No. 4:11-cv-01696

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

RAPHAEL DEON HOLIDAY,

Petitioner,

v.

RICK THALER,

Director, Texas Department of Criminal Justice,
Institutional Division,

Respondent.

Petition for Writ of Habeas Corpus
from a Capital Murder Conviction in the
278th District Court of Madison County, Texas

PETITION FOR WRIT OF HABEAS CORPUS

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TO THE HONORABLE U.S. DISTRICT COURT:

NOW COMES, RAPHAEL DEON HOLIDAY, the Petitioner, and respectfully submits his Petition for Writ of Habeas Corpus, asking the Court to issue a writ ordering his release from the Institutional Division of the Texas Department of Criminal Justice. This application follows his conviction and death sentence in the 278th District Court of Madison County, Texas, cause numbers 10,423, 10,425 and 10,427, styled *State v. Raphael D. Holiday.*

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record for Petitioner, RAPHAEL DEON HOLIDAY, certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that this court may evaluate possible disqualifications or recusal.

Interested Parties		
Individual	***Address***	***Participation***
	Petitioner	
Mr. Raphel Deon Holiday	Polunsky Unit	Petitioner
Mr. Seth Kretzer	440 Louisiana Street; St. 200 Houston, TX 77002	Appointed attorney for current federal habeas
Mr. James W. Volberding	110 North College Avenue Suite 1850, Plaza Tower Tyler, TX 75702 (903) 597-6622	Appointed attorney for current federal habeas
Mr. Alexander L. Calhoun	11319 Long Branch Austin, TX 78736	Appointed attorney for state habeas writ petition.
Gerald Bierbaum	1744 Norfolk Houston, TX 77098	Appointed attorney for state habeas writ petition.
Mr. William F. Carter	102 East 26th Street Bryan, Texas 77803	Appointed attorney for trial and direct appeal.
Mr. Frank Blazek	1414 11th Street Huntsville, Texas 77340	Appointed attorney for trial and direct appeal.
Respondent		
The Hon. Mr. Greg Abbott		Texas Attorney General
	Office of the Attorney General *Counsel for the State* Capital Litigation Division P.O. Box 12548,	Asst. Attorney General

Interested Parties		
Individual	***Address***	***Participation***
	Capitol Station Austin, TX 78711-2548 (512) 936-1600 (voice) (512) 320-8132 (fax)	
Mr. Tommy Skaggs	Austin	Asst. Attorney General
Ms. Tina Dettmer	Austin	Asst. Attorney General
Mr. William C. Bennett	Courthouse 101 W. Main, Room 207 Madisonville, Texas 77864	Criminal District Attorney Madison County
Mr. Charles Mac Cobb		Asst. District Attorney Asst. Attorney General
Judge		
Hon. Jerry Sandel		278th District Court, Madison County, Texas

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DESIGNATION OF ABBREVIATIONS AND EXPLANATION OF THE TRIAL RECORD

"Petitioner's Record Excerpts" are referred to in this brief with the abbreviation "PRE." References to the trial record statement of facts are abbreviated as "SF" or "RR" for reporter's record. References to the transcript are abbreviated as "CR" for the clerk's record.

STATEMENT OF JURISDICTION

This petition is submitted pursuant to 28 U.S.C. § 2254 et. seq., and amendments five (due process clause), eight (cruel and unusual punishment clause), and fourteen (due process and equal protection clauses), of the United States Constitution, and section nine, clause two of the United States Constitution (habeas corpus).

CIRCUMSTANCES SURROUNDING THE FILING OF THIS PETITION

Holiday's case became final May 5, 2010, when the CCA denied his petition for post-conviction relief. On February 15, 2011, this Court appointed undersigned counsel to represent Holiday in his federal habeas corpus proceedings. Pursuant to current Fifth Circuit authority, Holiday's one-year statute of limitations under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA") expires May 5, 2011. *See* 28 U.S.C. § 2244(d). With Court approval, Holiday timely filed an application which listed his claims but which was not fully written and argued.

Holiday now files, with Court approval, this amended application which, while far from perfect, presents his arguments and evidence for a writ of habeas corpus.

STATE COURT PRESUMPTION OF CORRECTNESS

Holiday hereby provides notice of his intention to challenge the presumption of correctness of certain findings of fact made by the state court in his case. Certain factual findings of the state

court in Holiday's case, if any are found to exist, are not entitled to the presumption of correctness under 28 U.S.C. § 2254(e)(1). These include, but are not limited to, factual findings made by the trial court in Holiday's trial and the opinions by the CCA on direct appeal. Pursuant to 28 U.S.C. § 2254(e)(1), Holiday intends to assert that certain findings of fact by the state court at trial, or on direct appeal, if any are found to exist, are not fairly supported by the record. Holiday also intends to assert other exceptions to the presumption of correctness, including, but not limited to: that the procedures employed by the state courts in making findings of facts were not adequate to afford him full and fair hearings; that material facts were not adequately developed at the state court hearings; that Holiday did not receive full, fair and adequate hearings in the state court proceedings; and that Holiday was otherwise denied due process of law in the state court proceedings.

In addition, Holiday asserts that certain findings of fact by the state court in regard to his state post-conviction proceedings, if any are found to exist, are not entitled to the presumption of correctness under 28 U.S.C. § 2254(e)(1). These include, but are not limited to: any and all factual findings made by the trial court in regard to Holiday's state post-conviction proceedings, as well as the decisions of the CCA on petition for review. Pursuant to 28 U.S.C. § 2254(e)(1), Holiday intends to assert that certain findings of fact by the state court, concerning his state post-conviction proceedings, if any are found to exist, are not fairly supported by the record.

EXHAUSTION

Holiday states that most of the federal constitutional claims alleged herein have been exhausted in proceedings before the Texas courts[1]. Some claims, however, were not fully

[1]The burden is on the Director to demonstrate that Holiday failed to exhaust a particular claim. *See, e.g.*, *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938); *Esslinger v. Davis*, 44 F.3d 1515,

presented to the state court, were not ripe for review, or could only be raised in this forum. Holiday expressly reserves his right to amend this petition. In *McCleskey v. Zant*, 499 U.S. 467, 498 (1991), the Supreme Court reaffirmed the "principle that [a] petitioner must conduct a reasonable and diligent investigation aimed at including all relevant claims and grounds for relief in the first federal habeas petition." Referring to Habeas Rule 6 (discovery), Habeas Rule 7 (expansion of the record) and Habeas Rule 8 (evidentiary hearing), the Supreme Court held that a habeas petitioner has to have reasonable means and the ability to investigate to form a sufficient basis to allege a claim in the first petition. *Id*. at 497-98. Holiday believes additional claims may be identified following a thorough review of the record, through investigation, after discovery is conducted and completed, or after an evidentiary hearing is held. At the appropriate time during these proceedings, Holiday will present any additional claims through amendments to the petition.

PROCEDURAL HISTORY

A. Procedural History in State Court.

Holiday was indicted for capital murder in the 278th District Court of Madison County, Texas, and tried in consolidated cause numbers 10,423, 10,425 and 10,427, styled *State of Texas v. Raphael Deon Holiday*. Following a jury verdict in favor of the state, the court imposed a death sentence.

Holiday's conviction and sentence were automatically appealed to the CCA in cause numbers AP-74,446, AP-74,447 and AP-74,448. The CCA denied the appeal entirely on February

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1528 (11th Cir. 1995); *Herbst v. Scott*, 42 F.3d 902, 905 (5th Cir. 1995); *English v. United States*, 42 F.3d 473, 477 (9th Cir. 1994); *Brown v. Maass*, 11 F.3d 914, 914-15 (9th Cir. 1993); *Harmon v. Ryan*, 959 F.2d 1457, 1461 (9th Cir. 1992).

8, 2006. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737 (Tex. Crim. App. Feb. 8, 2006).

Holiday's motions for rehearing were denied April 26, 2006. *Holiday v. State*, 2006 Tex. Crim. App. LEXIS 848, 849 and 850 (Tex. Crim. App. Apr. 26, 2006).

Holiday timely sought a writ of *certiorari* from the Supreme Court, which denied his petition November 13, 2006. *Holiday v. Texas*, 549 U.S. 1033, 2006 U.S. LEXIS 8661 (Nov. 13, 2006).

Holiday timely sought state habeas relief in an application filed in the same trial court, and assigned the cause numbers 10,423(A), 10,425(A) and 10,427(A), and styled *Ex parte Raphael Deon Holiday*.

The trial court recommended denial of all relief and on May 26, 2009 signed without any changes findings of fact and conclusions of law written by the local prosecutors.

The CCA denied relief May 5, 2010 in a summary order in cause numbers WR-73,623-01, WR-73,623-02 and WR-73,623-03. *See Ex parte Holiday*, 2010 Tex. Crim. App. Unpub. LEXIS 262 (Tex. Crim. App. May 5, 2010).

B. Procedural History in Federal Court.

As mentioned, Holiday petitioned for appointment of counsel to file an application for writ of habeas corpus under section 28 U.S.C. § 2254. The court appointed counsel February 15, 2011.

During these proceedings, since 2000, Holiday has been confined in the Polunsky Unit by the Director of the Texas Department of Criminal Justice.

STATEMENT OF FACTS

In support of this post-conviction writ of habeas corpus, Holiday asks this Court to take judicial notice of the state appellate and habeas record and incorporates his federal claims in that record by reference into this writ application.

The testimony at trial is briefly summarized as follows:

Holiday and Tammy Wilkerson formed a romantic relationship in mid 1996 or 1997. Prior to the relationship, Wilkerson, had already birthed two daughters, Tierra Shinea Lynch and Jasmine Rockell DuPaul, by two different fathers. During the relationship with Holiday, Wilkerson gave birth to Holiday's daughter, Justice Holiday.

The family couple moved to Plantersville in 1998, and then moved to Madison County, where they lived in a residence owned by Wilkerson's parents, Beverly and Louis Mitchell. The residence was located approximately a mile from the Mitchells' own home in a rural area.

In March 2000, Holiday was charged with Aggravated Sexual Assault of Tierra, and was excluded from Wilkerson's residence by a protective order. Nevertheless, Holiday and Wilkerson saw each other on several occasions, and sometimes engaged in sexual relations, on several instances between March 2000 and September 5, 2000. They also maintained daily phone contact. Although Wilkerson later claimed during the trial of this case that she was coerced into continuing her relationship with Holiday, Wilkerson never notified the authorities regarding the alleged violations of the protective order. In August 2000, Holiday was arrested for violation of a protective order after attempting to see her at her place of employment. Nevertheless, the relationship between Wilkerson and Holiday continued after his release from jail.

On the day of the incident, Holiday drove to Wilkerson's house in the late evening with two friends, Robert Lowery and John White, got out of the car and sent his friends away. When he got out of the car, Holiday took with him a pistol, a can of gasoline, and a screw driver.

After Holiday's friends left, Wilkerson became alarmed after seeing a figure at the window and called her parents. Wilkerson's mother, Beverly Mitchell, and Mitchell's brother, Terry Keller arrived at Wilkerson's residence, Keller armed with a shotgun. As they were placing the girls in the car, Holiday appeared in the house. Wilkerson immediately left through the backdoor of her house to call for help, leaving her mother, uncle and children with Holiday. Holiday compelled Keller to put down the shotgun. Holiday started to pour gasoline from the can he had brought on the ground and on Wilkerson's car. He attempted to light the gasoline, but it would not ignite. Holiday then directed Mitchell and Keller to bring the girls inside the house and sit on the sofa. Holiday and Mitchell left in Mitchell's car to go to her house, leaving Keller alone in the house with the three girls. At this point, Keller left the house – and the girls – to seek help.

On arriving at Mitchell's house, Holiday and Mitchell retrieved two five gallon containers of gasoline and returned to the Wilkerson's residence. Holiday directed Mitchell to pour gasoline through the residence, allegedly starting at some recliners in the livingroom-kitchen area of the residence and moving throughout the house into the washroom and bedroom. While in the bedroom, Mitchell testified that she heard one of her grandchildren call her name and she looked into the living room. Mitchell stated that she saw Holiday bend down toward the floor, and then she saw a fire start and move through the room. Mitchell escaped through a window in the back bedroom; Holiday escaped through the front door. The girls, who had been sitting on the couch when the fire started, did not escape.

Outside, Holiday took Mitchell's car and started to drive away. As he was driving away, he collided with a car driven by Madison County Sheriff's Deputy Ivan Linebaugh. Holiday and Linebaugh engaged in a high speed, multi-agency car chase until Holiday's car crashed and caught fire.

After Holiday was removed from the car and taken into custody, police and medical personnel observed that Holiday was burned on his hands, fingers, arms, and neck. A forensic pathologist who reviewed the photographs taken of Holiday's burn injuries opined that the burns were "consistent with" a person being burned by a flash after bending and reaching down as if to light an floor-level accelerant.

