IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

TERRY D. EDWARDS, SR. *Petitioner*, v. WILLIAM STEPHENS, Director, Texas Department Of Criminal Justice, Correctional Institutions Division, *Respondent*.	§ § § § § § § § § § § §	Case No. 3:10-CV-6-M DEATH PENALTY CASE **EXECUTION SCHEDULED: JANUARY 26, 2017**[1]

PETITIONER'S RULE 60(B) MOTION TO REOPEN JUDGEMENT

AND INCORPORATED MEMORANDUM OF LAW

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[1] Terry Darnell Edwards is scheduled to be executed on January 26, 2017. Undersigned counsel were appointed to Mr. Edwards's case in June 2016. At that time, his execution was scheduled for October 19, 2016. Counsel consulted with the Dallas County District Attorney's Office and, through negotiations with its Conviction Integrity Unit and Appellate Division, determined the need to modify the October 19 date. The DA's Office, in coordination with the Attorney General's Office, stipulated to the modification of Mr. Edwards's execution order, changing the date to its current date of January 26 by a trial court order entered on September 29, 2016.

I. INTRODUCTION

A. Statement of the Case

Texas is scheduled to execute Mr. Terry D. Edwards on January 26, 2017 for shooting and killing two former coworkers during a robbery, which he carried out with his older cousin, of a Subway shop in 2002 in Balch Springs. But Mr. Edwards did not shoot Mickell Goodwin or Tommy Walker. Due to pervasive prosecutorial misconduct and the gross incompetence of Mr. Edwards's defense counsel, his jury was told, by both sides, that he did, in fact, kill them. The State's evidence does not support that conclusion, and was contradicted by materials it failed to disclose to the defense. The misconduct of the prosecution and the complicity of the defense allowed the State to empanel a jury both void of African-Americans and predisposed, based on their venire questioning, to convict Mr. Edwards, who is black, and impose on him the ultimate punishment for the deaths of two white people. In November 2003, he was convicted of murdering Ms. Goodwin and then sentenced to die. Days thereafter, his cousin (Kirk Edwards) quietly pled guilty to robbery and is serving a term of years that will conclude in 2027.

At every step of his proceedings, Mr. Edwards has received abysmal representation, culminating at the state habeas level in fraud and in this Court in attorney abandonment. The conflict of interest of his federal habeas counsel, appointed pursuant to 18 U.S.C. §3599, and the attorney's resulting disengagement from this case caused a grave defect in the Court's proceedings, which ended by the denial of the habeas petition on August 6, 2014. This defect, coupled with the requisite extraordinary circumstances in this case, call for the Court to reopen its judgment in order for Mr. Edwards, through his current, un-conflicted counsel, to then present meritorious claims that his previously lawyers failed to develop and otherwise completely ignored.

B. Procedural Posture And Case History

1. The Dallas County Judgment At Bar Is Constitutionally Infirm Due To Prosecutorial Excesses And Grossly Deficient Performance From Appointed Counsel

Petitioner is under sentence of death for the murder of Ms. Mickell Goodwin pursuant to a 2003 Dallas County District Court judgment. On Monday morning, July 8, 2002, Ms. Goodwin and Mr. Tommy Walker, employees of a Subway franchise in Balch Springs, were shot and killed during a robbery. Local police apprehended Mr. Edwards as he fled the scene on foot, running him down with a patrol car minutes after the shootings. His co-defendant (and older cousin), Kirk Darnell Edwards, fled the scene in the getaway car. The following day, Kirk Edwards turned himself in to the authorities. After convicting Terry Edwards of the murder of Ms. Goodwin pursuant to Cause No. F02-15086, on November 21, 2003 his jury answered the special issues pursuant to the capital prosecution in a manner compelling a death sentence. Four days later, the State successfully moved to dismiss its separate indictment for the murder of Mr. Walker under Cause No. F02-15087.

On December 11, 2013, Kirk Edwards, who had been jointly indicted under a single cause for the murders of both Mr. Walker and Ms. Goodwin (No. F02-150585), pled guilty merely to aggravated robbery in exchange for a sentence of twenty-five years. For several years he has been eligible for parole and, in any event, will finish his term of years by 2027.

i. The State Tried And Convicted Petitioner As The Triggerman Despite The Evidence's Indication That He Did Not Use The Murder Weapon

The State's lead prosecutor, Assistant District Attorney D'Amore, tried Petitioner as the shooter in this double-homicide. As Mr. D'Amore put it during his closing in the penalty phase, "Yes, Kirk Edwards is involved but the man that pulled the trigger is sitting right here", (Trial

Tr., Vol. 55, 115-16),[2] and later: "Did he [Terry Edwards] do the shooting? Yes, overwhelmingly." (Tr. 55 at 118). The State was very effective; by the trial's end, defense counsel had subscribed to the State's narrative: "He killed two people out there." "We'll concede that." (Tr. 55 at 79). Throughout Petitioner's trial, ADA D'Amore pressed an extremely aggravated account: Terry Edwards was a "personification of evil" who wanted vengeance against an employer who fired him (Tr. 55 at 75); he went to Subway "with murder in mind, with greed in mind, with evil in his heart . . ." (*Id.* at 115-16), and he "controlled" and "engineered" the entire crime, including two execution-style murders of former colleagues (*Id.* at 74, 75).

But the evidence did not actually support this portrayal, and the defense failed to subject the State's case to meaningful testing. The State's physical evidence submitted at trial did not establish that Petitioner had used the murder weapon. Trial counsel, Messrs. Paul Brauchle and Hugh Lucas, failed to conduct any substantial investigation of its own and to mount any meaningful defense against the State's theory that Terry Edwards was the triggerman in the two shootings and that his culpability thus justified a death sentence.

The State conducted gunshot residue (GSR) handwipings of Terry Edwards immediately upon his arrest, which occurred minutes after the robbery, yards away from the crime scene where Petitioner had been left behind to dispose of the weapon and sandwich bags of cash from the store's proceeds from the Fourth of July Weekend.

The State established that the firearm recovered from the crime discharged antimony, barium, and lead. Terry Edwards was tested for this GSR and his results were negative; his

[2] The Court's docket reflects that shortly after the filing of Mr. Edwards's habeas petition, Respondent filed a single CD "consisting of State court papers" that were "not imaged" but filed on December 23, 2012. (See also August 26, 2014 docket entry re record on appeal). We, therefore, are citing to the transcripts independently instead of providing them as part of the Appendix. Upon request, undersigned are able to provide a copy of the transcripts.

handwipings failed to manifest the .380 automatic's trio of chemicals.[3] (App. 24). At trial, the State introduced evidence of the negative results from tests of decedent Tommy Walker's hands. The defense called a single witness at the guilt/innocence phase, Ms. Vickie Hall, a Trace Evidence Examiner employed by the Dallas County crime lab, the Southwestern Institute of Forensic Science (SWIFS). Ms. Hall testified only about the testing of the hands of Terry Edwards and Mr. Walker, which had been conducted by Senior Trace Evidence Examiner David W. Spence. (Tr. 52 at168). However, due in part to counsel's lack of understanding of the forensic evidence against their client, the prosecutor was able to elicit false and misleading testimony on cross-examination that Mr. Edwards could have physically removed trace chemical components from his hand. (*See* Tr. 55 at 68-69).

The prosecutor elicited from Ms. Hall that GSR could be partially removed from someone's hands through profuse sweating (*see* Tr. 52 at 186: "If there's a large amount of sweat, some of that moisture could rinse some of that residue away"), but, Ms. Hall further explained, its absence would be more likely explained by some sort of physical removal. (*Id*.). The prosecution then improperly argued, in closing, that the presence of traces of barium on Mr. Edwards's hands – without the presence of the other chemical components that testing had established were discharged in equivalent portions from the weapon – was just as strong as evidence that Terry Edwards was the triggerman as evidence that all three chemical components had been deposited would have been.[4] (Tr. 53 at 62).

[3] A trace level of barium was detected but "antimony, barium, and lead levels meeting the criteria for evidence of gunshot residue were not found." Trace Evidence Report, Dec. 5, 2002, David W. Spence, Sr. Trace Evidence Examiner, Southwestern Institute of Forensic Sciences.

[4] Barium is relatively commonplace in the environment and, by itself, without detection of the other two chemical components of the firearm's gunshot residue, does not suggest the likelihood that such residue had been on the individual's hands.

Petitioner's current counsel obtained a preliminary expert assessment of this key facet of the prosecution's case. According to Mr. Paul Kilty, a GSR expert with over 20 years FBI experience, including years as the Chief of the FBI Laboratory's Gunshot Analysis Unit in Washington D.C., presence of an elevated amount of barium on the hands does not indicate or suggest a likelihood that there is gunshot residue on Mr. Edwards's hands or that he fired a gun." (App. 6). The prosecution's argument regarding the barium is not only wrong, Mr. Kilty found, it is "scientifically unsupportable." (App. 5).[5]

While Ms. Hall testified about Petitioner's handwipings, the State has disclosed only in recent months that Ms. Hall, herself, also tested Ms. Goodwin's hands. (App. 25). But at the time of the trial the State had failed to provide that any such examination had been carried out. According to the results, Ms. Goodwin's right hand, which suffered a defensive wound during the shootings, tested positive for the firearm's GSR. *Id.* In contrast, Terry Edwards, who the State argued discharged the weapon three times, tested negative. (App. 24). This material evidence was absent from the record, as it was not disclosed to the defense. In the light of these tests, Ms. Hall's failure to identify the Goodwin testing during her trial testimony raises serious issues, especially when coupled with the State's suppression of the report.

Ms. Goodwin and Mr. Walker were shot at point blank range, resulting in soot and stippling around the sites of their wounds and voluminous blood loss. (Tr. 52 at 17-18; App. 8-9) But, as the State admitted at trial, Terry Edwards not only lacked the GSR indicative of having fired the murder weapon, but he had not a drop of blood on him from either victim when he was arrested just moments after the shootings. (Tr. 51 at 224-227). The extensive testing of his body

[5] Specifically, Mr. Kilty stated that: The three chemicals, barium, antimony, and lead, exist in the same particle, or in particles that contain two of the three. If you remove any of the components they would be removed linearly. It does not occur that just one of the components is removed; the components all increase or decrease together. It is **not possible** that a defendant who had gunshot residue on his hands could simply wipe two of the three components off of his hands and not the third. (*Id*. at 4-5). (emphasis added)).

and clothing for a blood match found only *his own* blood as a result of being hit by the patrol car during his arrest.[6] (*Id.*). The State's failure to test his clothing for GSR residue before trial, an omission contrary to the current best practice, only exacerbates the overarching absence of evidentiary support for its theory of the case against Petitioner. (App. 9, 20).

Further, with respect to blood drops at the crime scene, preliminary review of crime scene photographs establish that the two victims were shot while upright (App. 4, 8), and not, as ADA D'Amore insisted, despite the absence of actual evidence from the State's case, kneeling. (Tr. 55 at 117). The State, as set forth below, misused expert testimony to prop up this theory of execution-style murders and was enabled to do so by the defense's failure to consult with even a single independent forensic expert. Had they attempted to meaningfully prepare Petitioner's defense, they would have secured readily attainable evidence demonstrating, in fact, that the State's theory was unsupported. Current expert review of the evidence establishes that due to the large size of the blood drops from Ms. Goodwin "it is indisputable that [she] was standing when shot." (App. 8).[7] "Similarly," Mr. Tressel found, "there is no question that Mr. Walker was standing at the time that he was shot. Again the crime scene photographs make this a clear and indisputable conclusion." (App. 4). Had trial counsel consulted with an expert, as reasonably competent counsel would have, they would have been able to prove that the State's highly aggravated theory that the victims were on their knees, pleading for their lives, was not "a reasonable deduction" from the actual evidence.

[6] At the time of the initial investigation, a search warrant had been issued for the getaway car driven by Kirk Edwards. As of this filing, the result of the issuance of that search warrant – including any forensic examination of the automobile – has not emerged.

[7] As Mr. Tressel has explained: "The crime scene photographs depict large drops of blood on the ground near Ms. Goodwin's body. Blood dropping from a height reaches a terminal velocity at 6 feet. This means that blood that is dropped from six feet will have the same circumference as blood that is dropped from, for example, twenty feet. In this case, it is clear that Ms. Goodwin's blood dropped from a substantial height, approximately five feet above the floor." (*Id*. at 5).

ii. The State Introduced Evidence Of Petitioner's Involvement In A Prior Robbery That The Defense Did Not Meaningfully Challenge And Investigation Indicates Was Contrived

During the trial's penalty phase, the State introduced evidence that Petitioner had been involved in a robbery of a Subway franchise in Fort Worth that had taken place months before the Balch Springs robbery. That evidence was essentially an identification from a photo lineup by a single witness who had provided a distinctly different description of the robbery at the time of the crime in April 2002. (Tr. 53 at 87-118). None of the other eyewitnesses to the Fort Worth robbery positively identified Petitioner (*id.* at 125-129), but there is no indication that defense counsel attempted to investigate the circumstances of that crime despite the State's heavy reliance on it under its theory of the capital case.. It is apparent that significant evidence pointing to other perpetrators, individuals who had nothing to do with Petitioner, had been available but untapped at the time of trial. Critical law enforcement records, regarding the investigation of the Fort Worth aggravator, as well as other similar crimes, were withheld from trial counsel.

iii. Defense Aided The Prosecution In Its Use Of Dallas County's Longstanding Racially Discriminatory Practices In Jury Selection

Mr. Walker and Ms. Goodwin were White. Terry Edwards is Black. From an initial pool of approximately 3,000 county residents, the parties individually questioned 143 venire members in order to select Mr. Edwards's jury that, in the end, initially seated only white people. (An alternate of Hispanic ethnicity later replaced one of the initially seated jurors).

Mr. Edwards's jury was empaneled months after the first Supreme Court opinion addressing the Dallas County DA's racially discriminatory practices in the case of Mr. Thomas Miller-El. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).[8] In Miller-El's Dallas County trial in 1986, the District Attorney's Office used peremptory strikes to eliminate 10 out of the 11 Black

[8] *See also Miller-El v Dretke*, 545 U.S. 231 (2005), decided shortly after Mr. Edwards's case.

venire members individually questioned. Months after that trial, the Dallas Morning News published its first investigative journalism on that office's institutionalized practices in capital jury selection.[9] As displayed in the *Miller-El* litigation, the DA's Office under Bill Hill and his predecessors had an entrenched practice of striking prospective African-American jurors that manifested a consistent pattern encompassing the period of the trial at bar.[10]

The trial record at bar (consisting of 47 transcript volumes), reflects the District Attorney's use of its practice of trading strikes by mutual agreement based upon juror questionnaires. In Petitioner's case, this dictated the removal, off the record and without individual questioning from either party, and almost never from the defense, of swaths of the venire. This trading practice is known to have "impacted prospective black jurors far more than others, and kept many of those jurors from ever graduating to individual voir dire." (App. 618). As reflected in Mr. Edwards's case, the agreement method "stripped" away "the general demographic representativeness of" Dallas County and enabled the empanelment of a White jury without, apparently, the use of a single peremptory strike exercised against a Black venire member.

The ostensible basis for this comprehensive striking by agreement of the entire Black venire, apart from the two African-American prospective jurors struck for cause, would have been the individual member's answers to the questionnaire form. However, the DA has provided Petitioner's current counsel with copies of what that office has represented is the entirety of the

[9] The Dallas Morning News extensively chronicled this era, publishing two separate series of stories, one in 1986 and another in 2005, on the actual practices in that office. *See, e.g.*, Steve McGonigle & Ed Timms, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, Dallas Morning News, Dec. 21, 1986 (1986 WLNR 1716765).

