No. 32021A-422

In the 422nd Judicial District Court
of Kaufman County, Texas

Ex parte
Eric Lyle Williams

Court's Amended Findings of Fact and Conclusions of Law

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Legend for Record Citations

Trial Record: "RR" refers to the reporter's record of the trial. "DX" refers to the defense exhibits. "SX" refers to the State's exhibits. "CX" refers to the Court's exhibits. SX-MNT refers to the State's exhibits in the motion for new trial proceeding. DX-MNT refers to the defense exhibits in the motion for new trial proceeding. "CR" refers to the clerk's record.

Writ Record: "WRR" refers to the reporter's record of the hearing. "AX" refers to Applicant's exhibits. "SWX" refers to the State's exhibits. "CWX" refers to the Court's exhibits. "App." refers to the writ application.

After considering Applicant's Objections to the Trial Court's Findings of Fact and Conclusions of Law filed April 27, 2020, the court amends the findings of fact and conclusions of law adopted by the prior order.

Accordingly, having reviewed (1) the application for writ of habeas corpus, (2) the State's answer, (3) official court documents and records from the trial, direct appeal, and these writ proceedings, (4) evidence presented at the hearing conducted the week of August 12, 2019, (5) evidence filed after the hearing with approval of the court, (6) arguments presented by the parties, and (7) applicant's objections to the trial court's findings of fact and conclusions of law, the court makes the following findings of fact and conclusions of law.

Background Facts

Early Saturday morning, March 30, 2013, Applicant shot and killed Kaufman County Criminal District Attorney Mike McLelland and his wife, Cynthia, in their home.

Friends discovered the bodies later that day. (44 RR 84-89). The murder scene was confined to the entryway, living room, and a hallway. (44 RR 118-19, 123-24). Cynthia was found in the living room; Mike was found in the hallway outside the bathroom. (44 RR 88, 119, 125-26). Cynthia had been shot between 5-8 times, suffering wounds to her pelvis, chest, arm, and head. The shot to her head entered the top of her skull and exited her chin. (44 RR 168-88). Mike had been shot 16 times. He suffered wounds to his chest, abdomen, arm, buttock, hip, and leg. (44 RR 194-206). Many of Mike's wounds were consistent with being shot while he was lying down. (44 RR 208-09).

Although numerous projectiles and casings were found at the scene and several additional projectiles were recovered in the autopsies, it appeared only one gun was used in the murders. (45 RR 126-28, 137-39). A firearm and tool mark examiner determined that all of the casings found at the scene were fired from the same gun and that all of the projectiles suitable for comparison were fired from the same gun. (45 RR 125-29; SX 285-86, 289, 291). The casings were .223 caliber and manufactured by Lake City. (44 RR 126-27; 45 RR 133). In addition, the projectiles were consistent with having been loaded into a .223 caliber cartridge. (SX 285). This caliber bullet is most commonly fired from an AR-15 or an M16 firearm. (45 RR 96).

No evidence indicated forced entry, and nothing was taken. (44 RR 120). By all appearances, the couple was awakened and taken unaware by the killer. Although Mike owned numerous firearms, all were found still stored, indicating he had no time to reach them. (44 RR 136-37). Mike and Cynthia appeared dressed for bed, she in her nightgown and he in sweatpants and no shirt. (44 RR 119-20). The security system detected no motion in the house from 11:14 pm the night before until 6:40 am on Saturday, March 30 when the screen door and front door opened and closed, and there was movement inside. Two minutes later, the screen door and front door opened and closed again. No other movement occurred in the house until the bodies were discovered that evening. (45 RR 10-12, 20-25).

McLelland had successfully prosecuted Applicant the year before for a felony offense. At the time of the offense, Applicant was a justice of the peace in Kaufman County. As a result of his conviction, Applicant lost his bench, his bar license, and his position in the Texas State Guard. (44 RR 73-76, 235-36).

In light of these events, the sheriff sent a deputy to locate and interview Applicant. (45 RR 155-56). Just hours after the bodies were discovered, a deputy reached Applicant by phone and asked where he was. Applicant said he was with his wife "in the Quinlan area," which is near Lake Tawakoni. Applicant agreed to meet the deputy at a Kaufman restaurant, and he arrived with his wife, Kim, around 10:30 pm. (45 RR 155-58). Applicant told the deputy he had been at his in-laws' home earlier that day and had not fired a weapon since his prior arrest. (45 RR 159-60). Applicant consented to gunshot residue (GSR) handwipings, and he and Kim agreed to an examination of their cellphones' contents. (45 RR 159, 161). GSR particles were detected on Applicant's handwipings, indicating he had fired a gun, been near a gun when it was fired, or touched a surface that had GSR on it. (46 RR 13, 22; SX 300).

Around 10:00 pm the next day, the Kaufman Sheriff's Office received an anonymous Crime Stoppers tip about the murders. It stated, "Do we have your full attention now. Only a response from Judge Bruce Woods[1] will be answered. You have 48 hours." Believing the killer may have sent the tip, a sheriff's deputy responded,

[1] At the time, Judge Woods served as County Judge of Kaufman County.

"You have our attention. How can the county judge contact you?" The "tipster" responded,

> Your act of good faith will result in no other attacks this week. Judge Woods must offer a resignation of one of the 4 main judges in Kaufman – district or county court. List stress or family concerns, or whatever else sounds deniable. The media will understand. My superiors will see this as a first step to ending our actions. Do not report any details of this arrangement. You have until Friday @ 4pm. We are not unreasonable, but we will not be stopped.

(45 RR 183-87; SX 293a).

Again, the deputy responded. This time, he asked for information known only to the killer but received no reply. Attempts to trace the IP address of the tipster were unsuccessful, and the tipster never logged back into the Crime Stoppers system. (45 RR 188-89; SX 293a).

Over a week after the murders, Ranger Dewayne Dockery and Chief Deputy Rodney Evans contacted Applicant at his in-laws' home, and Applicant agreed to speak to them. During the interview, Applicant denied conducting any internet searches related to McLelland. Dockery and Evans repeatedly asked Applicant, a known firearms enthusiast, if he still had any guns; each time, Applicant denied that he did. Applicant said he had sold all but one – a Desert Eagle .44 automatic pistol – after his felony conviction. Applicant consented to a search of his home for firearms, during which the Desert Eagle pistol was recovered. (44 RR 237; 45 RR 191-96).

The next day, authorities searched Applicant's house. (45 RR 58-59). They found Applicant's black Ford Explorer Sport Trac in the driveway. (45 RR 61-62). Inside the vehicle, they found a yellow sticky note with the address for the Angry Dog, a Dallas restaurant, written on it. (45 RR 33; 46 RR 28). In a file cabinet in the garage, they found the title to a Crown Victoria along with a cell phone. The title had been transferred to a "Richard Greene." (45 RR 66-68). Inside the house were several computers, over $6000 in cash, two lock-pick kits, and two handwritten notes. On one note was a LexisNexis ID number and password. On the other was the web address for TipSubmit and several series of numbers. (45 RR 62-66). The numbers corresponded to the unique identifying numbers and passwords assigned to the March 31 and April 1, 2013 anonymous Crime Stoppers tips claiming responsibility for the

murders. (45 RR 179-87; SX 98, 293). The identifying numbers and passwords were provided to the tipster by the tip software. (45 RR 180-81).

In an initial search of the computers found in the home, police found a TOR browser, which prevents recipients from tracing a message back to the sender. (46 RR 93-94). The TOR browser on Applicant's computer was last accessed minutes before the Kaufman County Sheriff's Office received the April 1, 2013 Crime Stoppers tip. (46 RR 90-92, 94-95). The computer's internet browser history showed entries for Lexis.com, Kaufman County Crime Stoppers, Tips Online, and TipSoft. (46 RR 95-96). It also showed searches for "2004 Ford Crown Victoria trunk release" and how to make an anonymous tip. (46 RR 95-98, 101). Subsequent forensic analysis of the computers recovered an email sent by an "Alex Knight" on February 13, 2013 regarding a Crown Victoria for sale on Craigslist. (46 RR 108-10; SX 315). It also recovered a PayPal receipt emailed to Applicant for the purchase of shoe covers on January 14, 2013. (46 RR 111; SX 316).

When word of the search of Applicant's house got out, two men who served in the Texas State Guard (TSG) with Applicant, Rodger Williams[2] and Scott Hunt, contacted the police. Hunt told police Applicant contacted him in December 2012, asking him to meet for lunch. Applicant told Scott he had a favor to ask. Hunt thought Applicant's request was unusual because they were not friends and hadn't seen each other in over a year but he agreed to meet in January at the Angry Dog restaurant. (45 RR 29-33; SX 280). During lunch, Applicant behaved oddly. The conversation was awkward and forced, and Applicant told Hunt he was "financially at the end of his rope." (45 RR 34, 39). At one point, Applicant asked Hunt, who was considered to be a firearms expert, what he knew about armor piercing ammunition. (45 RR 36). He also asked Hunt to help him "get rid of an AR upper." Initially, Hunt thought Applicant wished to sell an upper, but then Applicant asked, "If I gave it to you, would you just . . . make sure it never sees the light of day?" Disturbed by the question, Hunt changed the topic without answering Applicant's. (45 RR 37-39). Concerned Applicant might be suicidal, Hunt told Applicant as they parted not to do anything stupid. Then, before leaving the restaurant parking lot, Hunt contacted Rodger (aka Barton) Williams, who was his superior in the Texas State Guard. (45 RR 40-41). The two met the next day, and Hunt shared his concerns about Applicant. Hunt contacted

[2] Williams is not related to Applicant. (44 RR 230).

Williams again when he learned authorities were searching Applicant's home, and the two men decided to come forward together. (45 RR 41-42).

Williams told police, in late December 2012, he rented a storage unit for Applicant. Applicant selected the facility, Gibson's Storage Units in Seagoville, and he gave Williams cash to cover the rental fee for a year. Williams rented the unit in his own name, but the contract gave Applicant access to the unit and Williams gave Applicant the passcode. Applicant told Williams he needed the unit to store some of his brother-in-law's belongings and did not want to rent it in his own name. Given his conviction, Applicant believed authorities could search anything tied to him; he claimed he did not want to subject his in-laws to such scrutiny. Williams offered to help Applicant move the belongings into the unit, but Applicant declined. Williams never accessed the unit himself. (44 RR 237-43; SX 274-279).

The day after Williams and Hunt came forward, authorities searched and processed the unit for 10 hours. (45 RR 70-71). Inside, they found a Ford Crown Victoria, a police surplus vehicle. The plates had been removed and were found on the floorboard. (45 RR 72, 84-85; SX 126-27, 132). Stored along the walls of the unit were knives, magazines, .223 caliber ammunition manufactured by Lake City, gun cases, police tactical gear, a sniper's mat, law enforcement badges and patches, ballistic vests, a crossbow, a homemade incendiary device, and the box of shoe covers Applicant had purchased online. (45 RR 74-77, 79-83; SX 105-06, 122-24, 135-40, 154-55). Applicant's name was found on many items in the unit, including a footlocker. Authorities found no items belonging to Rodger Williams or anyone else. (45 RR 80-81, 84; SX 106, 150, 153).

The unit also contained at least 30 firearms, one with Applicant's fingerprint on it. (45 RR 75; 46 RR 48-50; SX 304, 306-07). Among the firearms were two AR lowers without a corresponding upper.[3] (45 RR 87-88, 105, 109-11; SX 110, 113). One of these lowers was found in a blue bag; the lower was attached to a sling strap. The bag also contained a Velcro "SHERIFF" patch designed to be worn on a ballistic vest. (45 RR 77-80; SX 102, 145-46, 148-49). Additional tactical gear was found in a black 511-brand bag. In the bottom of that bag, agents found one live .223 caliber Lake City

[3] AR-15's are comprised of two parts – an upper and a lower. The upper is the portion from which the projectile is fired and, thus, leaves identifiable markings. The lower bears the weapon's serial number. The two parts are readily detachable from each other. (45 RR 99-100, 106).

round. (45 RR 77-78; SX 102, 140). A firearm and tool mark examiner found markings on the live round consistent with it having been chambered and then ejected without being fired. Those markings matched the markings on the 20 casings found at the McLelland murder scene, indicating that the round had once been chambered in the murder weapon. (45 RR 129-30; SX 287). The markings on the casings from the scene and the live round also matched those on .223 caliber casings found at an isolated underpass on highway US 175, just north of Kaufman. (44 RR 153; 45 RR 137-38; SX 221-34, 236, 290). Someone had fired multiple .223, 5.7, and 9-millimeter caliber rounds into the underpass. (44 RR 149-56; SX 189-200). The firearm and tool mark examiner determined the 5.7 caliber casings found at the underpass were fired from one of the AR-15's recovered from the storage unit. (45 RR 137-38; SX 290).

Authorities traced the Crown Victoria back to its prior owner, Edward Cole. (44 RR 212-14). Cole identified Applicant as the "Richard Greene" he sold the car to in February 2013. (44 RR 222). According to Cole, Applicant arrived in a black SUV like a Ford Sport Trac, did not take much of a test drive, and paid in cash. (44 RR 215-16). Cole produced an email exchange between himself and "Richard Greene" about the car. (44 RR 214-15, 219-20; SX 63). Cole also produced the envelope Applicant used to mail him back the garage door opener inadvertently left in the car. (44 RR 217-18; SX 64). The postage meter stamp on the envelope was traced to the meter registered to Applicant. (45 RR 172-74; SX 64b). Also, the phone number from which Applicant called Cole belonged to the cell phone found in the cabinet in his garage together with the Crown Victoria's title and manual. (46 RR 111-13; SX 217). And Applicant's prints were found inside the vehicle. (46 RR 29, 43-44; SX 302-303).

Security system records for Gibson's Storage showed unit 18 – the storage unit Rodger Williams rented for Applicant – had been accessed just before and right after the McLellands were murdered.[4] Surveillance footage from a fast-food restaurant adjacent to Gibson's showed what appeared to be a black Ford Sport Trac entering Gibson's at 6:00 am on the morning of the murders. Then, 11 minutes later, what appeared to be a white Crown Victoria or Mercury Grand Prix exited Gibson's. Both vehicles utilized the passcode for unit 18. In addition, surveillance footage from four area businesses showed what appeared to be a white Crown Victoria or Mercury

[4] Each unit had a unique passcode. To access the facility, one had to provide that code upon entry and exit. Also, if any unit other than the one corresponding to the passcode was accessed, an alarm went off. (44 RR 260-61).

Grand Prix traveling in the direction of the McLelland home. The fast-food restaurant's surveillance footage showed what appeared to be the same white vehicle returning at 6:40 am. Then, 17 minutes later, what appeared to be a black Sport Trac exited Gibson's. (44 RR 272; 46 RR 125-38; SX 65b, 272-273, 318-322).

Suspecting Applicant and his wife, Kim, had disposed of evidence in Lake Tawakoni on the day of the murders, DPS divers spent weeks searching an area off of Two Mile Bridge. The weapon used to murder the McLellands wasn't recovered though one diver found a bag containing items later connected to the McLellands' murders. Some were connected to Applicant.[5] Among the items was a cellphone appearing to have been intentionally broken. (45 RR 128-29, 158; 46 RR 61-67; SX 288, 308-310).

State's Punishment Evidence

On the morning of January 31, 2013, about two months before the McLelland murders, Applicant shot and killed Kaufman County Assistant District Attorney Mark Hasse on the sidewalk beside the employee parking lot of the Kaufman County Courthouse. Hasse and McLelland successfully prosecuted Applicant the year before for burglary and theft by a public servant. While serving as a justice of the peace, Applicant entered the sub-courthouse after hours and took three computer monitors from the IT department. (51 RR 229-230; 52 RR 119-21; 54 RR 19-24; SX 324).

On the morning of the murder, Hasse parked his burgundy Ford pickup truck in his usual spot. (48 RR 43). He was walking toward the courthouse when Applicant confronted him and shot him multiple times. (48 RR 57, 60-62, 85-87). Hasse suffered wounds to the head, arms, chest, and back. The wounds to his head and chest were fatal. (48 RR 145-153; SX 51-61, 332, 529).

Three people witnessed Hasse's murder: Patricia Luna – a county mail clerk who was working out in the county fitness room beside the lot; Lenda Bush – an attorney and former police officer driving toward the parking lot; and Martin Cerda – a mechanic working at Gomez Paint and Body across the street from the lot. (48 RR 35-36, 56-57, 83).

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[5] Some of the recovered items were related to the Hasse murder and, thus, were not specifically identified or admitted until the punishment phase.

Luna heard a weird noise, turned off her workout music, and peered through the blinds of the fitness room. She saw a man wearing a mask with holes for the eyes, a bulletproof vest, and army boots. The masked man fired a gun into the air. Then he walked to the passenger side of a light-colored car parked on the street, and the car slowly drove away. (48 RR 37-42).

Bush witnessed two men in a confrontation on the sidewalk as she drove toward the lot. A larger man approached Hasse as he walked toward the courthouse. The larger man wore a big black coat and a hood covering his head and face. The two men appeared to be speaking and started shoving each other. Then the larger man shot Hasse. Hasse straightened up, and the shoving match resumed until the larger man put his gun to Hasse's neck and repeatedly fired downward. Bush counted three shots but she heard more. She saw the shooter run to a parked car. She turned her car in front of the shooter's car hoping to get the license plate number, but there was no front plate. She described the car as silver, four-door, and medium sized; she could not identify the model, but she knew it was not a Taurus. The car drove off and she followed it for a couple of blocks. She called 911 and returned to the scene to help Hasse. When she arrived, Hasse was unconscious and never spoke to her. Although Bush knew both Hasse and Applicant, she recognized neither of them. Also, she did not think Applicant was the shooter because of his size, although she later learned he had put on weight. (48 RR 54-72).

Cerda was working on a car with the garage's door open when he heard a gunshot. He looked out the door and saw Hasse in an altercation with an armed man. Cerda recognized Hasse; he regularly saw him walk by in the morning on his way to work. He did not recognize the armed man and saw him only from behind. He described him as tall and wide, wearing a jacket with a hood, and holding a pistol by his side. The armed man grabbed Hasse by the jacket. Hasse tried to push the gun away and said, "I'm sorry, I'm sorry, I'm sorry." Then the armed man pointed his gun at Hasse's chest and fired. Hasse fell to the ground, and the armed man moved closer, pointed his pistol down toward Hasse, and fired several more times. He fired so many shots that he emptied one pistol, pulled out another, and began firing again. As he calmly walked away from the scene, the armed man fired two or three more times into the air. To Cerda, the shooting looked like a vendetta killing; both men appeared to know each other and the shooting seemed personal. (48 RR 82-94).

Kaufman Police Officer Jason Stastny, who was investigating a burglary a few blocks from the courthouse that morning, heard the gunfire. He heard five shots, and then he heard three more. The shots sounded slow and methodical. Stastny and his partner drove toward the sound of the gunfire and found Bush performing CPR on Hasse on the sidewalk beside the lot. Stastny saw the gunshot wound to Hasse's head, but he was still breathing. Stastny took over CPR until the EMTs arrived. Hasse took his last breath as the EMTs loaded him into the ambulance. (48 RR 95-108; SX 528). He was pronounced dead in the hospital emergency room at 9:08 am. (48 RR 113, 118-120).

Hasse arrived at the hospital still wearing his coat. Underneath it, he wore a holstered firearm. Hasse was a certified peace officer, and he carried a Glock pistol. Hospital staff removed Hasse's clothing while assessing his condition, and a bullet fragment fell out. The fragment and clothing were collected, and Hasse's hands were bagged. (48 RR 23-24, 115-118, 121-124; SX 423). Meanwhile, the authorities searched for a light-colored car like a Ford Taurus, and they processed the scene. They searched the entire parking lot as well as nearby side streets, and they took aerial photographs. The scene itself yielded little evidence; authorities discovered only two bullet fragments or projectiles. (48 RR 27, 103, 125-139; SX 422, 425, 445). The medical examiner later recovered additional fragments from Hasse's brain. (48 RR 154-55; SX 424). A tool mark examiner determined that three of the recovered projectiles – one from the scene, one found in Hasse's clothing, and one found in the autopsy – were fired from the same, unidentified weapon. Also, all three were consistent with .38 or .357 caliber rounds. (49 RR 9-19; SX 538-541).

Immediately after learning of Hasse's death, Mike McLelland and Kaufman Sheriff David Byrnes spoke at the hospital. Afterward, Byrnes sent Deputy Barry Dyson to "go find [Applicant]." Dyson took another deputy and a constable with him to Applicant's house. When they approached the house, a construction worker across the street informed them that someone had just arrived home. The man had heard the sirens in downtown Kaufman, and then minutes later, he heard a vehicle drive down the street at a high speed and abruptly stop. When he looked out the window as the vehicle passed, he saw a black SUV. (48 RR 170-179, 182-187).

Dyson knocked on the front door, and Applicant answered dressed in a nylon sweat suit with his left arm in a sling. He appeared flushed and sweaty, and his hand was wet and clammy when Dyson shook it. Applicant stepped outside to speak with

them. They told him Hasse had been shot and killed and they wanted to know where Applicant had been. Applicant acted shocked and told them he had just arrived home from the pharmacy where he had been to pick up a prescription for his bedridden and comatose wife. He also told them his arm was in a sling because he had just had rotator-cuff surgery. Dyson collected gunshot residue handwipings from Applicant, but the results were negative. Applicant allowed the constable to search inside his house, but the constable only spent a couple of minutes inside and left. (48 RR 187-191).

The Crime Stoppers unique identifiers found written on a document in Applicant's house pertained to two different tips - one sent between the murders and one sent after. The first claimed that two men, one named "Frank," had killed Hasse and then fled to Mexico. The second, which was the same tip demanding the resignation of a county judge, accurately identified the type of weapon and ammunition used to kill Hasse - information not yet known to authorities. (48 RR 212-218; SX 293, 530).

A search of the computers found in Applicant's house revealed they had been used to locate information on the internet related to the murders. Although the browser history only went as far back as April 2, 2013, right after the McLælland murders, the computer had been used to access numerous news articles about all three murders. It was also used to search for information about the prosecutors working the case, the Texas Rangers, and the types of guns used in the murders. Additionally, the Crime Stoppers website had been accessed just two days after authorities received one of the tips from the killer. The LexisNexis database had been accessed to research Hasse, to locate Hasse's home address in Rockwall, Texas, and to look up the license plate number of Hasse's neighbor's car. The Hasse related searches began just after Applicant's burglary trial and ended right before Hasse's murder. (49 RR 147-182; SX 584-587).

The search of Applicant's computers also revealed he made an appointment at Westway Ford on January 28, 2013, days after purchasing the Sable. Then, the day before he murdered Hasse, Applicant deactivated his Facebook account. The search also showed Applicant logged onto his computer on April 1, 2013, the day after the McLælland murders, and downloaded a copy of the search warrant for the McLælland crime scene. (49 RR 137-140; SX 580-581).

Records from the Gibson Storage Units showed that the day before Hasse's murder, someone entered and exited the facility twice using the code for Applicant's storage unit. The next day, someone using the same code entered about 30 minutes after the murder and exited about 15 minutes later. Weeks later, at the end of February, the facility's manager found a 2001 silver Mercury Sable parked behind the last building. It was not a stolen vehicle, but the manager could not locate its owner and had it towed. (48 RR 195-200; SX 272, 463). Authorities later recovered the vehicle and searched it. The vehicle's license plate number and VIN matched those in the LexisNexis database from one of Applicant's computers. (49 RR 182). Also, inside the Sable, the FBI found earplugs, a sunshade, and a piece of fiberboard. A DNA profile matching Applicant's was found on the earplugs, and his profile could not be excluded from a profile found on one of the car's headrests. (49 RR 120-126; SX 439, 439a, 464-470, 543, 577).

A DNA profile matching the profile of the Sable's prior owner, Jeff Reynolds, was recovered from a toothpick found in the car and from the driver's side door. Also, Reynolds' fingerprint was recovered from the fiberboard found inside. (49 RR 30-35, 126-127; SX 544-549, 579). Three days before Hasse's murder, Reynolds sold the car for $1,500 to a man who answered his Craigslist ad. Reynolds was unable to identify anyone in a police photo lineup, but he described the buyer as white, 45-46 years old, 5'10" tall, and weighing 220 pounds. The man arrived with a woman in a dark blue Ford Explorer Sport Trac. He told Reynolds he was buying the Sable for his daughter, but he was uninterested in needed repairs or a test drive. And the woman in the Sport Trac looked too old to be his daughter. (48 RR 158-169; SX 426, 463).

In the search of the storage unit, authorities found not only the Crown Victoria and the unfired .223 round cycled through the McLelland murder weapon, but an arsenal of other firearms and weapons. The firearms included shotguns, rifles, an AR-15 affixed to a tripod, AR lowers and uppers, semi-automatic pistols, and revolvers. (49 RR 84-95; SX 333, 335-342, 344-346, 348-356, 358-360, 362, 364-367, 370-371, 373, 377-378, 380-387, 531, 534, 536). Authorities also found firearm components, thousands of rounds of ammunition of various calibers, loaded magazines, lots of tactical gear (e.g., helmets, a ballistic vest, etc.), a variety of police uniform apparel, and several badges. In a canvas bag, they found bolt cutters, a fixed blade knife, two jars of homemade napalm, a cigarette lighter, shoe covers, gloves, goggles, and crossbow arrows with razor tips. (49 RR 48-57; 54 RR 112-116; SX 108, 115, 430-437,

472-505, 595-596). A DNA profile matching Applicant's profile was found on the gloves and goggles. (49 RR 123-126; SX 578).

The items recovered from Lake Tawakoni by DPS divers included a black stocking mask (originally thought to be a black bag) containing two revolvers and speed strips full of .38 caliber ammunition. One revolver contained five empty cartridge casings; the other contained three empty casings and two unfired rounds. (48 RR 202-211; 49 RR 19; SX 417-421, SX 506-519). The tool mark examiner determined the three projectiles previously identified as having been fired from the same weapon (the ones from the Hasse murder scene, clothing, and autopsy) were all fired from the Ruger .357 revolver recovered from the lake. (49 RR 14-18; SX 537, 542). The other revolver found in the lake was traced back to Kim Williams, who had purchased it in the late 1990's. (49 RR 107-109).

Applicant was arrested after the search of his house. (54 RR 76-77). A day or so later, his wife, Kim, came to the Kaufman County Sheriff's Office to provide her fingerprints, and she spoke to investigators at length. For several hours, she denied she and Applicant had anything to do with the murders, but she eventually revealed Applicant had committed the murders with her help. Although she was not completely truthful in the interview, afterwards, Kim began cooperating with the State. She took authorities to the bridge on Lake Tawakoni where Applicant had disposed of evidence, and she led them to the underpass Applicant had used for target practice. As a result, the State recovered evidence further implicating Applicant in the murders. (54 RR 91-92). Kim testified against Applicant at trial, describing how and why he committed the murders and her own complicity in the crimes.

According to Kim, the murders were fueled by Applicant's anger over his prosecution for stealing the computer monitors. When arrested for that crime, Applicant called her from his attorney's phone and told her had done nothing wrong, but he also instructed her to take one of the monitors on the kitchen counter, put it back in its box, and take it to her parents' house. Despite this request, Kim believed Applicant was innocent. (54 RR 20-22).

When Hasse and McLelland tried Applicant, Kim did not attend most of the proceeding because she was home in bed and "drugged up." (54 RR 25-26). She was taking a cocktail of prescription medications including OxyContin, morphine, Valium,

and Provigil. In retrospect, she characterized herself as a drug addict.[6] (54 RR 10-11). She only appeared to testify at punishment and was prepped beforehand by Applicant to say nice things about him. (54 RR 26).

Kim and Applicant met online in 1996, dated, and married in 1998. At first their marriage was a happy one. Both were gainfully employed, she at a hospital and he as Judge Glen Ashworth's coordinator. Applicant went to law school while working for the judge. Eventually, Applicant opened his own law practice and the couple moved into their home on Overlook. But in 2005, their relationship began to deteriorate. Kim, now addicted to prescription medications, had stopped working, went on disability, and spent days at a time in bed. Applicant was unfaithful and suggested divorce. Nevertheless, the two remained together, and Applicant was elected as a justice of the peace in Kaufman, taking office in 2010. (54 RR 10-18, 90-91).

In 2011, when arrested for burglary and theft, Applicant was suspended from his bench and from practicing law. While awaiting trial, Applicant became increasingly angry with McLelland and Hasse. He thought they were trying to set him up. He gave them nicknames; he called Hasse "fuckstick" and McLelland "sluggo." Over time, Applicant became angrier with Hasse because he led the burglary prosecution. (54 RR 23-25). Applicant also became very angry with Judge Ashworth. He believed Ashworth had given the prosecutors information about an extraneous armed assault he committed against a former girlfriend, Janice Gray. (54 RR 27-28, 77-78).

Applicant was convicted in 2012; he received probation, but he lost his law license and his bench. He spent his days on the computer and drank heavily, even while taking prescription medications. This affected his diabetes and made his mood worse. Applicant became obsessed with Christopher Dorner[7] and his manifesto and he even attempted to friend Dorner on Facebook. Over time, Applicant's anger toward Hasse and McLelland grew, and he began talking about killing them and Ashworth. Initially, Kim dismissed Applicant's statements. Applicant had talked of killing Ashworth as far back as 2007, calling him prissy and a prima donna. But

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[6] Kim stated that her addiction began in 1999 when she developed rheumatoid arthritis and began taking Vicodin, water pills, and prednisone. (54 RR 16).

[7] Dorner was a former Los Angeles police officer who shot several people; his manifesto detailed his grievances against certain people. (49 RR 41).

Applicant's talk about the killings persisted, and after Thanksgiving, Kim realized he was serious. (54 RR 25, 28-30, 73-74, 77-78).

Applicant told Kim he planned to kill Ashworth after the Super Bowl by shooting him with a crossbow, boring out his stomach, and putting napalm inside him. Applicant also talked of kidnapping the judge and putting him in their freezer or burying him in their flowerbed. Applicant took several steps to further these plans. He staked out the judge's house; he bought a crossbow with razor tips; he bought bolt cutters to cut the fence on the back of the judge's property; he practiced shooting the crossbow in his backyard; he made napalm; and he dug up the flowerbed to see if the judge's body would fit. (54 RR 31-32, 77-81; SX 414, 415a, 416a). Also, authorities found a key to Ashworth's property in Applicant's Sport Trac. The key opened the front gates of the property and a storage semi-trailer. With the key, Applicant could also gain access to the house because Ashworth left a house key hanging inside the storage shed attached to his carport. (54 RR 111-112, 119-120; SX 96).

Ultimately, Applicant killed Hasse first. In the beginning, he planned to shoot Hasse from the Sonic near the courthouse. Then he considered going to Hasse's home in Rockwall, waiting for him in his driveway, and shooting him in his truck. He even went to Hasse's property to scope it out, taking Kim with him. (54 RR 32-33). In the end, Applicant chose to kill Hasse in the employee parking lot. Applicant named his plan "Tombstone" after the western movie depicting street shootings in broad daylight. Applicant wanted to shock people with his brazenness. He and Kim scouted the location a couple of times beforehand, and Applicant described Hasse's truck to Kim. He told her he would kill Hasse using a pistol. As a convicted felon, Applicant was prohibited by law from owning a firearm, but he still possessed many. He had a couple at home and the rest he moved to the storage unit Roger Williams rented for him. Applicant took Kim to the unit to show it off. He was proud of how neatly he had organized it, and he knew where everything was. (54 RR 34-37).

Applicant took Kim with him to purchase the Hasse getaway car – a Mercury he found on Craigslist. Applicant wanted a car that would blend in. Applicant told the seller he was buying the car for his daughter and he dressed to look like a dad. As they were leaving the seller's, Applicant's Sport Trac stalled and they had to have it towed. They took the Mercury home that night; the next day, they parked it behind the O'Reilly Auto Parts store in Seagoville. Applicant chose this location because it would be easier to get to on the morning of the murder. (54 RR 38-39).

Kim agreed to be Applicant's getaway driver. She knew Applicant intended to kill Hasse, but she agreed to help because she was drugged and believed everything Applicant told her. According to Kim, "His anger was my anger." (54 RR 33-34).

As the day of the murder approached, Applicant got more excited, happy, and nervous; he was ready. The morning of the murder, they awoke at 8 am. Applicant disguised himself in a black Halloween mask and sunglasses, a black nylon jacket with a bulletproof vest underneath, dark pants, gloves, and black combat boots. The mask resembled a ghost face or ghoul. Applicant had purchased one like it for Kim to wear, but she refused because she was driving. (54 RR 39-40, 45). Both were excited as they left the house; they both wanted to murder Hasse. They left the house in Applicant's Sport Trac, retrieved the Mercury from the auto parts store, and parked the Sport Trac next to the hospital. Applicant transferred the two murder weapons to the Mercury and told Kim to drive toward the courthouse parking lot. (54 RR 42-44; SX 418-419). Kim parked in the lot facing the exit, kept the engine running, and put the sun visor in the window to shield them from view. Applicant identified Hasse's usual parking spot, and they waited for him to arrive. They watched Hasse park, get out of his truck, and walk toward the courthouse. As Hasse passed behind the Mercury, Applicant got out and caught up to him. Kim heard several shots, but she did not watch the shooting. She said it hurt to watch Applicant kill someone. Afterward, Applicant ran back to the Mercury, got in the passenger seat, and told Kim to drive. Applicant still had his mask on and had put the guns in his pocket. They retrieved the Sport Trac and then drove to the storage facility. Applicant parked the Mercury inside the unit, wiped it down to remove any fingerprints, and changed his clothes. (54 RR 44-49).

Kim drove them home. They were both in a good mood. Appearing satisfied with himself, Applicant described how Hasse begged for his life. Once home, Kim took some valium and laid down. Faking an injury, Applicant put his arm in a sling he had previously used for a frozen shoulder. He watched televised reports of the shooting and soon, the police arrived at their house. Applicant told Kim to remain quiet while he went outside to speak with the officers. One of the officers came inside and walked past Kim's bedroom, but she followed Applicant's instructions and did not speak to him. (54 RR 49-52).

Later, Kim and Applicant watched a televised press conference in which Mike McLelland vowed to find Hasse's killer. Applicant shook his head and smiled a cocky

smile. Applicant planned to kill McLelland next. Applicant had planned to shoot McLelland in the same employee parking lot, but his plan did not "pan out." Instead, Applicant decided to kill McLelland in his own home on Easter weekend. (54 RR 52-53). Applicant chose a holiday weekend because he thought McLelland would have no police protection. He bought a new getaway vehicle - a Crown Victoria - because the Mercury's transmission blew. Applicant cleaned the Mercury before abandoning it to be towed. He purchased the Crown Victoria from another Craigslist seller. For McLelland's murder, he wanted a vehicle that looked like an undercover police car. Kim went with Applicant to pick it up but did not meet the seller. (54 RR 53-55). Applicant planned to use a "long gun" for the McLelland murders. He tested out several weapons on the underpass between Seagoville and Kaufman, before choosing one. (54 RR 55-56).

Between the Hasse and McLelland murders, Applicant repeatedly drove past law enforcement's command post for the murder investigation. It was located in the armory very near Applicant's home. He would pretend to take pictures as they drove past and spoke of how easy it would be go inside and just start shooting. At the same time, Applicant became paranoid that law enforcement had bugged their house or was listening to them through their home computers. So, he and Kim would go into the kitchen pantry to discuss the murders. (54 RR 56-58).

In anticipation of the McLelland murders, Applicant and Kim drove to the McLelland house at night and took reconnaissance photos. Applicant planned to gain entry by pretending he was law enforcement responding to a report that a gunman was in the area. He expected Cynthia McLelland to answer the door and let him inside. Kim was to remain in the Crown Victoria and honk to alert Applicant to any trouble. While Applicant was angry with Mike McLelland, not Cynthia, he said she had to die because she would be a witness. He called her "collateral damage." (54 RR 58-59).

The night before the McLelland murders, Applicant was excited, happy, and in a good mood. He modeled the clothes he planned to wear; he looked like a SWAT team member. He wore a bulletproof vest with a "SHERIFF" patch on it, a helmet, ski goggles, and a black cotton covering that concealed his neck, mouth, and nose. (54 RR 60-61). The next morning, they awoke at 5:30 am, dressed, and left the house. They drove the Sport Trac to the storage unit and traded it for the Crown Victoria. Applicant drove them to the McLelland home, got out, left the driver's door open, and walked to the front door. He was wearing blue booties over his boots. Kim

remained in the passenger seat. At first, no lights were on in the house, but some came on after Applicant rang the doorbell. Someone opened the front door and let Applicant inside. Next, Kim heard lots of loud gunfire. Kim thought, "He's shooting them. Oh my gosh!" But she was happy about it. After the shooting stopped, Applicant returned to the car, put the long rifle he carried in the back seat, and drove them back to the storage unit. (54 RR 61-66, 80). The mood in the car was happy and satisfied. Applicant told Kim he had to shoot Cynthia an extra time because she was moaning; that was the last shot he fired. (54 RR 66-67).

Applicant parked the Crown Victoria back in the storage unit and cleaned it to remove fingerprints. Then he changed clothes and they left. They had a cookout at Kim's parents' house that day. That night, Kim and Applicant drove to Lake Tawakoni where it was dark and few cars were on the road. Applicant directed Kim to pull over on the bridge and got out, taking a bag from the back seat with him. The bag contained guns and Applicant's Razor phone. Applicant walked a short distance and threw the bag into the water. On their way back home that night, someone in law enforcement called Applicant and asked to meet. They stopped at a restaurant parking lot in Kaufman. Applicant did not stop to wash his hands on the way, and the officers performed a gunshot residue test on him. (54 RR 68-71). Applicant and Kim also willingly gave the officers their phones to search. Applicant had told Kim the police could track their phones, so Kim had left hers at home during the McLelland murders. (54 RR 71-72).

After the McLelland murders, Applicant spent a lot of time on his computer. He sent online tips to law enforcement, claiming he was messing with them. Eventually, the media came to the house and Applicant agreed to an interview. He watched the interview on television and was thrilled by it. Kim worried about attracting attention, fearing they would get caught. And she knew there were more people Applicant wanted to kill. (54 RR 74-75). In his head, Applicant maintained a hit list. In addition to Hasse, McLelland, and Ashworth, the list included Kaufman County Judge Erleigh Wiley. (54 RR 9, 75-76). Applicant wanted to kill Wiley because he thought she had "screwed him over for money" on CPS cases while he was in private practice. After the McLellands, Applicant planned to kill Ashworth and then Wiley. Kim was unaware of any affirmative steps Applicant took to kill Wiley. (54 RR 82).

In addition to the murders and the hit list, Kim described several other acts of violence perpetrated by Applicant. She recounted how he threatened another

attorney, Jon Burt, over a disagreement about rescheduling mediation. (54 RR 82-83). He also pulled a pistol on a couple in a church parking lot at Christmas time. Applicant was attempting to catch one of their dogs that had gotten loose and the couple tried to help, but Applicant thought they were trying to steal the dog. (54 RR 85-87). Applicant once threatened Kim's elderly father during an argument over cell phone usage, shining a flashlight in his face and threatening to hit him with it. (54 RR 85, 87). And Applicant had shot a cat in the field behind their house and thrown it in the street. Applicant hated cats and was upset because their dogs were barking at this one. This was not the first cat he killed. He told Kim he had shot another cat in the eye. (54 RR 89).

Applicant repeatedly threatened Kim during their marriage saying if he ever decided to "take everybody out," he would kill her too, and then himself. And twice, Applicant fired a gun at Kim. The first time, Kim was walking through the kitchen, and Applicant was standing at the kitchen bar. On this occasion, she thought Applicant was trying to kill her. The second time, Kim was taking the garbage out while Applicant was in the garage cleaning his guns. When she walked out, a gun went off and struck one of her car's tires. While Kim thought it possible the second shooting was accidental, she noted Applicant was an excellent marksman. (54 RR 84-85, 87-88).

Kim provided this testimony without the benefit of any deal with the State. She denied being given immunity in exchange for her testimony. She cooperated because she believed the victims' families deserved it and because she hoped and expected her assistance would be given consideration in her own pending capital murder cases. (54 RR 92-93). Although Applicant had told her she could claim spousal privilege and not testify against him, she had chosen to waive the privilege. And she no longer loved him. (54 RR 93-94).

Following Applicant's burglary and theft arrest in 2011, authorities searched his Sport Trac. Inside, they found an AR-15 rifle and a Benelli 12 gauge shotgun mounted in a roof rack above the front seats, as well as three Glock handguns, a Kel-Tec PLR handgun, and a Rock River LAR-15. In the backseat were backpacks containing extra magazines and ammunition. The search also yielded a machete and an axe. (49 RR 186-195; SX 564-565, 572-573).

In 2013, during the consensual search of Applicant's home the week following the McLelland murders, Ranger Dockery and Chief Evans found more than just the Desert Eagle pistol Applicant admitted having. Although Applicant insisted he had

sold his other firearms, Dockery and Evans found numerous firearm components, including two gun sites that would fit AR or M4 platforms. They also found an attachment used to punch out car windows, a box for an EOTech weapon site, a device used to detect body heat, and several cell phones in a storage box. (49 RR 59-76; SX 532). The FBI collected these items during its subsequent search of the house. Agents also recovered a copy of Christopher Dorner's manifesto, multiple gun magazines, ammunition, holsters, paperwork related to weapons purchases, and two handguns – a .44 magnum and the aforementioned Desert Eagle pistol. (49 RR 38-48).

In a search of one of Applicant's computers, authorities also found a 2007 email Applicant sent attorney Sandra Harward and later forwarded to Kim. The email read:

> [To Kim:]
>
> This was a pleasant email also – probably several criminal offices [sic] by me.
>
> Love, ERIC
>
> ---
>
> Sandra,
>
> I'm ready to eat barbed wire and spit nails.
>
> I'll drink gasoline and piss napalm.
>
> Let me loose on these lawyers and tomorrow will be the first day of Armageddon.
>
> Put Robert Guest last on the docket and I'll announce that I want 2 hours, and will call the attorneys as witnesses, and request an immediate transcript to deliver to the State Bar of Texas with My Grievance for Disbarment. – sort of a bluff, but after this week, maybe not.
>
> As always, the most committed wins. If anything, I am committed. I will prevail. No amount of law or facts will prevent me from doing the right thing. No judge in this county can stop me. They know it, and I know it.

No amount of posturing will prevent me from ensuring these children are protected. I will take him down, hard if necessary.

We'll do the "bad-cop" - "worse cop" routine on him. He gets no good-cop.

I'm also ready to effect completely running him out of town. If I want, no one will even rent him space for an office. The phone company will fuck up his number, and the computer service will actually give him a virus.

Let me know how far to take it. I have no problem sending him to the hospital with a severed vertebrae, removing his children's organs, throwing his wife into a gang bang train, or anything else creative you can come up with. I just really don't like this guy and he should go somewhere else, if allowed to live.

How about we don't share this email?

ERIC

(49 RR 141-42; SX 580).

In 1999, while attending a conference for court coordinators, Applicant threatened a former girlfriend, Janice Gray, at gunpoint in a bar. Applicant and Gray met at prior conference in the early 1990's and dated briefly. She thought he was intelligent and a nice person. She ended the relationship because she met someone who lived closer to her. She asked Applicant to stop calling and he seemed fine. He called a couple of times right before the 1999 conference, and she saw him at the conference in the hotel lobby. Applicant asked her out to dinner, but she declined. She told him she did not think it was a good idea and she had plans with friends. Then Applicant told Gray he had a gift for her son, and pulled a gun from behind his back. Applicant's possession of the gun was not unusual; he had shown her guns before and had them in his home. Applicant seemed agitated and nervous. Gray's friends joined her in the lobby and she left with them. They went out to a sports bar, and Applicant showed up there. He tapped her on the shoulder and asked her to step back because he wanted to talk with her. They spoke briefly about Gray's other relationship, and then Gray told Applicant she was going to return to her friends. Applicant responded,

"I have a gun," and drew it. He said, "If you walk away, I'll use it." Shocked, Gray stood still and began to cry. Two of her friends came over and she walked away with them. Her friends took her to the conference head, and he called the police. An officer was posted outside her hotel room that night, and the next day, he told her they had not found Applicant. Thinking Applicant had left town, the officer escorted Gray to the conference, but when she entered the room, she saw Applicant inside. The officer sent Gray into the bathroom and instructed her to wait until they retrieved her. Later that day, she went to the police department and reported what had happened. As a result, the police spoke to Judge Ashworth. To avoid Gray pressing charges, the judge promised Applicant would never bother her again and had him brought back to Kaufman. Gray assented, but the police agreed to hold onto her report in case Applicant contacted her again. Years later, Hasse and McLelland called Gray to testify to this incident at Applicant's burglary trial. (50 RR 7-25).

In 2010, while in private practice, an angry and upset Applicant showed up at the office of attorney Jon Burt threatening to burn down Burt's house, to stab him, and to kill him, his wife, and his children. Burt was out of the office, but another attorney who officed nearby, Dennis Jones, heard Applicant's threats and tried to calm him down. When Burt returned to the office, Jones told him of Applicant's threats. At the time, Applicant was serving as mediator in a civil case involving one of Burt's clients. Kim Williams had called Burt a couple of days before to reschedule a mediation session because Applicant had been hospitalized. Burt agreed and notified his client, but apparently, opposing counsel and his client were never contacted. They showed up for the session and became upset when they learned it had been cancelled. Opposing counsel got no answer when he called Applicant and he threatened sanctions against him. Burt attempted to dissuade him. He had had a good relationship with Applicant before this and did not know why Applicant was mad at him. Burt did not report the incident to police and no one in his family was ever harmed, but Applicant's threats concerned him. (50 RR 30-44).

In 2008, while serving as a county court at law judge in Kaufman, Erleigh Wiley[8] took on the duty of managing the CPS cases. When she took over, she reviewed the billing previously submitted by attorneys handling the cases. She pulled any bills totaling more than $1,000 and reviewed the case file. Applicant served as a guardian

[8] After Mike McLelland's murder, the Governor appointed Wiley to fill the position of Kaufman County Criminal District Attorney. (54 RR 135).

ad litem on many of the cases she reviewed and for years was paid upwards of $200,000 annually. Wiley asked Applicant to meet with her privately to discuss his billing. She did not want to embarrass him and wanted to clear up any misunderstanding. They met in Wiley's chambers; she explained she had taken over management of the CPS cases and was scrutinizing the bills. She asked Applicant why he had billed two hours to review a document that only took her thirty seconds to review. Applicant claimed the two hours included other work related to the document, such as calls to the caseworker. But Wiley pointed out Applicant had billed elsewhere for such calls. She told him to separate his calls in future billing, and then Applicant left. Afterwards, Applicant asked Wiley to remove him from the list of attorneys who handled CPS cases. She agreed, although she had no objection to him remaining on the list if he billed appropriately. Six months later, Applicant asked her to put him back on the list. She agreed and Applicant thanked her. After the McLellands' murders, Wiley was one of the public officials afforded protection. Like others, she feared for her safety describing the atmosphere in the Kaufman community as "unbelievable." (54 RR 124-136).

Defense Punishment Evidence

Many witnesses testified about Applicant's family, childhood, and young adulthood, including Applicant's mother, aunt, cousins, grade school and high school classmates, parents of his classmates, his scoutmaster, and his math team coach.

Applicant's mother, Jessie Ruth Williams, testified by deposition. At the time of trial, Jessie was undergoing cancer treatment. She talked about her marriage to Jim Williams, and Applicant's life from childhood to manhood. Jessie met Jim at a square dance when she was twenty-three. After a brief engagement, they married in 1966. Applicant, their first child, was born the next year. Jessie smoked during the pregnancy and had kidney infections. Applicant was born three weeks early and was small. (DX 68 at 4-8).

Applicant was a good boy who did not give them much trouble. He attended preschool at a Baptist church and kindergarten at West Creek Elementary. One year, they gave Applicant a pony. Applicant was jumping up and down with excitement when he got the pony, and named her Snow Princess. Their first house burned down from an electrical fire after they had lived in the house three weeks. The fire started while they were sleeping. By the time Jessie reached Applicant, there was already a

soot outline around him. Applicant was only four years old at the time, and she did not think he remembered the fire. (DX 68 at 11-16).

Applicant's sister, Tera, was born when he was eight years old. Despite some sibling rivalry, the two got along. And to her knowledge, Applicant never hurt Tera. Applicant had a dog named "Sweetie" that was hit by a car, but they told Applicant they did not know what had happened to her. Once, when Applicant was young and his grandmother picked him up for school, he asked to see her driver's license. When Applicant was seven or eight years old, he helped his father dispose of a dead skunk; he held his nose and pushed the body in a wheelbarrow a few feet at a time. Applicant liked to read and did not like to get dirty, but he would play. She once swatted him with a broom for reading in the chicken coop instead of cleaning it. He and Tera road the school bus; Applicant would keep to himself and Tera would socialize. Applicant had trouble with his ears and needed tubes, but the problem disappeared after he went to Tennessee one summer with his grandmother. (DX 68 at 16-28, 80).

Applicant did well in school, excelling in math and science. Applicant did not care for sports; he played the trumpet in the band. He would do his homework at school or on the bus, and he had no discipline problems. He became friends with Brad Pense during the fifth grade. The two would play Dungeons and Dragons and Star Wars. Applicant also became friends with Brad's parents; he remained friends with Brad through high school. (DX 68 at 28-32).

The family attended First Methodist Church in Azle, but Applicant was not baptized. Applicant became involved in scouting when he was six or seven years old. At first, Applicant was a Cub Scout. The den mother would host meetings at her home. Applicant seemed to enjoy it because he got to be a leader. He earned merit badges on his own, only occasionally asking for help. Jessie was more involved while Applicant was a Cub Scout; Jim became active when Applicant graduated to Boy Scout and began participating in weekend campouts. Applicant attended a two-week Boy Scout camp where the boys could swim and canoe. Although it wore him out, Applicant seemed to enjoy this. Eventually, Applicant became an Eagle Scout. They invited friends and family to the ceremony and 250-300 people showed up for it. (DX 68 at 33-37, 42-46).

Applicant made good grades in school, and he joined the honor society. He was in the math and science team in junior high school and remained on the team through high school. Andy Zapata was the teacher who sponsored the team. Jessie

helped raise money for the team, and traveled with the children for competitions. Applicant won trophies in these competitions, and their team was photographed for the local paper. Jessie saved these newspaper clippings because she was proud of Applicant. (DX 68 at 38-40, 46-47).

Applicant dated Tammy Hobbs (a.k.a. Tamara Maas) and became close to her parents; they remain close to this day. The family ran a local resort on Eagle Mountain Lake where Applicant worked. Applicant was also good friends with the Spears family, who had a couple of boys. (DX 68 at 40-42).

After high school, Applicant attended Texas Christian University. He chose TCU because he had a chemistry scholarship and his father, Jim, worked for the school. While in college, Applicant joined the ROTC. He graduated with a criminal justice degree and was commissioned into the Army at the same time as his cousin, Ian Lyles. (DX 68 at 49-50, 74).

When he was twenty-seven years old, Applicant learned he suffered from type 1 diabetes. He lost weight and looked terrible. Applicant had a hard time accepting that he had diabetes. Jessie was unaware of any incidents where Applicant lost consciousness because of his diabetes and she was also unaware of any other health issues he may have had. Applicant did fine on insulin, but once his illness was diagnosed, the possibility of a military career ended. This bothered Applicant quite a bit because his family had a history of military service. (DX 68 at 50-52, 61-62, 84).

Applicant worked for several police departments. Then he moved to Kaufman, where he worked at the Dobbs' resort and for a judge. Applicant decided to go to law school while working full-time. The family and many of Applicant's friends, including the judge he worked for, attended his law school graduation. (DX 68 at 52-54).

Before enrolling in law school, Applicant met Kim Williams. Jessie did not think Kim was Applicant's type and she did not like her. She thought Kim was a "bimbo" and not "down to earth" like Applicant. Kim was proud and attractive, and the two seemed "okay" as a couple. They married in Las Vegas without family present, which made Jessie unhappy. She was not around Kim much, and they only visited their home on Overlook once. Kim worked at first, but then stopped. She worked at Applicant's law practice for a while, but that did not work out. Applicant told them Kim suffered from arthritis and Sjogren's syndrome. Jessie was not familiar with Kim's illnesses, but she found a lot of Kim's medications when they were cleaning out

Applicant's house. Applicant became the sole source of income, and he took Kim to her doctor appointments. (DX 68 at 55-59, 62-63, 77, 80-82). Appellant also took care of Kim's parents. Jessie met Kim's parents and liked them because they were "down to earth." Both of Kim's parents became ill, and Applicant would take them to the doctor as well. (DX 68 at 63-65).

Applicant's law practice focused on working with children, even though he did not seem to want children of his own. Applicant got Jessie and Jim to volunteer for CASA, and he would visit them when he came to town to visit the relatives of the children he worked with. (DX 68 at 59-60).

Jessie was proud when Applicant became justice of the peace, although she did not understand why he wanted the job and did not know much about his campaign. When he was arrested on the burglary charge, Applicant called her. He said "that he didn't believe it," and she was heartbroken. She did not attend the trial because Applicant did not want her to. He told her nothing about the offense except to deny he committed it. What she knew she read in the paper. (DX 68 at 65-66, 69-70, 76).

After the murders, the FBI came to Jessie's and Jim's home; Jessie spoke to Applicant by phone. He told her the FBI was trying to pin the murders on him and to tell them to leave. Police arrested Applicant the same day. Jessie had not seen any of Applicant's media interviews. She wrote to Applicant and visited him in jail while he awaited trial. He gave her no explanation for why he was a suspect in the murders. She hoped the jury would not assess the death penalty; she felt Applicant could still help children and other inmates. She acknowledged the possibility Applicant committed the murders and how horrible they were, but she questioned whether any purpose would be served by taking Applicant's life. (DX 68 at 70-73, 77-78, 84).

Jessie stated she and Jim did all they could to instill good values in Applicant, and provided him with opportunities. They gave him a normal childhood and taught him right from wrong. She described Applicant as an intelligent and goal-driven adult. Also, he liked firearms; he had a BB gun as a child and was allowed access to other firearms as long as Jim was present. Jessie was unaware Applicant had pulled a gun on and threatened Janice Gray, a former girlfriend. (DX 68 75-76, 84-85).

Throughout her testimony, Jessie narrated numerous photographs of Applicant. They depicted him in infancy, early childhood, high school, young adulthood, and marriage. (DX 2-13; DX 68 at 9-11, 26-27, 32, 36-37, 44-45, 48, 57-

58). At several points in her testimony, Jessie became emotional and cried. (DX 68 at 10-11, 40, 50, 71, 73).

Lavon Humphries, one of Applicant's paternal aunts, described the childhood of Applicant's father, Jim. She also recalled Applicant as a child. At the time of her testimony, Humphries was eighty years old and battling stage four cancer of the bone and brain. She and her brother, Jim, were raised by their mother after their father died in an accident. There were eleven children, and the family struggled financially. Jim quit school to work and take care of their mother. Humphries described their mother as strong but she was not affectionate, and members of their family did not display emotion. Applicant was much like Jim, a little standoffish and not emotional. Jim and Jessie wanted better for their children. Jessie showed Applicant affection, and Jim tried to give Applicant a better life. Applicant was smart and better behaved than his cousins. She remembers him being a good kid who read a lot and did "boy stuff." Applicant was expected to succeed, and his family depended on him. He took care of paperwork, and over the years his responsibilities increased. (51 RR 127-37).