A forensic analysis of the debris recovered from the Wilkerson residence and from the person of Holiday and Mitchell revealed the presence of gasoline on debris collected from the laundry room, the kitchen and Holiday's tennis shoes. The results were negative for gasoline on Holiday's shirt and pants, Mitchell's night shirt and pants, clothing from one of the decedents, debris under the couch on which the decedents had been sitting, and on two cigarette lighters taken from Holiday after his arrest.

Wilkerson's father, Louis Mitchell, testified that the residence had a propane gas stove in which the pilot light was ignited, and a Dearborn heater on which the pilot light had been turned off. The house also had several electric utilities, the refrigerator, water heater, washer and dryer, and three air conditioners, all of which were in working order.

The State presented testimony regarding the causation of the fire by John DeHaan, a fire/arson investigator, and president of Forensic Scientists, Inc., from Viejo, California. DeHaan opined that the only scientifically supportable basis for causation of the fire was Holiday's having ignited the fire. DeHaan excluded as possible bases for the fire's causation the stove pilot light, the refrigerator, the air conditioner units, the water heater, and the floor heater.

The defense expert, Judd Clayton, presented the defense's theory of ignition that the fire could have started from the water heater located in the bathroom, an electrical spark the refrigerator, the window mounted air conditioner units, or the pilot lights on the stove top.

Although Clayton agreed with DeHaan that the broiler pilot light could not have been a possible ignition source, his reasons differed from DeHaan; DeHaan identified the broiler pilot light as a continuously burning gas pilot but concluded that the broiler pilot could not reasonably have ignited the gas vapors because the light was placed too high from the vapors, the light was placed in a compartment which retarded the entrance of the fumes, and that there had been no resulting explosion. Clayton excluded the broiler as a possible ignition source because he believed it to be an electrical ignition system.

The jury found Holiday guilty of capital murder as alleged in each of the three indictments.

At the punishment phase of trial, the State presented evidence that in addition to the facts leading up and involved in the incident ultimately leading to the fire in the Wilkerson residence, Holiday had previously sexually assaulted his maternal aunt and a cousin, and struck his mother in an argument when he was 15 years of age before leaving home. A forensic psychiatrist testified on behalf of the State, that based on a hypothetical set of facts relating to Holiday, that he had an anti-social personality disorder, and that he was likely to constitute a future danger of violent conduct.

The defense presented several witnesses who testified that Holiday had experienced a normal, uneventful and Church-going childhood, that he had been respectful to others, that he had been proud of his (deceased) daughter, and had adjusted well to incarceration. A forensic psychiatrist testified for the defense that Holiday's profile on a personality test, the MMPI revealed that he had suffered from depression and had poor internal mechanisms for coping with stress and frustration.

The jury answered the future dangerousness question in the affirmative, and answered the mitigation question in the negative, resulting in the imposition of a sentence of death.

GENERAL DISCUSSION OF CAPITAL PUNISHMENT LAW IN TEXAS

The following is an overview of capital punishment law in Texas.

The Texas Legislature has designated certain types of murders as eligible for the death penalty. To warrant the death penalty, the defendant must have committed another serious crime in addition to committing a murder. For instance, kidnaping and then killing a person is a capital offense. So is killing two people, rather than one. Killing a police officer in his line of duty is a capital offense.

In recent years, once a person is indicted for capital murder and the State decides to pursue the death penalty, the defendant is assigned two attorneys. One of the lawyers is the lead attorney; the other is the second chair attorney. Both attorneys are charged with investigating the case, filing motions, selecting the jury, and arguing as forcefully as possible for a not guilty verdict or a lesser conviction than capital murder, or if all else fails, for a life sentence.

The district attorney's office will equally prepare, usually assigning two, sometimes three, prosecutors to the case, along with one or two investigators and paralegals.

Lawyers for the defendant will usually file a large number of pretrial motions. The reason for this is because the state and federal law requires all issues raised on appeal to be first presented to the trial judge. Death penalty jurisprudence is thick with constitutional and statutory issues. All unsettled challenges to death penalty procedures must be raised. Failure to do so means that the issues are waived for direct appeal. Moreover, because the Supreme Court has insisted that effective assistance of counsel requires attorneys who are knowledgeable about death penalty litigation, the failure of trial lawyers to raise important issues at trial for later review on appeal can lead accusations that the trial lawyers were ineffective.

In a capital case, the trial judge will hold several pretrial hearings on motions by the State and defense. The judge will address motions to suppress, constitutional challenges, and hearings on the qualifications of experts. Any defense requests denied by the judge are preserved for appeal.

Texas adheres to individual voir dire of potential jurors. Generally, a large number of veniremen are summoned to the courthouse, around 600 or 700. Many jurors exercise certain allowable rights not to serve; others cannot be found. On appearance day, about 300 jurors or so will show.

The trial judge will perform the initial qualification of the jury panel. Either side may ask for the jury to be shuffled at this point. Jurors will be seated randomly in numerical order. Beginning with juror number one, the first twelve jurors who are not struck or removed for cause will constitute the jury.

The judge will screen out those who cannot speak and write English, who have felony or moral turpitude convictions, and those who are entitled to legitimate legal exemptions from service. In addition, the judge will hear explanations about physical disability, business conflicts, general biases, or other personal issues which might disqualify a juror. The judge may excuse some jurors but not others. At this stage, the attorneys for both sides have minimal input, other than a few questions for individual jurors called to the bench. Frequently, the lawyers for both sides will agree to excuse a juror for some reason. There is a certain Texas statutory provision which allows lawyers on both sides to agree to excuse a juror.

Qualifying the jury to this point is a difficult day-long affair. Once the venire is qualified for general jury service, they are scheduled for individual voir dire examination. Generally in groups of five to ten, they are instructed to return to court over the next three to four weeks, for individual questioning about their views on the death penalty.

When each juror arrives on his designated day, each side is generally allowed approximately forty-five minutes to question the juror. After the juror leaves, each side is permitted to challenge for cause. If granted, the juror is finally excused and deleted from the pool. If challenges for cause are denied, the juror remains in the pool and subject to a peremptory challenge or to become part of the twelve-member petit jury.

There are two methods in Texas for permitting peremptory challenges. For many years, judges required peremptory challenges to be exercised immediately after the juror is questioned individually and challenges for cause denied. This is sometimes called the sequential method of selecting the jury. The State goes first. If the State strikes the juror, the juror is gone. If the State declines to strike the juror, then the right passes to the defense. If the defense strikes the juror, the juror is eliminated. If the defense does not strike the juror, then the juror joins the twelve-member petit jury. This process is repeated until twelve jurors and two alternates are seated. Each side has ten peremptory challenges.

The second method can be referred to as the pool method. The goal is to create a pool of forty-eight death penalty qualified jurors. Each juror is questioned by the parties individually. The court rules upon any challenges for cause by the State or Defense. If the juror is not disqualified, then the juror is added to the pool in consecutive number. When forty-eight are reached, the court designates a day for strikes. Beginning with the first juror qualified, the State announces whether it will accept the juror or exercise one of its peremptory challenges. If not, the Court turns to the Defense, which announces whether it will accept the juror or use a strike. If the juror is not struck by either, then the juror joins the petit jury. The process ceases when twelve jurors and two alternates are seated. *See Rousseau v. State*, 824 S.W.2d 579, 582 n.4 (Tex. Crim. App. 1992), *aff'd,* 855 S.W.2d 666, *cert. denied*, 510 U.S. 919 (1993).

Both prosecutors and defense attorneys generally prefer the pool method. Both sides can exercise their strikes intelligently, eliminating the jurors at the extremes based on their death penalty views. This method benefits the defense by allowing identification of each of the *Morgan v. Illinois* jurors who managed to escape a cause challenge, before using any strikes. (In *Morgan v. Illinois*, the Supreme Court held that a juror who would automatically impose the death penalty for a capital murder regardless of the mitigating circumstances may be removed for cause. *See* 112 S. Ct. 2222 (1992).)

Once the jury is selected and sworn, trial proceeds in the usual fashion. If the defendant is found guilty of capital murder, the sentencing phase begins. In response to the Supreme Court's insistence that the jury decision-making process be guided, Texas has constructed three questions, called special issues. The questions have varied over the years.

The method of answering the special issues is complicated. If the jurors unanimously answer all three questions in the State's favor, as they did here, then the judge sentences the defendant to death automatically. If the jurors answer *unanimously* any one of the questions in the defendant's favor, then the judge will sentence the defendant to life in prison.

Jurors are also told that in order to answer any special issue in the defendant's favor, at least ten of the jurors must agree.

The jurors are *not* told certain outcomes. It is possible that the jurors might fail to agree *unanimously* on the answer in the State's favor to any special issue. If this occurs, then the defendant is sentenced automatically to life in prison. There is no retrial. Unlike in any non-capital case, a hung jury does not result in a retrial in the sentencing phase of a capital case. The result is always either a life sentence or a death sentence. Jurors, however, are not told this.

As a corollary, jurors are also not told that a single juror can decide in favor of a life sentence. Unanimity is required for a death sentence. A life sentence is the result otherwise, the result of a single juror's decision.

Moreover, jurors are not told what occurs if fewer than twelve jurors agree on an answer to a special issue in the State's favor, but fewer than ten jurors agree on an answer in the defendant's favor. Again, the answer is that the defendant receives an automatic life sentence.

In a non-capital case, jurors are informed of the effects of parole. In 1990, Texans amended the state constitution to require juries to be informed when a defendant becomes eligible for parole. In the 1970s and 1980s, there was concern that defendants served only a fraction of their sentence. Those supporting accurate sentencing wanted jurors to know when the defendant would be eligible for parole so that this could be taken into consideration when deciding the sentence.

In sharp contrast, in a death penalty case jurors are not permitted to know this information. A defendant who is tried for the death penalty, but who receives a life sentence, is eligible for parole only after he has served forty years.

Once the judge pronounces the death sentence and signs the judgment, appeal is automatic to the Texas Court of Criminal Appeals ("CCA"). At the same time that the trial judge appoints an appellate lawyer, the judge will also appoint an attorney to file the defendant's state article 11.071 application for state writ of habeas corpus. The state writ must be filed shortly after the state direct appeal brief is filed, before the CCA decides the appeal. If the direct appeal is affirmed, the defendant has the right to appeal to the United States Supreme Court. Once the CCA denies the direct appeal and the state writ application, the inmate must proceed to federal district court.

HOLIDAY HAS MET ALL PROCEDURAL REQUIREMENTS

ALL CLAIMS HAVE BEEN EXHAUSTED[2]

There are procedural hurdles which must be crossed before a petitioner may ask a federal court to review a claim entitling him to federal habeas relief. *See generally Fisher v. Texas*, 169 F.3d 295 (5th Cir. 1999).

A petitioner seeking a writ of habeas corpus in federal court must show that he has exhausted all avenues of relief in state court. A federal district court may decline to address the merits of a claim that was inexcusably "defaulted" by the petitioner in state court proceedings.

A federal "default" question generally involves an evaluation of whether and how a claim for relief was presented to and considered by a state court. A default question arises in several ways. First, a default question can arise if a claim in a habeas corpus petition was not presented, or not fully presented, to the state court. Presenting a claim to the state courts is called "exhausting" the claim. *See Keeney v. Tamayo-Reyes*, 112 S. Ct. 1715, 1720 (1992) (the exhaustion requirement is grounded in "comity concerns." "The purpose of exhaustion is . . . [to] afford the State a full and fair opportunity to address and resolve the [federal] claim on the merits.")

[2]Portions of this and the following section on exhaustion and procedural default were abstracted from a 1995 paper written entitled *Pleading Prejudice in Capital Habeas Corpus Proceedings*, by John H. Blume and Mark E. Olive.

"In order for a claim to have been 'fairly presented' to a state court to fulfill the exhaustion requirement, the applicant 'need not spell out each syllable of the claim before the state court.' Instead, a federal claim must only be the 'substantial equivalent' of one presented to the state courts." *Fisher*, 169 F.3d at 303 (citations omitted).

Second, a default question may arise if the claim was presented to the state court, but not in the manner that the state court normally and regularly requires that it be presented, such as when the claim is presented untimely, and the state court invoked its state rule to bar consideration of the inmate's claim. This is called a "procedural default." *See Wainwright v. Sykes*, 433 U.S. 72 (1977). This is discussed below.

Demonstrating Cause and Prejudice. A federal district court is required to give considerable analysis and receive evidence when called upon to determine whether there has been a default, and if so, whether the default will be excused so that the federal court can reach the constitutional merits of a claim. Whether there exists an independent and adequate state court basis for barring a claim is decided by the district court, and "[w]hether a petitioner's actions have created a state law procedural bar is a mixed question of law and fact." *Hansbrough v. Latta*, 11 F.3d 143, 145 (11th Cir. 1994). Even when a state court decides there has been default, the federal district court must make an independent inquiry. *Macklin v. Singletary*, 24 F.3d 1307 (11th Cir. 1994), *cert. denied*, 513 U.S. 1160 (1995).

