IN THE TEXAS COURT OF CRIMINAL APPEALS
AUSTIN, TEXAS
And
THE 195TH JUDICIAL DISTRICT COURT
DALLAS COUNTY, TEXAS

Ex Parte TERRY D. EDWARDS, SR., §	**Writ No. _____+**
Applicant	**CAPITAL CASE**
	EXECUTION DATE: JANUARY 26, 2017

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NOTE REGARDING CITATIONS

Citations to the Reporter's Record are "Tr." followed by the volume number and, after that, the page number, *e.g.*, Tr. 52 at 3 refers to page 3 of volume 52. Additional documents are found in Appendix, cited as "App." followed by a page number, e.g. (App. 1). The Appendix is consecutively paginated.

SUBSEQUENT APPLICATION FOR A WRIT OF HABEAS CORPUS

I. PRELIMINARY STATEMENT

Dallas County Assistant District Attorney Thomas D'Amore teamed up with Vicki Hall, a forensic technician, to provide the key link in the case: scientific evidence establishing that Mr. Terry Edwards was the person who shot and killed the decedents. Specifically, Ms. Hall testified that the gunshot residue testing she performed, which explicitly produced a negative result, was somehow ambiguous, and might suggest that Mr. Edwards had recently fired a weapon because he could have wiped or sweated off two of the three chemical elements normally found in gunshot residue.

Having elicited this misleading testimony from Ms. Hall, Mr. D'Amore repeatedly argued to the jury that Ms. Hall's gunshot residue testing established conclusively that Mr. Edwards was the shooter. Both Ms. Hall's testimony and D'Amore's arguments, however, are contrary to and unsupported by science. Ms. Hall and D'Amore also suppressed testing conducted directly by Ms. Hall. Additionally, D'Amore also failed to disclose other key pieces of evidence indicating that Mr. Edwards was neither the shooter in the present crime, nor a perpetrator in an unrelated robbery that the State wrongfully included in aggravation.

This misconduct is particularly remarkable because Mr. D'Amore and Ms. Hall had teamed up in another murder trial, providing the very similarly invalid gunshot residue testimony and intentionally misleading argument. In that case, Mr. D'Amore also suppressed key evidence regarding eyewitnesses. And in that case, the defendant was ultimately exonerated. *Ex Parte Miles*, 359 S.W.3d 647, 663–64 (Tex. Crim. App. 2012). Three of Mr. D'Amore's prosecutions have resulted in wrongful convictions and the release of the person charged. In light of the serious defects in the trial and appellate proceedings as discussed below, as well as the meritorious claims presented herein, this Court should grant Mr. Edwards an evidentiary hearing where he can establish his entitlement to relief.

II. STATEMENT OF THE CASE

A. Trial Counsel Capitulated to the State's Aims In Seating the All White Jury, Abjectly Failed to Provide Adversarial Testing to Challenge the State's Gross Misconduct Throughout the Trial, and Failed to Capture Readily Available To Combat the State's Aggravation.

On the morning of July 8, 2002, the two decedents, Mr. Tommy Walker and Ms. Mickell Goodwin, employees of a Subway franchise in Balch Springs, were shot and killed before the shop opened for business. Local police apprehended Mr. Terry Edwards as he fled the scene on foot, running him down with a patrol car minutes after the shootings. An officer watched him throw a gun into a trash-can, just before another officer hit him with a police car, throwing him to the ground.

Terry threw money in a Subway bag under the car. His co-defendant had apparently already fled the scene in the getaway car.

The following day, Mr. Kirk Edwards turned himself in to the authorities. After convicting Terry of the murder of Ms. Goodwin pursuant to Cause No. F02-15086, on November 21, 2003, his jury answered the special issues in a manner compelling a death sentence. Four days later, the State successfully moved to dismiss its separate indictment of Mr. Terry Edwards for the murder of Mr. Walker under Cause No. F02-15087. On December 11, 2013, Kirk, who had been indicted for the murders of both Mr. Walker and Ms. Goodwin under a single cause (No. F02-15085), pled guilty merely to aggravated robbery in exchange for a 25-year sentence. This relatively satisfactory result for Kirk Edwards is in keeping with the resolution of his many prior convictions and sentences for crimes of violence.

At Terry's trial the State introduced an extremely aggravated narrative: that Terry Edwards was a "personification of evil" who wanted vengeance against an employer who had fired him. (Tr. 55 at 75). And that he went into the Subway that day "with murder in mind, with greed in mind, with evil in his heart . . .". (*Id*. at 115-16). They laid out a story for the jury that Terry Edwards planned the robbery and murder of his former co-workers and then shot the victims execution style in cold blood. (*Id.* at 75). Terry, the DA, repeatedly asserted to the jury, was a

mastermind and a leader, who "controlled" and "engineered" the entire crime. (*Id*. at 74).

Kirk Edwards, by contrast, faded far into the background at trial. He was only placed near the crime by a single witness, who testified that he had been standing around in an adjacent parking lot (Tr. 52 at 132-138), and on security video at some nearby businesses, supporting the clear inference that he was likely no more than a getaway driver. (*Id*. at 227-228). The jury knew that Kirk Edwards was involved, because he later turned himself in and admitted his involvement to the police, but the prosecution's case clearly painted Terry Edwards as the triggerman. But as Assistant District Attorney 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." (Tr. 55 at 115-16), and later: "Did he do the shooting? Yes, overwhelmingly." (*Id.* at 118). In fact, the prosecution did such a fine job establishing its narrative that, by the penalty phase, even Terry Edwards's own counsel had adopted it. (*See Id*. at 79 ("We'll concede that. He killed two people out there.")).

In fact, the State's physical evidence submitted at trial neither established that Terry Edwards fired the murder weapon, nor that the victims were shot execution style. Although he was arrested immediately after the crime, and despite the fact that the shootings took place at fairly close range, Terry Edwards had no

blood or other genetic material from either victim on his person or his clothing. Further, gunshot residue testing (GSR) of the firearm concluded (a) that the pistol released three chemical components on to the hand of the shooter, and (b) Mr. Edwards did not have the requisite components on his hands for a positive GSR result. Thus, the State's testing *in no way* supports the proposition that Terry Edwards fired the weapon. Blood spatter and ballistics evidence also clearly indicate that the victims were neither kneeling nor stationary when they were shot.

Trial counsel did little to rebut the State's eight law enforcement or forensic expert witnesses as to the physical evidence (or lack thereof) that was presented at trial. Despite the existence of extensive forensic evidence tending to establish that Terry Edwards did not shoot the firearm in question, he obtained no meaningful defense – not even the retention of a single forensics expert to scrutinize the State's evidence – against the State's theory that Terry was the triggerman in the supposedly execution-style shootings, and that his culpability justified a death sentence. Because counsel failed to consult with independent forensic experts in order to understand the numerous forensic reports underlying the State's case, and sought no independent testing of their own, they were unable to cross-examine or impeach this evidence effectively. Having failed to prepare or obtain any independent expert assistance, the defense was left to rely upon empty and unsupported arguments, which the State easily rebutted and even mocked.

When the prosecution rested, the defense called just one guilt phase witness – a Dallas County employee and forensic technician for the Southwest Institute of Forensic Sciences, Vicki Hall – to testify about the lack of gunshot residue on Mr. Edwards's hands.[1] However, due in part to counsel's lack of understanding of the forensic evidence against their client, her testimony was used against Mr. Edwards. On cross-examination, the prosecutor was able to elicit false and misleading testimony that Mr. Edwards could have physically removed trace chemical components from his hand. (Tr. 55 at 68-69). In closing, the prosecution speciously argued, without adversarial testing from the defense, that the presence of traces of barium on his hands – without the presence of the other chemical components that are discharged in equivalent portions from the weapon – was evidence just as dispositive of Terry Edwards's having fired a gun, as evidence of all three chemical components would have been.[2] (Tr. 53 at 62).

The State thus gainfully advanced the scientifically-untenable theory that Mr. Edwards somehow removed from his hands two, but not all three, of the

[1] After review of the DA's file, it has now emerged Ms. Hall omitted from her testimony the mention of a key report *which bears her signature* and which was never turned over to trial counsel. That report shows that Ms. Hall tested and found the presence of gunshot residue on the hands of Mickell Goodwin and calls into question the prosecution's entire theory of the case.

[2] 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.

chemical components deposited upon the discharge of the firearm. Though trial counsel objected that the argument assumed facts not in the record, because they were unprepared and unknowledgeable about the forensic science at the heart their only witness's testimony, they failed to rebut the prosecutor's assertion or otherwise prove to the jury that the argument was physically and scientifically impossible.

In its own guilt-phase closings, defense counsel made passing, half-hearted attempts to draw the jury's attention to an unexplained bloody shoeprint found at the scene,[3] (Tr. 53 at 45), mentioned, without offering support or drawing conclusions, that there were many "people in an area where they probably shouldn't have been" to contaminate the crime scene (*Id*. at 45), and pointed, again, to the abundance of blood at the crime scene and contrasting lack of blood on Mr. Edwards's person, but concluding only that was "reasonable to assume that anyone that did this shooting is going to have blood on them." (*Id*. at 48). Counsel attempted to return the jury's attention to the results of the gunshot-residue testing, but, having conducted no independent testing, was helpless to rebut the erroneous scientific inferences that had been elicited during the State's cross of Ms. Hall.

[3]Despite the fact that they were seized almost immediately after the shooting, DNA testing on Mr. Edwards's shoes could not establish a link to either victim's blood.

During the punishment phase, the State brought in aggravation evidence that Terry Edwards had been involved in a prior robbery of a Fort Worth Subway franchise that had taken place months before the Balch Springs robbery. Evidence of Mr. Edwards's involvement in the crime was based almost exclusively on the in-court identification of a single eye-witness who had provided a strikingly different description of the robbery suspect when interviewed at the time of the crime.[4] (Tr. 53 at 87-118). Although no other eyewitness to the Fort Worth robbery were able to positively identify Mr. Edwards (*Id*. at 125-129), there is no indication that defense counsel attempted to locate or interview any of them.

Counsel's punishment phase presentation similarly reflected their lack of preparation. Counsel retained two expert witnesses—a psychologist and psychiatrist who had collectively met with Mr. Edwards for a handful of hours—to testify generally that Mr. Edwards would not be a future danger. (*See Id*. at 223-317). A third "expert," a retired corrections official who had never met Mr. Edwards, testified on direct that the Texas prison system was generally equipped to handle inmates like Mr. Edwards (*Id*. at 114-196), but, upon questioning by the

[4] Whereas police reports taken directly after the Fort Worth robbery describe a thin African-American man about seventeen years of age and 5'3" tall; Mr. Edwards is fully half a foot taller and was almost thirty years old at the time of that crime.

prosecution, he opined that he would likely be a danger to society if released.[5] (*Id*. at 115-16). Two high school friends, three teachers, and a coach testified that he had been a nice guy in high school. (*Id*. at 66-113, 197-210, 319-344). Finally Terry Edwards's mother, Linda Edwards, testified. She was the only person who knew Terry before or after high school but had only been a limited, intermittent presence in his life because Mr. Edwards had been raised by his grandmother. (*Id*. at 346-369). Left with this limited and profoundly skewed picture of the crime and of Mr. Edwards, the jury deliberated for less than two hours before sentencing him to death. (*Id*. at 119-120).