Two of Applicant's cousins, Ian Lyles and Cara Hervey, testified.

Ian recalled joining the Army with Applicant. Ian was commissioned active duty and went on to become a colonel and faculty advisor in the Army. Applicant was commissioned military police and went on to have a career in law enforcement. Ian last saw Applicant in 2009 at a family gathering. He conceded that they had not been close in a long time, but he frequently visited Applicant as a child. He met Kim at a Christmas party years before, and she and Applicant seemed happy. Ian was unaware Applicant had been fired from the Springtown Police Department. He mistakenly thought Applicant was an Army reservist and a bailiff, when he was actually a member of the Texas State Guard and a court coordinator. Ian said the trial had been devastating for both Applicant's and the victims' families, and he agreed Applicant is not a honorable man if he killed three people. (51 RR 159-73).

Cara was seven years older than Applicant. During their childhood, she saw him four or five times a year. Applicant did not want to make mud pies like the other kids or go barefoot. He did not try to attract attention, and she never saw him fight or argue. He was not quick tempered; he was quiet, shy, reserved, and happy to play alone. When Applicant was seven years old, he nearly drowned at the lake and the lifeguards did not see him; Cara had to pull him from the water. When Applicant was ten years old, he and Cara were bucked off a horse; Applicant was scared and shaken

by the incident. She described Applicant as a caring, gentle child who never meant harm to anyone. As an adult, Applicant remained shy and did not inflame or agitate others. He worked hard and tried to keep the peace.

Cara thought Applicant's wife, Kim, was vivacious and outgoing at first. But she got quieter after she got sick, and Applicant became her primary caregiver. For several years, Applicant missed family gatherings because he was taking care of Kim and her parents. Applicant was excited about becoming a lawyer. He worked hard professionally and personally, and he was devastated when he lost his job as Justice of the Peace. She last spoke to Applicant a month before trial but had not seen him in person in several years and mistakenly believed he had been a court bailiff rather than a court coordinator. She did not know if he committed the murders, but the person she knew would not have killed anyone. (53 RR 88-103).

Miguel Gentolizo was friends with Applicant during high school. They hung out with other boys that were into physics and calculus. They were "geeks" who liked to play games like Star Trek. Miguel liked Applicant because he and Brad Pense stood up to bullies at school. Miguel was a minority student, so it was unusual for someone to stand up for him. At first, he did not believe Applicant committed the murders, but he admitted he had not been in touch with Applicant in thirty years and cannot speak to the man he is now. He would contact Applicant and visit him in prison, however. (51 RR 174-81).

Billy Sheets became friends with Applicant in high school. They were on the math and science teams together and in the Junior Technical Society. Applicant was smart and performed well in school; he was never a discipline problem. He could be blunt, but he had a sense of humor and was upbeat. Billy was shocked to hear Applicant was charged with murder; he never saw him hurt anyone. Billy and Applicant tried to start a private investigation business together, and they worked together as reserve officers at the Springtown Police Department. Billy did not know how long Applicant worked for the White Settlement Police Department. He did not know why Applicant left the Springtown Police Department and last saw him twenty years ago. (51 RR 182-202).

David Houpt also became friends with Applicant in high school. Applicant welcomed David when he moved to town. They visited each other's homes and Applicant was best man at David's wedding. Applicant was a good student and a rule follower who wanted to be successful. He was not a loner; he had a good sense of

humor. David lost touch with Applicant in 1992 when David moved away; they just drifted apart. David knew Applicant had a job as a police officer, but he was uncertain what department he worked for. He was not surprised to hear Applicant went to law school. He was surprised to hear about Applicant's criminal charges, and he would maintain a relationship with Applicant while he was incarcerated. (51 RR 203-17).

Chris Spears became friends with Applicant in high school. They were on the math and science team together. Chris met Applicant through his brother Jesse. Applicant was a surrogate brother to him, and their family was a second family to Applicant. He would drive Chris to school. He was helpful, friendly, and good-natured, and Chris never saw him get angry. Chris thought Applicant was a "very respectful" kid and a "great guy." He recalled Applicant liked strategy games. He was shocked to hear of Applicant's crimes. Although he doubted the media gave the full story, he thought Applicant was guilty. (52 RR 41-49).

Jesse Spears became friends with Applicant in high school. They met in band and spent a lot of time playing games together at each other houses. Both he and Applicant dated Tammy Hobbs (Tamara Maas). Jesse and Applicant had less contact after Jesse's family moved away from Azle, but he invited Applicant to his wedding. He described Applicant as "fairly friendly"; he was not distant, unemotional, cold, or indifferent. Jesse never saw Applicant angry. Although he believed Applicant committed the murders, he was shocked when he heard about them. He never thought Applicant would end up here. He recalled Applicant attending a few gun and knife shows but did not think he had an unusual interest in them. He also recalled Applicant did not follow all traffic laws and believed it was only illegal if you got caught. (52 RR 16-27).

James Cummings became friends with Applicant when they were children and they remained friends through high school. James and Applicant were in the Boy Scouts and on the math and science team together. Applicant convinced James to join the team so he could win trophies and meet girls. The team was their social outlet. Their group of friends was smart and less popular; they did not get into trouble. James recalled going on scouting trips with Applicant; Applicant's dad was a scout leader. Applicant was smart, helpful, and had a good sense of humor. James heard Applicant got into law enforcement and went to law school; Applicant's career choices did not surprise James. James last spoke to Applicant while they were in college. They slowly drifted apart, but James would consider visiting Applicant in prison. James finds it

hard to reconcile the person who committed multiple murders with the person he knew back then. Growing up, they all knew right from wrong. (52 RR 28-40).

Hugh Pense met Applicant in elementary school and they became best friends. They both participated in scouting, band, and the math team. They spent a lot of time at each other's homes. Applicant was like a brother to him. Their group of friends was considered "nerdy." Applicant and Hugh were in ROTC together, and Applicant commissioned Hugh into the military. Hugh knew Applicant's law enforcement career did not work out. Hugh attempted a career as a police officer, too, but abandoned it after injuring his hand. Hugh did not think Applicant committed the murders; he could not reconcile it with the person he knew. He visited Applicant in jail while he was awaiting trial, and he would help him while he is in prison. (53 RR 104-31).

Tamara Maas and Applicant met in junior high school. They were both on the math team; she was one of the few girls on the team. Applicant later worked as security and a lifeguard for her family's resort business - Twin Points Beach. She described Applicant as "friendly, helpful, caring, protective, gregarious," and kind. Applicant was good at games that required strategizing and he was good at jujitsu. He would not tolerate people behaving rude or disrespectful and would threaten to remove them from the resort. Applicant was and still is a great friend to her. They dated some and went to prom together. She could not remember which of them ended the relationship, but Applicant never expressed anger or said a mean word about it. He did not stalk or threaten her. He continued to visit her family, and she attended his boot camp graduation. Applicant was protective of her and other women and cautioned her about marrying her ex-husband. She has seen Applicant get verbally aggressive with someone "to defend what was going on that was unacceptable," but she never saw Applicant get physically aggressive. She was shocked to hear of his crimes, and she does not think he is guilty of them. She interpreted Applicant's not guilty plea as a denial of guilt. She has spoken with Applicant, but they have not discussed the murders. Still, she believes in Applicant's innocence, and she will remain friends with him. (52 RR 50-68).

Lori Dunn met Applicant when he worked for the White Settlement Police Department. Lori was a thirty-year-old dispatcher in the department. Applicant was nick named "Opie" because he was baby-faced, quiet, shy, and timid. She and Applicant worked the midnight shift together and began spending time together outside of work. Their relationship was platonic, not romantic. This was a tough time

for Lori. Her children were living with her ex-husband in Oklahoma, and she had come to Texas to start over. She had been in a relationship with an officer, but he cheated on her. Applicant was helpful and supportive of her during this time. He once drove her to Oklahoma when her car broke down; he babysat her kids when they visited and she had to work; and he helped her remodel her house. Applicant was her best friend. When Lori moved to New Jersey, the two remained in touch and Lori visited Texas. Applicant helped Lori's daughter with a wrongful termination case, and Lori came to town and had dinner with Applicant while he was running for justice of the peace. Applicant was excited and happy about his campaign. Lori met Kim and thought she was odd; Kim was completely dependent on Applicant. Lori described Applicant as quiet and reserved. She said he can be perceived as standoffish, but he is warm, compassionate, and a good listener. She saw Applicant angry once, when he got fired for taking sick time to take her to the doctor. But Applicant was not violent. He was good man who cared about others and had a lot to offer. Lori recalled when Applicant's dog died as the result of a bad rabies vaccination and how he had alerted others to prevent more dogs from dying. Lori confirmed Applicant did not make it through his probationary period with the police department. Lori was shocked by Applicant's arrest, but she still considers him a friend. She wrote Applicant while he was awaiting trial and planned to visit him in prison. (53 RR 217-35).

Three parents of Applicant's childhood friends also testified – Dorothy Spears, Darlia Hobbs, and Bobby Hobbs.

Dorothy, a retired teacher and mother of Jesse and Chris Spears, recalled Applicant and his friendship with her sons. The boys met in 1982 and were part of a group of eight or nine boys that regularly played together. They spent many hours together playing Dungeons and Dragons at the Spears' home. They would also watch movies and go swimming. They were a "good bunch of kids." Most of the boys were smart, but they were not mean to those less intelligent than them. Applicant was well mannered, always did as he was asked, and never got in trouble. He was not privileged and was raised to know right from wrong. Dorothy came to trust him a great deal and let him drive Chris to school. She last saw Applicant in 1991, and she would contact him in prison. (51 RR 217-27).

Darlia and Bobby Hobbs recalled Applicant's friendship with their daughter Tamara and his work for them at their resort. Applicant was on the math team with Tamara. Darlia described him as a "good kid" and "one of the top ones." Bobby said

he was a hard worker and helpful. Applicant started working for them not long after they met him. He was good at his job, honest, and sincere. He wanted girls and their families to feel safe there. Applicant dated Tamara; their break-up occurred without incident and the two remained friends. Darlia and Bobby also maintained contact with Applicant, and he did some legal work for them. Bobby said Applicant is not a bad person, but he agreed he had never seen the side of Applicant that committed the murders. Darlia was proud of Applicant, and she would visit him in prison. Both love Applicant like a son. (53 RR 185-210).

Alvin Graham, Applicant's Scoutmaster, testified about Applicant as a child. His last contact with Applicant was in 1983; Applicant was in his troop in 1978-79. He described Applicant as smart, polite, and eager to learn. Applicant was inducted into the Order of the Arrow and became an Eagle Scout. Graham talked of the summer camp Applicant attended as a boy, describing the activities and the responsibilities the boys were taught and narrating several photographs of the boys, including Applicant. He said Applicant's father loved him. (51 RR 139-58; DX 8, 19-25).

Andy Zapata, Applicant's high school teacher and math and science team coach, recalled Applicant and his involvement with the team. He testified Applicant was an active member who attended competitions. The team members had to learn concepts not taught in the regular school curriculum. Applicant worked hard, reached the highest level of competition, and qualified for the state meet in science. He was respectful and dependable. Applicant's parents would come to the meets and support him. They were invested and proud of him. Zapata had not seen Applicant since his graduation, but was sad and surprised when he heard about the charges against him. He never saw Applicant angry or vengeful. He could see Applicant sharing knowledge with others as an adult. (53 RR 131-54; DX 49-56).

Heather and Andrea Jones, the stepdaughters of Kim's brother Jaime, testified Applicant and Kim let them live with them for a couple of summers. Jaime was physically abusive of the girls and their mother. The girls stayed with Applicant and Kim to get away from their father. Heather trusted Applicant to protect her from him. Neither girl saw much of Applicant during their stay, but he seemed like a nice person and was never unkind or angry. He kept to himself at home; he also worked late and frequently missed dinner. Kim was focused on her appearance, spent a lot of money, and spoiled their dogs. She stayed at home and spent lots of time on the computer. (53 RR 13-29).

Michelle Stephens, the tenant of Applicant's rental house, got behind in her rent, but he didn't evict her. Applicant allowed her to remain even though she owed him thousands in rent. Applicant's parents finally evicted her. (52 RR 84-86).

Frank Elliot, the Dean of Applicant's law school, told the jury the school became accredited in 1994.[9] From 1995-1999, the school offered both day and night classes to their students. At that time, it was a private school and cost more than state law schools. The students who attended during that time "really wanted it." Both Applicant and McLelland attended the school, although Elliot did not personally recall either of them. (52 RR 87-99).

Several fellow Kaufman attorneys testified to their interactions with Applicant.

Mark Calabria and his wife, Becky, ran a law firm in Kaufman. Applicant was a court coordinator when Calabria first met him. He thought Applicant worked hard and did a good job. He recalled Applicant worked full time while attending law school. He and his wife hired Applicant after he became a lawyer. Applicant got along well with others and had no bad character traits. He was professional and courteous, even-tempered, and affable, and he communicated and worked well with others. Applicant was a nerd or geek, however, and some perceived him as "uppity." Calabria heard Applicant had made threats against attorney John Burt, but he did not take them seriously. Calabria said Applicant had progressive plans for the JP court. He described Applicant's wife, Kim, as nice enough but kind of aloof. He did not see Kim encouraging or being helpful to Applicant after his burglary conviction, and he regretted not getting involved in the situation. Calabria's wife fired Applicant from their practice after he failed to disclose fees he earned on his CPS cases in violation of their professional fee agreement. He knew Hasse offered Applicant a plea bargain on the burglary case, but Applicant rejected it. Calabria agreed Hasse's murder was precipitated by his prosecution of Applicant and said Hasse began carrying a pistol after Applicant's trial. (53 RR 66-78).

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[9] At the time Applicant attended the school, it was known as Texas Wesleyan University School of Law. It is now known as Texas A&M School of Law. (52 RR 88).

Andrew Jordan, a former assistant district attorney and private practitioner,[10] described Applicant as "very competent," knowledgeable about the law, prompt, and prepared for hearings. Like Applicant, Jordan used to handle ad litem appointments; most of those appointments were made by Judge Tygrett. Jordan confirmed that when Judge Erleigh Wiley began managing the CPS cases, Applicant stopped getting appointments. Jordan did not think an attorney appointed to guardian ad litem cases would make $100,000 on them. At one time, Jordan ran the county law library. He described the library as limited but confirmed it had access to the LEXIS online legal research database. (52 RR 109-17).

Cathy Adams, a legal assistant and former attorney, met Applicant when he was working as Judge Ashworth's coordinator. Applicant was good friends with Judge Ashworth and regularly ate lunch with him. Adams continued to interact with Applicant after he became an attorney. He knew the law and was always prepared, cordial, punctual, and respectful, and he zealously represented his clients. She recommended Applicant to others and sought his advice herself. Others sought his advice as well. He was helpful and did not make her feel dumb. She socialized with Applicant some and considered him a good friend. She opined that Applicant was a good person, and his crimes were inconsistent with the man she knew. Adams was unaware of an affair between Applicant and attorney Tina Hall; she thought they were just friends. Applicant took care of his wife, and Adams considered him an excellent husband. Applicant defended his wife against criticism and was proud of her. Moreover, when Adams was disbarred, Applicant stood by her, he frequently checked on her, and he told her to keep her chin up; only two or three other friends reached out to her. (53 RR 157-62, 182-84).

Adams recalled that Rick Harrison's last campaign for Kaufman County Criminal District Attorney was hotly contested and personal; several people ran against him. According to Adams, when Applicant took office as justice of the peace, he wanted to make improvements, such as upgrading the computers, securing money, and redirecting certain mail. After Applicant's burglary trial, Adams was visiting the District Attorney's Office and saw a poster of Applicant's mugshot with the caption "captured." Adams remained friends with Applicant after his conviction, and she and a few others reached out to him. (53 RR 163-64, 176-77).

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[10] At the time of the murders, Jordan was employed as a public defender. (52 RR 110).

Adams was shocked by Applicant's arrest in this case. He was always upbeat, happy, optimistic, helpful, and outgoing. He cared about others and took an interest in other people's lives. She still cares about Applicant, and she did not think he was a psychopath. She would visit him in prison and write him. She had experienced "a breaking point" herself and wanted to kill others. But she never hurt anyone, and she agreed most people who reach their breaking point stop short of killing people. (53 RR 178-82).

Three different judges who worked with Applicant testified about his work as an attorney. Retired Judge Ruth Blake recalled Applicant's participation in a custody battle over a teenaged boy and a dispute over child support. Applicant was appointed as guardian ad litem. Judge Blake said Applicant's work on the case was fine and was of value to the child. (52 RR 100-08). Judge Howard Tygrett recalled Applicant was appointed as a mediator or a guardian ad litem on numerous cases; he received no complaints about the quality of Applicant's work but did say others complained about how much Applicant was billing. Now the cases are spread out more evenly among attorneys. (52 RR 132-36). Former Judge William Martin testified Applicant practiced before him as a guardian ad litem in CPS cases. Applicant did not always agree with CPS about terminating parental rights, and he was not a "rubber stamp." He would interview everyone, including the child, caseworker, witnesses, and parents, and he would review all the diagnostic material. Judge Martin described Applicant as engaged and empathetic to the children he represented. In his opinion, Applicant delivered valuable services in his cases. (53 RR 80-87).

Regina Fogarty, who worked for the justice of the peace, precinct 1, testified about Applicant's performance. She described him as courteous, diligent, and someone who took his work seriously. He tried to make technology improvements by initiating video magistration and adding WI-FI to the JP courtroom. (53 RR 61-65).

Rhonda Hughey, Kaufman County's District Clerk, told the jury she had known Applicant since he was Judge Ashworth's court coordinator. He performed his coordinator duties well. She recalled Applicant attending law school and going on to become an attorney who was appointed as a guardian ad litem in many CPS cases. She described Applicant as friendly, approachable, and helpful, and said he got along with everyone. Applicant would answer questions and go out of his way to help others. Initially, Hughey could not believe Applicant had committed the murders because it

was so out of character. She thought he was normal and intelligent. Her opinion about his guilt later changed. (52 RR 124-31).

Individuals who benefited from Applicant's legal assistance also testified. Applicant helped Cheryl Joseph's stepdaughter adopt a boy whose parents were drug addicts. Applicant was appointed as the boy's guardian ad litem, met with the boy and attended every court session. He was kind, never lost his temper, and did a good job. (53 RR 30-40). Applicant helped Ronald Fudge through a contested divorce and a two-year custody battle over his young son. Applicant continued representing him even when he could not pay him. Fudge became friends with Applicant during the process. At first, Fudge did not believe Applicant was guilty of the murders. His opinion has changed, but he would still visit Applicant in prison. (52 RR 74-81). Applicant was appointed as Casie Acevedo's guardian ad litem during her parents' divorce. She wanted to live with her father; Applicant listened to her and successfully advocated for this arrangement on her behalf. Casie described Applicant as kind and said she felt safe and comfortable with him. (52 RR 69-73). Applicant was also appointed as guardian ad litem for Micah Tomasella during his parents' divorce. Applicant spoke to Micah about what he wanted, advocated on his behalf in court, and seemed genuinely concerned about him during the process. (53 RR 210-14).

Rick Harrison, an attorney and former Kaufman County Criminal District Attorney, recalled Applicant's support for him during his 2006 election campaign. Harrison ran against Mike McLelland and beat him in a run-off election. Applicant wrote a letter to the paper on Harrison's behalf. In the letter, Applicant said McLelland should explain why he no longer worked for CPS and claimed he was not a life-long Republican. Harrison thought he was more qualified than McLelland because he had more criminal experience. In 2009, Harrison "got a DWI," and in the next election, McLelland ran against him again and beat him in the primary. McLelland did not like Harrison, and this election was contentious. Harrison hired Hasse when he was District Attorney, and Hasse continued to work for McLelland. (53 RR 46-53, 55; DX 36).

Harrison supported Applicant in his campaign for justice of the peace and was the first person to give him a campaign donation. He gave his support because Applicant asked for it and he was running against a Democrat. Harrison knew Applicant to be hardworking and certified in family law, but he did not deal with him once he became a justice of the peace. (53 RR 53-54).

Jenny Parks, a Kaufman attorney, first met Applicant when he worked as Judge Ashworth's court coordinator. She thought he had a good work ethic, never heard any complaints about him and had no issues with him herself. After Applicant became a family law attorney, she once recommended him to someone. She sought his advice and found him helpful. Applicant was close friends with Judge Ashworth and would go to lunch daily with him and Gary Sjerven. Applicant appeared to be a happily married, loving husband, and he took care of Kim when she became ill. Parks denied she and Applicant were close, but they were friends and she attended his burglary trial. In her opinion, the prosecution was ridiculous and Applicant was wrongly convicted. She thought the evidence did not support a conviction. Applicant had done only good things for the county, and to her "and a lot of other people in the county it didn't make any sense." Parks was also friends with Hasse. She described him as a "very aggressive" prosecutor who would brag about destroying the lives of the people he prosecuted. (50 RR 69-75, 82-83).

Parks acknowledged that everyone was a little afraid after the murders, but she did not suspect Applicant of them and was surprised when he was arrested. She was no longer surprised after seeing on television some of the evidence against him. She had never seen Applicant angry. He was quiet, reserved, pretty shy, and a little antisocial. She did not think Kaufman residents would resent her for her testimony, but said others were afraid to do the same. She contacted Applicant after his burglary conviction to see how he was doing, but she wished she had done more for him. (50 RR 76-82).

Sergeant Matthew Woodall, an investigator for the Kaufman County Sheriff's Office, said Applicant was arrested for the burglary at the auxiliary building where his court was located. His vehicle, parked in the building's lot, was searched and a computer monitor was recovered. Sergeant Woodall inventoried the firearms found in Applicant's vehicle and all were later returned to Applicant. The IT department, run by George York, was housed in the same building as the justice of the peace court. The IT department and the court were connected by a hallway. (51 RR 228-33, 236-38).

Rockwall Sheriff's Captain Bob Guzik, the jail administrator, described the jail facilities and fortifications, the security measures employed there, the disciplinary and grievance processes, and the education and work programs. When Applicant first arrived at the Rockwall County jail, he was classified as "medium" security and was

ranked a "7" based on the seriousness of his offense. When reassessed 90 days later, Applicant remained classified as "medium" security, but his rank was lowered to "6." Applicant was under 24/7 observation and, given his law enforcement background, segregated from other inmates, minimizing any opportunities for misconduct. Applicant filed an inmate worker application claiming to be Jesus Christ, but no incident report was filed; inmates regularly "messed with" jailers like this. Applicant had several medical issues. He periodically suffered from breathing problems and had to be taken to the hospital for it once. Applicant was taken to the infirmary twice for insulin shots, and his blood sugar was monitored daily. According to Guzik, the security employed in Applicant's case was unprecedented. He acknowledged that no security is perfect, inmates are watching all of the time, and Applicant had been outside of the Rockwall County jail without his knowledge. (50 RR 123-56).

Assistant Chief Carla Stone, the Kaufman County jail administrator, described their handling of Applicant up until his transfer to the Rockwall County jail. Applicant was familiar with the jail and its staff because of his prior service as JP. This was considered when managing his security. Because of his medical issues and the nature of his crime, Applicant was put on suicide watch and housed in administrative separation. Applicant was found unresponsive in his cell a couple of times. The first time, he fell and struck his nose. Applicant was diabetic, and both of these medical incidents were related to a drop in his blood sugar. Both times, Applicant was taken to the hospital without incident. Heightened security was employed, however, because of another inmate's escape years before during transport to the hospital. A search of Applicant's cell yielded a variety of food items (candy, cookies, chips) that had to be confiscated. This discovery led jail staff to believe Applicant was manipulating his blood sugar and his commissary orders were restricted. One night, Applicant's cell was accidentally left unlocked, but he made no attempt to escape. On the other hand, Applicant kept a list of every interaction with the officers and the comings and goings in that area of the jail. He also changed his sleeping position so the officers had to enter his cell in order to check on him. One officer was disciplined for documenting 15-minute checks on Applicant that he never performed. (50 RR 157-94).

Two correctional experts, James Aiken and Frank Aubuchon, testified about the prison system and its ability to manage inmates, including Applicant.

Aiken described the prison classification system generally, noting inmates are evaluated every six months to a year and systems are continuously modified and re-

examined. The classification system is designed to control and predict inmate behavior, and it works. Inmates become more compliant with age and prior institutional behavior is a reliable predictor of future institutional behavior. After reviewing Applicant's records and meeting with him personally, Aiken concluded Applicant could be "adequately kept and secured in a correctional environment for the remainder of his life without causing undue harm to staff, inmates or the general public." He believed Applicant's diabetes, background in law enforcement, and age would make him vulnerable in prison. Aiken acknowledged the most important factor in evaluating an inmate's security status is his crime. He agreed prisons are dangerous and no matter how hard the staff works there will still be murders, assaults, and escapes. Certain inmates thought to be innocuous had committed heinous crimes in prison. Applicant was very intelligent, had special law enforcement knowledge, and had successfully manipulated others and planned his crimes. (51 RR 25-61).

Aubuchon, a retired Texas Department of Criminal Justice classifications administrator who now works as a prison expert, described TDCJ and its classification system in detail. TDCJ has several levels of facilities and several custody levels within the general prison population. The system was last revised in 2003. Each inmate's custody level is assessed at the diagnostic unit first and again at the designated unit. Policies dictate an inmate's initial custody level, but an inmate can be reclassified to a more restrictive level based on his behavior. An inmate serving a sentence of life without parole (LWOP) can never be classified below a G3 custody level. Aubuchon described the liberties and restrictions of each custody level. He noted LWOP inmates can never earn good conduct time-credit, cannot have contact visits, and have limited work opportunities. TDCJ has a special prosecution unit to prosecute prison crime and also has a Security Threat Group Management Office (STGMO) that tracks gang members and their activities. Applicant would be classified as a G3 level inmate with the possibility of some considerations for safekeeping type housing. Applicant would be housed with other prisoners, some with no violent criminal history, and a single guard can be responsible for watching as many as 48 inmates at once. Certain escapes and murders had occurred in TDCJ, and cellphones posed a serious security problem. He said even inmates housed on death row committed violence against guards, and guards are paid poorly and receive minimal training. (51 RR 63-124).

Procedural History

A jury convicted Applicant of capital murder and, in accordance with the jury's answers to the special issues, the trial court sentenced him to death on December 17, 2014. The Court of Criminal Appeals affirmed his conviction and sentence on November 1, 2017. *Williams v. State*, No. AP-77,053, 2017 WL 4946865 (Tex. Crim. App. Nov. 1, 2017) (not designated for publication).

On December 17, 2014, the trial court appointed the Office of Capital and Forensic Writs to represent Applicant in his state habeas corpus proceeding. After receiving extensions totaling an additional 510 days, Applicant filed his original application on March 8, 2018. He raises eleven claims for relief, challenging the trial court's denial of his motion to disqualify District Attorney Pro Tem Bill Wirskye from participating in the writ proceedings, and both his conviction and death sentence. The trial court conducted a hearing on August 12-16, 2019 at which live testimony was presented on Applicant's claims 1-7. The court also admitted numerous exhibits from both parties during and after the hearing.

Claims Raised

Applicant raised the following claims in his writ application:

- The State procured Applicant's death sentence through prosecutorial misconduct.
- Applicant's trial counsel were ineffective in both the guilt and punishment phases of trial.
- Applicant was constructively denied his constitutional right to counsel under *Cronic*.
- Trial counsel's inability to review the entirety of the State's unprecedented amount of discovery violated Applicant's rights to due process and a fair trial.
- The trial court's comments, demeanor, and inconsistent ruling demonstrated a lack of judicial impartiality as guaranteed by the Due Process Clause.
- Applicant's appellate counsel rendered ineffective assistance on direct appeal.

- Applicant's right to a fair trial was violated when his jury was exposed to external influence that tainted the verdict.

- Applicant's death sentence is unconstitutional because it was assigned based on Texas's arbitrary system of administering the death penalty.

- Applicant's constitutional rights were violated when the trial court was prohibited from instructing the jury that a vote by one juror would result in a life sentence.

- The future dangerousness special issue is unconstitutionally vague, rendering the jury's verdict arbitrary and capricious.

- The penalty-phase jury instruction restricted the evidence that the jury could determine was mitigating.

Motion to Disqualify District Attorney Pro Tem Bill Wirskye

(1) On August 21, 2018, Applicant filed a motion entitled "Motion to Disqualify District Attorney Pro Tem Bill Wirskye." In the motion, Applicant contends Wirskye is a necessary and material witness to alleged acts of prosecutorial misconduct and, therefore, his continued service as District Attorney Pro Tem would violate Applicant's constitutional rights to due process, a disinterested prosecutor, and a fair trial. The State filed a response to Applicant's motion on September 10, 2018. This court denied the motion on March 29, 2019.

(2) On August 2, 2019, ten days before the scheduled evidentiary hearing, Applicant filed a "Renewed Motion to Disqualify District Attorney Pro Tem Bill Wirskye." The court heard argument from the parties on August 5, 2019 and again denied the motion. (4 WRR 9-19).

(3) Applicant's constitutional rights were not violated by Wirskye's representation of the State in these proceedings.

Background Facts

(4) Two days after Kaufman County Criminal District Attorney Michael McLelland and his wife, Cynthia, were murdered in their home, the Kaufman County Criminal

District Attorney's Office voluntarily recused itself from the investigation and prosecution of the murders and moved the court to appoint an attorney pro tem. (2nd Supp. CR 12-13).

(5) The court granted the motion and appointed Bill Wirskye and Toby Shook "to investigate and present to the grand jury any criminal offenses arising out of the deaths of Michael and Cynthia McLelland and to prosecute any case or cases which may arise from the grand jury investigation, said appointments to continue through any trials and appeals of those offenses and until they are relieved of their appointments in this matter by this Court." (2nd Supp. CR 9). Wirskye and Shook both accepted the appointment and took the oath of office on April 1, 2013. (2nd Supp. CR 10-11).

(6) As the Criminal District Attorneys Pro Tem of Kaufman County in this case, Wirskye and Shook led the investigation of the killings and presented their findings to the grand jury. Applicant was indicted for capital murder on June 27, 2013. (1 CR 32). In December 2014, Wirskye, Shook, and other assistant district attorneys pro tem, prosecuted Applicant on this charge, which resulted in a conviction for capital murder and death sentence. (1 CR 173; 10 CR 3935, 4007; 11 CR 4312-13, 4351).

(7) In accordance with the terms of his appointment, Wirskye, and other assistant district attorneys pro tem, represent the State in these writ proceedings.

(8) During the week of the live evidentiary hearing, Wirskye was present for portions, but not all, of the hearing. The majority of the writ hearing was handled by pro tem attorneys Lisa Smith and Libby Lange. (8 WRR 98

(9) Wirskye testified as a witness at the writ hearing on August 15, 2019.

Applicable Law

(10) Disqualification is a severe remedy. *In re Nitla de C. V.*, 92 S.W.3d 419, 422 (Tex. 2002) (citing *Spears v. Fourth Court of Appeals*, 797 S.W.2d 654 (Tex. 1990)). In considering a motion to disqualify, this Court must strictly adhere to an exacting standard to discourage its use as a dilatory trial tactic. *Id.*

(11) Moreover, the court's authority to disqualify a district attorney or his staff is limited. The office of a district attorney is constitutionally created and protected; thus, the district attorney's authority "cannot be abridged or taken away." *Landers v. State*, 256

S.W.3d 295, 303-04 (Tex. Crim. App. 2008) (citing *State ex rel. Eidson v. Edwards*, 793 S.W.2d 1, 4 (Tex. Crim. App. 1990)); Tex. Const. art. V, § 21.

(12) This Court may not disqualify Wirskye or his staff from these writ proceedings absent a conflict of interest that rises to the level of a due process violation. *Landers*, 256 S.W.3d at 304 (citing *State ex rel. Hill v. Pirtle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994).

(13) The Court may look to the Texas Disciplinary Rules of Professional Conduct when considering disqualification issues, but the rules are merely guidelines, not the standard for disqualification. *Gonzalez v. State*, 117 S.W.3d 831, 837-38 (Tex. Crim. App. 2003); *Nitla*, 92 S.W.3d at 422; *see also* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmts. 9 & 10, *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. A (providing Rule 3.08 is not well suited to use as a standard for disqualification, but may furnish some guidance in procedural disqualification disputes).

(14) As the party seeking disqualification, Applicant bears the burden of establishing a due process violation. *Gonzalez*, 117 S.W.3d at 837; *Nitla*, 92 S.W.3d at 422. This means Applicant must show he will suffer actual prejudice from the alleged "advocate-witness" conflict. *Landers*, 256 S.W.3d at 304-05; *Gonzalez*, 117 S.W.3d at 837. Applicant does not suffer actual prejudice unless he is deprived of a fair trial or his substantial rights are affected. *House v. State*, 947 S.W.2d 251, 252 (Tex. Crim. App. 1997) (citing *Brown v. State*, 921 S.W.2d 227 (Tex. Crim. App. 1996)).

Applicant Failed to Show Sufficient Grounds for Disqualification

(15) Applicant contends Wirskye is prohibited from acting as both a witness and prosecutor in this case under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct. Rule 3.08 generally prohibits a lawyer from being an advocate before a tribunal if the lawyer knows or believes that the lawyer is or may be a witness necessary to establish an essential fact on behalf of the lawyer's client. Tex. Disciplinary R. Prof'l Conduct 3.08(a).

(16) Applicant has not shown disqualification is warranted under Rule 3.08 of the Texas Disciplinary Rules of Professional Conduct.

(17) A district attorney may not be disqualified for violations of the disciplinary rules of professional conduct alone. *See Landers*, 256 S.W.3d at 310.

(18) In any event, Rule 3.08 specifically provides a lawyer may serve as both an advocate and witness so long as he gives notice to opposing counsel and disqualifying him would be a substantial hardship to the party. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.08(a)(5).

(19) The court finds the State gave proper notice to Applicant that Wirskye would testify in the instant proceeding. (4 WRR 9).

(20) The court finds disqualifying Wirskye would be a substantial hardship to the State given his knowledge of the case and particular expertise regarding the issues raised in the writ application.[11] (4 WRR 11-13).

(21) Additionally, the court notes the principal concern addressed by Rule 3.08 is the possible confusion the dual role of advocate-witness could create for the fact finder. *See* Tex. Disciplinary Rules Prof'l Conduct R. 3.08 cmt. 4; *Ayres V. Canales*, 790 S.W.2d 554, 557 n. 4 (Tex. 1990). "A witness is required to testify on the basis of personal knowledge, while an advocate is expected to explain and comment on evidence given by others. It may not be clear whether a statement by an advocate-witness should be taken as proof or as an analysis of the proof." Tex. Disciplinary R. Prof. Conduct 3.08 cmt. 4.

(22) The court finds this concern is not implicated in this case. The court, as the fact finder in this proceeding, has no difficulty determining whether Wirskye is speaking in his capacity as an advocate or a witness. The court also does not attribute greater credibility to Wirskye's testimony merely because he holds the office of District Attorney Pro Tem in this case.

(23) Applicant also has not shown a conflict of interest rising to the level of a due process violation that would warrant Wirskye's disqualification.

(24) The court finds Applicant's allegations of misconduct against Wirskye are not sufficient to establish a disqualifying conflict of interest. *Spears*, 797 S.W.2d at 656; *State ex rel. Hilbig v. McDonald*, 877 S.W.2d 469, 472 (Tex. App. - San Antonio 1994, original proceeding) (holding former complainant's accusation of prosecutorial

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[11] For this reason, Wirskye was also excepted from exclusion under evidence rule 614. Tex. R. Evid. 614(c) (providing the rule does not authorize excluding "a person whose presence a party shows to be essential to presenting the party's claim or defense").

misconduct against two trial prosecutors insufficient to justify disqualification of district attorney's office from proceeding on Applicant's motion for new trial).

(25) Applicant has been afforded a fair proceeding. Applicant fails to show what, if any, substantial rights have been affected by Wirskye's dual role as advocate-witness. Thus, Applicant has not shown actual prejudice.

(26) Accordingly, the Court concludes that Wirskye's disqualification is prohibited by law. *Landers*, 256 S.W.3d at 304 (providing that a court may not disqualify a district attorney absent a conflict of interest that rises to the level of a due process violation).

Claim 1: Prosecutorial Misconduct

(27) Applicant asserts the State procured his death sentence through prosecutorial misconduct. (App. at 12-73).

Deal with Kim Williams

(28) In Claim 1A, Applicant asserts the State violated his due process rights under *Brady* v. *Maryland* by failing to disclose material impeachment and mitigating evidence pertaining to Kim Williams. (App. at 12-31).

(29) Due process is violated when the State suppresses material evidence that is favorable to the defense. *Brady v. Maryland*, 373 U.S. 83, 87 (1963); *Ex parte Lalonde*, 570 S.W.3d 716, 724 (Tex. Crim. App. 2019).

Applicable Facts

(30) On June 27, 2013, the State indicted both Applicant and his wife Kim Williams on the same three counts of capital murder. (1 CR 32; AX 153-155).

(31) Kim Williams was appointed two attorneys: Paul Johnson as first chair and Lalon (Clipper) Peale as second chair. (AX 153-155; 5 WRR 95-96; 7 WRR 5-6).

(32) Prior to and during the trial, Applicant's counsel requested the State reveal any deals it had with Kim Williams, and each time, the State said it did not have a deal with her. (1 CR 232-34; 9 RR 15-17; 54 RR 141-42; AX 30).

(33) Kim Williams testified as a State's rebuttal witness in the punishment phase of Applicant's trial. She did not have a deal with the State, the State never gave her immunity, and prosecutor Bill Wirskye only ever asked her to tell the truth. (54 RR 8-9, 92-93). She was cooperating because the families had suffered a terrible loss, and they "deserve this, and I want to give it to 'em." The following dialogue also occurred:

> Q. [State]: Obviously you have some expectation of leniency after this, this process is over with Eric, is that correct?
>
> A. [Kim]: Yes. I'm hoping for consideration.
>
> Q. We have never talked about any specifics, have we?
>
> A. No, we have not.
>
> Q. I refused to talk with you and your lawyers about that, is that correct?
>
> A. Yes, that's correct.

(54 RR 93).

(34) On cross-examination by defense counsel, the following dialogue occurred:

> Q. [Defense]: You said that you had had some expectation of leniency for your participation in trial today?
>
> A. [Kim]: Yes.
>
> Q. And by that do you mean that you're hoping that they will spare you death by lethal infection?
>
> A. I'm hoping there's some kind of consideration, yes.
>
> Q. Is that your expectation?
>
> A. Sure.

(54 RR 101).

(35) Later, defense counsel asked Kim: "[F]or your testimony today, you have every expectation that the people of Kaufman County will afford you something less than lethal injection?" And Kim testified: "I have hope that I will be given consideration." (54 RR 109).

(36) In closing argument, defense counsel argued: "You heard some evidence from Kim Williams today. I want you to think about the credibility on that. She's hoping not to get the death penalty. The law regards an accomplice as a corrupt source, and you should too." (54 RR 167).

(37) After Applicant was convicted, the State offered Kim Williams a forty-year prison sentence if she pleaded guilty to murder, which she accepted. (AX 153; 5 WRR 165; 8 WRR 88).

(38) In his writ application, Applicant alleges the State promised Kim Williams a deal in exchange for her testimony. (App. at 17). Applicant says Kim "clearly understood she was cooperating with and testifying for the State" in exchange for "the State not only declining to seek the death penalty, but also recommending a sentence less than life without parole." (App. at 23).

(39) At the writ hearing, Applicant's counsel similarly alleged Kim knew she was safe from the death penalty and the testimony made it "clear that capital murder was off the table" for Kim and "[h]er life was going to be spared." (9 WRR 6-7, 13). Counsel also alleged the State made "secret assurances" to Kim that if she cooperated her life would be spared and the State had an "understanding" with Kim it did not disclose. (5 WRR 11, 14).

(40) Under *Giglio v. United States*, the State must disclose any agreement with a witness that may affect the witness's credibility. 405 U.S. 150, 154-55 (1972). No formal agreement is required; rather, courts have focused on whether—based on the State's assurances to the witness—the witness's credibility could be compromised. *Id.*

(41) Kim Williams testified at Applicant's trial that she did not have a deal with the State prior to testifying. (54 RR 101).

(42) Applicant did not call Kim Williams to testify at the writ hearing.

(43) At the hearing, lead prosecutor Bill Wirskye told the court he has been a licensed attorney in Texas since 1993. He spent eight years as a defense attorney, and the remaining eighteen years as a prosecutor. (8 WRR 59).

(44) Wirskye stated he did not offer Kim a deal before she testified. (8 WRR 82).

(45) Wirskye testified every time he talked to Kim's lawyers or was around Kim, and at every debrief, he would say:

> I know we do not have a deal. Do you understand that. I know you want a deal. I know you're not doing this out of the goodness of your heart. I know you want something at the end of this process. But here's how it's gonna be. If you come in and talk to us, if you come in and cooperate, if you get in that car and go show us physical evidence, you come in at your own peril, and we better not ever catch you lying. And as far as any talk about deals or what's gonna happen to you or the death penalty or anything else, we wait until we get past that first trial. And that was a very disciplined position that we insisted on in our dealings with her counsel and with her.

(8 WRR 86-87).

(46) Applicant's counsel chose not to directly question Wirskye about his denial of a deal.

(47) At the writ hearing, Kim Williams's lead attorney Paul Johnson testified he has been a licensed attorney for thirty-five years and has been a criminal defense attorney for thirty of those years. He has handled hundreds of capital cases and about twelve or fifteen of those have gone to trial for the death penalty. (8 WRR 5-6, 14-15).

(48) Johnson stated there was "[a]bsolutely not" a deal between Kim and the State before trial. (8 WRR 11).

(49) At the writ hearing, Kim Williams's second-chair attorney, Lalon Peale said he has been a practicing criminal defense attorney for twenty-six or twenty-seven years. He has worked on five death penalty cases that have gone to trial. While he could not say how many death penalty cases he had worked up that were resolved before trial, he was

currently working on five to ten cases that they were "working out." (5 WRR 95, 105-07).

(50) Peale testified Kim did not have a deal with the State before she testified. (5 WRR 163).

(51) When asked if he recalled Wirskye telling Kim that she had no deal, Peale testified:

> I think that he might have started every meeting out that way. I mean there was some, and when I say spiel, I don't, I'm not trying to make light of it, but I'm saying there was something that, prior, to my recollection, prior to every meeting he would go back over and say you recall, you know, we have no deal. We're asking for your cooperation. Those things.

(5 WRR 156-57).

(52) At the writ hearing, Applicant's counsel asserted in opening argument "Kim's own lawyer admitted to a colleague" she had a deal. (5 WRR 13). During the hearing, however, Applicant's counsel was unsuccessful in her efforts to prove this through Applicant's direct appeal attorney, Brady Wyatt, who was good friends with Kim Williams's attorney Paul Johnson. (5 WRR 185). When Applicant's counsel asked Wyatt if Johnson said Kim had a deal in exchange for her testimony, Wyatt stated: "Never said he had a deal. I think there might have been - no, I don't think he ever told me there was an actual deal on the table." (5 WRR 173, 185-86).

(53) Applicant fails to prove the State had a deal with Kim Williams to testify against him, and the Court finds there was no deal.

(54) Because the State did not have a deal with Kim, no evidence was suppressed, and the State did not violate *Brady* v. *Maryland*. *See, e.g.*, *Todd* v. *Schomig*, 283 F.3d 842, 849 (7th Cir. 2002) ("Without an agreement, no evidence was suppressed, and the state's conduct, not disclosing something it did not have, cannot be considered a *Brady* violation.").

(55) As to Applicant's assertion that Kim Williams's hope for consideration should have been disclosed, the court disagrees.

(56) In *Giglio*, the United States Supreme Court found a due process violation where a key government witness testified no one promised he would not be prosecuted, but a prosecutor later stated he had promised not to prosecute if the witness cooperated. 405 U.S. at 154-55. The Court held, where a witness's credibility was important, "evidence of any understanding or agreement as to a future prosecution would be relevant to his credibility and the jury was entitled to know of it." *Id.* at 150-55.[12]

(57) In *Duggan v. State*, 778 S.W.2d 465, 468 (Tex. Crim. App. 1989), the Court reiterated it did not "distinguish express agreements between the State and a testifying accomplice from those agreements which are merely implied, suggested, insinuated or inferred" and whether an agreement exists depends on whether the evidence "tends to confirm rather than refute the existence of some understanding for leniency." *Id.* (quoting *Burkhalter v. State*, 493 S.W.2d 214, 216-17 (Tex. Crim. App. 1973)). The Court held: "It makes no difference whether the understanding is consummated by a wink, a nod and a handshake, or by a signed and notarized formal document ceremoniously impressed with a wax seal. A deal is a deal." *Id.*

(58) The *Duggan* Court found a due process violation where two accomplices testified no leniency agreement existed, but the prosecutor later admitted telling the accomplices he would consider leniency in exchange for their testimony. The Court held that "some sort of understanding between the State and the accomplices did indeed exist." *Id.*

(59) In *Tassin v. Cain*, 517 F.3d 770 (5th Cir. 2008), Robert Tassin and his wife Georgina were charged with an armed robbery in which Robert killed a man. Georgina testified against Robert, and told the jury she faced the possibility of a five to ninety-nine-year sentence and no promises had been made relating to her testimony. *Id.* at 773. After trial, Georgina's attorney tendered an affidavit stating the presiding judge had told him in the presence of a prosecutor that, if Georgina testified, he would sentence her to fifteen years and, if her testimony was consistent with her police statements, he might drop her sentence to ten years. *Id.* at 774, 779. The attorney communicated the "plea offer" to Georgina. *Id.* at 775. In a post-conviction proceeding, the attorney testified similarly to his affidavit, and Georgina testified she believed she would receive a ten-year

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[12] The Court of Criminal Appeals has recently stated: "Inducements to testify must be disclosed." *Ex parte McGregor*, No. WR-85,833-01, 2019 WL 2439453, at * 1 (Tex. Crim. App. June 12, 2019) (not designated for publication) (citing *Giglio*).

sentence. The Court found a Fourteenth Amendment violation, holding: "Tassin presented evidence of an 'understanding or agreement' between [his wife] and the State, evidence that showed more than a mere 'hope or expectation' of a lenient sentence[.]" *Id.* at 779 (citations omitted).

(60) Additional Fifth Circuit case law supports this conclusion. *See Hill v. Johnson*, 210 F.3d 481, 486 (5th Cir. 2000) (noting Hill did not point to a Supreme Court decision holding the subjective beliefs of witnesses regarding the possibility of future favorable treatment are sufficient to trigger the State's duty to disclose under *Brady*); *Knox v. Johnson*, 224 F.3d 470, 482 (5th Cir. 2000) ("The record reflects a unilateral hope on Smith's part rather than a deal, whether implicit or explicit, between Smith and the State."); *Goodwin v. Johnson*, 132 F.3d 162, 187 (5th Cir. 1998) (holding "a nebulous expectation of help from the state . . . is not *Brady* material"); *United States v. Nixon*, 881 F.2d 1305, 1311 (5th Cir. 1989) (holding a witness's impression that the government would help him obtain a pardon in exchange for his testimony in the absence of a "specific promise to help" was not *Brady* material).

(61) And the Sixth Circuit has similarly held: "[T]he mere fact that a witness has an expectation of favorable treatment in exchange for his testimony is insufficient to demonstrate such an agreement; rather, 'there must be some assurance or promise from the prosecution that gives rise to a *mutual* understanding or tacit *agreement*.'" *Melville v. United States*, 457 Fed. Appx. 522 (6th Cir. 2012) (not designated for publication) (quoting *Akrawi v. Booker*, 572 F.3d 252, 263 (6th Cir. 2009)) (emphasis in orig.).

(62) The State has denied it assured or in any way indicated to Kim or her attorneys that she would receive leniency in exchange for her testimony and the evidence does not show otherwise.

(63) While neither Johnson nor Peale recounted specific conversations with Kim, Johnson testified, when a client is cooperating without a deal, he talks to them "at length" to ensure they understand they do not have a deal. Peale testified in this situation he is "crystal clear that there are no guarantees." (5 WRR 120, 162-63; 8 RR 10-11).

(64) The evidence shows the State did not have a tacit agreement or any type of mutual understanding with Kim regarding her testimony.

(65) The State did not have a duty to disclose Kim's subjective expectation for leniency or her hope for consideration; therefore, no evidence was suppressed, and the State did not violate *Brady v. Maryland.*

(66) Any claim by Applicant that Kim's expectation of leniency should have been disclosed should be denied.

(67) Alternatively, Applicant did not object at trial when Kim testified to her expectation of leniency and her hope of consideration; therefore, any *Brady* claim that the State failed to disclose Kim's expectation or hope is procedurally barred. An applicant may not raise a claim for the first time in a habeas-corpus proceeding if he had a reasonable opportunity to raise the issue at trial and failed to do so. *Ex parte De La Cruz*, 466 S.W.3d 855, 864 (Tex. Crim. App. 2015). Even constitutional claims can be forfeited on habeas due to lack of action. *Id.*

(68) To be timely, when alleged *Brady* evidence is disclosed at trial, the defendant must raise an objection as soon as the grounds for the complaint become apparent. *See Wilson v. State*, 7 S.W.3d 136, 146 (Tex. Crim. App. 1999).

(69) When Kim testified she had an expectation of leniency and a hope for consideration, Applicant's counsel did not object or request a continuance. A defendant's failure to request a continuance when *Brady* evidence is disclosed at trial arguably waives his complaint that the State has violated *Brady* and suggests that the tardy disclosure of the evidence was not prejudicial to him. *See Valdez v. State*, No. AP-77,042, 2018 WL 3046403, at *11 (Tex. Crim. App. June 20, 2018) (not designated for publication) (footnotes and citations omitted).

(70) "If the defendant received the material in time to use it effectively at trial, his conviction should not be reversed just because it was not disclosed as early as it might have and should have been." *Little v. State*, 991 S.W.2d 864, 866 (Tex. Crim. App. 1999).

(71) Applicant's counsel used Kim's testimony to Applicant's advantage at trial by asking Kim: "[F]or your testimony today, you have every expectation that the people of Kaufman County will afford you something less than lethal injection?" And Kim replied: "I have hope that I will be given consideration." (54 RR 109). Counsel argued in closing argument: "You heard some evidence from Kim Williams today. I want you to think

about the credibility on that. She's hoping not to get the death penalty. The law regards an accomplice as a corrupt source, and you should too." (54 RR 167).

(72) Applicant cannot show he was prejudiced by the allegedly tardy *Brady* disclosure that Kim had an expectation of leniency and hoped for consideration.

(73) Any claim by Applicant that Kim's expectation of leniency establishes a deal is procedurally barred and should be dismissed.

Applicant's Evidence of a Deal

Predictions and Actions of Kim Williams's Attorneys

(74) Applicant asserts the existence of a deal is evidenced by the fact that Kim Williams's lawyers never expected to go to trial, never filed any motions, no trial date was ever set, and the State never announced it was going to seek the death penalty. (App. at 18-19; 9 WRR 12-13).

(75) Paul Johnson explained, although Kim did not have a deal with the State, he believed the State would make an offer after trial because he believed the evidence they had to offer had "filled in a lot of missing pieces or it, it put together a much clearer picture of the whole case th[a]n they had without Ms. Williams's testimony." Further, "And I knew that it would certainly be an opportunity for [Kim] to, on - without a doubt, to avoid the, being considered for the sentence of death." (8 WRR 11).

(76) Johnson told the court:

> [I] think from my experience I have a pretty good idea of what, what cooperation is worth in a case based upon the need by the prosecutors for the information that the client possesses; and the more the need, the more the perceived benefit that I think would accrue to my client if they cooperate and testify and, and are truthful and prove to be truthful. So it's somewhat a value added equation as to what the, what the cooperation is going to be worth. If you're, if you're providing the critical missing piece of evidence, you're certainly going to get a better deal than if you just have some information that would assist.

(8 WRR 10).

(77) Although Lalon Peale did not recount his specific conversations with Kim due to the client-attorney privilege, he testified about the conversations he has with his clients who have something to offer the State but do not have a deal up front. (5 WRR 120, 162-63). Peale would have encouraged Kim to cooperate without a deal because:

> [S]he was facing the possibility of the death sentence. You know, my job is to save their life one way or the other. And so that's, I mean, that would be a main incentive. . . . [Y]ou just say if you take whatever deal is offered or if there's not a deal, look, we know these people, chances are they're not going to seek the death penalty on you. You'll be able to negotiate something down below a capital murder so that at some point you would be able to get out of prison.

(5 WRR 162-64).

(78) When asked what his expectations were for Kim's case given her cooperation, Peale stated: "My expectations, we would, we would work out some type of plea bargain." When asked: "Did you expect that the State would take her cooperation into consideration?" Peale stated: "We hoped that they would. That was the whole plan. That's why we were going about it this way." (5 WRR 148).

(79) Although Kim's attorneys believed Kim's cooperation would likely allow her to avoid getting the death penalty, this was based on their experience and well-educated predictions in working on capital cases and not on any promises or assurances by the State.

(80) At the writ hearing, Applicant's counsel questioned Peale extensively about his billing records and that they showed he filed few, if any, motions during his eighteen-month representation of Kim. (5 WRR 104-149). Peale said: (1) much of the billing records were redacted due to the attorney-client privilege; (2) the records do not contain all his activities and associated entries; and (3) his billing records are detailed enough to refresh his memory but are not generated to defend against complaints. (5 WRR 116-17, 119, 134, 141, 170-72).

(81) Peale could not remember what motions were filed but it "would not surprise" him if no motions were filed other than requests for things like the appointment a mitigation expert and/or investigator because they "weren't set for trial" in Kim's case, and they were getting discovery. (5 WRR 126-27).

(82) Wirskye said a trial date was never set in Kim's case, but explained: "We wouldn't. There's no need to set a trial date. We were going after the shooter first, and [Kim] had started down the path of cooperating with us; and we wouldn't even get to the issue of her trial or her sentence until we were done with the Eric Williams trial." (8 WRR 149).

(83) Regardless of how many or the type of motions filed in Kim's case, Kim's attorneys worked diligently on her case.

(84) Peale recounted some of his actions on the case, including that he met with or spoke with the prosecutors or law enforcement several times in Applicant's case, met with his co-counsel and with Kim several times, went on at least one of Kim's ride alongs, and attended quite a few, but not all of Kim's debriefings. (5 WRR 96, 117, 119, 121, 134-38, 140, 144, 155-57).

(85) Paul Johnson "did a lot of work on the case. I mean I did a ton of work on the case[,]" including meeting with Kim and his co-counsel many times; reviewing discovery as much as possible that was relevant to their issues; hiring an investigator and a psychologist; meeting with the prosecutors; and attending Kim's debriefings with the State. He accompanied Kim on ride alongs with the State to a couple of different locations after Kim had provided them with information that they passed along to the prosecutors. (8 WRR 5, 7-8).

(86) Kim's experienced attorneys made the calculated decision, with Kim's agreement, to have Kim cooperate in the hope of obtaining some type of plea bargain and avoiding the death penalty. And they acted accordingly; that is, their efforts were directed toward obtaining the best possible outcome for Kim Williams.

(87) The fact that Kim's attorneys did not expect to go to trial is not evidence of a deal between the State and Kim Williams.