Even if there has been an enforceable default, the federal district court may still proceed to the merit's of the petitioner's claim if the petitioner can demonstrate "cause" for and "prejudice" from the default. Cause and prejudice are federal questions requiring *de novo* review by the federal district court. *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) ("cause and prejudice" is a mixed question of law and fact which the federal court must decide). If the state alleges and the federal

court finds that a procedural default is applicable, a petitioner is entitled to an evidentiary hearing on the matter of cause and prejudice. *See Tamayo-Reyes*, 112 S. Ct. at 1721 ("a remand to the District Court is appropriate in order to afford respondent the opportunity to bring forward evidence establishing cause and prejudice"); *Wainwright v. Sykes*, 433 U.S. 72, 80 (1977); *Murray v. Carrier*, 477 U.S. 478, 487 (1986); *Walker v. Davis*, 840 F.2d 834, 839 (11th Cir. 1988); *Harich v. Dugger*, 813 F.2d 1082 (11th Cir. 1987).

Examples of cases applying these principles include: *Chacon v. Wood*, 36 F.3d 1459, 1468 (9th Cir. 1994) (new factual allegations supporting claim in federal court do not render a claim unexhausted unless they fundamentally alter the legal claim already considered by the state courts); *Beauchamp v. Murphy*, 37 F.3d 700, 704 (1st Cir. 1994) (discussing the fair presentation doctrine, recognizing here that state court would not have viewed the claim differently had the word "federal" appeared in the heading to the issue), *cert. denied*, 115 S. Ct. 1365 (1995).

Scarpa v. DuBouis, 38 F.3d 1, 6 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 940 (1995), includes a good discussion of the fair presentation doctrine, discussing ways in which a petitioner can fairly present claims to state courts. These include citing a specific provision of the Constitution, alerting the state court to the claim's federal nature through the substance of the claim, relying on federal constitutional precedents, claiming a particular right guaranteed by the Constitution, and asserting a state law claim that is "functionally identical" to a federal claim.

Other examples include *Laswell v. Frey*, 45 F.3d 1011, 1013-14 (6th Cir. 1995) (Court held that petitioner's pre-state-court trial double jeopardy claim was exhausted), *cert. denied*, 116 S. Ct. 199 (1995); *Williams v. Washington*, 59 F.3d 673, 677-78 (7th Cir. 1995) (Petitioner fairly presented her ineffective assistance of counsel claim; in applying this rule courts should "avoid hypertechnicality"), *cert. denied*, 516 U.S. 1179 (1996); *Shute v. Texas*, 117 F.3d 233, 237 (5th

Cir. 1997) (Shute's "double jeopardy claim has been before the Texas Court of Criminal Appeals twice. So, he need not raise it on direct appeal and is not barred from relief by the exhaustion doctrine.").

Application to Holiday. Each of the claims presented by Holiday in this application have been exhausted. Each claim was presented at least once to the state trial court and the CCA.

NO CLAIMS HAVE BEEN PROCEDURALLY DEFAULTED

A. Explanation of Default Principles

As mentioned, a requirement of a state death row petitioner seeking a federal writ of habeas corpus is to show that she has not procedurally defaulted any of the grounds for relief presented. In order for a claim to have been procedurally defaulted, the state court's ruling must *not* be based upon the federal constitution. In other words, the state ruling must be on grounds independent of the federal constitution. In addition, the state court's ruling *must be* based upon an adequate state ground. *See Ford v. Georgia*, 498 U.S. 411, 423 (1991) (discussing what is meant by "adequate" state ground).

For example, *Hill v. Lockhart*, 28 F.3d 832, 835 (8th Cir. 1994), *cert. denied*, 115 S. Ct. 778 (1995), held that ineffective assistance at guilt phase issue was adequately presented to state courts. Even though the issue was not "precisely articulated" in state post-conviction proceedings, the "necessary arguable factual commonality" existed between claims presented in state court and in the federal petition.

Boyd v. Scott, 45 F.3d 876, 880-81 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1964 (1995), held that a petitioner's claim was not defaulted even though state court discussed procedural bar because the state court decision was "interwoven with federal law and did not expressly state that its decision was based on state procedural grounds."

In *Gochicoa v. Johnson*, 118 F.3d 440, 445 (5th Cir. 1997), *cert. denied*, 118 S. Ct. 1063 (1998), the court held that a petitioner's failure to object at trial to the admission of a snitch's out-of-court statements did not prevent the federal habeas court from considering the petitioner's confrontation clause claim where the state courts did not, on direct or collateral review, rely on adequate and independent state procedural bar rules to reject the petitioner's claims. The mere existence of a procedural default, without reliance on it by the state court as an adequate and independent reason for denying the claim, is not enough to foreclose federal review.

"A federal court reviewing a state prisoner's habeas claim must respect a state court's determination that the claim is procedurally barred under state law." *Williams v. Cain,* 125 F.3d 269, 275 (5th Cir. 1997), *cert. denied*, 119 S. Ct. 114 (1998) (*citing Wainwright v. Sykes,* 433 U.S. 72, 90-91, 97 S. Ct. 2497, 2508-09 (1977). "The rule is quite simple: 'a procedural default does not bar consideration of a federal claim on either direct or habeas review unless the last state court rendering a judgment in the case clearly and expressly states that its judgment rests on a state procedural bar.'" *Williams*, 125 F.3d at 275 (*quoting Harris v. Reed,* 489 U.S. 255, 263, 109 S. Ct. 1038, 1043 (1989) (internal quotation marks and citation omitted)).

"In *Coleman v. Thompson,* 501 U.S. 722, 739, 111 S. Ct. 2546, 2559, 115 L.Ed.2d 640 (1991), the Court explained that the 'clear and express' statement requirement applies to cases where the state court's judgment fairly appears to rest primarily upon federal law, or to be interwoven with federal law, and not to cases where there is no reason to question whether the decision was based upon independent and adequate state law grounds." *Williams*, 125 F.3d at 275 n.3.

Of course, if there has been no adjudication on the merits in state court, and the claim is exhausted, then the statute by its terms requires no deference to the state decision. In that situation,

the general rule that federal courts review questions of law *de novo* would apply. See *Liegakos v. Cooke*, 106 F.3d 1381, 1385 (7th Cir. 1997) (Where the state appellate court erroneously applied a state procedural default rule to bar review, there was no adjudication on the merits and § 2254(d) did not apply.)

B. Holiday's Response to the Trial Court's and CCA's Findings That Holiday Procedurally Defaulted Claims.

As mentioned, each of the claims presented by Holiday in this application have been exhausted. Each claim was presented at least once to the state trial court and the CCA.

Sometimes the State (before the state trial court and CCA) will the position that when a death row inmate presents a claim *twice* to the state courts he procedurally defaults that claim. This position is illogical and contradicted by federal law.

What has occurred is that some Texas prosecutors have adopted a tactic of asking state court judges to sign decisions finding *federal* procedural default has occurred, then asking federal judges to defer to state court findings that an inmate's federal claim was defaulted. This is not permitted by federal law. Procedural default is a federal concept, not a state one. It is not appropriate for state courts to declare whether an inmate's federal claim has been procedurally defaulted for federal court purposes.

Here, all claims have been exhausted and none procedurally defaulted. Under each ground for relief, Holiday identifies the point at which the issue was preserved at trial, and later presented on direct appeal or in his state habeas petition. Issues need only be presented once to the state courts. It is not required that an issue presented to the state courts on direct appeal, and later again in the state habeas action.

In *Cone v. Bell*, 129 S.Ct. 1769 (2009), Tennessee similarly argued that federal courts could not review Cone's *Brady* claim because it was presented twice to state courts, and was thus procedurally defaulted. *Cone* held that state court procedural rules cannot automatically deny federal review of federal claims. It is the prerogative of federal court to decide whether a federal claim was appropriately presented to state courts. *Cone*, 556 U.S. 1782 at slip op. 16. "When a state court declines to review the merits of a petitioner's claim on the ground that it has done so already, it creates no bar to federal habeas review." *Cone*, 556 U.S. 1782 at slip op. 17. "When a state court refuses to readjudicate a claim on the ground that it has been previously determined, the court's decision does not indicate that the claim has been procedurally defaulted. To the contrary, it provide strong evidence that the claim has already been given full consideration by the state courts and is thus *ripe* for federal adjudication." *Cone*, 556 U.S. 1782 at slip op. 17-18 (emphasis in original). "A claim is procedurally barred when it has not been fairly presented to the state courts for their initial consideration – not when the claim has been presented more than once." *Id.* at 18.

In *Jimenez v. Quarterman*, 555 U.S. 133 (2009), the Court rejected Texas' arguments that an inmate's federal habeas petition was untimely because it was filed more than one year after the date his state conviction became final, notwithstanding that the state permitted an out-of-time direct appeal. The inmate argued that by permitting additional state review of his conviction by granting out-of-time direct appeal, the one-year AEDPA period did not begin until the completion of his direct appeal. The Justices unanimously agreed.

The Court identified the one-year AEDPA limitations period as "the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review." *Jimenez*, 555 U.S. 113, slip op. at 5 (quoting 28 U.S.C. § 2244(d)(1)(A)). A state

court judgement is final upon the conclusion of direct review or the expiration of the time for seeking such review. *Id.* at 6.

In the event, however, that the Court feels that a claim may not have been exhausted or may have been procedurally defaulted, Holiday respectfully makes two requests. First, he requests a hearing before the Court where his counsel can address the arguments in person and present evidence. Second, he requests that the Court hold the federal petition in abeyance so that state proceedings can be exhausted. The purpose is to prevent losing the opportunity to present all claims in federal court.

Such action is permitted by the Supreme Court. In *Burton v. Stewart*, 549 U.S. 154, slip op. at 6 (2007), the Court explained, "The plurality opinion in *Rose v. Lundy*, 455 U.S. 509, 520-522 (1982), stated that district courts should dismiss 'mixed petitions' -- those with exhausted and unexhausted claims – and that petitioners with such petitions have two options. They may withdraw a mixed petition, exhaust the remaining claims, and return to district court with a fully exhausted petition. We have held that in such circumstances the later filed petition would not be 'second or successive.' *Slack v. McDaniel*, 529 U.S. 473, 485-486 (2000)."

"Alternatively, prisoners filing mixed petitions may proceed with only the exhausted claims, but doing so risks subjecting later petitions that raise new claims to rigorous procedural obstacles." *Burton*, slip op. at 6 (citations omitted).

ASSERTION OF CAUSE AND PREJUDICE

If necessary, Holiday is able to demonstrate cause and prejudice for any procedural default because his ineffective trial and appellate lawyers were responsible for the default and their failures may be imputed to the State because the default occurred at a stage of the proceedings at which Holiday was constitutionally entitled to effective counsel with respect to the defaulted issue.

The "cause and prejudice" test requires that the applicant show cause for and prejudice resulting from the default. *Wainwright v. Sykes,* 433 U.S. 72, 87 (1987); *see also Engle v. Isaac*, 456 U.S. 107, 135 (1982); *Murray v. Carrier,* 477 U.S. 478, 495-96 (1986). Generally, cause exists if an objective factor external to the defense excuses counsel's failure to comply with the state procedural rule. *See generally Coleman v. Thompson,* 501 U.S. 722, 749-750 (1991); *Carrier*, 477 U.S. at 488.

Here, if indeed Holiday's attorneys failed to comply with a state procedural rule, their conduct in and of itself was so egregious that it satisfied the *Strickland* Standard.[3]

ARGUMENT AND AUTHORITIES

Claim 1: The evidence underlying Holiday's conviction for capital murder fails to satisfy the sufficiency standard of *Jackson v. Virginia*, 443 U.S. 307 (1979).

[3] *Edwards v. Carpenter*, 529 U.S. 446, 451 (2000); *Carrier*, 477 U.S. at 496; *e.g., Gray v. Lynn*, 6 F.3d 265, 268-69 (5th Cir. 1993) (failure to object to obvious defect in jury instructions IAC); *Freeman v. Lane*, 962 F.2d 1252, 1257-58 (7th Cir. 1992) (failure to raise 5th Amendment claim on appeal was IAC and cause for default); also *Prou v. United States*, 199 F.3d 37, 48 (1st Cir. 1999) (failure to challenge timely charging document was IAC and cause for default of challenge); *Jackson v. Leonardo*, 162 F.3d 81, 85 (2d Cir. 1998) (appellate counsel's failure to raise obvious double jeopardy claim was IAC); *Mason v. Hanks*, 97 F.3d 887, 891-92 (7th Cir. 1996) (appellate counsel omission of meritorious claim was IAC and cause for default).

***Exhaustion**:* This claim was presented to the CCA as points of error number 1 and 2 in Holiday's direct appeal brief. *See* Appellant's Brf. at 10-29 (see page 23 for reference to *Jackson*). The CCA denied the claim on the merits in its direct opinion in 2006, and explicitly referenced *Jackson v. Virginia*. *See Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *2-11, No. AP-74,446, slip op. at 1-4 (Tex. Crim. App. Feb. 8, 2006).