[10] *See* Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors*, Dallas Morning News, Aug. 21-23 (2005). WLNR 24660181; 2005 WLNR 24659981; 2005 WLNR 24658951; 2005 WLNR 24659140; 2005 WLNR 24658669; 2005 WLNR 24659060; 2005 WLNR 24657978; 2005 WLNR 24658335; 2005 WLNR 24657350; 2005 WLNR 24657134; 2005 WLNR 24657758; 2005 WLNR 24657224; 2005 WLNR 24658546).

questionnaires in its possession. These copies number only 35 of the 143 questioned venire members. Among those 35 is a single questionnaire completed by an African-American. It lacks any material that would supply a creditable basis for a cause strike of the given venire member, Mrs. Warrick, yet the DA and defense agreed – off the record – to strike her, just as the State and defense had done with every other Black venire member.

Current counsel for Petitioner have also obtained a strike list apparently maintained by ADA D'Amore (and/or ADA Tokoly) that includes, next to 32 of the venire members, a handwritten, encircled "B."[11] (App. 623). Especially in light of the troubled history of this District Attorney's Office,[12] there is obvious reason for "concern[] that these markings strongly suggest racial indications." (App. 622). These present deeply concerning markers of potentially odious prosecutorial misconduct and constitutional violations and, further, strongly reflects the profound consequences of defense counsel's appeasement of the State's trading practice to strip away diversity and representativeness from Mr. Edwards's jury.

iv. Defense Counsel Failed To Engage Surviving Family Members Who Wanted To Testify In Support Of Petitioner

On the last day of Mr. Edwards's penalty phase, defense counsel Mr. Hugh Lucas stated on the record that Ms. Cassandra McDaniel, the mother of two children of the decedent, Mr. Walker, contacted him to express the wishes of her family that they did not want Mr. Edwards to be sentenced to death. (Tr. 55 at 8-9). Trial counsel had done no investigation into the views of the surviving victims in this case and the trial court refused to stay the proceedings to permit Ms. McDaniel to testify. Current counsel have engaged Ms. McDaniel and her family. It has emerged

[11] This marking system may reflect race-based jury selection tactics historically used in the county (*infra*, n. 15**), and also encountered elsewhere. *See ,e.g., Foster v. Chatman*, 136 S.Ct. 290 (2016).

[12] In *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003), published a mere months before Mr. Edwards's trial, the Supreme Court noted that the fact that Dallas County ADA's marked race on the prospective juror's cards "reinforced" the supposition of racial discrimination established in the record in that case.

that due to their understanding of their father and his relationship with Petitioner, they remain insistent that Terry Edwards is not responsible for the shootings. (App. 26-34).

v. Direct Appeal Counsel Filed Appeal Late And Waived Argument

On direct appeal, Petitioner did not fair better with his appointed representation On November 11, 2003, Mr. Douglas Parks was appointed to represent Mr. Edwards. Mr. Edwards never met or spoke with Mr. Parks. On June 14, 2004, counsel filed a motion for a five-month extension of time. The court granted the motion, imposing a new deadline of November 30, 2004, and ordering that "NO FURTHER EXTENSIONS WILL BE ENTERTAINED. Failure to file appellant's brief may result in the issuance of a show cause order and/or judgment of contempt."(App. 671), Clerk's Order. That date came and went, without any filing on Mr. Edwards's behalf. On December 16, the CCA mailed Mr. Parks a post-card notifying him of the failure. (App. 672). In response, on December 22, 2004, Mr. Parks hastily prepared and filed his brief via mail, along with an extension motion requesting "until December 30, 2004, or the date this Court receives this brief, whichever is earlier." The brief was docketed on the following day. The State responded on June 28, 2005. The CCA initially scheduled the case for oral argument on September 28, 2005. On August 18, 2005, Mr. Parks wrote the CCA informing them that, in this capital case, "Appellant does not desire oral argument and submits the cause on the briefs." (App. 673). The State, one week later, replied, "Based on this Court's informing me that Appellant has waived oral argument, the State will also waive oral argument." (App. 674). Thus, the case was submitted and, on March 1, 2006, the CCA denied relief.

2. Petitioner's State Habeas Counsel Conducted No Investigation And Appears To Have Committed Grave Misconduct Under His Appointment

Mr. C. Wayne Huff of Boerne, Texas represented Mr. Edwards in state habeas proceedings. On July 5, 2005, Huff requested a three month extension for his petition on the grounds that "counsel's investigation of this case will involve the review of many documents not contained in the record, and the interview of witnesses not called at trial." *State v. Edwards*, F02-15086 (August 5, 2005).

However, by the time of the November 3, 2005 filing, the petition reflected that Huff had completed no investigation and offered not a single meaningful claim for Mr. Edwards. The state habeas petition contained just six boilerplate claims. Line-by-line review of the 58-page petition Huff filed for Mr. Edwards – compared to filings he had made for other clients and an appendix prepared by Mr. Edwards's appellate counsel – has determined that *the entire pleading contains only 10 original sentences*. (App. 210). (Five days after he filed this petition, Huff invoiced the state $24,611.81 for its preparation, which raises facial questions concerning misconduct in terms of fraud.) (App. 668-70).

Less than a month before he filed the state petition for Mr. Edwards, the Western District of Texas published an opinion concerning Huff's performance in a prior state habeas case. That federal court found that his capital habeas work for Mr. Rolando Ruiz was "appallingly" and "egregiously inept", "egregiously deficient", and "wholly incompetent." *Ruiz v. Dretke*, No. Civ SA-03-cv-303-OG, 2005 WL 2620193, at *2-3 (W.D. Tex. Oct. 13, 2005). In a description that easily applies to Mr. Huff's performance in the present case, the district court described his failure to investigate, develop and preserve meritorious extra-record claims surrounding constitutional violations stemming from Mr. Ruiz's capital

prosecution. As he did in *Ruiz*, Huff "made no apparent effort to investigate and present a host of potentially meritorious and readily available claims for relief." *Id.* at *2. Here, as in *Ruiz*, Huff made "virtually no effort to present the state habeas court with any evidence supporting the vast majority of the claims for state habeas relief." *Id.*

The State filed its 20-page Reply on April 6, 2006. Dallas County District Court entered an order finding that there were no issues warranting a hearing and directed the parties to file Proposed Findings of Fact and Conclusions of Law within 30 days. The State filed its Proposed Findings ten days later on April 17, 2006. Eight days later, on April 25, 2006, without waiting for the 30 days to expire, the Dallas County district judge signed the State's Proposed Findings and Conclusions of Law, with the word "State's" still in the title. Huff failed to object to this or any other aspect of the order or file his own Proposed Findings and Conclusions. The CCA affirmed the trial court on December 16, 2009.

3. Federal Habeas Counsel Disengaged From His Appointment Without Notifying The Court, Let Alone Withdrawing, Abandoning Petitioner During Critical Two-Year Period Of Case

Petitioner's federal habeas proceedings were defective due to his appointed attorney's misconduct during a critical period of his case. As set forth below, appoint counsel, Mr. Wardroup, accepted full-time employment in early 2011 with the Texas Criminal Defense Lawyers Association (TCDLA)—where he remains employed today—yet failed to withdraw from this case or otherwise notify the Court of his disengagement from the obligations under his appointment.

On January 11, 2010, the Court granted the January 4, 2010 motion to appoint Mr. Richard Wardroup pursuant to 18 U.S.C. §3599. (Doc. 2). Mr. Wardroup was Petitioner's only

counsel of record in the federal courts until the Fifth Circuit replaced him on June 25, 2015 with the substitution of Mr. Donald Vernay (*infra*).

Nearly eleven months after his appointment, Mr. Wardroup timely filed Mr. Edwards's habeas corpus petition on December 10, 2010 (Doc. 6),[13] which the Court ultimately denied on August 6, 2014 (Docs. 22, 23). Devoid of investigation-based claims, the Court denied each of the petition's "six grounds," all of which sought "relief pertaining to jury selection issues" based on the record. (Doc. 22 at 2). Comparison with the state habeas petition Mr. Huff assembled (*supra*) reflects that the federal petition's first five grounds presented augmented versions of the claims Mr. Huff had exhausted in state proceedings. The sixth and final "jury selection" claim concerned appellate counsel ineffectiveness (and consisted of two paragraphs, Doc. 6 at 50). (Doc. 22 at 18-20).

These claims are record based (with the exception of a representative cross-section claim focused on Hispanics that is adapted, nearly verbatim, from a wholly different case that state habeas counsel, Mr. Huff, had litigated—*Ex Parte Ochoa*, Dallas County, No. F02-53582-JM (*see* Exh. __*)—shortly before he filed for Petitioner the wholesale re-purposing of the *Ochoa* state petition.

After his December 15, 2010 filings (*supra*), Mr. Wardroup filed only an eight-page response to Respondent's answer on March 9, 2012 (Doc. 21), and, upon the Court's judgment on August 6, 2014, a notice of appeal (Doc. 24). On November 14, 2014, Mr. Wardroup

[13] Mr. Wardroup simultaneously filed on December 15, 2010 a motion to stay proceedings pursuant to *Rhines v. Weber*, 544 U.S. 269 (2005), in order to return to state court to exhaust unspecified "unexhausted" and "potentially meritorious" claims. (Doc. 9 at 2). Several months earlier, Messrs. Vernay and Wardoup, acting for Mr. Braziel in his capital petition before this Court, had filed this same generic motion. *Braziel v. Stephens*, No. 3:09-cv-1591-M (Doc. 17, Aug. 17, 2010). In *Braziel*, the Court later characterized the motion as submitted "to abate [Braziel's] proceedings to exhaust a claim of ineffective assistance of trial counsel because that claim was procedurally barred due to the ineffective assistance of state habeas counsel in failing to raise the claim earlier." (Doc. 27, Feb. 28, 2011). Then, during the pendency of *Trevino v. Thaler* in the Supreme Court, this Court *sua sponte* stayed the *Braziel* proceedings. (Doc. 30, discussed *infra*).

presented two issues in a 17-page application for certificate of appealability in the Fifth Circuit. *Edwards v. Stephens*, No. 14-70026. The State responded on December 12, 2014. Mr. Wardroup filed nothing further and, on May 19, 2015, the Fifth Circuit denied the application for COA.

Because he was not admitted to practice before the United States Supreme Court, Mr. Wardroup moved successfully to substitute counsel and, on June 23, 2015, Mr. Vernay was so appointed. Mr. Vernay filed a petition for a writ of certiorari on August 14, 2015, which was denied on November 2, 2015. *Edwards v. Stephens*, No. 15-5682.

4. Abandoned After Conclusion Of Federal Proceedings, Mr. Edwards Wrote The Court To Obtain Counsel

On January 8, 2016, the Dallas County DA moved to set Mr. Edwards's execution for May 11, 2016 and served process on Mr. Wardroup by email only and despite the indication in the federal dockets that Mr. Vernay had been substituted in as counsel of record for Mr. Edwards. The motion was unopposed. On February 1, 2016, then-presiding judge, the Hon. Fred Tinsley, entered the initial order setting Mr. Edwards's execution for May 11, 2016. On February 5, 2016, Mr. Edwards, who had not even been made aware of the State's January 8 motion to set his execution, learned of his execution date from the corrections department's death row administration at the Polunsky Unit in Livingston.

On March 2, Mr. Edwards mailed a handwritten letter to this Court addressing his abandonment by his last counsel, Mr. Vernay. (Doc. 32). Upon the Supreme Court's denial of the certiorari petition filed by Mr. Vernay, the attorney attempted to give back his case to prior federal habeas counsel, Mr. Wardroup. Mr. Edwards reported that he had sent two letters to Mr. Wardroup and Mr. Vernay in the attempt to identify whom between them was acting as his attorney. He received no response. He asked his mother to call Mr. Wardroup, but she received no return call.

By March 6, Mr. Edwards wrote again to the Court, further explaining that he had no lawyer. (Doc. 31). Since learning of his execution date from TDCJ personnel, he had still neither received the motion nor order setting his date, let alone the actual death warrant. The last correspondence he had received from an attorney was on November 10, 2015, whereby Mr. Vernay informed him of the denial of his petition for certiorari. As reflected in the prison's legal correspondence log, Mr. Edwards had written to Mr. Vernay in December, January, and February, and received no response to any of his inquiries about the status of his representation. In light of that abandonment, Mr. Edwards respectfully requested appointment of an attorney.

In response to Mr. Edwards's letter motion for the appointment of counsel, Don Vernay submitted a pleading defending his conduct and reputation. (Doc. 33). He explained that Richard Wardroup had approached him "for the sole purpose of preparing a petition for certiorari, since Wardroup was not admitted before the United States Supreme Court." (*Id.* at 1).

Mr. Vernay went on to explain that despite having been appointed to represent Mr. Edwards for eleven months, he had been "provided with no file or documents other than this Court's denial of the petition of habeas corpus and the opinion of the Fifth Circuit Court of Appeals denying the Petitioner's request for a COA, and had never met or spoken with Mr. Edwards." (*Id*.). Mr. Vernay further explained that while apprising Mr. Edwards of his cert. petition's denial, he stated that he was returning the case to Mr. Wardroup. (*Id.* at 2).[14]

[14] Mr. Vernay filed in the public docket the above-referenced correspondence despite it being obviously confidential and subject to attorney-client privilege. Further betraying the privilege attaching to attorney-client communications, Mr. Vernay argued on his own behalf that he "is/was completely unaware of the fact that Mr. Wardoup had no contacted [sic] Mr. Edwards regarding his execution date and so [Vernay] has not 'abandoned' Mr. Edwards as stated in [Edwards's] motion." While we do not understand how Mr. Vernay's failure to communicate with Mr. Edwards supports the assertion that he had not abandoned him, Mr. Vernay's foregoing self-serving representations manifested his conflict of interest against Mr. Edwards given the reputational interest that he had zealously protected at the expense of Mr. Edwards.

On March 18, 2016, the Court denied Mr. Edwards's pro se motion for substitution of counsel. The Court referred to the Fifth Circuit's June 25, 2015 appointment of Mr. Vernay and thus "directed [Vernay] to continue his representation under [18 U.S.C. §3599]." (Doc. 34).

After the April 6, 2016 order by Judge Tinsley vacating the original execution date and re-setting it for October 19, Mr. Vernay filed a motion on June 2, 2016 to substitute counsel wherein undersigned lead counsel, Ms. Merrigan and Mr. Perkovich, were specified as available to take over Mr. Edwards's representation. (Doc. 35). By the above-mentioned June 14, 2016 order (Doc. 36), this Court appointed Merrigan and Perkovich as lead counsel along with Carl David Medders, of Burleson, Pate & Gibson, as local counsel.

5. Current Counsel's Investigation Necessitated Trial Court's Modification Of Execution Date

Undersigned counsel have embarked on extensive review and investigation of Petitioner's case upon their June 14, 2016 appointment. On the basis of negotiations with the Dallas County District Attorney's Office concerning a September 26, 2016 letter addressed personnel with the Appellate Division and the Conviction Integrity Unit regarding the profound issues besetting this judgment (outlined above and discussed below), the parties in the trial court, in consultation with the TDCJ, jointly moved to modify the execution date to January 26, 2017 in order to afford additional time for investigation and case preparation. The 195th Judicial District Court of Dallas County granted the motion by an order dated September 29, 2016.

II. PETITIONER'S EXTRAORDINARY CIRCUMSTANCES REQUIRE REOPENING OF THIS HABEAS CASE TO REMEDY ITS DEFECT

A. "A Non-Merits-Based Defect" May Warrant Reopening

A Rule 60(b) motion cannot serve to attack "the substance of the federal court's resolution of a claim on the merits," *Gonzalez v. Crosby*, 545 U.S. 524, 532 (2005), rather, it must challenge "some defect in the integrity of the federal habeas proceedings." *Id.*, *quoted in*

Clark v. Stephens, 627 Fed.Appx. 305, 308 (5th Cir. 2015); *see Balentine v. Thaler*, 626 F.3d 842, 847 (5th Cir. 2010) ("[t]o open the Rule 60(b) door . . . there must be a showing of a non-merits-based defect in the district court's earlier decision on the federal habeas petition"); *quoted in In re Jasper*, 559 Fed.Appx. 366, 371 (5th Cir. 2014). Such a defect will concern "procedural failures, such as statute-of-limitations or exhaustion rulings." *In re Coleman*, 768 F.3d 367, 372 (5th Cir. 2014), citing *Gonzalez*, 545 U.S. at 532 (denying relief where "argument sounds in substance, not procedure.").