Kim Williams's Participation in Ride Alongs Without Counsel

(88) At the writ hearing, Applicant suggested Kim could have struck a secret deal with the State when she participated in a ride along with law enforcement and the State without her counsel present.

(89) In cross-examining Johnson, Applicant's counsel asked if Kim ever met with the prosecution without him. Johnson responded:

> I believe there was an occasion, maybe more than one, but I think one time I know that I allowed her to go to the location of where the guns were disposed of just as, with the stipulation that there would be no questioning of any type. And the Kaufman County Sheriff's officer that was responsible for all the transportation to and from the crime scenes was a lady named Jolie Stewart, who I've had many years working relationship with and I trust her completely, as I do Toby [Shook] and Bill [Wirskye]. So I believe on at least one occasion I recall I told them that, yeah, you all can load her up and go wherever you want as long as you're just gonna ask her to point. But if, if, you know, no questioning. And if that was, that was the agreement I, I believe that they held up to it. And, and I also believe that before that occurred I met with Kim also and told her that they were going to do it and that they would not be asking her any questions; and I believe she confirmed that to me, that they didn't, they did not attempt to.

(8 WRR 22-23).

(90) When given the opportunity on cross-examination, Applicant's counsel chose not to ask Bill Wirskye whether the State struck a secret deal with Kim during a ride along with the State.

(91) In closing argument, Applicant's counsel asserted: "We also heard that as part of her interactions with the prosecution, she spent time alone with them without her lawyers present. Now I know that Mr. Johnson said they were instructed not to ask her any questions, but who's to say that they didn't tell her anything in that time period." (9 WRR 13).

(92) Applicant has not offered evidence the State entered into a secret deal with Kim, and Johnson's detailed and credible description of how the ride alongs would have been conducted demonstrates no deal would have been made at that time.

(93) At the writ hearing, Applicant asserted that the timing of one of the ride alongs in August 2013 corresponds to the accusations of inmates Ray'la McCurry and Yolanda

Barton that Kim left the jail, came back, and started talking about a deal. (8 WRR 140; 9 WRR 13-14; AX 22 at 1; AX 55 at 1).

(94) The testimony of inmates McCurry and Barton is not persuasive on this issue as detailed below.

(95) The Court finds the State did not make a secret deal with Kim during a ride along when her defense attorneys were not present.

Bill Wirskye's Email Exchange with Paul Hasse

(96) Rather than questioning Bill Wirskye directly on cross-examination about his denial of a deal, Applicant's counsel introduced an email exchange between Mark Hasse's brother, Paul Hasse, and Wirskye after Applicant's trial, in which Paul asked about the plan for Kim Williams. Wirskye replied the prosecution team would be meeting in the next few days to decide what to offer her. Paul responded: "I know [Kim] was helpful and won't get the death penalty at trial but she is still incredibly guilty and could have easily prevented these murders." AX 92.

(97) Applicant's counsel never asked Wirskye directly about this email exchange so he could explain, but instead relied on it in closing argument to assert: "[I]it's already been communicated to [Paul] that we're talking in years, not death, not life without parole." (9 WRR 14-15).

(98) Wirskye indirectly denied this accusation when he testified on direct that the State had taken a "pretty disciplined approach" with the family members regarding what was going to happen with Kim's case because "the family members wanted the death penalty up front. They were obviously very sad. And we told the family, let's go get the shooter first and talk about the wife later. And that is in fact what happened." (8 WRR 87).

(99) Paul Hasse's email response is not evidence Wirskye told him anything inconsistent with the lack of a deal in this case.

(100) Paul Hasse's belief Kim Williams was not going to get the death penalty or life without parole is not evidence that the State had a deal with Kim.

(101) What Paul Hasse may have thought, or what the State may have told him, is not relevant to the legal issue of whether the State had a deal with Kim.

(102) "The government is free to reward witnesses for their cooperation with favorable treatment in pending criminal cases without disclosing to the defendant its intention to do so, *provided* that it does not promise anything to the witnesses prior to their testimony." *Shabazz v. Artuz*, 336 F.3d 154, 165 (2d Cir. 2003); *see Akrawi*, 572 F.3d at 263.

(103) That Kim obtained a plea bargain with the State for a forty-year sentence is not sufficient, by itself, to demonstrate that a deal existed between the State and Kim. *See Dowthitt v. Johnson*, 230 F.3d 733, 756 n.33 (5th Cir. 2000).

Kim Williams's Letters

(104) Applicant contends the letters Kim wrote while in the Kaufman County jail demonstrate she had a deal with the State. (App. at 23-24; AX 31).

(105) Applicant relies on language in one of Kim's letters that "my [public defender] is only trying to keep me from getting the Death Penalty but *I don't even think* they're asking for Death from me anymore, so they 'may' want to give me 20+ years[.]" Kim's own language, however, shows she is speculating, and this is highlighted by her next sentence, "I'm a babe in the woods, full of wolves who want to tear me apart just for general principle . . . to possibly make an 'example' regardless of how innocent I am?! . . . *Not sure how all this is gonna pan out for me either way. Yep, I'm freaked.*" (AX 31 at 26-27) (emphasis added).

(106) Applicant uses Kim's statement "[t]here's no way out of this other than a long prison term" in support of her claim, but the entirety of the paragraph gives it proper context. (AX 31 at 37 (4/3/14) (emphasis added)).

(107) Kim wrote in one letter: "I saw my atty [sic] yesterday (Wed) + some others. Can't talk about it but don't worry, I'll be okay." AX 31 at 11. But, in another letter, she wrote: "I really need a miracle & lots of prayers so hopefully I get out of here & go home. Yep! I'm stressed & still blessed. . . . (Girl, I must be stressed b/c I almost wrote I'm too stressed to be stressed! . . .)." (AX 31 at 7).

(108) Kim never stated in her letters that the State explicitly or implicitly offered or promised her a deal.

(109) Kim's letters reveal her extreme distress due to the uncertainty of any particular outcome in her three capital murder cases, which is inconsistent with having a deal with the State.

(110) At most, these letters show Kim's speculations and hopes, which as previously found, is not sufficient to prove a deal existed or to establish a *Brady* violation.

(111) In fact, Applicant states twice in his writ application that Kim's letters show she believed the State was not going to seek the death penalty against her. (App. at 23-24). While Applicant jumps to the conclusion Kim believed this because she had a deal with the State, he provides no support for this except the declaration of inmate Ray'la McCurry, which is not persuasive.

(112) Kim Williams's letters—as tendered by Applicant—do not establish Kim had an explicit or implicit deal with the State.

Inmate Yolanda Barton

(113) Applicant relies on the declaration and writ hearing testimony of inmate Yolanda Barton. (AX 55; 6 WRR 7-56).

(114) In her June 10, 2019 declaration, Barton says she was incarcerated in the Kaufman County Jail from April to October 2013 and met Kim Williams. (AX 55 at 1). Barton claims she was housed in administrative segregation (Ad Seg), her cell was directly across from and one down from Kim's cell, and they could talk to each other through the cell doors. (*Id.* at 2).

(115) In her declaration, Barton says: "Something that Kim struggled with was whether or not to accept the offer the State had given to her. I think the State's offer was around thirty years" and "I remember Kim going to court once and after she was back at the jail, she said the State was offering her a deal." (*Id.* at 4-5).

(116) At the writ hearing, Barton alleged Kim said "her counsel had advised her to divorce her husband. That at one point in time she had been offered a deal by the prosecutor to testify against him, and the only way she could do that was divorce him."

Barton continued: "I learned that [Kim] had been offered a deal, a plea deal if she testified against her husband. Her attorney advised her to do it, to divorce him, testify against him." (6 WRR 20, 28).

(117) Inmate Barton's allegations are contradicted the testimony of Wirskye and Kim's attorneys, Paul Johnson and Lalon Peale.

(118) Both of Kim's attorneys expressly denied telling Kim to divorce Applicant. (5 WRR 146; 8 WRR 24). Kim was still married to Applicant when she testified, although she had filed for divorce. (54 RR 95; 8 WRR 23).

(119) Barton's claim that her cell in ad seg was diagonal to Kim's was contradicted by evidence of the floorplan of the jail. (6 WRR 11-13; AX 252), (WSX 3).

(120) Barton has a criminal history of dishonesty. At the writ hearing, Barton said she had been in the Kaufman County jail on charges of forgery and tampering with a government document, which she pled guilty to in 2013. (6 WRR 9). She admitted having numerous convictions for: forgery of a financial instrument (2011); fraudulent use or possession of identifying information (2011); tampering with a government record (2011); and forgery of a financial instrument (2012). (6 WRR 9-10).

(121) Barton's has a history of mental illness and drug use. Barton testified she has been diagnosed with bipolar disorder and takes Seroquel and Celexa for her illness. (6 WRR 47-49). Barton acknowledged a problem huffing paint off and on for four years several years ago. (6 WRR 31-32).

(122) Barton's claim Kim had a deal with the State prior to testifying is not supported.

(123) Applicant fails to prove through Barton that Kim had a deal with the State prior to testifying.

Inmate Ray'la McCurry

(124) Applicant relies heavily on the declaration of Ray'la McCurry, an inmate in the Kaufman County Jail with Kim Williams in the fall of 2013. (AX 22). McCurry does not say what the charges against her were, and she does not explain why she was in the jail's Ad Seg, where she says she met Kim. (*Id.* at 1).

(125) According to McCurry, Kim told her "the people at Court told her that they were going to seek the death penalty against her if she didn't cooperate" and if her story was not what the prosecution wanted then they would seek the death penalty. (*Id.* at 5, 8-9).

(126) Inmate McCurry's allegations "that Kim told her that the people at the Court told her" are hearsay and are contradicted by Wirskye and Kim's attorneys.

(127) McCurry also makes the statement: "The prosecutors made a deal with Kim before she testified and she took it." (*Id.* at 9). McCurry does not explain the basis of this information or provide any additional details about how she came to this conclusion.

(128) McCurry also states: "The whole time I was in Kaufman County Jail with Kim, she was terrified that the State was going to kill her." (*Id.* at 9). This statement is inconsistent with McCurry's claim that Kim made a deal with the State. If the State had made a deal with Kim not to seek the death penalty in exchange for her testimony, then Kim would not be terrified that the State was going to kill her.

(129) McCurry, who was not in custody at the time of the writ hearing, had been served while in custody with a subpoena to appear at the writ hearing, and she was scheduled to appear but did not. (4 WRR 21-23; 5 WRR 192).

(130) The Court finds McCurry's claim that Kim had a deal with the State prior to testifying is not supported by the evidence.

Article Written by Pro Tem Bill Wirskye

(131) At the writ hearing, Applicant's counsel introduced an article written by Wirskye titled "Answering the Call: Prosecuting the Kaufman County DA Murders." (AX 100 - 43 American Journal of Criminal Law 113 (2015)).

(132) In the eleven-page article, Wirskye summarizes the nearly two-year investigation and prosecution of this case. (AX 100).

(133) In discussing Kim Williams, Wirskye wrote, after Kim acknowledged certain information to the FBI: "We wanted to follow up on this with her, so Toby and I entered into discussions with her lawyers. We made it very clear that we were not offering her a

deal but that we would take her truthful cooperation into account once we had tried her husband." (AX 100 at 118).

(134) This excerpt generally refers to the dealings between the State and Kim Williams's counsel. Those dealings were described in far greater detail in the trial and habeas proceedings, when the existence of a deal was specifically at issue.

(135) This excerpt is not a substitute for the testimony and evidence elicited during the trial and at the habeas proceedings. It is not a sworn statement, and it is not reliable evidence about the communications between the State, Kim Williams, and her counsel.

(136) And notably, Applicant's counsel did not question Wirskye about this portion of the article during the writ hearing, although counsel did confront Wirskye about three other statements in the article. (8 WRR 106-08, 114-15).

(137) The article does not establish the State had a deal with Kim Williams prior to testifying.

Applicant's Trial Attorneys

(138) Applicant's trial attorneys do not provide evidence of a deal.

(139) Applicant's lead attorney Matt Seymour stated in a March 2, 2018 declaration: "The defense team believed that Kim Williams had been offered a plea deal in exchange for her testimony." In support, Seymour relied on McCurry's declaration. (AX 24).

(140) Seymour's speculations based on McCurry's declaration do not establish a deal between Kim and the State.

(141) At the writ hearing, Seymour never mentioned McCurry's declaration. Instead, Seymour testified he believed the State and Kim had a deal because "nothing had happened on any of her cases, no filings, no motions." (7 WRR 69).

(142) Seymour also said: "I want to believe that Kim had a deal with the State. . . . As a criminal lawyer, I know that's not how it's done in practice[.] . . . But . . . I find it very hard to believe that she didn't have some expectation more than what, than just an expectation of leniency. I, I don't know how to rectify those two things." He later said he believed Kim was receiving some kind of consideration in exchange for her cooperation. (7 WRR 70-71, 74).

(143) Seymour agreed he could be wrong about the existence of a deal. (7 WRR 71).

(144) Seymour also agreed he was not aware of any deal Kim was offered, explaining: "I just speculated that she did have, at the very least, she believed, I believe that she believed that she had something, and I don't know why, but I believe that she, she thought that, but I believe that yes, she probably had." (7 WRR 75).

(145) When asked if the deal could have been a "wink and a nod understanding," Seymour stated: "I don't, I don't know what it would be, but yes, I think she felt that she had something." (7 WRR 75).

(146) Matt Seymour's personal belief that Kim Williams had a deal with the State is not based on tangible, credible evidence.

(147) Applicant's second chair attorney John Wright stated in a March 6, 2018 declaration "[t]he defense team members believed that Kim Williams had been offered a plea deal in exchange for her testimony." In support, Wright relied on McCurry's declaration. (AX 22, AX 53).

(148) Wright's personal belief and reliance on McCurry's declaration do not establish a deal between Kim and the State.

(149) At the writ hearing, Wright never mentioned McCurry's declaration. Instead, when asked if he had been aware of whether Kim had a deal in exchange for her cooperation, Wright stated: "[T]he file made things look suspicious that way; but no, we didn't know." (5 WRR 21).

(150) John Wright's speculation that Kim Williams had a deal because there was a lack of activity in Kim's case is not evidence of a deal between Kim and the State.

(151) Applicant's third-chair attorney Maxwell Peck III stated in a March 6, 2018 declaration that if he had been aware of the information McCurry provided in her declaration, he would have used that information to impeach Kim's credibility. (AX 26).

(152) Peck relied solely on McCurry's declaration, and this does not establish a deal between Kim and the State.

(153) Although Peck was scheduled to appear as a witness for Applicant at the writ hearing, he did not appear. (5 WRR 8-9).

(154) Applicant fails to prove the State made an express or implied deal or promise to Kim Williams or her counsel in exchange for her testimony.

(155) Applicant fails to establish the State violated *Brady v. Maryland* by failing to disclose a deal it had with Kim Williams in exchange for her testimony.

(156) Because the State did not have an agreement with Kim, no evidence was suppressed, and the State did not violate *Brady v. Maryland.*

(157) Applicant's claim that the State violated *Brady v. Maryland* by failing to disclose a deal with Kim Williams should be denied.

Suppression of Evidence of Kim's Mental Health and Criminal History

(158) Applicant asserts the State suppressed mental health and criminal history information about Kim Williams that would have impeached her. (App. at 25-26).

(159) Applicant's sole evidence in support is the declaration of his third-chair attorney Maxwell Peck, which provides Peck spoke with Kaufman County District Attorney Erleigh Wiley after Applicant's trial and she "mentioned something about Mrs. Williams having a criminal case regarding stealing, or attempting to steal a baby, and the fact that while in jail awaiting trial, Ms. Williams had been found to be in possession of illegal drugs." (AX 26).

(160) Peck did not appear at the hearing to testify for Applicant as scheduled. According to Applicant's counsel, (1) Peck had been responsive until the hearing neared and then he "went silent;" (2) Applicant's team had emailed him a subpoena two weeks before the hearing, but he "avoided that email, stopped returning calls, stopped responding to text messages;" (3) the Potter County Sheriff's Office had been unable to serve him; and (4) counsel had previously told Peck the date of the writ hearing. (5 WRR 8-9).

(161) At the writ hearing, Applicant failed to adduce any corroborating evidence in support of Peck's allegations.

(162) Although Applicant's counsel called Kaufman County District Attorney Erleigh Wiley as a witness at the writ hearing, counsel did not ask DA Wiley whether she had

made these statements to Maxwell Peck or whether there was any truth to these statements. (6 WRR 157-166).

(163) Wirskye never heard or had information that Kim kidnapped a baby or had been found with drugs in jail. (8 WRR 88-89).

(164) Applicant fails to carry his burden of proving, by a preponderance of the evidence, that the State suppressed mental health and criminal history information about Kim.

(165) Applicant fails to establish the State violated *Brady v. Maryland* by suppressing mental health and criminal history information about Kim Williams.

(166) Applicant's claim the State suppressed mental health and criminal history information about Kim should be denied.

False Testimony

(167) In Claim 1B, Applicant asserts the State presented false and misleading testimony at the guilt and penalty phases of Applicant's trial. (App. 31-32, 50).

(168) The Due Process Clause is violated when the State uses materially false testimony to obtain a conviction. *See Naupe v. Illinois*, 360 U.S. 264, 269-70 (1959); *Ex parte Lalonde*, 570 S.W.3d 716, 722 (Tex. Crim. App. 2019).

(169) In order to be entitled to post-conviction habeas relief on the basis of false evidence, an applicant must show by a preponderance of the evidence that (1) false evidence was presented at his trial, and (2) the false evidence was material to the jury's guilt or punishment verdicts. *Ex parte Weinstein*, 421 S.W.3d 656, 659-65 (Tex. Crim. App. 2014).

(170) In determining whether a particular piece of evidence has been demonstrated to be false, the relevant question is whether the testimony, taken as a whole, gives the jury a false impression. *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015).

(171) False testimony is material only if there is a reasonable likelihood the false testimony affected the jury's judgment. *Ex parte Lalonde*, 570 S.W.3d at 722 (citing *Ex parte Weinstein*, 421 S.W.3d at 665).

Punishment Phase

(172) Applicant asserts the State presented false testimony through Kim Williams. (App. at 31-49).

Kim Williams's Denial of a Deal with the State

(173) Applicant asserts Kim Williams testified falsely when she denied having a deal with the State. (App. at 33-35). Applicant relies solely on inmate Ray'la McCurry's declaration. (AX 22 at 5-10).

(174) As previously found, Ray'la McCurry's allegations—that Kim had told her she had agreed to cooperate with the State in exchange for the State not seeking the death penalty—are not credible.

(175) As previously found, the State did not have an express or implied deal with Kim to testify against Applicant.

(176) In addition, both parties told the jury Kim had an expectation of consideration for her testimony. (8 WRR 81-82, 150; 54 RR 93, 101, 109, 167).

(177) As Bill Wirskye explained at the writ hearing, when a prosecutor does not have a deal with a testifying accomplice or codefendant:

> The potential pitfall in doing it this way and where I've seen prosecutors get in trouble is they don't account for the expectation of, of consideration. So that is something that we tried to make very sure throughout our dealings with Kim Williams and certainly during her testimony that that expectation of consideration was accounted for. So just the fact we didn't have a deal, we never had a deal, we didn't want anybody to think that she wasn't trying to get something, that she wasn't trying to get some consideration, and that there may not be a deal coming.

(8 WRR 82). Wirskye said: "[W]e didn't hide anything." (8 WRR 150).

(178) Kim's testimony, taken as a whole, painted a complete picture of her cooperation, and it did not give the jury a false impression. *Ex parte De La Cruz*, 466 S.W.3d 855, 866 (Tex. Crim. App. 2015).

(179) The true nature of Kim's cooperation was conveyed to the jury.

(180) Applicant fails to prove Kim falsely testified she did not have a deal with the State before trial.

(181) The State did not present false testimony.

(182) Applicant's claim that Kim Williams testified falsely about having a deal with the State should be denied.

Kim Williams's Role in the Offenses & Her Portrayal of Applicant

(183) Applicant asserts Kim provided false and misleading testimony regarding her involvement in the offenses and she inaccurately portrayed Applicant. (App. at 35-36). Specifically, he claims Kim testified falsely that (1) she sat in the car during the McLelland murders, (2) Applicant directed her to dispose of the bag containing guns in Lake Tawakoni, and (3) her marriage to him involved "quite a bit of violence," including threats and Applicant firing a firearm at or near her. (54 RR 59, 69-70, 82, 84, 87).

(184) In support, Applicant relies on inmate Ray'la McCurry's declaration alleging Kim told her (1) she was inside the house when the McLellands were killed, (2) it was her idea to get rid of the gun in the lake, and (3) Applicant was not an abusive husband or a violent man but that "the prosecutors put lies in [her] head to make up this story about how Eric was an abusive husband who beat her[.]" (AX 22 at 5-8).

(185) As previously found, this court finds McCurry's declaration is not credible. And Applicant offers no additional evidence that Kim's trial testimony was false.

(186) Wirskye stated although the State reached out to Kim's attorneys soon after Kim went to jail:

> We specifically did not want to debrief her at that point. We were concerned that she was still in the midst of some kind of drug induced fog, 'cause we had seen her interviewed a week or so before. We were concerned she still had affection for her husband. And we wanted her to lead us to physical evidence to basically corroborate her good faith attempt to cooperate with us before we ever started debriefing her. . . .

> And in fact we made a very conscious choice to delay the debriefing as long as possible in the process, hoping her mind would clear[.]

(8 WRR 82-83).

(187) Applicant fails to prove Kim falsely testified about her role in the offenses or inaccurately portrayed Applicant.

(188) The State did not present false testimony regarding Kim's role in the offense or the violence Kim suffered in her marriage.

(189) Alternatively, even if Kim's testimony about her role in the offenses and her portrayal of Applicant could be regarded as false, it would not be material because there is no reasonable likelihood that it affected the jury's judgment.

(190) For one, Kim's statements were not the only evidence, much less the most compelling, regarding Applicant's violent nature. The evidence included: (1) the testimony of Applicant's former girlfriend Janice Gray, that he held her at gunpoint in a crowded bar and told her, "If you walk away, I'll use it." (50 RR 7-25); (2) evidence Applicant threatened physical harm to two lawyers and their families (49 RR 141-42; 50 RR 30-44); and (3) evidence Applicant threatened harm to others in his Crime Stoppers tips.[13] (45 RR 183-89).

(191) Also, Kim testified about Applicant's violent acts and threats toward others, which Applicant does not challenge as false, including that Applicant: pulled a pistol on a couple in a church parking lot; threatened Kim's elderly father by shining a flashlight in his face and threatening to hit him with it; and shot two cats. (54 RR 85-87).

(192) Regarding Kim's testimony that she stayed in the car when Applicant went inside the McLelland's house, no evidence shows Kim, or anyone else besides Applicant, fired the shots that killed Mike and Cynthia McLelland.

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[13] In an email exchange between Applicant and Crime Stoppers after the McLelland murders, Applicant wrote: "Your act of good faith will result in no other attacks this week." (45 RR 183-86).

(193) Also, substantial evidence implicates Applicant in the McLelland murders. Whether Kim was in the car or inside the McClelland's home does not decrease Applicant's culpability.

(194) Kim admitted her guilt in all three capital murders, testifying that, while Applicant pulled the trigger in all the murders, she was a willing participant. (54 RR 9).

(195) Regarding the McLelland murders, Kim told the jury about her participation, including that she went with Applicant to test-fire different guns to pick one to kill Mike, and she drove Applicant to the McLelland's house so he could take reconnaissance pictures. Kim admitted knowing Applicant planned to kill Mike by dressing up like law enforcement so Cynthia would more likely answer the door. After Applicant killed the McLellands, she and Applicant were both "happy and satisfied." Later that day, they "celebrated" by cooking steaks at her parent's house.[14] (54 RR 55-59, 64, 67-69).

(196) Likewise, even if it had been Kim's idea to dump the gun Applicant used in the McLelland murders in the lake, this would have done little to increase her culpability. Kim fully inculpated herself when she admitted she and Applicant both drove to Lake Tawakoni and she was fully aware Applicant was planning to—and did—throw a bag full of guns over the bridge into the lake. (54 RR 69-70).

(197) Because Applicant fails to establish Kim's testimony regarding her role in the offenses and her portrayal of Applicant were false or material, he fails to establish that he is entitled to relief.

(198) Applicant's claim that Kim provided false and misleading testimony regarding her involvement in the offenses and inaccurately portrayed Applicant should be denied.

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[14] Regarding Mark Hasse's murder, Kim admitted she drove Applicant to the parking lot, even though she knew Mark would lose his life. Kim testified they both wanted to kill Mark Hasse, and were both excited about it. Afterward, they were both happy. (54 RR 33-34, 42-43, 47).

Kim Williams's Testimony and Statements to Law Enforcement

(199) Applicant asserts Kim Williams's trial testimony on direct examination was false and misleading because it was inconsistent with, and contradicted, her statements to law enforcement in April 2013. (App. at 36-42).

(200) In support, Applicant relies solely on a record-based comparison between Kim's trial testimony and her statements to law enforcement on April 16 and 17, 2013, which Applicant had access to at the time of trial. (54 RR 8-94; AX 27, 28).

(201) This claim should be procedurally barred because Applicant could have objected or otherwise claimed at trial that the State was presenting false evidence through Kim Williams.

(202) Generally, a convicted person may not raise a claim for the first time in a habeas-corpus proceeding if he had a reasonable opportunity to raise the issue at trial or on direct appeal and failed to do so[15]. *Ex parte De La Cruz*, 466 S.W.3d 855, 864 (Tex. Crim. App. 2015). Even constitutional claims can be forfeited on habeas due to lack of action. *Id.*

(203) Here, Applicant's counsel could "reasonably be expected to have known that the testimony was false at the time it was made." *Estrada v. State*, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010). Applicant had an adequate opportunity at trial to object or otherwise claim the State was presenting false testimony through Kim Williams.

(204) Several months before trial, Applicant's attorney Matthew Seymour had Kim's April 16, 2013 audio/visual recorded interview with law enforcement transcribed. (AX 27; 7 WRR 71). Seymour also asked retired police detective Jim Trainum to analyze the State's interrogations of Kim, which would have included Kim's April 17, 2013 recorded police interview. (AX 28; 7 WRR 71). Trainum compared Kim's April 2013 statements with known facts and produced a list of conflicting statements, which Seymour utilized in cross-examining Kim. (7 WRR 71-72).

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[15] It appears the Court of Criminal Appeals has not definitively determined that a false-evidence claim can be procedurally barred. *See, e.g., Ex parte Chavez*, 371 S.W.3d 200, 216 (Tex. Crim. App. 2012) (Keller, PJ., dissenting).

(205) In cross-examining Kim, Seymour pointed out many of the inconsistencies between her interrogation statements and her testimony. (54 RR 104-07; 7 WRR 73).

(206) Thus, at the time of Applicant's trial, Matthew Seymour was fully aware of the inconsistencies between Kim's statements to police in April 2013 and her trial testimony that now forms the basis of Applicant's due-process complaint. Applicant could have raised the instant claim at the time of trial.

(207) Because defense counsel could have, but did not, object or otherwise complain at trial that the State was presenting false evidence through Kim Williams, his claim is procedurally barred. A writ of habeas corpus should not be used as a substitute for an appeal. *Ex parte Banks*, 769 S.W.2d 539, 540 (Tex. Crim. App. 1989).

(208) This claim should be dismissed.

(209) Alternatively, Applicant's complaint is more in the nature of a sufficiency of the evidence claim than it is a false testimony claim. That is, Applicant asserts that "the discrepancies between Ms. Williams's statements to law enforcement and her trial testimony undermine the reliability of her trial testimony and undermine her credibility." (App. at 37). Sufficiency claims are not cognizable in a habeas application. *Ex parte Perales*, 215 S.W.3d 418, 419 (Tex. Crim. App. 2007). Because Applicant actually raises a sufficiency claim, it should be dismissed.

(210) Alternatively, Applicant fails to prove Kim Williams's trial testimony was false.

(211) "A mere claim that a witness gave *inconsistent testimony* is not enough to charge the prosecution's knowing use of *false testimony*; it may well be that the witness' subsequent statements were true, in which event the claim on inconsistency is not a constitutional question." *Price v. Johnston*, 334 U.S. U.S. 266, 288 (1948), *overruled on other grounds*, *McCleskey v. Zant*, 499 U.S. 467 (1991).

(212) Discrepancies in a witness's testimony merely establish a credibility question for the jury and do not suffice to establish the testimony was false. *Koch v. Puckett*, 907 F.2d 524, 531 (5th Cir. 1990).

(213) In determining whether a particular piece of evidence has been demonstrated to be false, the relevant question is whether the testimony, taken as a whole, gives the jury a false impression. *Ex parte De La Cruz*, 466 S.W.3d at 866.

(214) On direct examination, Kim admitted that when she was interviewed by law enforcement after Applicant's arrest, she lied for hours saying she and Applicant were not involved in the murders. At some point during the interview, she broke down and gave a partial confession, but she still did not tell the whole truth. Kim explained she was a drug addict at that time. (54 RR 91-92).

(215) On cross-examination, defense counsel impeached Kim with some of the inconsistencies between her interview statements and her testimony, as detailed in Claim 2, and Kim acknowledged many of the inconsistencies and the fact that she was not completely honest in her April 16, 2013 police interview. (54 RR 104-07).

(216) Thus, the jury was aware of the inconsistencies between some of Kim's trial testimony and her earlier statements to law enforcement. And the jury was aware that, in the past, Kim had not been forthright and had downplayed her knowledge and level of involvement in the murders. The totality of Kim's testimony was not misleading, and it did not create a false impression.

(217) The jury reconciled all of Kim's testimony, and it chose to convict Applicant. *See Ex parte De La Cruz,* 466 S.W.3d at 870-71.

(218) Applicant fails to establish that certain inconsistencies between Kim's trial testimony and her earlier statements to law enforcement constituted false evidence.

(219) Alternatively, any specific inconsistencies in Kim's testimony that the jury did not hear would not be material because there is no reasonable likelihood they would have affected the jury's assessment of punishment.

(220) Applicant asserts Kim's version of events was critical to the State's effort to portray him as a future danger and secure a death verdict; and therefore, the State's reliance on her false testimony was material. (App. at 48).

(221) The jury was aware Kim's trial testimony was inconsistent with some of the earlier statements to the police.

(222) And, even to the extent Kim's testimony was inconsistent from her April 2013 statements to law enforcement, her trial testimony was truthful. Indeed, much of Kim's testimony was corroborated by physical evidence, as set out in detail in the State's response to Claim 2.

(223) Further, Bill Wirskye testified at the writ hearing that the State was able to corroborate Kim's information with physical evidence and he felt Kim was being honest during her debriefings. Kim testified consistently with what she said in the debriefings.[16] (8 WRR 82-86). The State was not accusing Kim of lying. (5 RR 139; 8 WRR 144).

(224) While the State relied in part on Kim's testimony as evidence of Applicant's future dangerousness, it also relied on other evidence separate from Kim's testimony.

(225) Other evidence of Applicant's future dangerousness included: (1) the testimony of Applicant's former girlfriend Janice Gray, that he held her at gunpoint in a crowded bar and told her, "If you walk away, I'll use it." (50 RR 7-25); (2) evidence Applicant threatened two lawyers and their families physical harm (49 RR 141-42; 50 RR 30-44); and (3) evidence Applicant threatened harm to others in his Crime Stoppers tips (45 RR 183-89). Also, the uncontroverted evidence showed Applicant had stockpiled an arsenal of firearms, firearms components, ammunition, and other weapons. (45 RR 74-75; 46 RR 48-50; 49 RR 84-95).

(226) Importantly, even without Kim's testimony, the jury found Applicant guilty of the McLelland murders. And in the punishment phase, the State relied on Cynthia's murder to show Applicant's future dangerousness. Specifically, the State argued that, when Applicant heard 65-year-old Cynthia moaning, "you would think if there was anything in that soul that would make him not dangerous, it would have been touched"; but instead, Applicant "[w]alks calmly over to her, takes that rifle, points it at the top of her head, and shoots her. And that tells you all you need to know about how dangerous [Applicant] is and what a threat he's going to be." (54 RR 154). Later, the State argued Cynthia's death "makes your decision clear." (54 RR 203).

(227) The State also argued Applicant was a future danger because he killed three people, arguing: "How many people have to die before someone stops him?" (54 RR 203).

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[16] When asked if Kim had added any new information during her testimony that he had not heard before, Wirskye pointed to Kim's testimony that "Eric's anger was my anger."

(228) Applicant fails to prove any inconsistencies in Kim's trial testimony the jury did not hear about were material to the jury's decision to assess Applicant's punishment at death.

(229) Applicant's claim that Kim's inconsistent testimony constituted material, false evidence should be denied.

Applicant's Relationship With Tina Hall

(230) Applicant asserts Kim Williams testified falsely that he had an affair with Tina Hall. (App. at 42-43).

(231) In support, Applicant relies on Tina Hall's post-trial affidavit in which she denies having an affair with Applicant and states she and Applicant were "never more than friends and colleagues." (AX 7).

(232) Hall watched portions of Applicant's trial via live-stream video on the internet, including the testimony of defense witness Cathy Adams, who testified in the punishment phase. (AX 7 at 4).

(233) Cathy Adams testified she knew Applicant as a friend and colleague, and she described Applicant as an "excellent husband." (53 RR 157-60). On cross-examination, the State asked Adams if she was aware of the affair Applicant had with Hall. Adams acknowledged knowing Hall, "who was currently living in Hawaii," but she denied any knowledge or suspicion of an affair. According to Adams, Applicant and Hall were just friends. (53 RR 182-84).

(234) Defense counsel objected that no evidence supported the State's line of questioning, but the State said it had a good faith basis for it. The State pursued this issue because Adams had left a false impression about the type of husband Applicant was. (53 RR 183; 8 WRR 97-98).

(235) According to Hall, later that night she faxed a letter to Bill Wirskye, asking him to correct the false statement he had made about the affair.[17] (AX 7 at 4).

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[17] The letter appears to have been faxed to Wirskye's Dallas office, although the trial was conducted in Rockwall. (AX 7 at 7) (Attachment A).

(236) The next day, Hall appeared in court and approached members of the prosecution team and denied having an affair with Applicant. (AX 7 at 4; 8 WRR 97-98).

(237) Later that same day, Kim Williams testified in the State's rebuttal case that Applicant was a good husband but he was unfaithful and had extramarital affairs, including one with Hall. (54 RR 90). Applicant did not object or otherwise claim the State was presenting false evidence at that time.

(238) This claim should be procedurally barred because Applicant had an adequate opportunity at trial to object or otherwise raise this claim but did not. Generally, a convicted person may not raise a claim for the first time in a habeas-corpus proceeding if he had a reasonable opportunity to raise the issue at trial and failed to do so.[18] *See Ex parte De La Cruz*, 466 S.W.3d at 864.

(239) Here, Applicant's counsel could "reasonably be expected to have known that the testimony was false at the time it was made." *Estrada* v. *State*, 313 S.W.3d 274, 286-88 (Tex. Crim. App. 2010).

(240) First, defense counsel had previously objected "there's no evidence of this nature at all" when the State asked Cathy Adams: "And Tina Hall and [Applicant] had an affair while he was married, isn't that true?" (53 RR 183). Thus, Applicant's counsel was aware of the issue.

(241) Hall recounts in her affidavit, after she speaking with the prosecutors, she sat "in the courtroom waiting to be called as a witness." She met with Applicant's counsel one week earlier. (AX 7 at 5).

(242) When Kim Williams testified about the affair, Applicant's counsel did not object or otherwise claim the State was presenting false evidence, although Applicant's counsel had objected the day before to the State's questions about the same topic.

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[18] The Court of Criminal Appeals has not definitively determined that a false evidence claim can be procedurally barred. *See, e.g., Ex parte Chavez*, 371 S.W.3d 200, 216 (Tex. Crim. App. 2012) (Keller, P.J., dissenting).

(243) Because Applicant had the basis to raise a false-testimony claim when Kim testified, but chose not to, his claim should be procedurally barred.

(244) Applicant's claim Kim testified falsely about an affair with Hall should be dismissed.

(245) Alternatively, Hall's denial of an affair does not prove by a preponderance of the evidence that Kim's testimony about the affair was false. Hall had a motive to refute being involved in the sensational case.

(246) Also, Hall spoke with the defense team about a week before trial, but the State was told she was living in Hawaii when it tried to interview her. (AX 7 at 5; 53 RR 182-83; 8 WRR 97-98). Hall does not explain why the State may have thought this, and instead states when she approached the State at trial, "[t]hey looked like they had seen a ghost, because I think they thought I was in Hawaii at the time." (AX 7 at 4).

(247) And, even in the face of Hall's denials, lead prosecutor Bill Wirskye testified at the writ hearing: "We developed information during the investigation that the defendant was having affairs with several people, Tina Hall among them. During one of the later debriefs with Kim Williams, she confirmed that." (8 WRR 97, 151). Wirskye said: "[T]here was no doubt in my mind after talking with [Kim] that she knew that her husband was having an affair with Tina Hall." (*Id.* at 151).

(248) Applicant fails to establish Kim testified falsely about the affair.

(249) Even assuming Kim's testimony Applicant had an affair with Hall could be regarded as false, it was not material because there is not a reasonable likelihood it affected the judgment of the jury.

(250) In light of the evidence Applicant committed three murders, the jury's hearing Applicant had an affair with Hall would have been inconsequential. And, the affair would have been several years earlier when Kim became addicted to drugs, and when Applicant and Kim were first having marital problems. (AX 1, 3; 54 RR 15-17).

(251) Although Kim testified Applicant had an affair, she also testified she had loved Applicant for many years and he had provided her with all she needed. (54 RR 94-96).

(252) Kim's testimony about Applicant's affair was not material.

(253) Applicant's claim Kim testified falsely that Applicant had an affair with Tina Hall should be denied.

Guilt Phase of Trial

(254) In a two-page argument, Applicant asserts the State presented false or misleading testimony at the guilt phase of his trial. (App. at 50-52).

(255) Applicant says James Jeffress's testimony regarding firearms analysis was "not just unreliable and inflammatory but blatantly false, and thus amounted to no evidence." (App. at 50).

(256) Applicant fails to allege facts to support his argument.

(257) Applicant also argues the State "presented false testimony from its fingerprint and DNA experts, in violation of [his] right to due process. *See* Claim Two, Sections A(3), *infra*." (App. at 51).

(258) Applicant fails to allege facts to support his argument. Applicant's general reference to his ineffective assistance claim on the fingerprint and DNA experts is not a sufficient substitute for presenting and applying facts to this specific claim.

(259) The argument the State's ballistics, fingerprint, and DNA experts testified falsely is unsupported by any evidence.

(260) Applicant fails to present facts that entitle him to relief.

(261) Applicant fails to prove the State presented false or misleading testimony at the guilt phase of trial.

(262) The State's experts did not present false or misleading testimony, and this claim should be denied.

Participation of Recused Assistant District Attorney

(263) In Claim 1C, Applicant contends his due process rights were violated because a member of the recused Kaufman County Criminal District Attorney's Office assisted in his prosecution. (App. 53-65).

(264) Specifically, Applicant asserts Kaufman County prosecutor Sue Korioth had a conflict of interest by participating in Applicant's prosecution, which conflict was imputed to Prosecutor Pro Tem Bill Wirskye.

(265) Applicant relies primarily on emails between Korioth and Wirskye during the investigation and prosecution of Applicant. (AX 177).

(266) Applicant fails to prove Korioth had an actual conflict of interest.

(267) Applicant fails to show Korioth was a decision-making member of the prosecution team or otherwise influenced Wirskye such that he did not make his own independent decisions.

(268) Ultimately, Applicant fails to demonstrate prosecutor pro tem Bill Wirskye had an actual conflict of interest rising to the level of a due process violation.

Background Facts[19]

(269) At the time of the writ hearing, Sue Korioth had been an attorney for thirty-seven years. She was board certified in criminal law in 1993 and in criminal appellate law in 2011. She had recently retired and did not renew her criminal law certification. (6 WRR 58, 120-21).

(270) Korioth was a prosecutor at the Dallas County Criminal District Attorney's Office from January 1987 to April 1999. She ran the appellate division from 1994 to 1999. (6 WRR 57-60, 120).

(271) In September 2009, Kaufman County Criminal District Attorney Rick Harrison hired Korioth as the office's sole appellate attorney. The office employed about thirteen attorneys, and with staff, about thirty-five people. Korioth lived in Dallas and commuted to Kaufman two to three days a week. The other days, she worked from home. (6 WRR 63-65).

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[19]Applicant called Sue Korioth as a witness at the writ hearing, and the State called Bill Wirskye. Much of the following background facts are based on their testimony.

(272) Harrison also hired experienced prosecutor Mark Hasse. (53 RR 46, 55).

(273) In 2010, Kaufman County elected Mike McLelland as its new criminal district attorney, and he was sworn in January 2011. Both Korioth and Hasse remained at the office. (53 RR 55; 6 WRR 64-65).

(274) McLelland and Hasse became good friends. (6 WRR 72).

(275) Korioth and Hasse previously worked as prosecutors at the Dallas County Criminal District Attorney's Office. The Dallas office employed about two hundred assistant district attorneys. According to Korioth, they never really worked together, but she "probably had dealings with him on a few occasions." (6 WRR 59).

(276) In March 2012, McLelland and Hasse tried Applicant for the burglary of county computer monitors while he served as a justice of the peace in Kaufman County. A jury convicted him and he was removed from office and lost his bar license. (44 RR 68, 73-76, 235-36; 6 WRR 83, 90, 127-28; 8 WRR 118; SWX 8).

(277) On the morning of Thursday, January 31, 2013, Mark Hasse was murdered near the Kaufman County Courthouse. Korioth was at home asleep in Dallas at the time. (6 WRR 68-69).

(278) When Korioth met with McLelland at the office the following Monday, he was upset and convinced Applicant had killed Hasse. (6 WRR 69-72, 131-32).

(279) Korioth wondered how Hasse's murder would be solved. According to Korioth, Hasse could be difficult to deal with, he loved going to trial, and he "loved to mess with people." A large field of potential suspects existed just in Hasse's Kaufman cases. Hasse had also worked in Dallas and made a lot of enemies because of his aggressive prosecutions. Hasse had fifteen or twenty years in between his jobs in Dallas and Kaufman County, so he likely had made some people angry. According to Korioth, "anybody in the courthouse" could have killed Hasse. (6 WRR 128-30).

(280) According to Korioth, someone called her—likely either the sheriff or one of his deputies—and asked her to talk to McLelland because he was "making a ruckus" and "hampering the investigation" by asking law enforcement to pick up Applicant and his friends. Confusion ensued because "you have multiple agencies, and you've got the sitting D.A. [saying] do this, do that, and the officers know they can't like pick somebody

up without probable cause or reasonable suspicions [sic], it creates a bad situation." (6 WRR 71-72, 131-32).

(281) Korioth convinced McLelland he should recuse himself because he was so upset about Hasse's murder. (6 WRR 72).

(282) Korioth suggested they ask defense attorneys and law partners Bill Wirskye and Toby Shook to be attorneys pro tem, and she and McLelland called and cleared it with them. (6 WRR 72-73; 8 WRR 66, 114).

(283) Korioth had worked with Wirskye and Shook when they were in the Dallas DA's Office and also when they were in private practice. Both Wirskye and Shook had extensive experience trying capital murder and murder cases, and they both had prior experience working with the Texas Rangers, local law enforcement, the FBI, and the ATF. (6 WRR 60-61, 84, 137).

(284) At the Dallas DA's Office, Wirskye and Korioth had been on friendly terms. According to Wirskye, after he left the office and became a defense attorney, Korioth became one of his many "legal phone a friends," whom he would call when he wanted to bounce off legal issues with someone he trusted. According to Korioth, she and Wirskye had a working relationship first, and then a friendship developed over the years, although they did not socialize. (6 WR 60-61, 143; 8 WRR 65, 113-14).

(285) Wirskye tried a murder case as a special prosecutor in Kaufman County a week or so before Hasse's murder. He spoke with Hasse and met McLelland during that time. Wirskye had previously tried another case in Kaufman County as special prosecutor, so he was somewhat known around the small-town courthouse. But he did not practice in Kaufman, and had no ties to that community. (6 WRR 72-73; 8 WRR 62, 64, 138).

(286) Korioth advised McLelland that Wirskye would be "a good murder D.A.," he "understands prosecuting a murder case," and he would "be able to work with the different agencies and, and get something done on this." (6 WRR 73-74).

(287) Wirskye lived and worked in Dallas, and he did not know many people in Kaufman. (8 WRR 62).

(288) On February 8, 2013, McLelland filed a recusal motion, drafted by Korioth, asking District Court Judge Michael Chitty to recuse the Kaufman County DA's Office

from the investigation and prosecution of offenses related to the death of Mark Hasse and to appoint an attorney or attorneys pro tem. The motion's stated reason for the recusal was "in order to avoid any conflict of interest or appearance of impropriety which might result from the investigation and prosecution of this office of the murder of one of its own employees," and the request was made under Article 2.07(b-1) of the Code of Criminal Procedure.[20] (AX 194; 2nd Supp. CR 4-5).

(289) Judge Chitty granted the recusal motion that same day and appointed attorneys Wriskye and Shook to investigate and prosecute any criminal offenses relating to the death of Mark Hasse. (AX 194; 2nd Supp. CR 6).

(290) In the days following Hasse's murder, a manhunt ensued, and multiple law enforcement agencies convened at a command center set up in town, including the FBI, the ATF, the Texas Rangers, and the Kaufman County Sheriff's Office among others. (6 WRR 71; 8 WRR 63).

(291) As Wirskye testified at the writ hearing: "When a prosecutor gets killed, it's a very different scenario because there's so many extra suspects." (8 WRR 79).

(292) As time passed and leads ran cold, the investigation started shutting down. (8 WRR 71).

(293) Then on March 30, 2013, McLelland and his wife Cynthia were murdered in their home. (6 WRR 75).

(294) Following the McLelland murders, Kaufman County's First Assistant Criminal District Attorney Brandi Fernandez filed a recusal motion, which was virtually the same as the prior motion. (AX 195; 2nd Supp. CR 12-13).

(295) Wirskye and Shook were appointed as pro tems in the McLelland murders. (6 WRR 79; 2nd Supp. CR 9).

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[20] As set out in the recusal motion, Article 2.07(b-1) provides: "An attorney for the state who is not disqualified to act may request the court to permit him to recuse himself in a case for good cause and upon approval by the court is disqualified." Tex. Code Crim. Proc. art. 2.07(b-1).

(296) At that point, clearly the Hasse and McLelland murders were related and Applicant's burglary trial was a common denominator. (6 WRR 134-35).

(297) In April 2013, Judge Erleigh Wiley was appointed as the Kaufman County District Attorney. (54 RR 124; 6 WRR 79, 157).

(298) In April 2013, Applicant was arrested for capital murder.

The Emails at Issue

(299) In his writ application, Applicant asserts, "records obtained by post-conviction counsel" reveal Sue Korioth continued to be involved in the investigation and preparation of the prosecution of his case. (App. at 55-56).

(300) In fact, the State allowed Applicant's writ counsel to review its file in February of 2017, before counsel filed Applicant's writ application. Wirskye testified he "wanted the whole file opened up because I didn't want any surprises. I wanted to have one good writ hearing hopefully and just let everything out there." (4 WRR 30; 8 WRR 95-96; SWX 1).

(301) In his writ application, Applicant's counsel relied on several emails between Wirskye and Korioth, that were in the State's file. (App. 53-65; AX 45-49).

(302) Prior to the writ hearing, the State located additional emails that were not in the State's trial file in February 2017 and turned them over to Applicant's counsel. Wirskye said his personal laptop computer containing his emails from this prosecution had been missing and when found, it was not working. When he got it functional, he printed all emails involving Korioth off both his Gmail and Outlook email accounts. (4 WRR 30; 8 WRR 70, 96, 155-56; SWX 1).

(303) There were many duplicate emails in the two email accounts. (8 WRR 155).

(304) The State turned over all emails between Wirskye and Korioth during the relevant time period, even though some of the emails did not relate to Applicant's case. In some of the emails, Korioth was answering legal questions for Wirskye in his defense practice. (8 WRR 155-56).

(305) During the writ hearing, Applicant's counsel introduced some of the emails.

(306) After the writ hearing, Applicant's counsel introduced a set of the emails the parties agreed were the least duplicative and mostly related to the case. (AX 177).

(307) The emails as a whole demonstrate generally Korioth assisted Wirskye in certain ways during the investigation and prosecution of Applicant. They do not establish Korioth was a decision-making member of the prosecution team or otherwise influenced Wirskye such that he was not making his own independent decisions.

(308) While the emails show generally that Korioth offered her opinion on certain issues, the evidence does not show if, or to what extent, Wirskye adopted and applied those opinions.

(309) Although the emails reveal communications between Wirskye and Korioth at the time of the investigation and prosecution of this case, the emails are nonetheless subject to interpretation and must be viewed in the larger context of the wide-ranging and unique scope of the investigation and prosecution.

(310) During their testimony at the writ hearing, Wirskye and Korioth explained many of the emails.

(311) Wirskye's and Korioth's testimony establishes Korioth did not make critical, controlling decisions about the investigation or prosecution of Applicant.

(312) Wirskye's and Korioth's testimony also establishes Korioth did not have a personal interest in investigating and prosecuting Applicant and Wirskye and his team were not under her influence.

Applicable Law

(313) A prosecutor is "disqualified" from a case if he is barred by law from conducting the prosecution. In contrast, a prosecutor is "recused" when he voluntarily withdraws from the prosecution. *See Coleman v. State*, 246 S.W.3d 76, 81 (Tex. Crim. App. 2008). Once the trial court approves a voluntary recusal, the district attorney is deemed disqualified under the statute. *See* Tex. Code Crim. Proc. art. 2.07(b-1).

(314) When an alleged conflict of interest is at issue, a district attorney or his staff may not be *disqualified* unless (1) an actual conflict of interest exists, and (2) the conflict rises to the level of a due process violation. *See Ex parte Reposa*, No. AP-75,965, 2009 WL

3478455, at *10 (Tex. Crim. App. 2009) (orig. proceeding, not designated for publication); *Landers v. State*, 256 S.W.3d 295, 304 (Tex. Crim. App. 2008); *Haywood v. State*, 344 S.W.3d 454, 452-53 (Tex. App.—Dallas 2011, pet. ref'd).

(315) The United States Supreme Court has held: "An arrangement represents an actual conflict of interest if its potential for misconduct is deemed intolerable." *Young v. United States ex rel. Vuitton et Fils S.A.*, 481 U.S. 787, 814 (1987).

(316) The Court of Criminal Appeals has deemed "intolerable" the situation where a prosecutor represents the State in prosecuting someone he previously represented in the same case. There, "the conflict of interest is obvious and the integrity of the prosecutor's office suffers correspondingly." *Ex parte Reposa*, 2009 WL 3478455, at *10.

(317) In other situations, the conflict is not so obvious as to require automatic disqualification, and the defendant must establish a due-process violation by showing "actual prejudice."

(318) One type of conflict that may arise is a prosecutor's personal bias or grudge against the defendant. *See Ex parte Reposa*, 2009 WL 3478455, at *10. This type of conflict does not merit automatic disqualification. Applicant must demonstrate an actual conflict of interest existed which prejudiced him in such a manner as to rise to the level of due process violation. *Id.*; *see Haywood*, 344 S.W.3d at 462.

(319) In discussing a conflict of interest claim based on a prosecutor's personal bias, the Court of Criminal Appeals has relied on language in *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). *See Ex parte Reposa*, 2009 WL 3478455, at *11.

(320) In *Marshall v. Jerrico*, the United States Supreme Court held: "Prosecutors need not be entirely 'neutral and detached[.] In an adversary system, they are necessarily permitted to be zealous in their enforcement of the law." *Id.* The Due Process Clause places limits on the "partisanship of . . . prosecutors." *Id.* at 249. "A scheme injecting a personal interest, financial or otherwise, into the enforcement process may bring irrelevant or impermissible factors into the prosecutorial decision and in some contexts raise serious constitutional questions." *Id.* at 249-50. Although the Court declined to specify when a prosecutor's personal interest necessitates recusal or disqualification, it left open the possibility that "different considerations might be held to apply if the alleged biasing influence contributed to prosecutions against particular persons, rather than to a general zealousness in the enforcement process." *Id.* at 250 & n.12.

No Actual Conflict Existed

(321) Applicant asserts his due process rights to a disinterested prosecution were violated because Sue Korioth held a deep resentment and animosity toward him, and this "interest" was imputed to the prosecutor pro tem Bill Wirskye when she assisted him and his team.

(322) Applicant does not assert Wirskye had a conflict of interest in his own right. Instead, Applicant asserts Wirskye was not a disinterested prosecutor because he sought out the assistance, legal advice, and investigative services of Korioth, who had an axe to grind with Applicant. (App. at 60).

(323) As set out in detail below, Applicant fails to establish (1) Korioth was a decision-making member of the prosecution team or otherwise influenced Wirskye such that he was not making his own independent decisions; (2) Korioth had an actual conflict of interest; or (3) prosecutor pro tem Bill Wirskye had an actual conflict of interest that rose to the level of a due process violation.

The Large-Scale Investigation

(324) Both Wirskye and Shook were appointed as attorneys pro tem but Wirskye primarily oversaw the law enforcement investigation. (6 WRR 89; 8 WRR 69).

(325) At least eighteen state, local, and federal agencies were involved. According to Wirskye, "there was a massive effort to protect different people, so they had all sorts of different agencies coming to assist." Wirskye testified he had tried many cases but this was a "one of a kind case." "No one had ever seen an attack launched on the criminal justice system before." (8 WRR 60-62).

(326) Regarding the scale of the investigation, Wirskye explained:

> Every morning during the height of this, both post-Hasse and post-McLelland, the mornings would start out with an 8:00 a.m. commanders' meetings. I would be there, the lead elements of every, the big three involved investigative agencies would be there, and we would kind of plot strategy for that day in the investigation. After those meetings were over, we would go out to a big briefing where generally one of the FBI agents would brief the assembled officers and agents and deputies every

morning to kind of get everybody an update on where we were. Once that briefing was over, those officers and agents would disperse and go run down leads.

(8 WRR 68).

(327) Wirskye further testified, in addition to the two big meetings every morning:

I was in a series of meetings, almost every day I was out there, both formal and informal. Almost every agency that was out there had to brief up their chain of command. The FBI had daily briefings to their local command. They had it back to their national command. ATF, DPD. I would attend various of those meetings in order just to kind of assist those different agencies in briefing up their chain of command.

(8 WRR 68-69).

(328) Wirskye said there were hundreds of meetings. (8 WRR 69).

(329) From at least February to May 2013, Wirskye was essentially working out of his car. (6 WRR 88-89).

(330) Wirskye and Shook did not have the resources of a district attorney's office behind them. (8 WRR 61). Wirskye explained:

There was 101, 1000 and 1 things that when you're operating as special prosecutor in a county that you need to talk to a D.A.'s office about. That magnitude is multiplied when the victim works in the office and potential witnesses work in the office. So it's easy to have a single point of contact that I trust, and [Korioth] was that single point of contact for that office when I needed something.

(8 WRR 125).