Introduction. According to Tami Wilkerson "around October, '96-'97" Holiday met her in Conroe, Texas, and approximately six months later they started living together. RR 32, p. 43; RR 32, p. 44. When they started living together, Tami was living with her two children: Tierra Shinea Lynch, who was born on November 5, 1992, and whose father was Lorenzo Merchant, and Jasmine Rockell DuPaul, who was born on February 27, 1995, and whose father was Timothy Lewis. RR 39, pp. 92–93. In August of 1998, they moved to Plantersville in Grimes County, Texas, and lived in a trailer house on property owned by his parents, James and Angela Nickerson. RR 39, p. 94. While living in Plantersville, Holiday's daughter, Justice Holiday, was born on November 18, 1998. RR 32, p. 43.

In September of 1999, they moved to the house in Madison County, Texas—where this offense occurred. RR 39, p. 94. This house was located approximately a mile from the home of Louis and Beverly Mitchell, who were Tami's parents. In March of 2000, Holiday was charged with aggravated sexual assault of his step-daughter, Tierra Shinea Lynch, and a protective order was issued prohibiting him from being around Tami or the children, including his daughter, Justice.

Holiday moved to Grimes County, and, despite the protective order, he and Tami continued to see each other. Tami said she and Holiday saw each other about 10 times from March until September of 2000. RR 32, p. 72. They would meet at Holiday's house, at her house, and at a

motel in Navasota, Texas. RR 32, p. 72. She said that Justice would stay over night with him. RR 32, p. 72. Because they continued to see each other, Louis Mitchell, Tami's father, tried to convince her to notify the necessary authorities regarding the violation of the protective order; she refused to do so. RR 39, p. 45.

In August of 2000, Holiday came to the IHOP where Tami was working to see her, and she called 911; he was arrested for violation of the protective order. RR 32, p. 76. From March until September, 2000, Holiday and Tami talked almost daily on the phone. RR 39, p. 98.

Holiday stayed with Steve Taylor in Grimes County during the two weeks prior to this incident. RR 36, p. 5. Taylor said that during the two week period Holiday and Tami talked on the phone on a daily basis. RR 36, p. 8. He said that one time Holiday told Tami he would kill her if "I can't get my kid", but he told Taylor that he was joking. RR 36, p. 9. During the two week period Tami came to visit Holiday twice. RR 36, p. 10. One night Taylor took Holiday to meet Tami—near her residence—and Holiday got in the trunk of Tami's car; they went to Tami's house. RR 36, p. 24. Holiday talked about "Tami and another man" and said he was "going to kill somebody." RR 36, pp. 11–12.

Robert Lowery said Holiday told him that "he was going to go up there and burn the house down and watch her [Tami] run out." RR 36, pp. 37–38.

On the night of this incident, Holiday asked Robert Lowery and John White to ride around with him, and unbeknownst to them, Holiday drove to Tami's house. RR 36 p. 51. When they arrived, Holiday got out of the car and told them to take his car back to his mother's house in Grimes County; he had a screwdriver, a gas can and a pistol. RR 36, p. 54. That night Tierra told Tami she heard glass break, and Tami looked out the window and saw a figure. She immediately

called her mother, and Ms. Mitchell and her brother, Terry Keller, drove to Tami's house; they had a shotgun with them. RR 33, p. 77. When they arrived, Ms. Mitchell put Tierra and Jasmine in her car, asked Tami if she had called 911—she had not—and started to call 911. When Ms. Mitchell turned around, Holiday was in the house "staring right at" her. RR 33, p. 80. Holiday "jerked" the phone out of her hand and "threw it against the wall and broke it." RR 33, p. 81. Then, Tami—who was standing near Mr. Mitchell—took off running through the bedroom and out the back door. RR 33, p. 83. Tami ran to a neighbor's house and called 911. Holiday pulled out a pistol and held it to his head, and Ms. Mitchell "thought he was going to shoot his self" so she tried to stop him. RR 33, p. 84. Holiday pulled the gun down from his head, and said "I'm going to make Tami pay for what she did to me taking my baby away." RR 33, p. 84. Ms. Mitchell said that Holiday was angry, and she could not calm him down. RR 33, p. 85. When Terry Keller realized that Holiday was in the house, he went to the door. Holiday then grabbed Ms. Mitchell and said "tell Terry to put the gun down or I'm going to kill you." RR 33, p. 85. Terry complied with his instruction and dropped the shotgun. Then, Holiday took Ms. Mitchell outside and ordered her to pick up the shotgun; she picked it up and gave it to Holiday. RR 33, p. 88. Holiday begin pouring the gasoline—he had brought with him—in front of the house and on the cars; he again said he would make "Tami pay." RR 33, p. 89. Jasmine and Tierra were in the car where he had poured gasoline. Holiday tried to light the gasoline, but it "didn't light." RR 33, p. 91. During this time, Justice had been in the house asleep, and Holiday told Terry Keller to get her and bring her outside—which he did. RR 33, p. 92. Holida took possession of the shotgun and the pistol; he shot the pistol "down in the ground" and the shotgun "up into the air"; he said "you see I'm not playing now." RR 33, p. 92. He then took all of them in the house and made them sit on the sofa, and he asked if there was any more gasoline; Ms. Mitchell said she did not know. He then told Ms.

Mitchell to come with him, and they left the house in her car. RR 33, pp. 93–94. They drove to the Mitchell residence and got "two five gallon things of gas" and drove back to Tami's house. When they returned, the children were still there, but Terry Keller was gone. RR 33 p. 95. He had left to find Ms. Mitchell. Ms. Mitchell said:

> We got to the house. He said "bring the gas into the house". Excuse me—so he went into the house and I put the gas down behind—in front of the table on the floor. And he said "pick up one and soak down the recliners". And I said "okay".
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> RR 33, p. 96.

Ms. Mitchell said:

> I come in the door and I sat the gas can here and Raphael over here, high chair. I go by him and start at the first recliner and go around it. And he said soak it good so I poured a whole bunch on it. And I go over to this recliner and pour it. All the time it's upside down. And I go in the room and I pour it around the room, washers and dryers. And I come back out and I go in her bedroom over to the dresser and around her bed and the gas cans are empty.
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> RR 33, p. 118.

She did not pour any gasoline around the couch where the children were sitting. RR 33 p. 119. When she was in the bedroom she heard Tierra call her name, and she turned back toward where the children were sitting. RR 33, pp. 97–98. When she turned around she said "I see Raphael with his foot up on the high chair and he was saying something, and I don't know what he was saying, and he bent down and the fire started." RR 33, p. 98. She said that she did not see a match or a lighter in his hand—when be bent down—but that the fire started "immediately as he reached down." When the fire started she said it "went the way that I poured the gas," and that she could not "get to the girls" so she went out the back door. RR 33, pp. 98–99.

Ms. Mitchell admitted that during the pretrial hearing she did not remember saying anything about "seeing Raphael [Holiday] bend down at the time the fire started." RR 38, p. 169.

Furthermore, in her statement to Ranger Frank Malinak on September 6, 2000, she admitted that she did not mention that Holiday "bent down" at the time the fire started. RR 38, p. 186.

After Ms. Mitchell went out the backdoor she was unable to go back in the house because of the fire. She saw Holiday "standing out by a big mimosa tree ... and he said ' what happened'." RR 33, p. 103. Holiday tried to force her into the car, but she "took off running" because she "didn't know if he had the gun or not." RR 33, p. 103. Holiday then got in Ms. Mitchell's car and drove off.

As Deputy Ivan Linebaugh was approaching the scene in his vehicle Holiday—in Ms. Mitchell's car—rammed into the deputy's vehicle. Deputy Linebaugh proceeded to give chase and Holiday's car "swerved off the road ... like he was trying to run over somebody. I seen another female running off in the woods and he went that way and then come back on the road and that's when I caught back up to him." RR 33, p. 169. The female was Tami Wilkerson.

Deputy Linebaugh engaged in a high-speed pursuit of Holiday in excess of twenty miles into Walker County where the engine of Holiday's car caught fire. Deputy Linebaugh effected an arrest. After Holiday was handcuffed, Deputy Linebaugh searched him and found fourteen bullets and "two cigarette lighters in his pocket" which he did not remove. RR 33, pp. 177–178. Deputy Linebaugh observed burn injuries on Holiday's hands, his fingers, the back of his ear, the back of his neck and "some burning on his arms." RR 33, pp. 199–200.

Holiday was transported to the Madison County Jail, and during the booking process William Babee, one of the jailers, took two cigarette lighters from him. RR 34, pp. 95–96. The cigarette lighters were sent to the lab for analysis. RR 35, p. 85. That same morning, Robert Dunn, chief deputy of the Madison County Sheriff's Department, observed that Holiday had "suffered some burns," and he was taken to the hospital. RR 34, p. 121.

Ivan Wilson, a trace evidence expert, testified that a .38 caliber revolver, the barrel and receiver of a shotgun, and the remains of three victims were collected inside the house that burned down. RR 34, p. 19. The pistol was found in the approximate northwest corner of the house, and the shotgun and victims were found in the approximate northeast corner. RR 34, pp. 19–20.

Jim Swindall, an expert in determining the presence of liquid accelerants, said the following, to wit: (1) he found the "presence of gasoline" on the shoes Holiday was wearing (RR 35, p. 122); (2) he found no presence of gasoline on Holiday's pants or his shirt (RR 35, p. 123): (3) he found the presence of gasoline in the debris collected from the laundry room (RR 35, p. 126); (4) he found the presence of gasoline on the debris collected from the kitchen floor (RR 35, p. 127); (5) the "clothing from the body" found in the living room and the fire debris under the "couch where the victims were found" were negative for the presence of gasoline (RR 35, pp. 127–128); (6) the night shirt and pants Beverly Mitchell was wearing were negative for the presence of gasoline (RR 35, pp. 128–129); and (7) the two cigarette lighters taken from Holiday at the jail were negative for the presence of gasoline (RR 35, p. 133).

Dr. Janie McLain, a forensic pathologist, was shown the photographs of Holiday's burns he sustained in the fire. She said she would categorize his burns as "[P]robably looking at mainly second and some third degree burn." RR 35, p. 167. Dr. McLain opined that Holiday's burns were on the lower part of the face—not the upper—"around the nose and the lips and right side of cheek." RR 35, p. 172. She said that Holiday's burns were consistent with a situation where a person "reached down with their right arm and bent down and that the accelerate ignited." RR 35, pp. 173, 175.

Louis Mitchell testified that Tami's house had three air conditioner units—two which were approximately thirty-two inches off the floor and one about four feet off the floor. RR 33, pp.

151–152. The house also had a Dearborn heater which used propane and had a pilot flame—which he claimed was not on the night of the fire. RR 33, pp. 152–153. There was also a gas stove in the house which had a pilot flame that "should have been" on. RR 33, p. 153. Also, the refrigerator, water heater, and washer and dryer—located in the house—were electric. RR 33, p. 153.

Dr. John DeHann, the State's fire expert, said the vapors from gasoline are heavier than air, thus they "sink to the floor and basically fill the room up from the floor." RR 36, p. 169. He said that gasoline vapors have to mix with air in a process called diffusion, and a flammability range is established by the process. RR 36, p. 174. He said that gasoline vapors have a very narrow flammability range. RR 36, pp. 175–176. In order for there to be ignition, Dr. DeHann said that there must be the—

> right concentration of vapor and air ... a suitable ignition source. That's one with enough energy to trigger the reaction. Then we have to have contact between that ignition source and that vapor air mixture while the vapor is in its correct concentration range. And that contact has to be maintained long enough for there to be a reaction started. If I can't satisfy all four of those conditions then I wouldn't get ignition.
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> RR 36, p. 177.

There can be ignition by "some other source in that room that is not in the immediate vicinity of where the gasoline is poured" if there is "time for the vapors" of a sufficient concentration to move either horizontally or upward. RR 36, p. 179. As "possible ignition sources," Dr. DeHann evaluated the water heater, the room heater, the refrigerator, the stove and air conditioner. RR 36, p. 181. He excluded them as potential ignition sources. RR 36, p. 182–183. He eliminated the hot water because it was in a separate room, and it would take the vapors too much time to reach it. RR 36, p. 183. He eliminated the stove unit in the northwest corner of the kitchen because the pilot flame was in a closed compartment, was too high from the floor, and was too far from the areas

where the gasoline was poured. RR 36, pp. 183–184. He eliminated the Dearborn heater on the west wall—which was near where Holiday was standing—because Louis Mitchell said the pilot flame was turned off. RR 36, p. 187. He eliminated the refrigerator because there was not enough time for the vapors to get into the concealed space where the ignition source was located. RR 36, p. 189. He eliminated the air conditioner because the glass window located above the air conditioner was melted, and there was no evidence of an explosion. RR 36, pp. 191–193. He said that the "thirty seconds or so" that it took Ms. Mitchell to pour the gasoline in the house would not be "enough time for the vapors to spread" and be of "high enough concentration" with any of the ignition sources in the house. He said that if the time-frame was doubled or tripled his opinion would be no different. RR 36, p. 195.