In *Clark*, the defect in the federal proceedings concerned "a conflict of interest" of the petitioner's §3599 counsel because the same attorney had acted for the petitioner in state habeas proceedings. *Clark*, 627 Fed.Appx. at 307-08. In granting a certificate of appealability, the Fifth Circuit determined

> that reasonable jurists could debate whether Clark's federal habeas proceeding was defective, either because the counsel the federal district court appointed to represent Clark labored under a conflict of interest, or because [the conflicted attorney's] failure to argue his own ineffectiveness as state habeas counsel is sufficient to satisfy Rule 60(b) even though it is an omission.

Id. at 309.

As set forth herein, Petitioner's counsel of record during the pendency of his habeas proceedings, Mr. Wardroup, labored under a more damaging conflict that that which the court contemplated in *Clark*, *viz.*, Wardroup had disengaged in the case due to acceptance of full time employment, abandoning the client during the pendency of the case. (App. 1). But Mr. Wardroup's implications on the integrity of these proceedings are not limited to the emergence in March 2011 of a conflict of interest with his client, Mr. Edwards. The (then) counsel of record's concealment of his disengagement from his actual work for Petitioner eviscerated the proceedings, doing so beyond the Court's view during a critical period of the case for Petitioner, a period where his federal counsel should have worked to overcome the gross

misconduct of his state habeas counsel in the state court proceedings.

B. Rule 60(b) Requires Timeliness And Extraordinary Circumstances

Pursuant to Rule 60(b), the non-substantive or "non-merits" basis for reopening a habeas case must be timely raised and possess the requisite "extraordinary circumstances." *Gonzalez*, 545 U.S. at 535. Upon their appointment as Petitioner's counsel on June 14, 2016, the undersigned expeditiously determined the defect infecting the proceedings as a result of Mr. Wardroup's concealed acceptance of full time employment resulting in the conflict against Petitioner and disengagement from his duties as counsel of record. Under these auspices, counsel have promptly moved the Court. *Clark*, 627 Fed.Appx. at 309 ("We measure the timeliness of the motion 'as of the point in time when the moving party ha[d] grounds to make such a motion, regardless of the time that has elapsed since the entry of judgment.'"), quoting *First Republic Bank Fort Worth v. Norglass, Inc.*, 958 F.2d 117, 120 (5th Cir. 1992).

The Court's extraordinary circumstances analysis should entertain, in their "totality," the case's key equitable factors. *Diaz v. Stephens*, 731 F.3d 370, 376-77 (5th Cir. 2013) (applying multi-factor Rule 60(b) analysis set forth in *Seven Elves, Inc. v Eskenazi*, 635 F.2d 396, 402 (5th Cir. 1981)). This *Seven Elves* analysis calls for Rule 60(b), inter alia, to be "liberally construed in order to achieve substantial justice." *Id.* As set forth herein (Sec. III *infra*), the totality of circumstances surrounding the deprivation of "substantial justice" in Petitioner's case are extraordinary. The substance of the many and grave constitutional infirmities besetting his state court judgment have obtained no presentation, let alone review, due to the prior absence of *any* investigation of his case in both his state and his federal habeas corpus proceedings. The foregoing defect of his initial §3599 counsel's conflict of interest and resulting disengagement from the case at a juncture when appointed counsel was obligated to undertake meaningful investigation pursuant to the tectonic change in the law wrought by

Martinez v. Ryan, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), presents this Court with equities that plainly warrant vacatur of the Court's denial of his habeas application and for Petitioner to be afforded actual process.[15] *See Ruiz v. Quarterman*, 504 F.3d 523, 528-32 (5th Cir. 2007) (engaging in fact-specific analysis of a Rule 60(b)(6) motion).

C. Under Petitioner's Extraordinary Circumstances, the Defect In These Proceedings, Which Came To Light Only After The Court Substituted Counsel, Requires The Case's Reopening

Mr. Edwards's circumstances weigh heavily in favor of the use of Rule 60(b)'s equitable power. As discussed below, Mr. Edwards's federal attorney of record had abandoned him, leaving him, for the majority of his time in this Court, with federal habeas counsel in a "technical" sense only. *See Battaglia v. Stephens*, 824 F.3d 470, 473 (5th Cir. 2016) (reversing N.D. Tex. (Boyle, J.) denial of motion for appointment of §3599 counsel and motion for stay of execution, remanding for appointment of conflict-free counsel to perform under the statute's clear criteria), quoting *Christeson v. Roper*, 135 S.Ct. 891, 895 (2015) (per curiam). Mr. Edwards, having lost the statutorily protected benefit of meaningful representation from his federally appointed counsel, must call upon the equitable power vested in our federal courts, a power that is "adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice." *Klaprott v. United States*, 335 U.S. 601, 614-15 (1949) (Black, J.)

[15] The defect in Petitioner's federal habeas case results from the breakdown of 18 U.S.C. §3599, as explained herein. However, Petitioner must further note alternative prospective "extraordinary circumstances," *viz.*, the possible change in Rule 60(b) law in this circuit due to the pendency of *Buck v. Davis*, S. Ct. No. 15-8049, *sub nom. Buck v. Stephens*, 630 Fed.Appx. 251 (5th Cir. 2015). *Buck* reflects a deep circuit split in whether a change in law is categorically excluded as a basis for Rule 60(b) "extraordinary circumstances" (as the Fifth Circuit in *Adams v. Thaler*, 679 F.3d 312, 320 (2012), joined by the Fourth, Sixth, and Eleventh Circuits, has held), or whether such a change in habeas corpus law may be a factor in the requisite Rule 60(b) analysis, as the Third, Seventh, and Ninth Circuits have held. The Supreme Court has held, at last count, four cert. petitions for *Buck* (three from the Sixth Circuit and one from the Fourth). Suffice it to say that the Supreme Court's determination of this issue, among others, in *Buck* may bear upon the analysis at bar for Petitioner concerning the available grounds and the nature of the legal inquiry for applying Rule 60(b) in capital habeas cases.

(construing Rule 60(b)(6)'s "other reason" clause). The actual deprivation of counsel masked by the *apparent provision* of statutory counsel is among the gravest defects that may afflict a capital habeas proceeding. *Compare Clark*, 627 Fed.Appx. at 309.

1. Title 18 U.S.C. §3599 Requires Conflict-Free, Meaningful Representation

Mr. Edwards was statutorily entitled to counsel under 18 U.S.C. §3599(a)(2), which encompasses, *inter alia*, "all available post-conviction process." *Harbison v. Bell*, 556 U.S. 180, 185 (2009) (quoting §3599(e) as "set[ting] forth counsel's responsibilities"). *Harbison* provides that the federal statutory right to counsel for men under a state judgment imposing a death sentence extends all the way through state executive clemency proceedings. 556 U.S. at 182. In *Martel v. Clair*, 132 S.Ct. 1276, 1286 (2012) (unanimous), the Supreme Court recognized the necessity for substitution when the initial counsel has "developed a conflict with or abandoned the client." *See also Christeson*, 135 S. Ct. at 892. As the Fifth Circuit has recently explained, federal courts must apply §3599 so that the contemplated right to counsel is, in fact, "meaningful" at least to the extent the petitioner may have his interests and particular claims presented and advocated. *See Battaglia*, 824 F.3d at 475.

2. Petitioner's Counsel Of Record Abandoned His Case For Full-Time Employment Without Notifying The Court

On January 11, 2010, this Court appointed Richard Wardroup to represent Petitioner in his habeas corpus proceeding. (Doc. 2). On December 15, 2010, Mr. Wardroup filed Petitioner's habeas petition. (Doc. 6). Three months later, however, in March 2011, Richard Wardroup "accepted a full time position with the Texas Criminal Defense Lawyers Association (TCDLA)." (App. 1). It is a position that "has demanded and continues to demand [his] full attention." (*Id*.). As Mr. Wardroup admits, "When I took the TCDLA job in March 2011, I *generally stopped*

work on my cases in order to dedicate my time to my full time employment for TCDLA."[16] (*Id*.). (emphasis added). Mr. Wardroup acknowledges his abandonment in a sworn statement:

> I never attempted to withdraw from representing Mr. Edwards or to inform the district court of my changed status although I stopped working on his case until the court's scheduling order required that I file a response to the State's answer to the habeas petition. After obtaining an extension, I filed the reply in March 2012. It was eight pages in length. I then did not consider the case, in any meaningful way that I can recall, until it was denied over two years later.

(App. 1-2).

Mr. Wardroup's full time position, about which he failed to notify this Court, constituted a conflict of interest that culminated in the abandonment of his client. (*See* App 615-616). Mr. Wardroup's resulting absence is partly illuminated by comparing Mr. Wardroup's profile in a parallel case before this very Court, *Braziel v. Stephens*, No. 3:09-cv-1591-M, wherein he and Mr. Don Vernay had been appointed on September 29, 2009. (Doc. 5, Doc. 4, respectively). In that case, Mr. Wardroup "simply let [Vernay] handle that litigation after I took on my employment responsibilities with TCDLA." (App. 2). Mr. Wardroup did not move to withdraw from the case until June 2014, after this Court had scheduled a hearing. The Motion to Withdraw averred that Don Vernay had assisted Mr. Wardroup, "at all times" in the representation and that though Mr. Wardroup had kept up with the litigation since he began work for TCDLA", "he has not been actively engaged in the representation." *Braziel v. Stephens,* 3:09-cv-01591, Doc. 56, at 1 (Jun. 17, 2014). Because Mr. Wardroup's "responsibilities with TCDLA have made it impossible for him to be actively involved in the litigation of this matter as it goes forward," Mr. Wardroup moved to withdraw. *Id*. at 2.

[16] According to Mr. Wardroup, the position with TCDLA focuses on his "trial-level experience. In fact, I had no meaningful habeas corpus experience before being appointed to these cases in 2009 and 2010." (App. 2).

At the evidentiary hearing, the Court granted Mr. Wardroup's motion to withdraw, "conditioned upon Mr. Wardroup providing an affidavit regarding any knowledge of the whereabouts of the file of state habeas counsel Douglas Parks." *Braziel v. Stephens,* 3:09-cv-01591, Doc. 64, (Jul. 31, 2014). At the hearing, it had emerged that Mr. Wardroup "had not supplied Mr. Vernay with the whole file of state habeas counsel." (*Id*.).

Unlike the *Braziel* case, in Mr. Edwards's case, Mr. Wardroup "was the only attorney appointed to represent him in his habeas corpus case." (App. 2). Nonetheless, Mr. Wardoup admits that "[o]ver the years that I was counsel of record for him while employed by TCDLA, I took no steps to withdraw or to replace myself with an available, qualified attorney." App. Wardroup 2-3; *compare Christeson*, 135 S.Ct. at 895 (explaining that active representation of the petitioner in federal appellate or collateral proceedings did not obviate the conflict). In November 2014, Mr. Wardroup prepared and filed an Application for Certificate of Appealability in the Fifth Circuit, which was denied. *Edwards v. Stephens,* 14-70026; *see Christeson*, 135 S.Ct. at 895 (finding it "irrelevant that the Eighth Circuit had not previously *sua sponte* directed substitution of counsel in the course of denying [petitioner's] request for a certificate of appealability . . . when the conflict was not evident").[17] Subsequently, Mr. Vernay was substituted for Mr. Wardroup to pursue certiorari, because the latter was not admitted in the Supreme Court. Upon substitution, however, Mr. Wardroup did not transfer the file to Mr. Vernay. (App. 3).

[17] The case history in *Christeson* is analogous. Initial federal counsel abandoned Mr. Christeson as his one-year deadline for filing his petition passed, failing to make initial contact of *any kind* (letter, call, visit) before a May 27, 2005 date—which was six weeks *past* the filing date for the petition. Counsel's abandonment at that critical juncture in the habeas case (*i.e.*, when the petition was due in April 2005), caused a conflict of interest. *Christeson*, 135 S.Ct. at 894. However, the attorneys persisted as counsel of record and, thereafter, even litigated in the district court the question of their untimeliness, spending a year and a-half before the petition was dismissed for untimeliness. *Christeson v. Roper*, No. 4-cv-8004-DW, Doc. 52, Jan. 31, 2007 (W.D. Mo.). Thereafter, these same lawyers who had abandoned the petitioner during his federal habeas filed a certificate of appealability in the Eighth Circuit, which that court of appeals denied. *Christeson v. Roper*, No. 07-1905, May 29, 2007 (8th Cir.).

3. Conflict Of Interest From Counsel's De Facto Abandonment Caused Grave Defect At The Heart Of These Proceedings And Sustained The Deprivation Of Substantial Justice

The abandonment perpetuated by federal counsel caused a fatal defect in these proceedings. Coupled with the misconduct of state habeas counsel, which apparently rose to the level of fraud, these problems warrant invocation of Rule 60(b)'s equitable powers. This deprivation of the right to counsel requires reopening of the judgment and the permission of Mr. Edwards, through his current un-conflicted counsel, to present on his behalf a range of potentially highly meritorious bases for relief, as outlined herein (Sec. III *infra*), including the preparation of numerous issues relating to the deficient performance of his trial attorneys and the resulting prejudice to him. *See Mendoza v. Stephens*, 783 F.3d 203 (Mem.) (5th Cir. 2015) (per curiam) (remanding to district court weeks following Supreme Court's decision in *Christeson* and pursuant to *Trevino*, which had been decided years prior but during case's pendency in circuit court). This way forward is clear in the light of recent jurisprudence from the Supreme Court and the Fifth Circuit.

During the pendency of *Mendoza* in the Fifth Circuit, the Supreme Court decided *Christeson*, which held that a habeas petitioner saddled with an attorney laboring under a conflict of interest is entitled to new habeas counsel and a remand in order to explore available bases under Rule 60(b) for reopening his habeas case closed as a consequence of attorney misconduct. Promptly thereafter, the Fifth Circuit remanded Mendoza's case to the district court "to determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings" filed many years prior. *Mendoza*, 783 F.3d at 205 (Owens, J., concurring).

Christeson recognized that the entitlement to federal habeas counsel safeguards the client from harm that would otherwise result from his appointed counsel's conflict of interest in the

representation. In *Christeson*, the issue causing the conflict had been the federal attorneys' own misconduct that resulted in their failure to timely file his habeas petition. 135 S. Ct. at 892. In *Mendoza*, the conflict is more like the problem at the center of Mr. Edwards's federal habeas proceedings in that it concerned the incapacity to properly litigate the federal case based on the evolution of the jurisprudence marked by *Trevino*. Specifically, Mendoza's state habeas attorney brought his case into federal habeas court and thus could not be relied on to "conduct a review to determine whether there are any ineffective-assistance-of-trial-counsel claims that should have been, but were not, raised in the state habeas proceedings." *Mendoza*, 783 F.3d at 205.

In contrast, Mr. Edwards was saddled with counsel who admits that he "stopped working on the case" after March 2011 and "then did not consider the case, in any meaningful way that I can recall, until it was denied over two years later." (App. 3). During this time period, the Supreme Court issued *Trevino* (*see also Mendoza*). The previously undisclosed conflict and profound attorney misconduct must alter the understanding of Mr. Wardroup's appointment in this Court and, on the basis of the foregoing Fifth Circuit and Supreme Court precedents, necessitate the reopening of this case for further proceedings whereby conflict-free counsel may be able to develop and present meritorious claims for the Court's review.