(331) Wirskye stated he used Korioth as a liaison, explaining:

There were just too many things that we - for instance, I didn't have forms. I needed to know how to do grand jury subpoenas. In a very real sense, we stood up a second D.A.'s office at that command post. And

> without having local knowledge as to who the clerks were, what the forms were, how do we do this, it would have been impossible. And that is one of the crucial roles that she played during the investigation in helping us stand up that D.A.'s office, that independent D.A.'s office that was off-site.

(8 WRR 74).

(332) Wirskye further testified Korioth helped in relaying some information to the Kaufman County D.A.'s Office. Specifically,

> [I]t was more unspoken than anything, but [Korioth] and I trusted one another. So she would not ask me what was going on, but she was aware more than anyone in Kaufman that we were working and we were actively following leads. And I knew [Korioth] would come back and disperse that message. . . . So I relied on [Koritoh] to kind of reassure people when I wasn't around. Listen, I've talked to [Wirskye], I've talked to [Shook]. The investigation is proceeding. They are working hard. Everyone would come up with different suspects, and [Korioth] would tell them hey, they're, they're working, they're working. And in that respect I think she played an important role, kind of managing the psyche of the Kaufman County community, especially the criminal justice community.

(8 WRR 74-75).

(333) Korioth told the court that, at this time, she had been in Kaufman for years, and she "was pretty well trusted around the courthouse and knew pretty much the different departments and players." She tried to always be there as a resource if Wirksye needed something from the DA's office, the county, or the courts. And, "early on there were a lot of things that he needed." (6 WRR 89).

(334) Korioth said normally when a pro tem is appointed, the pro tem can take that file and walk away and handle it. But, when the DA and one of his assistants are killed, "the office is part of the crime scene basically." So, "it wasn't like they could walk away and not have to deal with the courthouse or our office and not have to deal with our records." (6 WRR 90).

(335) Korioth further explained:

> The first two months when they had that big task force, I don't know, I know they fielded a lot of calls. . . . I know that they would come to us and ask for files. Ar[y]an Brotherhood files, files that [Hasse] had handled, old files [Hasse] had handled. They asked for the files on the burglary trial on the Applicant here. They asked for other information. And so I tried to be a, a single central source for them, both so that they weren't making phone calls all day trying to get that information and also so that they weren't talking to somebody whose sister-in-law worked for so and so so that it was all over the county in ten minutes.

(6 WRR 90-91).

(336) Korioth saw her role in this case as a legal researcher and paralegal for Wirskye and Shook. They had no back up until the cases were indicted and others came on board. Korioth explained she had done a lot of research over the years, and she had access to Westlaw; so, if Wirskye called and asked her to find a case, she would do it. (6 WRR 91-93; AX 206).

(337) Korioth never attended the daily law enforcement meetings, or if she did, it was happenstance; she was not invited. Wirskye said Korioth did not have much involvement in the investigation. (8 WRR 66, 68).

(338) Wirskye told the court Korioth was worried about McLælland's focus on Applicant as Hasse's killer to the near complete exclusion of any other suspect but Wirskye was "able to assure her, without giving her details, that the investigation was looking at a variety of suspects and not just [Applicant]." (8 WRR 67).

(339) Before the McLællands were killed, Applicant was a person of interest, but he did not become a suspect until after the McLælland murders. Applicant's burglary conviction connected the two cases. (6 WRR 134; 8 WRR 117).

(340) Applicant asserts the information Korioth provided the FBI after the McLælland murders aided in the investigation and eventual prosecution of Applicant. As set out below, however, the information she provided about Applicant was that McLælland had believed Applicant had killed Hasse; McLælland and Hasse carried guns when the cases first started with Applicant; and McLælland had told her that a judge told him Applicant

had a hit list. This information was known by others; Korioth did not possess unique information. (App. at 58-60; AX 49; 8 WRR 115-17).

(341) Korioth also provided the FBI with her thoughts about other possible avenues to pursue, including that McLelland had been "working on an injunction case on the gun range on FM 2578" and had been trying to find a way to arrest the owners." She advised "the gun range case was heated" and McLelland had taken it upon himself to prosecute the case. (AX 49).

(342) Local, state, and federal law enforcement officials investigated all potential suspects, collected evidence, and determined Applicant killed Hasse and the McLellands.

(343) Applicant presents no evidence Korioth influenced the investigation, and no evidence indicates she swayed the investigation to focus on Applicant.

(344) Independent of the involvement of Korioth, the evidence of Applicant's guilt is strong. No showing exists that the investigation improperly focused on Applicant, or improperly focused on Applicant because of Korioth's efforts.

The Prosecution Team

(345) Wirskye stated members of the prosecution team included "first and foremost" Wirskye and Shook. They were both decision makers. Wirskye was the primary decision maker because Shook was also minding the law practice. (8 WRR 69, 71).

(346) Much later, after Applicant's arrest, Wirskye and Shook started to assemble a trial team. (8 WRR 121).

(347) Wirskye and Shook had the following people sworn in: Jerri Sims from the U.S. Attorney's Officer; Tom D'Amore, who was in private practice; Tarrant County prosecutor Miles Brissette, and Tarrant County investigator Danny Nutt. When the trial was moved to Rockwall County, Wirskye and Shook had the Rockwall County Criminal District Attorney Kenda Culpepper and her first assistant Damita Sangermano sworn in. Closer to trial, they had Collin County prosecutor John Rolater and Lisa Smith sworn in. (8 WRR 71-72, 111, 121).

(348) Wirskye testified Korioth was not on the team, and she was never going to be on the team. (8 WRR 71, 78).

(349) Korioth did not consider herself a member of the team, and she knew she did not "have any authority." (6 WRR 141, 145).

(350) To the extent Applicant suggests the mere number of emails including Korioth demonstrates an inappropriate level of involvement, this is not supported by the record. Wirskye testified he communicated a lot through email and the number of emails that included Korioth was a "fraction of the emails" he exchanged in this case. Depending on the stage of the investigation, he exchanged well over a hundred emails, texts, and phone calls a day. (8 WRR 70).

(351) Also, Wirskye "over-included" people on the emails he sent. He did not know how to use email groups, so would often include many people to make sure he didn't leave anyone out. Likewise, Korioth testified Wirskye would sometimes send out "bulk emails." (6 WRR 152-53; 8 WRR 122).

(352) To the extent Applicant suggests that, because Korioth was included on emails about meetings, she attended many meetings, Wirskye's and Korioth's explanations show otherwise.

(353) Wirskye kept Korioth in the loop in part because he told everyone in Kaufman County to call her if they needed to know something because she would have the latest updates that could be disseminated. (6 WRR 142, 149-50; 8 WRR 74).

(354) Wirskye told the court Korioth was included on emails about meetings not necessarily to invite her but to keep her informed. He explained: "There are probably some [emails] where I invited her to meetings, there are probably some that are just the FYI." (8 WRR 122).

(355) Wirskye said many combined prosecution and law enforcement meetings were held about evidence and the trial. Korioth was invited to some of those, but Wirskye only remembered her attending one. (8 WRR 121-22).

(356) One email from Wirskye to Shook, Sims, Brissette, Nutt, Rolater, and Korioth stated in part:

> 404(b) meeting this Friday at 1 pm at our office. . . . Also, we have an informal meeting at our office Thursday at 1:30 pm with the defense to discuss pretrial motions etc. (Sue will have to sit that one out.) Finally, we are meeting with the DNA and firearms people Wednesday at 10 am at their lab in Garland.

(AX 229).

(357) Regarding the above email, Wirskye explained he thought Korioth was invited to the 404(b) meeting but she was not invited to the meeting with the defense because she was not on the team. He never would have invited her to the forensic and ballistics meetings. (8 WRR 123).

(358) The only evidence of what meetings Korioth actually attended was provided by Korioth. She said she went to two or three meetings over the course of a year or two when Wirskye updated and provided information to the local law enforcement and other agencies. (6 WRR 104-05).

(359) Applicant's counsel asked Korioth about a chain of emails in which Wirskye thanked her for attending a meeting and wrote: "Not sure if I feel better or worse about discovery." The emails also indicate prosecutor Miles Brissette attended the meeting. While Applicant characterizes this as Korioth and Brissette meeting about discovery, the emails show it was some type of group meeting that included an FBI agent. Korioth did not specifically remember such a meeting. (6 WRR 104-05; 9 WRR 10; AX 217).

(360) As set out below, there were many reasons why Korioth would have been included on emails even though she was not part of the team, including that Korioth's duties at the Kaufman County DA's office overlapped with issues in Applicant's prosecution; Wirskye wanted to keep Korioth informed about how the prosecution was progressing so, when appropriate, she could pass it on to the relevant people; and Wirskye sought discreet pieces of legal and factual information from Korioth.

Korioth's Duties at the Kaufman County DA's Office Overlapped with Issues that Arose in the Prosecution of Applicant

(361) Korioth explained, "[t]here were a lot things where I was representing the county and on, on our end of things like the HIPAA issue on [Applicant's] jail records when

the defense wanted them. And so those situations, I was just trying to act as a, a middle point, a link between the two worlds." (6 WRR 142).

(362) For one, Korioth was the open records attorney for the Kaufman County DA's office, and advised the Kaufman County Sheriff's Office on open records requests. After Hasse was killed, the DA's office, the Sheriff's offices, and Wirskye received open record requests from the press and others, and she answered them all because that responsibility never got shifted over. (6 WRR 89-90, 148; 8 WRR 75-76).

(363) Korioth and Wirskye also had to coordinate efforts when Wirskye decided it was time to arrest Applicant. There was an issue as to whether to arrest him on his appeal bond on his burglary case, in which Kaufman County still represented the State, or whether to arrest him on a new charge. Although Koroith drafted some motions and orders for Wirskye relating to Applicant's burglary conviction, Wirskye made the decisions regarding Applicant's arrest. (6 WRR 96-98; 8 WRR 78; AX 212).

(364) Similarly, when an issue arose regarding Applicant's use of a Kaufman County LexisNexis account, Korioth tracked down information about the county's various LexisNexis accounts. (6 WRR 145-48; *see, e.g.*, AX 177 at 240-42).

(365) Wirskye contacted Korioth when Applicant's counsel filed a change of venue motion. The emails show Korioth drafted some "rough-ish drafts of response, order, and affidavit," but they mostly show her efforts to gather names for potential State's affiants. Korioth was "well trusted around the courthouse" and "pretty much knew the different departments and players." In the end, the prosecutors pro tem and Applicant's defense team agreed to a change of venue to Rockwall County.[21] (3 RR 4-5; 6 WRR 89, 106-08; AX 218-222).

(366) Additionally, after Applicant was in jail, Charles Brownlow committed capital murder in Kaufman County, and the county decided to seek the death penalty against him. Korioth was one of the prosecutors assigned to the case. The same defense attorneys representing Applicant were representing Brownlow. Korioth and Wirskye

[21] On the eve of trial in October 2014, Applicant filed a second change of venue motion. After a hearing, the trial court denied that request. (27 RR 5-29).

shared information because they were getting a lot of the same motions in both cases. (5 WRR 37-38; 6 WRR 63, 150-52; 8 WRR 76).

Wirskye Sought Korioth's Assistance as a Friend, Former Colleague, and Respected Appellate Attorney, but Not as a Decision Maker

(367) Applicant argues that, even with a prosecution team, Wirskye continued to seek and rely on Korioth's advice, knowledge, and assistance in order to secure a conviction and the prosecution team frequently adopted and pursued Korioth's ideas regarding strategy and development of their case. (5 WRR 13).

(368) Applicant overstates Korioth's level of participation and influence.

(369) Applicant fails to present evidence that Korioth made critical, controlling prosecutorial decisions.

(370) There is no evidence—and the emails do not reveal—that Wirskye abdicated his decision-making responsibilities to Korioth. Notably, Toby Shook was also a decision maker, and it is reasonable to presume he would have monitored and collaborated with Wirskye on all critical decisions.[22]

(371) Although Wirskye sought Korioth's advice, knowledge, and assistance, this was not because she was a team member but because she was a trusted friend and a respected appellate attorney.

(372) Wirskye described Korioth as a trusted friend and "one of the smartest criminal lawyers in Texas." Wirskye related "everyone respected her legal experience and her opinion." (8 WRR 65-66, 76).

(373) But their interactions had boundaries, and Korioth was not a decision maker. (6 WRR 143, 152; 8 WRR 69, 78, 80).

(374) Korioth testified she did not use her friendship with Wirskye to insert herself in the case. (6 WRR 144).

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[22] Applicant did not call Toby Shook to testify and does not specifically argue that he had a conflict.

(375) Wirskye said Korioth did not play the "friendship card" to get information she was not entitled to and, although he gave her more information than he gave other people, "it was still kind of on a need to know basis" for her. (8 WRR 80, 126).

(376) Korioth got late night phone calls from Wirskye decompressing after long days in large part because she is a night owl, and she was probably the only person he knew who was up at 1:00 a.m. She listened as a friend. But they tried to respect the situation's boundaries, considering that sometimes there was not a boundary; for instance, when Wirskye needed information from Kaufman County files. (6 WRR 88-89, 143).

(377) Wirskye described Korioth as one of many friends he called and vented to. (8 WRR 125-26).

(378) Wirskye sought Korioth's input on certain things like who he could trust in the Kaufman community, but ultimately, he made the decisions on how to use the input. (8 WRR 66-7).

(379) When Wirskye called Korioth with a legal question or some discreet question about something in Kaufman, she would answer it, and they would hang up. Wirskye testified: "And to her credit as a professional, she never put me in the spot where I had to divulge anything that I thought was sensitive to her." (8 WRR 80, 126).

(380) Korioth described her assistance as that of a legal researcher or paralegal saying, "I wasn't making decisions. I wasn't saying you're gonna put this on, you're gonna put that on. Saying this is what the case law looks like to me, here, you read it." (6 WRR 91, 100-01, 126, 144-45).

(381) Korioth never was a decision maker for the prosecution team. "[M]y vote didn't count for anything, you know. I mean my case law did to the extent that it was correct and they could read it, but my vote did not, and I didn't expect it to." (6 WRR 152-53).

(382) Korioth drafted and reviewed documents for Wirskye but "I may have drafted this or that, but I didn't, I mean like the, the major documents started other places or were drafted other places. They weren't my, product of my advocacy[.]" (6 WRR 155).

(383) The night the investigative team drafted a search warrant to search Applicant's house, Wirskye couldn't find another lawyer to come to the command post to review it,

so he asked Korioth to do it because he "needed a second set of eyes to look at that and look for typos and make sure that [it] was good to go." (8 WRR 67).

(384) When Applicant's counsel tried to suggest at the writ hearing that Korioth drafted the affidavit for the search warrant on the storage unit, Wirskye disagreed and explained Korioth had looked at it along with other people because they wanted as many eyeballs on it as possible. Although Korioth stated in the email she was "trying to cut some of the clutter and compress some info" and she would send it to him "for what it's worth," there is no correlating evidence showing the nature of her edits or whether Wirskye relied on or incorporated her edits. (8 WRR 119-20; AX 89).

(385) Korioth acknowledged she reviewed and revised the arrest warrant affidavit for Applicant's arrest. She did not know where the affidavit originated from, but she thought she may have cut and pasted information from some search warrants the Plano police had put together the week before. When Wirskye emailed Korioth a question about the affidavit, Korioth responded: "[W]hat do I know, I'm recused[.]" Korioth said that was her way of telling Wirskye she was not trying to give him legal advice. Ultimately, a magistrate approved the affidavit and signed the warrant. (6 RR 91, 99-101; AX 213).

(386) Korioth acknowledged sending Wirskye an email with six indictments attached, including three indictments for Applicant and three for Williams. When asked if she drafted the indictments, Korioth stated she did not know who originally drafted them; she had forms used by the Kaufman County grand jury; and she was sure she put the language they had on the forms as a matter of word processing. (6 WRR 101; AX 214). Korioth sent Wirskye three draft indictments on Applicant's case three days earlier. (AX 177 at 057). Whether Korioth drafted the indictments or not, nothing suggests she decided the course of the litigation. And no correlating evidence showing if, or the extent to which, Wirskye relied on or incorporated Korioth's suggestions. (1 CR 32).

(387) Applicant's counsel argued at the writ-hearing closing arguments that Korioth suggested legal strategies, asserting she recommended proceeding on the indictment "for the McLellands" and that was what happened. (9 WRR 11). Presumably, counsel was relying on a chain of emails where Wirskye asked for John Rolater's input on "the 404b issue with putting the Hasse murder on during case-in-chief on the Cynthia McLelland indictment." Wirskye also copied Toby Shook and Korioth on the email. After Rolater responded, Korioth responded in part "[w]e have a lot of reasons for going with Cynthia first." (AX 177 at 190). Although the State proceeded on the indictment alleging the

McLelland murders rather than the Hasse murder, this July 7-8, 2014 email chain was written after the indictment had been filed on June 27, 2013. (1 CR 32). Korioth's statement fails to show she dictated which indictment Wirskye and Shook filed or their reasons for doing so.

(388) One email shows Wirskye sent Korioth a draft of a notice to seek the death penalty against Applicant and asked if she had "any thoughts or edits." Korioth responded: "looks fine." While Applicant highlighted this at the writ hearing, it does not demonstrate Korioth had any say or influence in the pro tems' decision to seek the death penalty against Applicant. (6 WRR 102-03; AX 215).

(389) Emails show Korioth reviewed and offered her opinion on drafts of the guilt and punishment phase jury charges prepared by prosecutor pro tem John Rolater five months before trial. (6 WRR 116-17; AX 236-27).

(390) In one of the jury-charge emails, Koroith wrote: "[I]t is really strange to be trying to work on a capital when you also are kind of in the middle of it. Really skew perspective, even after a year and 1/2. I'm so glad we got a quick recusal on this thing, even though I frequently feel that it's ruining [Wirskye's] life." (6 WRR 116-17; AX 236-37). This demonstrates Korioth knew her limitations and role.

(391) While the emails and testimony show Korioth assisted Wirskye, Applicant fails to show Korioth made critical, controlling decisions in the investigation and prosecution, or that Wirskye abdicated his and Toby Shook's independent decision-making power to Korioth.

(392) Thus, Applicant fails to prove prosecutor pro tem Bill Wirskye had an actual conflict of interest.

Evidence Korioth was Partial, "Interested" and an Actual Conflict of Interest

(393) Applicant asserts Korioth was an "interested" prosecutor because (1) her office had been recused from the investigation and prosecution of the deaths of Hasse and the McLellands; (2) she was close friends with Mark Hasse; (3) the office was a crime scene, and the employees were traumatized; (4) she was a potential witness who was interviewed by the FBI; and (5) she had an ax to grind against Applicant. *See Wright v. United States*, 732 F.2d 1048, 1056 (2nd Cir. 1984) (holding that a prosecutor "is not disinterested if

he has, or is under the influence of others who have, an axe to grind against the defendant").

(394) Applicant fails to prove Korioth was an "interested" prosecutor who had an actual conflict of interest.

Kaufman County DA's Office Was Voluntarily Recused

(395) Applicant asserts his right to a disinterested prosecution was violated when Korioth disregarded the trial court's recusal order. (App. at 55).

(396) The Kaufman County DA's Office voluntarily requested to be recused from the investigation and prosecution of offenses related to the deaths of Hasse and the McLellands in order "to avoid any conflict of interest or appearance of impropriety," under Article 2.07(b-1) of the Code of Criminal Procedure. The motion was granted. *See* Tex. Code Crim. Proc. art. 2.07(b-1) (AX 194, 195).

(397) A prosecutor is "disqualified" from a case if he is barred by law from conducting the prosecution but, a prosecutor is "recused" when he voluntarily withdraws from the case. *See Coleman*, 246 S.W.3d at 81. Once the trial court approves a voluntary recusal, the district attorney is deemed disqualified under the statute. *See* Tex. Code Crim. Proc. art. 2.07(b-1); *In re Simon*, No. 03-16-00090-CV, 2016 WL 3517889, at *6 (Tex. App.—Austin June 22, 2016) (orig. proceeding) (not designated for publication).

(398) A statutory disqualification is distinguishable from an actual conflict that rises to a constitutional due process violation. *See generally State ex rel. Hill v. Pritle*, 887 S.W.2d 921, 927 (Tex. Crim. App. 1994) ("A trial court may not disqualify a district attorney or his staff on the basis on a conflict of interest that does not rise to the level of a due process violation.").

(399) As found below, Korioth did not have an actual conflict of interest, and the appearance of impropriety, alone, does not establish the kind of due process violation required to disqualify a prosecutor. *See Haywood*, 344 S.W.3d at 463.

(400) Also, the recusal order in the Hasse case provides "the Kaufman County District Attorney and his office are recused from investigation and prosecution of offenses relating to" his death."[23] (AX 194; 2nd Supp. CR 6).

(401) Korioth did not investigate or prosecute the murders of Hasse and the McLellands.

(402) To the extent Applicant relies on a violation of a state statute to support his claim, a state statutory claim is not cognizable in a habeas proceeding where no violation of federal constitutional rights has occurred. *Ex parte Graves*, 70 S.W.3d 103, 109 (Tex. Crim. App. 2002).

(403) Here, any violations of article 2.07 do not establish a constitutional claim because Korioth did not have an actual conflict of interest that violated Applicant's due process rights. *Landers*, 256 S.W.3d at 304.

(404) Applicant's claim Korioth had a conflict of interest because she violated a state statue, without a showing of a constitutional violation, is not cognizable in this habeas proceeding.

Mark Hasse

(405) Applicant asserts Korioth was "interested" in Applicant's prosecution because she was "close friends" with Mark Hasse. (9 WRR 8).

(406) Applicant relies primarily on an article Bill Wirskye wrote titled "Answering the Call" in which Wirskye wrote "Mark Hasse was also an assistant D.A. in Kaufman, and he and [Korioth] were close friends." (8 WRR 108, 114-15; AX 100).

(407) This excerpt from Wirskye's article does not constitute reliable, conclusive evidence.

(408) At the writ hearing, when asked if Korioth and Hasse had been close friends, Wirskye said: "I think they'd been friendly. I can't really characterize – I know they

[23] The "Order Appointing Attorneys Pro Tem" in the McLelland case does not contain recusal language; but appoints attorneys pro tem Bill Wirskye and Toby Shook. (2nd Supp. CR 9).

worked together, and it was a small office. I think they knew one another fairly well from their days in Dallas." (8 WRR 114-15).

(409) Korioth said she was not friends with Hasse, although they "worked fine together." "[W]e, to say things mildly, we saw things very differently in life; and we didn't, didn't socialize. I don't think I even knew where he lived until he got murdered." (6 WRR 66).

(410) Korioth's first-hand, personal testimony regarding the status of her friendship with Hasse is relevant and conclusive on the issue.

(411) Regardless of the status of Korioth and Hasse's friendship at the time of Hasse's death, Applicant fails to prove Korioth committed misconduct toward Applicant's prosecution based on her friendship with Hasse.

(412) Applicant fails to prove Korioth's relationship with Hasse caused her to have "an axe to grind" against Applicant.

District Attorney Wiley's Personal Conflict of Interest

(413) District Attorney Wiley was a witness at Applicant's trial because she was on his hit list. (54 RR 9, 76, 123-38; 6 WRR 165-66).

(414) Korioth testified she was cautious about what information she was privy to regarding Applicant's prosecution. Korioth also said she was careful about the information she shared with Wiley. (6 WRR 139-40, 150).

(415) To the extent Wiley had an actual conflict of interest, no evidence shows this conflict was imputed to Korioth. *See In re Simon*, 2016 WL 3517889, at *7 (noting that the Court of Criminal Appeals has never held that an entire district attorney's office must be disqualified when a district attorney is disqualified).

(416) Likewise, no evidence reflects Korioth passed along Wiley's conflict by inserting any irrelevant or impermissible factors into the prosecution of Applicant.

The Office as Part of the Crime Scene

(417) In a similar claim, Applicant asserts Korioth was "interested" in this case because the Kaufman County DA's Office was a crime scene, and the employees were traumatized. (9 WRR 7-8).

(418) While the employees at the DA's office would have been affected emotionally, this does not mean Korioth had an improper interest in seeing Applicant prosecuted other than simply "a general zealousness in the enforcement process." *Marshall v. Jerrico*, 446 U.S. at 250 n.12.

(419) Also, precisely because the office was a part of the crime scene, prosecutor pro tem Wirskye needed a point person in the Kaufman County DA's office to provide any relevant documents and information needed to investigate and prosecute the offenses. As Korioth testified, when a pro tem is appointed, normally the pro tem can take the file, walk away, and handle it; but, when the DA and one of his felony assistants is murdered, "the office is part of the crime scene basically. So it wasn't like they could walk away and not have to deal with the courthouse or our office and not have to deal with our records." (6 WRR 90).

(420) Applicant fails to establish Korioth had an actual conflict because she worked in the Kaufman County DA's Office when both Hasse and the McLellands were killed.

FBI Interview

(421) Applicant asserts Korioth was a fact witness because the FBI interviewed her and because her "personal knowledge of the circumstances surrounding [Applicant's] case made her a fact witness." (App. at 58-59; 5 WRR 12; 9 WRR 8; AX 49).

(422) Applicant relies primarily on the FBI's April 2, 2013 interview of Korioth. (AX 49).

(423) Korioth was at home at the time of both murders, did not have actual knowledge of the Hasse and McLelland murders, and was not a fact witness. (6 WRR 132).

(424) Korioth's interview with the FBI after the McLelland murders did not make her a fact witness.

(425) According to Wirskye, everyone in the Kaufman County office should have been interviewed by the FBI after the Hasse and McLelland murders. (8 WRR 115).

(426) During the FBI interview, Korioth told the FBI in part that McLelland was convinced Applicant killed Hasse; McLelland and Hasse carried guns when the cases first started with Applicant; and McLelland had told her a judge told him that Applicant had a hit list. (AX 49).

(427) The FBI report demonstrates Korioth provided information many people likely possessed. For instance, the Kaufman County Sheriff was aware of McLelland's belief the Applicant killed Hasse, and according to Wirskye, "people were talking about the hit list" right after Hasse's murder. Also, Wirskye testified Applicant was a person of interest from moments after Hasse was shot. (6 WRR 71-72; 8 WRR 116).

(428) Korioth also told the FBI: that McLelland had often said he went to bed early and work up early; the murders could have happened in the morning; she did not believe the McLellands would have answered the door in the middle of the night since they were on edge; if McLelland answered the door, it was because he trusted whoever was at the door; and she believed McLelland had his paper delivered and that he may have been getting the paper in and had the door unlocked.

(429) Korioth's beliefs about the McLelland's habits and her speculations about how the murders may have occurred did not make her a fact witness, especially in light of the investigations conducted by all the various law enforcement agencies.

(430) Korioth was not a fact witness to the Hasse and McLelland murders, and Applicant overstates the significance of the information she gave the FBI when he says it "aided in the investigation and eventual prosecution of [Applicant]." (App. at 59).

Applicant

(431) Applicant asserts Korioth had severe animosity and deep resentment toward him and she had an "ax to grind" against him. (App. at 59-60; 5 WRR 12; 9 WRR 9).

(432) In support, Applicant relies primarily on an excerpt from the book "Target on My Back: A Prosecutor's Terrifying Tale of Life on a Hit List," written by Kaufman County Criminal District Attorney Erleigh Wiley, published in 2017.

(433) Applicant's counsel did not introduce the book into evidence but instead read excerpts out loud.

(434) Applicant relies specifically on a scene portrayed in the book where Wiley seeks Korioth's advice regarding whether to recuse the office from Applicant's case, and Korioth is alleged to have said: "Before this motherfucker gets the needle, there will be all kinds of shit thrown at the wall . . . . And we don't want him breathing because we had a DA who was the judge signing a search warrant." (App. at 60).

(435) Applicant also relies on an excerpt when Wiley states: "I didn't trust her totally in this case. She had too much of a personal conflict." (6 WRR 163).

(436) Wiley testified at the writ hearing that her book was "based on a true story" but she took "literary license." She did not take notes at the time of the events, and it was based on her own personal experiences and perception. (6 WRR 161-62).

(437) In the book, Korioth was described as "very colorful," she was a "great character to embellish," and "sometimes what [Korioth] is as a character, it's several people, but you use one focal person to adopt a sentiment, maybe even for yourself or something." (6 WRR 161).

(438) Wiley explained: "So some statements are actually attributed, some statements are a combination or accumulation of thoughts and processes[.]"

(439) When asked what Korioth's personal conflict was, Wiley stated: "I don't know, that two people in our office were killed." When Applicant's counsel suggested Wiley was questioning Korioth's motivation for asking her to recuse, Wiley stated "No," explaining that Korioth was a professional, and she was just telling her what could be a problem. (6 WRR 163-64).

(440) When asked about her statements to Wiley, Korioth said she had no independent recollection of it but "it wouldn't be anything outside of what I would normally say." (6 WRR 85).

(441) Korioth has a reputation for being foul mouthed and for "talking like a sailor." (6 WRR 122; 8 WRR 65).

(442) Korioth elaborated: "The implication that because I used colorful or profane language in referring to this defendant that I had something against him is ludicrous. It would not be unusual for me to make a comment like that trying to convince her she needed to stay out of it." (6 WRR 86-97).

(443) Korioth told the court, after reading the relevant chapter in Wiley's book, her impression was that Wiley "seemed to be kind of doing one of those based on fact novels more than a book because it all seemed confused." For instance, the quoted conversation about recusal was actually about whether Wiley should get back into the prosecution of Applicant after the office had been recused. (6 WRR 84-85, 87, 133).

(444) Korioth said it was possible that when she said "motherfucker," she was not referring to Applicant but to "whatever MF" was arrested. (6 RR 133-34).

(445) Excerpts from Wiley's book are not reliable, credible evidence Korioth had an ax to grind with Applicant.

(446) Applicant fails to tender any credible evidence that Korioth had a deep resentment and animosity toward Applicant on a personal level that was so "intolerable" it created an actual conflict of interest.

(447) The record demonstrates Korioth did not have a personal ax to grind against Applicant.

(448) Korioth lived in Dallas, commuted to the office three days a week, and was not a "Kaufman County person." (6 WRR 65, 81).

(449) Korioth's interactions with Applicant before his burglary trial were limited.

(450) Korioth answered a legal question from Applicant when he was a JP, and she attended a couple of meetings Applicant likely attended. (6 WRR 122-24).

(451) Korioth was on the periphery of Applicant's burglary trial. She probably did some research for Hasse on the case, because of her role as the appellate attorney in the office, but she did not remember what the research issues were. (6 WRR 125-26).

(452) Leading up to the trial, she had been sick and was not in Kaufman any more than she had to be. She saw the video implicating Applicant and agreed it was a good case; but she did not attend or help much with the trial. She heard about the trial from

McLelland, Hasse, and another assistant, and it sounded like it was a "really angry trial." (6 WRR 126-29).

(453) Korioth represented the State on the appeal of Applicant's burglary trial because she handled all the appeals in the office at that time. (6 WRR 125).

(454) When asked about her opinion of Applicant, Korioth testified: I didn't really have one. I'll, I'll say I wasn't terribly impressed with any of the JPs in Kaufman County, but they were small town JPs, you know, and that's me being ugly. But I don't think I really had much opinion." (6 WRR 125).

(455) Korioth explained Rick Harrison, who hired her, seemed to like Applicant but McLelland seemed to despise him. When asked if she had strong feelings about Applicant, Korioth stated: "What's the point. You know, I didn't live there. I didn't know who was right and who was wrong, so I basically just kind of dismissed both of their opinions." (6 WRR 125).

(456) When Korioth was asked whether her sole motivation was to see Applicant in jail or whether it was to see the killer caught, Korioth testified:

> My motivation was to see whoever was murdering people get caught and prosecuted, and hopefully by doing that to stop people from getting shot. Like it is in any case, you never want to see more people get shot. But no, I, I didn't have anything against [Applicant] and in fact wouldn't want him to be prosecuted if he wasn't the one doing the murders.

(6 WRR 133).

(457) Korioth ensured an impartial investigation. She talked constantly to McLelland about asking law enforcement to pick up Applicant and his friends, telling him: "[Y]ou know, Mike, I know you're upset, but we can't just go pick people up." (6 WRR 71-72, 131-32).

(458) Applicant relies on an email Korioth sent the State before the writ hearing, when she wrote: "It just pisses me off that that sniveling little bastard was stealing Westlaw [sic] services from the county for 4 or 5 years[.]" But Korioth testified this did not indicate extreme prejudice, rather: "I think anybody that steals from the county, from taxpayers, is kind of a sniveling little bastard. That's just how I feel." No evidence in the record

shows Korioth contaminated the capital murder prosecution of Applicant because Applicant had stolen LexisNexis services from the county. (6 WRR 118-19; AX 207).

(459) Korioth's testimony she did not have a personal animosity or resentment against Applicant rising to an actual conflict of interest is supported by the evidence.

(460) Applicant fails to prove Korioth was partial or "interested" or that she had an actual conflict of interest in this case.

No Due Process Violation

(461) To succeed on his conflict claim, Applicant must establish an actual conflict of interest existed that prejudiced him in such a manner as to rise to the level of a due-process violation. *See See Ex parte Reposa*, No. AP-75,965, 2009 WL 3478455, at *10 (Tex. Crim. App. 2009) (orig. proceeding, not designated for publication).

(462) Applicant's claim that prosecution by an interested prosecutor is fundamental error not subject to harmless error analysis is not supported by the applicable law.

(463) Applicant does not show he was actually prejudiced.

Applicant's Conflict of Interest Claim is Subject to a Prejudice Review

(464) Applicant argues Korioth's involvement in his prosecution constitutes fundamental error not subject to harmless error review.

(465) In support, Applicant relies on *Young v. U.S. ex rel. Vuitton et Fils S.A.*, 481 U.S. 787 (1987), and *Ex parte Spain*, 589 S.W.2d 132, 134 (Tex. Crim. App. 1979). The holdings in *Vuitton* and *Spain* are not dispositive.

(466) In *Young*, Louis Vuitton, a leather goods manufacturer, sued S.K. for trademark infringement. S.K. settled with Vuitton and consented to a permanent injunction prohibiting him from making or selling fake Vuitton goods. Later, S.K. was caught making and selling the counterfeit goods. Vuitton's attorneys asked the trial court to appoint them as special prosecutors in a criminal contempt action for the violation of the settlement injunction, which the court granted. A jury convicted S.K. of criminal contempt. S.K. argued the appointment of Vuitton lawyers violated his right to be prosecuted by an impartial prosecutor.

(467) In overturning the conviction, the *Young* Court declined to address whether the prosecutorial conflict of interest was unconstitutional; instead, it relied on its "supervisory authority" over the federal courts' procedures to enforce their orders and held that "counsel for a party that is the beneficiary of a court order may not be appointed as prosecutor in a contempt action alleging a violation of that order."

(468) Also, the *Young* Court was split as to whether the conflict of interest was subject to harmless error analysis. A plurality of the Court held it was not, but an equal number of justices, four, argued that since the error was not of constitutional dimension, the case should have been remanded to the lower courts for harm analysis. *See* Young, 481 U.S. at 809-10, 826-27; *see also* 54 Baylor L. Rev. at 188.

(469) Thus, the *Young* case "did not settle the issue of whether a prosecutor's lack of disinterestedness can constitute a per se violation of due process or whether disinterestedness is subject to harmless error analysis." Edward L. Wilkinson, *Conflicts of Interest in Texas Criminal Cases*, 54 Baylor L. Rev. 171, 187 (2002).

(470) Also not dispositive is the holding in *Spain* that, when a prosecutor prosecutes a defendant whom he formerly represented as defense counsel in the same case, no specific prejudice need be shown by the defendant; such a violation constitutes a due process violation. 589 S.W.3d at 134; *see Landers*, 256 S.W.3d at 304 ("For a prosecuting attorney to 'switch sides' in the same criminal case is an actual conflict of interest and constitutes a due-process violation, even without a specific showing of prejudice."). This situation does not apply to the instant case.

(471) And courts have held the rule is somewhat different where the conflict-of-interest claim does not involve prior representation in the same criminal matter. *Landers*, 256 S.W.3d at 304.

(472) The Court of Criminal Appeals has held a conflict of interest alleged to have arisen from the prosecutor's personal bias or grudge against the defendant is not an obvious conflict on its face that merits automatic disqualification; instead, in this situation, the applicant must demonstrate an actual conflict of interest existed that prejudiced him in such a manner as to rise to the level of a due-process violation. *See Ex parte Reposa*, 2009 WL 3478455, at *10; *see Haywood v. State*, 344 S.W.3d 454, 462-63 (Tex. Crim. App. 2011) (requiring a showing of actual prejudice to the defendant where a conflict of interest is alleged).

(473) This requirement is consistent with the general habeas law that a post-conviction habeas corpus application must allege facts showing both a cognizable constitutional violation and harm. *See Ex parte Weinstein*, 421 S.W.3d 656, 664-65 (Tex. Crim. App. 2014).

(474) Applicant's conflict claim is subject to a prejudice analysis.

Applicant Cannot Show He Was Actually Prejudiced

(475) Applicant has not met his burden to show he was actually prejudiced by the circumstances of his prosecution such that his due process rights were violated.

(476) Applicant has not shown Korioth injected a personal interest into the enforcement process that brought irrelevant or impermissible factors into the prosecutorial decision. *See Marshall v. Jerrico, Inc.*, 446 U.S. at 242, 248-50.

(477) Applicant does not establish Korioth directed or controlled the investigation to ensure Applicant was targeted for prosecution. In fact, the record shows the opposite: Korioth slowed down, if not stopped, McLelland's efforts to target Applicant immediately after Hasse's death. *Cf. Wright v. United States*, 732 F.2d 1048, 1057 (2d Cir. 1984) (petitioner did not allege interested attorney was "the real instigator of the decision to proceed before a new grand jury").

(478) Significantly, local, state, and federal law enforcement officials investigated all potential suspects and determined the perpetrator by collecting evidence *before* any indictments were issued.

(479) Applicant does not assert and the evidence does not show he would not have been indicted or convicted had Korioth not been involved whatsoever. *See Haywood*, 344 S.W.3d at 463.

(480) Applicant's wife, Kim Williams, implicated herself and Applicant in the murders, and law enforcement corroborated her statements.

(481) Applicant has presented no evidence Wirskye or Shook had an improper motive in prosecuting Applicant or that they unfairly prosecuted him. *See Buntion v. State*, 482 S.W.3d 58, 77 (Tex. Crim. App. 2016) (holding that no actual misconduct by the district attorney's office was shown in pursing the death penalty in Buntion's case).

(482) The evidence shows prosecutors pro tem Wirskye and Shook represented the State fairly and exercised sound professional judgment during the prosecution.

(483) Ultimately, Applicant was tried by an impartial judge and jury, he was represented by counsel, and he had a full opportunity to present his case. The jury had sufficient evidence to support its finding that Applicant was guilty and that he deserved a death sentence.

(484) Applicant fails to prove he was actually prejudiced by Korioth's assistance in his case.

(485) Korioth's assistance in Applicant's case did not violate Applicant's due process rights.

(486) Applicant's claim that his rights to due process and fair trial were violated because Sue Korioth participated in his prosecution is denied.

Communications with Jury

(487) Applicant asserts the State violated his due process rights under the Texas and Federal Constitutions by engaging in ex parte communication with the jury during the penalty phase deliberations.[24]

(488) For a defendant to have a fair trial, the jury must decide the case on the basis of the evidence presented at trial. *See Parker v. Gladden*, 385 U.S. 363, 364 (1966); *Ocon v. State*, 284 S.W.3d 880, 884 (Tex. Crim. App. 2009); *Barnett v. State*, 420 S.W.3d 188, 193 (Tex. App.—Amarillo 2013, no pet.).

(489) Any private communication, contact, or tampering with a juror, directly or indirectly, during a trial about the matter pending before the jury is presumptively prejudicial, if such contact is not authorized by the court and is made without the

[24] Applicant also discusses Article 36.22 of the Code of Criminal Procedure, which prohibits contact with jurors. Tex. Code Crim. Proc. Ann. art. 36.22 (West 2006). To the extent Applicant relies on this statute, such argument is not cognizable on habeas review because it does not allege a fundamental or constitutional violation. *Ex parte Sanchez*, 918 S.W.2d 526, 527 (Tex. Crim. App. 1996).

knowledge of the parties. *Remmer v. United States*, 347 U.S. 227, 229 (1954);[25] *Oliver v. Quarterman*, 541 F.3d 329, 334-36; *Balderas v. State*, 517 S.W.3d 756, 782 (Tex. Crim. App. 2016).

(490) Applicant bears the burden of showing a conversation occurred between a juror and an unauthorized person. *See Ex parte Lalonde*, 570 S.W.3d at 725 (applicant bears the burden to prove by a preponderance of the evidence facts that entitle him to relief); *see also Hughes v. State*, 24 S.W.3d 833, 842 (Tex. Crim. App. 2000) (defendant has the burden of proving the allegation of juror misconduct); *Barnett*, 420 S.W.3d at 193; *see generally Remmer*, 347 U.S. at 229.

(491) Applicant's sole evidence is the declaration of his father, Jim Williams. Jim stayed at the same motel as the jurors the night they were sequestered at the punishment phase. He claims while he was outside smoking that night: "two women and two men who I recognized as jurors came down to the smoking area while I was out there. We did not speak to each other but I was close enough to hear their conversation." He says: "As they were finishing their cigarettes, one of the women said they better get back up to the 'meeting room' because the prosecutors wanted to talk to them." (AX 20 at 11-12).

Procedurally Barred

(492) Applicant fails to prove he could not have raised this issue at the time of trial or on direct appeal.

(493) "[I]n general, claims that could have been raised on appeal cannot be raised at all on habeas." *Ex parte Lalonde*, 570 S.W.3d 716, 727 n.11 (Tex. Crim. App. 2019) (Keller, P.J. and Slaughter, J., concurring). "By raised on direct appeal, we mean, that the claim was or could have been raised at trial or in a motion for new trial, which would make it raisable on direct appeal." *Id.* at 727 n.9.

(494) The Court of Criminal Appeals has recently highlighted its "trend to draw stricter boundaries regarding what may be advanced on habeas petitions because the Great Writ should not be used to litigate matters 'which should have been raised on

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25 The *Remmer* presumption of prejudice has been questioned. *See e.g., United States v. Smith*, 354 F.3d 390, 395 (5th Cir. 2003); *Oliver*, 541 F.3d at 341.

appeal or at trial." *Id.* at 727 n.11 (quoting *Ex parte Jimenez*, 364 S.W.3d 866, 880 (Tex. Crim. App. 2012)).

(495) Applicant alleges "the State's misconduct—which occurred outside of the courthouse and, presumably, outside the knowledge of the Court and trial counsel—went undiscovered until post-conviction investigation, preventing Mr. Williams from making objections to the misconduct[.]" (App. at 72).

(496) Applicant neither alleges nor proves when he learned what his father allegedly overheard.

(497) Although Applicant presents Jim's declaration, Jim does not address whether he relayed this alleged information to anyone at or near the time it happened. (AX 20).

(498) Thus, Applicant fails to sustain his burden of showing his claim is reviewable.

(499) Applicant's claim that prosecutors communicated with sequestered jurors should be dismissed as procedurally barred.

Applicant Fails to Allege Facts that Entitle Him to Relief

(500) As Applicant's father, Jim Williams is a biased witness, and has not been confronted and subjected to cross-examination.

(501) Assuming Jim Williams heard jurors say they were meeting with the prosecutors, it seems reasonable to expect him to immediately come forward and tell someone on the defense team, the bailiff, or the trial court.

(502) Jim Williams fails to explain why he did not come forward at or near the time of trial, or under what circumstances he decided to tell someone. His delay and lack of explanation calls into question the accusation's veracity. If raised at the time of trial, the claim could have been immediately investigated.

(503) Even assuming Jim Williams overheard jurors talking while sequestered, a high probability exists that he misunderstood what was said.

(504) At the writ hearing, lead defense counsel Matthew Seymour told the court Applicant's father is hard of hearing. (7 WRR 57). A memorandum written by mitigation

specialist Stephanie Bell provided: "Jim Williams has trouble hearing out of his right ear." (SWX 7 at 141 - 8/13/14 memo p. 3 & Bates Stamp 081679).

(505) At the time of trial, Jim was at least 85 years old and taking tranquilizers to reduce the tremors in his hands. (SWX 6 at 13 - 4/24/13 memo p. 2 & Bates stamp 097378; SWX 6 at 55 - 7/11/13 memo p. 3 & Bates Stamp 082028; SWX 6 at 58 - 7/11/2013 memo p. 6 & Bates stamp 082031).

(506) Jim Williams's written statement he heard jurors say they were meeting with the prosecutors does not establish that actually occurred.

(507) While Applicant specifically requested a hearing in his writ application in order to "prove the merits of his claim," he offered no additional evidence at the hearing on this issue. (App. at 72-73).

(508) Applicant has not provided corroborating evidence.

(509) Applicant fails to tender statements or testimony from any jurors. *See* Tex. R. Evid. 606(b) (allowing a juror to testify on whether "any outside influence was improperly brought to bear on any juror"); *McQuarrie v. State*, 380 S.W.3d 145, 154 (Tex. Crim. App. 2012).

(510) On direct examination at the writ hearing, lead prosecutor Bill Wirskye denied he had any ex parte contact with jurors. (8 WRR 97). Applicant's counsel did not question Wirskye about this issue.

(511) The trial court's verbal and written admonitions and instructions to the jurors add credence to Wirskye's denial and call into question Jim Williams's allegations.

(512) The court verbally instructed the jurors on the first day of trial:

> No one may discuss this case with you during your service as jurors. . . . To maintain the integrity of the jury system, the law prohibits [the lawyers] from speaking with you until you are released from duty on this case. *If someone does contact you or tries to contact you, report that fact to the bailiff at once.* . . . **The lawyers in this case are outstanding lawyers and totally and completely ethical. There won't be any situation with**

them. But there may be other people that try to contact you. *Make sure that you let me know or the bailiffs know if that occurs*[.]

44 RR 16 (emphasis added).

(513) The court's statement highlights both the extreme unlikelihood one of the prosecutors in this case would engage in ex parte communication with sequestered jurors and the jurors' knowledge that any such conduct would be wrong and should be reported.

(514) The trial court's charge to the jury in the punishment phases instructed the jurors not to "talk about this case to anyone not of your jury," that "no one has the authority to communicate with you except the officer who has you in charge, and finally: "Do not attempt to talk with the officer, the attorneys, or the Court concerning any questions you may have." (11 CR 4292, 4296).

(515) A reviewing court presumes the jury followed the trial court's instructions, unless there is evidence to the contrary. *See Jenkins v. State*, 493 S.W.3d 583, 616 (Tex. Crim. App. 2016).

(516) Applicant fails to proffer any credible evidence that jurors talked about meeting with the prosecutors or met with the State while they were sequestered.

(517) Applicant fails to prove, by a preponderance of the evidence, the facts that would entitle him to relief. *See Ex parte Lalonde*, 570 S.W.3d at 725.

(518) Applicant's claim the State engaged in prosecutorial misconduct by communicating with the sequestered jurors should be denied.

Claim 2: Ineffective Assistance of Trial Counsel

(519) In Claim 2, Applicant contends trial counsel rendered ineffective assistance in both the guilt and punishment phases of his trial. (App. at 74-76).

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

a preponderance of the evidence that: (1) counsel's representation fell below an objective standard of reasonableness, and (2) there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) (explaining the standard under *Strickland*). A reasonable probability is simply "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694. That requires a "substantial," not just "conceivable," likelihood of a different result. *Cullen v. Pinholster*, 563 U.S. 170, 189 (2011) (citing *Harrington v. Richter*, 562 U.S. 86 (2011)).

(521) Isolated errors or omissions of counsel do not amount to deficient performance. *Ex parte Bowman*, 533 S.W.3d 337, 350 (Tex. Crim. App. 2017). Counsel's performance is judged by the totality of his representation. *Id.* Constitutionally competent legal representation is not a static thing: "there are countless ways to provide effective assistance in any given case." *Id.* (quoting *Strickland*). "[C]ounsel's function, as elaborated in prevailing professional norms, is to make the adversarial testing process work in the particular case." *Id.* The presumption is that counsel "rendered adequate assistance and made all significant decisions in the exercise of reasonable professional judgment." *Id.* An applicant who cannot overcome this presumption by a preponderance of the evidence will not succeed in his Sixth Amendment claim. *Id.* The applicant must identify with particularity "the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment." *Id.*

(522) Applicant fails to demonstrate by a preponderance of the evidence any deficiency in trial counsel's representation of him in the guilt or punishment phases of his trial.

(523) Even assuming counsel's representation at trial was deficient, Applicant fails to demonstrate by a preponderance of the evidence any resulting prejudice.

(524) Further, the record shows Applicant's suffered no violation of his Sixth Amendment right to effective assistance of counsel.

(525) Applicant received effective assistance of counsel in both phases of his trial, and Claim 2 should be denied.

Punishment Phase Representation

Mitigation Investigation

(526) Applicant contends his trial counsel rendered ineffective assistance by failing to conduct an adequate mitigation investigation. In particular, he claims counsel should have further investigated and presented evidence of (1) brain damage and (2) a history of family trauma, dysfunction, addiction, poverty, and mental illness. (App. at 74-75).

(527) "Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary." *Strickland*, 466 U.S. at 691. "[A] particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments." *Wiggins* v. *Smith*, 539 U.S. 510, 524 (2003). "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable[.]" *Strickland*, 466 U.S. at 690. Counsel is not required "to investigate every conceivable line of mitigating evidence no matter how unlikely the effort would be to assist the defendant at sentencing." *Wiggins*, 539 U.S. at 533. "In assessing the reasonableness of an attorney's investigation, . . . a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further." *Id.* at 527.

(528) When assessing prejudice from an inadequate mitigation investigation, the applicant must demonstrate a reasonable probability that the jury would not have sentenced him to death if the post-conviction mitigation evidence had been presented at trial. *Strickland*, 466 U.S. at 694-95. This means the applicant must show a reasonable probability that at least one juror would have answered the mitigation issue in his favor. *Wiggins*, 539 U.S. at 537. To determine whether the applicant has met this burden, the aggravating evidence is weighed against the totality of the available mitigating evidence, including both the trial and habeas evidence. *Id.* at 534. When counsel has presented some mitigating evidence, the failure to conduct an adequate mitigation investigation will not prejudice the defense if the new mitigating evidence "would barely have altered the sentencing profile presented" to the decision-maker. *Sears* v. *Upton*, 561 U.S. 945, 955 (2010) (quoting *Strickland*).

(529) Applicant fails to show a deficiency in counsel's mitigation investigation.

(530) Applicant also fails to demonstrate a reasonable probability that but for counsel's allegedly deficient investigation the jury would not have sentenced him to death.

Brain Damage Investigation Not Deficient

(531) Applicant claims counsel was deficient for not timely requesting funding for brain imaging and the expert assistance of a neuroradiologist. He also claims counsel was deficient for not employing an expert to conduct a thorough psychological evaluation and an expert who could educate the jury about the impact of diabetes on his functioning. (App. at 81-86, 91-95). Applicant theorizes that the murders were precipitated by a significant brain injury, likely caused by his diabetes, which inhibited his emotional control, his judgment, his memory, and decision-making. (App. 74-75, 99). He claims "highly mitigating" evidence of this could have been presented at trial but for counsel's delay in conducting the necessary investigation. (App. at 81-82).

(532) Applicant fails to show by a preponderance of the evidence that counsel was deficient for delaying the request for brain imaging and a neuroradiologist's assistance.

(533) Applicant fails to show by a preponderance of the evidence that counsel was deficient for not having an expert conduct a psychological evaluation of applicant.

(534) Applicant fails to show by a preponderance of the evidence that counsel was deficient for not presenting an expert at trial to attest to the impact of diabetes on Applicant's functioning.

(535) Applicant fails to rebut the presumption that counsel made sound strategic decisions with respect to the brain damage investigation.

(536) At trial, counsel presented no evidence Applicant suffered from brain damage. But contrary to Applicant's contention, counsel conducted a timely and thorough investigation into his physical and mental health. Counsel also requested ample expert assistance in developing evidence to support a neuropsychological mitigation defense at punishment. Ultimately, counsel made a strategic choice to shift their focus to other, more viable mitigation theories.

The Investigation

(537) The investigation began during counsel's first meeting with Applicant on April 22, 2013, immediately after his arrest and two months before his July 27 indictment. During the meeting, counsel collected a client history including Applicant's current health concerns and medications, hospitalizations and emergency room visits, drug and alcohol usage, and mental health history. Applicant was a Type I diabetic who took insulin daily, he used a sleep apnea device nightly, he had passed out from low blood sugar in 2011 and driven himself to the hospital for stitches to his nose, he had been hospitalized in September 2010 for acute pancreatitis and acute renal failure, he had gall bladder surgery in 2005, and he had gone to the emergency room in 2002 and 2003 for low blood sugar. Counsel also learned Applicant had suffered from anxiety and insomnia or a sleep disorder. Counsel also obtained the name and contact information for Applicant's primary physician, Dr. Mark Sij. After collecting this information, counsel discussed Applicant's medical issues with him. (SWX 6 – memo dated 4/24/13; Initial Client Information Worksheet dated 4/24/13).

(538) On February 14, 2014, counsel requested funding for Dr. Steven Yount, an osteopath. Dr. Yount was hired to evaluate Applicant's health. (Unsealed CR 88-92; 3rd Supp. CR 27-31) (Ex parte Motion F). The court granted the motion on March 17, 2014. (Unsealed CR 110).

(539) On April 14, 2014, counsel sought input from Richard Burr, a criminal defense attorney with significant experience in death penalty litigation who regularly consults with other attorneys in capital defense matters. (5 WRR 48-50; 7 WRR 130-31; AX 59). Counsel met Burr and his wife, Mandy Welch, in person to discuss mitigation themes and investigation. (SWX 6 – memo dated 4/21/14, Bates Stamp 28362-28363). They discussed the possibility Applicant suffered from psychological issues or disorders. *Id.* Counsel was already considering this possibility and planned to conduct a battery of medical testing and brain scans or imaging. *Id.* Burr recommended, however, that counsel consult a neuropsychologist before conducting any tests. *Id.* At Burr's urging, the defense subsequently obtained funding for expert assistance from Dr. James Merikangas, a psychiatrist and neuropsychologist. *Id.*; (3rd Supp. CR 95-99; 5 WRR 50-51; 7 WRR 132). Dr. Merikangas's role was to provide an armchair assessment of potential psychological issues and help counsel locate additional assistance in developing evidence of those issues. *Id.* Dr. Merikangas did not perform a psychiatric evaluation of Applicant. (7 WRR 133).

(540) On May 20-21, 2014, counsel provided Dr. Yount with access to a variety of Applicant's medical records, including Dr. Sij's records. (Unsealed CR 354-55; AX 62).

(541) In May 2014, counsel had a conference call with Dr. Merikangas, Dr. Yount, and Burr. (5 WRR 50; 7 WRR 130-31; AX 95, 96). During this conference, counsel theorized "something was wrong with [Applicant's] thinking and that his medical issues might have resulted in mental issues." (7 WRR 132). Dr. Yount remarked there was a high rate of bipolar people with diabetes. (7 WRR 133). Dr. Merikangas recommended an MRI. (7 WRR 133-34).