Judd Clayton—the fire expert for Holiday- said the Dearborn heater was the "number one candidate" as the source of the fire. RR 39, p. 96. He said that during April of 2000 there were two days that approached freezing and that there was no "way that you can determine from the physical condition" of the heater whether its pilot flame was "on or off at the time of the fire." RR 39, p. 97. If the pilot was off, then it would be eliminated as a source. The pilot on the stove was the second most likely source of ignition, followed by the air conditioner, the refrigerator, and lastly the water heater. RR 39, p. 106. Regarding the distribution of the gasoline vapors, he said what is important "is how the vapors that emanate from that liquid [the gasoline] mix with the air." RR 39, p. 107. He said that in a small area—like the house—the "majority of the vapors will be very rich, that is in excess of the flammable liquids." RR 39, p. 108. The air movement caused by the air conditioner and the ceiling fan will "stir those vapors up." RR 39, p. 108. According to him, Ms. Mitchell's movement would stir the vapors, and "you reach an area where you can't predict where you're going to have ignitable mixtures." RR 39, p. 108. He said that the amount of time it

"takes for gas vapors to travel from the area where it is poured to the possible source of ignition" cannot be accurately predicted. RR 39, p. 109. He was "very confident that the air conditioner was going to have a tendency to force the gas vapors to the outer extremity of the walls." RR 39, p. 130. When asked if he found any physical evidence that indicated an intentional source of ignition he said he saw "no indication of evidence that was recovered at that scene that would have provided a source of ignition." RR 39, p. 116. He said there was "ample physical evidence of accidental sources of ignition." RR 39, p. 116. As to the movement of the gasoline vapors, he said:

> I can say that at some point in time an ignitable mixture would envelope the area surrounding the gas range. I don't know at what point in time. It may be in five seconds, it may be in a minute and-a-half. But that air will be circulating and sooner or later the proper mixture is going to happen because that is a very closed, confined area.
>
> RR 39, p. 133.

He said the following, to-wit:

> I can't tell you nor do I know of anyone who is being up front with you as to which of those possible ignition sources did, in fact, ignite that fire. Because there were vapors in and about that room distributed by the mechanisms we talked about that could easily have been at the ignitable range and easily have penetrated cracks and crevices necessary to get to heat sources and set that fire off.
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> RR 39, p. 172.

As to whether the lighters—found on Holiday—could have been a possible source of ignition, Mr. Clayton said that he did not see any "sooting or discoloration that would indicate" they were near any ignitable liquids. He said the lighters were "perhaps a remote possibility" as an ignition source. He said that he could not foresee "somebody using one of these lighters to light a fire and then stick it back in their pocket." RR 39, p. 186.

Analysis. The standard in 2006 when the CCA decided Holiday's appeal for determining legal sufficiency for federal due process purposes is *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Jackson* directs the reviewing court to view "the evidence in the light most favorable to the prosecution," and if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" then the evidence is legally sufficient. This *Jackson* standard of review gives full play to the responsibility of the trier of fact to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. In reviewing the evidence for legal sufficiency, the court must presume the trier of fact resolved any conflicting inferences in favor of the prosecution and must defer to that resolution.

The Texas capital murder of a child statute provides that an offender who intentionally or knowingly murders an individual under six years of age shall bear the risk of a capital murder conviction. *See* TEX. PEN. C. ANN. SECTION 19.03(a)(8). Additionally, the capital murder statute provides that an offender who intentionally or knowingly murders more than one person in the same criminal transaction shall bear the risk of a capital murder conviction. *See* TEX. PEN. C. ANN. SECTION 19.03(a)(7).

Intent to kill is a question of fact to be determined by the jury. *Robles v. State*, 664 S.W.2d 91(Tex. Crim. App.1984). The fact-finder may use common sense and apply common knowledge, observation, and experience gained in the ordinary affairs of life when giving effect to the inferences that may reasonably be drawn from the evidence and may infer knowledge or intent from the acts, words, and conduct of the accused. *See Manrique v. State*, 994 S.W.2d 640, 649 (Tex. Crim. App. 1999).

The CCA's decision was unreasonable, thereby overcoming AEDPA 2254(d)(2) because the CCA unreasonably applied the facts. The problem in this case — which the CCA never seems to have recognized — is lack of proof of one of the elements of the State's elements for conviction: causation. Whatever else one may think of Holiday, no rational trier of fact could have found the essential element, *i.e.*, intentional or knowing, beyond a reasonable doubt to support these capital murder convictions. There was no evidence that Holiday intentionally or knowingly started the fire, or that he *actually* started the fire. The eyewitness testimony of Ms. Mitchell only established—if one believes her testimony at trial and not her testimony at pretrial—that Holiday bent down and the fire started. Though she said she was looking at Holiday when the fire started, she never testified that she saw him actually set the fire. For the evidence to be legally sufficient to support these convictions, it must establish that a rational jury could have found beyond a reasonable doubt that Holiday either intentionally or knowingly started the fire, *and actually* started a fire, that caused the death of the three children. No rational jury could so find. If the fire was accidentally ignited, Holiday was not guilty of the capital murders. To be guilty of capital murder, Holiday had to either intentionally or knowingly set the fire. No evidence supports that he did. Holiday directed Ms. Mitchell to pour the gasoline in the house, and at his direction, it was poured away from the children. Holiday's lighters revealed no presence of gasoline, sooting, or discoloration. If Holiday had started the fire with one of his lighters, it would have been reasonable to infer that there should have been some physical evidence to indicate such; there was none. An accidental ignition of the fire is a more reasonable inference because Holiday was burned, he dropped his pistol, he left the shotgun in the house, and he was not near an exit when the fire started. There were at least five potential sources of ignition in the house. Judd Clayton found no

evidence which indicated that the fire was started intentionally. He said that the time it takes vapors to move through the house cannot be accurately predicted.

Viewing "the evidence in the light most favorable to the prosecution" no rational jury could have found beyond a reasonable doubt that Holiday started the fire.

The evidence was legally insufficient to support Holiday convictions for capital murder.

Claim 2: The State violated the Sixth Amendment fair jury trial clause and *Wainwright v. Witt*, 469 U.S. 412 (1985), by granting the State's request to remove qualified Juror Servaine Sessions.

Exhaustion: This claim was presented to the trial court which denied relief. RR 31:13. It was then presented to CCA as point of error number 3 in direct appeal brief. *See* Appellant's Brf. at 30-35. The CCA denied relief on the merits, and explicitly referred to the federal claim. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *15-20, No. AP-74,446, slip op. at 5-6 (Tex. Crim. App. Feb. 8, 2006). The CCA did not hold this claim to be procedurally defaulted.

Introduction. On May 21, 2002, after the jury had been selected, but prior to it being sworn, Servaine Sessions—who was selected as a juror—requested to speak to the trial judge. After conversing with Ms. Sessions, the court conducted a hearing relating to her jury service. During the brief hearing, the following entire exchange occurred between the trial judge and Ms. Sessions, to-wit:

> Q. And we have met on a couple of occasions because of the fact that you've been on the jury panel and then we had your individual interview. And as it turns out you are now on the final jury to sit as a trial juror in the case against Raphael Deon holiday; am I correct?
>
> A. Yes, sir.
>
> Q. And, of course, we talked to some ninety or so. I don't remember specifically anything you said at that time that would indicate a possible problem dealing with jury service in this matter, but upon my arrival -- I'm saying this for the

record that the court reporter is making -- on my arrival this morning you indicated to me that you needed to talk to me about your jury service; am I correct?

A. Yes, sir.

Q. And I have told the lawyers that we had a very brief conversation and I didn't go into what the problem was, but you indicated that you would like to talk; am I correct?

A. That's correct.

Q. Okay. I don't know anything wrong at this point with you. I may not be able to actually make any final decisions on what you're about to say. Chances are, given the circumstances, we are this far along in the trial, you will be required to continue your service. But I just want the lawyers to know what is in your heart and in your mind because they are entitled to know that. So you may go ahead and just tell us what it is that you think may be a problem for you.

A. I thought for sure when I was here that I could -- after listening to the trial and receiving all the information I could decide one way or the other on -- after the guilty phase if I had to do the death penalty phase. And I been praying about it. And that's just the only thing, I don't know. I'm not saying I can't serve and do my civil duty, I'm just not sure even after hearing the information if I could say one way or the other yes.

Q. What do you mean yes?

A. On the death penalty. That was the thing. I thought if he was found guilty and then I didn't know I was going to have to do the sentencing phase or if the Judge was going to do that. And, if so, after listening to those two questions, if it's going to be considered the death penalty, that's what I was afraid of. I don't know one way or the other. I thought yes, I could say if it was put to me yes, this person deserves the death penalty, and now I'm not -- just not certain on that.

Q. You were certain at the time but since then you have become less certain? Is that what you're telling us?

A. Yes. I'm not totally not certain or totally certain. It's just that I have had some confusing thoughts on it.

Q. Okay.

A. I been praying about it and seem like everything I read -- it wasn't anything dealing with the court, it's just that I read my Bible daily and seem like every page I went to it has something to do with humanitary (sic), it has something

to do with Commandments. And I didn't know if that was God, God's way of speaking to me on what -- on what I was about to do or what. And I just wanted to be honest and up front and let them know, I don't know one way or the other. If you can understand that? And this just didn't happen when she told me -- when the County Clerk called me I was like oh, God. So I prayed that night. For two nights I didn't sleep.

Q. I know it's heavy on your heart and it's a heavy responsibility. You have made us all aware of the situation.

A. That's all I wanted to do was make you aware of it.

RR 30 pp. 9–12.

On May 23, 2002, the trial court heard the State's Motion to Excuse Ms. Sessions from the jury. CR Supp. 2, p. 80. The trial court found that Ms. Sessions was "not qualified to serve" because "her religious views opposing the death penalty are of such a nature that they would, in my opinion, prevent or impair her performance of her duties as a juror and in accordance with the jury's instructions and her oath." The State's challenge for cause was granted over Holiday's objection. RR 31, p. 13.

Analysis. The views of Ms. Sessions regarding the death penalty did not prevent or substantially impair the performance of her duties in accordance with her instructions and her oath. The trial court violated *Wainwright v. Witt,* 469 U.S. 412, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985) when it granted the state's challenge for cause over Holiday's objection. Ms. Sessions was qualified to serve on a death penalty jury, and her removal was reversible error.

In a capital prosecution, a prospective juror is not subject to a challenge for cause merely because she is opposed to or has conscientious scruples regarding the death penalty. *Witherspoon v. Illinois*, 391 U.S. 510, 515, 88 S.Ct. 1770, 20 L. Ed.2d 776 (1968). In fact, when a prospective juror only voices "general objections to the death penalty or expressed conscientious or religious scruples against its infliction" the defendant's right to an impartial jury under the 6th and 14th

amendments in a capital murder case prohibits the exclusion of the prospective juror. *Id*., at 1776. But, a prospective juror—who has conscientious scruples about the death penalty—may be disqualified if her views would "prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and her oath." *Wainwright v. Witt,* supra at 425. Accordingly, the exclusion of prospective jurors must be limited to those who were "irrevocably committed ... to vote against the penalty of death regardless of the facts and circumstances." Ms. Sessions was not "irrevocably committed" to vote against the penalty of death. In fact, she was far from it.

If a prospective juror is barred from jury service because of his or her view about capital punishment on "any broader basis" than inability to follow the law or abide by their oaths, the death sentence cannot be carried out. *Witherspoon, supra*. The improper exclusion of a single venire-person under *Witt* is reversible error. *See Gray v. Mississippi*, 481 U.S. 648, 666 (1987).

The CCA unreasonably applied the facts, thereby permitting Holiday to overcome the AEDPA 2254(d)(2) barrier to relief. First, the CCA noted, the State conceded that she said nothing to disqualify her for cause. Sessions was actually selected. Second, the CCA relied upon the wrong factors, finding her dismissal proper because she was “distressed,” she was uncertain what her answer to the special issues might be as this point, she had not slept well for two nights, and she prayed and read her Bible. All of this, to the CCA, amounted to juror uncertainty about what she would do when the time came, which in the CCA’s mind was sufficient to justify excusing a perfectly qualified juror. Consequently, according to the CCA’s view, excusing the juror was perfectly within the orbit of a trial judge’s discretion. What the CCA failed to do was to apply the trial judge’s permitted discretion within the analytical federal constitutional created by the Supreme Court, thereby improperly applying existing Supreme Court jurisprudence. Stunningly,

the CCA even recognized the trial judge's failure to apply the required federal constitutional standard: "[T]he trial court did not utilize the key language from *Wainwright* when questioning Sessions, ..." *Holiday*, slip op. at 6; LEXIS at 20. And since the trial judge did not comply with *Wainwright*, the CCA decided not to do so either. This utterly the wrong decision.