As outlined in this motion (*infra*, Sec. III), numerous creditable claims for relief have emerged from current counsel's extensive review and investigation. These underlying equities strongly support reopening but, in substance, are not the subject for adjudication in this motion.[18] *See Mendoza*, 783 F.3d at 211 ("This court is not deciding any other issues at this time, including whether any new matters that additional counsel might identify are barred by any provisions of

[18] Such analysis regarding the merits of constitutional claims and possible procedural impediments that the State may raise must be reserved for a later juncture in the proceedings in this Court. Suffice it to say at this point that these claims have available pathways to return to this Court for their proper presentation, especially since *Trevino*.

AEDPA."); *see also Battaglia*, 824 F.3d at 475. During The Case's Pendency Between 2010 And 2014, New Grounds For Cause And Prejudice To Excuse Claims Defaulted Due To State Habeas Counsel's Fraudulent Conduct Emerged, Yet Were Left Unused Due To Federal Habeas Counsel's Conflict Of Interest

1. In Effect, Petitioner Had No Counsel During The Period When One Was Most Needed

During the pendency of Mr. Edwards's habeas corpus petition (between Dec. 15, 2010 and Aug. 6, 2014), the Supreme Court issued two opinions of vital importance to Mr. Edwards: *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), establish that the deficient performance of state habeas counsel may provide grounds to overcome the otherwise applicable procedural default of unexhausted trial counsel ineffectiveness claims. Yet Mr. Edwards's nominal §3599 counsel "was no longer functioning as such, having taken another full time position" (App. 614). Counsel of record completely and, on the surface, incomprehensibly ignored both *Martinez* and *Trevino* to the grave disadvantage of Petitioner. (*Id.*).

If Mr. Edwards's federal habeas counsel had been conflict-free and actually engaged as counsel during the critical period after *Martinez*, and certainly after *Trevino*, were decided and before this Court denied his petition almost a year and a-half thereafter, such counsel would have invoked those authorities, given the glaringly deficient performance of Mr. Edwards's state habeas counsel, Mr. Wayne C. Huff, who failed to raise a single issue of trial-counsel-ineffectiveness in either phase of the capital trial. (*Id.*). As the Western District of Texas had described on October 13, 2005–less than a month before the state habeas lawyer filed Mr. Edwards's state habeas petition–Mr. Huff's capital habeas work was both "appallingly" and "egregiously inept", "egregiously deficient", and "wholly incompetent." *Ruiz v. Dretke*, No. Civ.

SA-03-CA-303-OG, 2005 WL 2620193, at *2-3 (W.D. Tex. Oct. 13, 2005). As suggested herein, Mr. Huff's patently deficient performance for Mr. Edwards rose to the level of attorney misconduct and caused the utmost prejudice. (*See* App. 611-13).

Yet federal habeas counsel, for his part, completely failed to address Mr. Huff's actions despite the publishing of *Martinez* and *Trevino* during the pendency of Mr. Edwards's federal habeas petition. On its face, the development is inexplicable. But the underlying facts permit the Court to make sense of this gravely regrettable turn of events that compromised the integrity of the case. Mr. Wardroup's change of circumstances and his resulting misconduct in failing to withdraw—or, at a minimum, apprise the Court of the conflict of interest against his client arising solely by his election to take employment—rendered the ensuing proceedings defective. *See Clark*, 627 Fed.Appx. at 307-08, 309; *see also Mendoza*, 783 F.3d at 203 (remanding to "district court solely to appoint supplemental counsel consistent with this opinion and the requirements of 18 U.S.C. §3599, and to consider in the first instance whether the petitioner can establish cause for the procedural default of any ineffective-assistance-of-trial counsel claims pursuant to *Martinez* and *Trevino*").

2. Substantial Justice Dictates Use Of Procedural Remedy For This Harm

The harm to Mr. Edwards resulting from the absence of un-conflicted counsel who would have been engaged and able to invoke *Martinez* and *Trevino* could not have been greater. The Supreme Court introduced those developments in the federal habeas jurisprudence in order to protect petitioners in exactly his predicament: Mr. Edwards's meritorious claims of the ineffective assistance of trial counsel were not presented in state habeas corpus proceedings due to the severely deficient performance of state habeas counsel. As outlined further below, a considerable number of meritorious ineffective assistance of counsel claims are readily apparent from review and investigation of the trial record. Yet state habeas counsel failed to raise a single

one from the defense's abject performance concerning Mr. Edwards's criminal responsibility and the penalty phase of his trial.

Mr. Huff's patently deficient performance for Mr. Edwards rose to the level of attorney misconduct and caused the utmost prejudice. Current counsel's collection and review of prior habeas petitions filed by Huff confirm that he 'cut and pasted' every claim in Mr. Edwards's state habeas petition verbatim from prior writs and appeals in other cases.[19] (*See* App. 210-610). Line by line review determines that the entire 58-page pleading contains only 10 original sentences. (for which Mr. Huff invoiced the state $24,611.81 five days later). Yet federal habeas counsel failed to present any of this extremely important information to the Court in response to the developments of *Martinez* and *Trevino* during the pendency of this habeas petition. Claims pursuant to *Strickland v. Washington* and *Brady v. Maryland*, are "the most common claims that arise in post-conviction." (App. Blume at 2). Both types of claims require extra-record investigation and, when uncovered, case and fact-specific pleading. But during state habeas counsel's compromised performance, the attorney raised just a single trial-counsel-ineffectiveness issue (derivative of a boilerplate fair cross-section claim concerning the venire, which was also taken verbatim from another client's case). (*See* App. 261-62). Such performance defies the purpose of post-conviction, which is "is fundamentally to afford the prisoner the opportunity to develop investigation-based claims beyond the four corners of the appellate record." (App. 612). Post-conviction requires "an individualized assessment of the case facts and investigation in response to facts suggestive of potential claims." (*Id*.). There is no way that preparing a petition from the wholesale copying of other litigations can satisfy that intent. Put simply:

[19] Huff copied the statement of facts verbatim from Appendix A of the direct appeal, changing only the references to the Petitioner from Mr. Edwards to Applicant. A highlighted copy of Mr. Edwards's start court motion along with the source documents are attached at App. 210-610.

> Copying and pasting claims verbatim from prior cases is a profound disservice to the client, the legal profession, and to the courts, which demand the highest level of advocacy where the stakes are the greatest. Filing a petition that has been copied and pasted wholesale and then billing for hundreds of hours also raises a disturbingly strong inference of fraud perpetrated by state habeas counsel.

(App. 612). Huff's conduct is especially troubling given the serious infirmities at trial, discussed below. (*See also* App. 613-14).

The de facto absence of federal habeas counsel during a key juncture in these proceedings is also reflected in the failure of prior appointed counsel even to raise the issue of state habeas counsel's ineffectiveness in connection with that attorneys' default of *every* ineffective assistance of trial counsel claim concerning the defense's performance in both phases of the bifurcated trial. *See Trevino*, 133 S.Ct. 1911; *see also Tabler v. Stephens*, 591 Fed.Appx. 281, (Mem.) (5th Cir. 2015) (per curiam) ("hold[ing] that the equitable rule established in *Martinez v. Ryan* [*infra* . . .] logically extends to ineffective assistance of habeas counsel that prevents an initial-review collateral proceeding from ever taking place"), relying on *Christeson*, 135 S.Ct. 891. The consequences for the integrity of Petitioner's proceedings resulting from Mr. Wardroup's conflict, disengagement, and abandonment during the period following the publication of *Martinez* and *Trevino* can hardly be overstated, given that, as the Fifth Circuit has noted, until the new law, "this circuit had consistently held that ineffective assistance of state habeas counsel could not establish such cause" to overcome procedural default in the state proceedings. *Mendoza*, 783 F.3d at 208-09, n.29, compiling cases, *e.g.*, *Cantu v. Thaler*, 632 F.3d 157, 166 (5th Cir. 2011). Those tandem cases "fundamentally altered the obligations of federal habeas corpus counsel in capital cases," opening a "new gateway for additional claims (and facts supporting claims) that would previously have been deemed procedurally barred." (App. 615).

III. UPON REOPENING, SUBSTITUTED COUNSEL WOULD BRING MERITORIOUS CLAIMS

Although Rule 60(b) may not itself be used to raise new claims for habeas corpus relief after a first habeas corpus proceeding has become final, *Gonzalez,* 545 U.S. at 531, as discussed above, the equitable principals of Rule 60(b) require holistic consideration of the factors present in the case. In this case, the equities require judicial intervention, so that the severe constitutional infirmities may be heard.

A. If Reopened, Petitioner Would Have Various Procedural Avenues To Bring Meritorious Claims

Repeatedly, the Supreme Court has held that federal courts should exercise their equitable authority to review claims where a petitioner demonstrates extraordinary circumstances warranting re-opening the case. Of particular relevance in this case is *Martinez v. Ryan*'s sanction of a federal court's consideration of new, meritorious claims of ineffective assistance of trial counsel that were procedurally defaulted because of post-conviction counsel's deficient performance. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013) (holding *Martinez*, 132 S. Ct. 1309 (2012) applies to Texas cases). However, post-conviction counsel's ineffectiveness is not the only mechanism for reviewing the merits of new bases for relief.

1. State Habeas Counsel's Deficient Performance Provides Cause to Excuse Procedural Defaults

In two seminal cases, the United States Supreme Court has addressed the relationship between post-conviction counsel's professional conduct and the power of the federal courts to review the merits of claims for relief. *See Trevino v. Thaler*, 133 S. Ct. 1911 (2013); *Martinez v. Ryan*, 132 S. Ct. 1309 (2012). In 2012, in *Martinez*, the Court held that state post-conviction counsel's deficient performance could serve as cause to excuse the petitioner's default of his claim of ineffective assistance of trial counsel. 132 S. Ct. at 1313. Specifically, the Court

held that a court should exercise its equitable authority to excuse a procedural default where state post-conviction provided the first opportunity to present a claim of trial counsel's ineffectiveness and post-conviction counsel was deficient for failing to present that claim. *Id.* at 1320. The Court emphasized that it was exercising its equitable authority, something the courts regularly do when deciding whether to excuse a procedural default. *Id.* at 1318 citing *McCleskey v. Zant*, 499 U.S. 467, 490 (1991); *Coleman v. Thompson*, 501 U.S. 722, 730-31 (1991); *Fay v. Noia*, 372 U.S. 391, 430 (1963).

In *Trevino v. Thaler*, 133 S. Ct. 1911 (2013), the Court again addressed whether it should exercise its equitable authority to excuse a procedural default. There, the Court was confronted with whether equitable relief under *Martinez* was available to petitioners pursuing relief under Texas's appeals and post-conviction scheme. That scheme appeared to permit at least some claims of trial ineffectiveness to be raised on appeal, where a defendant was entitled to counsel, and the Fifth Circuit had held that *Martinez* did not apply to Texas cases. *See Ibarra v. Thaler*, 687 F.3d 222, 227 (5th Cir. 2012). In *Trevino*, the Court rejected a formalistic approach that would have precluded equitable relief. Rather, it held that where a state review system, in actual practice, makes it "virtually impossible" for an ineffective assistance claim to be presented on direct review, as it held the scheme in Texas does, *Martinez* relief is available. *Id.* at 1915. Thus, the Court again permitted merits review of otherwise defaulted claims where state habeas counsel's deficient performance resulted in the default.

There should be no doubt: upon reopening of the case, state habeas counsel's deficient performance, bordering on fraud, can serve as cause to excuse the procedural default of the claim.

2. Other Avenues Also Permit Merits Review of Claims After the Court Reopens the Case

Once reopened, there are several avenues for raising claims for relief aside from state habeas counsel's ineffectiveness. First, claims that "relate back" to the first proceeding may be introduced subsequent to a grant of a motion to reopen. *Mayle v. Felix*, 545 U.S. 644, 650 (2005) (an amended habeas petition does not violate AEDPA's one-year time limit if it relates back to previously asserted grounds for relief). Such claims "relate back to the date of the original pleading if the original and amended pleadings 'arise out of the [same] conduct, transaction, or occurrence.'" *Id.* at 655 quoting Fed. R. Civ. P., Rule 15(c)(2).

Courts regularly permit petitioners to "relate back" after succeeding on a motion to reopen. For example, in *Tabler v. Stephens*, No. 12-70013, 591 Fed.Appx. 281 (5th Cir. Jan. 27, 2015) the Fifth Circuit remanded the case to the District Court "to consider in the first instance whether Tabler, represented by his new counsel Widder or other unconflicted counsel, can establish cause for the procedural default of *any* ineffective-assistance-of-trial-counsel claims pursuant to *Martinez* that he may raise, and, if so, whether those claims merit relief." *Id.* (emphasis added).

In the District Court, Mr. Tabler had been represented by the same attorneys who represented in state post-conviction. Those attorneys had raised several claims in the initial habeas petition, including claims of ineffective assistance of counsel. Doc. 39, *Tabler v. Thaler*, No. 6:10-cv-0034 (W.D. Tex. Feb. 12, 2010). At the Fifth Circuit, represented by new counsel, Mr. Tabler requested an opportunity to develop new claims pursuant to *Martinez*. The Fifth Circuit granted the request in light of habeas counsel's conflict of

interest. The court granted him blanket authority to raise ineffective assistance of trial counsel claims, even though the initial habeas petition had already been fully adjudicated.

Relating back, however, is not the only mechanism for raising additional bases for relief. For example, if, AEDPA's statute of limitations has not yet run on the basis for a claim, that claim can be asserted in the reopened case. AEDPA's statute of limitation bars claims not brought in an application for a writ of habeas corpus within one year of "the date on which the factual predicate for the claim or claims presented could have been discovered through the exercise of due diligence." 28 U.S.C. §2244(d)(1)(D). Where the state has provided assurances that it has complied its obligations under *Brady v. Maryland*, 373 U.S. 83 (1963), there is "no requirement to investigate further" to establish diligence. *Starns v. Andrews*, 524 F.3d 612, 619 (2008); *see also Moore v. Knight*, 368 F.3d 936, 938 (7th Cir. 2004) (diligence met via reliance on trial judge averring that he had not undertaken improper *ex parte* communication); *Wilson v. Beard*, 426 F.3d 653, 662 (3d Cir. 2005) (diligence established despite media reports of prosecutor's unlawful tactics where defendant was incarcerated and did not learn of tactics until so informed by his attorney). Thus, as long as a *Brady* claim is brought within one year of the newly discovered basis for bringing it, AEDPA is no bar to reviewing it. This is equally true subsequent to a Rule 60(b) motion to reopen a case. *See, e.g.*, *Willis v. Jones*, 329 Fed App'x 7, 2009 WL 1391429, *8 (6th Cir. May 15, 2009) (unpublished) (reviewing *Brady* claim after reopening where petitioner was "entitled to rely on the state's representation that it did not have impeaching information in its files"). Once the case is reopened, there are multiple extant avenues for reviewing the merits of Mr. Edwards' claims.

Even absent a showing of extraordinary circumstances, new bases for relief are corgnizable for this Court's review. Innocence, both of the offense itself, and of death penalty eligibility, provides a mechanism for raising new claims. Where a petitioner can demonstrate that "a constitutional violation has probably resulted in the conviction of one who is actually innocent," the bar on second or successive petitions does not apply. *Schlup v. Delo*, 513 U.S. 298, 327 (1995).