(542) In June 2014, Dr. Yount examined Applicant and ordered laboratory tests. He found Applicant's blood sugar to be dangerously low and ended the exam early. Dr. Yount opined Applicant's diabetes was poorly controlled. He recommended an MRI. (58 RR 9-10, 14-15; 7 WRR 134; AX 62).

(543) On July 30, 2014, the court authorized funding for Dr. Joan Mayfield, a neuropsychologist, to conduct neuropsychological testing. (3rd Supp. CR 48 – Order on Ex parte Motion M). The court also authorized funding for medical laboratory testing. (Unsealed CR 363-65).

(544) On August 1-2, 2014, Dr. Mayfield administered a battery of neuropsychological tests to Applicant in the Rockwall County jail. These tests measured Applicant's cognitive strengths and weaknesses. (58 RR 62-63).

(545) On August 18, 2014, Dr. Mayfield reviewed the test results with counsel in a phone conference. (5 WRR 62-63; 7 WRR 137-38; AX 109). Overall, Applicant's scores were within the normal or average range. Some were above average and a few were low average. None showed significant deficits. Applicant had some weakness in his language scores, but it was still within functional ability. (58 RR 63-69). The absence of any deficits meant any anomalies in Applicant's brain structure were not affecting his cognitive functioning. (58 RR 69). Mayfield did not do emotional testing, such as the MMPI or the PAI and she normally isn't asked to do such testing. (58 RR 70-71). Mayfield recommended an MRI. (7 WRR 139).

(546) In September 2014, Dr. Yount arranged for additional laboratory testing on Applicant. The lab work included Applicant's glucose level, insulin level, c-peptide levels, liver enzymes, lipids, and thyroid hormones. Dr. Yount reported the results of

this testing to counsel on September 25, 2014 and inquired about conducting brain scans. (AX 62; AX 106).

(547) On September 23, 2014, counsel notified the State of its designated expert witnesses. The list included Drs. Mayfield, Merikangas, and Yount. (10 CR 4009-10).

(548) On October 31, 2014, counsel requested funding for assistance from Dr. John Fabian, a neuropsychologist. The request was premised on the need for expert assistance in determining the types of brain imaging to be performed and whether Applicant suffered from a mental illness. (3rd Supp. CR 51-53 – Ex parte Motion R).

(549) According to Dr. Fabian, the defense team asked him to "evaluate whether [Applicant's] history of having hyperglycemic blackouts as a result of his poorly treated diabetes could explain aspects of the capital murder allegations." Fabian interviewed Applicant and reviewed Dr. Mayfield's test results. He did not review any other records, and the defense team instructed him not to conduct any psychological testing. Based on the neuropsychological test battery results, news media articles, and his interview with Applicant, Fabian believed Applicant was exhibiting symptoms of a serious mental illness, paranoia, but he could not confirm this without psychological testing. (AX 25).

(550) On November 9, 2014, counsel requested funding for brain scans or brain imaging, including but not limited to an fMRI and PETSCAN. Counsel wished to hire Dr. William Orrison, a neuroradiologist, to interpret scans and determine whether Applicant suffered from a brain tumor or other abnormality that may or may not be associated with his diabetes. (60I RR Court's Exhibit 1 – Ex parte Motion T).

(551) On November 11, 2014, the court asked counsel to provide additional support for the request. Lead counsel, Matthew Seymour, forwarded this request to the rest of the defense team. Two days later, the court followed up with another email to counsel, asking if he planned to provide additional support for the request. Counsel immediately responded he would provide the support after the Daubert hearing scheduled the next day, but he did not forward the additional support to the court until November 27, 2014. (60I RR Court's Exhibit 1; 7 WRR 136-37).

(552) On December 1, 2014, the first day of trial, counsel filed a supplement to their second motion for continuance urging, for the first time, the need to conduct medical testing to determine if as a result of his diabetes, Applicant was suffering from brain damage. (10 CR 4255). The court denied this supplemental motion. (44 RR 10).

(553) On December 3, 2014, the court granted the motion for funding to cover the expense of Dr. Orrison's assistance and brain imaging. (3rd Supp. CR 79).

(554) Although trial had started, counsel contacted Dr. Yount and asked him to search for a facility where diffuse tensor imaging (DTI), a particular type of MRI, could be conducted. Yount had difficulty finding a facility in the Dallas/Fort Worth area that could perform an MRI with DTI. (53 RR 8; 58 RR 15-16; AX 62).

(555) On December 8, 2014, counsel filed another supplement to their second motion for continuance claiming additional time was needed to arrange for the brain scans that the court had now agreed to fund. (10 CR 4286). The court denied this supplemental motion. (48 RR 7).

(556) And on December 15, 2014, the day before trial ended, counsel filed yet another supplement to their second motion for continuance; in this pleading, counsel asserted that Dr. Orrison would testify to the presence of any brain abnormalities shown by the imaging and that Dr. Fabian would testify "regarding the effects on behavior of brain abnormalities detected by the brains scans done at the direction of Dr. Orrison." (10 CR 4305-06). The court denied this supplemental motion. (53 RR 7-9).

(557) Counsel imaged Applicant's brain on January 9, 2015, about three weeks after trial. The results were reviewed by two neuroradiologists – Dr. Williams Orrison and Dr. Tomas Uribe Acosta. Counsel presented the opinions of both doctors in the hearing on Applicant's Motion for New Trial. Counsel also offered the testimony of Drs. Yount and Mayfield. Counsel argued they had discovered new evidence of brain damage and that the court had prevented them from presenting it at trial by not providing them the time and resources to develop it sooner. (11 CR 4367-4374).

(558) But in the hearing on the motion, Dr. Yount testified counsel made the decision not to bring up the brain damage issue at trial because of Dr. Mayfield's test results. His testimony was corroborated by a note he made in his file: "Decision made not to attempt defense on basis of neuropsych, little found by Dr. Mayfield." (58 RR 47-48). In addition, Mayfield confirmed the results of her neuropsychological testing evinced no functional deficits and were inconsistent with a moderate to severe brain injury. (58 RR 62-70). Moreover, Dr. Uribe Acosta testified Applicant's brain imaging was normal and did not show a moderate to severe brain injury. (58 RR 76-87; SX MNT 1).

(559) The court denied Applicant's motion for new trial, finding: (1) the court did not prevent Applicant from developing and presenting evidence of a brain injury; (2) the defense team "investigated such a defense months before trial and, based on the results of that investigation and the results of subsequent testing, made a sound strategic decision not to pursue it at trial"; and (3) the court timely responded to and ultimately granted an "eve of trial" request for funding for brain imaging. (Supp. 1 CR 22-23).

Sound Strategic Choice

(560) The preceding facts show counsel did not fail to pursue brain imaging and corresponding expert assistance in a timely manner. Rather, counsel made a strategic decision before trial to focus their time and efforts on developing other, more viable mitigating evidence.

(561) Applicant fails to rebut the presumption this strategic decision was a reasonable one. Moreover, the record affirmatively supports its reasonableness.

(562) The results of Dr. Mayfield's neuropsychological test battery were inconsistent with moderate to severe brain damage. The results showed no cognitive deficits and a normal brain.

(563) Also, evidence Applicant suffered from brain damage which made him irrational and prone to outbursts would have been inconsistent with the defense's argument that applicant did not pose a future danger.

(564) And evidence Applicant had a poorly functioning emotional processing system would have been inconsistent with the fact that he had a highly successful legal career, making the brain damage claim less persuasive or credible.

(565) Furthermore, the brain damage evidence Applicant claims counsel should have developed would have required a psychological evaluation. This would have necessitated emotional testing, such as the MMPI and the PAI. The results of this testing would likely have yielded evidence of anti-social personality disorder or psychopathic characteristics, which would have been highly aggravating facts. Moreover, as the State had filed a *Lagrone* motion, counsel could not have utilized the results of a psychological evaluation to support a brain damage claim without disclosing any aggravating results to the State and its own psychological expert. Even if the defense did not administer the MMPI, the State's expert would have been permitted to examine and test Applicant and he would

have administered the MMPI as well as the PCL-R (Hare Psychopathy Checklist). Whether obtained through defense or state testing, the State would certainly have presented any aggravating data to the jury. Thus, by not pursing the brain damage theory any further, counsel avoided generating and revealing aggravating evidence for the State's use at punishment.

(566) Lastly, by continuing to seek funding for imaging on the eve of and during trial, counsel increased their chances of getting a continuance and buttressed a post-conviction claim attacking the denial of one. If given more time to develop it, counsel may well have presented their evidence of brain damage. But absent more time, counsel's decision to focus on other, readily available mitigation evidence that was consistent with their future dangerousness theory was sound.

Brain Damage Evidence Not Credible or Persuasive

(567) Even assuming counsel should have finished their brain damage investigation before trial, Applicant fails to demonstrate his defense was prejudiced by it.

(568) Applicant argues as a result of counsel's deficient investigation, "highly mitigating evidence of [his] brain abnormality was not discovered until weeks after trial." Applicant claims he suffers from a severe brain impairment, particularly in his limbic system and frontal lobe, and "decades of uncontrolled diabetes caused pathological changes to his brain which, in turn, impacted his behavior." (App. at 98, 105).

(569) Applicant fails to prove he suffers from brain damage. Moreover, the reliable, evidence shows he does not.

(570) In support of this claim, Applicant relies primarily on Dr. Orrison's opinion that Applicant's brain imaging shows moderate to severe brain injuries. Orrison offered his expert opinion as a neuroradiologist.[26] Specifically, he opined Applicant suffered from progressive moderate to severe bilateral hippocampal atrophy, changes of left frontal

[26] Although also a neurologist, Dr. Orrison had not practiced neurology in quite a long time and was acting only as a neuroradiologist in Applicant's case. (57 RR 70).

sheering (diffuse axonal) injury, and a corresponding decrease in corpus callosum fiber tracts anteriorly. (11 CR 4375-83; 57 RR 10).[27]

(571) Dr. Orrison's opinion is not reliable evidence of moderate to severe brain injury.

(572) Dr. Orrison based his opinion on review of Applicant's brain imaging and two independent quantitative computer analyses of Applicant's brain. The imaging included CT scans dated June 17, 2011 and December 1, 2013, and an MRI with diffuse tensor imaging (DTI) dated January 9, 2015. (57 RR 12). The quantitative computer analyses of Applicant's brain were performed by MINDSET and NeuroQuant. (57 RR 14).

(573) To the extent Dr. Orrison opined the MRI showed an injury, he is contradicted by Dr. Uribe Acosta, the neuroradiologist who conducted the initial review of Applicant's January 2015 MRI. Dr. Acosta disagreed with Dr. Orrison's conclusion Applicant suffered from moderate to severe brain injury. (58 RR 79, 85). He determined the January 2015 MRI was a "normal brain MRI." He testified Applicant "does not have any significant disruption of the major tracts." He saw no trace of any blood products in his brain parenchyma. He saw only mild volume loss in the right hippocampus. (58 RR 76-77, 85-87; SX-MNT 1).

(574) While Dr. Uribe Acosta viewed the DTI images visualizing the tract of the brain, he did not review the quantitative analyses by MINDSET and NeuroQuant. (58 RR 76, 79-80). However, Dr. Orrison's reliance on the quantitative analyses is suspect.

(575) Quantitative analyses are not relied on for diagnosis in a clinical setting. The NeuroQuant report expressly acknowledges this fact. The report – as set out on slide 5 of Dr. Orrison's PowerPoint presentation – states, "Charts and normative values are provided for reference purposes only. Their use for diagnostic purposes has not be approved by any regulatory agency." (11 CR 4390). As Dr. Acosta explained, when it comes to diagnosis, "abnormal intensity MRI in the hippocampus or if you have indirect signs of loss of volume . . . [are] more valuable than the actual [quantitative] measurements." (58 RR 80-81).

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[27] Dr. Orrison prepared two reports – one dated January 15, 2015 and a supplemental report dated February 20, 2015. The record only contains a copy of his January report. (11 CR 4375-87).

(576) DTI is not regularly used in a clinical setting either. One of the articles Dr. Orrison cited in his PowerPoint presentation (slide 18) points out the concerns with using DTI in a clinical setting. (SX-MNT 3 - "A Decade of DTI in Traumatic Brain Injury: 10 Years and 100 Article Later"). Moreover, other experts have advised and cautioned against its use for diagnostic purposes. (SX-MNT 5 - "Diffusion Tensor Imaging in Mild Traumatic Brain Injury Litigation" and "Diffusion Tensor Imaging of Mild Traumatic Brain Injury").

(577) Some have even opined that expert testimony based on DTI is inappropriate in legal proceedings focused on traumatic brain injuries. (SX-MNT 4 - "Based on this review, we suggest that expert testimony regarding DTI findings will seldom be appropriate in legal proceedings focused on mTBI."); *see also* Andrew M. Lehmkuhl II, *Diffusion Tensor Imaging: Failing Daubert and Fed. R. Evid. 702 in Traumatic Brain Injury Litigation*, 87 U. Cin. L. Rev. 279 (2018).

(578) In addition to Dr. Orrison, Applicant presents the opinions of three other experts in these writ proceedings - Dr. George Woods, M.D., Dr. Pamela Blake, M.D., and Dr. Alan Jacobs, M.D. All three experts opine that Applicant suffers from a brain injury. (AX 1-3, 57).

(579) Dr. Blake, a neurologist, independently reviewed Applicant's brain imaging. She agreed with Dr. Orrison's findings that Applicant suffers from a serious brain abnormality and areas of his brain are significantly atrophied. (AX 3).

(580) Dr. Woods, a neuropsychiatrist, conducted a neuropsychiatric evaluation of Applicant in 2017. He said Applicant has brain atrophy and suffers from a Major Neurocognitive Disorder and a Mood Disorder - both of which are secondary to his diabetes. (AX 1).

(581) Dr. Jacobs, a neurologist and neuroendocrinologist, said Applicant's uncontrolled diabetes has damaged his brain and impacted his behavior significantly. (AX 2, 57).[28]

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[28] In his January 7, 2017 declaration, Dr. Jacobs characterized his opinion as "a hypothesis." (AX 2). In his more recent declaration, however, he offered "his medical and professional opinion, which he held to a reasonable degree of neuroendocrinological certainty." (AX 57).

(582) Each of these experts base their opinion on Dr. Orrison's interpretation of the MRI with DTI and the MINDSET and NeuroQuant analyses. (AX 1-3). And Dr. Blake reviewed the same imaging and analyses herself. (AX 3). Thus, their opinions Applicant's brain is damaged suffer from the same reliability issues as Dr. Orrison's.

(583) More importantly, their opinions ignore the limited significance of brain imaging.

(584) Brain scans can show activity in the brain, but cannot show thoughts, feelings, or behaviors. A person's behavior is a richer source of relevant evidence about their criminal conduct than a scan of their brain. (7 WRR 155, 157).

(585) Also, the existence of a structural abnormality in Applicant's brain does not mean he suffered an impairment. Octavio S. Choi, MD, PhD, *What Neuroscience Can and Cannot Answer*, J. Am. Acad. Psychiatry Law 45:278-85 (2017) ("[B]ecause many brain defects do not result in impairment, neuroimaging alone cannot establish, except in rare cases, whether an individual is impaired, or, if impaired, whether the defect is the cause.").

(586) An individual can have a structural abnormality without a functional deficit. They can also have a functional deficit without a structural abnormality. (58 RR 69-70; 7 WRR 155, 162-63).

(587) Even if Applicant had a structural abnormality in his brain, he suffered no functional deficits.

(588) As previously noted, Dr. Mayfield, the neuropsychologist who administered the neuropsychological battery of tests to Applicant right before trial, found no significant cognitive deficits. She found most of Applicant's test scores within the normal or average range. In fact, the scores showed Applicant was of high average intelligence. Applicant had some weakness in his language scores, but those scores were still within functional ability. Dr. Mayfield was surprised at Dr. Orrison's opinion that Applicant suffered from a moderate to severe brain injury because Applicant's test data did not show significant deficits. If Applicant did have such an injury, she would have expected his test scores to be lower. In her opinion, any anomalies in Applicant's brain structure were not affecting his "day-to-day" cognitive functioning. (58 RR 66-70).

(589) The State's expert, Dr. J. Randall Price, also a neuropsychologist, reviewed Dr. Mayfield's neuropsychological test results and agreed with her interpretation of them. (7 WRR 153-56).

(590) Dr. Mayfield and Dr. Price are qualified, experienced neuropsychologists, and their interpretation of Applicant's neuropsychological test data is reliable and credible.

(591) Even Dr. Blake agreed Applicant's cognitive functioning was normal. (7 WRR 163-64; AX 3).

(592) Applicant's scores on the neuropsychological testing fell in the below average range on 4% of the measures, but this is normal and does not evince a deficit. Studies show that healthy adults given the same tests score below average between 10 and 15% of a large number of tests. (7 WRR 153; SX-MNT 2 – "To Err is Human: 'Abnormal' Neuropsychological Scores and Variability are Common in Healthy Adults").

(593) According to Dr. Jacobs, average scores are abnormal for Applicant. They represent a decline in Applicant's "premorbid state" as witnesses have described Applicant as intelligent, an excellent lawyer, and a good student. (AX 57 at 5).

(594) Dr. Jacobs's opinion is premised entirely on lay opinions about Applicant's intellect, and he fails to account for the possibility the "witnesses" may have exaggerated or misapprehended Applicant's cognitive abilities. Furthermore, Applicant presents no prior test data against which to compare Dr. Mayfield's test results. Thus, Dr. Jacobs's opinion Applicant's cognitive functioning has declined is questionable.

(595) One of Applicant's experts, Dr. Woods, states Applicant suffers from a functional deficit, namely, major neurocognitive disorder. (AX 1).

(596) Major neurocognitive disorder has two criteria: (1) evidence of cognitive decline documented by standardized neuropsychological testing and (2) cognitive deficits that interfere with independence in everyday activities. DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, at 602 (5th Ed. 2013); (7 WRR 166).

(597) Dr. Woods premises his diagnosis on his own interpretation of Dr. Mayfield's neuropsychological test data. His interpretation is unreliable. (AX 1). The interpretation of such test data is a neuropsychologist's, not a neuropsychiatrist's, area of expertise.

Also, as Dr. Price's testimony shows, Dr. Woods misinterpreted the test data. (7 WRR 166-67, 174; AX 1).

(598) No evidence shows Applicant is unable to function independently in everyday activities and in fact, the evidence shows quite the opposite. Applicant's crime was sophisticated and involved complex planning. (7 WRR 170). But the murders aside, Applicant was an attorney who ran for and won public office and took care of his ill wife and in-laws. He required assistance from no one in his daily living.

(599) Dr. Price disagrees with Dr. Woods's diagnosis. Based on Dr. Mayfield's test results, he says Applicant does not even meet the criteria for mild neurocognitive disorder. The record evidence supports his opinion. (7 WRR 166-67).

(600) Applicant's experts maintain he suffers from some emotional, rather than functional, impairment, which Dr. Mayfield's testing was not designed to detect. Dr. Woods opines Applicant suffers from a mood disorder. Dr. Fabian says he may suffer from delusional paranoia. (AX 1, 25). And Dr. Jacobs reports the longer Applicant's diabetes remained uncontrolled the more aberrantly he behaved. (AX 2, 57).

(601) Dr. Jacobs's correlation between Applicant's diabetes and "aberrant behavior" is weak. He provided no criteria defining aberrant behavior, he did not quantify aberrant behavior, and he did not calculate a correlation coefficient. His analysis is so simplistic and inconsistent that it is questionable whether it evinces any correlation between Applicant's behavior and his diabetes. It certainly does not demonstrate Applicant's diabetes caused his behavior. (7 WRR 160-61; AX 2, 57).

(602) Even assuming Applicant suffers from an emotional impairment, the evidence does not show it was caused by a structural abnormality. Structure does not equal function. The brain operates on systems of connectivity. Particular mental activities cannot be limited to certain parts of the brain. One part of the brain can be involved in multiple functions. Thus, one part of the brain could be involved in the regulation of emotion as well as cognitive activities like attention, memory, and executive functioning. At most, the science allows for a correlation between the impairment and the abnormality. At present, no expert can validly conclude a structural abnormality in the brain caused an impairment. This is a reverse inference error. (7 WRR 156-58).

(603) Consequently, the brain damage evidence Applicant presents does not show he committed the murders because of an impairment caused by a structural brain abnormality.

(604) Further, brain damage evidence was a double-edged sword. As Seymour testified, evidence Applicant suffered from a permanent brain injury would have undercut the defense's argument that Applicant would not pose a future danger to anyone in prison. (7 WRR 47-48); *see Shore v. Stephens*, No. H-13-1898, 2016 WL 687563, at 17 (S.D. Tex. Feb. 19, 2016) (not designated for publication) (rejecting ineffective assistance claim based on counsel's failure to present evidence defendant suffered from a brain injury because evidence was a "two-edged sword" that increased the likelihood the jury would find the defendant posed a future danger).

(605) Also, Applicant's brain damage evidence is inconsistent with his achievements. As Seymour testified:

> [I]t was atypical in . . . that [Applicant] was a very successful man. He was most formerly a judge. I mean he had achieved so much in his personal life out of hard work, good will, luck, and everything else. I don't know. I mean he was just, he had it . . . [S]o I think that kind of cut crossways with me that I was like I don't know if the jury is going to buy that his emotional processing system doesn't work well when he's achieved so much because I don't think that they can reconcile those two things . . .

(7 WRR 47).

(606) The record supports Seymour's opinion. The evidence shows even with brain abnormality or impairment, Applicant was an intelligent, highly functioning adult and had been for decades.

(607) Based on the foregoing, there is no reasonable probability that presenting the brain damage evidence would have altered the outcome of Applicant's trial.

Investigation into Applicant's Background, Family History, & Health

(608) Applicant claims counsel's investigation into his background, family history, and health did not start expeditiously and was never completed. (App. at 87). According to Applicant, some mitigation witnesses were never interviewed, and some of the interviews

were not timely or thorough. (App. at 89-90). He claims counsel's "tardy and surface-level investigation led to an ad hoc mitigation presentation without a cohesive and compelling narrative of the story of [his] life." (App. at 90).

(609) Applicant fails to prove by a preponderance of the evidence any deficiency in counsel's investigation into his background, family history, and health. He also fails to prove any resulting prejudice to his defense.

(610) In actuality, the defense team began their mitigation investigation very early on in their representation of Applicant and made significant efforts to develop mitigation evidence. Their efforts yielded an inordinate amount of mitigation evidence which fostered the development of a sound mitigation theory.

(611) Moreover, counsel presented a substantial amount of relevant evidence advancing that mitigation theory at trial. And the jury was not deprived of any compelling, relevant mitigation evidence.

Investigation Not Deficient

(612) In support of his attack on counsel's mitigation investigation, Applicant presents declarations or testimony from John Wright (second-chair counsel), Maxwell Peck (third-chair counsel), Jill Patterson (a creative writing professor), and Richard Burr (a criminal defense attorney and consultant). Altogether, these witnesses describe the investigation as belated, disorganized, and poorly documented. They characterize the lead mitigation specialist, Stephanie Bell (now Walker), as young, distracted, ill-equipped, and inexperienced. They depict lead counsel, Matthew Seymour, as a disinterested, ill-informed supervisor who did not properly support and direct the mitigation investigation. (AX 26, 53, 59, 61; 5 WRR 29).

(613) These witnesses inaccurately portray the mitigation investigation and the skill and performance of Bell and Seymour.

(614) Bell was assisted in the mitigation investigation by Rodnic Ward, the team's fact investigator, and Patricia Rist, the other mitigation specialist assigned to the RPDO Terrell Office. Bell also consulted other mitigation specialists working for RPDO, but found their suggestions unhelpful. (5 WRR 81; 6 WRR 11; 7 WRR 20-21; SWX 18).

(615) Applicant's case was Bell's first as a mitigation specialist. But Bell worked hard, took direction well, and had an education and work experience that equipped her for the job. Before coming to work at RPDO, Bell earned a Bachelor of Science in Psychology and a Master of Arts in Forensic Psychology. From August 2012 to April 2013, she was employed as an intern investigator in the Public Defender's Office in Washington, D.C. Her duties included interviewing potential witnesses and gathering evidence in rape and murder cases. She attended training at the Airlie Capital Punishment Conference in 2013, which provided useful information about mitigation investigation and put her in contact with other defense attorneys. Notably, Bell has since gone to law school and is now a licensed Texas attorney. (6 WRR 11, 23-24; 8 WRR 34, 88; SWX 18).

(616) Bell was assigned to other cases as well, but they were in different stages of the process and she was not working on all of them while Applicant's case was pending. She spent a great deal of time, effort, and energy conducting the mitigation investigation. (7 WRR 23-24, 109; AX 58; SWX 18).

(617) Numerous memos prepared by Bell, Ward, and Rist show they were capable interviewers who made repeated and concerted efforts to locate and acquire information from individuals and establish relationships with potential witnesses and cultivate them to testify at trial. Many of the mitigation witnesses who testified at trial were discovered, interviewed, and developed as witnesses by Bell, Ward, and Rist. (7 WRR 109-10; SWX 6-7).

(618) To facilitate the investigation, Bell created a timeline system. Despite stringent limitations on funding for travel, Bell, Ward, and Rist effectively conducted the investigation. (7 WRR 24, 34).

(619) Seymour directly supervised and closely monitored the work of Bell and those who assisted her. Seymour was the only attorney working on Applicant's case for several months, and during that time, he oversaw all aspects of it. He created a OneNote file for the mitigation investigation into which memos and other information about witnesses could be digitally stored. The team took notes during interviews and they prepared memos from those notes that were shared with Seymour and the other team members. Seymour scheduled regular team meetings where members discussed tasks, vetted issues, gave updates, and made future plans. Seymour, Bell, and Rist drove to work together and discussed the investigation as they drove. Also, they all worked in close

proximity to each other and talked about the investigation during office hours. Bell would seek guidance from Seymour, and he was accessible to her and other team members. He would share insights and offer suggestions. Moreover, he was knowledgeable about the mitigation evidence discovered in the course of the investigation. (7 WRR 15-17, 21-23, 48-50, 109-130, 141-42; 8 WRR 34, 47-48, 55-56; SWX 2, 18).

(620) The criticisms of Burr, Peck, Patterson, and Wright are premised on inaccurate information and their belated involvement in the case.

(621) Burr was not a member of the team, and his interaction with them did not occur until April 2014, a year after the investigation began. He was consulted and met with the team in person only once for a couple of hours and then corresponded a handful of times by phone and email. After the April 2014 meeting, Burr's attention and assistance were focused on potential neurological and psychiatric issues. He was not present during any other team meetings, and he did not interact with the mitigation specialists or fact investigators after the April 2014 meeting. Nor did Burr continue to advise Seymour, Wright, or Peck with respect to the rest of the mitigation investigation. (7 WRR 130-32; AX 59; SWX 7 - Seymour memo dated 4/22/14)

(622) Burr's recollection of the April 2014 meeting is inconsistent with Seymour's documented account. While Burr now says, "[T]he team could not figure out how to get to square one," Seymour wrote just days afterward that the team had already considered "the same avenues of information" Burr recommended and that what Burr offered them was not "what to do, but another way to do it." (AX 59; SWX 7 - Seymour memo dated 4/21/14).

(623) With respect to Wright, Peck, and Patterson, they did not join the team until later. They lacked first-hand knowledge about how much work the other team members had done before their arrival and what mitigating information it had.

(624) Wright joined the team several months into the investigation, and he was preoccupied with two other death penalty cases. (5 WRR 73-74, 77-78, 85; 7 WRR 14-15, 84-85; 8 WRR 44; AX 58).

(625) Peck joined the team even later, over a year after RPDO took the case and just a few months before trial, and he initially devoted his efforts to jury selection, not mitigation. (5 WRR 32; 7 WRR 11-13; AX 26, 58). Further, once Peck began working

on the mitigation case, he failed to consult Bell, the team's lead mitigation specialist, about the work that she and others had done. (SWX 18).

(626) Patterson came to the team along with Peck shortly before trial. They had previously worked together and were close. Patterson's job was to help develop a narrative at trial, a story to tell the jury. Although she interviewed witnesses in Applicant's case, this was not her area of expertise. She was neither a lawyer nor a trained mitigation specialist. (5 WRR 81-82; 7 WRR 11-12; AX 58, 61).

(627) Given their late arrival, neither Peck nor Patterson were present for the many team meetings conducted by Seymour and attended by Bell, Rist, and Ward during 2013 and 2014. They were not privy to the information discussed.

(628) Although Bell and other team members prepared memos detailing much of the work they did in the mitigation investigation, Patterson and Peck were unaware of them. (AX 26, 61; SWX 6-7). This may have been due, in part, to their mistaken belief, that the memos were being stored in OneNote. (AX 61; 7 WRR 17).

(629) Also, Peck was not reassigned to the mitigation case because it was suffering or underdeveloped. He was reassigned because of his poor performance in jury selection. (7 WRR 17-19; 8 WRR 37).

(630) Lastly, there was dissension on the defense team. The attorneys disagreed and argued about strategic decisions. Also, Peck's behavior affected morale; he did not handle disagreement well, had a temper, and was critical of Bell. The team became divided. (5 WRR 91-93; 7 WRR 11-12, 19, 44-46, 51-54, 59-60, 85-88, 93-95; 8 WRR 34-37, 46-48, 50-53; SWX 2, 18; AX 108, 164, 180, 182, 188). This colored the recollections and perceptions of Peck, Patterson, and Wright.

(631) In actuality, the mitigation investigation began quite early and was thorough.

(632) Seymour, Bell, and Ward began the mitigation investigation in their first meeting with Applicant on April 22, 2013, just days after his arrest and over a month before his capital murder indictment. The team obtained information about Applicant's health history, his physician, his parents and in-laws, his birthplace and childhood home, his education, and his employment history. (SWX 6 - memo and initial client information worksheet dated 4/24/13).

(633) A week later, on May 1, 2013, Bell and Ward met with Applicant again and conducted a lengthy mitigation interview. Bell explained her "role as a mitigation specialist" and that it was "important to begin [her] work now." Bell asked for information about family, friends, and colleagues. The discussion covered Applicant's siblings, much of his work history, his relationship with Kim, and his involvement in ROTC and the Boy Scouts. (SWX 6 – Bell and Ward memos re: 5/1/13 visit).

(634) Later that same month, Ward began interviewing Applicant's neighbors. (SWX 6 – Ward memos re: 5/18/13 interviews).

(635) Two weeks later, Seymour, Bell, and Ward met with Applicant again and obtained information about his tenant, Michelle Stephens, Applicant's and Kim's drinking habits, his parents' drinking habits, his father's Class C assault of his sister Tera, abuse Tera suffered in her first marriage, Applicant's campaign for justice of the peace, and prior conflicts he had with the District Attorney's Office. (SWX 6 memo re: 5/30/13 meeting).

(636) The preceding investigation happened before Applicant was even indicted, and continued for over a year, right up until trial in December 2014. (SWX 6-7).

(637) Moreover, although Bell, Ward, and Rist conducted the investigation in earnest for more than a year, in the end, all of the team members assisted except for Parks. Julie Williams, another RPDO mitigation specialist, and an RPDO fact investigator from the Wichita office assisted right before trial. (5 WRR 30, 81; 7 WRR 13, 50-51, 89-90, 142-43; 8 WRR 34; SWX 7). The investigation had more than sufficient manpower devoted to it.

(638) Applicant's criticisms of the work performed by the team ignore the difficulties posed by forces beyond its control.

(639) Applicant was guarded about his personal life and less helpful in developing mitigating evidence than the team's other clients. Applicant seemed mostly interested in the guilt phase of his trial. During Bell's meetings with him, she felt he was not cooperative or forthcoming with information. This frustrated the mitigation investigation. (7 WRR 27; SWX 18).

(640) In addition, Applicant's closest relatives – his parents, his sister Tera, and Tera's husband Zach – would not show up for meetings with the team or would show up late.

When the family members did meet with the team, they wanted to discuss evidence related to the murders rather than mitigating evidence. The team had to separate Applicant's mother and father in order to get needed information. Applicant's father was hard of hearing, interrupted others, and would "take over the conversation." (7 WRR 55-59; SWX 6 - memos dated 7/2/13, 7/10/13; SWX 7 - memos dated 5/14/14, 5/15/14, 5/27/14, 8/13/14; SWX 18).

(641) Despite these difficulties, Bell, Rist, and Ward repeatedly contacted and interviewed both Applicant and his immediate family. They secured releases so records could be obtained. (SWX 6 - memos dated 4/24/13, 5/1/13, 5/3/13, 5/30/13, 7/2/13, 7/9/13, 7/10/13; SWX 7 - memos dated 2/5/14, 5/15/14, 5/27/14, 7/22/14, 8/18/14, 7/25/14, 11/3/14).

(642) The team also had difficulty obtaining information from people in Kaufman and Azle. Applicant was not of much help in this regard, and Bell had to get creative - using yearbooks, driving through Kaufman, and looking up attorneys online. But many people were uncooperative or did not want to be involved. Some felt they were betraying the victims, whom they knew as well, and others were worried about their own reputations. (50 RR 77-78; AX 58; SWX 7 - memos dated 9/2/14, 11/7/14; SWX 18).

(643) Applicant alleges: "About one-third of the mitigation witnesses were interviewed for the first time while jury selection was ongoing, after Mr. Peck had joined the team, about ten percent were first interviewed during the culpability phase of [Applicant's] trial, about ten percent were interviewed for the first time during the defense's penalty phase presentation, and about one-quarter appear to have never been interviewed at all prior to their testimony." (App. at 90). Applicant does not identify the witnesses he is referring to or explain his math in any greater detail. Also, he cites to no supporting record or extrinsic evidence.

(644) To the extent these allegations are predicated on the assertions of Peck, Wright, Patterson, and Burr, they are not credible. As noted above, the recollection of Peck, Wright, Patterson and Burr are misinformed or biased.

(645) As evidence of what could have been discovered and presented but was not, Applicant presents sworn statements from nineteen individuals: Zachary Bellemare, Duane Farmer, Annie Gary, Tina Hall, Cara Hervey, Kent Hervey, Elisa Lyles, Ian Lyles, Lea Lyles, Helen Murdock, James Murdock, Mark Norwood, Janice Overgaard, Donald Propst, Jennifer Russell, Glenn Tadlock, Jim Williams, Sandra Harward, and

Teresa Craine. (AX 4-21, 23). But only nine of these nineteen individuals assert they were never interviewed by the defense team. (AX 6, 12-16, 19, 21, 23). Six were interviewed. (AX 4-5, 8, 10, 20; SWX 6 - memos dated 7/9/13, 7/10/14; SWX 7 - memos dated 5/15/14, 5/27/14, 7/25/14, 8/1/14, 8/13/14). And of those six, two testified: Ian Lyles and Cara Hervey. (51 RR 182; 53 RR 88-103; AX 8, 11). The remaining four do not state whether they were interviewed and, if so, when. (AX 7, 9, 17-18). Thus, these statements do not substantiate Applicant's mathematical analysis. If anything, when compared to the mitigation evidence discovered and presented at trial, the statements show how little mitigating information was not discovered and presented.

(646) The mitigating evidence contained in the nineteen statements Applicant presents relate to his grandparents' childhoods, marriages, and life traumas, his parents' upbringings, his father's military service and excessive drinking, his sister's emotional instability and substance abuse, his brother's abusive behavior, his wife's preoccupation with appearances and money, diabetes in his mother's family, and alcoholism in his father's family. They also spoke to Applicant's own unusual personality traits, his struggle with diabetes, and how profoundly the burglary prosecution affected him. (AX 4-21, 23).

(647) The record reflects the team discovered most, if not all, of this information and that counsel was well aware of it. (7 WRR 109-130; SWX 6-7).

(648) Also, much of it was presented at trial.

(649) Counsel decided on an "arc of man" or "arc of life" mitigation theory. This meant presenting a full picture of who Applicant was and what he had to offer others, i.e., that his life had value. It also meant showing his crimes were an aberration. (7 WRR 46-47).

(650) Seymour, Peck and Wright were in agreement about this theory; they just disagreed on how to present it. Peck and Wright were in charge of the mitigation presentation. Peck wanted to present as many witnesses as possible and go in chronological order. He believed the more witnesses he presented the less likely the jury would assess a death sentence. Seymour wanted to present the strongest, most impactful witnesses first, and then, if time permitted, back fill with additional witnesses. He feared they would have a limited time to put on their presentation and might lose the jury's attention with repetitious witnesses. Although Seymour disagreed with Peck's strategy, he supported and assisted him during the mitigation presentation. (5 WRR 29, 80-81; 7 WRR 51-55, 94-95; 8 WRR 36, 56; AX 26).

(651) In the end, the defense team presented over forty witnesses in support of this mitigation theory - an unusually high number. And their testimony covered the entire arc of Applicant's life - infancy, childhood, family, education, marriage, health, professional life, and loss of livelihood.

(652) As previously noted, counsel presented testimony from Cara Hervey and Ian Lyles. To the extent counsel chose not to present the remaining seventeen declarants as witnesses, his choice may be attributed to reasonable trial strategy.

(653) Counsel's decision not the call those seventeen witnesses is presumed to be sound strategy. Applicant fails to rebut that presumption. Seymour, Wright, and Parks testified at the writ hearing, and Peck and Wright executed declarations in support of the writ application. Applicant could have elicited information from any of his trial counsel as to their reasons for not calling these seventeen individuals. He chose not to.

(654) Usually, a record that is silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett v. State*, 65 S.W.3d 59, 63 (Tex. Crim. App. 2001).

(655) A reasonable basis for not calling them may be deduced for several, if not all, seventeen individuals.

(656) Applicant's father was quite elderly (85 years old at trial), hard of hearing, and tended to go off topic during conversations. There was reason to fear how he would perform on the witness stand. (7 WRR 57; SX 7 - memo dated 8/13/14; SX 18).

(657) There was also reason to fear how Applicant's brother-in-law, Zachary Bellemare, would perform as a witness. Like Applicant's parents and sister, he showed up late for meetings, and apparently, his interactions with the defense team were contentious. According to Seymour, "Zach was an absolute nightmare. He's very lucky he didn't get punched in the nose by me at some point." (7 WRR 55-56; SWX 7 - memo dated 5/15/14).

(658) Also, some of the information contained in the declarations constituted hearsay. For example, Donald Propst referred to specific conversations he had with Tera during their marriage, statements Tera made to CPS, and statements his father made to him. (AX 17). And in Applicant's father's affidavit, he refers to statements his own grandfather made to his mother and statements his parents made to him. (AX 20). Even mitigating

evidence must be offered in an admissible form. *See Valle v. State*, 109 S.W.3d 500, 507 (Tex. Crim. App. 2003) (holding due process does not guarantee a defendant the right to present his defense in the form he desires). Applicant fails to identify any exception to the hearsay rule under which such testimony would have been admissible.

(659) Further, much of the information contained in the declarations is redundant or similar to testimony counsel offered through other witnesses. Applicant's mother's deposition testimony covered many of the topics addressed by the declarants, such as, Applicant's fastidiousness as a child, his quiet introverted nature, the impact diabetes had on his life and career choices, his father's military service, and his relationship with his parents and his maternal grandmother. (DX 68). Applicant's friends and family alike testified to his quiet, reserved and somewhat "nerdy" personality. (51 RR 176-77; 53 RR 19, 71, 89-91, 117, 219; DX 68). Several witnesses attested to the burglary trial and its impact on Applicant. And Applicant's diabetes was covered by his mother and a couple of his jailers. (50 RR 73-75, 143-47, 177-79, 183; 53 RR 73, 75, 77-78, 176-79; DX 68).

(660) To the extent evidence about the life experiences of Applicant's grandparents was not presented, counsel could have reasonably concluded it had minimal relevance to Applicant and his life. It appears Applicant never met three of his grandparents; thus, they had no direct impact on him. (AX 5-6, 8, 20). And to the extent Applicant knew his maternal grandmother, counsel put on evidence about their relationship. (DX 68).

(661) Also, counsel could have reasonably concluded any evidence of a family tendency toward addiction and mental illness was more aggravating than mitigating as it showed Applicant was predisposed toward unpredictable and violent behavior.

(662) Finally, counsel did not have an unlimited amount of time to put on the mitigation evidence and, thus, had to prioritize the more impactful, effective witnesses. It would have been sound trial strategy to avoid taking up time with evidence that was repetitive, far removed from Applicant, or less compelling than other evidence.

(663) In sum, the mitigation investigation with respect to Applicant's background, family, and health was not deficient. It was timely, thorough, and comprehensive, and its relevant, significant results were presented to the jury.

Defense Not Prejudiced by Investigation

(664) Applicant claims counsel's deficient mitigation investigation prejudiced his defense because counsel failed to reveal to the jury an "absorbing social history narrative of family mental illness, dysfunction, addiction, trauma, poverty, and abuse." (App. at 74). Applicant sets out this "narrative" in seventy-seven pages of his writ application. (App. 116-93).

(665) Much of the narrative relates to information that was well developed at trial, such as, Applicant's childhood, the emotionally reserved nature of his father and father's family, his fastidious nature, education, employment history, poorly managed diabetes and related illnesses, his alcohol abuse, marriage to Kim and her decline in health, his depression, campaign for justice of the peace, prosecution for burglary, and evidence of "survivalist" preparedness in his home. This evidence was admitted through both State and defense witnesses. In fact, the narrative Applicant presents parallels the State's theory as to what motivated him to murder Hasse and the McLellands.

(666) Applicant argues the jurors did not hear that his:

- parents were raised in poverty and in families rife with trauma and lacking in affection;
- parents modeled what they had learned in their upbringings in how they raised their own children;
- parents drank heavily, inflicted physical violence on their children, and raised their children in a home lacking warmth, love, and affection;
- siblings suffered from mental illness; and
- siblings abused substances.

(App. at 192).

(667) Applicant paints a worse picture of his family history and its impact on him than the evidence shows.

(668) Applicant's parents did grow up in poverty and experience loss, but Applicant suffered little, if at all, as a result of it. Despite their own upbringings and limited financial

means, Applicant was raised by two parents who provided for their son, were proud of him, attended his scouting and school activities, and documented and celebrated his accomplishments. The evidence showed Applicant had a healthy relationship with his parents into adulthood. They maintained contact with him and volunteered for CASA because of his work with children. His mother was upset she did not get to attend his wedding. Even if Applicant's parents were reserved in expressing affection, they clearly loved him and showed it by their actions.

(669) Applicant alleges he was "subjected to beatings from the adults in his household." (App. at 148-49). Despite the inordinate number of declarations Applicant obtained from family, no one reported witnessing abuse or any signs of it. The evidence shows only that Applicant's mother, Jessie, once beat him with a broom when she caught him reading in the chicken coop instead of cleaning it. (DX 68). The allegation Applicant was an abused child is not shown in this record.

(670) Evidence Applicant's siblings, Tera and Tony, and his maternal grandmother suffered from mental illness is purely anecdotal. Applicant presents no evidence of any diagnosis or treatment by a mental health professional.

(671) The evidence Tera and Tony abused drugs is likewise anecdotal. Applicant presents no evidence either Tera or Tony were hospitalized or treated for substance abuse.

(672) Even if substantiated, a family tendency toward addiction and mental illness would have been more aggravating than mitigating because it showed Applicant was predisposed toward unpredictable and violent behavior.

(673) Evidence of Applicant's parents' drinking was not brought out at trial. And Applicant presents evidence from a variety of sources supporting his allegation that his father was an alcoholic. Applicant fails to show how the failure to present this evidence prejudiced his defense. He does not show he suffered abuse from drunk parents. And at trial, there was no dispute about his own drinking habits. Thus, the evidence is mitigating only to the extent it shows Applicant's genetic predisposition to alcoholism.

(674) Ultimately, counsel selected and presented sufficient witnesses to support their mitigation theory. Among those who testified were individuals who were quite close to Applicant and invested in his life, e.g., his mother, Lori Dunn, and Tamara Maas. No significant mitigating factor went undiscovered and undeveloped at trial.

(675) The additional mitigating evidence Applicant presents in these proceedings was largely redundant or minimally relevant and would not have altered the sentencing profile presented to the jury. Thus, counsel's failure to discover and present it did not prejudice Applicant's defense.

Investigating and Challenging State's Punishment Evidence

(676) Applicant contends counsel rendered ineffective assistance in the punishment phase by failing to investigate and challenge the State's punishment evidence on a variety of fronts. (App. at 194).

(677) Applicant fails to demonstrate any deficiency in counsel's investigation of or challenges to the State's punishment evidence.

(678) Applicant also fails to show he was prejudiced by an alleged deficiency.

Impeachment of Kim Williams

(679) Applicant contends counsel failed to impeach Kim Williams by confronting her with inconsistencies between her statements to law enforcement officials in April 2013 and her testimony on direct examination. (App. at 194-201).

(680) Counsel did impeach Kim on cross-examination with inconsistencies between her interview statements and her testimony. In particular, counsel pointed out inconsistencies between Kim's statement to police and her trial testimony regarding:

- Her description of the Mercury Sable;
- The name of the auto parts store where they parked the Sable;
- The clothing Applicant wore during the Hasse murder;
- Whether she saw a gun in Applicant's hands before the Hasse murder;
- Whether Applicant wore a vest during the Hasse murder;
- Whether she knew what Applicant was doing in the storage unit after the Hasse murder;

- Whether she went to bed after the Hasse murder and recalled nothing afterward;

- Whether Applicant obscured his face during the McLelland murders;

- Her recollection of the type of clothing Applicant wore during the McLelland murders;

- Her identification of the McLelland house;

- Whether it was too dark to see anything outside at the McLelland house the morning of the murders;

- How many shots Applicant fired during the McLellands' murders; and

- The type of weapon Applicant used to murder the McLellands.

(54 RR 104-07).

(681) Applicant contends counsel should have impeached Kim with additional inconsistencies between her statements to law enforcement and her testimony.

(682) Applicant fails to show by a preponderance of the evidence that counsel was deficient for not confronting Kim with additional prior inconsistent statements.

(683) Further, the record affirmatively shows counsel was not deficient.

(684) Counsel could have impeached Kim with additional inconsistencies. When counsel cross-examined Kim, he was very familiar with the variances between her accounts. He expected Kim to testify, and in preparation for trial, he invested quite a bit of time and resources into analyzing her different accounts. He hired an expert, Jim Trainum, to evaluate Kim's recorded police interviews. Trainum is a retired police detective with expertise in false confessions. Trainum analyzed Kim's interview and compared it against the known facts. Trainum's analysis yielded a list of conflicts, which counsel utilized in his cross-examination of Kim. (7 WRR 71-72).

(685) Ultimately, however, counsel made a strategic decision to impeach Kim with only some, not all, of the inconsistencies between her prior statements to law enforcement and her testimony. After confronting Kim with several inconsistencies and

watching the jurors' reaction to them, counsel determined the inconsistencies were not having much, if any, impact on the jurors. Instead of continuing to point out more of the same, counsel opted to focus on examining Kim about matters that seemed to resonate more with the jurors, such as the things Applicant did for Kim's family. (7 WRR 72-73).

(686) Applicant fails to rebut the presumption this was a reasonable strategic decision.

(687) The record affirmatively reflects this decision was reasonable.

(688) Even though he did not point out every inconsistency, counsel pointed out quite a few. In doing so, counsel communicated to the jury that, in the past, Kim had not been forthright and had downplayed her knowledge and level of involvement in the murders. Thus, he did impeach her credibility using her prior inconsistent statements.

(689) Kim did not fight counsel regarding the inconsistencies and acknowledged most of them. By doing so, Kim appeared open and honest, an impression counsel would likely only have emphasized by attacking her harder.

(690) And counsel was in the unique position of being able to observe firsthand the effect his examination of Kim was having on the jurors. Witnessing their apparent lack of interest in the inconsistent statements, he made the sound choice to move on to matters that held their attention and otherwise benefited Applicant.

(691) Lastly, the additional inconsistencies Applicant claims counsel should have confronted Kim with were no more significant than the ones he did point out. Those counsel brought up suggested Kim was attempting to minimize her level of involvement in the murders and the planning that went into them. The additional inconsistencies would have done nothing more than reiterate this.

(692) Applicant fails to show by a preponderance of the evidence that counsel's decision not to confront Kim with additional prior inconsistent statements prejudiced his defense.

(693) Applicant claims confronting Kim with all of her prior inconsistent statements would have discredited her version of events and undermined her credibility. (App. at 195, 201). He argues Kim's testimony was critical to the State's case in establishing his future dangerousness and the State relied on details Kim omitted from her police interviews. (App. at 200).

(694) The State did argue Kim's testimony as evidence of Applicant's future dangerousness. But additional prior inconsistent statements would not have rendered Kim's testimony unreliable, and would not have prevented the State from utilizing it as evidence of future dangerousness.

(695) Pointing out that Kim made other prior inconsistent statements about the crimes would only have reiterated she was untruthful back in April 2013; it would have done little, if anything, to impeach her trial testimony.

(696) Much of Kim's trial testimony was corroborated by other evidence. For example:

- Ballistics evidence corroborated her testimony Applicant used the underpass for target practice;

- Recovery of the mask and the Hasse murder weapons from Lake Tawakoni corroborated Kim's testimony Applicant wore a mask during Hasse's murder and then disposed of the guns that night in the lake;

- The discovery in the storage unit of the crossbow and a bag filled with homemade napalm, crossbow arrows, bolt cutters, knife, and shoe covers corroborated Kim's testimony applicant planned to murder Ashworth by waiting for him after the Super Bowl, shooting him with the crossbow, boring his stomach out, and putting napalm in it;

- Evidence the Sable had been abandoned in the storage unit and towed away corroborated Kim's testimony about Applicant's disposal of the Sable after Hasse's murder;

- The testimony of Jeff Reynolds, the owner of the Sable, corroborated Kim's testimony about the subterfuge Applicant used to acquire the car and the fact that Kim accompanied him to make the purchase;

- Evidence Applicant had conducted a computer search for Hasse's home address and run the license plate of Hasse's neighbor's car corroborated Kim's testimony that she and Applicant had surveilled Hasse's home;

- Barton Williams's testimony corroborated Kim's testimony about how applicant acquired the storage unit;

- The discovery of the firearms in the unit corroborated Kim's testimony that Applicant had not disposed of his weapons after his conviction as he claimed;

- Evidence Cynthia McLelland had been shot in the top of her head corroborated Kim's testimony Applicant told her he shot Cynthia an extra time because she was moaning;

- Evidence the alarm system showed the front door opening and closing at 6:40 am and again at 6:42 am corroborated Kim's testimony as to when and how quickly the McLellands' murders occurred and how Applicant entered the McLelland home; and

- Video of a Crown Victoria exiting and entering the storage facility before and after the McLelland murders, the vehicle's subsequent recovery from Applicant's storage unit, and video of a vehicle consistent with a Crown Victoria traveling a route between the facility and the McLelland home corroborated Kim's testimony that the vehicle was used in the murders.

(697) Moreover, while Kim downplayed her role in the murders during the initial police interviews, she acknowledged her complicity with great detail at trial, which lent further credibility to her testimony.

(698) Kim also acknowledged she had cooperated with the State before and during trial in the hopes that she would benefit in her own capital murder cases. Evidence Kim had an ulterior motive for her testimony, namely, to improve her own situation, impugned her credibility more than the additional inconsistencies would have.

(699) The State also had other evidence of Applicant's future dangerousness that Kim's testimony had no bearing on. There were Applicant's verbal threats against John Burt and his family, the letter threatening violence against opposing counsel in one of his ad litem cases, and his armed, public threat to shoot a former girlfriend, Janice Gray.

(700) Even without Kim's testimony, the State had considerable evidence implicating Applicant in three murders. The State did not need Kim's testimony to establish Applicant's guilt or propensity for violence.

(701) Confronting Kim about additional prior inconsistent statements would not have altered the outcome of Applicant's trial. Even assuming counsel was deficient to not doing so, his choice did not prejudice Applicant's defense.

Spousal Privilege Objection

(702) Applicant claims counsel failed to assert spousal privilege under rule 504 with respect to Kim Williams's testimony about statements Applicant made to her. Specifically, he claims counsel should have objected to the admission of Kim's testimony that Applicant:

- threatened to kill Judges Ashworth and Wiley (54 RR 9, 31-32, 76-81);
- threatened to kill Kim (54 RR 84);
- threatened to shoot officers stationed at the armory (54 RR 56-57);
- was angry with Ashworth, Hasse, and McLelland, talked badly about them, and told her he wanted to kill them (54 RR 24, 29); and
- admitted to shooting a cat in the eye (54 RR 89-90).

(App. at 201-04).

(703) Applicant fails to show by a preponderance of the evidence that counsel was deficient for not objecting to this testimony based on spousal privilege.

(704) In order to show counsel was deficient for not objecting to the testimony, Applicant must show the court would have committed error in overruling such an objection. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011). Applicant fails to make this showing.

(705) Except for Applicant's statement about shooting a cat in the eye, the complained-of testimony was not privileged under rule 504 and, thus, admissible.

(706) Applicant and Kim were married when he made the complained-of statements to her. (54 RR 11-12).

(707) However, the statements related to Ashworth, Wiley, Hasse, McLelland, and the officers at the armory, were made in furtherance of a crime and excepted from the privilege.

(708) Rule 504(4)(A) provides the spousal privilege does not protect confidential communications that "are made – wholly or partially – to enable or aid anyone to commit or plan to commit a crime or fraud." Tex. Evid. R. 504(4)(A).

(709) Kim's testimony affirmatively showed she and Applicant were co-conspirators in several crimes. They were not just co-conspirators in the murders of Hasse and the McLellands. They were also co-conspirators in the planned future murders of Ashworth and Wiley. The statements Applicant made regarding his animosity toward these people, his intentions to kill them, and how he planned to kill them were patently related to that conspiracy. So, too, were Applicant's statements about attacking the law enforcement officers stationed at the armory who were investigating the Hasse and McLelland murders. *See Goforth v. State*, 273 S.W. 845, 846-57 (1925) (holding spousal communications made in furtherance of conspiracy to manufacture liquor were not privileged); *Wolf v. State*, 674 S.W.2d 831, 842 (Tex. App. – Corpus Christi 1984, pet. ref'd) (holding defendant's statements to husband regarding defendant's plans to facilitate murder were made in furtherance of conspiracy and, thus, not protected by spousal privilege).

(710) Kim's testimony Applicant was angry with Ashworth, Hasse, and McLelland did not refer to any communication or utterance. It referred to observable behavior, that is, a display of anger, which is not protected by rule 504. *See State v. Mireles*, 904 S.W.2d 885, 890 (Tex. App. – Corpus Christi 1995, pet. ref'd) (holding wife's testimony about husband's actions that she observed were not protected by spousal privilege); *Freeman v. State*, 786 S.W.2d 56, 59 (Tex. App. – Houston [1st Dist.] 1990, no pet.) (holding spousal privilege extends to utterances, not acts, therefore, testimony relating to actions not excludable).

(711) And Applicant's threat to kill Kim was excepted from the privilege because it constituted a verbal act, not a communication. It was res gestae of an assault offense Applicant committed against Kim, and not protected. *See Butler State*, 645 S.W.2d 820, 824 (Tex. Crim. App. 1983) (holding husband's threats against wife were res gestae of the offense, not privileged communications).

(712) Counsel is not deficient for not objecting to this admissible evidence. *McFarland v. State*, 845 S.W.2d 824, 846 (Tex. Crim. App. 1992), *overruled on other grounds by Bingham v. State*, 915 S.W.2d 9, (Tex. Crim. App. 1994).