B. After Obtaining A Lengthy Extension, Appellate Counsel Ignored A Threat Of Contempt, Failing To File A Timely Brief, And Ultimately Filed A Brief Largely Containing Claims He Had Raised In Another Case

On November 11, 2003, Mr. Douglas Parks was appointed to represent Mr. Edwards on direct appeal. Prior to filing a brief in the case, on June 14, 2004, Mr. Parks filed a motion for an extension of time and ultimately received a five-month extension. That extension imposed a new deadline of November 30, 2004 and explicitly indicated that "NO FURTHER EXTENSIONS WILL BE ENTERTAINED." (App. 671).

[5] This testimony was particularly damaging because at the time of trial, Texas did not have Life Without Parole. Thus the jury was instructed that, if sentenced to life, Mr. Edwards could be released after serving 40 years.

The order further threatened Mr. Parks with contempt if he failed to timely file a brief. Apparently undeterred, Mr. Parks did not file a brief on November 30. On December 16, 2004, the clerk mailed Mr. Parks a postcard notifying him of the deficiency. In response, on December 22, 2004, Mr. Parks filed a hastily prepared brief, ostensibly raising 13 claims for relief.

However, this performance actually did little to advance issues specific to Mr. Edwards's case. The first three "claims," while case-specific, all address the same basic issue: whether a certain potential juror should or should not have been struck for cause. The remaining claims appear to be either copied in large part or in their entirety from another case in which Mr. Parks had recently filed a brief. (App. 355-492). Having done obviously little to prepare the briefing, appellate counsel then compounded his dereliction by affirmatively waiving oral argument. (App. 674). On March 1, 2006, this Court denied relief on all claims.

C. State Habeas Corpus Counsel Failed To Conduct Any Meaningful Investigation And Filed A Petition Exclusively With Claims Copied And Pasted From Other Cases And, Nonetheless, Billed The State $24,611.81 For His Effort.

Mr. C. Wayne Huff of Boerne, Texas represented Mr. Edwards in state habeas corpus 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.

D. Federal Habeas Corpus Counsel Abandoned Mr. Edwards Without Informing The Court When He Took Full-Time Employment, Forgoing A Critical Opportunity To Develop Claim For Relief

Petitioner's federal habeas proceedings were defective due to his appointed attorney's misconduct during a critical period of his case giving rise, in part, to the need for this litigation. Appointed counsel, Mr. Richard 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. Although Mr. Wardroup timely filed Mr. Edwards's habeas corpus petition on December 10, 2010, his representation was devoid of investigation-based claims, and the court denied each of the petition's "six grounds," all of which sought "relief pertaining to jury selection issues" based on the record. *See* App. 675-703.

On March 20, 2012, just days after Mr. Wardroup filed his final brief in the District Court, the United States Supreme Court, in *Martinez v. Ryan*, 132 S. Ct. 1309 (2012), held that the deficient performance of state habeas corpus counsel may excuse the procedural default of substantial ineffective-assistance-of-trial-counsel claims that can only be raised for the first time in state habeas corpus proceedings. The next year, the Court held that the rule announced in *Martinez* applied to Texas's habeas corpus system. *Trevino v. Thaler*, 133 S. Ct. 1911 (2013).

The Supreme Court introduced those developments in the federal habeas jurisprudence in order to protect petitioners in exactly Mr. Edwards's predicament: his meritorious claims of the ineffective assistance of trial counsel were not presented in state habeas corpus proceedings until now because of the severely deficient performance of state habeas counsel. As alleged 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 substantial prejudice. 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 Mr. Edwards's federal habeas petition.

Such performance defies the purpose of post-conviction, which "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, as Huff did in state court, can satisfy that intent. "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." (App. 612). Huff's conduct is especially troubling given the serious infirmities at trial, discussed below. (App. 613-14). Federal

counsel's failure to respond to *Martinez* and *Trevino* and general abandonment in conjunction with abysmal representation of Mr. Edwards at every level has given rise to the need for this Court's involvement.

III. CLAIMS FOR RELIEF

A. Because Mr. Edwards's Conviction Was Based On False, Misleading, And Scientifically Invalid Testimony, He Is Entitled To A New Trial.

Mr. Edwards's capital sentence was procured based on false and misleading testimony and prosecutorial argument, in violation of due process. *See* U.S. Const. amend. XIV; *Napue v. Illinois*, 360 U.S. 264, 269 (1959). 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 on him (or blood on him in general), no gunshot residue, and no DNA from the victims whatsoever on his person. The State had no direct evidence to prove that Terry, rather than Kirk, shot the victims. Yet they homed in on Terry from the beginning, fabricating a case that would affirmatively and conclusively demonstrate that he was the shooter, regardless of the evidence. (Tr. 55 at 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 highly fictionalized – theory of the crime.

1. The State Introduced False Testimony And Withheld Evidence Regarding the Gunshot Residue Evidence.

Gunshot residue (GSR) consists of the chemical components that are ejected from a firearm when it is discharged. Despite the testimony elicited at trial, it is indisputable 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. (Tr. 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.

Vicki Hall was a SWIFS employee and the only witness called by the defense at Mr. Edwards'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 (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 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.[6] (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, on the basis that those facts were not in the record, the trial court overruled the objection. (*Id*.).

[6] 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.

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.[7] 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:

> 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.

(App. 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

[7] 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).

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).[8]

In addition to the false testimony and argument, and as discussed in further detail below, the State also failed to disclose material documents pertaining to the GSR testing, including a positive GSR test result obtained by Ms. Hall herself from handwipings of Mickell Goodwin. 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 elements present in GSR, in contrast with the testing performed on Mr. Edwards. (*Id*.). In addition to her patently false representations about the GSR evidence as it related to Mr. Edwards's culpability,

[8] Mr. Kilty observed a number of additional deficiencies and inconstancies with the with the State's forensic testing of the gunshot residue and the handing of the case. He noted that the forensic reports were "incomplete," including an absence of "a number of documents that [he] 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*.).

Ms. Hall also, inexplicably omitted the fact that she had performed this independent testing from her testimony.

2. The State Introduced False Testimony in Support of a Fictionalized Narrative of the Shooting as an "Execution-Style" Killing.

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 as they knelt on the ground in terror. (Tr. 55 at 75, 116). 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; *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-motivated, 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?")).

> 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. And 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, subsequent forensic analysis shows that this testimony was patently false. In fact, it is "indisputable" that both victims were standing, not kneeling or on the ground, when they were shot. (App. 8-9). 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[9] conducted a preliminary review of the materials and concluded

[9] 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

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 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

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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).

print "may be a critical piece of evidence in determining the identity of the shooter." [10] (*Id*.).

Finally, Mr. Tressel's other 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 a 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).

[10] 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." (App. 9). In his preliminary review of the evidence, Mr. Tresssel indicated that he 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). However, 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).

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 scene investigation and to developing a coherent explanation of how the offense conduct unfolded." (*Id*.). Yet, "law enforcement failed to undertake this analysis." (*Id*.). However, as it did with the testimony about the GSR testing, the State was content to simply fabricate the evidence and argument it needed to support its own fictional crime narrative, in the absence of credible evidence and sound forensic investigation.

3. Such Presentation Of False Forensics And False Testimony Represents A Pattern And Practice Of Misconduct By The Very Same District Attorney's Office, Prosecutor, And Primary Forensic Expert Who Were Involved In Securing Mr. Edwards's Conviction

Counsel's ongoing investigation has revealed a pattern and practice of similar misconduct by ADA D'Amore, the Dallas County District Attorney's Office, and forensic expert Vicki Hall in cases unrelated to Mr. Edwards's prosecution. Since 1989, Dallas County has seen fifty-two exonerations,[11]

[11] The National Registry of Exonerations maintains a database of cases involving exonerations since 1989 and is a project of the Newkirk Center for Science & Society at University of California Irvine, the University of Michigan Law School and Michigan State University College of Law. It was founded in

including twenty-six wrongful convictions that occurred during the tenure of Thomas D'Amore.[12] Undersigned counsel have been able to establish that D'Amore was the lead prosecutor *on at least three* of those cases and that his misconduct was either partially or wholly responsible for the wrongful convictions.[13] In two of those cases, D'Amore procured wrongful convictions by

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2012 in conjunction with the Center on Wrongful Convictions at Northwestern University School of Law.

https://www.law.umich.edu/special/exoneration/Pages/mission.aspx

[12] The actual number of wrongful convictions in this period is actually higher. Two additional cases, not yet included in the registry, involve misconduct by the Dallas County DA's Office that bear striking resemblance to its misconduct here. In 2014, Dennis Lee Allen and Stanley Orson Mozee were released in light of the gross prosecutorial misconduct in their cases. DNA confirmed their innocence. The two had been convicted of the 1999 murder of a Dallas pastor, largely on the basis of informant identification. However, undisclosed letters in the DA's file established that the informants had been incentivized by favorable treatment in exchange for their testimony. Additionally, the DA's office also failed to disclose the identity of two eyewitnesses to the murder who could not identify Mozee or Allen as the perpetrator. In the present case, counsel have uncovered evidence that the DA failed to disclose the existence of exculpatory eyewitness statements pertaining to both the underlying crime and the central aggravator. Further, as to the underlying crime, the DA's file included *only* those witnesses who testified at trial. It is improbable that every interviewed witness testified at trial. In the light of the DA's actions in Mozee and Allen, the DA's omissions must be viewed with suspicion.

[13] In light of Mr. D'Amore's substantial misconduct uncovered by present counsel in this and various other cases, undersigned have requested Mr. D'Amore's complete personnel file and the complete prosecution files for a number of wrongful convictions procured by his office in several communications since August. After delays and a lack of disclosure, undersigned's office submitted a Public Information Act request relating to Mr. D'Amore's file and personnel records on December 14. Despite the Texas PIA's statutory requirement that such requests be answered within ten business days, the Dallas County District Attorney's Office waited until January 13, to inform counsel that Mr. D'Amore

eliciting false testimony from technicians at the Southwestern Institute of Forensic Sciences—and one involved the very expert in this case.

a. Richard Miles Is Wrongfully Convicted, Due in Substantial Part to False, Collusive Testimony by Vicki Hall of SWIFS

On February 15, 2012, the Court of Criminal Appeals granted habeas corpus relief to Richard Miles, on the grounds that he was actually innocent, and set aside his convictions. *Ex parte Miles*, 359 S.W.3d 647 (Tex. Ct. App. 2012). In 1995, Miles had been convicted of murder and attempted murder in Dallas County and sentenced to a total of sixty years. *Id*. This conviction was based substantially on false GSR testimony from Southwest Institute of Forensic Sciences (SWIFS) employee Vicki Hall, which was elicited by Tom D'Amore, and which bore substantial similarities to the false testimony at issue in Terry Edwards's case. Mr. Miles was released from prison in 2010.[14]

Ms. Hall's testimony and the direct examination by D'Amore in the Miles case were dishonest in a manner that reflects not only collusion and fraud, but also bears substantial similarities to the erroneous forensic testimony that the two presented at Mr. Edwards's trial. Ms. Hall testified in Miles's 1994 trial that she

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would be given until January 27 – one day after Mr. Edwards's execution – to review his own records and note any objections to its disclosure. *See* App. 704-706.

[14] Leslie Minora, *Two Years After Wrongfully Convicted Richard Miles Was Released, He's Officially Innocent*, Dallas Observer (Feb. 15, 2012) available at http://www.dallasobserver.com/news/two-years-after-wrongfully-convicted-richard-miles-was-released-hes-officially-innocent-7108362.

had tested swabs from the defendant's hands for gunshot residue and that the low levels of antimony and barium on one palm indicated that Mr. Miles had either recently "fir[ed] a weapon or handl[ed] a very dirty weapon." *Id*. at 655. In response to questioning from D'Amore, and despite the fact that the barium and antimony levels found on Mr. Miles's hand were below her own agency's set limits for establishing a positive test result for the presence of GSR, Ms. Hall told the jury that the low levels met "FBI standards" for gunshot residue. *Id*. at 655, 662. The "FBI standards" to which Ms. Hall cited at trial were not, in fact, published anywhere, but rather contained in handwritten notes that she said she had taken while attending an FBI training seminar in 1993. *Id*. at 662.