Prospective jurors may not be excused merely because their beliefs about the death penalty might influence the decision-making process. The fact that a prospective juror will be influenced by her feelings regarding the death penalty does not, in and of itself, make her challengeable for cause, nor does it constitute substantial impairment of juror's performance of her duties. Ms. Sessions never suggested that she would "consciously distort" her answers to the special issues in order to prevent the imposition of the death penalty. Ms. Sessions never said she was opposed to nor had conscientious scruples about the death penalty; she only said she had "some confusing thoughts." According to *Adams v. Texas*, 100 S.Ct. 2521, 448 U.S. 38 (U.S. Tex. 1980), "conflicting feelings" about the death penalty do not disqualify a person from jury service "who is able to put those feelings aside and impartially serve the simple fact-finding function called for under the special issues."

In *Stevens v. Horn*, 319 F.Supp.2d 592 (W.D.Pa. 2004), *aff'd in part, remanded in part*, 288

Fed.Appx. 4 (3rd Cir. July 25, 2008), Noting that petitioner's claim challenged the state court's factual determination and that the state court denied petitioner's claim on the merits, the district court held, pursuant to §2254(d)(2), that the state court based its decision on an unreasonable determination of the facts in light of the evidence presented at trial. During *voir dire*, the court asked "Do you have an opinion about the death penalty which would prevent you from following the Court's instructions as to what penalty should be imposed?" The veniremember responded, "I

don't believe in the death penalty." Immediately, the prosecutor challenged the veniremember for cause, and the trial judge excused the veniremember. The district court determined that a review of the state court record revealed an unreasonable determination of the facts because the prosecutor did not ask any additional questions to determine whether the veniremember could set aside her opposition and apply the law and the court's instructions as required under *Witherspoon v. Illinois*, 391 U.S. 510 (1968) and *Wainwright v. Witt*, 460 U.S. 412 (1985). The district court granted the death-sentenced petitioner a new sentencing hearing.

A new trial for Holiday is required.

Claim 3: **The State violated Holiday's Sixth Amendment right to confrontation by allowing Nurse Jane Riley to relate damaging banned testimonial hearsay by Tierra Lynch in violation of *Crawford v. Washington*, 541 U.S. 36 (2004).**

Claim 4: **The State violated the Fifth and Fourteenth Amendment due process clause provisions by allowing Nurse Jane Riley to relate damaging banned testimonial hearsay by Tierra Lynch.**

Exhaustion. Holiday timely presented these federal claims to the trial court which overruled. RR 32, pp. 183–189. He carried the claims to the CCA as point of error number 4 in his direct appeal brief. *See* Appellant's Brf. at 35-39 (see pgs. 37, 39 for constitutional references). The CCA denied the claims on their merits, without finding procedural default. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *20-25, No. AP-74,446, slip op. at 6-7 (Tex. Crim. App. Feb. 8, 2006).

State Disposition. The CCA disposed of the *Crawford* claim by finding that whether there was a violation or not, there was no harm to Holiday, because the nurse's testimony repeated without elaboration what came from other sources independently. Once again, the CCA failed to apply the correct analysis. When a state court evaluates a federal constitutional claim, it must apply

the federal constitutional claim harm analysis under *Chapman v. California,* 386 U.S. 18 (1967), which holds that when an appellant establishes that the lower court proceedings contained error impacting his or her federal constitutional rights, the error requires reversal unless the prosecution can establish it was harmless beyond a reasonable doubt. The CCA conducted no such analysis. Failing to do so was an unreasonable application of Supreme Court law, permitting relief through AEDPA 2254(d)(2). *See, e.g., Eddleman v. McKee*, 471 F.3d 576, 588 (6th Cir.2006) ("We hold that, when a state court has found an error to be harmless, we should ask on collateral review whether the state court's harmless-error decision was contrary to, or an unreasonable application of, the clearly established federal rule that a trial error is harmless only if it is harmless beyond a reasonable doubt. Applying this standard of review to the case at hand, we hold that the Michigan Court of Appeal's harm-less error determination was an unreasonable application of the Supreme Court's decisions in *Chapman v. California* and *Arizona v. Fulminante*.") (citations omitted).

Analysis. In light of the CCA's presumption that there was *Chapman* error, this Court should find that that indeed occurred, and focus only on the reasonableness of the CCA's harm analysis.

The out-of-court statements by Tierra Lynch were testimonial in nature and, therefore, admitted in violation of the confrontation clause. Further the statements lacked sufficient indicia of reliability and were not admissible as any exception to the hearsay rule.

Nurse Riley testified that her job was to interview children to determine if they had been sexually abused. She interviewed Tierra Lynch in March of 2000. Over numerous objections, she testified about the questions she propounded Tierra and the answers she heard. She asked Tierra if she knew why there was blood in her panties. Tierra said no. She asked Tierra if something had happened to her and she responded "yes." She asked if anyone was with her when something

happened and she said her "Step-daddy" (Appellant). She asked if someone told her not tell anyone and she said "yes, my step-daddy" (Appellant). Dr. Fred Fason, a psychiatrist with extensive training in the area of interviewing child victims of sexual abuse, indicated that the interview could not be considered reliable because it was not recorded, and that it was the product of suggestive and leading questions. Dr. Fason reviewed a videotaped statement taken of Tierra Lynch during which she made no statement consistent with that taken by Nurse Riley. Dr. Fason testified that the tape showed a forensically reliable interview. RR 32, pp. 155–181.

The interview of Tierra Lynch occurred three days after she had been examined by Dr. Ali who had determined that she had been sexually assaulted. Nurse Riley had conducted many such interviews and prepared rape kits in other cases but did not do so in this case because of the three-day lapse between the alleged assault and the interview. She works with a forensic interviewer. She interviewed Tierra Lynch as result of a referral from the Madisonville Police Department or Child Protective Services.

These out-of-court statements by Tierra Lynch are clearly testimonial. *Crawford v. Washington*, provides guidance as to the scope of the confrontation clause protections. "An accuser who makes a formal statement to government officers bears testimony in a sense that a person who makes a casual remark to an acquaintance does not." The Court in *Crawford* held that in such circumstances the confrontation clause required the exclusion of such testimony despite the finding of reliability or an exception to the hearsay rule.

In *Crawford*, the Court held that the admission of the defendant's wife's tape recorded statement at his trial for stabbing a man who allegedly tried to rape her violated the Confrontation Clause. Out of court statements by witnesses that are testimonial are barred by the Confrontation Clause, unless witnesses are unavailable and defendants had prior opportunity to cross-examine

witnesses, regardless of whether such statements are deemed reliable. The Court said that where "testimonial statements are at issue, the only indicum of reliability sufficient to satisfy constitutional demands is the one the Constitution actually prescribes: confrontation." 541 U.S. at 68-69; *see also Melendez-Diaz v. Massachusetts*, 129 S.Ct. 2527 (2009) (The Court held (5-4) that sworn affidavits reporting results of forensic testing indicating that material seized from a defendant was cocaine were "testimonial," such that the affiants were witnesses the defendant was entitled to confront under the Sixth Amendment and *Crawford*").

In this case Tierra's statement was in response to the questioning of the government's sexual assault nurse whose purpose was to determine if the child was the victim of sexual assault. The nurse's testimony that such was merely for the purpose of diagnosis and treatment is belied by the circumstances. Dr. Ali had already determined the medical diagnosis. Tierra was referred to the nurse by the police investigating the criminal allegation. The nurse worked with a forensic interviewer whose job was to obtain a forensic statement that could be used in court. The nurse's questions about who she was with and whether or not the person asked her to not tell anyone is strongly indicative of the investigative purpose of her interview.

Tierra was taken to the sexual assault nurse some three days after a physician had examined her and concluded she had been sexually assaulted. As such, Holiday's objection on the grounds of denial of his right of cross-examination and confrontation should have been sustained.

If such statements were not testimonial, they lacked sufficient indicia of reliability and were not properly excepted from exclusion under the hearsay rule.

Here the statement of Tierra to the nurse was not recorded. The statement consisted of very little more than affirmative answers to leading questions. The statement was inconsistent with the recorded statement taken by the forensic interviewer. Dr. Fason, a noted psychiatrist, testified

extensively and in detail as the unreliability of the statement taken by Nurse Riley from Tierra Lynch.

The State expressed its view that the statement of Tierra Lynch to Nurse Riley was admissible under the exception of a statement made for the purpose of medical treatment and diagnosis. RR 32, p. 184. The evidence does not support that exception. Nurse Riley testified that she asked the questions to diagnose and treat the child but there was no evidence that the child was seeking treatment. She had been to a physician several days before. The child was then referred to Scotty's House by law enforcement where the child was then interviewed by Nurse Riley and later by Nick Cantu, the forensic interviewer. There was no evidence that the child gave the answers to Nurse Riley in an attempt to get treatment or to be diagnosed.

The record demonstrates that Tierra's *Crawford*-barred testimony was harmful and federal courts reverse in such instances. For example, in *Vasquez v. Jones*, 496 F.3d 564 (6th Cir. 2007) (amended op.). The Sixth Circuit granted relief on petitioner's Confrontation Clause claim in this Michigan homicide case. The decedent was an innocent bystander killed by a 9 mm. handgun during a shootout at a block party, and while petitioner admitted grabbing a gun and firing it in self defense, that gun was a .22 rifle. The state's only unimpeached evidence that petitioner actually fired a handgun came from witness Brown, who testified at a preliminary hearing but absconded before he could appear at petitioner's trial. The trial court declared Brown unavailable, allowed the prosecution to introduce his preliminary hearing testimony, and refused defense counsel's request to impeach him through introduction of his prior convictions. Relying on *Delaware v. Van Arsdall*, 475 U.S. 673 (1986), the Sixth Circuit concluded that the state court's refusal to permit use of Brown's prior convictions for impeachment on the grounds that a state statute prohibited it under

the circumstances, and that petitioner had an adequate opportunity to cross-examine Brown at the preliminary hearing (where the priors were not used) was not harmless under *Brecht*. *See* 496 F.3d at 575. As to the *Van Arsdall* factors, the court found that all five favored a finding that the error was not harmless: (1) Brown's testimony was important in that it provided the only unimpeached evidence that petitioner possessed and fired a handgun during the shootout; (2) the testimony was not cumulative; (3) no physical evidence corroborated Brown's story, and no other evidence tipped the balance in favor of Brown's, rather than petitioner's, version; (4) the trial court "permitted little *effective* cross-examination of . . . Brown's preliminary examination testimony," 496 F.3d at 577; *see also id*. ("we doubt that the opportunity to question a witness at a preliminary examination hearing satisfies the pre-*Crawford* understanding of the Confrontation Clause's guarantee of 'an opportunity for effective cross-examination,'" (citation omitted)); and (5) the state's case "was not terribly strong without . . . Brown's testimony." 496 F.3d at 577. In reaching these conclusions, the court also remarked that "a federal habeas court need not defer to the state-court factfinder's credibility determinations when reviewing an error for harmlessness." 496 F.3d at 578 n.12.

A similar reversal occurred in *Cooper v. McGrath*, 314 F. Supp.2d 967 (N.D. Cal. 2004). Relying on *Crawford v. Washington*, 541 U.S. 36 (2004), the district court granted relief, determining that the admission of a co-defendant's statement implicating petitioner in violation of the Confrontation Clause was not harmless. The district court held the admission of the statement "had a substantial and injurious effect on the jury's verdict against [petitioner]" because it "was the *only* evidence that put [petitioner] at the murder scene." 314 F. Supp.2d at 988 (emphasis in original). The court noted that although the state redacted the statement to omit the shooter's name, the statement identified petitioner by name as being present at the scene, pulling down the victim's

pants, and driving the alleged assailants around. The court further observed that "[a]lthough the sufficiency of the evidence is not the standard for determining whether an error resulted in prejudice, the fact that there was insufficient evidence without the improperly admitted evidence shows how powerfully it affected the jury's verdict." 314 F. Supp.2d at 989.

A new trial is required.

Claim 5: **The State violated Holiday's right to adequate notice of the offense and due process of law provided by the Fifth and Fourteenth Amendment, by refusing to quash the indictment for failure (1) to notify of the manner and means that Holiday was alleged to have ignited the fire in an arson case, and (2) by failing to allege whether the State sought to impose liability by means of conspiracy or parties law.**

Claim 6: **The State violated Holiday's Sixth Amendment right to be informed of the nature and cause of the accusation against him by refusing to quash the indictment for failure (1) to notify of the manner and means that Holiday was alleged to have ignited the fire in an arson case, and (2) by failing to allege whether the State sought to impose liability by means of conspiracy or parties law.**

Exhaustion. These claims were timely presented to the trial court which denied relief. RR 2:5-8, CR 162, CR 9, 1; CR vol. 2 at 162 (motion to quash indictment); Supp. CR 2 (cause 10,425) 2:18-21; Supp. CR 2 (cause 10,427) 2:18-21; also in Supp. CR 2: 2:18-2:21 (cause 10,425); Supp. CR 3: 2:18-2:21 (cause 10, 427)). (Note: In our review of the record, we are not completely certain that the trial attorney advocated that the indictment was required to have a parties allegation or a jury charge on parties was required in the face of the indictment. But we think the trial lawyer's arguments and motions were broad enough to preserve the claim.)