(713) On the other hand, Applicant's admission to shooting a cat in the eye sometime in the past was privileged as it referred to a completed crime in his past that Kim had no part in. *See United States v. Montgomery*, 384 F.3d 1050, 1059-60 (9th Cir. 2004) (holding defendant's communications with wife before she joined conspiracy were protected by spousal privilege); *see also United States v. Wood*, 924 F.2d 399, 402 (1st Cir. 1991) (questioning whether statements in letter between husband and wife about their crime were made in furtherance of a crime and excepted from spousal privilege where statements were made after both had been arrested for crime).

(714) Nevertheless, Applicant fails to rebut the presumption that counsel's decision not to object to Kim's testimony that Applicant told her he shot a cat in the eye constituted reasonable trial strategy.

(715) The law presumes counsel had a sound strategic reason for not objecting to this testimony, and Applicant fails to rebut that presumption.

(716) Applicant had the opportunity to question counsel at the writ hearing about the decision not to object, but did not do so. Thus, the record is silent as to counsel's reasons for not objecting.

(717) Usually, a record that is silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett*, 65 S.W.3d at 63.

(718) Sound reasons may be deduced from the record as to why counsel did not object. Counsel could have reasonably concluded that objecting to this testimony would have afforded little benefit and would have drawn additional attention to aggravating evidence. Before testifying to the complained-of statement, Kim testified to another act of animal cruelty. She recalled in detail an incident where applicant killed a cat and threw it in the street. (54 RR 89). This testimony was more graphic and prejudicial than the complained-of statement. Moreover, it was admissible; it related to an act witnessed by Kim, not a communication, and, thus, was not privileged. Objecting to the complained-of testimony would not have kept the jury from hearing any evidence about Applicant's abuse of cats. At best, it would have resulted in the exclusion of the less graphic evidence

of it. And at the same time, it would have drawn attention to the complained-of statement.

(719) Applicant also fails to show by a preponderance of the evidence that not objecting to these portions of Kim's testimony prejudiced his defense.

(720) Even if the complained-of statements had been excluded, the jury would still have heard much of Kim's testimony about all three murders. Kim was a participant in preparing and planning for the murders and an eyewitness to them. Her personal observations were not privileged and provided ample evidence of Applicant's culpability and the heinous nature of the crimes. Also, she led authorities to the Hasse murder weapons and other instruments that Applicant had tossed in Lake Tawakoni.

(721) Further, substantial evidence exists, outside of Kim's testimony, implicating applicant in the murders. The evidence shows Applicant purchased the two cars used in the murders with cash and fake identities, illegally stockpiled an arsenal of firearms and other weapons, sent Crime Stoppers tips containing information known only to the murderer, and had been successfully prosecuted by two of the victims and lost his legal career and the prestige of public office as a result.

(722) Considerable evidence also shows extraneous violent acts perpetrated by Applicant. This evidence showed Applicant shot at Kim twice, threatened harm to others in his Crime Stoppers tips, threatened physical harm to others and their family members, including children, in writing and in person, and held a former girlfriend at gunpoint in a crowded bar.

(723) Finally, the complained-of statements were not the only evidence, much less the most compelling, of Applicant's violent nature and complicity in the murders. Consequently, their exclusion would have yielded little, if any, benefit to Applicant. Thus, counsel's decision not to object to them could not have altered the outcome of Applicant's trial.

Impeachment with Tina Hall Affair

(724) Applicant contends counsel should have called Tina Hall to impeach Kim Williams's testimony Applicant had an affair with Hall. Applicant claims there was no affair and Hall was available to refute Kim's testimony. (App. at 205-06).

(725) At punishment, counsel called Cathy Adams. Adams testified Applicant was an "excellent husband." (53 RR 160). On cross-examination, the State asked Adams if she was aware of the affair Applicant had with Hall. Adams knew Hall, who was currently living in Hawaii, but she denied any knowledge or suspicion of an affair. According to her, they were just friends. (53 RR 182-84).

(726) Counsel objected that no evidence supported this questioning, but the State told the court it had a good faith basis and pursued this issue because Adams had left a false impression about the type of husband Applicant was. (53 RR 183; 8 WRR 97-98).

(727) Hall met with the defense the week before trial started, and watched Adams testify by live-stream video on the internet. The next day, Hall appeared in court and told the State she had not had an affair with Applicant. And she was present in court and available to testify if called, but neither side presented her as a witness during trial. (8 WRR 97-98; AX 7).

(728) The State subsequently called Kim Williams to testify and asked her about the affair. Kim said although Applicant was a good husband, he was unfaithful and had had extramarital affairs, including one with Hall. (54 RR 90).

(729) Applicant fails to show by a preponderance of the evidence that counsel was deficient for not calling Hall as a witness.

(730) The law presumes counsel had a sound strategic reason for not calling Hall to testify, and Applicant fails to rebut that presumption.

(731) Applicant had the opportunity to question counsel at the writ hearing about the decision not to present testimony from Hall, but did not do so. Thus, the record is silent as to counsel's reasons for not calling Hall.

(732) Usually, a record that is silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett*, 65 S.W.3d at 63.

(733) A number of well-founded reasons for not calling Hall could be deduced or inferred from the record. Like the State, counsel may have had good cause to believe there had been an affair and feared a challenge would prompt the State to present additional, credible evidence of it. They could also have believed there was no affair but

determined Hall would not make a good or credible witness. She had apparently led others to believe she was living in Hawaii when, in fact, she was in Texas, suggesting she had been avoiding questioning or a court appearance. (53 RR 182-83; 8 WRR 97-98). And even if credible, Hall may have made a poor witness for other reasons, such as her emotional state. Although Adams had denied the affair in her testimony, Hall demanded an immediate retraction from the State, and the next day she approached numerous attorneys trying to get someone to listen to her, all of which suggests she was upset. (AX 7). Even if Hall would have been credible and emotionally sound, counsel may have thought her insistence she had not had a relationship with Applicant was unflattering to him. Or counsel could have concluded that Adams's denial of an affair was credible and presenting Hall's testimonial denial, too, would simply have drawn further, unwanted attention to the matter. Any one of these reasons would constitute reasonable grounds not to call Hall as a witness.

(734) Applicant also fails to show by a preponderance of the evidence that his defense was prejudiced by the decision not to present Hall as a witness.

(735) While Hall was available and present to testify, her denial of an affair with Applicant would have served little, if any, benefit to his defense. As noted above, it is questionable that Hall would have performed well on the stand and her credibility would have been questioned. But even if she was credible and did perform well, her denial of an affair would have done little to redeem Applicant. In the face of three murders, an affair several years before was inconsequential. Furthermore, other evidence disputing the affair was already before the jury through Adams. She rebuffed the prosecutor's repeated efforts to get her to acknowledge an affair. (53 RR 182-83). It is unlikely that additional testimony from Hall on the matter would have altered the punishment verdict.

Challenge to DNA Evidence

(736) Applicant contends counsel should have challenged DNA evidence the State presented at punishment. Specifically, he argues counsel should have objected to inadmissible and misleading testimony by the DNA analyst, objected to hearsay statements of a non-testifying analyst, focused on Applicant's exclusion from important pieces of evidence, highlighted the discovery of unidentified male DNA profiles, and exposed multiple instances of contamination. (App. at 206).

(737) Applicant fails to prove by a preponderance of the evidence that counsel was deficient in his handling of the DNA evidence.

(738) Applicant fails to rebut the presumption that counsel's handling of the DNA evidence constituted sound trial strategy.

(739) Applicant fails to prove by a preponderance of the evidence that counsel's handling of the DNA evidence prejudiced Applicant's defense.

(740) Applicant fails to acknowledge much of counsel's efforts with respect to addressing the DNA evidence. Those efforts were significant.

(741) Counsel obtained the assistance of a DNA expert, Libby Johnson, early on in his representation of Applicant. (Unsealed CR 57-67). He also filed motions to stay DNA testing until the testing procedures could be discussed and to ensure the defense's receipt of bench notes and reports. (1 CR 211; 9 CR 3592-3603).

(742) Johnson helped review some of the DNA reports. But more importantly, her assistance was key to preventing errors in the lab during batch sequencing. She recommended batching items in a particular way to reduce the chance of error. The State agreed to Johnson's recommendation and, together, Seymour and Wirskye crafted an agreed order that governed the testing procedures, which the court signed. (4 RR 8-11; 9 RR 11-12; 7 WRR 61).

(743) Ultimately, the order counsel negotiated ensured non-depleted samples would be retained, touch DNA testing would be performed, and the defense would receive copies of all test results, bench notes, and other lab records related to the testing. The order also required the State to confer with the DPS lab staff and supervisors "to address defense counsel's concern regarding batching of biological evidence for testing to eliminate or minimize the potential for cross-contamination or spoliation of biological evidence" and notify the defense of the arrangements for batching biological evidence. (9 CR 3661-62).

(744) With the lab's agreement, Johnson's batching recommendations were followed in Applicant's case. In fact, her recommendation is now the standard the lab follows. (7 WRR 61). Counsel's efforts before testing ensured the DNA test results were as accurate as possible.

(745) Counsel also negotiated and drafted a stipulation regarding the DNA testimony that the non-appearing DNA analyst, Kimberly Mack, would give. The stipulation acknowledged Mack's qualifications and competency, the work she performed in

Applicant's case, and each of the reports she generated. It also noted DPS's general policy of not conducting touch-DNA testing. And lastly, it documented the contamination of some items of evidence, namely weapons, with the DNA of other lab personnel. (SX 576).

(746) The State presented no DNA evidence in the guilt phase. And in his guilt phase closing, counsel argued the absence of DNA evidence linking Applicant to the McLelland murders. (47 RR 32, 39).

(747) Then later, at punishment, counsel cross-examined the testifying DNA expert, Amber Moss. During that examination, counsel elicited that: (1) there was a partial profile found in the steering wheel of the Mercury Sable from which one of the State's investigators, William Kasper, could not be excluded, (2) under testing guidelines for capital cases, the DPS lab generally does not test for touch-DNA on items where there has been a minimal amount of contact, such as steering wheels, shift knobs, door handles, etc., and (3) touch-DNA can be transferred. (49 RR 127-31).

(748) Applicant contends counsel should not have agreed to the stipulation and should have launched a full assault on the testimony of the expert who did testify, DNA analyst Amber Moss. In particular, he would have questioned Moss about the method she employed and tested her knowledge of the process and Mack's work. He argues counsel should have highlighted the fact that Mack, herself, contaminated an item during testing.[29]

(749) But Seymour stated he agreed to the stipulation rather than conduct a full-on attack on the analyst's testimony for two reasons. In his own words:

> One, in many ways the DNA reports eliminated Mr. Williams in, in vast numbers of items. Secondly, the new guidelines that had come out on, on capital DNA processing essentially said that they should not or – test on items of touch DNA because of the unreliability. And many of the items where [Applicant] was tied to items, they were all touch DNA items. So in large part I relied on her reports to substantiate part of my defensive posture.

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[29] Evidence of this contamination was admitted in the November 14, 2014 DNA report. (SX 579). Thus, evidence of the contamination was before the jury.

(7 WRR 62).

(750) Seymour's closing argument in the guilt phase bears out this strategy, and it was a sound one. Counsel got the best of both worlds. He could argue DNA evidence was reliable only to the extent it excluded Applicant from the evidence of the murders.

(751) Any further attack on the DNA evidence would have been inconsistent with counsel's strategy and would have scored the defense little benefit.

(752) Mack's and Moss's credentials and qualifications were unimpeached and the record shows both are qualified, experienced DNA analysts. (49 RR 116; SX 576). There was no reason to doubt the reliability of their work.

(753) Further, although Applicant argues Moss's testimony was inaccurate or misleading on certain fronts, he presents no evidence supporting his claims.

(754) Applicant's critique of Moss's testimony focuses largely on her testimony "matching" his profile to the profiles found in the Mercury Sable. But this testimony was not inaccurate or misleading. Moss explained the significance of a "match" depends on its statistical relevance. Specifically, she testified:

> When we have a DNA profile from the evidence and a DNA profile from a known sample, and they match each other, we then are able to calculate statistics. So what we do is we are able to put in that DNA profile into a, a software program essentially that calculates how common or how rare is that DNA profile, and we calculate it with the DPS in three major North American populations.

(49 RR 121-22).

(755) From this record, Moss's testimony and the results of the testing she and Mack performed are reliable and credible. (49 RR 116-36; SX 576-79).

(756) Even assuming counsel could have impeached the accuracy of the DNA test results, it would have had no impact on the case. Although inculpatory, the DNA evidence was not the linchpin of the State's case. The State offered no DNA evidence in the guilt phase and at punishment, the evidence linking Applicant to Hasse's murder was considerable without the DNA evidence.

(757) Thus, Applicant's defense was not prejudiced by counsel's decision not to attack the DNA evidence further.

(758) Counsel rendered effective assistance in the handling of the DNA evidence, and this claim should be denied.

Extraneous Victim Impact Evidence

(759) Applicant claims counsel was deficient for not objecting to portions of Justin Lewis's testimony about Mark Hasse. Lewis was an investigator in the Kaufman County Criminal District Attorney's Office who worked with Hasse. (48 RR 19-21). Applicant contends Lewis's testimony was irrelevant and highly inflammatory victim-impact evidence related to an extraneous offense victim. (App. at 230-34).

(760) Specifically, Applicant argues counsel should have objected to Lewis's testimony that:

- he was "close" to Hasse;
- he spoke at Hasse's funeral;
- Hasse "brought a tremendous amount of prosecutorial experience to that office";
- Hasse was "considered Mike McLelland's top assistant district attorney"; and
- Hasse was a certified peace officer, which basically made him a police officer.

(App. at 230-31).

(761) Applicant fails to prove by a preponderance of the evidence that counsel was deficient for not objecting to the testimony.

(762) Applicant fails to rebut the presumption that counsel made a sound strategic choice not to object to the testimony.

(763) Applicant fails to prove by a preponderance of the evidence that counsel's decision not to object to the testimony prejudiced his defense.

(764) Victim impact evidence related to an extraneous offense is irrelevant and inadmissible under evidence rule 401. *Cantu v. State*, 939 S.W.2d 627, 637 (Tex. Crim. App. 1997).

(765) The complained-of portions of Lewis's testimony are not victim impact evidence.

(766) Victim impact evidence is evidence "of the effect of an offense on people other than the victim." *Roberts v. State*, 220 S.W.3d 521, 531 (Tex. Crim. App. 2007).

(767) The complained-of portions of Lewis's testimony relate to the nature of his relationship with Hasse, Hasse's role in the office, and peace officer certification. They did not convey information about how Hasse's murder affected Lewis.

(768) Notably, Lewis later testified about how the news that Hasse had been shot affected him, and counsel objected to that testimony.[30] Clearly, counsel recognized victim-impact evidence when he heard it.[31] (48 RR 28-29).

(769) To the extent Applicant suggests Lewis's testimony constituted improper victim *character* evidence, he fails to show counsel should have objected.

(770) Victim character evidence is "evidence concerning good qualities possessed by the victim." *Mathis v. State*, 67 S.W.3d 918, 928 (Tex. Crim. App. 2002) (quoting *Mosley v. State*, 983 S.W.2d 249 (Tex. Crim. App. 1998)). It, too, is inadmissible with respect to extraneous offense victims. *Cantu*, 939 s.W.2d at 637-38.

(771) Applicant argues Lewis's testimony pertained to Hasse's good character and compared his worth to other members of society. Although it could be construed as evidence of Hasse's character, it was primarily probative of other facts in issue.

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[30] When asked how the news of Hasse's murder affected him, Lewis responded, "Shock at first, you know. I knew somebody had been shot, but responding there, I never – it never occurred to me that it was – ." (48 RR 28-29).

[31] The admissibility of this testimony was subsequently litigated on direct appeal, and the Court of Criminal Appeals found any error was harmless. *Williams*, 2017 WL 4946865, at *28-30.

(772) Lewis was the State's first punishment phase witness. The State used Lewis to identify the live and autopsy photographs of Hasse. (48 RR 22, 29-30; SX 2, 50). Because Lewis was unrelated to Hasse, the State needed to lay the foundation for his identification of him. Lewis's familiarity and relationship with Hasse were probative of his knowledge of Hasse and, thus, his ability to identify him.

(773) Furthermore, Lewis's testimony regarding Hasse's abilities as a prosecutor related directly to the motive for his murder. Applicant killed Hasse because he prosecuted him for burglary. Hasse's high-level role in the Kaufman District Attorney's Office put him in the position of prosecuting Applicant.

(774) Also, Lewis's testimony that Hasse was a peace officer and, thus, akin to a police officer, explained how Hasse could be lawfully carrying a firearm when he was shot by Applicant. As a licensed peace officer, he was legally authorized to carry and regularly did so.

(775) If counsel had objected to these complained-of portions of Lewis's testimony, the court would have overruled his objection. The testimony was not inflammatory and irrelevant but relevant and admissible.

(776) Counsel could have concluded the same during trial and chosen not to object.

(777) In any event, counsel's decision not to object did not prejudice Applicant's defense. Lewis's testimony was brief and unemotional and would have had little impact on the jury. By comparison, the defense presented far more positive evidence of Applicant's character from a number of witnesses. The State presented substantial evidence of Applicant's history of violence and likelihood of future violence. Exclusion of Lewis's testimony would not have altered the outcome of Applicant's trial.

(778) Counsel did not render ineffective assistance by not objecting to Lewis's testimony, and this claim should be denied.

Challenge to Exclusion of Mitigating Evidence

(779) Applicant contends counsel made faulty objections and offers of proof with respect to the exclusion of testimony from several defense punishment witnesses. He claims counsel should have objected to the testimony's exclusion under the 8th and 14th Amendments as well as article 38.36 of the criminal procedure code. Also, he argues

counsel omitted information from the offers of proof that would have established the admissibility of the excluded testimony. He claims that but for the deficiencies in counsel's objections and offers of proof, the court would have admitted the testimony at trial or its exclusion would have been reversed on appeal. (App. at 234-49).

(780) Applicant fails to prove by a preponderance of the evidence any deficiency in counsel's handling of the excluded punishment testimony.

(781) Applicant fails to rebut the presumption that counsel exercised sound strategy in the handling of the excluded punishment testimony.

(782) Applicant fails to prove by a preponderance of the evidence that counsel's handling of the excluded punishment testimony prejudiced his defense.

(783) This claim relates to the following excluded testimony:

- Judge Chitty's testimony regarding the location of the IT department in relation to the JP court;

- Regina Fogarty's testimony regarding the improvements Applicant wanted to make to the magistration video system;

- Mark Calabria's testimony regarding how Applicant was perceived in Kaufman, whether the prosecution of Kaufman officials was handled differently than other individuals, and Applicant's isolation after his burglary trial;

- Cathy Adams's testimony regarding whether people in Kaufman were unwilling to speak on Applicant's behalf, why Adams thought Applicant was arrested for the burglary, the politics of Rick Harrison's campaign for district attorney, Hasse's aggressive prosecution style, McLelland's demeanor toward Applicant, Hasse's reference to Applicant as Adams's "thief friend," and the personal nature of the burglary prosecution; and

- Rick Harrison's testimony regarding whether McLelland was prone to harboring grudges, whether McLelland remembered the letter Applicant wrote on Harrison's behalf, whether McLelland harbored a grudge against Harrison's supporters, the polarizing nature of the election, Harrison's immediate suspicion

that Applicant murdered Hasse, Harrison's friendship with the prosecutors pro tem, and his request that they investigate Applicant.

(784) The law presumes counsel had a sound strategic reason for his actions. Applicant fails to rebut that presumption.

(785) Applicant had the opportunity to question counsel at the writ hearing about this issue, but he did not do so. Thus, the record is silent as to counsel's reasons for not to making the complained-of objections or additions to the offers of proof.

(786) Usually, a record that is silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett*, 65 S.W.3d at 63.

(787) The record shows additional objections or amendments to the offers of proof would have been pointless.

(788) To a large extent, counsel was attempting to retry the burglary and theft cases and argue Applicant was actually innocent and wrongfully prosecuted. This was improper. Applicant's burglary and theft convictions were final.[32] The law prohibits a collateral attack on the sufficiency of the evidence supporting a prior final conviction. *Galloway v. State*, 578 S.W.2d 142, 143 (Tex. Crim. App. 1979). To the extent the excluded testimony was proffered for that purpose, the court properly excluded it, and no additional objections or modified offers of proof would have rendered it admissible.

(789) Further, while Applicant contends counsel should have included information in the offers of proof showing the witnesses had personal knowledge about the excluded information, he makes no showing counsel could have truthfully asserted this. None of the witnesses whose testimony was excluded gave post-conviction affidavits about what they knew, and no other record evidence exists showing they possessed personal knowledge of the excluded information.

(790) Finally, Applicant contends the exclusion of these witnesses' testimony deprived the jury of evidence "that the political climate around [Applicant's] election to Justice of

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[32] Applicant's burglary and theft convictions were affirmed on direct appeal on July 29, 2013, and the mandate issued on October 18, 2013. The instant trial took place in December 2014.

the Peace was fraught, that the prosecution of [Applicant] for the theft and burglary charges was overzealous, [and] that [Applicant] became isolated after conviction." (App. at 240). But other evidence of the same nature came in through other witnesses.

(791) As the Court of Criminal Appeals noted in its opinion on direct appeal, "the jury was already aware that Hasse and McLelland had successfully prosecuted Williams for burglary and theft in 2012, and that these convictions motivated Williams to commit the instant offense." *Williams*, 2017 WL 4946865, at * 40. To the extent the excluded testimony was evidence that the 2012 burglary prosecution was selective or overzealous, it was cumulative of other testimony from Adams and Jenny Parks. *Id.* at 43. The excluded testimony was largely redundant.

(792) More importantly, the excluded evidence emphasized Applicant's motive for killing the McLellands and Hasse. *See id.* at 40 (noting Harrison's immediate suspicion that Applicant murdered Hasse was not mitigating).

(793) Given its cumulative and aggravating quality, the evidence's exclusion, if error, would have been harmless on appeal.

(794) Consequently, the failure to object on other grounds or include additional information in the offers of proof did not prejudice Applicant's defense.

(795) Counsel rendered effective assistance in the handling of the excluded testimony, and this claim should be denied.

Challenge to State's Closing Argument

(796) Applicant contends counsel rendered ineffective assistance by not objecting to three arguments by the State during closing in the punishment phase.

(797) Applicant fails to prove by a preponderance of the evidence counsel was deficient for not objecting to the State's arguments.

(798) Applicant fails to rebut the presumption counsel made a sound strategic choice not to object to the State's arguments.

(799) Applicant fails to prove by a preponderance of the evidence that counsel's decision not to object to the State's arguments prejudiced his defense.

(800) Counsel has no duty to object to argument that is proper. *McFarland v. State*, 845 S.W.2d 824, 844 (Tex. Crim. App. 1992).

(801) In order to show counsel was deficient for not objecting to closing argument, Applicant must show the court would have committed error in overruling an objection. *Ex parte Martinez*, 330 S.W.3d 891, 901 (Tex. Crim. App. 2011). Applicant fails to make this showing with respect to any of the complained-of arguments.

(802) "The purpose of closing argument is to facilitate the jury in properly analyzing the evidence presented at trial so that it may 'arrive at a just and reasonable conclusion based on the evidence alone, and not on any fact not admitted in evidence.' It should not 'arouse the passion or prejudice of the jury by matters not properly before them.'" *Milton v. State*, 572 S.W.3d 234, 239 (Tex. Crim. App. 2019). Proper jury argument falls into four areas: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *Id.* "Generally, the bounds of proper closing argument are left to the sound discretion of the trial court." *Id.*

(803) The first argument Applicant complains of relates to the threat Applicant poses to others in the future. Specifically, the prosecutor argued:

> The last two people that have prosecuted him are dead. You know he had two more people on his list. Has he added to his list since he's been paused? We know he doesn't deal real well with the criminal trial process. Has he added to his list? As yourself that. Ask yourself that one simple question.

(54 RR 197-98). Applicant argues this argument was inflammatory and improperly implied if the jury did not return a death verdict, Applicant might kill the lead prosecutor or "possibly the jurors, too." (App. at 251-52).

(804) Applicant claims the State revisited this theme later and put himself more directly in the victims' shoes with the following argument:

> I don't stand up and seek revenge. He did. I stand up, like Mike McLelland and like Mark Hasse, and ask for justice, and ask for those certain final answers. He must be stopped. It's that simple. How many people have to die before someone stops him?

(54 RR 203).

(805) The above arguments were not inflammatory or otherwise improper.

(806) The first argument does not suggest the jury should fear Applicant's wrath. The argument refers to prosecutors, and as Applicant contends, it suggests that he may pose a future threat to the lead prosecutor in this case. But that is a reasonable deduction from the evidence. The evidence showed Applicant murdered the Kaufman County Criminal District Attorney and one of his assistants in revenge for prosecuting him for burglary. The evidence also showed Applicant had a hit list of other public officials he planned to kill. It logically followed Applicant would add those prosecuting him for capital murder to the list of individuals he wished to kill. *See Fifer v. State*, 141 S.W. 989, 212 (Tex. Crim. App. 1912) (holding argument that if set free defendant would "kill another good sheriff" constituted reasonable deduction from evidence).

(807) Further, this argument was responsive to counsel's argument challenging the State's proof of Applicant's future dangerousness. Counsel had just argued that Applicant would not pose a future danger because "his vengeance was complete." (54 RR 181). The State's argument pointed out that Applicant may not be done exacting his revenge and anyone who prosecuted him risked provoking his ire and, thus, jeopardized their own safety.

(808) The second complained-of argument is a request for justice for the victims and a plea for law enforcement.

(809) Next, Applicant complains of the following argument:

> I beg you to remember the victims in this case. The D.A. and his top assistant, who stood up for justice, who stood up against [Applicant]. I beg you to remember Cynthia McLelland. Her death makes your decision clear. Her death makes your decision clear. It's up to us now. It's up to the system, it's up to you as jurors to put some finality, to put some closure to their loss, to put some finality and put some closure into the pain that this man can inflict.

(54 RR 203). Applicant contends this argument "called on the jury to return a death verdict not based on the answers to the Special Issues, as the law requires, but rather to appease the victims' families and communities." (App. at 253).

(810) This argument does not tell the jurors to disregard the special issues. The prosecutor asked the juror to think of the victims and stop Applicant from hurting anyone else. Again, that is a proper plea for law enforcement. *See Ayala v. State*, 267 S.W.3d 428, 435-36 (Tex. App. - Houston [14th Dist.] 2008, pet. ref'd) (holding argument asking jury to think of victim and victim's family and deliver justice to them constituted proper plea for law enforcement and did not ask juror to render verdict based on desires of victim's family).

(811) Finally, Applicant complains about argument regarding Hasse's murder. Specifically, the prosecutor argued:

> Now you've heard about the murder of Mark Hasse. You've heard about this man's first murder; and just as surely as Mark Hasse has risen from the grave and come into this courtroom and told you who his murderer was, the evidence we've introduced to you lets you know without a shadow of a doubt, it points the accusing finger of guilt at the right person.

(54 RR 193). Applicant contends this argument argues facts not in evidence and constitutes an improper appeal to the emotions and sympathy of the jurors rather than the evidence presented.

(812) Contrary to Applicant's contention, this argument is a reference to the facts in evidence proving Applicant murdered Hasse. The prosecutor is referring to how strong the case is implicating Applicant in Hasse's murder. It is as strong as Hasse's eyewitness account would have been had he survived. Analogizing the strength of the evidence to the testimony of a ghost was simply a literary tool, the use of which is acceptable in closing argument. *Broussard v. State*, 910 S.W.2d 952, 959 (Tex. Crim. App. 1995) (holding counsel may employ analogies in argument to emphasize and explain evidence).

(813) Regardless of any impropriety in the above arguments, counsel could have made a sound strategic decision not to object to them.

(814) The decision to object to particular statements made during closing argument is a matter of trial strategy. *Nicholson v. State*, 577 S.W.3d 559, 570 (Tex. App. - Houston [14th Dist.] 2019, pet. ref'd).

(815) Applicant had the opportunity to question counsel in the writ hearing as to their reasons for not objecting, but did not.

(816) Usually, a record that is silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett*, 65 S.W.3d at 63.

(817) Counsel could have reasonably concluded objecting to the complained-of arguments would have needlessly drawn further attention to them, especially in light of the court's written instruction to the jury to consider only the evidence properly admitted at trial. (11 CR 4295);[33] *see Bryant v. State*, 282 S.W.3d 156, 173 (Tex. App. – Texarkana 2009, pet. ref'd) (holding counsel made reasonable strategic decision not to emphasize improper closing remark with contemporaneous objection).

(818) Finally, any impropriety in the complained-of arguments did not prejudice Applicant's defense. None of them was extreme or manifestly improper, violative of a mandatory statute, or injected new facts harmful to Applicant. *See Hawkins v. State*, 135 S.W.3d 72, 79 (Tex. Crim. App. 2004) (enunciating standard for reversal based on improper argument). And the court instructed the jury to disregard any arguments not supported by the law or the evidence, and the jury is presumed to have followed that instruction. (11 CR 4295). Thus, counsel's failure to object to any impropriety did not prejudice Applicant's defense.

(819) Counsel did not render ineffective assistance by not objecting to the above-cited arguments, and this claim should be denied.

Guilt Phase Representation

Challenge to State's Version of Events

(820) Applicant contends counsel failed to adequately investigate and challenge "the State's version of events." He argues counsel was deficient for not investigating the possibility that: (1) Kim Williams was more involved in the killings than she admitted to law enforcement; (2) the McLellands were murdered around 2:30-3:00 am, rather than 6:40 am; and (3) a third person participated in the murders. (App. 262-67).

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[33] The Court's instruction read: "You are instructed that any statements of counsel made during the course of the trial or during argument not supported by the evidence, or statements of law made by counsel not in harmony with the law as stated to you by the Court in these instructions, are to be wholly disregarded."

(821) Applicant fails to prove counsel's investigation into these matters was deficient. He also fails to prove counsel was deficient for not challenging the State's case regarding the level of Kim's involvement, the timing of the McLellands' murders, and the number of participants in the murders.

(822) Applicant also fails to rebut the presumption counsel's decisions with respect to these matters constituted reasonable trial strategy.

(823) Applicant had the opportunity to question counsel at the writ hearing about whether he investigated any of these matters and, if not, why he did not. Thus, the record is silent as to what investigation counsel conducted and why he chose not to challenge the State's case on these points.

(824) Usually, a record that is silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption that counsel's conduct was reasonable. *Mallett*, 65 S.W.3d at 63.

(825) And Applicant fails to show any of these alleged deficiencies prejudiced his defense.

Kim Williams's Level of Involvement in Murders

(826) Applicant contends counsel should have investigated Kim Williams's level of involvement. He claims this investigation would have yielded information showing Kim was more culpable than she admitted to law enforcement. According to Applicant, Kim was a willing participant in everything, she came up with the idea of disposing of the gun in the lake, and she was inside the McLelland home during the murders. In support of this claim, Applicant cites to Ray'la McCurry's declaration. (App. at 264-65; AX 22).

(827) Applicant fails to prove by a preponderance of the evidence that counsel's investigation into Kim's level of involvement in the murders was deficient.

(828) Applicant also fails to prove any deficiency in the investigation prejudiced his defense.

(829) Counsel made concerted efforts to investigate Kim and her level of involvement. Counsel attempted to gain access to Kim through her attorneys, moved to depose her,

investigated inmates who may have had contact with her during her pretrial incarceration, and contacted Kim's former classmates. (9 CR 3838; 8 RR 10; 7 WRR 72-73).

(830) Furthermore, counsel hired an expert to evaluate Kim's recorded interviews with law enforcement. And counsel impeached Kim on cross-examination with the inconsistencies between her recorded statements and her direct examination testimony. (54 RR 104-08; 7 WRR 71-72).

(831) Applicant relies on McCurry's declaration and testimony as evidence that Kim's testimony minimized her involvement in the murders. But as previously found, McCurry is not a reliable or credible source of information about Kim.

(832) Even if counsel discovered McCurry and utilized the information in her declaration, it would have done little to impeach Kim's trial testimony.

(833) Kim never painted herself as anything other than a willing participant. She admitted to assisting and attending all three murders. She admitted she was happy about the victims' deaths. And she admitted she drove Applicant to the lake where he disposed of the guns.

(834) Proving it was Kim's idea to get rid of the guns would not have increased her culpability. And even if McCurry put Kim inside the McLelland house, she did not put the murder weapon in Kim's hands. Again, it would not have increased Kim's culpability.

(835) Moreover, evidence Kim may have assisted in ways she did not acknowledge at trial would not have reduced Applicant's culpability. As previously found, the evidence implicating Applicant in the murders was considerable.

(836) Thus, even if counsel discovered McCurry and utilized the information in her declaration, it would have had minimal, if any, impact and would not have altered the outcome of Applicant's trial.

Time of McLellands' Murders

(837) Applicant contends counsel had reason to investigate the possibility the McLellands were murdered around 2:30-3:00 am because a couple of neighbors reported hearing bangs or fireworks around that time. (App. at 265). In support of this claim, Applicant presents what appears to be pages from reports summarizing interviews

law enforcement conducted with neighbors. (AX 42-43). These reports reflect three individuals heard what sounded like fireworks around 2:30-3:00 am on March 30, 2013. *Id.* Applicant claims counsel could have called the State's timeline of the offense into question and raised a doubt as to his guilt if this evidence had been investigated and presented at trial.

(838) Applicant does not explain how such evidence would exculpate him. However, the State's theory the crime occurred at 6:40 am was supported by the evidence of Applicant's entry into and exit from his storage unit that morning.

(839) Applicant presents no evidence counsel was unaware of these law enforcement reports. He also presents no evidence counsel failed to investigate whether the murders could have occurred earlier.

(840) Counsel was likely aware of these reports. Despite voluminous discovery, the defense team was familiar with the State's evidence inculpating Applicant in the McLellands' murders. Counsel Matthew Seymour and defense investigator Rodnic Ward spent a significant amount of time reviewing this evidence and discussing it with Applicant. Applicant's insistence that he did not commit the murders motivated the defense team to find any exculpatory or impeaching evidence. Moreover, counsel knew the State's evidence so well he even predicted what evidence the State would present in the guilt phase. (7 WRR 20-21, 25, 27, 41; SWX 6-7).

(841) Counsel could have reasonably determined it would be fruitless to pursue the possibility the McLellands were shot between 2:30-3:00 am. The records of the alarm company (ADT) showed no movement inside the McLelland house and no doors opening or closing between 11:30 pm and 6:40 am on March 29-30, 2013. Absent some evidence of movement by people or doors around 2:30-3:00 am on March 30, 2013, no rational person would have concluded the murders occurred at this earlier time.

(842) Applicant presents no evidence impugning the alarm company records. And but for law enforcement reports, he presents no evidence supporting his claim the murders occurred earlier.

(843) Given the scarcity of the evidence supporting the theory, Applicant could not have been prejudiced by the decision not to pursue it.

Third Participant

(844) Applicant contends counsel should have utilized evidence that an unidentified male's DNA was found on two items in the storage unit - a sunflower seed and a toothpick - to show someone other than Applicant and Kim Williams had access to the unit. According to Applicant, this evidence was exculpatory because it shows another person may have participated in the murders. (App. at 266).

(845) Applicant fails to prove by a preponderance of the evidence counsel was deficient for not utilizing the discovery of an unidentified male's DNA on the sunflower and toothpick.

(846) Applicant fails to rebut the presumption counsel made a sound strategic decision not to utilize this DNA evidence.

(847) Applicant fails to prove by a preponderance of the evidence counsel's decision not to use this DNA evidence prejudiced his defense.

(848) At the time of trial, the DNA evidence showed the presence of an unidentified male's DNA on the sunflower seed and toothpick found in the storage unit. (SX 578).

(849) The trial record and writ proceedings do not reflect where in the unit the seed and toothpick were found. That someone else's DNA was found on the seed and toothpick does not necessarily show this unidentified person entered the unit.

(850) Even if the DNA evidence showed someone else entered the unit, it does not exculpate or reduce the culpability of Applicant for the murders. The evidence does not put a third person at the scene of the murders or put the murder weapons in someone else's hands. At most, it shows someone else may have been aware of and had access to the unit and its contents. But whether or not someone else had access to the unit, the overwhelming weight of the evidence still points to Applicant as the killer of both Hasse and the McLellands.

(851) In short, the evidence would have yielded little, if any, benefit to the defense. Thus, not utilizing it was sound strategy and could not have affected the outcome of Applicant's trial.

(852) In 2016, the DNA results were reanalyzed. The DNA profile still has not been matched to any other known profile. However, the results are now inconclusive as to Barton Williams and four other known individuals. (83 WRR SWX 1 part 56 at p. 232 - October 7, 2016 Supplemental DNA Laboratory Report, p. 7).

(853) The reanalyzed results were unavailable to counsel at the time of trial. Counsel cannot be deemed deficient for not making use of information that did not exist at the time of trial.

(854) Even if it had existed, however, counsel could have reasonably chosen not to utilize it. At most, the evidence could have impeached Barton Williams's testimony that except for the day he rented it, he never went inside the unit. (44 RR 241-43). And the evidence's impeachment value was minimal; it did not definitively put Barton Williams's DNA in the unit. It only showed his profile could not be excluded, along with the profiles of four others. And, given the overwhelming evidence linking Applicant to the unit and its contents, impeachment of Barton Williams's testimony about the unit would have benefited the defense little, if at all.

(855) Applicant's right to effective assistance of counsel was not violated by counsel's decision not to utilize the results of DNA testing on the seed and toothpick found in the storage unit, and this claim should be denied.

Suppression of LexisNexis Search Results

(856) Applicant contends counsel should have moved to suppress evidence of LexisNexis searches run from his IP address. The searches related to both Hasse and McLelland before their murders, and they showed Applicant was surveilling Hasse. (46 RR 69-76; 49 RR 173-82; SX 311, 311b, 584-587). Applicant claims the searches were run from his own private LexisNexis account, and were obtained them without a search warrant, his consent, or justification for a warrantless search. Therefore, he argues, evidence of the LexisNexis searches was illegally obtained and inadmissible. Further, he claims the State relied on the LexisNexis searches to obtain search warrants for his house and storage unit and his arrest warrant; thus, any evidence obtained as a result of those warrants should also be suppressed. (App. at 267-72).

(857) Counsel filed a motion to suppress evidence of the LexisNexis searches. (10 CR 3918-21). Applicant claims counsel "inexplicably" failed to obtain a hearing or ruling on

the motion and abandoned it. (App. at 270-71). Counsel did not forget about this motion; he withdrew it. (43 RR 4-5).

(858) Applicant fails to demonstrate by a preponderance of the evidence that counsel was deficient for withdrawing the motion to suppress.

(859) Applicant also fails to rebut the presumption that counsel's decision constituted reasonable trial strategy.

(860) And Applicant fails to prove his defense was prejudiced by counsel's decision.

(861) Contrary to Applicant's assertion, the online database searches were not conducted using Applicant's own private LexisNexis account.

(862) Counsel investigated from which LexisNexis account the searches were conducted and determined that the account belonged to Kaufman County, not Applicant. (7 WR 66).

(863) At trial, the State presented evidence through two witnesses, the Kaufman County LexisNexis contracts, the source documents pertaining to the searches, and spreadsheets summarizing the pertinent LexisNexis searches. The State's evidence showed all of the pertinent searches were conducted using an account owned by Kaufman County; that account was identified by the bill group number 126MVF. (46 RR 69-76; 49 RR 173-82; SX 311, 311a, 311b, 584-587).[34]

(864) Moreover, the defense investigator contacted LexisNexis, and the company confirmed Applicant did not have an account in his own name. (7 WRR 66).

(865) Applicant presents no evidence refuting Kaufman County's ownership of the LexisNexis account. His claim is based on unsubstantiated "information and belief." (App. 269).

(866) Ownership of the account was not the only obstacle to suppression, however. No matter who owned the account, a suppression motion could not have succeeded unless Applicant asserted standing. *See Matthews v. State*, 431 S.W.3d 596, 606 (Tex. Crim. App. 2014) (holding federal and state constitutional rights are personal and, thus,

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[34] Access to the CD containing some of the records requires a password – "1ln1nvest."

accused must show search violated his, not third party's, legitimate expectation of privacy). Proof of standing would have required a showing that Applicant, not a third party, had an expectation of privacy in the LexisNexis searches. *Id.* (citing *Rakas v. Illinois*, 439 U.S. 128 (1978)). Thus, Applicant would have had to acknowledge that it was he who ran the complained-of searches. He would have no expectation of privacy in searches run by someone else.

(867) Counsel thoroughly discussed this issue with Applicant, explaining the benefits he could reap from admitting standing and the consequences of denying it. Still, Applicant refused to acknowledge he ran the searches. Realizing the suppression motion would fail, counsel chose to withdraw it. (7 WRR 65-66; SWX 7 - Seymour memos dated 6/30/14 and 9/15/14).

(868) Given Applicant's refusal to acknowledge he ran the searches, counsel made a reasonable strategic decision to withdraw his motion to suppress.

(869) Counsel cannot be deficient for failing to pursue a meritless claim.

(870) If counsel had presented the motion to the court without Applicant's acknowledgement, the court would have denied it based on Applicant's lack of standing. Thus, counsel's decision not to present the motion had no deleterious impact on Applicant's defense.

Legality of Chitty Warrants

(871) Applicant contends counsel should have moved to suppress and objected to the admission of evidence obtained based on a warrant issued by Judge Michael Chitty of Kaufman County. According to Applicant, Judge Chitty authorized the search of Applicant's house at 1600 Overlook knowing he was disqualified from Applicant's case. Applicant argues Judge Chitty's disqualification rendered the search warrant void and, thus, the incriminating evidence seized from his house inadmissible. (App. at 273-74).

(872) Applicant fails to prove by a preponderance of the evidence that counsel's decision not to challenge the validity of the search of his house was deficient. He also fails to prove the decision prejudiced his defense.

(873) Applicant presents no evidence Judge Chitty issued the warrant to search his house.

(874) No copy of the search warrant appears in the clerk's record on direct appeal, and Applicant tendered no extrinsic evidence of the warrant in these writ proceedings.

(875) As it stands, the record reflects only that Judge Chitty issued the warrant for Applicant's arrest in the burglary and theft case and set his bond after his arrest in the instant case. (1 CR 20; 44 RR 74).

(876) But even assuming Judge Chitty issued the search warrant, Applicant fails to show counsel was deficient for not challenging its validity.

(877) To show counsel was deficient for not challenging the warrant, Applicant must show the court would have been obliged to grant a motion to suppress. *Jackson v. State*, 973 S.W.2d 954, 957 (Tex. Crim. App. 1998). Applicant fails to make this showing.

(878) Judge Chitty's issuance of the warrant would not have affected its validity, and, thus, suppression of the evidence seized under it would have been unwarranted.

(879) A judge's disqualification affects his jurisdiction and renders any actions by him null and void. *Lee v. State*, 555 S.W.2d 121, 124 (Tex. Crim. App. 1977). But Applicant fails to demonstrate Judge Chitty was disqualified. Moreover, the record refutes the allegation.

(880) Applicant argues Judge Chitty's disqualification is evident from his recusal. By recusing himself, Chitty showed "he had knowledge of a basis for him to be disqualified from" the case. And "the basis of his recusal would have been known to Judge Chitty at the time he authorized the warrants that made clear [Applicant] was being investigated for the death of the McLellands." (App. at 274).

(881) Applicant is wrong. Recusal is not synonymous with disqualification. A judge may be recused for reasons that do not disqualify him. *See* Tex. R. Civ. P. 18b.

(882) In Texas, a judge may be removed from a case for one of three reasons: he is constitutionally disqualified, he is subject to a statutory strike, or he is subject to disqualification or recusal under Texas Supreme Court rules. *Gaal v. State*, 332 S.W.3d 448, 452 (Tex. Crim. App. 2011). But, generally, grounds for disqualification are limited to those identified in the constitution. *Id.*

(883) Judicial disqualification occurs in a criminal case when (1) the judge is the injured party; (2) the judge has been counsel for the accused or the State; or (3) the judge is related to the defendant or complainant by affinity or consanguinity within the third degree. *See* Tex. Const. art. V, § 11; Tex. Code Crim. Proc. Ann. art. 30.01 (West 2006); Tex. R. Civ. P. 18b(a).

(884) Bias may also be grounds for disqualification, but only where it is shown to be of such a nature, and to such extent, as to deny a defendant due process of law. *Kemp v. State*, 846 S.W.2d 289, 305 (Tex. Crim. App. 1992).

(885) Judge Chitty voluntarily recused himself sua sponte after Applicant was indicted for the instant capital murder. He did so without identifying the reasons behind his decision. (App. at 274; 1 CR 33).

(886) Applicant does not allege or show on what particular basis Judge Chitty chose to recuse himself. He asks the court to infer some unidentified reason for disqualification from the record. The record supports no such inference.

(887) Judge Chitty's issuance of the search warrant for Applicant's house would not have legally barred him from presiding over Applicant's capital murder trial. *Kemp*, 846 S.W.2d at 306 (holding mere fact that judge issued defendant's search or arrest warrant does not disqualify him from presiding over defendant's subsequent trial).

(888) Also, Judge Chitty's testimony at Applicant's trial evinces no grounds for disqualification. There is no evidence that a year and a half before trial, when the warrant for Applicant's house was issued, Judge Chitty knew he would be a witness. Although Applicant was clearly a suspect, it was still uncertain he would be prosecuted for the murders. Moreover, Judge Chitty was not a fact witness to any of the murders. He merely provided background information, identifying Applicant and attesting to his career and his burglary prosecution. Such information could very likely have been provided by any number of individuals.

(889) And there is no evidence Judge Chitty was actually biased against Applicant. Applicant presents no extrinsic evidence of actual bias. Nor is actual bias evident in Judge Chitty's trial testimony. His testimony appears even-tempered and fact based.

(890) Judge Chitty could have voluntarily recused himself for personal reasons that arose well after the search warrant issued and did not bear on his ability to be neutral and detached.

(891) He could also have wished to avoid any appearance of partiality or impropriety, given that he presided over the burglary trial that motivated Applicant to murder Hasse and the McLellands. (44 RR 68-69, 74-76). Although insufficient to require his disqualification, such an appearance may have ethically obligated Judge Chitty to recuse himself. *See* Tex. Code Jud. Conduct, Canon 2(A), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G, app. C (West 2019); *see also* Tex. R. Civ. P. 18b (distinguishing grounds for disqualification from grounds for recusal).

(892) Absent evidence of some disqualifying factor, a challenge to the validity of the search warrant for applicant's house would have been futile. Counsel is not required to file futile motions. *Mooney v. State*, 817 S.W.2d 693, 698 (Tex. Crim. App. 1991); *see also Diaz v. State*, 380 S.W.3d 309, 312 (Tex. App. - Fort Worth 2012, pet. ref'd) (holding counsel not ineffective for not seeking to recuse from suppression hearing and trial same judge who issued blood warrant).

(893) Moreover, the failure to file a futile motion could have had no prejudicial effect on Applicant's defense.

Judicial Bias

(894) Applicant contends counsel should have objected to Judge Snipes's judicial bias and moved to recuse him at trial. (App. at 275).

(895) Applicant fails to prove by a preponderance of the evidence counsel was deficient for not making a judicial bias objection and moving to recuse Judge Snipes.

(896) Applicant fails to rebut the presumption counsel made a sound strategic choice not to make a judicial bias objection or move to recuse Judge Snipes.

(897) Applicant fails to prove by a preponderance of the evidence counsel's decision not to make a judicial bias objection and move to recuse Judge Snipes prejudiced his defense.

(898) As set out in detail in the findings and conclusions on Applicant's Claim 5, Judge Snipes was not biased.

(899) Applicant's right to trial before a neutral and detached hearing officer was not violated.

(900) Thus, any attempt to remove Judge Snipes during Applicant's trial would have failed. Counsel cannot be deemed deficient for failing to pursue a meritless claim.

(901) Counsel could have reasonably concluded that an attempt to remove Judge Snipes would be fruitless.

(902) Furthermore, because Judge Snipes was a neutral and detached hearing officer, Applicant's defense was not prejudiced by counsel's decision not to seek his removal.

(903) Counsel's was not ineffective for not seeking Judge Snipes's removal and the claim should be denied.

Challenge to Jeffress Testimony

(904) Applicant contends counsel rendered ineffective assistance with respect to his handling of the expert testimony of the State's firearm and tool mark examiner James Jeffress. In particular, Applicant contends counsel was deficient for:

- not challenging the technique Jeffress used;
- not challenging his assertion the AFTE[35] Code of Ethics requires an expert who disagrees with the conclusion of another expert to contact the other expert and work toward a mutual conclusion;
- eliciting bolstering hearsay from Jeffress that another examiner had agreed with his results; and
- not making a hearsay objection to Jeffress's testimony which implied the defense expert agreed with him.

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[35] "AFTE" stands for "the Association of Firearm and Tool Mark Examiners."

(App. at 276-88 & fn. 274).

(905) Applicant fails to prove by a preponderance of the evidence counsel's handling of Jeffress's testimony was deficient.

(906) Applicant fails to rebut the presumption that counsel's handling of Jeffress's testimony constituted sound strategy.

(907) Applicant fails to prove by a preponderance of the evidence that counsel's handling of Jeffress's testimony prejudiced his defense.

(908) Jeffress is a well-educated and experienced forensic scientist employed in the firearm and tool mark section of the DPS crime lab. He was qualified as an expert in firearm/tool mark identification. He is a credible and reliable expert witness. (42 RR 7-49; 45 RR 121-53; SWX 17).

(909) As the proponent of Jeffress's expert testimony, the State bore the burden of demonstrating its reliability by clear and convincing evidence. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992); Tex. R. Evid. 702. To be reliable, scientific evidence must satisfy three criteria: (1) the underlying theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. Factors that could affect the determination of reliability include, but are not limited to: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community; (2) the qualifications of the expert testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *Id.*

(910) Before trial, the court conducted a *Daubert/Kelly* hearing at which counsel challenged the validity of the scientific theory underlying Jeffress's testimony. This hearing was conducted in response to a motion filed by counsel. (10 CR 4170-74; 42 RR 6-52). Applicant claims counsel also should have challenged the scientific technique Jeffress used. His claim focuses on Jeffress's testimony concerning the projectiles and casings from the McLelland murder scene, the casings from the highway underpass, and

the live round found in the storage unit. Jeffress's testimony linked them all to one firearm, the McLelland murder weapon.[36]

(911) In particular, Jeffress said he analyzed all of the projectiles and casings found at the McLelland murder scene. He determined all of the casings and projectiles suitable for comparison were fired from the same gun. (45 RR 125-29; SX 285-86, 289, 291). He also analyzed the live round found in the bottom of the tactical bag in the storage unit and found markings on the live round consistent with having been chambered and ejected without being fired. Those markings matched the markings on the 20 casings found at the McLelland murder scene, indicating the round had once been chambered in the murder weapon. (45 RR 129-30; SX 287). Lastly, he analyzed the .223 casings found at the underpass on highway US 175. He determined the markings on those casings matched the markings on the casings from the murder scene and the live round from the bag in the unit. (44 RR 153; 45 RR 137-38; SX 221-34, 236, 290). The McLelland murder weapon was never recovered. Thus, Jeffress did not compare the projectiles, casings, and live round to ammunition test fired from or cycled through a known firearm. (44 RR 147).

(912) Applicant contends Jeffress did not properly apply the scientific technique because he did not utilize ammunition test fired or cycled through a known firearm. Applicant argues counsel should have challenged Jeffress's testimony on this basis in the *Daubert/Kelly* hearing. He attributes this omission to counsel's failure "to perform necessary legal and factual research into the question of whether the firearms analysis in this case was admissible." (App. at 279).

(913) Applicant's characterization of counsel's efforts is inaccurate. Seymour spent a significant amount of time, energy, and resources preparing to challenge the admissibility of Jeffress's testimony. He extensively researched the issue by reading numerous scientific journal articles and contacting some of the authors, he utilized a trial resource guide from a forensic ballistics group website, and he retained a ballistics expert, Dr. Charles Clow. Dr. Clow evaluated all of the ballistics evidence in Applicant's case, and his conclusions were largely consistent with those of Jeffress. Seymour's preparation was

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[36] Jeffress also testified in the punishment phase. He concluded the three projectiles recovered from the Hasse murder scene, clothing, and autopsy were fired from the Ruger .357 revolver recovered from the lake. (49 RR 14-18; SX 537, 542). Applicant raises no ineffective assistance complaint with respect to this testimony.

so extensive that in the process, he became something of a ballistics expert himself. (7 WRR 31-32, 63-65). Furthermore, he thoroughly cross-examined Jeffress during the hearing and before the jury. (42 RR 24-46, 48-49; 45 RR 139-51). And he argued against its reliability at length in closing. (47 RR 45-47). There was nothing deficient about counsel's preparations for Jeffress's testimony.

(914) Furthermore, no matter how much effort counsel put into this issue, a challenge to the reliability of Jeffress's testimony based on the absence of a known murder weapon would have failed.

(915) Citing the 2009 NAS report[37] and *Sexton v. State*, 93 S.W.3d 96 (Tex. Crim. App. 2002), Applicant contends no firearm and tool mark examiner may identify a projectile, casing, or round as having been fired from or cycled through the same firearm without having the firearm available for creating test tool marks. (App. at 277-84). His argument is based on outdated information and legal authority.

(916) Since the NAS Report was published in 2009, "the Firearms and Toolmarks community has published a large volume of studies regarding the theoretical and practical aspects of the practice of comparing toolmarks present on bullets and cartridge cases to both test fires generated in the laboratory as well as other items of evidence submitted to the laboratory. These studies, even when using consecutively manufactured components, have had error rates ranging from 0 to 1.5%." (SWX 17 at No. 17).

(917) As for *Sexton*, the opinion is neither persuasive nor controlling authority. First, it is factually distinguishable. In *Sexton*, the firearm examiner's testimony comparing magazine marks on ammunition without the magazine was excluded because he could not explain the machining methods used to create the magazine, did not properly qualify his testimony as to the certainty of his identification, and did not provide sufficient studies involving the analysis of magazine marks or even tool marks in general. Jeffress's testimony did not suffer from this deficiency; he demonstrated a full understanding of the science and the method he employed. (45 RR 121-53).

(918) Also, at the time *Sexton* was decided, there were few validation studies pertaining to identification by tool marks without a known tool. Now, Jeffress and other qualified

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[37] National Research Council, Strengthening Forensic Science in the United States, A Path Forward (2009).

examiners can explain the scientific underpinnings of firearm/tool mark identification. Moreover, there are dozens of published studies pertaining to identification without a known tool. (SWX 17 at Nos. 18 & 19).

(919) Applicant argues a known firearm is necessary to prevent an examiner from confusing subclass characteristics with individual characteristics. (App. at 280). A properly trained examiner, Like Jeffress, can reliably distinguish between subclass and individual characteristics without a known firearm. (SWX 17 at Nos. 10-12).

(920) In short, the evidence clearly and convincingly shows the science does not require a known firearm for identification. The evidence shows the technique or method Jeffress employed in his analysis of the evidence was valid and properly applied by him. (SWX 17); *see also Lewis v. State*, No. 02-13-00367-CR, 2014 WL 7204708, at *7-11 (Tex. App. - Fort Worth Dec. 18, 2014, pet. ref'd) (not designated for publication) (holding Jeffress's testimony that casing found at scene had been loaded into same magazine as unfired cartridge found in accomplice's truck premised on reliable scientific methodology despite lack of test from known weapon).