At the prompting of Mr. D'Amore, Ms. Hall also testified that the relatively low levels of the two elements and the presence of residue on only one of Mr. Miles's hands could be explained "because Applicant's washings were done between thirty and forty minutes after the shooting, and 'the more active a person is, the more possibility you have of wiping any residue off.'" *Id.* at 665. However, the more likely explanation, according to a subsequent expert retained by Mr. Miles's postconviction counsel, is that the presence of those compounds at low levels are relatively common, occurring in about 10% of the population.

In 2010, Ms. Hall signed an affidavit admitting that she "would testify differently than" she had in 1995. *Id*. at 662. The reason, she stated, was that the

barium and antimony levels present on Miles's hands were below the SWIFS standards both in 1995 and in 2010, meaning that "'both then and now[,] the results would be reported as negative for [gunshot residue].'" *Id*. (quoting Hall's statement). She said that she did not testify to this fact, however, because D'Amore didn't question her about the SWIFS standards and that "instead, her testimony focused on the FBI standards" for which she could provide no published citation. *Id*. Ms. Hall's testimony in Miles represents not only dishonesty and gamesmanship, it suggests collusion with ADA D'Amore. Her omission, as a SWIFS employee, of the SWIFS standard, should be viewed with extreme skepticism, as should D'Amore's questioning, which apparently focused on scientific standards of dubious, if not completely fictitious, provenance.

Just as she did in Mr. Edwards's case, Ms. Hall assisted ADA D'Amore in obtaining Mr. Miles's conviction by presenting scientifically-unsupported evidence that her testing had detected the presence of GSR; advancing an untenable argument that the absence of certain GSR elements, but not others, might be explained because they were "wiped off;" and conveniently omitting key information that would have seriously undermined the credibility of the rest of her testimony.

b. Assistant District Attorney D'Amore Has Engaged In Other Misconduct That Bears Striking Similarities To The Tactics Employed In Mr. Edwards's Case, And Which Further Undermines The Reliability of the Conviction and Sentence

The false forensic testimony elicited in Mr. Edwards's case should be viewed with even further skepticism when it is properly seen as part of a specific pattern and practice of misconduct on the part of Mr. D'Amore. Other instances of Mr. D'Amore's misconduct in the Miles case itself casts further doubt on the Edwards prosecution, in light of the substantial similarities between the two. Moreover, Mr. D'Amore's role in two other wrongful convictions further establishes a pattern of forensic falsification and prosecutorial overreaching that were hallmarks of the evidentiary presentation at issue here.

In *Miles*, this Court found that, in addition to eliciting Ms. Hall's false forensic testimony, D'Amore had secured the wrongful conviction by coaching another eyewitness, who protested that he did not in fact recognize the defendant prior to trial, to identify the defendant anyway by showing him where the witness would be sitting in the courtroom. *Miles*, 359 S.W.3d at 661. This was in spite of the fact that dozens of other eyewitnesses to the offense could not positively identify Mr. Miles as the killer and told the police that the actual perpetrator was substantially taller and darker skinned than Mr. Miles. *Id*. at 668.

This Court also found that ADA D'Amore had suppressed material, exculpatory evidence from other witnesses contained in police reports. *Id*. at 670.

One undisclosed report documented an anonymous telephone call made to police three months prior to Miles's trial, in which a woman told the police that her ex-boyfriend had admitted to the shooting and that the police had arrested the wrong person. *Id*. at 658-659. The second undisclosed report recounted an altercation between the victims and a third, undisclosed suspect, who had threatened to shoot them, in the days immediately prior to the shooting. *Id*. at 666. As discussed *infra*, these other instances of misconduct in the Miles case resonate soundly with the tactics employed by D'Amore in Mr. Edwards's case as well.

Mr. D'Amore was also responsible for the wrongful conviction of Entre Nax Karage, who was convicted in 1997 in of sexually assaulting and murdering his 14 year old girlfriend. *See Ex Parte Entre Nax Karage*, 2005 WL 2374440 (2005). D'Amore prosecuted that case based, in part, on testimony elicited from a Southwestern Institute of Forensic Sciences DNA technician, Carolyn Van Winkle, who concluded that the defendant's clothing had tested positive for blood. *Karage v. State*, 1999 WL 454638 (Tex. App. 1999). In 2005, over objection from the Dallas County DA, counsel for Mr. Karage moved to have the DNA evidence found on the victim re-tested. Cross-reference with a national database that took place as part of the re-testing resulted in a match—to another defendant who had been convicted in Dallas County on the same day as Karage of a similar crime (the sexual assault and kidnapping of a 14 year old girl). Whether D'Amore actually

knew about and suppressed evidence of the alternate suspect is irrelevant. He should have known and should have disclosed any evidence about the similar case. Additionally, D'Amore elicited misleading, inadmissible and prejudicial testimony from several witnesses, including a friend of the victim's and a police officer. Though undersigned counsel are currently investigating D'Amore's conduct in the *Karage* and his use of the SWIFS technician's testimony, it is clear that misconduct by D'Amore played a significant role in this wrongful conviction.

Finally, Mr. D'Amore was involved in the 1997 prosecution of Moises Catalan, who was exonerated in 2003, for aggravated assault. *Catalan v. Cockrell*, 315 F.3d 491 (5th Cir. 2002). In that case, D'Amore proceeded with his prosecution, despite the fact that the victim had initially identified the defendant's brother-in-law as the sole perpetrator of the assault, and Mr. Catalan as a mere bystander. *Id*. at 492. Although the district court overturned the conviction – and the Fifth Circuit affirmed – based on defense counsel's failure to cross-examine the victim about his initial account of the offense, the Dallas County DA's office dropped the charges against him after reversal. *Id*. Although no court explicitly reached the question of whether or not Mr. D'Amore committed misconduct by pursuing Catalan's prosecution in light of the victim's exculpatory statements, his conduct there, as in Mr. Edwards's case, further establishes the prosecutor's profound pattern of overreaching prosecutions.

Individually, each of these instances of misconduct should cast further suspicion on Mr. D'Amore's practices in the instant case.

4. Reversal Required

This Court has reversed convictions when a jury was misled because an expert espoused an unreliable scientific theory or when other factors rendered an expert's testimony unreliable. *See, e.g., Ex parte Graf*, No. AP-77003, 2013 WL 1232197 (Tex. Crim. App. Mar. 27, 2013) (reversing after expert testimony deemed false because critical aspects of the testimony were disproven); *Ex parte Henderson*, 384 S.W.3d 833, 835 (Tex. Crim. App. 2012) (Price, J., concurring) (stating that due process is violated where a critical part of an expert's testimony is shown to be "highly questionable"); *id.* at 849-50 (Cochran, J., concurring) (stating that due process is violated where expert opinion on critical disputed issue is shown to be unreliable). Here, the jury was misled by expert testimony and the prosecutor's false argument in closing. The remedy for this violation is reversal of the conviction and sentence.

Additionally, if this Court does not find D'Amore knowingly elicited false testimony, Mr. Edwards is still entitled to a new trial under *Ex parte Chabot*, 300 S.W.3d 768, 770-71 (Tex. Crim. App. 2009) and *Ex parte Chavez*, 371 S.W.3d 200, 207-08 (Tex. Crim. App. 2012). Because *Chabot* and *Chavez* were both decided after Edwards's Initial Application was filed in 2005, this claim was then

unavailable, thus this claim meets the strictures of Article 11.071, § 5(a)(1).

The *Chabot*/*Chavez* standard does not require proof that the State *knew* that the testimony at issue was false. An applicant must only show "whether the testimony, taken as a whole, gives the jury a false impression." *Chavez*, 371 S.W.3d at 208. The State denies due process where, as here, the State uses false testimony to obtain a particular sentence, regardless of the State's intent. *Estrada v. State*, 313 S.W.3d 274, 287-88 (Tex. Crim. App. 2010) (citing, *inter alia*, *Johnson v. Mississippi*, 486 U.S. 578, 590 (1988) (finding death sentence based on "materially inaccurate" evidence violates Eighth Amendment); *Townsend v. Burke*, 334 U.S. 736, 740-41 (1948) (finding conviction based on "materially untrue" information violates due process "whether caused by carelessness or design"); *see also Chabot*, 300 S.W.3d at 771. To be entitled to habeas relief on the basis of false evidence, an applicant must show that (1) false evidence was presented at trial; and (2) the false evidence was material to the jury's verdict. *Ex parte Weinstein*, 421 S.W.3d 656, 665 (Tex. Crim. App. 2014). Here, both elements are met.

B. The Court Should Overturn *Graves* And Permit The "Egregiously Inept" Performance of Terry Edwards's 11.071 Counsel To Overcome Default And Present Otherwise Forfeited Meritorious Sixth Amendment Claims.

In *Ex Parte Graves*, the TCCA determined that incompetence of state habeas counsel was "not cognizable" and, thus, ineffective assistance of counsel claims

brought for the first time in a successive 11.071 petition, were barred by Section 5. *Ex parte Graves*, 70 S.W.3d 103 (Tex. Crim. App. 2002). The TCCA agreed with Graves that it "would seem an empty gesture to appoint incompetent counsel" and that "a 'potted plant' appointed as counsel is no better than no counsel at all." *Id*. The Court disagreed, however, as to the point at which counsel should be "competent" and decided that the "plain language" of the statute meant that counsel must be "competent" at the time of appointment, not during the actual representation and refused to permit a subsequent habeas petition where the first petition was undermined by "egregiously inept" counsel. *Id*.

Mr. Edwards presents evidence of meritorious Sixth Amendment claims, which were forfeited by the grossly incompetent performance of his state habeas counsel. For the reasons discussed below, the Court should overrule *Graves* and permit him "one full and fair opportunity to present" his Sixth Amendment claims.

1. This Court Should Revisit *Graves*.

The three dissenters in *Graves* argued that "Article 11.071 of the Texas Code of Criminal Procedure should be interpreted to afford a death row inmate one full and fair opportunity to present whatever claims he may have with the effective assistance of counsel." *Graves*, 70 S.W.3d at 129 (Holcomb, Price and Johnson, JJ dissent). They disagreed with the Court's narrow reading of 11.071, which focused on "the time at which counsel is deemed 'competent' to represent the habeas

applicant" under § 2(a); concluding that the statute entitled an applicant to counsel whose qualifications meant that counsel was "competent" "*at the time of appointment.*" *Id.* at 114 (emphasis added). The dissent argued that the plain meaning of the statute as well as the legislative history ran contrary to the majority's rigid distinction. Id. at 121-22. Finally, they focused on the equities involved. Judge Price wrote that he had "grave concerns about dismissing claims like the applicant's." Id. at 120. Years later, Judge Price would revisit his dissent, noting that "Graves himself ultimately obtained post-conviction relief in federal court and was later exonerated of capital murder." *In Ex parte Kerr*, 358 S.W.3d 248, 250 (Tex. Crim. App. 2011).