They were presented to CCA as point of error number 5 in Holiday's direct appeal brief. *See* Appellant's Brf. at 40-44 (see page 44 for constitutional references). The CCA denied the

claims. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *25-27, No. AP-74,446, slip op. at 7-8 (Tex. Crim. App. Feb. 8, 2006).

The CCA ruled that the portion of Holiday's argument asserting that the party liability must be charged by indictment was procedurally defaulted under state law. The CCA further held, on the merits of Holiday's challenge to the sufficiency of the indictments, that his indictments satisfied the requirements of state law. The CCA did not address his federal claims, permitting *de novo* federal review. *See ibid; see* discussion *infra* at 67.

Discussion. The indictment fails to allege any act or omission committed by Holiday or for which Holiday would be criminally responsible. Holiday could not determine whether he was being accused of igniting a fire that caused the deaths, or of causing someone else to pour gasoline which ignited accidentally, with intent to cause the deaths, or of failing to protect the children from an accidental fire, or of pouring gasoline on the children and igniting the fire. Each of these theories were proposed in the discovery and allowed by the indictment. Holiday did not procedurally default any of these points, which he made in the trial court.

Here, the indictment alleges less than "starting a fire." The indictment in each cause number merely alleged that Holiday "caused the death of an individual . . . by burning said individual with fire." Holiday filed a motion to quash contending that he did not receive adequate notice, that the indictment failed to allege the manner and means of the offense and that Holiday had been unable to discern the State's factual and legal theory of the case despite extensive investigation and attempts at discovery. The trial court denied the motion to quash in each cause. RR 2, pp. 5–8. Holiday re-urged the motions to quash after both sides had rested and closed. RR 41, p. 20.

The indictment allowed for many possible factual scenarios to result in conviction. The charges to the jury, despite objections by Holiday, provided no additional guidance because the application paragraph merely tracked the indictment. The evidence and the record revealed many possible scenarios that may have resulted in the death of the three children. One such possible scenario — by Holiday at trial — is that Beverly Mitchell poured gasoline throughout the house, which was inadvertently ignited by a pilot light. Another scenario is that Holiday poured gasoline in the house and ignited the gasoline with a lighter. Another scenario is that after the fire started, or despite the risk of a fire starting, Holiday by omission failed to remove the children from the house to safety.

Freed from a constitutionally specific indictment, the State was able to advance several theories of guilt based upon a theory that Holiday was criminally responsible for the conduct of Beverly Mitchell. As mentioned, Ms. Mitchell is the person who testified that she poured gasoline throughout the house while the three victims sat on the sofa. The indictment alleged no facts which would give rise to a conviction based on section 7.02 of the Texas Penal Code (parties theory).

Analysis of Supreme Court Jurisprudence in Effect in 2006. Holiday has a Sixth Amendment right "to be informed of the nature and cause of the accusation . . ." *Spinkellink v. Wainwright*, 578 F.2d 582, 609 n. 32 (5th Cir.1978), *cert. denied*, 440 U.S. 976 (1979). "[N]otice of a specific charge, and a chance to be heard in a trial of the issues raised by that charge . . . are among the constitutional rights of every accused in a criminal proceeding in all courts, state or federal." *Cole v. Arkansas,* 333 U.S. 196, 201, 68 S. Ct. 514 (1948); *Dunn v. United States*, 442 U.S. 100, 106 (1979) ("To uphold a conviction on a charge that was neither alleged in an indictment nor presented to a jury offends the most basic notions of due process."); *Eaton v. City of Tulsa,* 415 U.S. 697, 698-99 (1974) (per curiam) ("[T]he question is not upon what evidence the

trial judge could find petitioner guilty but upon what evidence the trial judge did find petitioner guilty," and constitutional due process is denied when an appellate court sustains a trial court "by treating the conviction as a conviction upon a charge not made."); *In re Ruffalo,* 390 U.S. 544 (1968); *DeJonge v. Oregon*, 299 U.S. 353, 362 (1937); *Cola v. Reardon,* 787 F.2d 681 (1st Cir. 1986). The Sixth Amendment requires that an information state the elements of an offense charged with sufficient clarity to apprise a defendant of what he must be prepared to defend against. *Russell v. United States*, 369 U.S. 749, 763-64 (1962).

The seminal decision of *Cole v. Arkansas* set the principle that due process required that the charging document provide notice of the charges against which the citizen must defend himself. In *Cole*, the state court information (the charging document) charged Cole with violation of a certain statute, the trial judge believed that the information charged violation of the same statute, and the judge informed the jurors that the information charged Cole with violation of that certain statute. Yet the jury instructions authorized conviction under a different statute, and the court's judgment convicted Cole of that different statute, and the state appellate court found that Cole was guilty of violating a different statute. *See* 333 U.S. at 199-200. The Supreme Court held that such a conviction is barred by the due process clause of the Constitution because fundamental to the concept of due process is that the charging document provide notice to the citizen of precisely that violation of law against which he must defend. "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Id.* at 201.

Where the statutory definition of an offense employs generic terms it is not sufficient for the indictment merely to copy the statute. Rather, the indictment must, as the Supreme Court says, "descend to particulars" of the wrongful actions of the person charged. *Russell v. United* States,

369 U.S. 749, 765 (1962); *see also Hamling v. United States*, 418 U.S. 87, 117-18 (1974) ("[t]he language of the statute may be used in the general description of an offence, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offence, coming under the general description, with which he is charged."); *Miller v. Commonwealth*, 77 S.W.3d 566 (Ky. 2002) (reversing where victim described one rape and estimated the number of times that conduct was repeated, but did not offer any additional information differentiating the first instances from the other 224 instances for which Miller was convicted); *accord Valentine v. Konteh*, 395 F.3d 626 (6th Cir. 2005) (granting habeas relief for vague indictment for 20 undifferentiated counts each of rape of a minor); *Parks v. Hargett,* No. 98-7068, 1999 U.S. App. Lexis 5133, 1999 WL 157431 (10th Cir. Mar. 23, 1999) (finding indictment insufficient but affirming because notice provided by another record source).

These principles echo in Fifth Circuit precedent. In *Plunkett v. Estelle*, the Fifth Circuit rejected the reasoning of the Court of Criminal Appeals, much as Cyphers asks the Court to reject the Tyler Court of Appeals's. Plunkett was convicted of the murder of his girlfriend's two-year old child. The indictment charged that he intentionally or knowingly caused the death in violation of section 19.02(a)(1) of the Texas Penal Code. Plunkett prepared his defense against that allegation. During closing argument, however, the prosecutor argued that he was guilty of intending to cause a different crime: serious bodily injury and committed an act clearly dangerous to human life that caused the death, which was a violation of section 19.02(a)(2). The jury charge, at different points, discussed both the section 19.02(a)(1) and the (a)(2) language. The Fifth Circuit concluded that the jury charge unconstitutionally permitted jurors to convict him of two offenses, one of which was not charged in the indictment, violating the Sixth Amendment. 709 F.2d 1004, 1010 (5th Cir. Tex. 1983), *cert. denied*, 465 U.S. 1007 (1984). Similarly, Cyphers contends that he was charged

with a single crime, by three theories, but the state and court converted the single charge into three convictions. While the three convictions are of the same statute, not different statutes as in *Plunkett*, the principle remains that due process does not allow conviction of a crime not charged (here, Cyphers's two additional convictions), and double jeopardy does not permit repetitive conviction of a single crime (Cyphers's same two additional convictions).

In *Tasco v. Butler,* 835 F.2d 1120 (5th Cir. La. 1988), the Fifth Circuit remanded for an evidentiary hearing to determine whether Tasco received timely notice of enhancement allegations, explaining that "his fundamental liberty interests were at stake, and due process required that the state afford him a fair opportunity to defend himself against the charges of recidivism." *Id.* at 1123. *Tasco* is useful because the issue was not whether he received notice of the statutory offense, but whether he received notice of information which could and did double his sentence. Similarly, Cyphers complains that he was charged with three paragraphs, which is permitted, but not told that these were counts, which directly and powerfully affects sentencing, by tripling the 12-year jury sentence he received to 36 long years.

In *Tarpley v. Estelle*, 703 F.2d 157 (5th Cir.1983), *cert. denied*, 464 U.S. 1002 (1983), Tarpley was charged by indictment with credit card abuse under section a certain Penal Code section, but the trial judge's instructions contained elements of both this offense and the separate offense of receiving property or services obtained by illegal credit card use, criminalized under a separate Penal Code provision. Ordering a new trial, the Fifth Circuit wrote, "As guarantors of this constitutional right, the federal courts have not hesitated to grant habeas relief to a state criminal defendant convicted of an offense other than that for which he was charged." *Id.* at 160.

In *Ricalday v. Procunier*, 736 F.2d 203, 207 (5th Cir. Tex. 1984), the Fifth Circuit denied habeas relief, but did find that Ricalday satisfied the first element of *Strickland v. Washington*'s

ineffective assistance of counsel standards by finding that his attorney failed to object to the wide variance between the crime charged by the indictment and the separate crime charged by the jury instructions. "Under federal constitutional law, a violation of the due process clause results when a criminal defendant is convicted of a crime he was never charged with committing: . . . ." *Id.* at 207.

In *Gray v. Raines*, 662 F.2d 569 (9th Cir.1981), information charging forcible rape did not provide adequate notice of charge of statutory rape since the two offenses require proof of different elements. In *Watson v. Jago,* 558 F.2d 330 (6th Cir.1977), the Sixth Circuit granted habeas relief because while the indictment charged first-degree murder, the prosecution proceeded on felony murder theory. In *Goodloe v. Parratt*, 605 F.2d 1041 (8th Cir. 1979), habeas relief was granted because the information charged Goodloe with driving a vehicle to avoid arrest for driving with a suspended license, but the jury instruction charged a separate offense of flight to avoid prosecution for willful and reckless driving.

We do not believe that the *Branch* or *McKay* rules apply. In *Branch v. Estelle*, Branch challenged his single burglary indictment which produced his single burglary conviction, alleging that the difference in the alleged and actual offense dates invalidated the indictment. The Court invoked the rule to which it has adhered many times, that "the sufficiency of a state indictment is not a matter for federal habeas corpus relief unless it can be shown that the indictment is so defective that the convicting court had no jurisdiction." 631 F.2d 1229 (5th Cir. Tex. 1980); *see, e.g, Wood v. Quarterman,* 503 F.3d 408 (5th Cir. Tex. 2007) (capital murder indictment properly listed six victims, resulting in a single capital murder conviction and sentence); *Brown v. Johnson,* 224 F.3d 461, 463 (5th Cir. Tex. 2000) (single murder indictment yielded single murder conviction and sentence, challenged unsuccessfully for lack of signature

by prosecutor); *Meyer v. Estelle,* 621 F.2d 769 (5th Cir. 1980) (single indictment for robbery resulted in single conviction for robbery; Meyer challenged and lost on identity of victim); *Murphy v. Beto,* 416 F.2d 98 (5th Cir. 1969) (single theft indictment yielded single conviction); *Bueno v. Beto,* 458 F.2d 457 (5th Cir. 1972) (single robbery indictment yielded single robbery conviction); *accord Evans v. Cain*, 577 F.3d 620, 624 (5th Cir. 2009) (Evans was indicted under multiple counts for rape and robbery. Evans received concurrent sentences for each count. The Circuit upheld his indictment and conviction and denial of new trial, applying the *Branch* rule.).

The Fifth Circuit applies the rule of construction in *McKay* that requires the reviewing federal court to determine whether a reasonable construction of the indictment actually charges the inmate's conviction and sentence. *McKay v. Collins*, 12 F.3d 66, 69 (5th Cir. 1994) ("An indictment should be found sufficient unless no reasonable construction of the indictment would charge the offense for which the defendant has been convicted."), *cert. denied*, 513 U.S. 854 (1994).

In conclusion, the indictments are constitutionally deficient, requiring remand for a new trial.

Claim 7: The State violated the Eighth Amendment by barring Holiday's attorneys from informing jurors that when answering the special issues that state law does not require a "Yes" or "No" answer, but will be satisfied if jurors are unable to reach a verdict on any special issue.

Texas requires judges to mislead jurors. If Texas procedures authorize a jurors a mechanism to decide in favor of a non-death sentence, does the Eighth Amendment, which requires intelligent, informed, guided juror decision making on who lives and who dies, permit a judge to mislead jurors and tell them that they do not have such a mechanism?