B. Investigation Incumbent On §3599 Counsel Yields Numerous Potentially Meritorious Claims

There are significant meritorious, constitutional issues arising from Terry Edwards's trial. From the empaneling of an unconstitutional jury with the complicity of ineffective defense counsel through a penalty phase riddled with error, the trial was marked with prosecutorial misconduct and grossly incompetent defense. The State elicited perjury, misled the jury, and withheld material evidence. *See, e.g.*, *Napue v. Illinois*, 360 U.S. 264 (1959). Defense counsel, whether because of the State's misconduct or due to their own incompetence, failed to conduct the requisite investigation or confer with necessary experts. *See, e.g.*, *Brady v. Maryland*, 373 U.S. 83 (1963); *Strickland v. Washington*, 466 U.S. 668 (1984). The jurors prematurely deliberated, relying on extraneous information to reach the death verdict, and at least one juror lied during voir dire, concealing his bias against defendants who exercise their right to trial. *See, e.g.*, *United States v. Aaron Burr*, 25 F.Cas. 49, 50 (C.C.Va. 1807) ("Such a person may believe that he will be regulated by testimony, but the law suspects him, and certainly not without reason. He will listen with more favor to that testimony which confirms, than to that which would change his opinion; it is not to be expected that he will weigh evidence or argument as fairly as a man whose judgment is not made up in the case.").

Trial counsel's conduct repeatedly fell below the standard of care required of counsel at the time of Mr. Edwards's trial. As described by one of the nation's leading scholars on capital punishment, trial counsel fell below the standard of competence by (1) failing to investigate the relationship between one of the victims and Mr. Edwards, (2) failing to investigate Kirk Edwards's relative culpability, (3) failing to investigate Mr. Edwards's alleged prior unadjudicated criminal conduct, (4) failing to conduct independent testing of the forensic evidence relied on by the State, and (5) failing to interview members of Mr. Edwards's family, including family members who had information about Kirk Edwards and the crime. (App. 612-15). Individually and collectively, these deficiencies prejudiced Mr. Edwards. Moreover, all the violations described below form the bases for significant claims[20] that have never undergone merits review by any court.

1. Mr. Edwards's Vior Dire Was Constitutionally Flawed

a. African-American Jurors Were Systemically Stricken On the Basis of Race

Terry Edwards is African-American. Mr. Walker and Ms. Goodwin were white. In selecting Mr. Edwards's jury, 143 venire members were questioned. The initial jury empaneled was all white. Eventually, one Hispanic alternate was seated on the jury. Though, despite diligent efforts, undersigned counsel have been unable to reconstruct the voir dire, serious constitutional violations have emerged. Should this Court permit Mr. Edwards to reopen his habeas proceedings, he will prove, after discovery and a hearing, that the systemic exclusion of all African-American venire members, enabled by the actions of both the State and his own counsel, from his jury resulted in a constitutional violation that warrants a grant of relief.

The DA turned over questionnaires from only 35 of the 143 questioned venire members. Among those 35 is a single questionnaire completed by an African-American. It lacks any

[20] Mr. Edwards will raise these claims in an amended petition after this Court reopens the case.

material that would supply a creditable basis for a cause strike of the given venire member, Mrs. Warrick, yet the DA and defense agreed – off the record – to strike her, just as the State and defense had done with 29 other Black venire members. Undersigned counsel have pursued, to no avail as of yet, the complete set of questionnaires and jury cards, moving for or otherwise requesting this indispensable aspect of these proceedings from Mr. Edwards's trial counsel, the trial court, the trial court reporter, appellate counsel, post-conviction counsel, and the Court of Criminal Appeals.[21] Eventually, the court reporter was able to locate in her storage locker a partial set of jury cards, containing basic biographical information about the jurors.

Though the jury questionnaires are a necessary part of the record in any case, "access to juror questionnaires would have been of even greater importance for counsel in a Dallas County capital trial based on the dubious practice prevalent at and around the time of Mr. Edwards's 2003 trial of striking venire members by mutual agreement based, ostensibly at least, on responses to juror questionnaires." (App. 621). Undersigned counsel consulted with Bruce Anton, an attorney practicing criminal law in Texas for over 30 years, about these practices in capital cases in Texas. *Id.* Mr. Anton explained that, at the time of Mr. Edwards's trial "Dallas County defense counsel had participated in the State's practice of agreeing to excuse jurors who expressed on their questionnaires any hesitations about the death penalty." (App. 617). Essentially, the State and defense counsel would rate each questionnaire and would agree, off the record, before ever questioning the juror, to strike the jurors. (App. 619).

The practice is inherently unreasonable. *Id*. ("This process of 'trading' is not a valid, let alone reasonable strategy.") First, it overwhelmingly benefits the prosecution, by excusing

[21] On Friday, September 23, the Dallas County District Court finally granted counsel's unopposed motion to order production of the questionnaire's completed by Mr. Edwards's venire. This motion had been pending since August 30. The questionnaires are vital to Mr. Edwards's record. That no prior counsel has attempted to obtain or review them underscores the deficiencies in this case, especially given that prior state and federal habeas counsel raised claims solely related to jury selection and the venire.

jurors who are competent to serve and capable of being rehabilitated. "It is not reasonable to strike people based on questionnaires without an opportunity to question them, because questionnaires, especially the form used in this case (and the template widely used in the county at that time) are ambiguous, unclear, incomplete, and—experience informs us—widely misunderstood by venire members." (App. 618-19). The State used their trades to get rid of jurors who were "very readily rehabitable on the stand." (App. 619).

Second, and critically, it "impacted prospective black jurors far more than others, and kept many of those jurors from ever graduating to individual voir dire by both sides." *Id*. In essence, many black venire members, targeted by the state for trade, were never questioned on the record. "The result has been to exclude well-qualified African-American jurors from even making it to individual voir dire, let alone on the jury." *Id*. It is constitutionally impermissible for the State to categorically exclude jurors on the basis of race. For defense counsel to participate is both a violation of *Batson* and a violation of the Sixth Amendment right to counsel.

Finally, it deprived the capital defendant of a complete record, and shielded the jury selection from judicial scrutiny. It "precludes appellate counsel from raising *Batson*-type challenges, and facilitates the selection of juries with very few African-American jurors. It did not comport with a reasonable standard of care, even at that time." (App. 618). In Mr. Edwards's case, there is an additional problematic feature to the infirm trading mechanism. Many of the jurors who appear in the record, were dismissed *off the record* by agreement of the parties, after being questioned by the State (frequently the defense waived questioning). This type of off the record agreement is uncommon.

According to Mr. Anton, the trading practice must be viewed "in the context of Dallas County, and the practices of the Dallas County District Attorney's Office" where "prosecutors

have always been very good at employing disparate questioning of prospective black jurors, in order to get them excused for cause." (App. 619). Mr. Edwards's jury was empaneled in 2003, months after the first Supreme Court opinion addressing the Dallas County DA's racist and discriminatory practices in the case of Mr. Thomas Miller-El. *Miller-El v. Cockrell*, 537 U.S. 322 (2003).[22] In Miller-El's Dallas County trial in 1986, the DA used peremptory strikes to eliminate 10 out of the 11 Black venire members. Months after that trial, the Dallas Morning News published its first investigative journalism on the DA's institutionalized racial practices in capital jury selection.[23] As displayed within the *Miller-El* litigation immediately before, during, and after Mr. Edwards's prosecution, the DA's Office under Bill Hill and his predecessors had an entrenched practice of striking prospective African-American jurors that persisted through the period of the trial at bar.[24]

The emerging record in Mr. Edwards's 2003 trial suggests systematic exclusion of African-American jurors at a level reminiscent of the precursors to *Swain v. Alabama*, 380 U.S. 202 (1965),[25] and not merely violative of *Batson v. Kentucky,* 476 U.S. 79 (1986), which replaced the onerous standard in *Swain*.

The tactics employed by the Dallas County DA's office, highlighted in the *Miller-El* decisions, "can improperly weaken the resistance of some defense counsel" and "has, in some

[22] *See also Miller-El v Dretke*, 545 U.S. 231 (2005), decided shortly after Mr. Edwards's case.

[23] The Dallas Morning News extensively chronicled this era, publishing two separate series of stories, one in 1986 and another in 2005, on the actual practices in that office. *See, e.g.*, Steve McGonigle & Ed Timms, *A Pattern of Exclusion: Blacks Rejected from Juries in Capital Cases*, Dallas Morning News, Dec. 21, 1986 (1986 WLNR 1716765).

[24] *See* Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, But Analysis Shows They Are More Likely to Reject Black Jurors*, Dallas Morning News, Aug. 21-23 (2005). WLNR 24660181; 2005 WLNR 24659981; 2005 WLNR 24658951; 2005 WLNR 24659140; 2005 WLNR 24658669; 2005 WLNR 24659060; 2005 WLNR 24657978; 2005 WLNR 24658335; 2005 WLNR 24657350; 2005 WLNR 24657134; 2005 WLNR 24657758; 2005 WLNR 24657224; 2005 WLNR 24658546).

[25] *See Strauder v. West Virginia*, 100 U.S. 303 (1880), cited in *Swain*, 380 U.S. at 228 (Goldberg, J., dissenting, citing *Strauder* as holding that under the Equal Protection Clause "a state cannot systematically exclude persons from juries solely because of their race or color"); *see also Hernandez v. Texas*, 347 U.S. 475 (1954); *Norris v. Alabama*, 294 U.S. 587 (1935).

cases precipitated defense counsel's capitulation to the State's improper tactics targeting African-American venire members who may have expressed reservations about the death penalty but not to an extent that, in the end, would be disqualifying." (App. 620). Defense counsel's "capitulation" to these constitutionally infirm tactics constituted deficient performance, and resulted in the improper excusing of African-American jurors based upon their race. *Id*

The practice clearly "effectuated categorical capitulation to the State's aims of empanelling a white and pro-death jury at the expense of the defendant." (App. 618). All but two of the prospective black jurors were removed by mutual agreement between the defense and the State. No African-American jurors were selected for the jury, two African-American venire members were struck for cause, and that the State did not exercise a single peremptory strike in removing all other African-Americans from the venire. This is perhaps one of the most strident features of the methods employed by the Dallas County DA's office; it resulted in the prosecutors being "able to avoid using peremptory strikes of prospective black jurors, and being subject to *Batson* challenges. The practice thus was highly susceptible to race-driven use to wrongly eliminate qualified members of the venire." (App. 619).

The trial record at bar (consisting of 47 transcript volumes), reflects the District Attorney's use of its practice of trading strikes by mutual agreement based upon juror questionnaires. In Petitioner's case, this dictated the removal, off the record and without individual questioning from either party, and almost never from the defense, of swaths of the venire. This trading practice is known to have "impacted prospective black jurors far more than others, and kept many of those jurors from ever graduating to individual voir dire." (App. 618). As reflected in Mr. Edwards's case, the agreement method "stripped" away "the general demographic representativeness of" Dallas County and enabled the empanelment of a White jury

without, apparently, the use of a single peremptory strike exercised against a Black venire member.

The ostensible basis for this comprehensive striking by agreement of the entire Black venire, apart from the two African-American prospective jurors struck for cause, would have been the individual member's answers to the questionnaire form. However, the DA has provided Petitioner's current counsel with copies of what that office has represented is the entirety of the questionnaires in its possession. As discussed above, of the 35, only one is a questionnaire completed by an African-American. It lacks any material that would supply a creditable basis for a cause strike of the given venire member, yet the DA and defense agreed – off the record – to strike her, just as the State and defense had done with every other Black venire member.

Current counsel for Petitioner have also obtained a strike list apparently maintained by ADA D'Amore (and/or ADA Tokoly) that includes, next to 32 of the venire members, a handwritten, encircled "B."[26] (App. 623). Especially in light of the troubled history of this District Attorney's Office,[27] there is obvious reason for "concern[] that these markings strongly suggest racial indications." (App. 622). These present deeply concerning markers of potentially odious prosecutorial misconduct and constitutional violations and, further, strongly reflects the profound consequences of defense counsel's appeasement of the State's trading practice to strip away diversity and representativeness from Mr. Edwards's jury.

[26] This marking system may reflect race-based jury selection tactics historically used in the county (*infra*, n. 15**), and also encountered elsewhere. *See ,e.g., Foster v. Chatman*, 136 S.Ct. 290 (2016).

[27] In *Miller-El v. Cockrell*, 537 U.S. 322, 347 (2003), published a mere months before Mr. Edwards's trial, the Supreme Court noted that the fact that Dallas County ADA's marked race on the prospective juror's cards "reinforced" the supposition of racial discrimination established in the record in that case.

i. Unqualified Jurors Were Actually Seated On The Jury

ii. Two Seated Juror Improperly Engaged In Premature Deliberations

Two of the jurors in Mr. Edwards's case prematurely deliberated, reaching the penalty determination during the guilt phase, while relying on extrinsic evidence. Those two jurors expressed to a third juror that they were worried that, as Christians, they would be unable to impose a death sentence. The third juror "suggested that they read the passage of Romans that helped [the third juror] and it would tell them what to do." That day, they went "home and read the verse." (App. 634). Although the Bible did not itself physically enter the jury room, its influence on the deliberative process is clear. After having read the Bible passage, they reported to the third juror that they were "ready to impose the death penalty." (App. 634).

In a sworn statement from one of these two jurors, she avers that her decision to impose death was (1) made before the penalty phase and (2) was made as a result of having referenced the passage from Romans. She averred, "I knew that when we were deciding guilt that Terry Edwards would automatically be sentenced to death." (App. 657). She also noted that the penalty evidence "did not change the sentencing outcome made when we[, the jurors,] decided his guilt." (App. 657).

iii. The Jury Foreperson Was Seated Despite Making Material False Representations In Voir Dire

The foreperson in Mr. Edwards's case failed to disclose his prior juror service and how it jaded his view of the judicial system. Because of his prior juror service, the foreperson came to view that a defendant's exercise of his right to a trial and Mr. Edwards's "whole case was a waste of taxpayer time and money." (App. 636). On his questionnaire, when asked about whether or not he had served on a jury previously, the foreperson indicated that he had only served once before, in 2002, the same year as Mr. Edwards's trial. (App. 646). In a subsequent declaration,

the foreperson indicated that he had served on a jury during college in Fort Worth. (App. 638). The foreperson graduated from college in 1995. (App. 651). On his questionnaire, the foreperson indicated that he did not know the outcome of the prior case on which he had served. In his subsequent declaration, Juror #5 indicated not only that he knew the outcomes of *both* of the prior cases on which he served, but also that his experience as a juror had soured him on what he perceived to be chronic abuses of the judicial system.

Both prior cases were civil matters, which the juror characterized as frivolous and an abuse of judicial process. "My experiences have disillusioned me on the system and made me see how it is abused to waste taxpayer money." (App. 638). "Edwards' case reminded me a lot of those other cases, because it just seemed like another waste of time and money and an abuse of the court system. Throughout the experience, I just kept wondering why we were even there and why he did not plead guilty and avoid the trial." (App. 636.)

The foreperson averred that he would have been fine with Mr. Edwards receiving a sentence of forty years had he pled guilty and avoided trial: "If Mr. Edwards had not gone to trial, he probably would have only gotten thirty or forty years, and I would have been fine with that too." (App. 636).

2. Compelling Evidence Exists That Mr. Edwards Did Not Shoot The Victims.

The State did not present testimony from any eyewitnesses to the murders of Mickell Goodwin and Tommy Walker. They did not produce video evidence of the shootings, nor did they rely on a statement or testimony from Mr. Edwards's co-defendant. Though Terry Edwards was arrested immediately after the crime, he had no blood spatter (or blood in general), no gunshot residue, no DNA from the victims whatsoever. The State had no direct evidence to prove that Terry, rather than Kirk, shot the victims. Yet they homed in on Terry, arguing affirmatively and conclusively that he was the shooter. *See* (Trial Tr., Vol. 55, 115-16) ("Yes,

Kirk Edwards is involved but the man that pulled the trigger is sitting right here,"); (*Id*. at 118) ("Did he do the shooting? Yes, overwhelmingly."). What the State lacked in substantiated evidence it made up for with an extremely aggravated – and fabricated – theory of the crime.

a. The State Introduced False Testimony And Withheld Evidence Regarding the Forensic Evidence.

i. The Gunshot Residue Evidence

The prosecution also grossly mishandled the gunshot residue evidence. Gunshot residue (GSR) consists of the chemical components that are ejected from a firearm when it is discharged. It is undisputed that Mr. Edwards did not have GSR on his hands. He was arrested immediately following the crime, taken to the police station and tested within the hour. (Trial Tr. vol 52 at 181-82). The prosecution withheld key documents regarding the GSR testing and elicited false testimony from an expert witness testifying about the testing in the case.