The process took eighteen years in total. The equities present in the case of Anthony Graves provide further reason for the TCCA to overturn the procedural rule derived from his case. Put simply, procedure should not be permitted to trump fairness at all cost. When faced with egregious actions by state habeas counsel, in combination with meritorious and compelling claims, the Court can and should carve out a narrow exception to *Graves* to permit process to give way to fairness and afford a petitioner one full and fair opportunity at state habeas that entails competent representation. [15]

[15] In *Graves*, the TCCA expressed concern that recognizing an exception based on inadequate 11.071 counsel would initiate a "perpetual motion machine."

a. Statutory Context, Legislative History, And Plain Meaning All Support An Interpretation Of "Competent" That Encompasses The Manner Of The Representation, Not Just Counsel's Status At Appointment

Under a plain reading, §2(a) does *not* merely require the *appointment* of competent counsel; it directly invokes the *representation*. *See Ex parte Alvarez*, 2015 WL 1956254, at *5 (Yeary, J. concurring joined by Johnson & Newell, JJ.) ("Significantly, Article 11.071, Section 2(a), does not provide merely for 'the appointment' of competent counsel. It mandates that death row applicants actually 'be represented by competent counsel,' which would seem to contemplate an on-going enterprise."); *Ex parte Buck*, 418 S.W.3d 98, 107 (Tex. Crim. App. 2013) (Alcala, J., dissenting, joined by Price & Johnson, JJ.) ("[*Graves*] does not account for the statute's requirement that an applicant be 'represented' by competent counsel. This phrasing suggests that an applicant's entitlement to competent counsel extends throughout the course of representation.").

A reading within the context of the statute supports this interpretation. Article 11.071 §3(a) provides that "counsel shall investigate expeditiously, before and after the appellate record is filed in the court of criminal appeals, the factual and legal grounds for the filing of an application for a writ of habeas corpus."

See, e.g., *Ex parte Graves*, 70 S.W.3d at 114. There are many ways, however, that this Court can carve a narrow exception to *Graves* to permit a rare Applicant, like Mr. Edwards, who was saddled with 11.071 counsel who was so incompetent as to raise only pro-forma, meritless claims, causing the Applicant to forgo merits review of meritorious ineffective assistance of counsel claims.

TEX. CODE CRIM. PROC. art. 11.071, §3(a). Read together, section 2(a) imposes a requirement of competent representation, and section 3(a) defines what competent representation is. *See Ex parte Buck*, 418 S.W.3d at 107 (Alcala, J. dissenting) ("Reading Section 2(a) and 3(a) in conjunction, I conclude that appointed counsel in an 11.071 proceeding must demonstrate a minimum level of competence in his representation of an applicant and in his investigation of any factual or legal bases for relief."). Such a reading of sections 2(a) and 3(a) gives effect to the statutory "premise that a death row inmate does have one full and fair opportunity to present his constitutional or jurisdictional claims in accordance with the procedures of the statute." *Ex parte Kerr*, 64 S.W.3d at 419.

This interpretation is also in keeping with the legislative history. The relevant sections of Article 11.071 were attempts to solve the problems associated with inadequate state post-conviction performance. *See Ex parte Graves*, 70 S.W.3d at 121 (Price., J., dissenting) ("'If enacted, C.S.S.B. [Committee Substitute Senate Bill] 440 would streamline the review of capital convictions and significantly reduce the time between conviction and the imposition of a death sentence, *while assuring that capital convictions are fully and fairly reviewed.*'") (quoting HOUSE COMM. ON JURISPRUDENCE, COMM. REP., Apr. 27, 1995, Tex.C.S.S.B. 440, 74th Leg., R.S. (1995)) (emphasis added); *Ex parte Buck*, 418 S.W.3d at 107 (Alcala, J., dissenting) (quoting DEBATE ON H.B. 440, TEXAS

HOUSE, SECOND READING, 74TH LEG., R.S. (May 18, 1995), statement of Rep. Gallego (stating that habeas applicants will "get lawyers from day one. They get fully paid investigators. They get all of the investigation . . . everyone who is convicted will have a fully paid investigation into . . . any claim they can possibly raise.")). Reading § 2(a) as an attempt to solve a specific problem entails a forward-looking interpretation of 11.071 attorney competency. *See Ex parte Alvarez*, 2015 WL 1956254, at *5 (Yeary, J., concurring, joined by Johnson, & Newell, JJ.) ("It makes little sense for the Legislature to recognize the need for an attorney who is competent—that is to say, who has the 'qualifications, experience, and ability' to conduct the daunting factual investigation and to navigate the often-byzantine law involved in post-conviction habeas corpus representation— with no expectation that he would then actually *provide* his client with competent post-conviction habeas corpus representation."); *Ex parte Graves*, 70 S.W.3d at 121 (Price, J., dissenting) ("The appointment of counsel is meaningless without the requirement that counsel be competent."); *id.* at 130 (Holcomb, J., dissenting) ("The only sensible interpretation of 'competent counsel' is the traditional one: counsel reasonably likely to render, and rendering, effective assistance.").

Additionally, legislative developments following *Graves* confirm that it misinterpreted section 2(a). At the behest of the TCCA, the 81st Texas Legislature formed the Office of Capital Writs (OCW) in order to provide counsel to capital

defendants during their state habeas proceedings. The Legislature created the OCW to address the grave issue of incompetent attorneys engaged in state post-conviction representation. The Legislature expressly stated that the OCW "would help the state meet *its obligation* that death penalty cases be handled fairly and competently with consistent representation throughout the state." BILL ANALYSIS, SB1091, HOUSE RESEARCH ORGANIZATION, May 18, 2009, at 4 (emphasis added). The legislative history of the OCW statute makes multiple references to "incompetence" as an ongoing basis for the law. *See, e.g., id.* at 4-5 (stating that the OCW "would address the problem of *incompetent* attorneys wasting the resources of the criminal justice system by raising issues that were improper or by making other errors") (emphasis added).

b. Significant Changes in Federal Jurisprudence On Which the Graves Court Relied Also Warrant Modifying Or Reversing Graves.

This Court should reevaluate *Graves* in light of the Supreme Court's decisions in *Martinez v. Ryan*, 132 S.Ct. 1309 (2012), and *Trevino v. Thaler*, 133 S.Ct. 1911 (2013), which 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. The Court emphasized that it was exercising its equitable authority, something the courts regularly do when deciding whether to excuse a procedural default. *Martinez*, 132 S.Ct. 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)). Importantly, *Martinez* and *Trevino* – alter federal jurisprudence in a manner that fundamentally changes the legal landscape on which *Graves* was based.

In *Martinez*, the U.S. Supreme Court emphasized that it was *not* declaring a constitutional right to counsel in state post-conviction proceedings, but merely exercising its equitable authority over habeas procedure to establish an excuse for forfeited IAC claims. *See Martinez*, 132 S. Ct. at 1315. *Graves* was decided based on a premise that *Martinez* and *Trevino* now disprove—"that the absence of a constitutional right to counsel [in state habeas proceedings] necessarily means that an applicant may not challenge the effectiveness of habeas counsel's representation." *Ex parte McCarthy*, 2013 WL 3283148, at *6 (Alcala & Johnson, JJ., dissenting). Thus, *Martinez* and *Trevino* eliminated the crucial federal precedent upon which *Graves* relied. *Graves*, 70 S.W.3d at 109 ("It is a well established principle of *federal and state law* that no constitutional right to effective assistance of counsel exists on a writ of habeas corpus.") (emphasis added). *See also, id.* at 109 n.25 (citing *Coleman*, 501 U.S. at 752 ("there is no constitutional right to an attorney in state post-conviction proceedings . . . consequently, a petitioner cannot claim constitutionally ineffective assistance of counsel in such proceedings"). Additionally, *Martinez* and *Trevino* overturned the

two Fifth Circuit cases that *Graves* relied upon for the proposition that, because "there is no constitutional right to counsel on a writ of habeas corpus," ineffective 11.071 counsel could not excuse a forfeited ineffectiveness claim. *Ex parte Graves*, 70 S.W.3d at 112. *Martinez* and *Trevino* make clear that a distinction between the two can be made; this Court should also recognize this distinction.[16]

The arguments advanced by the State in *Trevino* are relevant to the discussion here. In *Trevino* the State of Texas argued that, if forfeited IAC claims could be subject to merits litigation in *federal* court, there should be a corresponding change to facilitate prior merits review in *state* court. The State of Texas "submit[ted] that its courts should be permitted, in the first instance, to decide the merits of Trevino's ineffective-assistance-of-trial-counsel claim." 133 S. Ct. at 1921 (citing Brief for Respondent 58-60); *see also*, Brief for the Respondent at 58-59, *Trevino v. Thaler*, 133 S. Ct. 1991 (2013) (No. 11-10189) ("If this Court changes the [rule against excusing forfeiting IAC claims] now, equity *demands* at a minimum that the CCA have an opportunity to reevaluate its procedural ruling and adjudicate Trevino's [IAC] claim on the merits.") (emphasis added). The State made a similar argument in *Ibarra v. Thaler*, 687 F.3d 222 (2012)—the Fifth

[16] Though pre-*Martinez*, the dissent in *Graves* noted this distinction, observing that "In *Coleman*, the Supreme Court left open the question whether there is an exception to *Finley*, and *Giarratano*, where state collateral review is the first place that a state criminal defendant can present a particular challenge to his conviction." *Graves*, 70 S.W.3d at 124. (internal citations omitted).

Circuit authority that *Trevino* overturned. *See* The Director's Supplemental Br. Respecting the Pet. For Rehearing En Banc at 5, *Ibarra v. Thaler*, No. 11-70031 (5th Cir. June 4, 2013) ("[A]s between forcing Ibarra to exhaust and allowing him to complain in federal court . . . without giving the State a proper opportunity to adjudicate his claim[,] exhaustion plainly is the lesser of two evils.").

Additionally, principals of federalism militate in favor of overturning *Graves* and giving state courts an opportunity to rule on IAC claims forfeited by inadequate state post-conviction counsel. *See Ex parte Alvarez*, 2015 WL 1956254, at *7 (Yeary, Johnson & Newell, JJ., concurring) ("Principles of federalism counsel in favor of Texas making the first determination of the merits of any [IAC] claim, so that federal review will remain as deferential as possible to our judgments."); *Ex parte Diaz*, No. WR-55850-02, 2013 WL 5424971, at *5 (Tex. Crim. App. Sept. 23, 2013) (Price, J., dissenting) ("*Martinez* and *Trevino* have triggered federalism concerns, paving the way for de novo federal review of a number of state claims and concomitantly diluting the control Texas would otherwise exercise over the finality of its own convictions."); *Ex parte McCarthy*, 2013 WL 3283148, at *7 (Alcala & Johnson, JJ., dissenting) ("Unless this Court revises its current approach, federal courts will now have the opportunity to decide a vast number of [IAC] claims . . . without any prior consideration of those claims

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

c. Viable Avenues Exist For The TCCA To Allow Mr. Edwards To Present His Meritorious Claims Involving Ineffective Assistance of Counsel.

Should the Court overturn the basic principle in *Graves* – that Article 11.071 § 5(a) forecloses merits review of IAC claims defaulted by inadequate state post-conviction counsel – then it must identify a doctrinal mechanism to allow a prisoner to present, for the first time, his meritorious claims. Relying upon the plain language of the statute, this Court could permit an applicant to proceed under § 2(a) or § 5(a)(1). First, the TCCA could hold that 11.071 § 2(a)'s requirement of competent counsel requires that state courts not give effect to the forfeiture caused by deficient representation. Second, the TCCA could refuse to give effect to Mr. Huff's forfeiture on the ground that, because he was incompetent, claims discussed below were in fact "unavailable" when the initial 11.071 application was filed.