(921) Applicant contends Jeffress misrepresented that the AFTE Code of Ethics requires an examiner who disagrees with the conclusions of another examiner to contact the other examiner and "come to a mutual conclusion." (45 RR 153). Applicant claims counsel should have exposed this on cross-examination of Jeffress.

(922) The AFTE Code of Ethics provides the following:

> It shall be regarded as ethical for one examiner to re-examine evidence material previously submitted to or examined by another. Where a difference of opinion arises, however, as to the significance of the evidence or to the test results, it is in the interest of the profession that every effort be made by both examiners to resolve their conflict before the case goes to trial. However, work product and trial strategy may require consent of counsel.

(SWX 17 - Appendix 2).

(923) On its face, the provision does not require an examiner to contact an examiner whose conclusions he disagrees with. Thus, if counsel had confronted Jeffress with this

provision, he could have impeached Jeffress on that point. But it would have had little prejudicial impact on Jeffress's credibility.

(924) The introduction of the AFTE Code of Conduct states it is a guide, not all-inclusive or immutable law. The introduction also states the code represents "general standards, which each worker should strive to meet." (SWX 17 – Appendix 2 of Jeffress Affidavit). Thus, while the code does not require communication and resolution of disagreements among examiners, it endorses it as the ethical standard by which examiners should abide, a fact the State could easily have established on re-direct examination of Jeffress.[38]

(925) In light of this, counsel could have reasonably concluded attacking Jeffress on this point would have yielded little benefit to the defense.

(926) Applicant claims counsel should have objected to Jeffress's testimony about the ethics code provision as hearsay because it implied Clow, the defense expert, agreed with Jeffress's conclusions. (App. at 286 fn. 274).

(927) Jeffress testified on re-direct examination that:

- after he completed his analysis of the evidence, he packaged it and released it to a firearms examiner at the Tarrant County Medical Examiner's Office;
- the Tarrant County lab has good firearms examiners that do work for defense attorneys; and
- no one contacted him afterwards disagreeing with his conclusions in Applicant's case.

(45 RR 151-53).

(928) The State elicited this testimony in response to counsel's concerted efforts on cross-examination to impeach the reliability of Jeffress's conclusions. (45 RR 139-51). Thus, to the extent Applicant argues the complained-of testimony was "bolstering," he is incorrect. *Cohn v. State*, 849 S.W.2d 817, 819 (Tex. Crim. App. 1993) (defining

[38] While Jeffress himself does not belong to AFTE (SWX 17 at No. 23), it appears Clow is a board member of the organization. *See* https://afte.org/about-us/board-of-directors.

bolstering as improperly using evidence to add credence or weight to another unimpeached piece of evidence offered by the same party). The State was rehabilitating Jeffress after impeachment.

(929) Even assuming this testimony constituted inadmissible hearsay, it did not prejudice Applicant's defense. If counsel had objected to it, at most, he would have kept out the implication the defense expert impliedly agreed with Jeffress's conclusions. The State could still have elicited from Jeffress the fact that the evidence had been made available to the defense for testing. This would have been responsive to counsel's impeachment of Jeffress on cross-examination and not hearsay.

(930) Moreover, to the extent the complained-of testimony implied the defense expert agreed with Jeffress, it was correct. (7 WRR 73-74). In other words, the State did not present false testimony to the jury on the matter.

(931) Lastly, Applicant argues counsel should have objected to Jeffress's testimony that his conclusions were verified by a second firearm/tool mark examiner. (45 RR 143). Applicant argues this testimony was inadmissible hearsay and not responsive to the prosecutor's question. He claims counsel should have objected and moved to strike the testimony. (App. at 288).

(932) Again, the complained-of testimony occurred on re-direct examination, following counsel's impeachment of Jeffress. (45 RR 139-51).

(933) Even assuming the complained-of testimony was non-responsive and inadmissible hearsay, counsel could have made a reasonable strategic decision not to object to it. If prevented from eliciting this information through Jeffress's hearsay testimony, the State could have presented the second examiner as a witness to testify to the results of his own analysis of the same evidence. This would have been responsive to counsel's impeachment of Jeffress and not hearsay. It would also have drawn further attention to highly inculpatory evidence. Opting to avoid emphasizing this evidence and, instead, allow the complained-of hearsay testimony was a sound strategic choice. In doing so, counsel avoided greater prejudice to the defense.

(934) Counsel rendered effective assistance in his handling of Jeffress's testimony, and this claim should be denied.

Challenge to Fingerprint Evidence

(935) Applicant contends counsel should have requested a *Daubert/Kelly* hearing and challenged the admissibility of expert testimony identifying latent fingerprints found in the Crown Victoria and on one of the firearms recovered from the storage unit as Applicant's fingerprints. The State presented the fingerprint identification evidence through two DPS latent fingerprint examiners - Jack Flanders and Mark Wild. Both experts analyzed the print evidence utilizing the ACE-V method. (46 RR 35-55; SX 301-307). Applicant argues the ACE-V method is not "foundationally valid" and Flanders and Wild did not reliably apply it. Applicant claims a challenge to the method and its application would have resulted in the exclusion of the evidence and altered the outcome of his trial. (App. at 288-322).

(936) Applicant fails to prove by a preponderance of the evidence counsel was deficient for not challenging the admissibility of fingerprint identification evidence.

(937) Applicant fails to rebut the presumption counsel made a sound strategic choice not to challenge the admissibility of the fingerprint identification evidence.

(938) Applicant fails to prove by a preponderance of the evidence that counsel's decision not to challenge the admissibility of the fingerprint identification evidence prejudiced his defense.

(939) The proponent of expert testimony bears the burden of demonstrating its reliability by clear and convincing evidence. *Kelly v. State*, 824 S.W.2d 568, 573 (Tex. Crim. App. 1992); Tex. R. Evid. 702. To be reliable, scientific evidence must satisfy three criteria: (1) the underlying theory must be valid; (2) the technique applying the theory must be valid; and (3) the technique must have been properly applied on the occasion in question. *Kelly*, 824 S.W.2d at 573. Factors that could affect the determination of reliability include, but are not limited to: (1) the extent to which the underlying scientific theory and technique are accepted as valid by the relevant scientific community; (2) the qualifications of the expert testifying; (3) the existence of literature supporting or rejecting the underlying scientific theory and technique; (4) the potential rate of error of the technique; (5) the availability of other experts to test and evaluate the technique; (6) the clarity with which the underlying scientific theory and technique can be explained to the court; and (7) the experience and skill of the person who applied the technique on the occasion in question. *Id.*

(940) The court may respond to a challenge to the reliability of expert testimony by holding a "*Daubert*" or "*Kelly*" hearing at which the parties are afforded the opportunity to demonstrate the reliability or unreliability of the expert testimony. *Wolfe v. State*, 509 S.W.3d 325, 328 (Tex. Crim. App. 2017); Tex. R. Evid. 705.

(941) If counsel had requested it, the court would have conducted a hearing on the reliability of the fingerprint identification testimony. But Applicant fails to show the testimony was unreliable and, thus, excludable.

(942) In his attack on the validity of the ACE-V method, Applicant points to "the NAS Report,"[39] "the OIG Report,"[40] and "the PCAST report."[41] Applicant suggests these reports call into question the "foundational validity" of the ACE-V method.

(943) The NAS Report did not conclude fingerprint evidence is so unreliable as to render it inadmissible. It stressed the subjective nature of the judgments made by an examiner during the ACE-V process, and focused on the need to prevent overstatements about the accuracy of a comparison and the need for additional research. *See U.S. v. Rose*, 672 F.Supp. 2d 723, 725 (D. Md. 2009); *see also Commonwealth v. Gambora*, 457 Mass. 715, 933 N.E.2d 50, 58 (2010).

(944) The OIG Report regarding the Mayfield case did not discredit the ACE-V method either. Ultimately, the ACE-V method was used to correctly identify the fingerprint at issue in the Mayfield case. The OIG Report concerned the importance of independent verification of an examiner's findings and the importance of a defendant's opportunity to have an independent expert examine the latent prints at issue in a particular case. *Id.* at 726.

(945) And the PCAST Report concluded "that latent fingerprint analysis is a foundationally valid subjective methodology." Furthermore, it determined,

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[39] National Research Council, Strengthening Forensic Science in the United States, A Path Forward (2009).

[40] Office of Inspector General, A Review of the FBI's Handling of the Brandon Mayfield Case (2006).

[41] President's Council of Advisors on Science and Technology, Forensic Science in Criminal Courts: Ensuring Scientific Validity of Feature-Comparison Methods (2016).

"Conclusions of a proposed identification may be scientifically valid, provided that they are accompanied by accurate information about limitations on the reliability of the conclusion." PCAST Report at 101.

(946) The ACE-V method is foundationally valid.

(947) Applicant fails to show Flanders and Wild did not validly apply the ACE-V method in his case.

(948) The PCAST Report concluded valid application of the ACE-V method requires that an expert:

- Have undergone appropriate proficiency testing to ensure he or she is capable of analyzing the full range of latent fingerprints encountered in casework and reports the results of the proficiency testing;
- Disclose whether he or she documented the features in the latent print in writing before comparing it to the known print;
- Provide a written analysis explaining the selection and comparison of the features;
- Disclose whether, when performing the examination, he or she was aware of any other facts of the case that might influence the conclusion; and
- Verify the latent print in the case at hand is similar in quality to the range of latent prints considered in the foundational studies.

PCAST Report at 102.

(949) Applicant argues the State would have been unable to prove that Flanders and Wild were capable of reliably applying the ACE-V method, they did reliably apply it, or their assertions were valid. (App. at 310). He fails to substantiate this claim.

(950) Applicant presents no evidence showing Flanders and Wild were not qualified or properly trained. Applicant claims there is no evidence that they received regular proficiency testing, but he makes no showing they did not receive it.

(951) Moreover, the record indicates both experts were qualified and properly trained. In addition to his degrees in anthropology and biology, Flanders completed a year-long DPS training program in fingerprint analysis that covered processing and comparison of latent prints, digital photography, lifting, and report writing. Since this training, Flanders completed continuing education courses covering these same areas. He had been comparing prints for about one-and-a-half years, and demonstrated a thorough understanding of the ACE-V method. (46 RR 35-38). Although Wild did not detail his own training, he confirmed he, too, worked in the DPS Crime Lab on a daily basis. (46 RR 47).

(952) Applicant points out Flanders made a mistake applying the method with respect to other latent prints collected in Applicant's case. Specifically, he did not compare them in the proper orientation. Applicant fails to show how this isolated mistake means Flanders could not reliably apply the method. That it was caught and rectified indicates Flanders and the crime lab were vigilant in pursuing accurate and reliable results.

(953) Moreover, to the extent this mistake impugned Flanders's opinion, it did not go unnoted at trial. It was reflected in Flanders's November 24, 2014 report, and counsel confronted Flanders with it during cross-examination. (46 RR 45; SX 305).

(954) Applicant also notes that somehow the DNA of two other DPS fingerprint examiners was found on some of the weapons seized from the storage unit. Apparently, the examiners touched the firearms before they were processed for DNA. Flanders's DNA was not found on the firearms. He and every other member of his section were required to attend a contamination prevention program. (49 RR 36-38).

(955) Applicant fails to explain how this impugns Flanders's and Wild's testimony. It does not relate to the application of the ACE-V method, and had nothing to do with their handling of the evidence. The fact the "contamination" was discovered and remedial action was taken indicates the crime lab is vigilant in policing its work and ensuring its reliability. Moreover, counsel brought it to the jury's attention during cross-examination of Flanders in the punishment phase.[42] (49 RR 36-37).

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[42] Applicant does not allege counsel rendered ineffective assistance by not challenging the reliability of Flanders's punishment phase testimony identifying the latent prints found on a fiber board in the Sable as those of its prior owner, Jeff Reynolds.

(956) Applicant claims counsel failed to confirm the latent prints were of sufficient quality to support the experts' identification opinions. In support of this claim, Applicant cites to the prints as they appear in the exhibit volume of the reporter's record. (60E RR SX 301-03, 306-07). Applicant presents no evidence counsel did not have access to the original prints or other reproductions that were of higher quality. Applicant had the opportunity to ask counsel what he had access to and chose not to.

(957) Applicant claims there is no evidence Flanders and Wild completely documented their analysis of the latent before comparing it to Applicant's known prints. Applicant does not present Flanders's and Wild's files for review. Thus, he fails to show they did not generate the proper documentation.

(958) Applicant also fails to present any evidence the examiners did not follow proper procedure. In fact, Flanders's testimony refutes such a claim; Flanders testified he completed his analysis of the lifted latent prints before comparing them to Applicant's known prints. (46 RR 44).

(959) Applicant also fails to present any evidence showing Flanders and Wild were exposed to contextual bias, that is, were influenced by irrelevant information.

(960) Applicant argues Flanders and Wild used improper terminology, overstating the accuracy of their comparisons. (App. at 314-16). The record shows the experts referred to "making an identification." More specifically, they identified points of comparison on the both the unknown and known prints, compared them side by side, and determined whether they originate from the same source or not. By "making an identification," the experts determined the unknown and known prints originated from the same source. The experts made an identification only if there were sufficient points of comparison, or common characteristics. (46 RR 37-38, 48-50). This testimony did not leave a false impression with the jury about the reliability of the opinions. *See Escobar v. State*, No. AP-76,571, 2013 WL 6098015, at *19-21 (Tex. Crim. App. Mar. 10, 2014); *Foster v. State*, No. 04-18-00326-CR, 2019 WL 3805499, at *1-2 (Tex. App. – San Antonio Aug. 14, 2019, no pet.) (not designated for publication).

(961) In short, the record indicates Flanders and Wild were trained experts who properly employed the ACE-V method in Applicant's case. Applicant's claims to the contrary are unsubstantiated.

(962) Counsel likely knew any challenge to the fingerprint identification evidence would fail and, thus, opted not to pursue it. To the degree he could do so, counsel did impeach the experts' testimony on cross-examination. Moreover, counsel relied on the fingerprint evidence to argue the existence of unidentified prints on the Crown Victoria. (47 RR 38-39). Attacking the fingerprint experts' testimony would have been inconsistent with this argument. This was sound trial strategy.

(963) Even if the fingerprint identification testimony had been excluded, it would not have affected the outcome of Applicant's trial. Although the testimony linked Applicant to the murders, it was far from the only evidence that did. Even without the fingerprint identification testimony, Applicant's culpability was shown. The State linked Applicant to the murders through a substantial amount of circumstantial evidence, including the incriminating Crime stoppers tip sent from Applicant's IP address, the video and storage unit records showing the Crown Victoria coming and going from the unit at times consistent with the McLellands' murders, the recovery of the Hasse murder weapon and the mask from Lake Tawakoni, and the bullet from Applicant's storage unit that was cycled through the McLellands' murder weapon.

(964) Thus, counsel's decision not to challenge the reliability of the fingerprint identification testimony did not prejudice Applicant's defense.

(965) Applicant's right to effective assistance of counsel was not violated by counsel's decision not to challenge the fingerprint identification testimony, and the claim should be denied.

Challenge to Chain of Custody

(966) Applicant contends counsel should have objected the State failed to establish a proper chain of custody for State's Exhibit 102, an unfired round found in Applicant's storage unit. James Jeffress, a DPS forensic firearm and tool mark examiner, analyzed the round and determined it had been fired from the same weapon used to kill the McLellands. (45 RR 131-36; SX 283-84, 288).

(967) Applicant claims the State failed to establish proper chain of custody for the round because the sponsoring witness, FBI Agent Diana Strain, did not testify about "who seized the round, what kind of identifying mark was placed on it, who placed the round in storage and who brought it to trial." (App. 322). Applicant argues a proper

objection would have resulted in exclusion of the round or the jury giving it less weight and, as a result, there would have been a different outcome in his trial. (App. at 322-23).

(968) Applicant fails to prove by a preponderance of the evidence counsel was deficient for not objecting or that the decision prejudiced his defense.

(969) Further, the record supports counsel's decision was reasonable trial strategy and had no deleterious impact on Applicant's defense.

(970) The State presented the projectile through FBI Agent Diana Strain, the team leader of the Evidence Response Team (ERT) in the Dallas FBI Office. (45 RR 55). The ERT processes scene and has 32 members, including agents and support personnel. A senior team leader handles the administrative procedures and the remaining members are divided into three teams. Each team has a team leader, a photographer, an evidence technician, a sketcher, and additional people conducting the search. (45 RR 56). Extensive training is required to be an ERT member, and Strain had been a team leader for five years. (45 RR 57).

(971) Agent Strain described the ERT's procedures for processing scenes. Once ERT members arrive at the scene, they receive a pre-briefing of the facts of the investigation. Then the team leader and assistant team leader enter the scene and conduct a preliminary survey. They return to the team and re-brief them. First, the photographer and the sketcher document the condition of the scene upon the team's arrival. Then the rest of the team begins to process the scene. (45 RR 57-58).

(972) Agent Strain led fourteen ERT members in the processing of the storage unit. The team was assisted by Texas Rangers and an ATF agent. During the search of the unit, the ERT discovered a bag containing tactical equipment and a .223 caliber Lake City round. The round was found loose in the bottom of the bag. (45 RR 77-78). The prosecutor showed Strain State's Exhibit 102 and she identified it as the live .223 Lake City round collected from the bag. According to Strain, it was marked as FBI No. 127 and the bag it was found in was marked FBI No. 128. The round was subsequently admitted into evidence without objection from counsel. (45 RR 88-89; SX 102).

(973) A photograph of the round in the trial record shows handwriting on the underside of the baggie containing the round; only a portion of the handwriting is discernible. The baggie is stored in a larger baggie bearing two stickers. One sticker bears a bar code, identification numbers, a 2015 storage date, and the description "ONE

ROUND WITH GLASS VILE OF GU." The other is an exhibit sticker. (60C RR SX 102).

(974) Applicant had the opportunity to question counsel at the writ hearing about the decision not to object to the round, but didn't. The record is silent as to counsel's reasons for not objecting.

(975) Usually, a record silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption counsel's conduct was reasonable. *Mallett*, 65 S.W.3d at 63.

(976) From the record, it may be deduced counsel's choice not to object constituted reasonable trial strategy. The State did not offer each person who touched the round at the storage unit or each person who transported the round following its seizure, but the State did not do this for most of the physical evidence. This was not surprising given the sheer volume of physical evidence seized and the time it would have taken to present every link in the chain for every piece of evidence offered. Thus, counsel likely concluded the State was not unable to prove up each link in the chain but was simply trying to be efficient. Strain's testimony indicates the State would have had no trouble in proving up each link in the round's chain of custody. Her testimony shows experienced federal agents with significant training in crime scene processing marked and processed the round with care. It also shows the round was found by an ERT member and given a specific number. Moreover, counsel knew the round had been analyzed by DPS forensic analyst James Jeffress and knew it had been transported to the lab after seizure.

(977) The only alteration to the round was its disassembly during subsequent lab analysis, which the State acknowledged before offering it into evidence and counsel would have been well aware of given his extensive preparation on the ballistics evidence. (45 RR 89).

(978) Applicant does not allege or demonstrate the round was tampered with or counsel had any reason to suspect it had been tampered with.

(979) Counsel could and likely did deduce that objecting would only have resulted in drawing further attention to a damning piece of evidence.

(980) Even if counsel had objected to deficient authentication of the round, it would not have resulted in its exclusion. Nor would the round have been given less evidentiary

weight by the jury. As Agent Strain's testimony indicated, the State could have supplied the "missing" links in the chain.

(981) Laurie Gibbs, the former co-case agent for the FBI in the investigation, attested by affidavit she participated in the search of the storage unit, noticed the round in the bag, and brought it to the ERT's attention because she believed it was significant. She was present when the ERT members collected and packaged it. She also attested that all evidence was turned over to the Kaufman Sheriff's Office before being submitted to the Garland DPS lab. Agent Gibbs's affidavit fills in any gaps in the chain of custody for the round. (SWX 15). *See Norris v. State*, 507 S.W.2d 796, 797 (Tex. Crim. App. 1974) (holding officer of local crime lab's testimony he received exhibits in question from local police officers, logged them in and turned them over to analyst was sufficient to establish chain of custody).

(982) Thus, Applicant was not prejudiced by counsel's decision not to object.

Challenge to State's Closing Argument

(983) Applicant contends counsel rendered ineffective assistance by not objecting to a comment made by the State during closing argument in the guilt phase.

(984) Applicant fails to prove by a preponderance of the evidence counsel was deficient for not objecting to the State's argument.

(985) Applicant fails to rebut the presumption counsel made a sound strategic choice not to object to the State's argument.

(986) Applicant fails to prove by a preponderance of the evidence counsel's decision not to object to the State's argument prejudiced his defense.

(987) The law governing proper argument as set out in response to Applicant's Claim 2 is incorporated here by reference.

(988) Applicant contends counsel should have objected to the following argument:

> If not [Applicant], then who? If it's not [Applicant], then who is the mystery murderer that simultaneously harbors a murderous rage against the McLellands but also bears the intelligence and the ill will against [Applicant] to frame him? Who is this person? They say Kim Williams.

> Well, that doesn't work. She may hate the McLellands, but why would she frame her husband? If not him, then who? Ask yourself that question as you consider the evidence. Ask yourself that question as you go back and look at motive in this case. If not him, then who?

(47 RR 51). The State repeated the "if not him, then who" refrain during its closing. (47 RR 52, 55). Applicant contends this argument improperly assigned a burden to the defense to present an alternate suspect and shifted the burden to him to prove his innocence. (App. at 324). Applicant mischaracterizes the argument and takes it out of context.

(989) The State made the above argument in rebuttal. The State opened its guilt argument with a lengthy and detailed recitation of all of the evidence implicating Applicant in the McLelland murders. The State likened the circumstantial evidence linking Applicant to the murders to a fingerprint. (47 RR 11-32). Counsel followed with an argument that Applicant was innocent and the State's evidence was weak and circumstantial. (47 RR 32-50). The above rebuttal argument did not tell the jury to shift the burden of proof to Applicant but challenged counsel's argument Applicant was not the murderer and the circumstantial evidence of guilt was weak.

(990) Moreover, during the opening argument, the State expressly acknowledged its burden of proof and argued how the State had met its burden. (47 RR 11-12, 14-16, 32). And in rebuttal, the State expressly addressed counsel's attacks on the purported weaknesses in the State's evidence. (47 RR 51-57). The State did not suggest Applicant should shoulder the burden instead.

(991) The court would have overruled an objection the complained-of argument improperly shifted the burden of proof to Applicant.

(992) Regardless of any impropriety in the above argument, counsel could have made a sound strategic decision not to object to it.

(993) The decision to object to particular statements made during closing argument is a matter of trial strategy. *Nicholson,* 577 S.W.3d at 570.

(994) Applicant had the opportunity to question counsel in the writ hearing as to their reasons for not objecting, but did not.

(995) Usually, a record silent as to counsel's motivations for a tactical decision cannot overcome the strong presumption counsel's conduct was reasonable. *Mallett*, 65 S.W.3d at 63.

(996) Counsel could have reasonably concluded objecting to the complained-of arguments would have needlessly drawn further attention to them, especially in light of the court's instructions the law placed the burden of proof on the State and any arguments inconsistent with the law should be disregarded. (11 CR 4276, 4278);[43] *see Bryant*, 282 S.W.3d at 173.

(997) Finally, any impropriety in the complained-of arguments did not prejudice Applicant's defense. It was not extreme or manifestly improper or violative of a mandatory statute, and did not inject new facts harmful to Applicant. *See Hawkins*, 135 S.W.3d at 79. The court properly instructed the jury on the law governing the burden of proof and told the jurors to disregard any arguments conflicting with the law. (11 CR 4276, 4278). The jury is presumed to have followed those instructions. Counsel's decision not to object did not prejudice Applicant's defense.

(998) Counsel did not render ineffective assistance by not objecting to the above-cited arguments, and this claim should be denied.

Claim 3: Cronic

(999) In Claim 3, Applicant contends that trial counsel's failure to review all of the State's discovery before trial constituted ineffective assistance under the standard enunciated in *United States v. Cronic*, 466 U.S. 648 (1984). (App. at 331-40).

Claim Not Previously Raised on Direct Appeal

(1000) Applicant could have but failed to raise this claim on direct appeal.

(1001) Habeas corpus will not lie as a substitute for direct appeal. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004). Even a constitutional claim is forfeited if

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[43] The Court's instruction read: "You are instructed that any statements of counsel made during the course of the trial or during argument not supported by the evidence, or statements of law made by counsel not in harmony with the law as stated to you by the Court in these instructions, are to be wholly disregarded."

Applicant had the opportunity to raise it on appeal and did not. The writ of habeas corpus is an extraordinary remedy available only when there is no other adequate remedy at law. *Id.*

(1002) Nothing prevented Applicant from raising this claim on direct appeal.

(1003) The only new evidence Applicant has to support this claim that was not already part of the appellate record is additional statements from counsel reiterating the tremendous amount of discovery that they never finished reviewing. (5 WRR 39-43; 7 WRR 41-43; AX 53).

(1004) Applicant's *Cronic* claim is an improper attempt to use the writ as a substitute for appeal.

(1005) Applicant's *Cronic* claim is not cognizable and should be denied.

No Cronic Violation

(1006) Alternatively, Applicant fails to demonstrate a violation of his right to effective assistance under *Cronic*.

(1007) The Supreme Court handed down *Strickland* and *Cronic* on the same day. Under *Strickland*, claims of inadequate legal assistance require a defendant to show deficient performance by counsel as well as prejudice. Deficient performance means that counsel's representation fell below an objective standard of reasonableness under prevailing professional norms. *Strickland*, 466 U.S. at 688. Courts indulge a strong presumption counsel's conduct falls within the wide range of reasonable professional assistance, and a defendant must overcome the presumption the challenged action might be considered sound trial strategy. *Id.* at 689.

(1008) To show prejudice, a defendant must show a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. *Id.* at 694. In the punishment phase of a death penalty trial, the standard is whether there is a probability sufficient to undermine confidence in the outcome, or "absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death." *Id.* at 695; *Martinez v. Quarterman*, 481 F.3d 249, 254 (5th Cir. 2007) (applying *Strickland* standard in Texas death penalty case).

(1009) The opinion in *Cronic* eliminates *Strickland's* prejudice requirement if the circumstances are so likely to prejudice the accused that the cost of litigating their effect is unjustified. *Cronic*, 466 U.S. at 658. These circumstances exist in three situations: (1) when there is the complete denial of counsel at a critical stage, (2) when counsel entirely fails to subject the State's case to meaningful adversarial testing, and (3) when the likelihood that any lawyer--even a fully competent one--could provide effective assistance is so small that a presumption of prejudice is appropriate without inquiry into the actual conduct of the trial. *See Bell v. Cone*, 535 U.S. 685, 695-697 (2002).

(1010) Applicant contends he is entitled to relief under *Cronic* because without more time to finish reviewing discovery, no competent counsel could have rendered effective assistance in his case and his counsel could not subject the State's case to meaningful adversarial testing. (App. at 340).

(1011) Applicant fails to prove by a preponderance of the evidence that no counsel could have rendered effective assistance without additional time to finish reviewing the discovery. He also fails to prove his counsel entirely failed to subject the State's case to meaningful adversarial testing because he did not finish reviewing the discovery.

(1012) The circumstances in Applicant's case did not prevent competent counsel from rendering effective assistance, and counsel did subject the State's case to adversarial testing.

(1013) It is undisputed the State provided a great deal of discovery in Applicant's case and Applicant's counsel did not review it all before trial.[44] (2 RR 7; 4 RR 12-14; 6 RR 12-13 9 RR 32-35; 43 RR 8-9; 5 WRR 39-43; 7 WRR 37-43; 8 WRR 89-91; AX 53).

(1014) But the State provided more discovery than it was required to provide in Applicant's case. The State chose to comply with the Michael Morton Act, the current version of article 39.14 of the criminal procedure code, even though the act was inapplicable to Applicant's case. Ultimately, the State gave the defense a copy of everything in its possession. (6 RR 16; 8 WRR 89-90).

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[44] References to the amount of data have ranged from 17 to 25 terabytes. (6 RR 17; 43 RR 8-9; 5 WRR 110; 8 WRR 89).

(1015) Thus, Applicant's claim is predicated on counsel's failure to review items the State was not legally obligated to provide to the defense.

(1016) Relying on the ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases, Applicant argues counsel is obligated to review and be familiar with the State's file. (App. at 322).

(1017) But Applicant provides no authority for the proposition counsel must review everything in the State's possession in order to render effective assistance.

(1018) And *Cronic* itself indicates otherwise. In *Cronic*, defense counsel was appointed 25 days before trial in a case the State had taken 4½ years to investigate and during which, had accumulated and reviewed thousands of documents. The Supreme Court concluded the circumstances did not warrant a presumption of prejudice, stating, "Neither the period of time that the Government spent investigating the case, nor the number of documents that its agents reviewed during that investigation, is necessarily relevant to the question whether a competent lawyer could prepare to defend the case in 25 days." *Cronic*, 466 U.S. at 663.

(1019) In other words, just because the State collects and reviews something does not mean the defense must do so. As noted in *Cronic*, "The Government's task of finding and assembling evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge." *Id.* at 664.

(1020) The investigation in Applicant's case generated a lot of data because of the nature of his crimes. Applicant murdered an assistant prosecutor; then two months later, he murdered the elected prosecutor and his wife. Given Hasse's profession, at first, authorities had a wide variety of suspects, and a manhunt involving multiple agencies ensued. During this initial manhunt, a substantial amount of data was generated. Much of that data, however, was irrelevant to Applicant's defense. For instance, there were hotel manifests from the interim between the murders, and in-car video from law enforcement traffic stops after Hasse's murder. (5 WRR 112; 7 WRR 41-42, 98). The investigation focused on Applicant only after the McLellands' murders. At that point, the data generated by the investigation began to revolve around Applicant.

(1021) Although much of the data generated between Hasse's and the McLellands' murders had little bearing on Applicant's defense, the defense received it in discovery.

Thus, the defense received a significant amount of data that was of little use or benefit to Applicant.

(1022) That said, the State did not bury the defense in immaterial information to thwart counsel's trial preparation. Rather, the State provided discovery in a timely fashion and in an accessible, organized format.

(1023) Once the State realized the quantity and complexity of the information at issue, it obtained the services of the Tarrant County Criminal District Attorney's Office to process, organize, and deliver the discovery to the defense team. With the assistance of the Tarrant County office, the discovery was professionally managed, duplicated, and delivered to the defense. (6 RR 13-15; 7 WRR 37; 8 WRR 90-93).

(1024) Moreover, the State did not oppose the defense's first or second motions for continuance. Rather, the State confirmed that, in terms of discovery, Applicant's case was the largest case anyone on the prosecution team had seen and that counsel's remarks about discovery were "well taken." (10 CR 4002-06; 4 RR 12-17).

(1025) Under *Brady* and article 39.14, Wirskye prepared a "person of interest" spreadsheet. The spreadsheet identified where the defense could locate information in the discovery related to each "person of interest" identified in the investigation. Wirskye emailed directly to counsel items that were time-sensitive, required disclosure under *Brady*, or were otherwise significant. Also, on request, Wirskye directed counsel to items or information counsel had difficulty locating in the discovery. And at Wirskye's direction, any copies made during the discovery process were provided first to the defense to ensure they had access to it as soon as possible. (10 CR 3947-48; Unsealed CR 378-95; 7 WRR 42-43; 8 WRR 91-93).

(1026) As in *Cronic*, the State utilized its resources to assemble, organize, and summarize a substantial amount of data, thus, simplifying the work of the defense team. *Id.* at 663-64 ("[T]he time devoted by the Government to the assembly, organization, and summarization of the thousands of written records . . . unquestionably simplified the work of the defense counsel . . .").

(1027) The court was aware early on that discovery involved an enormous amount of data, and monitored the discovery process. (2 RR 7). The court required written updates from both sides about how much discovery had been provided and when and how much more remained to be delivered. (9 CR 3612-16; 6 RR 7-8).

(1028) The court gave counsel additional time to prepare for trial based, in part, on the need to review discovery. The court initially scheduled jury selection to begin on May 5, 2014 and trial to start on October 20. (3 RR 6). The court postponed jury selection nearly 4 months (from 6/2/14 to 9/22/14), and delayed the trial date by an additional 6 weeks (from 10/20/14 to 12/1/14). (6 RR 21; 9 RR 37). From the date the State announced its intent to seek the death penalty (6/23/13), the defense had over 16 months to prepare for trial.[45] (1 CR 63; 4 RR 15). This was longer than the judge had granted counsel three other death penalty cases he presided over. (4 RR 15).

(1029) The State and the court facilitated the defense's receipt and review of the discovery.

(1030) Furthermore, the amount of discovery was not so great that its review could not have been completed by the defense team before trial.

(1031) Applicant argues that to finish reviewing the discovery before trial, it would have taken a team of individuals devoted solely to that task. He claims the State had such a team. In support of this allegation, he points to the assistance the Tarrant County Criminal District Attorney's Office provided the prosecution. (App. at 334-35).

(1032) The State did enlist the services of the Tarrant County Criminal District Attorney's Office, but that office primarily assisted in processing the evidence and creating exhibits for trial. Most of the review was conducted by a handful of others. All of the documentary evidence was reviewed and organized by Wirskye himself. Over the summer of 2014, he looked at every single piece of paper the investigation generated and created the person of interest spreadsheet; he did this after hours, spending his days running his private practice. Wirskye did not review all of the digital media evidence (DME), but he did review all the relevant portions. The DME consisted of video, phone extractions, hard drive images, and other digital media containers; it was reviewed in its entirety by a handful of investigators and interns before trial. (8 WRR 90-95, 105-11, 151-52; SWX 12, 16).

(1033) Notably, although the discovery was accessible to everyone on Applicant's trial team, not all were reviewing it. (7 WRR 39, 102). In the end, four attorneys, an

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[45] Counting from the date of counsel's appointment (4/22/13), the defense had over 19 months to prepare. (9 RR 36).

investigator, and at least two mitigation specialists assisted in Applicant's defense. Yet most of the discovery review was conducted by just two of them - Seymour and his investigator, Rodnic Ward. (7 WRR 20-21, 41, 102, 108)

(1034) But more importantly, Applicant also fails to show what parts of the discovery or how much data was not reviewed by counsel.

(1035) Seymour could not quantify the amount of discovery he did review. (7 WRR 43). He described the discovery he received, identifying the dates he received discovery and generally describing what was delivered, that is, a certain number of disks, hard drives, paper, and digital media evidence. (7 WRR 98-99, 104-08). But Applicant presented no evidence of how much data was on each disk, hard drive, etc., and the record shows some of the drives were not full. (6 RR 18). The record also shows the State provided multiple copies of some items. The State provided the defense with four copies of a set of four terabyte-sized drives. So, the defense was provided with four copies of the same four terabytes, not sixteen distinct terabytes of data. (SWX 16).

(1036) Wright testified he doubted the defense reviewed a quarter of the discovery received, but he spent little time reviewing the discovery himself. (5 WRR 44; 7 WRR 14-15, 108). Seymour and Ward spent much time reviewing discovery; Seymour did not stop reviewing it until November 14, 2014, right before trial. Also, both men demonstrated extensive knowledge of the information contained in the discovery. Seymour's knowledge is apparent from his trial performance; Ward's knowledge is reflected in his numerous pretrial memos. (7 WRR 43-44; 8 WRR 101-02; SWX 6-7).

(1037) Applicant also fails to show the nature of the unreviewed data, that is, "underlying raw data" versus "human readable data." With respect to the digital media evidence (DME), a substantial amount of the data likely relates to underlying raw data. (SWX 16).

(1038) Applicant has not shown what the subject matter of the unreviewed discovery is. He does not show to what phase of the trial it would have related. Thus, he makes no showing of its significance to his case.

(1039) Counsel may have reviewed the significant portions of the discovery and nothing of import remained for review. Seymour, who was most familiar with the discovery, said reviewing the remainder would not have changed the verdict. (7 WRR 43-44). And Applicant's habeas counsel have had the discovery for years, but have produced nothing

relevant, much less material, to Applicant's defense that went undiscovered. (9 WRR 16-24).

(1040) Ultimately, Applicant has not shown that no competent counsel could finish reviewing the discovery. He has only shown his own counsel did not finish their review of it. Apparently, the defense team prioritized other matters over completing the discovery review. This appears to have been a sound strategic choice.

(1041) In his declaration, John Wright, Applicant's second chair counsel, asserted the failure to finish reviewing discovery prevented the defense from making a fully informed decision about a theory of defense or a mitigation theory. (AX 53). The record refutes his assertion.

(1042) Contrary to Wright's declaration, an email exchange between himself and Seymour a few months before trial shows Wright did not consider further review of the discovery important to Applicant's defense. (SWX 2 at p. 2) ("All that discovery is unlikely to make Eric not guilty. We might find a nugget of mitigation or two, but we are better off trying to develop our own that to glean it from the efforts of the state.")

(1043) Moreover, the trial record shows counsel did subject the State's case to meaningful adversarial testing. Counsel mounted a reasoned, well-developed defense, which was substantiated by evidence, in both the guilt and punishment phases of Applicant's trial.

(1044) The defense had everything the State offered at trial. And there were no surprises. Seymour correctly anticipated most of the evidence the State offered in the guilt phase. (7 WRR 44; 8 WRR 93-94).

(1045) In guilt, counsel challenged the reliability and weight of the ballistics evidence linking him to the McLellands' murders, attacked the highly circumstantial nature of the State's case, and avoided opening the door to the admission of evidence of Hasse's murder. Counsel also made a "full throated actual innocence" closing argument in the guilt phase that surprised and impressed Wirskye. (8 WRR 101-02).

(1046) In punishment, counsel theorized and presented evidence showing Applicant was not a future danger and his life still had value. Specifically, counsel presented expert and lay testimony showing the prison system could control inmates with violent proclivities and Applicant no longer had violent proclivities since he had exacted

revenge. Counsel also presented considerable testimony showing the totality of Applicant's contributions to his family, friends, and community. (7 WRR 46-47).

(1047) Counsel's failure to finish reviewing the discovery did not prevent them from adequately preparing and presenting a meaningful defense.

(1048) Applicant's right to effective assistance under *Cronic* was not violated, and this claim should be denied.

Claim 4: Discovery Due Process

(1049) In Claim 4, Applicant contends his right to due process was violated by "the State's data dump of an unprecedented quantity of discovery material." Applicant claims his counsel could not review it all before trial and were forced to trial without knowledge of the "universe" of exculpatory, impeachment, and mitigating evidence it could contain. As a result, he argues, "counsel could not adequately present their own case or challenge the State's." (App. at 341-42).

Claim Not Previously Raised on Direct Appeal

(1050) Applicant could have but failed to raise this claim on direct appeal.

(1051) Habeas corpus will not lie as a substitute for direct appeal. *Ex parte Townsend*, 137 S.W.3d 79, 81 (Tex. Crim. App. 2004). Even a constitutional claim is forfeited if Applicant had the opportunity to raise it on appeal and did not. The writ of habeas corpus is an extraordinary remedy available only when there is no other adequate remedy at law. *Id.*

(1052) Nothing prevented Applicant from raising this claim on direct appeal.

(1053) The only new evidence Applicant has to support this claim that was not already part of the appellate record is additional statements from counsel reiterating the tremendous amount of discovery that was not completely reviewed. (5 WRR 39-43; 7 WRR 41-43; AX 53).

(1054) Applicant's claim is an improper attempt to use the writ as a substitute for appeal.

(1055) Applicant's claim is not cognizable and should be denied.

No Due Process Violation

(1056) Even if his claim were reviewable, Applicant fails to prove by a preponderance of the evidence any violation of his due process rights.

(1057) Applicant's claim presupposes that he had a constitutional right to review all of the discovery provided to him. But, "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). "[T]he Constitution does not require the prosecutor to share all useful information with the defendant." *United States v. Ruiz*, 536 U.S. 622, 629 (2002). Furthermore, while *Brady v. Maryland*, 373 U.S. 83 (1963) prohibits the State from concealing exculpatory evidence, it does not place any burden on the State to conduct a defendant's investigation or assist in the presentation of the defense's case. *United States v. Marrero*, 904 F.2d 251, 261 (5th Cir. 1990).

(1058) In addition, as a general rule, the government has no duty to direct a defendant to exculpatory evidence within a larger mass of disclosed evidence. *United States v. Skilling*, 554 F.3d 529, 576 (5th Cir. 2009). Where potentially exculpatory information is available to the defendant through an exercise of due diligence, there is no suppression for the purposes of *Brady*. *Id.*

(1059) Applicant contends evidence favorable and material to his defense was suppressed by the voluminous nature of the discovery. He suggests the discovery was so voluminous it could not be reviewed in the time the Court allotted the defense team. Specifically, he asserts there were more than 25 terabytes of discovery comprised of more than 35 single-terabyte external drives, more than 250 CD's, and thousands of loose pages of documents. (App. at 345-46 & fn. 295).

(1060) Applicant fails to show the discovery was so voluminous it could not be reviewed in the time allotted. While it is undisputed the amount of discovery was "unprecedented," the exact amount has yet to be proven. As previously noted, there have been references to anywhere from 17 to 25 terabytes of data.[46]

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[46] While the scale of the discovery in Applicant's case was novel to the parties, it is not without precedent. *See United States v. Warshak*, 631 F.3d 266, 295 (6th Cir. 2010) (State provided discovery provided 3 "tera-drives" containing 17 million pages, over 500,000 hard copies of documents, 275 discs of grand jury materials, and 13 discs of potential trial exhibits); *Skilling*, 554 F.

(1061) Seymour generally described the discovery he received, identifying the dates he received discovery and generally describing what was delivered, that is, a certain number of disks, hard drives, paper, and digital media evidence. But Applicant presented no evidence of how much data was on each disk, drive, etc. Moreover, the record shows some of the drives were not full. (6 RR 18; 7 WRR 98-99, 104-08).

(1062) Also, as stated above, the State provided multiple copies of some items--four copies of a set of four terabyte-sized drives, not sixteen distinct terabytes of data. (SWX 16).

(1063) Despite the size, the State reviewed all of the discovery. All of the evidence was viewed by a handful of individuals on the prosecution team. All of the documentary evidence was reviewed and organized by Wirskye himself. Over the summer of 2014, he looked at every piece of paper the investigation generated and created the person of interest spreadsheet "after hours" while running his private practice. Wirskye did not review all of the digital media evidence (DME), only the relevant portions. The DME consisted of video, phone extractions, hard drive images, and other digital media containers and was reviewed in its entirety by a handful of investigators and interns before trial. (8 WRR 90-95, 105-11, 151-52; SWX 12, 16).

(1064) In contrast, although the discovery was accessible to everyone on Applicant's trial team, not all were reviewing it. (7 WRR 39, 102). Most of the review was conducted by only two of the team's members - Seymour and Ward. (7 WRR 20-21, 41, 102, 108). If other team members or other employees of RPDO assisted in the review of the discovery, the defense may have been able to review it all before trial.

(1065) Applicant suggests the State thwarted a complete review of the discovery by providing "no guidance as to what information was contained on the numerous drives and discs." He argues some of the files could not be opened and viewed and suggests the State padded the discovery with duplicative and irrelevant data. (App. at 346-47). In short, Applicant accuses the State of bad faith in the discovery process.

3d at 576 (State purportedly provided several hundred million pages of documents); *United States v. Gross*, No. 8:18-CR-00014, 2019 WL 7421961 (C.D. CD Cal. Dec. 20, 2019) (State provided over 6 million pages of documents and 1600 audio recordings; *United States v. Simpson*, No. 3:09-CR-249-D, 2011 WL 978235, (N.D. Tex. Mar. 21, 2011) (not designated for publication) (State provided 200 terabytes of data in discovery).

(1066) Applicant fails to prove these allegations, and the record refutes them.

(1067) Although the discovery did not come with an index, it was organized. The State realized the quantity and complexity of the information at issue and obtained the services of the Tarrant County Criminal District Attorney's Office to process, organize, and deliver the discovery to the defense team. With the assistance of the Tarrant County office, the discovery was professionally managed, duplicated, and delivered to the defense. (6 RR 13-15; 7 WRR 37; 8 WRR 90-93).

(1068) Wirskye prepared a "person of interest" spreadsheet to assist the defense in its review of the discovery. The spreadsheet identified where the defense could locate information in the discovery related to each "person of interest" identified in the investigation. Wirskye also emailed directly to counsel items that were time-sensitive, required disclosure under *Brady*, or were otherwise significant. In addition, on request, Wirskye directed counsel to items or information counsel had difficulty locating in the discovery. And at Wirskye's direction, any copies made during the discovery process were provided first to the defense to ensure they had access to it as soon as possible. (10 CR 3947-48; Unsealed CR 378-95; 7 WRR 42-43; 8 WRR 91-93; AX 100). *See Skilling*, 554 F.3d at 577 (holding due process not violated by State's voluminous "open file," where State provided data in electronic and searchable form, produced a set of "hot documents" thought important to case or potentially relevant to the case, created indices to other documents, and provided defendant access to databases).

(1069) As previously stated, some of the data provided was duplicative or not material. But the duplicates were provided so each attorney on Applicant's team could have their own copy to review; it was not provided to slow the review process down. (SWX 16). The only data Applicant identified as irrelevant was information pertaining to the initial manhunt, which counsel apparently had no difficulty in identifying and did not spend much time on. (5 WRR 112; 7 WRR 41-42, 98). Thus, it does not appear it detracted from counsel's review of other, relevant data.

(1070) While Applicant asserts some of the files were inaccessible, he presents no evidence substantiating this claim. Seymour's testimony contradicts it. Seymour stated he was impressed with the State's management of the discovery "as far as corralling, packaging, indexing, and sending it over to us." According to Seymour, the only problem with the discovery pipeline was "it didn't turn off." (7 WRR 37).

(1071) Applicant contends the State failed to deliver the discovery in a timely manner. Again, applicant fails to substantiate his claim.

(1072) The discovery was not dumped on Applicant right before trial. Seymour's testimony shows he received regular deliveries between August 2013 and November 2014. The process took some time because of the amount of data in a variety of formats that had to been documented, copied, and delivered in an accessible form. Still, Seymour's testimony shows more than six months before trial, the lion's share of the discovery had been delivered. (7 WRR 104-08).

(1073) Applicant claims counsel failed to prepare and present an adequate defense because they did not finish the discovery review. To the extent Applicant assumes that no counsel could have adequately prepared without first reviewing all of the discovery, the law does not support him.

(1074) As previously noted, just because the State collects and reviews something does not mean the defense must do so. "The Government's task of finding and assembling evidence that will carry its burden of proving guilt beyond a reasonable doubt is entirely different from the defendant's task in preparing to deny or rebut a criminal charge." *Cronic*, 466 U.S. at 664. The time the State devotes to the assembly, organization, and summarization of the thousands of written records can simplify the work of the defense counsel. *Id.* at 663-64.

(1075) To the extent Applicant contends his own counsel could not adequately prepare for trial without finishing the discovery review, he fails to substantiate his claim.

(1076) As previously stated, Applicant fails to demonstrate how much of the discovery was not reviewed. He also fails to show what the remainder consisted of, much less its significance. And he makes no showing Brady material went undiscovered, though his habeas counsel have had the discovery materials for years.

(1077) Counsel mounted a reasoned, well-developed defense, substantiated by evidence, in both the guilt and punishment phases of Applicant's trial.

(1078) Applicant's due process rights were not violated by the amount of discovery provided to him, the manner in which it was provided, or the denial of additional time to finish reviewing it; his claim should be denied.

Claim 5: Judicial Bias

(1079) In Claim 5, Applicant contends the trial judge's comments, demeanor, inconsistent rulings and behavior outside the courtroom demonstrated a lack of judicial impartiality as guaranteed by the Due Process Clause. (App. at 353).

(1080) Judge Michael R. Snipes, an experienced trial judge, was appointed to preside over Applicant's trial proceedings.

(1081) During the course of the trial, Applicant did not object to the trial judge's alleged comments, demeanor, and/or inconsistent rulings.

(1082) After Applicant had presented 29 of his 40 witnesses during the punishment phase, Applicant's trial counsel noted for the record his impression the trial court was growing impatient or frustrated with the defense. (53 RR 9-11). Counsel did not want this to impact the jury's consideration of their punishment witnesses, so they requested a jury instruction on the matter. (53 RR 11). The trial court granted the request and gave the following oral instruction to the jury: "[I]f you have seen anything in my demeanor or attitude which leads you to conclude that I have certain opinions about the case or certain beliefs about what lawyers are doing in the case, you're to wholly disregard that and consider only the evidence that's before you from the witness stand." (53 RR 12-13).

(1083) After Applicant was convicted and sentenced to death, he filed a motion for new trial alleging the trial judge's rulings from the bench, facial expressions, demeanor, and behavior in and around the courthouse demonstrated he was biased against Applicant. (11 CR 4369-70, 4461-62).

(1084) Judge Webb Biard was appointed to preside over the motion for new trial and set the matter for a live evidentiary hearing. (11 CR 4404-05). At the hearing, Applicant's counsel presented audiovisual recordings of the trial proceedings that they obtained from the Dallas CBS affiliate after trial. (59 RR 5-7). Defense counsel also presented a spreadsheet they had prepared describing their "impressions" of the expressions and comments made by Judge Snipes during 8 of the 12 days of trial. (59 RR 5-7; DX-MNT 16). During closing argument, Applicant's counsel argued the trial judge exhibited a pattern of inconsistent rulings and disparate treatment between defense counsel and the prosecution. (59 RR 16). Counsel also noted that, after the punishment verdict, the trial judge compared Applicant to notorious murderers, which revealed the court's attitude to the Applicant. (59 RR 18-19).

(1085) After hearing evidence and argument presented by both sides, Judge Biard denied the motion for new trial. (11 CR 4476). With regard to Applicant's judicial bias claim, the court found:

> The trial court judge, the Honorable Mike Snipes, was not biased against the Defendant. The Defendant established no extrajudicial source giving rise to any judicial bias. Furthermore, evidence of the Judge's demeanor and his rulings during the course of trial do not evince a deep-seated favoritism or antagonism toward the defendant that would make fair judgment impossible. Lastly, there is no evidence that any frustrations the court may have expressed toward the parties had any influence on the jury deliberations or verdict.

(CR 1st Supp. 22).

(1086) On direct appeal, Applicant alleged the trial court erred in denying his motion for new trial on the basis of judicial bias. The Court of Criminal Appeals overruled this point of error, noting Applicant had failed to identify in the record where he preserved the claim at trial, and he failed to identify which of the judge's rulings were inconsistent and where the judge disparately treated Applicant's counsel. *See Williams v. State*, AP-77,053, 2017 WL 4946865, at *26 (Tex. Crim. App. Nov. 1, 2017) (not designated for publication).

(1087) In 2019, Judge Snipes became a retired visiting judge and was assigned to preside over Applicant's writ proceedings. *See* Tex. Code Crim. Proc. Ann. art. 11.071, § 9(c) (West Supp. 2019) (providing that either the current presiding judge of the convicting court or the judge who presided over the original capital felony trial, if qualified under Section 74.054 or 74.055, Government Code, may preside over the habeas proceedings).

(1088) Applicant filed a motion to recuse Judge Snipes, arguing his recusal is mandated by rule 18b of the civil procedure rules because (1) the judge's impartiality might reasonably be questioned, (2) he is actually biased, and (3) he has personal knowledge of disputed evidentiary facts. (Recusal Motion at 1-2). Applicant's contentions were premised on Judge Snipes's comments and conduct during trial, his reference to presiding over Applicant's trial in a letter to Congresswoman Eddie Bernice Johnson applying for the position of U.S. Attorney for the Northern District of Texas, and his

appearance at a book signing for Kaufman County District Attorney Erleigh Wiley's "Target On My Back." (Recusal Motion at 1-2).

(1089) Judge David Evans was appointed to preside over the recusal proceeding and held a hearing on Applicant's motion on March 1, 2019. (3 WRR 5-6). After considering the argument and evidence presented by the parties at the hearing and the applicable law, Judge Evans granted Applicant's motion to recuse Judge Snipes. (Recusal Order at 1-2). The order granting recusal specified the ruling was not based on Judge Snipes's conduct during the trial or the letter written to Congresswoman Eddie Bernice Johnson, but was based on the appearance of impropriety created by him attending Wiley's book signing event after trial. (Recusal Order at 1-2).

Procedural Bar

(1090) Under Texas law, the failure to object at trial generally waives the error for collateral review. *See* Tex. R. App. P. 33.1(a) (requiring a specific objection and a ruling from the trial judge to preserve error for appellate purposes); *see also Ex parte Pena*, 71 S.W.3d 336, 338, n.7 (Tex. Crim. App. 2002); *Ex parte Bagley*, 509 S.W.2d 332, 333-34 (Tex. Crim. App. 1974) (holding that the appellate rule requiring a trial objection also applies in habeas cases).

(1091) As Applicant did not object to the trial judge's comments, demeanor, and/or inconsistent rulings during trial, he failed to preserve his judicial bias claim for review.

(1092) Applicant cites *Blue v. State*, 41 S.W.3d 129, 131-33 (Tex. Crim. App. 2000) (plurality op.), for the proposition that no trial objection was necessary because the trial judge's actions rose to the level of fundamental error. (App. at 357). However, the Texas Court of Criminal Appeals has recently recognized there is no "fundamental error" exception to the rules of error preservation. *Proenza v. State*, 541 S.W.3d 786, 794 (Tex. Crim. App. 2017).

(1093) Claims of improper judicial *comments* raised under Article 38.05 of the Code of Criminal Procedure require no trial objection to be considered on appeal. *See Proenza*, 541 S.W.3d at 801. This principle, however, is inapplicable here because Applicant's complaint pertains to the trial judge's demeanor and conduct, not to a particular comment made in violation of Article 38.05.

(1094) Even if no trial objection was necessary to preserve error, this claim is procedurally barred because it was litigated in the motion for new trial and on direct appeal. Issues which have been raised and rejected on direct appeal are not cognizable in post-conviction habeas proceedings. *See Ex parte Nailor*, 149 S.W.3d 125, 131-32 (Tex. Crim. App. 2004); *Ex parte Torres*, 943 S.W.2d 469, 475 (Tex. Crim. App. 1997); *Ex Parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984).

(1095) To the extent Applicant is attempting to raise a new claim of judicial bias not previously litigated, this is procedurally barred and should have been raised on direct appeal. *See Ex parte Boyd*, 58 S.W.3d 134, 136 (Tex. Crim. App. 2001) (citing *Ex parte Bagley*, 509 S.W.2d 332, 334 (Tex. Crim. App. 1974)) (the writ of habeas corpus may not be used to litigate matters that could have been raised at trial and on direct appeal).

No Violation of Due Process

(1096) Even if reviewable, Applicant's claim is without merit.

(1097) The Due Process Clause guarantees a defendant a fair trial before a judge with no actual bias against the defendant or interest in the outcome of the case. *Celis v. State*, 354 S.W.3d 7, 21 (Tex. App.—Corpus Christi 2011), *aff'd*, 416 S.W.3d 419 (Tex. Crim. App. 2013) (citing *Bracy v. Gramley*, 520 U.S. 899, 904-05 (1997)).