Vickie Hall was a SWIFS employee and the only witness called by the defense at Petitioner's guilt phase. As discussed above, Ms. Hall testified as to GSR testing performed on Terry Edwards and Tommy Walker, both of which yielded negative results. (Tr. Vol. 52 at 166-87). On cross-examination, however, the prosecutor was able to elicit false and misleading testimony that Mr. Edwards could have physically removed trace chemical components from his hand. (*See* Tr. 55 at 68-69). The prosecutor elicited from Ms. Hall that GSR could be partially removed from someone's hands through profuse sweating (*See* Tr. 52 at 186: "If there's a large amount of sweat, some of that moisture could rinse some of that residue away"), but, Ms. Hall further explained, its absence would be more likely explained by some sort of physical removal. (*Id*.). The prosecution then argued, in closing that presence of traces of barium on Mr. Edwards's hands – without the presence of the other chemical components that testing had established were discharged in equivalent portions from the weapon – was just as strong as evidence that Terry

Edwards was the triggerman as evidence that all three chemical components had been deposited would have been.[28] (Tr. 53 at 62).

Further, the State argued in closing that Mr. Edwards managed to achieve this scientifically impossible feat while handcuffed in the back of a police car, a location typically covered with gunshot residue as a result of the inherent features of police work. ADA D'Amore introduced that scientifically unsupportable make-believe to the jury despite *the total lack of record support for it*:

> one way that that can happen that those results aren't positive on all three elements, they wipe the hands, hands come in contact with something else. *And we know* he was wiping his hands on his pants. *We know* when he's in the squad car he's seat belted in the back seat with his hands behind his back, *brushing up against the seat, brushing up against his clothes*.

Tr. 53 at 62 (emphasis added). Though defense counsel objected, again on the basis that those facts were not in the record, the court overruled the objection. (*Id*.).

In fact, the prosecution's argument was fabricated and was based upon false testimony, which they elicited from a defense expert, with whom it appears they were working in concert. Undersigned counsel asked former longtime FBI Agent Paul Kilty to conduct a preliminary review of the testing, reports and testimony related to the GSR evidence.[29] Mr. Kilty made a number of findings undermining the reliability of the GSR evidence introduced at trial. First, The prosecution's argument regarding the barium is not only wrong, Mr. Kilty found, it is "scientifically unsupportable." (App. 19). Specifically, Mr. Kilty stated that:

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[28] Barium is relatively commonplace in the environment and, by itself, without detection of the other two chemical components of the firearm's gunshot residue, does not suggest the likelihood that such residue had been on the individual's hands.

[29] Paul Kilty is a gunshot residue expert who worked for over 20 years for the FBI, first as a Special Agent in the Baltimore Field Office, then as a Supervisory Special agent in the FBI Laboratory, and finally as the Chief of the FBI Laboratory's Gunshot Analysis Unit in Washington D.C. (App. 16).

> The three chemicals, barium, antimony, and lead, exist in the same particle, or in particles that contain two of the three. If you remove any of the components they would be removed linearly. It does not occur that just one of the components is removed; the components all increase or decrease together. It is **not possible** that a defendant who had gunshot residue on his hands could simply wipe two of the three components off of his hands and not the third.

(*Id*. 19-20 (emphasis added)).

The State thus exploited a scientifically untenable theory that Mr. Edwards somehow removed from his hands two, but not all three, of the chemical components deposited upon the discharge of the firearm, turning exculpatory evidence into inculpatory evidence. Mr. Kilty noted a further flaw with the prosecution's false barium argument: even were it scientifically possible, a police vehicle would be a very unlikely place for a defendant to remove gunshot residue from his hands, as they themselves "can be sources of gunshot residue because they frequently carry persons who have fired guns." (App. 20).[30]

In addition, the State withheld from the defense material documents pertaining to the GSR testing. The State failed to disclose to defense counsel a report indicating that the State had tested Mickell Goodwin's hands for GSR and obtained a positive result.[31] Notably Vickie Hall, trial counsel's lone witness, had herself performed the test. Notably, Ms. Hall inexplicably omitted this fact from her testimony. According to the results of that test, Ms. Goodwin's right hand, which suffered a defensive wound during the shootings, tested positive for all three trace

[30] In addition to the false testimony and argument, Mr. Kilty observed a number of inconstancies with the with the State's forensic testing of the gunshot residue and the handing of the case. The forensic reports to be "incomplete" — "Absent were a number of documents that I would normally expect to find, including worksheets, and the analytical data generated by the testing." (App. 19). He also questioned the methodology utilized by the State. By 2002, an electron microscope was the "well-established" method of testing. However, in this case, cotton swabs, which are not suitable for the electron microscope, were submitted to the laboratory. Thus, even though Mr. Kilty noted that it was likely that the Dallas lab possessed an electron microscope, they were unable to use it in this case. (App. 20). Mr. Kilty noted that there was no reporting about GSR testing of Mr. Edwards's clothing. Such testing could have been completed with the electron microscope. (*Id*.) In order to answer these questions, Mr. Kilty will need to conduct a thorough review of the forensic reports, underlying data and notes, testimony, and photograph evidence.

[31] Current counsel reviewed the DA's file on Monday, August 9, 2016, and obtained the document, which was not present in the file of prior counsel.

elements present in GSR. In contrast, Terry Edwards, who the State argued discharged the weapon three times, tested negative. This material evidence was absent from the record and not disclosed to the defense.

The suppressed report, which revealed the presence of GSR on Ms. Goodwin's hand, is a major red flag, raising a number of questions about the prosecution's theory and the reliability of the crime scene analysis. Had defense counsel had the report, it would have impacted their trial strategy in a number of significant ways. First, the suppressed report and testimony reveal that Ms. Hall, the defense's lone expert, was working in concert with the State. Discovery of the report that the defense would not have trusted Vickie Hall to testify as their lone witness, because they would have know that she was working in concert with the State to mislead the jury and hide evidence. Second, there is a reasonable probability that counsel would have consulted with an expert in order to understand the significance of the report. Such an expert would have explained that the presence of GSR increases the likelihood that GSR is present on a shooter, and would have urged counsel to push for GSR testing of Mr. Edwards's clothing. Both experts remarked on the failure of the State to test Mr. Edwards's clothing for GSR; proper procedure at that time dictated that once Mr. Edwards's hands tested negative for GSR, the crime lab should have tested Mr. Edwards's clothing." (App. 9). (*See also Id.* ("The wounds on the victims are not contact wounds, thus the gun was not flush against them and the cloud of gunshot residue emitted from the gun would be expected to have been on the shooter's clothing.")).

Had defense counsel consulted with even a single forensic expert, they would have known to request this important testing. They would also have been equipped to counter the false testimony elicited by the prosecutor and the extremely aggravating arguments derived therefrom.

Had trial counsel consulted with an expert, as reasonable counsel would have,[32] they would have been able to prove that the highly aggravated theory from the prosecution that the victims were on their knees, pleading for their lives, was not "a reasonable deduction." They would have been able to conclusively refute the argument that Mr. Edwards successfully removed two of the three chemical components contained in any particle of the GSR. Had they attempted to meaningfully prepare Mr. Edwards's defense, they would have secured readily attainable expert evidence that would have demonstrated, in fact, that the State's theory was not at all a reasonable deduction.

ii. The Ballistics Evidence

The State's theory was that Terry Edwards wanted vengeance against an employer who had fired him and shot his co-worker and manager in the head in cold blood, execution-style. (Tr. 55 at 75). ADA D'Amore told the jury that Terry went into the Subway that day "with murder in mind, with greed in mind, with evil in his heart . . ." (*Id.* at 75, 115-16). Mr. Edwards, D'Amore, repeatedly argued, was a mastermind and a leader, who "controlled" and "engineered" the entire crime. (*Id*. at 74. *See also id*. at 75 ("What personification of evil is it that can take two people that you know and you have worked with, and shoot them in the head at close range, so close, so close that the gunpowder from the muzzle of his gun is seared and burned into the flesh.")).

A key piece of this vengeance, execution-murder theory was that that victims were on their knees when they were shot and killed. The "evidence shows you" D'Amore instructed the jury, that the victims were "kneeling." (Tr. 55 at 116); *See also, id.* ("as they're kneeling, sitting, looking over, do you think they know that he's going to pull the trigger? Do you think they're hoping at that point that he just takes the money and leaves?")

[32] Mr. Kilty noted that he "simply [did] not understand" trial counsel's failure to "call or otherwise engage an analyst to assess the foregoing reporting – let alone examine and scrutinize the testing data or actual evidence – concerning the firearm." (App. 21).

> Do you think for a minute that when they [victims] got up and said goodbye to their loved ones, they'd anticipate running into Terry Edwards in the state that he was in, with the evil he had in mind that morning? Is it consistent that when Tommy Walker, when that gun is pulled on him by that man right there, that he's kneeling down, and that the force of that blow, when he's shot in the head one time and his death occurs instantly, that he just flies back onto that floor on his back?

(Tr. 53 at 66). The argument that the victims were kneeling was critical to the prosecution's central theory that the murders were a planned revenge killing.

The evidentiary support for the theory that the victims were on their knees came from the State's questioning of two well qualified medical examiners.

Dr. Walter Kemp performed the autopsy of Tommy Goodwin. Dr. Kemp was an assistant professor at the University of Texas Southwestern and an adjunct Medical Examiner at the Dallas County Medical Examiner's Office. (Tr. 52 at 14). Dr. Kemp testified that he performed autopsies at Parkland Memorial Hospital and at the Dallas County Medical Examiners, was licensed to practice medical in Texas and Montana, and was board certified in anatomic, clinical, and forensic pathology by the American Board of Pathology. *Id*. D'Amore elicited from Dr. Kemp that it "would be consistent" with the evidence that the victims were kneeling when they were shot. (Tr. 52 at 23. *See also id*. at 25 (D'Amore: ". . . you can't tell from your autopsy whether he was standing, kneeling down . . . head bowed over, but it certainly could be consistent with that. Dr. Kemp: "Yes."); *id*. at 30 (D'Amore: ". . . it's entirely consistent he could have been sitting; he could have been kneeling and the force of that blow, because it was so close could be that it spun him around, and he ended up on his back if he's kneeling down?" Dr. Kemp: "I would think so, I mean, because there's a lot of force there."); *id.* at 29 (Dr. Kemp: ". . . and may be possible in kneeling, if the person falls back and then their legs stretch out.")).

Dr. Joanie McClain had been a medical examiner with Dallas County for 11 years. Dr. McClain performed the autopsy on the victims. Three times D'Amore elicited from Dr. McClain that the evidence was consistent with a finding that Ms. Goodwin was on the ground when she was shot. (Tr. 52 at 44 (D'Amore: "It could be consistent, of Ms. Goodwin kneeling down or bending over, tilting her head, something to that type of situation?" Dr. McClain: "Yes." D'Amore: "Sitting down, possibly I guess, also?" Dr. McClain: "Yes."); *see also id.* at 45(D'Amore: "Would it be consistent, if that was the second shot, that when she received that, she just simply fell forward, whether she was kneeling, bending over, and fell forward to the ground?" Dr. McClain: "Yes.")).

Though the defense cross-examined each expert, the questioning did nothing to undercut the essential narrative that the evidence would support the theory that the victims were on their knees. (*See e.g.* Tr. 52 at 29 (Brauchle: "…you don't have any reason to believe that the body was in a kneeling position, do you?" Kemp: "I mean, it would be possible to be in a sitting position and fall back like that, and may be possible in a kneeling, if the person falls back and then their legs stretch out.").

The State injected this testimony and related theory throughout the trial. In the defense's penalty phase presentation, D'Amore used it to undermine Dr. Kessner, the defense's psychiatrist, asking "if the State's version in this case is that he made those two people kneel down and shot them in the head, would you accept that?" (Tr. 54 at 246). The defense objected to this questioning of its expert, on the grounds that the State's argument assumed facts outside of the record. (*Id*.; Tr. 55 at 117). Overruling the objection, the court told counsel that the State's theory was a "reasonable deduction" based on the testimony adduced trial. (*Id*.).

However, that testimony was false. In fact, it is "indisputable" that both victims were standing, not kneeling or on the ground, when they were shot.[33] Undersigned counsel, for the first time in Mr. Edwards's case, consulted with independent experts to undertake review of the forensic evidence and testimony. Robert Tressel, a crime scene analysis and forensic expert with over 30 years of law enforcement experience[34] conducted a preliminary review of the materials and concluded unequivocally that the victims were standing when shot. It is clear, based upon his review of the evidence, "that Mickell Goodwin and Tommy Walker were standing at the time that they were shot." (App. 4).

> The crime scene photographs depict large drops of blood on the ground near Ms. Goodwin's body. Blood dropping from a height reaches a terminal velocity at 6 feet. This means that blood that is dropped from six feet will have the same circumference as blood that is dropped from, for example, twenty feet. In this case, it is clear that Ms. Goodwin's blood dropped from a substantial height, approximately five feet above the floor.

(App. 8). He also found that "there is no question that Mr. Walker was standing at the time that he was shot. Again the crime scene photographs make this a clear and indisputable conclusion." (*Id*.).

Mr. Tressel noted a number of other issues, undermining credibility in the State's investigation of the crime scene. He noted the import of a partial shoe print found at the crime

[33] At App.4-15. is a preliminary report from forensics expert, Robert Tressel, who conducted a preliminary review of the materials and offered a preliminary report in support of funding. (App. 4). The report makes a number of findings and conclusions, but is far from complete. Mr. Tressel identified key documents that are missing from prior counsel's file. Mr. Tressel undertook the preliminary review at no charge to the Court, and identified several issues that require follow up. In order to conduct a complete review of the forensic evidence in the file, including documents contemplated in outstanding discovery requests, and offer testimony at a hearing, the remainder of Mr. Tressel's time will need to be funded.

[34] Mr. Tressel has over thirty years of experience in law enforcement and crime scene analysis. From 1973-1985 he was a police officer and then Detective Sergeant with the Cobb County Police. From 1985-1998, he conducted forensic investigations with the Cobb County Medical Examiner's Office, becoming the Operations Manager in 1993. He began consulting privately in 1998 and, since 2011, has been the Chief Investigator for the Cobb County District Attorney's Office. He has extensive homicide training, including, but not limited to, crime scene processing, crime scene analysis, blood spatter interpretations, death investigations, and interpreting injuries and their causes. He has been involved in over 500 homicide investigations and has testified in eleven states. (App. 4).

scene. (App. 9). Testing at trial of Mr. Edwards's shoe revealed that his was not a match to the partial print. (*Id*.). Mr. Tressel found that the partial print "may be a critical piece of evidence in determining the identity of the shooter." (*Id*.). By analyzing the "location of the victims, blood spatter, and trajectory," Mr. Tressel concluded that "the source of the partial shoe print was either the shooter or one of the first responders." (*Id*.). Mr. Tresssel would need to conduct additional analysis in order to rule out the first responders, who are identified in the crime scene evidence log. (*See* Tr. 51 at 52).[35] This analysis is critical because "if proven, it would exclude Mr. Edwards as the shooter." (*Id*.).