Finally, the TCCA could invoke its equitable authority to apply the provision in a way that permits merits consideration of claims forfeited by grossly incompetent lawyers, such as Mr. Huff. The TCCA is not precluded from using its equitable authority to apply § 5 in a way that reflects parallel federal law—especially if doing so facilitates a state constitutional obligation to ensure the availability of a state habeas privilege. TEX. CONST. art. I, § 12; *see also Ex parte*

Carpenter, No. WR–49,656–05, 2014 WL 5421522, at *1 (Tex. Crim. App. Oct. 8, 2014) (Alcala, J., concurring) (stating that in the appropriate case, the TCCA should create an equitable or statutory remedy to forfeiture generated by incompetent 11.071, to create a state corollary to the federal *Martinez* doctrine).

2. The Equities In Mr. Edwards's Case Require This Court to Revisit Graves.

The TCCA was recently asked to revisit *Graves* in *Ex parte Ruiz.* 2016 WL 6609721 (Tx. Crim. App. 2016). The Court declined, holding that "while the consequences resulting from the poor performance of Ruiz's habeas counsel . . . may highlight the need to revisit our holding in *Graves*, the time to reconsider *Graves* under the facts of this case has passed." *Id*. at 18. The time had passed because Mr. Ruiz had already filed a successive habeas petition that did not raise prior habeas counsel's incompetence.

In the present case, Mr. Edwards too suffers the "consequences resulting from the poor performance of Ruiz's state habeas counsel." Both men were represented by the same deficient counsel, C. Wayne Huff. For Mr. Edwards, however, "the time to reconsider *Graves*" has not yet passed. Mr. Edwards, unlike Ruiz, has not filed a prior successive 11.071 application; nor has he ever had the benefit of a single post-conviction hearing or merits review of his compelling claims of ineffective assistance. Mr. Edwards's case, unlike *Ruiz*, presents the

opportune vehicle for this Court to reexamine *Graves* and harmonize Texas's approach with the changing federal landscape.

a. Mr. Edwards's 11.071 Counsel Was "Appallingly Inept" And Forfeited All Of His Meritorious Claims

In *Ruiz*, the TCCA noted that

> Section 2(a) of Article 11.071 of the Texas Code of Criminal Procedure provides that 'An applicant shall be represented by competent counsel . . .'. It almost seems as if the Legislature could have had someone like Ruiz's 'egregiously deficient' habeas counsel in mind when it included the requirement of 'competent counsel' in Article 11.071.

Ex parte Ruiz. 2016 WL 6609721 *17. Mr. Edwards's was represented by the same "egregiously deficient" habeas counsel as Ruiz. And just as in Ruiz's case, counsel's conduct in Mr. Edwards's case was "appallingly inept." It is undisputable that the 54-page state habeas petition filed by Huff contained only ten original sentences. (App. 210). Save for the Statement of Facts, which was copied verbatim from Mr. Edwards's Appellate brief, the petition and its claims contained *no* facts about Terry Edwards or his case. *Id*. While it would be understandable if the attorney had cut and pasted some legal research, or pro forma language, in this case *every single claim* was copied verbatim. *Id*. Not one claim was contained extra-record evidence pertaining to Mr. Edwards or his trial, or reflected any investigation, or even a cursory familiarity with the record at trial. *Id*. After state counsel filed the petition, he submitted a bill to the county for over $24,000. (App.

668-68). That was the last thing he filed. The court declined to hold an evidentiary hearing on the paltry petition and Huff declined to submit a Proposed Findings of Fact. The court adopted the State's proposed findings, without another word from defense counsel. These proceedings simply "cannot be what the Legislature intended when it enacted Article 11.071 to provide capital habeas litigants "one full and fair opportunity to present all [ ] claims in a single, comprehensive post-conviction writ of habeas corpus[.]" *Ex parte Buck*, 418 S.W.3d at 98 (Alcala, J., dissenting).

State habeas counsel raised just one single trial-counsel-ineffectiveness issue in the 11.017: a derivative, boilerplate fair cross-section claim concerning the venire, which was also taken verbatim from another client's case. (*See* App. 261-62). The most common claims in state habeas are claims involving *Strickland v. Washington* and *Brady v. Maryland*. (App. 612). Both require extra-record investigation and, when uncovered, case and fact-specific pleading. Mr. Edwards's 11.071 counsel raised not a single one. 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." (*Id*.). 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:

> 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.

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

b. The Meritorious Claims Herein Have Not Yet Been Presented.

Unlike the petitioner in *Ruiz*, Mr. Edwards has never had a post-conviction hearing in either state or federal court. This is his first successor 11.071 petition. Additionally, as discussed *infra*, Mr. Edwards was functionally without counsel, throughout the majority of his federal habeas proceedings, until undersigned were appointed, just six months ago, after his prior counsel abandoned him. On January 11, 2010, the federal district appointed Mr. Richard Wardroup as federal habeas counsel. Shortly after filing Mr. Edwards's habeas petition, however, Mr. Wardroup "accepted a full time position . . . [that] has demanded and continues to demand my full attention." (Doc. 83-1 at 1). "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." (*Id.* at 1-2). This status change, of which he did *not* notify the Court, created a conflict of interest and culminated in abandonment of his client. (*Id.* at 615-16).

That is, "[c]ounsel in federal habeas corpus proceedings are required to do more than merely wait until the court grants or denies relief, or file perfunctory pleadings in response to docket notifications." (*Id.* at 615). The district court denied the habeas petition without holding an evidentiary hearing and without granting a COA. The Fifth Circuit also denied a COA.

In 2015, the Fifth Circuit substituted Mr. Wardorup for Don Vernay to draft a petition for writ of certioari, because the former was not licensed to practice in the Supreme Court bar. However, Mr. Wardroup never delivered the file to Mr. Vernay. (App. at 2). 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.

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, despite Mr. Vernay's substitution. 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 the federal district court addressing his abandonment by his last counsel, Mr. Vernay. *Edwards v. Stephens*, N.D. Tex., 3:10-CV-6-M, 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. *Id.* 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. *Id.* 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.* Mr. Vernay explained 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 communicated that he was returning the case to Mr. Wardroup. (*Id.* at 2).[17]

On March 18, 2016, the district court denied Mr. Edwards's pro se motion for substitution of counsel. 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.

[17] 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.

Edwards's representation. *Id.* at 35. On June 14, 2016, after a substitution motion, this court appointed undersigned counsel.

As discussed below, Mr. Edwards has unearthed meritorious claims that no court has ever adequately reviewed. This Court should permit him to litigate them in this forum. This case is deserving of a hearing.

3. Trial Counsel Provided Prejudicially Ineffective Assistance.

During the guilt and penalty phases of Mr. Edwards's trial, defense counsel were provided with ample opportunities to refute the highly aggravated narrative that the State presented of his crime. They repeatedly fell below the baseline standards recognized by *Strickland v. Washington*, 466 U.S. 668 (1984), failing to avail themselves of these opportunities and, thereby denying Mr. Edwards his Sixth Amendment guarantee of the assistance of counsel in his defense. Had they conducted basic investigation, they would have uncovered fatal weaknesses with virtually every aspect of the State's case in aggravation.

Texas courts adhere to the same two-pronged standard for analysis of *Strickland* violations as that promulgated by the U.S. Supreme Court. *See Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999). Here, trial counsel's individual and cumulative failures to conduct even the most basic investigation into Mr. Edwards's case were so serious as to undermine the reliability of the result at trial and to establish a reasonable probability of a

different outcome were it not for their unprofessional errors. *See Strickland*, 466 U.S. at 694.

a. Trial Counsel Were Ineffective for Failing to Conduct Any Meaningful, Independent Analysis of the State's Flawed Forensics Evidence.

As discussed in detail in *infra*, Mr. Edwards's conviction was tainted by a shoddy and incomplete investigation, which was compounded by the presentation of false and misleading forensic testimony by the State. For their part, however, Mr. Edwards's trial counsel's performance was egregious. As a result of their utter failure to investigate or obtain independent testing of any of the State's forensic evidence, they were caught completely flat-footed and unable to rebut the State's highly aggravated evidence.

It is incumbent on counsel, especially in a capital case, to engage qualified experts to provide independent testing of the State's forensic evidence. *See Hinton v. Alabama*, 134 S.Ct. 1081, 1089 (2014). This is especially so where the State relies on forensics, rather than eyewitness testimony, as the primary support for its theory of the case.

> Assuming . . . that there were no eyewitnesses to the homicide, defense counsel at trial had an obligation to ensure the reliability of the State's evidence and theory of the case. The standard of competence at the time of trial, state habeas, and now, required an independent assessment of the state's forensic evidence . . . Failing to do so fell below the standard of care required of

> competent counsel at all previous stages of Mr. Edwards' case.

(App. 614).

Independent forensic experts would have readily identified shortcomings in the State's case. Consulting with independent experts would have helped counsel understand that "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; *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.")). [1] Post-conviction counsel's expert found it inexplicable that trial counsel would fail 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). Had defense counsel consulted with even a single forensic expert, they would 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, 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" because it was entirely inconsistent with the evidence. 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 supported by the evidence.

b. Trial Counsel Were Ineffective for Failing to Refute or Investigate the Aggravating Evidence Regarding the Fort Worth Subway Robbery.

In *Rompilla v. Beard*, the Supreme Court explained that trial counsel has an obligation to investigate the State's case in aggravation as well as the defense case for life. 545 U.S. 374 (2005). In *Rompilla*, the Court held that trial counsel, in 1988, who failed to do so provided ineffective assistance, violating the defendant's right to counsel. *Id.* at 377; U.S. Const. amend. VI.

The centerpiece of the State's case for Mr. Edwards's future dangerousness was purported evidence of his participation an April, 2002, robbery of a different Subway sandwich franchise in Fort Worth. However, the evidence against Terry Edwards was tenuous and the narrative leading up to charges being filed – and then subsequently dismissed – was dubious, at best, and fabricated at worst. Even in the face of the blatant inconsistencies in files that they were provided by the State regarding the Fort Worth robbery, however, the defense not only failed to bring up any of 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.

The Fort 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.[18] For instance, the Fort Worth Police Department's entries dated at the time of the crime have been altered to reflect that Terry Edwards 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 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,

[18] 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.

reveal that the line-up was actually shown to Weast *prior* to that date, on August 5, 2013. (App. 94-95). Moreover, the affidavit signed by Weast implicating Mr. Edwards 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 Fort Worth Police files is the absence of any handwritten notes or contemporaneous witness statements taken during the investigation.

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. Trial counsel failed to raise any of these glaring inconsistencies at trial. Nor does it appear, based on their failure to put on any contrary evidence of their own, that counsel pursued any meaningful follow-up investigation that the inconsistencies might have suggested.

For instance, trial counsel failed to investigate or interview potential eyewitnesses to the Fort Worth robbery who might have been in a position to undermine the single witness around whom they had built virtually their entire case. At trial, 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 four months later as Terry Edwards, took his phone and threatened to kill everyone in the store. (Tr. 53 at 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).

Based on the narratives contained in the files that were made available to trial counsel, 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. However, these files were both incomplete and bore indicia of unreliability. They

reflected that Detective Ortega met with at least one of the other victims of the Fort Worth robbery, who was unable to identify Mr. Edwards as the perpetrator. (App. 94). Witnesses to the Fort Worth robbery were even apparently brought to court, where their presence was noted, on the record, by counsel. (Tr. 55 at 15-17). 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.

There were 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 another individual and his loosely-affiliated band of fellow-perpetrators who "repeatedly robbed the city's Subways, terrorizing the young employees who worked there" throughout 2002. (*See* App. 715-716). 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.

