prior to her going to work.

I then prepared three evidentiary search warrants: one for Nelson's DNA, one for Nelson's cell phone, and one for Springs' two phones. Once these three warrants were written, I presented them before the Honorable Municipal Judge Smith. Judge Smith reviewed the three warrants and issued them warrant numbers: 01-1106-SW (Nelson's DNA), 01-1105-SW (Nelson's cell phone), and 01-1104-SW (Springs' cell phones).

03/09/2011

At 08:13 hours, I met with Detective T. Eby #1357 of our Economic Crimes Unit. I explained to Detective Eby my search warrants and provided him with the three cell phones in which I needed forensic examinations completed. Detective Eby took custody of the phones.

At 11:00 hours, I received a phone call from Ronika requesting I meet with her away from her college in order to view the lineup. We agreed to meet at the Jack in the Box located across from the Main Police Station. At 11:45 hours I met with Ronika, who was identified by pictured TXDL. Ronika handed me a black iPhone which she said was the same iPhone she traded for with Springs. The phone was locked and indicated the SIM card was missing. I then administered the lineup of Springs to Ronika myself as there were no blind administrators available. Ronika was read the photo lineup instructions from off of the photo lineup instruction form which she stated she understood. Ronika viewed the photo lineup and immediately identified Springs as the person she received the iPhone from. Ronika completed a confidence statement for her selection. This process was audio recorded.

When I returned to my office, I contacted Laura Dobson and requested the security code to Clinton's iPhone. Laura provided it to me. Using this code, I was able to unlock the phone and described the apps/pictures currently saved on the phone. Laura said this sounded consistent with what she remembered being on the phone. With Laura's permission, I viewed the recent phone calls, text messages, and e-mails on the phone. I did not notice any new usages for the phone. I then powered off the phone and made arrangements for Laura to meet with me in order for her to recover the phone (item CLB-15).

I went back down to the City of Arlington Jail to meet with Nelson in order to execute the DNA search warrant. I met with Nelson in his cell and explained to him the warrant and provided him with a copy. While using gloves, I collected two sets of buccal swabs which were immediately placed in an evidence envelope for safekeeping until they could be booked in as evidence (item CLB-06).

At 15:00 hours, Detective Lopez and I drove to the Tire King and met with the owner Aljabri. Aljabri provided us with a similar statement as previously provided to Officer Freeland. Aljabri allowed us access to his surveillance video system. I viewed this video and first observed the white Mitsubishi Galant pull onto the property at 14:31 hours. At 14:38 hours I observed someone talking to Johnson on the fringe of the camera's viewing area. At 14:46 hours, Johnson is seen placing a black bag into his car. A minute later, the Galant is seen pulling out of the parking lot. This video was downloaded onto a CD and later booked in as evidence (item CLB-12).

At 15:45 hours, Detective Lopez and I arrived at 808 Tharpe St. #121 at the Bel Aire Apartments in order to speak with Samuel McIntosh. After knocking multiple times, we made contact with McIntosh who allowed us entry into his apartment. McIntosh confirmed his nickname of "Sun Dun". McIntosh told us he remembered "Romeo", Springs, Cotter, and Cobb over at his apartment on the night of the offense, but denied that they watched the news. McIntosh also denied seeing Springs with an iPhone. McIntosh said he was later told that Springs may have had a stolen phone which came out of the church. McIntosh told Springs if that was true he needed to get rid of it because it wasn't worth getting caught with the phone. McIntosh denied having any conversations about the offense with Springs.

McIntosh did admit to knowing Springs and "Romeo" were out trying to rob people several days prior to the

Narrative

murder, but didn't believe they actually robbed anyone. McIntosh didn't believe Springs had anything to do with the murder because he said Springs was "soft". However, McIntosh agreed it was unlikely that Springs would have been given proceeds of the offense if he didn't have any direct involvement in the offense. McIntosh denied being involved in the offense or its cover up.

03-10-2011

At 08:00 hours, Detective Eby informed me he was finished with his examination. I took custody of the suspect's cell phones from Detective Eby. He also furnished me with a DVD that contained the results from his examination. This DVD was later booked in as evidence (item CLB-14).

I reviewed the results and noted the suspects had been in contact with one another on the day of the offense.

I received notice that all charges pertaining to this investigation were accepted on both Springs and Nelson by the Tarrant County DA's Office.

I met with John Elliott at the Main Police Station. John asked me if it were possible to have his wife's car keys and cell phone released to him. I pulled the items out of property and released them to him. John signed the appropriate property release forms documenting their dispositions.

03/11/2011

I pulled all jail phone calls for both Springs and Nelson for their time at the Arlington City Jail. These phone calls were later downloaded onto two CDs.

03/21/2011

I received a copy of Cotter's phone results from her consent to search form via Metro PCS. I reviewed these results which corroborated Cotter's statement as well as the time frame in which she said they occurred.

03/25/2011

I prepared court orders for both Nelson's and Springs' cell site information including all text messages (with content if possible), phone calls, and all billing information. Copies of these orders were forwarded to the Tarrant County DA's Office for processing.

I also received a copy of Dobson's autopsy.

04/04/2011

I still had not received a copy of the Park's Mall at Arlington surveillance video. I contacted Security Officer Powell at the mall who provided me a copy downloaded onto a CD. Security Officer Powell told me due to the system's settings he wasn't able to capture the suspects too many times inside the mall. He said this is due to the system's automated rotating pan and shoot feature. Security Officer Powell did capture Nelson walking through the lower level center court of the mall before taking the escalator upstairs into the food court. No other suspects were seen or recorded by Powell.

At this time, this will conclude this portion of my narrative. The narrative may continue with any future follow up investigations that occur or when I receive the results for the court orders on Springs' and Nelson's cell phones.

This case can be cleared by adult arrest x2.

Case Clearance: AA x2.