Finally, Mr. Tressel's findings directly contradict several key pieces of testimony offered by the State's law enforcement and forensic experts, which supported the State's theory that the victims were on their knees. Mr. Tressel explained that the bullet found in the back of the store was evidence that Ms. Goodwin was standing. (App. 8). In contrast, at trial the State's witnesses told the jury that law enforcement "had no clue how [the bullet] ended up back there. . . We have no idea." (Tr. 51 at 90). Mr. Tressel also conclusively determined that blood found on the wall behind the victims had been emitted from a greater height and spattered onto the wall and dripped downward. (App. 10). This directly contradicts the testimony of Sergeant Don Rowe, Senior Sergeant in the Crime Scene Division of the Dallas County Sherriff's Department, who testified that the blood came onto the wall from an upward angle (indicating that the victim would have been lying down on the ground when shot). (Tr. 51 at 86). Mr. Tressel further found that the blood spatter and drippings behind the victims "should have been measured in order to determine the trajectory, revealing the location of the shooter and the victims at the time the shots were fired." (App. 10). "Such an analysis would have been vital to a comprehensive crime

[35] Law enforcement investigators testifying for the State repeatedly asserted that they were extremely careful not to disturb the crime scene. *See e.g.* Tr. 51 at 64- 65, 68,

scene investigation and to developing a coherent explanation of how the offense conduct unfolded." (*Id*.). Yet, "law enforcement failed to undertake this analysis." (*Id*.).

iii. The State Withheld Other Material and Exculpatory Evidence

iv. Potential Eye-Witness Testimony

After undersigned's appointment, and only at the request of current counsel, the Dallas County District Attorney's office recently disclosed handwritten notes contained within its files. In those files a piece of paper—absent from any of the other prior counsel files—describing a potential eyewitness to the homicide, with a description of the perpetrator that matches Kirk Edwards, not Terry Edwards. (App. 200). Above the account is an attorney note: "Jeff Savage – info rec'd wit during trial Re: Kirk?" (*Id*.). Jeff Savage is an investigator with the Dallas County District Attorney's Office.

Below the note is a diagram of the shopping center where the crime took place, with an arrow pointing out of the Subway. (*Id*.). Around that arrow is the following description: "white foreign car; Nissan? West toward interstate; 4" .357 revolver; dark pants sneakers; B/M running from Subway Did not see him come out door." (*Id*.). Below the drawing, the note lists a name, GT Morton, a phone number, and this note: "Wrecker driver within 30 yards of White car, ex constable." (*Id.*). G.T. Morton does not appear on the State's final witness list prepared in connection with trial. (App. 209).[36]

The details contained in the note clearly describe Kirk. First, Terry Edwards was wearing shorts, not pants, on the day of the robbery. (Tr. 51 at 33, 145-146, 222). Kirk Edwards, on the other hand was wearing pants. (Tr. 51 at 237-38). Second, it was Kirk who had borrowed his

[36] Mr. G.T. Morton is the husband of Jeff Savage's wife's best friend. This connection may explain why Jeff Savage appears to be reporting this information, although it does not explain why Mr. Morton's name would not have been turned over to the defense as possible *Brady* evidence. Further investigation and a hearing are required to fully understand the significance of the suppressed note.

girlfriend's vehicle, a light-colored Nissan Maxima, to drive to Balch Springs on the morning of the offense. (App. 201-202). Third, Terry Edwards escaped out of the back of the building and was arrested in a gas station parking lot shortly after the crime, but Kirk Edwards—who absconded and did not turn himself in until the day after the shooting—would have been in a position to escape heading west toward the interstate in said vehicle on the morning of the shooting.

The note not only suggests that an additional eyewitness may have been able to place Kirk at the scene of the crime, it also suggests that had exited the front door of the Subway, contradicting all of the witnesses and forensic evidence presented at trial—none of which corroborated that Kirk had ever even been inside the store.

Finally, the note also suggests that, whoever the witness is, he may have been in position to see the homicide take place. The witness appears to have been in front of the Subway with a view of the store that would have included the site of the murders. In light of the lack of any eyewitnesses to the homicide, such a witness would have been critically important. Yet this exculpatory evidence from the DA's file was never disclosed to any prior counsel for Mr. Edwards.

v. Forensic Analysis and Testing of The Getaway Car Driven by Kirk Edwards

Kirk Edwards was responsible for driving the getaway car. Because Kirk was able to dispose of his clothing before turning himself him 24 hours after the crime, any investigation and forensic analysis of the car was essential. Prior counsel's file contained a search consent form signed by Kirk Edward's girlfriend, giving the police the permission to search her car. (App. 201). Recently, the Balch Springs Police Department turned over a "Case Summary" which reflects that the automobile driven by Kirk was impounded by police. (App. 205). That "Case

Summary" was withheld from prior counsel. Notably, the State shared with prior counsel a different "Case Summary" which omits the detail regarding the impounding. (App. 207). Despite multiple requests, undersigned counsel have not yet obtained the documents regarding the State's forensic testing and analysis of the car.

vi. Compelling Witnesses Were Available To Rebut the State's Aggravating Theory of the Crime.

vii. Members of the Victim's Family Wanted to Speak On Mr. Edwards's Behalf.

Nor did counsel take other important steps to rebut the State's aggravating narrative. There were many witnesses who could have offered important testimony rebutting the State's aggravating theory. Chief among them were Tommy Walker's daughter, Samantha Lamphier, and her mother, Cassandra McDaniel-Horridge. As reflected in the transcript, on the last day of Mr. Edwards's penalty phase, defense counsel, Mr. Hugh Lucas, stated on the record that Ms. McDaniel-Horridge, the mother of two children of the decedent, Mr. Walker, contacted him to express the wishes of her family that they were willing to testify in support of Mr. Edwards. (Trial Tr. Vol. 55, 8-9). Trial counsel had done no investigation into the views of the surviving victims, nor had they made any effort to interview the victims prior to that time. (*Id*.; App. 29; App. 32-33). Counsel requested a brief continuance, in order to interview Ms. McDaniel and "explore any previous relationship, any previous history in regard to Tommy Walker." (Tr. Vol. 55 at 9). Trial counsel had not yet interviewed these potential witnesses. This information, counsel told the court, "could be material to this Jury." (*Id*.). Defense counsel argued that the testimony of Ms. McDaniel-Horridge and her children "may very well go to the Defendant's background, taking into consideration all the evidence, and it may certainly be something that the Court might need to be mitigation evidence." (*Id*.). The trial court refused to stay the proceedings to permit Ms. McDaniel-Horridge to testify. (*Id*.).

In fact, counsel's late musings were correct. Mr. Tommy Walker had been responsible for hiring Mr. Edwards. Mr. Walker managed the Balch Springs store, and in that context, the two worked closely together and according to Ms. McDaniel and Ms. Lamphier, became "friends." (App. 30). Before the district manager fired Mr. Edwards, he asked Mr. Walker to do so, claiming there was a discrepancy between the receipts and cash count. Mr. Walker refused, because he did not believe that Mr. Edwards was responsible for the discrepancy and because he "really liked and cared about" Terry Edwards. (*Id.*).

Terry Edwards lived with Mr. Walker for a period, and Samantha Lamphier, grew fond of Mr. Edwards. (*Id*.). She remembers Mr. Edwards and members of his family visiting for dinner at her father's house. (App. 26). Based on her interactions with Terry, Ms. Lamphier did not believe that Mr. Edwards was capable of killing her father. (*Id*.; *see also* App. 31). Based on her relationship with Mr. Edwards, Ms. Lamphier was and is "adamant" that Mr. Edwards not receive the death penalty. (App. 32). Although Samantha was only a teenager at the time, her mother brought her to trial so that she could be involved, because it was her desire to testify on Mr. Edwards's behalf as part of a case for life. (*Id*.; App. 28). She believed, and believes very strongly that Terry "never intended for [her] dad to die, and he deserved to have the jury hear from the victim's family who had known him before they made a decision about whether or not to sentence him to death." (App. 28).

When Mr. Edwards received an execution date, Ms. McDaniel-Horridge again attempted to reach out to his attorney; this time Mr. Richard Wardroup. (App. 33). She "called and left multiple messages with him, but he never called [her or her wife] back." (*Id.*). Having struck out with his current counsel, she called one of Mr. Edwards's former lawyers, Douglas Parks. (*Id.*). He initially had no memory of the case, even though he represented Mr. Edwards on direct

review. (*Id.*). After refreshing his memory about the case, he informed her that he was unable to help because he was no longer representing Mr. Edwards and that their best recourse would be to contact the Supreme Court to inquire about obtaining a stay of execution. (*Id.*). After a call to the Supreme Court proved futile. Ms. McDaniel-Horridge contacted Mr. Edwards's mother, Ms. Linda Edwards. (*Id.*). Ms. Edwards did not know who Mr. Edwards's lawyers were. (*Id.*).

At no point prior to Mr. Edwards receiving an execution date did a member of Mr. Edwards's defense team speak with either Samantha or her mother. Even when they reached out to Mr. Edwards's prior counsel, their calls went unanswered.

viii. Multiple Family Members Were Available To Testify In Support of Terry Edwards Edwards, And Against Kirk Edwards.

Additionally, multiple family members of both Terry and Kirk Edwards would have been willing to offer testimony that undermined the state's aggravation theory. These family members would have been willing to testify that Kirk Edwards was a bully known for harassing and physically and psychologically intimidating those around him. They would have testified that the gun used in the homicides belonged to Kirk and that Kirk bragged about his assaultive behavior and was widely believed within the family to be the person who planned the robbery and ultimately perpetrated the homicides. They were prepared to testify about the sharp contrast that Terry Edwards presented to Kirk: that Terry was a timid child, for whom committing the present offenses were far outside his character, and who had overcome a challenging upbringing to become a loving father. However, beyond Mr. Edwards's mother, who was largely uninvolved in his upbringing and who suffered significant problems of her own, trial counsel failed to present the testimony of a single member of Mr. Edwards's family. (Tr. 53, at 346-69) (trial testimony of Ms. Linda Edwards). Moreover, with the exception of a ten-minute phone call,

defense counsel at trial and every prior member of Mr. Edwards's defense team failed to even interview these family members.

Terry's uncle Barry Edwards, for instance, would have been able to tell defense counsel and a jury what he knew about his nephews Kirk and Terry and about their relative culpability in the offense. Had he been contacted by trial counsel, Mr. Edwards could have testified that it was Kirk Edwards, "who was all about fast money and the next scheme," who owned the gun used in the robbery. (App. 53-54). He would have testified that "[e]ven as a little kid, Kirk would tell you whatever lie it took to avoid the blame or get himself out of a situation" and was not "really concerned with anyone but himself." (App. 52-53). And he would have testified to his encounters with Kirk Edwards in the hours following the offense, which convinced him that "Kirk was lying to me about basically everything" and that Terry Edwards was facing the death penalty "for a killing that he did not commit." (App. 53-54, 56).

Terry's maternal first-cousin, Consuelo Moss, considers her relationship with Mr. Edwards as "more like the relationship between a brother and a sister than one between cousins." (App. 65). Ms. Moss is the only other family member trial counsel contacted, and communicated her close relationship with Mr. Edwards during that brief phone call.[37] Nevertheless, his prior defense team conducted a perfunctory interview, consisting of "a few questions" spanning only around ten minutes. (App. 67).

Had she been asked, Ms. Moss would have testified to information about Kirk Edwards's influence over Terry and about Terry's childhood and development. She would have testified about a specific incident when Ms. Moss was a teenager and Kirk picked her up from her aunt's house in a car with "a really nice stereo system and rims." (App. 68). She was "impressed" and wondered how he could afford the car. (*Id*.).

[37] That is, her only interaction with the defense team prior to her interactions with the current team.

The two rode together from Ms. Moss's aunt's house to her great-aunt's house an hour away. (*Id*.). While they were there, Kirk convinced her great-aunt and uncle to swap vehicles with him for a day. (*Id*.). On the drive back, the police pulled the two over. (App. 69). Kirk told Ms. Moss to provide the police with a fake name and that he would do the same. (*Id*.). The police ultimately let the two proceed without a ticket. (*Id*.).

Within a week or two, a drug dealer came by Ms. Moss's aunt's house looking for his car. (*Id*.). The drug dealer said that Kirk had stolen the car and that he would kill Kirk if he did not return it. Ms. Moss "could not believe that Kirk would put his whole family in danger" in such a reckless manner. (*Id*.).

The day before the robbery and homicides that led to Mr. Edwards's conviction, Ms. Moss recalled Kirk was attending a barbecue at Ms. Moss's uncle's house. (App. 70). At the barbecue, Kirk asked Ms. Moss for a ride the next day to the house of her great aunt and uncle. (*Id*.). Ms. Moss replied that she could if he provided her gas money. Kirk responded that "if everything goes well tomorrow, you won't have to worry about no gas." (App. 71). The ride never happened, and Kirk was ultimately arrested for his involvement in the robbery. When Ms. Moss heard about the robbery, the exchange with Kirk made sense to her and she understood that he had known about and planned the offense. (*Id*.).

Ms. Moss would have further testified that possessing or using a gun would have been very uncharacteristic of Terry Edwards and that he was likely taken advantage of by his older cousin: "Terry was so afraid of guns that he left college during his freshman year after there was a shooting in his dorm." (App. 72). Ms. Moss had never seen Terry with a gun or heard him talk about a gun. By contrast, Kirk was "more volatile and aggressive" than Terry and "was always

committing other crimes." (*Id*.). On at least one occasion, he "pull[ed] a gun on one of his ex-girlfriends" and robbed her. (App. 72).

Another cousin to Kirk and Terry, Tawain Edwards, would also have testified that about Kirk's volatility and penchant for violence.[38] Tawain Edwards knew Kirk Edwards to be a "bully." (App. 61). He was someone who "was constantly picking on other people, getting into fights, and trying to manipulate people for his own advantage." (*Id*.)

Kirk had only been out of prison for about a month when the homicide occurred. During that month, he bragged to Tawain about the "fights that he had been in when he was inside and how many guys he had whooped." (App. 60). Tawain knew Kirk as someone who "was into showing his psychological dominance over other people." (*Id*.). He recalled multiple, specific incidents in which Kirk Edwards instigated fights and confrontations, even with his own family, and over matters as trivial as a piece of fried chicken. (*Id*.).

Kirk and Terry's maternal aunt, Ruby Brown, was also willing to testify for the defense.[39] As a child, Kirk's Aunt Ruby regarded him as a "monster," who "was disrespectful to his elders" and did not appear to be disciplined by anyone responsible for raising him. (App. 39-40). The same went for his brother, Kevin Edwards, who was a "demon possessed . . .currently doing a life sentence for murdering a security guard," leading Ms. Brown to conclude that Kirk's reputation for violence and robberies within the family may have been a genetic trait particular to his branch of the family tree. (App. 40).

According to Ms. Moss, Kirk likely took advantage of Terry's trust, a trust that he would naturally have in a close relation and that would accompany his deference to his older relative:

[38] Until recently, no member of Mr. Edwards'sdefense team had spoken with Mr. Tawain Edwards. (App. 64).

[39] Likewise, no member of Mr. Edwards's defense team had spoken with Ms. Ruby Brown, Mr. Edwards's maternal aunt, until recently. (App. 42).

"Terry was always very trusting, especially of his older cousins. He looked up to us to protect him. . . . I think this made it easy for Kirk to take advantage of Terry and get him caught up in something he never would have been involved in on his own." (App. 72). Ms. Brown likewise will "believe to her deathbed that Kirk Edwards was the main one behind the robbery and pulled the trigger on those two people." (App. 42).

Like other members of the community into which Terry was born, his mother was swept away by the crack epidemic of the 1970s and 1980s. (App. 35). Terry's general vulnerability made him, in part, more susceptible to Kirk's manipulation. This part of his upbringing was yet another aspect of Terry's life that his family was willing to testify about. Although very supportive of her son now, throughout Terry's childhood, his mother was a drug-addicted prostitute largely incapable of caring for him. She abandoned him with a neighbor when he was just an infant. (App. 36, 58). The neighbor eventually stopped by his Aunt Ruby's house to see if she knew where Linda was. (App. 36). His aunt was shocked to learn that Terry's mother had dropped him off with the neighbor several days earlier, and had not been heard from since. (*Id*.). The neighbor had kept young Terry for as long as she could, but could no long afford diapers or formula for the baby. (*Id.*).