Had trial counsel exposed the substantial weaknesses in the state's case and presented the substantial evidence that someone other than Mr. Edwards was responsible for the string of Fort Worth Subway robberies, there is a reasonable probability that the jury would have rejected the State's weak case in aggravation and returned a sentence less than death.

c. Trial Counsel Were Ineffective for Failing to Interview or Present Testimony from Members of the Victim's Family Who Were Available and Wished to Speak On Mr. Edwards's Behalf.

Trial counsel for Mr. Edwards also failed to take other important steps to rebut the State's aggravating narrative by conducting even a meager investigation into the most significant relationships of his adult life, including his relationships with the victims and the co-defendant. If they had, they would have quickly uncovered that there were, in fact, many witnesses who could have offered important testimony rebutting the State's aggravating theory of the crime.

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. (Tr. 55 at 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). This is despite the fact that these very family members had come to court at the beginning of the trial in order to show their support for Terry Edwards and caused a commotion when they seated themselves on the defendant's side of the courtroom in a show of support. (App. 32).

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 9-10). This information, counsel told the court, "could be material to this Jury;" however, trial counsel had no specific information to offer the Court in this regard because they not previously identified or interviewed these potential witnesses. (*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*. at 11). With nothing further, however, the trial court refused to stay the proceedings in order to permit counsel to interview Mr. Walker's surviving family members or to allow them to testify. (*Id*.).

In fact, counsel's late musings about the relevance of these witnesses' potential testimony 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 Mr. Walker's daughter 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 Mr. Edwards, Ms. Lamphier did not believe that he 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 she 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).

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. Competent counsel had an obligation to investigate the relationship between Mr. Edwards and Mr. Walker. (App. 612). Had counsel undertaken this

basic investigation, they would have discovered that Mr. Walker had remained close with Mr. Edwards, even after the district manager fired him. This information, particularly coming from the relatives of Mr. Walker, would have powerfully countered the State's narrative that Mr. Edwards undertook a revenge killing for being fired from a Subway, creating a reasonable probability that but for trial counsel's failure to conduct this investigation, the jury would have reached a different result.

d. Trial Counsel Were Prejudicially Ineffective For Failing To Interview Or Present Testimony From Multiple Members Of Mr. Edwards's Own Family Who Were Available To Testify In Support Of Terry Edwards, And Against Kirk Edwards.

Mr. Edwards stood accused of collaborating with his cousin to perpetrate a robbery-homicide. In a capital case, it is always "incumbent upon trial . . . counsel to full[y] investigate and fully understand [the defendant's] family and its dynamics." (App. 614); *see also Wiggins v. Smith*, 539 U.S. 510 (2003). However, where the co-defendant is a cousin of the defendant, this is particularly so. Had they been contacted by counsel, multiple family members of both Terry and Kirk Edwards would have been willing to offer testimony that undermined the State's theory of the crime and that placed Mr. Edwards's role in the offense within the broader context of not only of his life story, but also of the unique family dynamics that were at play between Terry Edwards and his cousin. "[F]amily members are always a source of important mitigating evidence." (App. 614).

Had they been contacted by trial, or any subsequent counsel, Mr. Edwards's family members would have been willing to testify that Kirk Edwards was a bully known for harassing and for 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. By the same token, these family members 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,[19] 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

[19] This telephone call was with Mr. Edwards's maternal cousin, Consuelo Moss. (*See* App. 73).

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.[20] Nevertheless, his prior defense team conducted a perfunctory interview, consisting of "a few questions" spanning only around ten minutes. (App. 73).

Had she been asked, Ms. Moss would have testified to information about Kirk Edwards's influence over Terry and about Terry's childhood and

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

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*.).

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.[21] Tawain Edwards knew Kirk Edwards to be a "bully." (App. 60). 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).

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

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.[22] 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: "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

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

"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."[23] "[H]e got on my nerves he was so scared." (App. 75). 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

[23] 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).

using a gun. Instead, he was "a pretty boy" who "got by on his looks, not by being street-smart, carrying weapons, or knowing how to fight." (App. 61).

Had counsel interviewed 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).

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., so 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. 62). According to Tawain, Terry was "too soft" to say no to Kirk. (App. 62).

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. (Tr. 53 at 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.

However, because trial counsel (and, incidentally, none of Mr. Edwards's appointed counsel since) ever sought testimony, or even basic information from any of the rest of his family, the jury was left with a profoundly distorted view of Terry Edwards, his older cousin, or the relationship between the two. The jury simply had no idea about the dynamics between these two men that would have begun to provide an alternate explanation for these senseless killings, acts of violence completely out of character for Mr. Edwards. This failure was unreasonable and created a reasonable probability that had they conducted this investigation, the outcome would have been different.

e. Trial Counsel Were Ineffective for Failing to Conduct Their Own Investigation Into Other Aspects Of Kirk Edwards's Criminal History And Prior Bad Acts.

Beyond failing to present testimony from Kirk Edwards's own family members regarding his reputation for violence and manipulation, influence over his cousin, and his culpability for the instant offense, trial counsel also failed to provide the jury with information that, during the course of his lengthy criminal and carceral history, Kirk had a long career of placing the blame for his own actions on others and disclaiming responsibility in order to avoid punishment.

Even without the relevant context from the Edwards family, the simple fact that Kirk Edwards and Terry Edwards were co-defendants should have alerted trial counsel to the need to conduct independent investigation into Kirk Edwards's background and his role in the offense. Particularly given the disparate treatment of the two men by the State, "competent trial . . . counsel had an obligation to investigate the background of [Terry Edwards's] co-defendant and to obtain information about the co-defendant's prior convictions including the co-defendant's possible modus operandi or history of violent crime." (App. 613).

Because trial counsel failed to conduct this basic investigation, the jury did not learn that Kirk Edwards, over the course of his criminal career, (i) was convicted of stealing a truck that he insisted, in an unsuccessful attempt to place the blame on his co-defendants, had taken without him (1988); (ii) was convicted

of driving yet another stolen vehicle that he told the police he had gotten from someone else (1989); and (iii) was convicted of stealing a television set that he maintained he had instructed a cousin to return to the victim (1990); before finally (iv) being convicted and sentenced to a twenty-five year term for yet another theft that, by his account, he "did not do" (1994). (App. 116-199).

Nor did the jury learn that, while in the custody of the Texas Department of Criminal Justice, Kirk was disciplined thirteen times for fights with other inmates and staff—several of them violent—and for all of which he disclaimed responsibility. Although Kirk Edwards had been incarcerated for most of his adult life and had been out on parole for just a few months at the time of the Subway robbery, trial counsel by all appearances performed no independent investigation of his criminal history and made no effort to present any evidence of it to the jury.

In each of the above respects, Mr. Edwards's trial counsel failed to meet the baseline standards for competent representation. These deficiencies, both individually and collectively, worked to deny Mr. Edwards effective assistance of counsel. Had counsel performed competently, the jury would have heard powerful evidence that undermined the State's case, including from family members of the victim and his co-defendant who would have testified on Mr. Edwards' behalf. But for these failures, there is a reasonable probability that the outcome would

have been different. For the foregoing reasons, Mr. Edwards' right to effective assistance of counsel was violated. *See* U.S. Const. amend. VI.

4. Appellate Counsel Provided Prejudicially Performance On Appeal.

Appellate counsel provided prejudicially deficient assistance of counsel. *See* U.S. Const. amends. VI, XIV. Mr. Edwards is entitled to reversal because, individually and cumulatively, "but for his counsel's unreasonable [performance there is a reasonable probability], he would have prevailed on appeal." *Smith v. Robbins*, 528 U.S. 258, 285-86; *see Smith v. Murray*, 477 U.S. 527, 535-36 (1986) (applying *Strickland* standard to attorney error on appeal).

a. Appellate Counsel Unreasonably Failed To Raise The Trial Court's Refusal To Grant A Short Extension For Trial Counsel To Interview Important, Newly Discovered Witnesses

On the final day of Mr. Edwards' penalty phase, defense counsel informed the court that Ms. Cassandra McDaniel-Horridge, the mother of two of the children of decedent, Mr. Walker, contacted him to express their support of Mr. Edwards. (Tr. 55 at 8-9). Counsel requested a brief continuance, noting they had not spoken to these potential witnesses. (Tr. 55 at 9). Counsel informed the trial court that these witnesses "could be material to this Jury." (Tr. 55 at 9). Specifically, knowing that Mr. Edwards and Mr. Walker were friends, trial counsel noted that the testimony could "go to the Defendant's background . . . and it may certainly be something that the Court might need to be mitigation evidence." (*Id.*). The trial

court denied the continuance, and Ms. McDaniel-Horridge and her children did not have an opportunity to testify.

Despite this presentation of the issue, appellate counsel failed to raise a claim based on the trial court's refusal to grant a short continuance. Had appellate counsel done so, there is a reasonable probability that this Court would have reversed. Hearing testimony on behalf of Mr. Edwards from the victims' children and their mother would have been a powerful rejoinder to the state's narrative of a callous execution-style revenge killing. In light of counsel's modest request – short continuance during which they could speak with the as-yet uninterviewed witnesses – there is a reasonable probability that the appellate court would have reversed. As such, Mr. Edwards was deprived the right to appellate counsel, and this Court should reverse.

b. Appellate Counsel Unreasonably Failed To Raise The Trial Court's Refusal To Grant A Short Extension For Trial Counsel To Interview Important, Newly Discovered Witnesses

As discussed *supra*, Vicki 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.[24] (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

[24] 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.

> hands behind his back, *brushing up against the seat, brushing up against his clothes*.

Tr. 53 at 62 (emphasis added).

Defense counsel repeatedly objected to this argument, the only scientific argument in support of Mr. Edwards as the triggerperson, but the trial court overruled those objections. Inexplicably, appellate counsel failed to raise the issue on direct review. Had appellate counsel raised the issue, there is a reasonable probability that the court would have reversed. The argument was at the heart of the State's case for death and was plainly improper, mirroring the improper argument that led to Mr. Richard Miles' wrongful conviction, *supra*.

Both individually and collectively appellate counsel's deficient performance create a reasonable probability that but for those errors, the outcome of his appeal would have been different and, therefore, prejudiced Mr. Edwards. U.S. Const. amends. VI, XIV.

5. Trial Counsel And The Trial Court Failed To Preserve The Record Concerning the Exercise Of Peremptory Strikes, And The Limited Evidence Available Establishes That Mr. Edwards Is Entitled To A New Trial Based On The State's Use of Race In Using The Strikes.

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. 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 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. [25] 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.

[25] 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.

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 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).[26] 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.[27] 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.[28]

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

[27] 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).

[28] *See* Steve McGonigle et al., *A Process of Juror Elimination: Dallas Prosecutors Say They Don't Discriminate, But Analysis Shows They Are More*

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),[29] 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 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.

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).

[29] *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).

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 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."[30] (App. 623). Especially in light of the troubled history of this District Attorney's Office,[31] there is obvious reason

[30] This marking system may reflect race-based jury selection tactics historically used in the county, and also encountered elsewhere. *See ,e.g., Foster v. Chatman*, 136 S.Ct. 1737 (2016).

[31] 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.

for “concern[] that these markings strongly suggest racial indications.” (App. 621). 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. In light of the foregoing, Mr. Edwards is entitled to a new trial free from the taint of racial discrimination and where he receives effective assistance of counsel.