(1098) Trial courts have broad discretion in managing the course of a trial generally. *See Dang v. State*, 154 S.W.3d 616, 619 (Tex. Crim. App. 2005); *In re State ex rel. Skurka*, 512 S.W.3d 444, 452 (Tex. App.—Corpus Christi-Edinburg 2016, orig. proceeding); *see also* Tex. R. Evid. 611 (requiring the court to exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to: (1) make those procedures effective for determining the truth; (2) avoid wasting time; and (3) protect witnesses from harassment or undue embarrassment).

(1099) A trial court possesses the authority to express itself in exercising its broad discretion. *In re Commitment of Barbee*, 192 S.W.3d 835, 847 (Tex. App.—Beaumont 2006, no pet.). A trial court may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time. *Id.* Generally, Texas law imputes good faith to a trial judge's judicial actions in controlling a trial. *Id.*

(1100) Judicial remarks during the course of trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or

partiality challenge. *Liteky v. United States*, 510 U.S. 540, 555, 114 S.Ct. 1147, 127 L.Ed.2d 474 (1994); *Barfield v. State*, 464 S.W.3d 67, 81 (Tex. App.—Houston [14th Dist.] 2015, pet. ref'd). Moreover, expressions of impatience, dissatisfaction, annoyance, and even anger do not establish bias or partiality. *Liteky*, 510 U.S. at 555–56. A judge's ordinary efforts at courtroom administration—even a stern and short-tempered judge's ordinary efforts at courtroom administration—remain immune. *Id.* at 556; *Garcia v. State*, 246 S.W.3d 121, 147 (Tex. App.—San Antonio 2007, pet. ref'd).

(1101) During the writ hearing, Brady Wyatt, one of Applicant's attorneys who worked on the direct appeal, described Judge Snipes as a great judge who runs a "tight" courtroom. (5 WRR 189). Judge Snipes expects parties to arrive in his courtroom prepared and on time. (5 WRR 189). He is focused on making sure jurors are taken care of and their time, and the court's time, is not wasted. (5 WRR 189-90).

(1102) Applicant's lead trial counsel, Matthew Seymour, was familiar with Judge Snipes from his time practicing in Dallas County. (7 WRR 35-36). Seymour knew Judge Snipes ran a tight ship and would expect punctuality, professionalism, and accuracy from all the lawyers working on the case. (7 WRR 35-36). During Applicant's trial, Judge Snipes maintained control of the proceedings and kept things running on time, as Seymour expected. (7 WRR 66-67). At times he was brusque, but he tried to be uniform in his treatment of the parties. (7 WRR 67). Seymour disagreed with two of Judge Snipes's rulings, but nonetheless felt Judge Snipes gave Applicant a fair trial. (7 WRR 69, 77-78).

(1103) Co-counsel Doug Parks has known Judge Snipes for many years and tried cases before him. (8 WRR 49). Parks described Judge Snipes as a "no-nonsense" judge. (8 WRR 32). Parks felt Judge Snipes gave Applicant a fair trial. (8 WRR 32).

(1104) Applicant has failed to prove by a preponderance of the evidence the trial judge's comments, demeanor, rulings or behavior outside the courtroom show the trial judge was biased against him or he was denied a fair trial.

Comments and Demeanor

(1105) In the writ application, Applicant contends the trial court showed bias by repeatedly expressing frustration with the defense team's allocation of time in presenting punishment witnesses and chastising trial counsel for attempting to ask questions of witnesses they should have been able to ask. (App. at 353-54).

(1106) In support of his claim, Applicant presented an affidavit from Jill Patterson, a member of the defense team who assisted with the development and presentation of mitigation witnesses at Applicant's trial. According to Patterson, the trial judge sometimes called the defense witnesses boring and suggested breaks during their testimony. He did not allow much testimony from a couple of defense witnesses and shut down a lot of testimony about Applicant's prior theft trial. He also got mad at the defense team for not being able to fill the day with witness testimony. Patterson also alleges when she was helping Applicant's elderly aunt who has cancer walk to the witness stand, the trial judge told her to "stop putting on for the jury." (AX 61; 15 WRR 232-34).

(1107) Judge Biard, who presided over the motion for new trial proceedings, found Judge Snipes's comments and demeanor during Applicant's trial did not show judicial bias. (CR 1st Supp. 22).

(1108) Judge Evans, who presided over the recusal proceedings, found Judge Snipes's conduct during Applicant's trial did not show judicial bias and did not support recusal. (Recusal Order at 1-2).

(1109) Likewise, this Court finds Judge Snipes's comments and demeanor during Applicant's trial do not show judicial bias.

(1110) With regard to the last allegation raised in Patterson's affidavit, Patterson appears to be referring to Applicant's 80-year old aunt with stage four lung cancer, Lavon Humphries. (51 RR 127). The record does not reflect Judge Snipes told Patterson to "stop putting on for the jury" or made any statement of the sort when Humphries approached the stand. (51 RR 125-27). The record reflects he was courteous to Humphries, directed her to walk all the way up to the witness stand, and directed her to keep her voice up during her testimony so the jury could hear her. (51 RR 126). If the trial judge, at any point, did make a comment to Patterson, it is not in the record and was not in front of the jury and would not show bias.

(1111) That the trial judge may have expedited or limited testimony and ordered breaks during certain testimony does not establish bias. *See Barbee*, 192 S.W.3d at 847 (a trial court may properly intervene to maintain control in the courtroom, to expedite the trial, and to prevent what it considers to be a waste of time).

(1112) The trial judge's expressed frustration and annoyance with defense counsel does not establish bias. *See Barfield*, 464 S.W.3d at 81 (judicial remarks during the course of

a trial critical or disapproving of, or even hostile to counsel, the parties, or their cases, ordinarily do not support a challenge for bias); *Liteky*, 510 U.S. at 555–56 (expressions of impatience, dissatisfaction, annoyance, and even anger do not establish bias or partiality).

(1113) Moreover, the record demonstrates the trial judge's annoyance and frustration with counsel's presentation of punishment witnesses was justified.

(1114) By the time the defense began presenting witnesses during punishment, the parties were well aware of how the trial judge maintained order in his courtroom so as not to waste the jurors, or the court's, time. (7 WRR 66-67; 8 WRR 32).

(1115) Maxwell Peck, one of the attorneys on Applicant's trial team, was primarily in charge of mitigation witnesses. He called an unusually large number of witnesses to testify on Applicant's behalf during the punishment phase. His strategy was to bring as many witnesses as he could, even if they were all saying the same thing or had little or nothing to add to what had already been said. (8 WRR 36-37, 50-51). Seymour did not agree with this strategy and thought they should focus on the most relevant mitigation witnesses. (7 WRR 52-55). Seymour warned Peck his strategy might bore the jury and annoy the judge to the point he would try to move things along or shut it down. (7 WRR 54, 95). Peck persisted.

(1116) Peck had a hard time managing his extensive witness list. (7 WRR 54). His presentation of the punishment witnesses was repetitive and not well-prepared. (7 WRR 52-53; 8 WRR 50-51). He presented many witnesses who had not seen the Applicant in years, making the jury grow restless and lose interest. (7 WRR 54, 95). Peck ignored admonishments from the trial judge, as well as co-counsel, about his repetitive witnesses. (8 WRR 50-51). Peck also allotted too much time when planning for each witness, which resulted in huge gaps in the schedule and annoyed the judge. (7 WRR 55). Even Peck's own teammate felt the trial judge's frustrations with him were justified. (7 WRR 67, 78-79).

(1117) The record contains many instances of the trial judge exerting "ordinary efforts at courtroom administration." *Liteky*, 510 U.S. at 556. For instance:

a. Outside the presence of the jury, Judge Snipes asked defense counsel to plan better for witnesses so he did not have dismiss jury early when "we could be putting witnesses on" (50 RR 208);

b. While discussing scheduling outside the presence of the jury, Judge Snipes pointed out that defense had presented 29 witnesses so far in the punishment phase, many of whom were cumulative of each other, and had already taken as much time as the State took in its punishment case-in-chief (52 RR 137-38);

c. Judge Snipes admonished defense counsel about having their witnesses ready to take the stand (53 RR 104);

d. Outside the presence of the jury, Judge Snipes admonished defense counsel about presenting witnesses who were all testifying to the same or irrelevant information and instructed counsel to direct the future witnesses to go directly to testimony relevant to Applicant (53 RR 154-56);

e. Outside the presence of the jury, Judge Snipes warned defense counsel he was risking contempt by disregarding his rulings concerning the admissibility of certain testimony (53 RR 164-65);

f. Judge Snipes twice instructed defense counsel to "wrap up" his direct examination of the defense's 16th punishment witness of the day (53 RR 227, 231).

(1118) As these excerpts show, when Judge Snipes displayed frustration or annoyance, it was not without cause. Judge Snipes's frustration stemmed from delays and inefficiency in the presentation of evidence, a perfectly reasonable response from the person responsible for overseeing the proceedings.

(1119) The record reflects Judge Snipes attempted to focus the defense's efforts on the development of novel information relevant to Applicant. His efforts show an attentive, diligent jurist, not a biased one. *See Liteky*, 510 U.S. at 542-556 (holding judge's limitation of cross-examination, cautioning defense counsel to confine questions to material matters, admonishing witnesses to keep answers responsive to questions asked, and admonishing counsel not to make political speech in closing argument were ordinary and routine matters of court administration).

Inconsistent Rulings

(1120) Applicant also contends the trial judge's rulings were inconsistent and resulted in disparate treatment of Applicant. (App. at 355; AX 61).

(1121) Applicant does not articulate which rulings he is complaining about or show how the trial judge's rulings were erroneous under the law. Thus, he fails to allege facts supporting his claim for relief.

(1122) The record shows Judge Snipes treated the parties similarly. He did not reserve his expressions of frustration for the defense. (52 RR 139-140; 55 RR 239). He imposed restrictions on the State's presentation. He sustained defense objections to the testimony of State's witnesses (*see e.g.*, 50 RR 154, 189; 53 RR 63; 54 RR 51, 70, 83, 86, 116), he told the State to "wrap up" its cross-examination of a defense witness (53 RR 234), and he limited the State's presentation of the audio-recorded conversation between Applicant, a Texas Ranger, and a police chief. (49 RR 69-70).

(1123) The record is also replete with comments by Judge Snipes showing his high regard for Applicant's trial counsel and their work on his case. Before and during trial, he repeatedly complimented them and lauded their efforts on Applicant's behalf. (2 RR 7-8; 6 RR 22; 9 RR 35; 27 RR 5, 28-29; 42 RR 52; 43 RR 7-8; 44 RR 10, 16; 46 RR 148-49; 47 RR 10; 49 RR 146). These remarks refute the complaint of judicial bias.

Sentencing Remarks

(1124) Applicant also complains about the following remark, made by the trial judge after sentencing in this case:

> As to you, Mr. Williams, you made yourself out to be some sort of Charles Bronson death wish vigilante in this case. I never bought that. And to any diluted [sic] souls out there who may have bought it, at the end of the day, you murdered a little old lady; and you would have murdered two other innocent people if you had the opportunity. That puts you right there with Charles Manson, Jeffrey Dahmer, and Richard Speck.

(55 RR 7–8). Applicant contends these final comments confirmed the judge's bias toward Applicant. (App. at 354).

(1125) The law recognizes judges are human beings, not automatons. "A judge who presides at a trial may, upon completion of the evidence, be exceedingly ill disposed towards the defendant, who has been shown to be a thoroughly reprehensible person." *Liteky*, 510 U.S. at 551.

(1126) A judge is free to form opinions based on facts introduced or events occurring in the course of trial. *Liteky*, 510 U.S. at 555. Remarks by a judge that are critical or disapproving of, or even hostile to a defendant do not support a challenge for bias unless they reveal an opinion derived from an extrajudicial source. *Id.; Barfield*, 464 S.W.3d at 81.

(1127) Here, there is no evidence Judge Snipes's opinion of Applicant was acquired extra-judicially. It was made after the trial had concluded, after he had sat through a lengthy presentation of evidence during both the guilt-innocence and punishment phases of trial. It is reasonable to deduce it was based entirely upon the evidence presented during Applicant's trial, and Applicant presents no evidence to the contrary.

(1128) No evidence shows the feelings Judge Snipes formed over the course of trial affected his ability to afford Applicant a fair trial. Judge Snipes granted every defense request for expert assistance and funding, two motions for continuance, and one change of venue. (53 RR 9; 5 WRR 88; 7 WRR 32-33; 8 WRR 18). He explicitly expressed his concern Applicant receive a fair and speedy trial. (4 RR 14, 16). He ordered Applicant not be shackled during the proceedings. (4 RR 18-19). He instructed the jurors throughout the trial not to expose themselves to media about the case. *See e.g.*, (44 RR 274-75; 45 RR 198-99; 46 RR 150; 47 RR 59). He repeatedly admonished reporters not to film the computer screens of the attorneys. (44 RR 228, 46 RR 6).

Letter and Book Signing

(1129) Applicant also points to the trial judge's behavior outside the courtroom in support of his judicial bias claim. He claims Judge Snipes's bias was demonstrated by his reference to presiding over Applicant's trial in a letter to Congresswoman Eddie Bernice Johnson applying for the position of U.S. Attorney for the Northern District of Texas, and by his appearance at a book signing for Kaufman County District Attorney Erleigh Wiley's "Target On My Back." (App. at 355-56; AX 50, 52).

(1130) During the recusal proceedings, Judge Evans found Judge Snipes's letter to Congresswoman Johnson did not show judicial bias and therefore did not support recusal. (Recusal Order at 1-2). Judge Evans did not specifically find Judge Snipes's attendance at the book-signing event showed judicial bias but granted the motion to recuse based on the appearance of impropriety, concluding Judge Snipes's attendance could be perceived as partiality by reasonable members of the public at large. (Recusal Order at 1-2).

(1131) Judge Snipes's letter to Congresswoman Johnson requesting appointment to the position of U.S. Attorney was, in effect, his resume for that job. In the letter, Judge Snipes describes his military service, his experience as federal prosecutor along with the prosecution rewards he received, and his experience as a state court judge. In addition to the more than 300 bench trials he presided over, the letter specifically referred to Judge Snipes's then current assignment – presiding over Applicant's capital murder trial. The responsibility of presiding over the trial was no small task. It required someone with the ability to shoulder significant responsibility while in the national spotlight. For this reason, in itself, the assignment was noteworthy. The letter neither explicitly nor implicitly reflects Judge Snipes's opinion of Applicant's guilt or punishment.

(1132) With regard to the book signing, this was a public event occurring in 2017, three years after Applicant's trial had concluded. (3 WRR 51-52). Judge Snipes left the bench after Applicant's trial and was not presiding over Applicant's case at the time he attended the book signing. (3 WRR 49-53).

(1133) The fact Judge Snipes attended one of Ms. Wiley's book-signings and was photographed with her does not demonstrate he endorsed the contents of the book. As the book itself shows, Judge Snipes was not one of its reviewers. *See* ERLEIGH WILEY, A TARGET ON MY BACK: A PROSECUTOR'S TERRIFYING TALE OF LIFE ON A HIT LIST (2017).

(1134) Additionally, Judge Snipes's attendance of the book-signing event years *after* Applicant's trial had concluded is not evidence of favoritism toward the State *during* the trial, which is the claim in this proceeding.

(1135) Neither Judge Snipes's letter to Congresswoman Johnson nor his attendance of the book signing after the trial demonstrate judicial bias during Applicant's trial.

Facial Expressions

(1136) Although not specifically pled, Applicant also references the trial judge's countenance, facial expressions, and body language as evidence of his bias. (App. at 354-55).

(1137) According to the affidavit of Patterson, Judge Snipes often rolled his eyes and made aggressive facial expressions at the defense team. During the motion for new trial

proceedings, Patterson watched the audiovisual recordings from the trial and noted these instances. (AX 61).

(1138) Applicant does not cite any specific instances of inappropriate facial expressions in the writ application.

(1139) Moreover, there is conflicting evidence in the record as to whether such expressions were made and, if they were, whether they were directed entirely at the defense or at both parties.

(1140) Parks testified at the writ hearing that he did not observe any unusual behavior from Judge Snipes during Applicant's trial. (8 WRR 32-33). He never saw Judge Snipes making faces or rolling his eyes. (8 WRR 50).

(1141) Likewise, Seymour did not remember Judge Snipes making any unusual facial expressions during the trial. (7 WRR 67).

(1142) Lalon Peale, one of Kim Williams's attorneys, watched many days of Applicant's trial and took detailed notes. (5 WRR 114). There is nothing in his notes about Judge Snipes making inappropriate facial expressions. (5 WRR 114-15). Peale does recall hearing other attorneys talk about it after the trial, but his understanding was that it went both ways, to the State and the defense. (5 WRR 114-15).

(1143) Applicant also has not shown the alleged facial expressions were seen by the jury or influenced their view of the evidence in any way. The jurors were specifically instructed if they saw anything in the judge's demeanor or attitude which led them to conclude he had certain opinions about the case or certain beliefs about what the lawyers were doing, they were to wholly disregard it and consider only the evidence presented from the witness stand. (53 RR 12-13). The jury is presumed to have followed this instruction, and Applicant presents no evidence to the contrary.

(1144) None of the complained-of actions by the trial judge demonstrate bias against Applicant or that Applicant was denied a fair trial.

(1145) Applicant's due process rights were not violated; this claim should be denied.

Claim 6: Ineffective Assistance of Appellate Counsel

(1146) Applicant claims his appellate counsel rendered ineffective assistance of counsel because he failed to raise meritorious issues on appeal.

(1147) On appeal, as at trial, applicant has a constitutional right to effective assistance of counsel. A complaint appellate counsel was constitutionally deficient is governed by the standard enunciated in *Strickland v. Washington. Smith v. Robbins,* 528 U.S. 259, 285 (2000); *Ex parte Butler,* 884 S.W.2d 782, 783 (Tex. Crim. App. 1994). The decision about which claims to raise on direct appeal is a strategic one, and under *Strickland,* appellate counsel is afforded the presumption his representation is consistent with reasonable trial strategy.

(1148) Where counsel's decision not to raise a particular complaint on appeal is at issue, it must be determined (1) whether reasonable appellate counsel would have raised it, that is, whether it was available and meritorious, and (2) whether there is a reasonable probability raising the issue would have led to a different outcome in the appeal, namely, reversal. *Butler,* 884 S.W.2d at 783.

(1149) As with any ineffectiveness claim, Applicant bears the burden of proving counsel's ineffectiveness by a preponderance of the evidence. *Strickland,* 466 U.S. at 687. Moreover, as applicant is seeking habeas relief, he bears the burden of proving his factual allegations by a preponderance of the evidence. *Ex parte Morrow,* 952 S.W.2d 530, 534 (Tex. Crim. App. 1997).

(1150) The court finds Applicant fails to prove any of the claims discussed below had merit or would have resulted in reversal. Consequently, he fails to prove appellate counsel was constitutionally deficient.

Appellate Counsel

(1151) Applicant was represented on appeal by John Tatum and Brady Wyatt, both experienced attorneys.

(1152) Tatum's extensive experience and qualifications are laid out in his affidavit, which was admitted by the Court. (SWX 11 at 1).

(1153) Wyatt testified at the habeas hearing. (5 WRR 173-92).

(1154) Tatum was the primary author of Applicant's brief on appeal. (SWX 11; 5 WRR 180).

(1155) Wyatt's role was to argue the case and review the video for the judicial bias claim. (SWX 11; 5 WRR 180).

(1156) Tatum made the final decision about what issues to raise on appeal. (5 WRR 182; SWX 11).

(1157) Tatum reviewed all aspects of the appellate record, including jury selection, the guilt phase, the punishment phase, and the motion for new trial. (SWX 11).

(1158) Tatum reviewed all claims made by the defense in the trial. (SWX 11).

(1159) Tatum conferred with Applicant—who was an experienced attorney himself—regarding the claims he wished raised on appeal. (SWX 11).

(1160) Tatum's affidavit reflects a reasonable investigation of appellate claims for a case of this kind. (SWX 11).

(1161) Tatum's affidavit is credible. Wyatt's testimony at the habeas hearing was credible.

Continuance Claim

(1162) Under this sub-claim, Applicant complains appellate counsel was ineffective in failing to raise a claim on appeal regarding the trial court's denial of his motion for continuance related to discovery. (App at 361-67).

(1163) Applicant has failed to rebut the presumption of sound strategy regarding this claim.

(1164) Applicant has failed to prove his appellate counsel were constitutionally ineffective as to this claim.

(1165) On appeal, a claim that a continuance was erroneously denied is reviewed for abuse of discretion. *Gallo v. State*, 239 S.W.3d 757, 764 (Tex. Crim. App. 2007).

(1166) To succeed on appeal with such a claim, a defendant must show "with considerable specificity how [he] was harmed by the absence of more preparation time than he actually had." *Gonzales v. State*, 304 S.W.3d 838, 843 (Tex. Crim. App. 2010); *see also* George E. Dix & John M. Schmolesky, 43 Texas Practice § 33.20. Generally, this requires the defendant, via motion for new trial, to show what information, evidence or witnesses the defense would have had available had the motion for continuance been granted. *Id.*

(1167) Here, Applicant has failed to show what information, evidence, or witnesses Applicant could have called had his motion for continuance been granted.

(1168) Applicant's habeas counsel have had 5 years to comb through the trial records and the relevant discovery in order to uncover evidence not used by trial counsel.

(1169) Under Claim 3, the Court made extensive findings regarding Applicant's claim that the discovery process in this case deprived him of effective assistance of counsel.

(1170) Under Claim 4, the Court made extensive findings regarding Applicant's claim that the discovery process in this case deprived him of due process of law.

(1171) The Court's findings under Claims 3 and 4 show Applicant was not harmed by the absence of more time to prepare for trial.

(1172) Under Claim 2, the Court made extensive findings regarding Applicant's claim his counsel was ineffective in its handling of a claim Applicant had brain damage.

(1173) The Court's findings under Claim 2 show Applicant was not harmed by the absence of more time to investigate and present evidence of any brain condition.

(1174) Applicant cites no analogous authority supporting his argument that this was a viable appellate claim.

(1175) Appellate counsel were not ineffective in their decision not to raise this continuance claim on appeal.

Second Change of Venue Motion Claim

(1176) Applicant next claims appellate counsel was ineffective for failing to challenge the trial court's denial of his second change of venue motion. (App. at 367-72).

(1177) Applicant has failed to rebut the presumption of sound strategy regarding this claim.

(1178) Applicant has failed to prove his appellate counsel were constitutionally ineffective as to this claim.

(1179) On appeal, a challenge to an order denying a change of venue is reviewed for abuse of discretion. *Ransom* v. *State*, 920 S.W.2d 288, 299 (Tex. Crim. App. 1994).

(1180) A motion for change of venue based on pretrial publicity must establish that "the publicity was pervasive, prejudicial, and inflammatory." *Gonzales* v. *State*, 222 S.W.3d 446, 449 (Tex. Crim. App. 2007) (citing *Salazar* v. *State*, 38 S.W.3d 141, 150 (Tex. Crim. App. 2001). "Widespread publicity by itself is not considered inherently prejudicial. Indeed, even extensive knowledge of the case or the defendant in the community as a result of pretrial publicity is not sufficient if there is not also some showing of prejudicial or inflammatory coverage." *Id.* (citing *Faulder* v. *State*, 745 S.W.2d 327, 338–339 (Tex. Crim. App. 1987).

(1181) The State filed controverting affidavits in response to Applicant's second motion for change of venue. (CR 4065-71). The trial court heard evidence and argument on the second motion for change of venue. (27 RR 5-29).

(1182) Applicant has cited no evidence from the extensive individual voir dire in the case in support of this claim. (App. at 367-72).

(1183) Applicant alleges in a footnote that some 90 percent of the venire had been exposed to media coverage, but he does not cite any evidence in the record supporting that statement. (App. at 370 n. 305).

(1184) During the hearing on the second motion for change of venue, the State challenged Applicant's claims about voir dire, noting that, at the time of the hearing, 8 jurors had been seated and only 2 prospective jurors had indicated they could not be fair due to pretrial publicity. (27 RR 16-17).

(1185) Applicant alleged 6 prospective jurors had indicated they could not be fair due to pretrial publicity. (27 RR 8).

(1186) About 3000 prospective jurors were summoned for Applicant's trial. (27 RR 22).

(1187) About 43 percent of the summonses were answered, resulting in an initial pool of nearly 1300 prospective jurors. (*See* 27 RR 22).

(1188) Applicant identified no prejudicial news coverage in the hearing, in that he did not identify coverage with prejudicial evidence against him or confessions. (27 RR 5-29).

(1189) At the hearing, Applicant identified no specific, recent media coverage of his case. (27 RR 17-18).

(1190) Over 18 months elapsed between the last of the murders and Applicant's trial.

(1191) The population of Rockwall County exceeded 85,000 at the time of trial. (CR 4067).

(1192) Here, the record shows Applicant brought no meaningful evidence of prejudicial news coverage after his first change of venue, no meaningful evidence of the prospective jurors' exposure to media coverage, and little to no evidence of the effect of media coverage on the jurors.

(1193) Applicant could not show the trial judge abused his discretion by denying a second change of venue. *See Gonzales*, 222 S.W.3d at 451-52 (change of venue not required where actual evidence of media coverage offered at hearing, including broadcast video of the offense, 2/3 of prospective jurors had seen media coverage of the case, and 1/3 of prospective jurors could not set aside that coverage).

(1194) Appellate counsel were not ineffective for declining to raise a claim on appeal about the second change of venue motion.

Death Qualified Jury Claim

(1195) Applicant complains appellate counsel failed to raise a claim on appeal regarding his trial motion to have two juries hear his case, one on guilt and another on punishment. (App. at 372-74).

(1196) Applicant has failed to rebut the presumption of sound strategy regarding this claim.

(1197) Applicant has failed to prove his appellate counsel were constitutionally ineffective as to this claim.

(1198) The Court of Criminal Appeals has held it does not violate Due Process to have the same jury determine guilt and punishment in a death penalty case. *Sparks* v. *State*, No. AP-76,099, 2010 WL 4132769, at *17 (Tex. Crim. App. Oct. 10, 2010) (not designated for publication).

(1199) The Supreme Court has held it does not violate Due Process to have the same jury determine guilt and punishment in a death penalty case. *Lockhart* v. *McCree*, 476 U.S. 162, 178, 183-84 (1986).

(1200) Applicant cites no analogous authority supporting the proposition that a single jury assessing guilt and punishment in a death penalty case violates due process.

(1201) Appellate counsel were not ineffective for declining to assert a claim regarding a "death qualified" jury on appeal.

Incendiary Device Claim

(1202) Applicant claims appellate counsel were ineffective in failing to assert on appeal the trial court erred by admitting a photograph of an incendiary device recovered from the storage unit during the guilt phase of trial. (App. at 374-76).

(1203) Applicant has failed to rebut the presumption of sound strategy regarding this claim.

(1204) Applicant has failed to prove his appellate counsel were constitutionally ineffective as to this claim.

(1205) During the guilt phase of trial, the State offered multiple photos of items seized from Applicant's home and a storage unit as well as multiple items seized. (45 RR 51-54).

(1206) Applicant's trial counsel objected to State's Exhibit 155, a photograph he described as "an improvised incendiary device." Counsel noted the item was listed on the State's notice of extraneous offenses and was more prejudicial than probative. The objection was overruled. (45 RR 52; SX 155). Counsel later clarified he objected to the exhibit on the ground it was evidence of an extraneous offense; the trial court understood that as the basis for the objection. (45 RR 53).

(1207) State's Exhibit 155 is a photograph of a plastic bottle of charcoal lighter fluid that has a tennis-ball-and-rope dog toy attached to it with duct tape. A cigarette lighter is also attached to the bottle. The exhibit depicts front and back views of the item. (SX 155).

(1208) An FBI agent later testified the item was "an improvised incendiary device." (45 RR 82).

(1209) Trial counsel did not object to the FBI agent's testimony. (45 RR 82).

(1210) To preserve error for appeal, a party must make a timely, specific objection and obtain a ruling. Tex. R. App. P. 33.1.

(1211) To the extent Applicant's claim depends upon the FBI agent's testimony, it was not preserved for appeal.

(1212) Evidentiary rulings at trial are reviewed for abuse of discretion. A clear abuse of discretion is shown only where the trial court's determination falls outside "the zone of reasonable disagreement" with regard to the determination. *Montgomery v. State*, 810 S.W.2d 372, 386, 391 (Tex. Crim. App. 1991) (op. on reh'g). A trial court's decision admitting evidence should be upheld on appeal if it is right for any reason. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

(1213) Applicant cites no analogous authority in the application supporting his claim that admission of this photograph was error.

(1214) Other items offered contemporaneously and without objection included State's Exhibit 139—a photo of a crossbow; State's Exhibit 145—a photograph of an AR lower; State's Exhibit 146—a photograph of an AR lower; State's Exhibit 147—a photograph of an AR lower; State's Exhibit 148—a photograph of an AR lower; State's Exhibit 149—the AR lower from SX 148 with magazines and a SHERIFF patch; State's Exhibit 153—a photograph from a footlocker labelled "WILLIAMS, ERIC"; State's Exhibit 157—a photograph of two loaded AR magazines; State's Exhibit 170—a photograph of a Desert Eagle pistol.

(1215) The Desert Eagle pistol was seized from Applicant's garage. (45 RR 64-65).

(1216) The other items were seized from Applicant's storage unit in Seagoville. (45 RR 72, 77-81, 83).

(1217) The components depicted in State's Exhibit 155 are not themselves illegal: charcoal lighter fluid, a dog toy, and a cigarette lighter.

(1218) Abundant evidence proved Applicant committed the violent murder of the McLellands. As recounted by the Court of Criminal Appeals, "the jury could reasonably infer from the ample circumstantial evidence" that Applicant shot Cynthia McLelland 5 to 8 times and Mike McLelland at least 10 times in their home on March 30, 2013. *Williams v. State*, No,. AP-77,053, 2017 WL 4946865, at *1-4 (Tex. Crim. App. Nov. 2, 2017) (not designated for publication).

(1219) Non-constitutional errors like that alleged in this claim are reversible on appeal only if they affect a substantial right of the accused. Tex. R. App. P. 44.2(b).

(1220) Applicant cites no analogous authority in the application supporting his claim he was harmed by any erroneous admission of this exhibit.

(1221) Applicant suffered no harm even if the exhibit was erroneously omitted, given the nature of the crimes, the relatively benign nature of the challenged exhibit, and the multitude of other weapons seized from the same location admitted without objection.

(1222) Applicant likewise suffered no harm because the FBI agent's testimony about the incendiary device was admitted without objection.

(1223) Appellate counsel were not ineffective in declining to appeal the ruling on the photo of the incendiary device.

Victim Impact Evidence Claim

(1224) Applicant next claims appellate counsel were ineffective for failing to raise a claim on appeal complaining of the admission of alleged victim impact evidence during the guilt phase of trial. (App. at 377-80).

(1225) Applicant has failed to rebut the presumption of sound strategy regarding this claim.

(1226) Applicant has failed to prove his appellate counsel were constitutionally ineffective as to this claim.

(1227) "Victim impact evidence" generally refers to evidence regarding the effect of the victim's death on others. *Mosley v. State*, 983 S.W.2d 249, 261 (Tex. Crim. App. 1998).

(1228) "Victim character evidence" generally refers to evidence regarding a victim's good qualities. *Id.*

(1229) At trial, the lead prosecutor asked the McLellands' son-in-law if Cynthia McLelland had any medical issues. Applicant's trial counsel objected on grounds of relevance, and the objection was overruled. (44 RR 81-82).

(1230) To preserve error for appeal, a party must make a timely, specific objection and obtain a ruling. Tex. R. App. P. 33.1.

(1231) A trial objection urging a claim different from that urged on appeal is insufficient to preserve the appellate issue. *See Wheatfall v. State*, 882 S.W.2d 829, 836 (Tex. Crim. App. 1994)(holding that an objection to the voluntariness of a statement did not preserve a claim that it was a comment on post-arrest silence); *Camacho v. State*, 864 S.W.2d 524, 532-33 (Tex. Crim. App. 1993)(holding that hearsay and relevancy objections did not preserve a claim regarding improper admission of extraneous offense evidence).

(1232) The relevance objection by Applicant's trial counsel did not preserve a claim that the testimony was improper victim impact evidence.

(1233) The challenged testimony was not victim impact testimony because it did not relate to the effects of the victim's death on others.

(1234) The testimony was relevant because it allowed the jury to assess whether Cynthia had any ability to resist her attacker.

(1235) Non-constitutional errors like that alleged in this claim are reversible on appeal only if they affect a substantial right of the accused. Tex. R. App. P. 44.2(b).

(1236) Abundant other evidence from the guilt phase showed Applicant murdered the McLelland's in their home.

(1237) Applicant cites no fact-specific authority supporting that his trial objection preserved the error he asserts, the objection had merit, or he was harmed.

(1238) Applicant's reliance on *Miller-El v. State*, 782 S.W.2d 892 (Tex. Crim. App. 1990) is misplaced because the challenged evidence in that case dealt with the long-term prognosis for a victim in light of their injuries rather than basic biographical facts about the victim.

(1239) Appellate counsel were not ineffective for failing to challenge the ruling regarding Cynthia McLelland's disabilities on appeal.

Individualized Sentencing Claim

(1240) Applicant next claims appellate counsel were ineffective for failing to challenge testimony regarding the actions of other inmates. (App. at 381-83).

(1241) Applicant has failed to rebut the presumption of sound strategy.

(1242) Applicant has failed to prove his appellate counsel were constitutionally ineffective.

(1243) Evidentiary rulings at trial are reviewed for abuse of discretion. A clear abuse of discretion is shown only where the trial court's determination falls outside "the zone of reasonable disagreement" with regard to the determination. *Montgomery v. State*, 810 S.W.2d 372, 386, 391 (Tex. Crim. App. 1991) (op. on reh'g). A trial court's decision admitting evidence should be upheld on appeal if it is right for any reason. *Romero v. State*, 800 S.W.2d 539, 543 (Tex. Crim. App. 1990).

(1244) During the punishment phase of a death penalty case in Texas the jury is required to answer what is commonly referred to as Special Issue No. 1. Tex. Code Crim. Proc. art. 37.071, §2(b)(1). This special issue requires the jury to answer "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id.* The State has the burden of proof on this issue by proof beyond a reasonable doubt. *Id.* §37.071(2)(c).

(1245) During the punishment phase, Applicant called Carla Stone, the Kaufman County Jail Administrator. Stone testified extensively about general operations of the jail and about Applicant's time in the jail. (50 RR 157-94).

(1246) Stone's testimony included evidence about Applicant's medical incidents, lapses by guards during his jailing, and the jailers' belief he was manipulating his blood sugar levels. (50 RR 178-81, 183).

(1247) During cross-examination, the prosecutor asked Stone about an incident where another inmate managed to escape during a trip to the hospital. (50 RR 188-89).

(1248) Applicant's trial counsel objected on the basis of "individualized sentencing," and the trial court overruled the objection, stating trial counsel had "opened the door." (50 RR 188-89).

(1249) The point of Applicant's direct examination of Stone was inmates cannot be dangerous in jail; this was a false impression.

(1250) Stone's limited testimony about the escape answered the false impression left by direct examination.

(1251) This testimony was relevant to Special Issue No. 1 because it related to whether Applicant could be safely held in prison.

(1252) Applicant's authorities do not support his claim that evidence regarding the actions of other inmates violates his right to individualized sentencing. (App. at 381).

(1253) The opinion on direct appeal rejected a similar claim regarding evidence of prison escapes admitted during cross-examination of Frank Aubuchon. *Williams*, 2017 WL 4946865 at *31-33.

(1254) Even if erroneously admitted, the substantial volume of other evidence regarding the three murders committed by Applicant, his other convictions, his plans to kill others, and his threats against others would render such an error harmless beyond a reasonable doubt.

(1255) Appellate counsel were not ineffective for declining to appeal the ruling regarding the escape attempt by another Kaufman County inmate.

Inadequate Briefing Claims

(1256) Applicant claims appellate counsel were ineffective because multiple meritorious claims in the brief on appeal were inadequately briefed. (App. at 383-91).

(1257) Applicant has failed to prove his appellate counsel were constitutionally ineffective as to this claim.

(1258) Applicant merely lists claims he believes were inadequately briefed or that were held to be inadequately briefed on appeal. App. at 383-91.

(1259) To prove ineffective assistance of counsel on appeal, Applicant must actually prove there is a reasonable probability that properly briefing an issue would have led to a different outcome in the appeal, namely, reversal. *See Butler*, 884 S.W.2d at 783.

(1260) Applicant has not briefed in the Application the claims to demonstrate they have merit.

(1261) Applicant fails to acknowledge that several of the alleged inadequately briefed claims were considered on the merits. *See Williams*, 2017 WL 4946865 at *21 (considering Point of Error 19), *28-30 (Point of Error 27), *38-40 (Point of Error 32).

(1262) Applicant has adduced no evidence demonstrating the claims have merit.

(1263) Appellate counsel was not constitutionally ineffective in the writing of his appellate brief.

Cumulative Effect

(1264) Finally, Applicant claims the cumulative effect of his appellate counsel's representation resulted in the deprivation of effective assistance of counsel.

(1265) Applicant has failed to prove his appellate counsel were ineffective as regards any of his sub-claims under Claim 7.

(1266) Because he has failed to show any viable sub-claim, his claim of a cumulative effect lacks merit.

(1267) Applicant has failed to prove he received ineffective assistance of counsel on appeal.

Claim 7: Jury Tampering

(1268) In Claim 7, Applicant claims the State's ex parte communication with the sequestered jurors during the punishment phase violated his constitutional right to a fair and impartial jury and tainted the verdict. (App. 393-95).

(1269) As previously found with respect to Claim 1D, Applicant fails to proffer any credible evidence that sequestered jurors talked about meeting with, or actually met with, prosecutors.

(1270) Applicant fails to prove by a preponderance of the evidence any violation of his right to a fair and impartial jury.

(1271) Applicant's claim the State's ex parte communications with the sequestered jurors was an external influence that violated his right to a fair and impartial jury should be denied.

Claims 8-11: Challenges to Texas's Death Penalty Scheme

(1272) In Claims 8 through 11, Applicant challenges the constitutionality of Texas's death penalty scheme. (App. at 396-431).

Procedurally Barred

(1273) Claims 8 through 11 are all procedurally barred on habeas review.

(1274) With regard to claim 8, Applicant failed to present his complaint at trial by motion or objection. Matters not raised at trial cannot form the basis for habeas relief. *See Ex parte Dutchover*, 779 S.W.2d 76, 77 (Tex. Crim. App. 1989); *Ex parte Crispen*, 777 S.W.2d 103, 105 (Tex. Crim. App. 1989); *Ex parte Bagley*, 509 S.W.2d 332, 333 (Tex. Crim. App. 1974) ("The same rule as to the necessity of an objection to complained of evidence has been applied by this Court in habeas corpus cases.").

(1275) Applicant also failed to present claim 8 for review on direct appeal. *Williams*, 2017 WL 4946865. Habeas review is not to be used as a substitute for appeal. *Ex parte Clore*, 690 S.W.2d 899, 900 (Tex. Crim. App. 1985). If a claim could have been raised on appeal, but was not, the Applicant is procedurally barred from raising the issue for the first time through habeas. *See Ex parte Cruzata*, 220 S.W.3d 518, 520 (Tex. Crim. App. 2007); *see, e.g., Ex parte Ramos*, 977 S.W.2d 616, 617 (Tex. Crim. App. 1998)

(holding that because claims concerning the jury charge at punishment should have been raised on direct appeal, the claims would not be addressed on habeas). Applicant was not prevented from raising claim 8 on appeal; he simply chose not to. *See Williams*, 2017 WL 4946865.

(1276) Finally, habeas corpus is not to be used to relitigate matters that were addressed on appeal. *See Ex parte Drake*, 883 S.W.2d 213, 215 (Tex. Crim. App. 1994); *see, e.g., Ex parte Acosta*, 672 S.W.2d 470, 472 (Tex. Crim. App. 1984) (holding that matters addressed on direct appeal would not be addressed on habeas). Applicant raised the allegations in claims 9 through 11 on direct appeal. He briefed them in points of error 38 and 39, and the Court of Criminal Appeals rejected them. *Williams*, 2017 WL 4946865, at *46. Thus, they may not be relitigated in these proceedings.

(1277) For all the foregoing reasons, claims 8 through 11 are procedurally barred and should be dismissed.

Challenges to Death Penalty Scheme

(1278) Alternatively, Claims 8 through 11 are meritless and should be denied.

Claim 8: Constitutionality of the Texas Death Penalty Scheme

(1279) In Claim 8, Applicant alleges the Texas death penalty framework is unconstitutional because there are geographic and racial disparities in the exercise of prosecutorial discretion to seek the death penalty. Applicant claims these disparities violate the constitutional guarantee of equal protection. His argument could also be construed to allege a violation of the constitutional guarantee against cruel and unusual punishment. (App. at 396-409). Applicant fails to prove any constitutional violation.

(1280) The constitutionality of the State's discretionary authority to seek the death penalty in capital murder cases is unquestioned. *See, e.g., McClesky v. Kemp*, 481 U.S. 279, 311-13 (1987) (discussing the "fundamental" need for prosecutorial discretion in the capital punishment system); *Roberts v. State*, 220 S.W.3d 521, 535 (Tex. Crim. App. 2007) (stating it has previously rejected the notion that there should be "a statewide policy or standard for determining in which cases the State will seek the death penalty as opposed to leaving the decision in the hands of the individual district attorneys"); *Crutsinger v. State*, 206 S.W.3d 607, 612 (Tex. Crim. App. 2006) ("We have held that prosecutorial discretion does not violate the Eighth and

Fourteenth Amendments."); *Hankins v. State*, 132 S.W.3d 380, 388 (Tex. Crim. App. 2004) ("The State has discretion to seek the death penalty and this prosecutorial discretion is not unconstitutional."); *Threadgill v. State*, 146 S.W.3d 654, 671-72 (Tex. Crim. App. 2004) (rejecting the claim that article 37.071 "fails to provide a mechanism by which the state determines the death worthiness of the Defendant"); *Ladd v. State*, 3 S.W.3d 547, 574 (Tex. Crim. App. 1999) (rejecting the claim that defendant's death sentence violates his Eighth and Fourteenth Amendment rights because Texas law gives prosecutors complete discretion on whether to seek the death penalty); *McFarland v. State*, 928 S.W.2d 482, 511 (Tex. Crim. App. 1996) ("[I]t is well settled that the discretion afforded the State to seek the death penalty is not unconstitutional . . . ."); *Barefield v. State*, 784 S.W.2d 38, 46 (Tex. Crim. App. 1989) ("We adhere to the proposition that the imposition of the death penalty is not unconstitutional because the discretion given the prosecutor."); *see generally Gregg v. Georgia*, 428 U.S. 153, 199 (1976) (rejecting defendant's complaint that the prosecutor has "unfettered authority to select persons whom he wishes to prosecute for a capital offense and to plea bargain with them").

(1281) The United States Supreme Court has recognized "the capacity of prosecutorial discretion to provide individualized justice is 'firmly entrenched in American law,'" and offers substantial benefits to the criminal defendant. *McClesky*, 481 U.S. at 311-12 (citations omitted). Along with the prosecutor's discretion to seek the death penalty is the prosecutor's discretion to decline to charge, offer a plea bargain, or decline to seek death. *See id.* A capital punishment system that does not allow for such discretion "would be totally alien to our notions of criminal justice." *Id.* (quoting *Gregg*, 428 U.S. at 200 n.50).

(1282) A prosecutor's discretion is not limitless. It is still subject to certain constitutional constraints. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996). Under the equal protection component of the Fifth Amendment, the State may not base its decision on an arbitrary classification such as the defendant's membership in a protected class. *See id.* (explaining that the decision to prosecute may not be based on "an unjustifiable standard such as race, religion, or other arbitrary classification") (quoting *Oyler v. Boles*, 368 U.S. 448, 456 (1962)); *McClesky*, 481 U.S. at 310 n.30 ("This Court has repeatedly stated that prosecutorial discretion cannot be exercised on the basis of race."). A criminal defendant's equal protection rights are violated when the prosecutors in *his* case act with such a discriminatory purpose. *See McClesky*, 481 U.S. at 292.

(1283) Applicant does not allege the State's decision to seek the death penalty in his case was based on his membership in any protected class or discriminatory intent or act by the State. Consequently, Applicant has not alleged a cognizable equal protection claim. *See Taylor v. Johnson*, 257 F.3d 470, 473 (5th Cir. 2001) (explaining that an individual asserting an equal protection claim must allege and prove that he was treated differently from similarly-situated individuals, and that this unequal treatment stemmed from a discriminatory intent).

(1284) Applicant cites law review articles referring to studies that purportedly establish a connection between race and geography and the State's decision to seek death. Applicant does not provide the empirical data from those studies. Also, many of the studies do not specifically relate to Texas. More importantly, none of the referenced studies show the State acted with a discriminatory purpose in seeking the death penalty in Applicant's case. *See Bell v. State*, 938 S.W.2d 35, 51 (Tex. Crim. App. 1996).

(1285) Applicant disregards other studies showing no racial discrimination in the exercise of the prosecutorial discretion to seek the death penalty. *See e.g.*, D. Baime, Report to the Supreme Court Systemic Proportionality Review Project: 2000-2001 Term 61 (2001); D. Baldus, G. Woodworth, G. Young, & A. Christ, The Disposition of Nebraska Capital and Non-Capital Homicide Cases (1973-1999); A Legal and Empirical Analysis, Executive Summary 14-22 (2001); Joint Legislative Audit and Review Commission, Review of Virginia's System of Capital Punishment, iii (2002); Klein & Kolph, Relationship of Offender and Victim Race to Death Penalty Sentences in California, 32 Jurimetrics J. 33, 44 (1991).

(1286) Applicant's argument that geographical disparities exist in the exercise of prosecutorial discretion to seek death has been rejected by the Court of Criminal Appeals. *See Crutsinger*, 206 S.W.3d at 611-13; *Allen v. State*, 108 S.W.3d 281, 285-87 (Tex. Crim. App. 2003); *King v. State*, 953 S.W.2d 266, 274 (Tex. Crim. App. 1997); *Bell*, 938 S.W.2d at 55.

(1287) Applicant asserts seven Texas counties are responsible for fifty percent of the inmates currently sitting on death row and forty-nine percent of executed inmates. (App. at 401). He attributes this disparity to differences in "ideology, experience litigating capital cases, and resource availability." (App. at 404). But again, the law affords prosecutors broad discretion in the decision to seek death and permits

consideration of these kinds of factors in the exercise of that discretion. *See Crutsinger*, 206 S.W.3d at 612. Applicant fails to assert or demonstrate disparate treatment between himself and other similarly "geographically" situated defendants.

(1288) Finally, the Texas death penalty framework does not violate the constitutional guarantee of equal protection or the constitutional prohibition against cruel and unusual punishment. If reviewable, Claim 8 should be denied.

Claim 9: Constitutionality of the 12-10 Rule

(1289) In Claim 9, Applicant contends the Texas death penalty framework violates his constitutional rights against cruel and unusual punishment and to due process of law. U.S. CONST. amends. VIII & XIV. Specifically, he maintains the ten-vote requirement for the jury to return a "no" answer to the first special issue and a "yes" answer to the mitigation issue coerces minority "life" voters to vote with the majority in the belief that their vote is worthless without nine other jurors to join them. *See* Tex. Code Crim. Proc. Ann. art. 37.071, §§ 2(d)(2), (f)(2) (West Supp. 2019). He also contends, contrary to existing law, the jury should be informed the failure to agree with respect to either issue results in a life sentence. *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(a)(1) (West Supp. 2019) (requiring jury not be told the effect of a deadlock). (App. at 410-17).

(1290) The Court of Criminal Appeals has repeatedly decided these issues against Applicant. *See, e.g., Rayford v. State*, 125 S.W.3d 521, 532 (Tex. Crim. App. 2003). In addition, the Supreme Court has held the Eighth Amendment does not require the jury to be instructed "as to the consequences of a breakdown in the deliberative process." *See Jones v. United States*, 144 L.Ed.2d 370, 382-83 (1999).

(1291) Applicant complains nonetheless the 10-12 rule acts as an improper dynamite charge in violation of *Mills v. Maryland*, 486 U.S. 367, 383 (1988). The jury charge in *Mills* was determined to be unconstitutional because it prevented the jury from acting on mitigating evidence unless it unanimously agreed a particular factor was mitigating, allowing a single juror to impose a death sentence. *See Mills*, 486 U.S. at 380. The charge in *Mills* violated the rule that the sentencer may not be prevented from considering, as a mitigating factor, all relevant evidence. *Id.* at 374-75.

(1292) The legitimacy of Texas's 10-12 rule has already been addressed in relation to *Mills* and upheld. *See Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996). The Texas statute allows a single juror to give effect to any piece of mitigating

evidence by voting "no" on any special issue. *Rousseau v. State*, 855 S.W.2d 666, 687 n.26 (Tex. Crim. App. 1993).

(1293) Moreover, the court specifically instructed Applicant's jury they need not agree on what particular evidence supports a negative answer to special issue one or an affirmative answer to special issue two. (11 CR 4293-94). Applicant's jury was instructed they could not answer the special issues in a manner that would result in a life sentence unless ten jurors agree to that answer. *Id.* But the charge also informed the jurors in order to vote "yes" to special issue one and "no" to special issue two, that is, vote for the death penalty, they had to do so unanimously. *Id.*

(1294) Under these facts, Applicant's argument the jurors were misled lacks merit because every juror knew capital punishment could not be imposed without the unanimous agreement of the jury on both special issues. *See Lawton v. State*, 913 S.W.2d 542, 559 (Tex. Crim. App. 1995). While the jury was not informed of the consequences of a hung jury, each juror knew that, without his or her vote, the death sentence could not be imposed. *Id.*

(1295) If reviewable, Claim 9 is meritless and should be denied.

Claim 10: Constitutionality of the Future Dangerousness Issue

(1296) In Claim 10, Applicant claims the future-dangerousness special issue, as set out in article 37.071, section 2(b)(1), violates the Eighth and Fourteenth Amendments because the terms it employs are vague and do not properly channel the sentencer's discretion. More specifically, he claims the statute's failure to define terms such as "probability," "continuing threat to society," and "criminal acts of violence" violates the constitutional requirement that each statutory aggravating circumstance genuinely narrow the class of persons eligible for the death penalty. (App. at 418-23).

(1297) It is well-settled the terms "probability," "criminal acts of violence," and "continuing threat to society" require no special definitions. *See, e.g., Saldano*, 232 S.W.3d 77, 91 (Tex. Crim. App. 2007); *Rayford*, 125 S.W.3d at 532; *Murphy v. State*, 112 S.W.3d 592, 606 (Tex. Crim. App. 2003). The terms are "taken and understood in their usual acceptation in common language," and the jury is presumed to understand them without being provided with their definitions. *See* Tex. Code Crim. Proc. Ann. art. 3.01 (West 2015); *see also Harvey v. State*, 123 S.W.3d 623, 628 (Tex. Crim. App. 2003); *Feldman v. State*, 71 S.W.3d 738, 757 (Tex. Crim. App. 2002). Consequently,

complaints about the statute's failure to define such terms are without merit. *See, e.g., Murphy*, 112 S.W.3d at 606 (holding the future-dangerousness special issue is not unconstitutionally vague for failing to define "probability," "criminal acts of violence," and "continuing threat to society"); *Cantu v. State*, 842 S.W.2d 667, 691 (Tex. Crim. App. 1992) (rejecting assertion that judge should define "probability" and "criminal acts of violence"). Therefore, if reviewable, claim 10 should be denied.

Claim 11: Constitutionality of the Mitigation Instructions

(1298) In Claim 11, Applicant contends the statutory definition of mitigating evidence violates the Eighth and Fourteenth Amendments because it limits the jury's consideration of mitigating factors to those that render a capital defendant less morally blameworthy. U.S. CONST. amends. VIII & XIV. (App. at 424-31).

(1299) The mitigation special issue instructs the jury to answer "yes" or "no" to the following question:

> Whether, taking into consideration *all of the evidence*, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment without parole rather than a death sentence be imposed.

Tex. Code Crim. Proc. Ann. art. 37.071, § 2(e)(1) (West Supp. 2019) (emphasis added).

(1300) Section 2(f)(4) of article 37.071 requires the trial court to instruct the jury it shall consider "mitigating evidence" to be "any evidence that a juror might regard as reducing the defendant's moral blameworthiness." *See* Tex. Code Crim. Proc. Ann. art. 37.071, § 2(f)(4) (West Supp. 2019). Applicant claims this definition is too narrow because it limits the definition of "mitigating evidence" to only evidence that "specifically implicates" the defendant's moral blameworthiness. He claims this definition excludes consideration of numerous other types of constitutionally relevant mitigating evidence, "including evidence that he was an Eagle Scout, participated in the math club, and was generally well-liked by his classmates." (App. at 428).

(1301) The Court of Criminal Appeals has consistently and repeatedly rejected this attack on article 37.071. *See, e.g., Lucero v. State*, 246 S.W.3d 86, 96 (Tex. Crim.

App. 2008); *King*, 953 S.W.2d at 274; *Shannon v. State*, 942 S.W.2d 591, 597 (Tex. Crim. App. 1996). Under article 37.071, the consideration and weighing of mitigating evidence is an open-ended, subjective determination made by each individual juror. The statute explicitly requires the jury to consider "all of the evidence" in determining the mitigation special issue. *See Threadgill*, 146 S.W.3d at 672. Moreover, it leaves it to the jurors to determine what evidence, if any, militates against a death sentence. *Shannon*, 942 S.W.2d at 597. Thus, it does not narrow the jury's consideration to factors concerning only moral blameworthiness. *Id.* For these reasons, if reviewable, Claim 11 should be denied.

Unless previously forwarded to the Texas Court of Criminal Appeals, the Clerk is **ORDERED** to prepare a transcript of all papers in cause number 32021A-422 and to transmit the same to the Court of Criminal Appeals as provided by article 11.071 of the Texas Code of Criminal Procedure.

The transcript shall include certified copies of the following documents:

1. Applicant's subsequent application for writ of habeas corpus and any other pleadings filed by Applicant in cause number 32021A-422, including any exhibits;

2. The State's Answer to Applicant's subsequent writ application filed in cause number 32021A-422;

3. Any other pleadings filed by the State in cause number 32021A-422;

4. Any proposed findings of fact and conclusions of law filed by the State and Applicant in cause number 32021A-422;

5. This court's Amended Order (containing all findings of fact and conclusions of law) in cause number 32021A-422;

6. Any and all orders issued by the court in cause number 32021A-422;

7. The indictment, judgment, sentence, docket sheet, and appellate record in cause number 32021-422.

The Clerk is further **ORDERED** to send a copy of this court's Amended Order containing the above findings of fact and conclusions of law to Applicant's counsel, Benjamin Wolff, at Benjamin.Wolff@ocfw.texas.gov or via mail at their address of record and to counsel for the State, Collin County Assistant District Attorney Lisa Smith, at lsmith@co.collin.tx.us or via mail at their address of record.

SIGNED the 15th day of May, 2020.

Judge Molly Francis, Sitting by Assignment
422nd Judicial District Court
Kaufman County, TX