As a result, Terry was a "sensitive boy" who grew up "looking for approval" because he felt "rejected" by a "mother [who] wanted to be out using drugs and running the streets instead of taking care of him." (App. 51).

As a result of Linda's addiction, Terry was raised by his grandmother, Celesta, who kept a chaotic household ill-equipped to serve the needs of a young child. (App. 65). Many of their relatives, who struggled to maintain housing of their own, often stayed in her two-bedroom apartment in the Dallas housing projects as well, and there were "usually people sleeping pretty

much everywhere." (App. 66). For several years, Mr. Edwards shared a twin bed with his uncle, Gordon Edwards, who was eventually arrested for murder. (*Id*.). On the night the police arrested Gordon, they initially pulled Terry out of bed, before they found Gordon hiding in the closet.

Celesta had been married for many years to a man with a violent temper who often physically abused his children and step-children. (App. 38). Shortly after Celesta divorced him, she had surgery to remove a brain tumor. (App. 39). After the surgery, Celesta's "personality changed—she became much more withdrawn, less outgoing—and her mind and her memory just weren't ever as sharp again" (*Id*.). She was moved by family into the subsidized housing project where Terry Edwards would eventually join her. (*Id*.).

For a short period, Terry's mother was sober, and secured an apartment long enough for her son to move in with her. (App. 58). During that time, Linda was with a boyfriend who physically abused her. (*Id*.). Soon enough, however, drugs came back into her life, she lost the apartment, and Terry had to move back in with his grandparents. (*Id*.). Terry wanted his mother to be part of his life, but she largely was not, and, when she was present, she introduced destabilizing forces in Terry's life, including drugs and an abusive boyfriend.

Despite these challenges, Terry was regarded as the "golden boy" among his cousins. Terry is one of two cousins in his generation of the Edwards family to graduate from high school, and is the only one to have gone to any college. (App. 59). As a young child, he was considered "a good sweet little boy, although he was timid" and "not tough or adventurous like other little boys." (App. 37). When he played football with his cousins, he would often quit the game early, because he was "upset and cry[ing] over the smallest little thing, like a scratch that

didn't even bleed." (App. 37). Sandra Sparks, his aunt, still remembers him fondly as a "sissy."[40] "[H]e got on my nerves he was so scared." Ex. # at 2 [Sparks ¶6] His family suggested his timidity was from having absorbed the trauma around him in his life, especially in his early years. (App. 37).

As he got older, he helped his younger cousins with their homework, and helped them to stay out of trouble. (App. 59.) On one occasion, one of Terry's cousins was getting jumped by a neighborhood bully and Terry intervened, thereby ending the harassment. (App. 59). Terry did not have a reputation for having or using a gun. Instead, he was "a pretty boy and ladies man" who "got by on his looks, not by being street-smart, carrying weapons, or knowing how to fight." (App. 61).

Had counsel consulted Tawain, he also could have helped explain the aggravating evidence introduced by the prosecution that Terry was in a "gang" and dispel any notion that Terry was a member of a criminal enterprise. Tawain would have told the jury that he claimed affiliation with the "Bloods" after being beat up by some people from a different neighborhood claiming to be Crips. (App. 63). For kids like Tawain and Terry, vulnerable to attack and living in dangerous neighborhoods, claiming affiliation was a means of protection. (*Id*.).

Terry, his cousin could have testified, was never known for gang involvement. Though Terry and Tawain were close, Tawain had "never even heard of the 4312 Hardheads," (App. 63), the name of the so-called gang with which the State argued Terry was affiliated. If that is a group, Tawain explained, "that just must have been a name that the kids who grew up in the same housing project as Terry went by." (App. 63).

[40] As part of the investigation, the Dallas and Lancaster police searched the house of Ms. Sandra Sparks, Mr. Edwards' maternal aunt. Despite her availability to speak with Mr. Edwards' lawyers "this whole time," until recently no one from Mr. Edwards defense team interviewed her. (App. 79).

Charlite Darden, the mother of Terry's son, Terry Jr. (dec.), was never interviewed by any member of Terry's prior defense teams. (App. 43). She and Terry met when they were in high school. She describes Terry as a loving father, who treated her well. (App. 44). She blames their having split on their immaturity when they met. (App. 44). Even though the two only lived together for a couple of years, "Terry maintained a relationship with his son." (App. 44). Even when Terry was in prison, he would call "every chance he got and wrote letters." (App. 44).

When Terry got out of prison, he was "determined to make an honest living for his kids' sake" and "took a genuine wholehearted interest in making time in his life to be an active parent." (App. 44-45). To that end, he obtained a job at Subway and talked about returning to college. During this period, Ms. Darden would send Terry Jr. to spend the night with him.

Ms. Darden only met Kirk a couple of times, the last time being shortly before the homicides. Kirk came by to drop Terry off for a visit and tried to come into Ms. Darden's house. She did not let him in because he "was agitated and hostile and his eyes looked glazed over and empty." (App. 46). Kirk "los[t] it" and became "really verbally abusive" with Ms. Darden. She told Terry that there was something wrong with Kirk and that Kirk was "going to get him in trouble." (App. 47).

On the morning of the crime, Terry Jr. went to the house of Terry's Aunt Sandra. (App. 45). Aunt Sandra lived next door and frequently watched Terry Jr. She was not surprised to find Terry Jr. knocking on her door, but before Sandra could get outside, Terry and Kirk had already left. (App. 45). It was early, and Aunt Sandra remembers telling Terry Jr. to lay down and get some rest. (App. 45).

That afternoon, before the robbery had made the news, Aunt Sandra received a call from Kirk. He volunteered her that Terry had shot two people and that he, Kirk, had nothing to do

with the robbery or shootings, other than giving Terry a ride. Ex. (App. 45). Because it was not yet public that two people had been shot, Sandra wonders to this day how Kirk knew that detail of the crime, if he truly had nothing to do with the robbery and shootings. (App. 46.)

At the time that Terry was arrested, he was only a few months from completing probation. Tawain was shocked to learn of Terry's involvement in the crime, and immediately suspected Kirk's influence. Several days before the crime, Terry had driven Kirk to Tawain's house, which worried Tawain because he knew what a bad influence Kirk was. During the visit, it was "clear to [Tawain] that Kirk didn't have any intentions in visiting except to try and get money." (App. 66). According to Tawain, Terry was "too soft" to say no to Kirk. (App. 66).

When Terry's grandmother Celesta developed Alzheimer's disease, he took it hard. Although her experience with the disease was difficult on the entire Edwards family, Mr. Edwards "took it hardest of all . . . because Celesta was like his mother." (App. 65). After she succumbed to the disease and passed away, "He just seemed lost." (App. 65).

Prior to Terry's trial, Ms. Darden was visiting with Terry at the same time Kirk's mother was there. She called Ms. Darden over to Kirk's booth. Kirk asked Ms. Darden to "convince Terry to take the fall for him." She "couldn't believe the nerve of it and didn't understand why he thought [she] would possibly go along with that. (App. 48).

Each of these family members was readily available to Mr. Edwards's prior counsel. However, prior counsel, including trial counsel, presented no evidence beyond testimony from Mr. Edwards's mother, a person with significant limitations. As she admitted at trial, she was a drug addict for "the major portion of [her] life," and was either using drugs or incarcerated throughout Mr. Edwards's upbringing. Vol. 53, at pp. 347-48. Thus, she was not in a place to give details about Kirk's propensity for violence or Terry's vulnerability to his older cousin.

3. The State Introduced A Highly Prejudicial Aggravator Based Upon Fabricated Evidence.

In the punishment phase, the prosecution introduced testimony from several witnesses that Terry Edwards had robbed another Subway sandwich shop in Fort Worth three months prior to the underlying robbery and murders. The State's case centered almost exclusively on the testimony of Michael Weast, one of the witnesses to the Fort Worth robbery who testified that the robber who stood lookout in that offense, whom he identified 4 months later as Terry Edwards, took his phone and threatened to kill everyone in the store. (Trial Tr., Vol. 53, 100). The prosecution also called a security guard who chased after the robbers and the investigating Fort Worth police officer, though neither was able to offer any identifying or corroborating information to affirmatively attach Mr. Edwards to the Fort Worth robbery. (Tr. 53 at 119-143).

The evidence against Terry Edwards was tenuous and the narrative leading up to charges being filed – and then subsequently dismissed – is dubious, at best, and fabricated at worst. The Forth Worth police and DA files constructed in support of the decision to charge Mr. Edwards are riddled with errors and appear to be assembled post-hoc in an effort to fabricate a *modus operandi*, and, crucially, evidence of Mr. Edwards's future dangerousness.[41] For instance, the Fort Worth Police Department's entries dated at the time of the crime have been altered to reflect that Terry Edwards's was identified as a suspect (an identification that took place four months later). (App. 92-93). And the narrative description contained in the District Attorney's file likewise, inexplicably lists the date at which the Fort Worth and Balch Springs police

[41] As part of their investigation on Mr. Edwards's case, undersigned counsel requested and received the Fort Worth Police and DA files related to the Fort Worth Robbery. (App. 80-109). Apparently the DA at trial failed to turn over many of the documents therein, as they documents were not located in prior counsel's file. Nor have undersigned counsel seen requests for these documents in the files of prior counsel.

departments began communicating about the similarities between the two offenses as April 29, 2002—more than two months *prior* to the Balch Springs offense. (App. 94).

In support of the Fort Worth charges against Terry Edwards, on April 9, 2003, lead investigator, Detective Carlos Ortega, swore out an affidavit, attesting that the case had been assigned to him on August 31, on which date he had met with Weast and showed him a photo lineup. (App. 88). Other reports, however, reveal that the line-up was actually shown to Weast *prior* to that date, on August 5, 2013. (App. 94). Moreover, the affidavit signed by Weast implicating Terry is dated on August 13, and, while it discusses a photo-lineup, it makes no mention of August 5 or the circumstances of the photo lineup. (App. 86-87). Increasing suspicion in the veracity of the Forth Worth Police files is the absence of any handwritten notes or contemporaneous witness statements.

The few police reports that were actually generated at the time of the offense undermine the State's subsequent, transparent efforts to connect Mr. Edwards to the crime. The initial descriptions of the perpetrators given to the police by the victims and witnesses did not match Terry Edwards. (App. 101). Both perpetrators described in the initial police reports were 17 years old. (*Id.)*. One had stained and decayed teeth, was 5'9", weighed 130 lbs, wore a pony-tail, and had a dark complexion. (*Id.*). The other was 5'3" with an "extremely slim build" (though it is unclear what this means, it is presumably less than the other suspect's estimated weight of 130 lbs). (*Id.*). Weast later identified the second suspect, who served as lookout (5'3", 130 lbs), as Terry Edwards, despite the fact that Mr. Edwards was more than a decade older, half a foot taller, and about 50 pounds heavier than the suspect described at the time of the offense. At trial, the DA used the Fort Worth robbery charge extensively in aggravation. The DA drew distorted parallels between the Fort Worth robbery and the Balch Springs robbery, telling the jury that Mr.

Edwards had gone to the bathroom to check for other witnesses in both robberies, had used language like "what's up, dog" in both robberies, was a leader in both robberies, "controlling it" "engineering it," and was "concerned with the getaway" in both robberies. (*Id*. at 73-74). The DA used the Fort Worth robbery as further evidence that it was Terry Edwards, and not Kirk who was the shooter in the Balch Springs robbery. (*See id*. at 72-73 ("Think of the robbery that you heard in Fort Worth, a very short period of time before the robbery/murder that we're here about today. You know, in that robbery, he goes in with another man, not Kirk. The common denominator in that robbery and the robbery/murder that we're here about is the Defendant.")). The prosecutor also argued that the Fort Worth robbery was proof that Mr. Edwards's propensity for violence was escalating. (*Id*. at 74. ("The point I'm trying to make is the crimes are escalating. They're getting worse and worse.")).

To strengthen the evidentiary value of the fabricated Fort Worth robbery, the DA improperly bolstered the identification of Terry Edwards as the Fort Worth robber. The prosecution deceptively argued that Terry Edwards had been identified by an eyewitness of the Fort Worth robbery "right after the robbery from the photo lineup that was given to him by the Fort Worth police." (Tr. 55 at 73). In fact, that eyewitness, Weast, did not view the photo lineup until *four months* after the Fort Worth robbery and one month after the Balch Springs robbery.

Even in the face of such blatantly inflammatory and inconsistent evidence, the defense not only failed to bring up the myriad problems with the State's case, but also unreasonably and inexplicably failed to conduct any of their own investigation into these allegations against Mr. Edwards.

Based on the narratives contained in the files, Mr. Edwards was initially linked to the case when Detective Ortega heard about the robbery in Balch Springs and contacted the Dallas

Police Department, requesting a photo of Terry Edwards and constructing a lineup. In addition to showing Weast Terry Edwards's photo, various records reflect that Detective Ortega also met with two other victims of the Fort Worth Robbery, neither of whom identified Terry Edwards as the perpetrator of the Fort Worth Subway Robbery. (App. 98). These witnesses were apparently brought to court, where they may have been interviewed again by the State's investigators. (Tr. 55, 15-17). Despite their apparent presence in the courtroom, remarkably, trial counsel never attempted to interview these witnesses. This is so despite the fact that counsel had in their file a police report indicating that the male victim could not make a positive identification of Mr. Edwards.

Moreover, although they offered vague reassurances on the record two days later that none of the non-testifying witnesses brought to court had anything exculpatory to say about Mr. Edwards, the State failed to turn over the record indicating that the female victim *also* was unable to positively identify Terry Edwards as the shooter. That document was only obtained recently by undersigned counsel in response to a Public Information Act request. The State similarly failed to disclose evidence of the investigation, prosecution, and identification of several other suspects involved in similar robberies in the Fort Worth area during 2002. There were, in fact, more than twenty robberies of Subway sandwich shop franchises in and around Fort Worth over the span of 2002, the majority of which were ultimately attributed to a loosely-organized group of perpetrators to whom Mr. Edwards was never connected or alleged to be connected. Although identified and arrested in November 2002, none of these individuals was prosecuted until *after* the State had successfully used the Fort Worth aggravator to secure its conviction and death sentence in the present case. Despite the similarities in the crimes and the time frame, trial counsel were never notified of the investigation, arrest, or identities of any these

perpetrators. This rash of Subway robberies received considerable media attention and was even cited by the City of Fort Worth as a significant factor in the 8.4% increase in crime rate in 2002. (App. 114). However, trial counsel apparently never undertook their own investigation of the other Fort Worth Subway robberies either.

Nor did the DA disclose evidence of another unsolved offense that took place earlier in April 2002 in Fort Worth, also committed by an African-American suspect, with a firearm. (App. 110-12). The apparent similarities led the Fort Worth DA to write in his file that the two crimes were "possibly related" to one another. (App. 94). Prior counsel, however, were never alerted to the Fort Worth DA's file, the DA's note, or the existence of the case. Evidence of such a similar crime would certainly be material and exculpatory and would have assisted counsel in rebutting an extremely damaging aggravator.

IV. CONCLUSION

The egregious conduct of prior counsel, combined with the severe constitutional violations in this case that are at risk of going unaddressed, warrant the exercise of this Court's equitable powers under Rule 60(b). Mr. Edwards respectfully requests that this Court grant his Motion and reopen his judgment. In the alternative, Mr. Edward suggests that the showing herein requires that this Court hold an evidentiary hearing.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January 2017, the foregoing pleading was served upon all counsel of record in this case via the ECF filing system, pursuant to the Federal Rules of Civil Procedure.

/s/ Jennifer A. Merrigan

CERTIFICATE OF CONFERENCE

I hereby certify that I conferred with opposing counsel, Ellen Stewart-Klein, via email, on January 9, 2017. I informed her of the details of this filing. She represented that her office does oppose this motion.

/s/ Jennifer A. Merrigan
JENNIFER MERRIGAN