To the extent the extant record is insufficient to make out such claim, the inadequacy of the record and trial counsel’s failure to that the record is complete is, itself cause for reversal. As discussed above, Mr. Edwards’s trial court record is lacking materials, which are critical to a full constitutional review of his case. Despite multiple efforts, counsel have been unable to obtain 1) a full set of venire cards revealing the demographics of the venire; 2) a complete set of juror questionnaires (currently the DA has turned over 35); 3) the defense strike lists. In any cases, these materials are necessarily a part of the record and are necessary to a constitutional review of the case. In the present case, as discussed *infra*, because of the frequent off-the record agreement regarding juror strikes, these materials are critical. Without them, it is impossible to fully construct the race of the venire, the reason(s) for the state’s strikes, and, critically, whether African-Americans were stricken impermissibly.

A complete and accurate record is a "basic tool of an adequate defense or appeal," and the constitution demands its provision in criminal case. *Britt v. North Carolina*, 404 U.S. 226, 227 (1971); *see* U.S. Const. amend. XIV; *Ake v. Oklahoma*, 470 U.S. 68, 77 (1985). It is the rare case in which such significant portions of the proceedings were not recorded and preserved for further review. However, in the rare instances in which the record does not permit meaningful review, the appropriate remedy is a new trial in which a proper record can be constructed in the first instance.

In *State v. Sanders*, the North Carolina Supreme Court confronted a situation in which the trial court's instructions to the jury were poorly transcribed. 321 S.E.2d 836, 836 (1984) (*per curiam*). The "portions of the jury instructions before [the court] contain[ed] a strikingly large number of incomplete sentences, unintelligible phrases and words so misspelled as to cast doubt upon their meaning." *Id.* The Court held that in light of the substantial gaps in the record and the unavailability of the court reporter to correct the record, reversal was required. It was a death penalty case, and the court considered the "gravity of the offenses for which [the] defendant was tried" and the seriousness of the penalty imposed to conclude that a new trial on all charges was required. *Id.*

Here, in light of the foregoing, the same remedy is appropriate.

6. Relying on Extrinsic Evidence, Two Jurors Prematurely Deliberated, And A Third Juror Lied About His Prior Service, Obscuring His Ineligibility To Serve In Mr. Edwards's Case.

The Sixth and Fourteenth Amendments to the United States Constitution guarantee a criminal defendant the right to a trial by an impartial jury. *See* U.S. Const. amend. VI; *Irvin v. Dowd*, 366 U.S. 717, 722 (1961) ("In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, indifferent jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process." (internal quotation marks omitted)); *Turner v. Louisiana*, 379 U.S. 466, 471-73 (1965). An impartial jury is one that arrives at its verdict "based upon the evidence developed at trial" and without external influences. *Irvin*, 366 U.S. at 722; *see also Remmer v. United States*, 347 U.S. 227, 229 (1954) ("In a criminal case, any private communication, contact, or tampering directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed presumptively prejudicial[.]"). The right to a fair and impartial jury is at "the heart of fairness in a trial," *Stockton v. Virginia*, 852 F.2d 740, 743 (4th Cir. 1988), a right that applies with equal force to sentencing proceedings that are tried to a jury. *See Morgan v. Illinois*, 504 U.S. 719, 727-28 (1992).

a. Several Jurors Relied on a Bible Passage to Determine Mr. Edwards's Sentence.

An external influence affecting a jury's deliberations violates a criminal defendant's right to an impartial jury. *See, e.g.*, *Parker v. Gladden*, 385 U.S. 363, 364-66 (1966) (per curiam); *Turner*, 379 U.S. at 472-73; *Remmer*, 347 U.S. at 229. "The external influences recognized by the Court in those decisions are factually diverse, but they share a single, constitutionally significant characteristic: they are external to the evidence and law in the case, and carry the potential to bias the jury against the defendant." *Oliver v. Quarterman*, 541 F.3d 329, 336 (5th Cir. 2008) quoting *Robinson v. Polk*, 444 F.3d 225, 231 (4th Cir.2006) (King, J., dissenting).

Regarding the Bible in particular, the Fifth Circuit has held that it constitutes an external influence. Thus, "when a juror brings a Bible into deliberations and points out to her fellow jurors specific passages that describe the very facts at issue in the case, the juror has crossed an important line." *Oliver*, 541 F.3d at 339. In so holding, that court noted that less "egregious" reliance on the Bible was also widely considered an impermissible external influence: "Most circuits have ruled that when a Bible itself enters the jury room, the jury has been exposed to an external influence." *Id.* The court explained that the Bible serves as an external influence where "it may have influenced the jurors simply to answer the questions in a manner that would ensure a sentence of death instead of conducting a thorough inquiry into [the] factual issues." *Id*. at 340. It was critical to the court that the

jurors rely "on only the evidence and law presented in an open court room." *Id.* The jury's use of the Bible to answer questions that should have been addressed in open court.

Here, although the Bible did not itself physically enter the jury room in Mr. Edwards' case, its influence on the deliberative process is clear. Instead, when two of the jurors expressed doubts about whether or not they could impose a death sentence on Mr. Edwards, another juror suggested that they read a particular Bible passage, Romans 13, from which she, herself, sought guidance when struggling with whether or not she would be able to deliver a death verdict . (App. 634). The two jurors took the suggestion and, after having read the Bible passage, reported that they were ready to impose the death penalty. (*Id*.).

The prejudice from this external influence is presumed. *United States v. Chiantese*, 582 F.2d 974, 978 (5th Cir. 1978) *cert. denied* 441 U.S. 922 (1979). But even if it were not, the influence here is unmistakable. Before referring to the passage in question, several jurors had doubts about the appropriate sentence. And, after consulting it, indicated that they were prepared to impose a death sentence. At a minimum, Mr. Edwards is entitled to a hearing in order to establish how and the extent to which this extrinsic evidence influenced the thinking of these jurors.

b. Premature Deliberations Prevented At Least Two Jurors From Meaningfully Considering A Verdict Less Than Death.

Deliberations which occur prior to the court submitting the case to the jury violate a defendant's right to a fair and impartial jury and due process of law. U.S. Const. amends. VI, XIV. The constitution requires that "each juror keep an open mind until the case has been submitted to the jury." *United States v. Klee*, 494 F.2d 394, 396 (9th Cir. 1974). Forming an opinion via premature deliberation prevents fair consideration of the evidence and shifts the "burden of proof and place[s] upon defendants the burden of changing" that opinion. *Winebrenner v. United States*, 147 F.2d 322, 328 (8th Cir. 1945); *see 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 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.").

Here, two of the jurors decided to impose the death penalty before the penalty phase started. 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." Having read the verse, they informed the third juror that they were "ready to impose the death penalty." (App. 634).

The sworn statement of one of these two jurors corroborates 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).

Additionally, premature deliberation by some jurors, but not the entire jury, deprives the defendant of the right to have the jurors collectively decide the case through collaborative deliberation. *United States v. York*, 600 F.3d 347, 357 (5th Cir. 2010) (citing *United States v. Resko*, 3 F.3d 684 (3d Cir. 1993)). Premature deliberation also deprives the defendant of the right to have the jurors reach a decision based on the judge's instructions. *Id.* at 357-58.

Premature deliberation requires reversal, where that deliberation demonstrates that the juror cannot be impartial. *See United States v. Collins*, 972 F.2d 1385, 1403 (5th Cir. 1992) *cert. denied* 507 U.S. 1017 (1993) citing *McDonough Power Equip. v. Greenwood*, 464 U.S. 548 (1984). Although merely discussing the testimony and weight of the evidence will not suffice to establish

impartiality, an expression of a belief about appropriate outcome in advance of deliberations does establish such a claim. *United States v. Arriola*, 49 F.3d 727, 1995 WL 103275 at *5 (5th Cir. 1995) (unpublished disposition).

Here, at least some of the jurors reached a decision about Mr. Edwards's ultimate fate before the penalty phase commenced. Their decision to impose death in light of a Bible passage they read prevented them from considering the penalty evidence. For this additional reason, Mr. Edwards is entitled to have his sentence reversed. At a minimum, it calls for a hearing in which he can present his evidence of premature deliberation.

c. The Foreperson To Mr. Edwards's Jury Was Jaded From His Prior, Undisclosed Jury Service And Could, Therefore, Not Fairly Consider A Sentence Less Than Death.

It is manifest that a defendant in a criminal case is entitled to an unbiased jury. *Irvin v. Dowd*, 366 U.S. 717 (1961). A juror's hostility to the interests of the defense and the court, in itself, constitutes impermissible bias, but "[c]ertainly, when possible non-objectivity is secreted and compounded by the untruthfulness of a potential juror's answer on voir dire, the result is a deprivation of the defendant's right to a fair trial." *United States v. Scott*, 854 F.2d 697, 699-700 (5th Cir. 1988) (internal citations omitted). "To obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid

basis for a challenge for cause. *McDonough Power Equipment, Inc., v. Greenwood*, 464 U.S. 548, 555 (1984).

In Mr. Edwards's case, juror #5, who also served as the jury foreperson, failed to disclose information about his prior jury service on his jury questionnaire. Although prior jury service is not always, by itself, a sufficient basis to impute juror bias or support a challenge for cause, a juror may be excused for cause because of prior service if it can be shown by specific evidence that he has been biased by the prior service. *United States v. Price*, 573 F.2d 356, 361 (5th Cir. 1978). Here, by his own admission, the foreperson's prior jury service had so profoundly jaded his view of the judicial system, that it prevented him from serving objectively on the Edwards jury.

On his questionnaire, when asked 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). He further said that he was unaware of the outcome of that single, prior case on which he had served. (*Id*.). In a subsequent declaration, however, the foreperson indicated that he had, in fact, served on multiple juries prior to his service as the foreperson in Mr. Edwards's case, including once during college in Fort Worth. (App. 638). The foreperson graduated from college in 1995. (App. 651). Moreover, the foreperson indicated that he had formed strong opinions about the outcomes in both of the cases, which

he perceived to involve abuses of the judicial system, and that his experiences as a juror had soured him on what he perceived to be chronic abuses of the judicial system. Because of his prior juror service, the foreperson said that he had come to view a defendant's exercise of his right to a trial and, in fact Mr. Edwards's "whole case" as "a waste of taxpayer time and money." (App. 636).

The foreperson characterized his first term of jury service as involving a personal injury tort "where the plaintiff clearly was not entitled to anything" and where, as a result, the jury found for the defendant. (App. 638). Similarly, his second experience as a juror took place in a civil case where "the evidence clearly showed" that the defendant had not broken the law. (*Id*.). The foreperson characterized these cases as frivolous and an abuse of judicial process: "[m]y experiences have disillusioned me on the system and made me see how it is abused to waste taxpayer money." (App. 638). These prior experiences, if disclosed on his questionnaire and explored during voir dire, would have certainly qualified as the kind of disqualifying prior experiences that would have rendered him fundamentally hostile to the interests of the court, the defense, and due process in a way that would have supported a challenge for cause to his empanelment.

The foreperson averred that he would have been satisfied to see Mr. Edwards receive a substantially less harsh sentence had he foregone his constitutional right to a jury 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. 637). However, the foreperson's prior experiences with jury service and with the judicial system had predisposed him to view Mr. Edwards more negatively, and to judge him more harshly as a result. "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. 639).

In *United States v. Nell,* this court explained that juror bias can come to light in two ways: "by express admission or by proof of specific facts showing such a close connection to the circumstances at hand that bias must be *presumed*." 526 F.2d 1223, 1229 (5th Cir.1976) (emphasis added). Here, the taint of Juror #5's prior jury experience give rise not only to such a presumption of bias; they rendered him, by his own admission, actually biased against a defendant who might insist on availing himself of his constitutionally-guaranteed rights to due process and resulted in the deprivation of Mr. Edwards's right to a fair trial. However, should there remain any doubt as to the foreperson's partiality or the effect of his prior jury service on his verdict in the Edwards case, the Supreme Court has long held that the remedy for allegations of juror partiality is a hearing in

which the defendant has the opportunity to prove actual bias. *Smith v. Phillips*, 455 U.S. 209, 215 (1982).

Mr. Edwards thus, requests that his conviction and sentence be overturned because of the juror bias manifest in his case. In the alternative, he requests a hearing in which he can present evidence of the bias.

7. Mr. Edwards Is Ineligible For The Death Penalty Because He Did Not Show Reckless Indifference To Human Life.

In light of the newly discovered evidence, including evidence that the state has suppressed, *infra*, and that trial counsel should have presented, Mr. Edwards is not eligible for a sentence of death because his actions do not exhibit a reckless indifference to human life. *Tison v. Arizona*, 481 U.S. 137 (1987); U.S. Const. amends. VIII, XIV. In light of this new evidence, the State's case that Mr. Edwards was the shooter has been dismantled, and Mr. Edwards' consistent claim that he was in the bathroom at the time of the offense and not the shooter. Simply participating in a robbery is not sufficient for death eligibility. *Enmund v. Florida*, 458 U.S. 782 (1982). And the state's evidence, properly understood (and argued) does nothing to prove Mr. Edwards's participation in the shooting and fails to establish his death eligibility.

Had trial counsel properly investigated the case, *supra*, or received the evidence to which it is entitled, *infra*, competent counsel would have been obligated to raise a claim that Mr. Edwards was not death eligible. Had counsel

done so, the trial court would have found that the State had not made its case. U.S. Const. amends. VI, XIV; *Strickland*, 466 U.S. 688.

C. The State Suppressed Material, Exculpatory Evidence from Mr. Edwards's Counsel That Profoundly Undermines Confidence In The Outcome Of His Trial.

Generally, capital habeas applicants are limited to "one bite of the apple." *Ex Parte Miles*, 359 S.W.3d 647, 663 (Tex. Crim. App. 2000) (citing Tex. Code Crim. P. art. 11.07, §4(a)). However, subsequent applications may be reviewed if the facts establish that the "claims and issues have not been and could not have been presented previously in an original application . . . because the factual or legal basis for the claim was unavailable on the date the applicant filed the previous application." *Id.* (quoting Tex. Code Crim. P. art. 11.07 §4(a)(1)). The same exception applies in capital cases. Tex. Code Crim. P. art. 11.071 §5(a)(1).

Under this exception, a factual basis of a claim is considered unavailable "'if the factual basis was not ascertainable through the exercise of reasonable diligence on or before that date,' and reasonable diligence 'suggests at least some kind of inquiry has been made into the matter of the issue.'" *Miles*, 359 S.W.3d at 663-664 (quoting *Ex parte Lemke*, 13 S.W.3d 791, 794 (Tex. Crim. App. 2000)). Where such an inquiry has been made, later discovery of the basis for the claim will not be barred for a failure to diligently pursue it.

Here, trial counsel repeatedly asked, and was repeatedly assured via court rulings and statements from the State, that all exculpatory evidence had been provided. The trial court granted no fewer than seven motions to produce exculpatory evidence including "Witnesses Favorable to Defendant," "Exculpatory and Mitigating Evidence," "Production and Inspection of Evidence Pursuant to *Brady*," "Discover Criminal Record of State's Witnesses," "Disclose Extraneous Offenses," "Production of Witness Statements," and "Discover Criminal Record of State's Witnesses." (Tr. 3 at 11-21). The prosecutor informed the defense it would turn over "everything I can get my hands on" and that he was "going to turn over everything," even though "I don't have to." (Tr. 3 a 13). The trial court required the state to disclose police reports, witness statements, and other evidence related to a prior unadjudicated robbery, discussed *infra*. (Tr. 3 at 21). The trial court also granted trial counsel's request to produce exculpatory and mitigating evidence. (Tr. At 18.) In sum, the State and the trial court repeatedly assured the defense that all exculpatory evidence either would be or had been disclosed. As such, Mr. Edwards is entitled to rely on those representations and has exercised diligence in obtaining the newly discovered evidence discussed below. *Miles*, 359 S.W.3d at 663-64.

1. The State Withheld Material, Exculpatory Evidence from Mr. Edwards's Counsel That Profoundly Undermines Confidence in the Outcome of His Trial

At trial, the State suppressed forensic reports, evidence of an interview with undisclosed eyewitness with exculpatory information, and various pieces of information that crucially undermined the credibility of its case against Mr. Edwards in another Subway sandwich shop robbery – a case which, although brought into evidence against Mr. Edwards during the punishment phase of his trial, the State notably declined to pursue. This withholding of material, exculpatory evidence violated Mr. Edwards's constitutional rights. *See* U.S. Const. amend. XIV.

Under *Brady v. Maryland*, "the State violates a defendant's right to due process if it withholds evidence that is favorable to the defense and material to the defendant's guilt or punishment." *Smith v. Cain*, 132 S. Ct. 627, 630 (2012) (citing *Brady*, 373 U.S. at 87 (1963)). "[E]vidence is 'material' within the meaning of *Brady* when there is a reasonable probability that, had the evidence been disclosed, the result of the proceeding would have been different." *Smith*, 132 S. Ct. at 630. "A reasonable probability does not mean that the defendant 'would more likely than not have received a different verdict with the evidence,' only that the likelihood of a different result is great enough to 'undermine[] confidence in the outcome of the trial.'" *Id*. (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)); *see also Ex parte Mowbray*, 943 S.W.2d 461, 466 (Tex. Crim. App. 1996); *Ex parte Adams*, 768 S.W.2d 281, 290 (Tex. Crim. App. 1989).

Here, the State suppressed evidence that, both independently and cumulatively, undermined the crucial elements of its case that Terry Edwards was a lone triggerman with an escalating criminal pattern of violence, who bore primary responsibility for the robbery and murder at the Subway sandwich shop.

2. The State withheld from the defense material documents pertaining to the GSR testing.

As noted *supra*, 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.[32] (App. 18, 25). Notably Vicki Hall, trial counsel's lone witness at guilt, had performed the suppressed test herself, but she inexplicably omitted this fact from her testimony as well. 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 elements present in GSR. In contrast, Terry Edwards, who the State argued discharged the weapon three times, tested negative. This material evidence was both 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

[32] 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.

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 District Attorney. Had the defense had this report, they would not have called Vicki Hall to testify as their lone witness, because they would have known 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 independent expert in order to understand the significance of the report. Such an expert would have explained that the presence of GSR on Ms. Goodwin's hands increased the likelihood that GSR would also be present on a shooter, and would have urged counsel to push for GSR testing of Mr. Edwards's clothing. Moreover, counsel would have been equipped to counter the false testimony elicited by the prosecutor and the extremely aggravating arguments derived therefrom, conclusively refuting the argument that the GSR evidence was consistent with the State's theory that Mr. Edwards was the triggerman.

Especially when viewed in light of all of the issues regarding Ms. Hall's testimony in Mr. Edwards's case, the State's omission of this key piece of evidence fundamentally compromised Mr. Edwards's ability to fairly prepare a defense.

3. The State Withheld Evidence from an Undisclosed Eye-Witness to the Offense

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).[33]

[33] 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.

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 girlfriend's vehicle, a light-colored Nissan Maxima, to drive to Balch Springs on the morning of the offense. (App. 201-02). 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.

Given the State's theory of the crime and extensive argument that Terry Edwards was the triggerman, and especially given that only a single eyewitness ever mentioned seeing Kirk Edwards, and that this witness did not place him in the store when she testified at trial,[34] evidence of such a witness would have been extremely important in helping to refute the State's theory of the crime. Its suppression was prejudicial to Mr. Edwards

4. The State Withheld Evidence Regarding the Impoundment 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

[34] Although this witness indicated, in her original statement to the police, that she had, in fact, seen both men enter the Subway, she recanted this version of events in her trial testimony. (Tr. 52 at 146-148).

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.

5. The State Withheld Evidence Regarding the Fort Worth Robbery Introduced During the Punishment Phase

As explicated previously, the State's case in aggravation focused on a robbery of Subway in Fort Worth. Mr. Edwards was never prosecuted for the robbery, and irregularities in the investigation pervaded the case. The State not only built its case on an inherently unsound foundation, it propped up the meager case that it had by withholding material, exculpatory evidence from the defense.

Although other eyewitnesses to the Fort Worth Subway offense were brought to the courtroom and had occasion to see Mr. Edwards in open court, they ultimately never testified. (Tr. 55 at 15-17). And although the State 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's actions in concealing information about their pre-trial investigation into that robbery belie those generalized assertions. Specifically, the State failed to turn over records indicating that the female victim to the robbery—who was behind the cash register and would have been in perhaps the best position to see the perpetrators to the Fort Worth robber had also been unable to positively identify Terry Edwards as the shooter when she was shown a prior photo lineup. (App. 98). The "Witness

List" for the Fort Worth robbery containing that information was only obtained recently by undersigned counsel in response to a Public Information Act request. Had trial counsel had this information in its possession prior to trial, it would have been on notice that it should conduct its own interviews of this witness and develop evidence to refute the State's aggravator.

As elaborated *supra*, there was a rash of Subway franchise robberies in and around Fort Worth over the span of 2002, which were eventually attributed to other individuals, who were identified and prosecuted during the pendency of Mr. Edwards's case. Despite the similarities in the crimes and the time frame, and despite the fact that the State had identified far more plausible perpetrators for the Fort Worth robbery that they attempted to attribute to Mr. Edwards, trial counsel were never notified of the investigation, arrest, or identities of any these other suspects.

Finally, the District Attorney also failed to 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 existence of this case or provided with the information noted in the Fort Worth DA's file or the Fort Worth Police Department's investigative file

for this case. Evidence of such a similar crime would certainly have been material and exculpatory and would have assisted counsel further still in rebutting an extremely damaging aggravator.

The state's obligation under *Brady* to disclose evidence favorable to the defense turns on the cumulative effect of all such evidence suppressed by the government. *Kyles v. Whitley*, 514 U.S. 419, 421 (1995). Likewise, the analysis of whether or not the evidence suppressed by the State is "material" for the purposes of making out a *Brady* violation is a cumulative one, and boils down to whether or not "the net effect of the evidence withheld by the State in this case raises a reasonable probability that its disclosure would have produced a different result." *Id*. at 421-22.

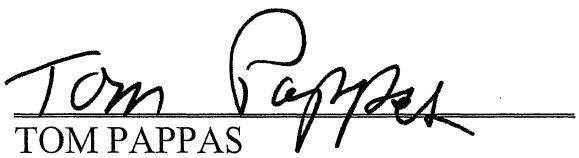
IV. PRAYER FOR RELIEF

For the foregoing reasons, Terry Edwards prays that this Court:

1. Find that the requirements of section 5 of Article 11.071 have been satisfied;
2. Excuse section 5 of Article 11.071's bar on successive petitions based on state habeas corpus counsel's deficient performance;
3. Issue an order remanding the case to the convicting court for an evidentiary hearing for the purpose of examining the merits of his claims; and
4. Grant any other relief that law or justice requires.

Respectfully submitted,

BURLESON, PATE & GIBSON, L.L.P.



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Subsequent Application for a Writ of Habeas Corpus was served by electronic and/or in person delivery on January 18, 2017 upon the following counsel for the State:

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