Exhaustion. The claim was timely presented and denied on the merits at the trial court. *See* RR 8, pp. 246–48, overruled p. 250. The claim was presented to CCA as point of error number 6 in Holiday's direct appeal brief. *See* Appellant's Brf. at 44-46 (see p. 46 for 8th Amendment argument). The CCA denied this claim on the merits. *See Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *27, slip op. at 8 (Tex. Crim. App. Feb. 8, 2006).

In addition, although Holiday did not expressly cite a 14th Amendment due process violation in his direct appeal brief, such a claim is implied by necessity. Holiday cited *Caldwell v. Mississippi*, *infra*, in which the Supreme Court found an 8th Amendment violation in a state's capital sentencing procedures. The 8th Amendment applies of the states through the 14th Amendment due process clause. *Robinson v. California,* 370 U.S. 660 (1962). Moreover, the Supreme Court cited due process principles during its discussion of *Caldwell*. For these reasons, to the extent necessary to support this claim, Holiday asserts a due process violation under the Fourteenth Amendment. There are circumstances where misrepresentations by prosecutors will violate due process. *See Miller v. Pate*, 386 U. S. 1 (1967); *Brady v. Maryland*, 373 U. S. 83 (1963).

Factual background. Citing a certain provision of the Texas capital sentencing scheme under Code of Criminal Procedure article 37.071, the State sought and obtained a court order ordering Holiday's attorney not to "inform or suggest to the jury" that they could answer the special issues in three ways because the law "contemplates three different alternatives." RR 8, p. 246. Holiday countered that he was entitled to tell the jurors that the law does not require a verdict of "yes" or "no" and will be satisfied "if the jurors are not able to reach a verdict." RR 8, p. 248. The Court overruled. RR 8, p. 247.

Argument and Authorities. Does the Constitution permit a judge to mislead jurors on an option to decide a case in favor of a death penalty defendant, when state law provides such an option? The CCA has never provided a satisfactory answer to this claim, presented repeatedly for twenty years. In Holiday's appeal, the CCA denied this claim on the basis of two state cases, *Williams v. State*, 937 S.W.2d 479, 490 (Tex. Crim. App. 1996), and *Draughon v. State*, 831 S.W.2d 331, 337-38 (Tex. Crim. App. 1992), *cert. denied,* 509 U.S. 926 (1993). *Williams* merely cited *Draughon* and moved on.

Draughon did not analyze the issue either. Draughon raised the issue *pro se* provided no analysis. In *Draughon*, the CCA correctly characterized the Texas sentencing scheme as "uncommonly enigmatic." (Difficult to understand or interpret.) 831 S.W.2d at 337. Then the court explain a curious aspect of Texas procedure: that "there is no such thing as a hung jury at the punishment phase of a Texas capital murder trial, in the sense that unresolved issues might later be litigated at a retrial of the same case. Failure of the jurors to agree automatically results in a sentence of life imprisonment." *Id*.

The power of jurors to decide the outcome of a capital prosecution in favor of a non-death sentence is profound. Unfortunately, jurors are *deliberately* misled about the procedure that applies to their expected guided decision. While one provision requires an automatic non-death sentence if jurors make a carefully reasoned decide not to answer a special issue (Tex. Code Crim. P. art. 37.071(e) (1990)), another provision bars jurors from being told either (1) that they have the right to make such a carefully reasoned decision of non-answer, or (2) the non-death result of that non-answer (Tex. Code Crim. P. art. 37.071(g) (1990)).

Not satisfied with merely withholding vital decision-making procedures from jurors, the Texas death penalty scheme, then and now, requires the trial judge to tell jurors a deliberate

falsehood. The judge is required mislead jurors to believe that "a sentence of life imprisonment is not possible unless ten jurors agree to answer one or more special punishment questions in the negative." *Draughon*, 831 S.W.2d at 337; Tex. Code Crim. P. art. 37.071(d) (1990).

To guarantee that jurors are misled, Texas bars the defense lawyer and the judge from telling jurors of their right to non-answer in order to compel a non-death sentence. Tex. Code Crim. P. art. 37.071(2)(a)(1) (1990) ("The court, the attorney representing the state, the defendant, or the defendant's counsel may not inform a juror or a prospective juror of the effect of a failure of a jury to agree on issues submitted under Subsection (c) or (e).")

The CCA resolved the issue by dodging the constitutional ramifications and supposing that jurors would continue to take their roles seriously, even if misled and therefore ignorant. The CCA acknowledged that the "reliability of the decision to impose death is reduced impermissibly when, among other reasons, jurors are misled into believing that their decision may be less momentous than it really is." *Draughon*, 831 S.W.2d at 337. By making this concession, the Court was acknowledging the weakness of jury misleading in the face of the heightened reliability requirement imposed by the Supreme Court on jury capital sentencing. But then the CCA promptly evaded concern by mistakenly substituting juror *seriousness* for the juror *knowledge*, required by the Supreme Court's demand for accurate jury sentencing: "But whatever the shortcomings of Texas capital sentencing procedure, we see nothing in the statutes here challenged by Appellant that operates to diminish the *seriousness* of juror deliberations or to suggest that ultimate responsibility for determining the propriety of a death sentence rests elsewhere. If anything, those statutes seem likely to stimulate in jurors a more *serious* approach to their task by encouraging them to reach agreement through continued deliberation rather than to abandon hope of consensus

prematurely. It is only if they are 'unable to answer' that the trial judge must impose sentence in the absence of a verdict." *Draughon*, 831 S.W.2d at 337 (emphasis added).

The CCA then mistakenly decided that a carefully considered non-answer by jurors could not constitute a decision for constitutional purposes. The CCA wrote, "Abstention is not a jury option. Rather, as in other cases, it is merely a consequence of the jury's inability to exercise its available options by reaching a verdict. It is not, nor would it be appropriate to suggest that it is, a verdict itself." *Id.* at 338.

It is impossible to see the CCA's logic. The CCA was not being asked a state law question; it was asked constitutional one, that is (1) whether a state statutorily authorized favorable non-answer was permitted by federal constitutional law, and (2) whether summarily withdrawing that procedure from the decision maker (here the jury) comports with federal constitutional law when the result is death.

The CCA must have been aware of the fourteenth and eighth amendment demands because it cited two constitutional decisions while evading their analysis. *Caldwell v. Mississippi,* 472 U.S. 320 (1985); *Dugger v. Adams,* 489 U.S. 401 (1989).

For AEDPA analysis, the CCA provided sufficient explanation of its decision for the Court to determine that it misapplied federal constitutional law, thereby allowing Holiday to pass through the procedural hurdle of AEDPA section 2254(d)(1).

The CCA recognized its duty to secure informed individual juror evaluation of the proper sentencing decision, citing federal constitutional law of *Mills*: "More troubling, however, is the implication that our statutes, by requiring consensus, inhibit the free exercise by each juror of his individual judgment about the propriety of a death sentence. *See Mills v. Maryland,* 486 U.S. 367, 100 L. Ed. 2d 384 , 108 S. Ct. 1860 (1988)." *Draughon*, 831 S.W.2d at 338.

Further, the CCA recognized that it was on dangerous constitutional ground, knowing that a juror ignorant of one his vital state authorized options is not a constitutional juror: "Again, however, it is not that jurors are somehow forbidden to cast or prevented from casting a negative vote unless nine other jurors agree to do so as well. Rather, it is the danger that jurors, *unaware of the operation of the law*, might mistakenly think a sentence other than death to be impossible unless ten of them agree that *renders the procedure constitutionally suspect*. *Draughon*, 831 S.W.2d at 338 (emphasis added).

But then the CCA fumbled, confusing juror *ignorance* with juror *knowledge*, and waiving off worries: "But, because the jury instructions of which Appellant here complains are not reasonably susceptible of such an interpretation, we are satisfied that no juror would be misled by them into thinking that an affirmative answer should be given unless ten or more jurors agree to give a negative one. At worst the jury would simply not know the consequence of failing to agree. And, as we have already indicated, *there is no apparent constitutional inhibition to concealing from jurors the consequence of their deliberations, so long as they are not misled into believing that ultimate responsibility for the verdict rests elsewhere*." *Draughton*, 831 S.W.2d at 338 (emphasis added).

We disagree, and we believe that it is not a reasonable application of federal constitutional law to hold that it is permitted to mislead jurors as long as the jurors believe that they alone are making the life or death decision. But it is precisely because jurors know they are making the life or death decision that each juror be informed that (1) he or she has a third state-sanctioned option, (2) that option may be activated by a single juror or all twelve jurors, and (3) that option will result in a non-death sentence.

Moreover, the very rationale by the CCA for permitting jury concealment is flawed. There is little discernible link between the concept of a *knowledgeable* juror and a *serious* one. It is hard to imagine a juror on a capital sentencing jury who is not serious about his role or fails to appreciate that his or her decision will decide the defendant's life or death. But the constitution requires more. A juror must be serious *and* knowledgeable about his or her options in order to exercise those options intelligently with the required guided discretion and reliability.

Truth in sentencing is most compelling in capital cases because the penalty of death is qualitatively different from other penalties, and, as such, this difference mandates a greater degree of reliability when a sentence of death is imposed. *See Woodson v. North Carolina*, 428 U.S. 280, 304 (1976). Holiday sought to truthfully inform the jurors that the law would be satisfied even if they were unable to answer one of the special issues. This was not a misstatement of the law; it is the law.

Harm Analysis. The CCA acknowledges the probability of harm. Shrugging off worries, the CCA candidly admits that jurors are likely to be misled, writing that "if one assumes that jurors are told during voir dire, as they nearly always are, that a negative answer to one or more of the statutory punishment questions necessarily results in life imprisonment, it is conceivable that they will surmise later instructions requiring ten votes for a negative answer mean that a life sentence will not be imposed otherwise." *Draughon*, 831 S.W.2d at 837.

Further, *Draughon* does not necessarily dispose of Holiday's claim because Holiday did not contend that the jurors should be informed of the *effect* of not answering a special issue; he only wanted the jurors to understand that they were not *required* to answer the special issues.

The federal constitutional law in effect when the CCA decided Holiday's direct appeal in 2006 required the court to order a new trial. We can see this in three ways.

1. Violation of Caldwell v. Mississippi. Eighth Amendment jurisprudence in 2006 barred government officials from misrepresenting to jurors the operation of state capital sentencing procedures.

The 8th Amendment prohibits procedures that needlessly undermine the reliability of the capital sentencing process. *Caldwell v. Mississippi*, 472 U.S. 320 (1985). *Caldwell* condemned as a violation of the Eighth Amendment attempts by state prosecutors to minimize jurors' sense of responsibility for the outcome of their verdict, by asserting that the verdict will be reviewed on appeal. The underlying concept is one which applies to Holiday. What concerned the Court was that the constitution does not permit state officials to make false representations to jurors about the procedures that govern the juror's decision making process. In *Caldwell* it was misrepresentation that the appellate process would correct any misapplication of the death sentence by jurors, which the Court recognized as an attempt to alter jurors' views on the precise mechanisms of death penalty procedures, with the consequence that queasy jurors would feel less directly responsible for the decision. In *Holiday*, the concern is misrepresentation by the trial court and prosecutors that only two options existed for deciding the Texas special issues, with the implied suggestion that a hung decision would force lengthy retrial, thereby pressuring queasy jurors to fold to the group decision for death. Common to both situations are: (1) inaccurate information, (2) provided by government officials, (3) to jurors, (4) about procedures, (5) governing jurors's decision making process, (6) in capital sentencing, (7) that pressure or facilitate queasy jurors, (8) to vote for death.

2. Violation of Woodson v. North Carolina. The Eighth Amendment jurisprudence in 2006 barred states from undermining the heightened reliability required for jury capital decision making.

Due to the uniqueness of the death penalty, the Supreme Court requires heightened reliability in the decisions made by the jury and judge during the course of a capital trial. *See, e.g., Zant v. Stephens*, 462 U.S. at 884. In *Woodson v. North Carolina*, 428 U.S. 280 (1976), the Court

explained why the Constitution requires an individualized sentencing determination in a capital case even though there is no parallel requirement in non-capital cases.

This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case. *Woodson*, 428 U.S. at 305.

In short, death is different. *See Thompson v. Oklahoma,* 487 U.S. 815, 856 (1988) ("Under the Eighth Amendment, the death penalty has been treated differently from all other punishments").

The heightened need for reliability in capital cases has been relied upon by the Court in a variety of contexts as an important rationale for its decisions. *See, e.g., Woodson v. North Carolina* 428 U.S. at 304-05 (invalidating mandatory capital sentencing statute); *Gardner v. Florida*, 430 U.S. 349 (1977) (requiring disclosure to defendant of all information contained in confidential pre-sentence investigation report in sufficient time to allow defendant a meaningful opportunity for response); *Lockett v. Ohio,* 438 U.S. 586, 603-05 (1978) (requiring consideration of all relevant mitigating evidence to avoid "the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty"); *Green v. Georgia*, 442 U.S. 95 (1979) (forbidding the exclusion of relevant mitigating evidence due to the state's hearsay rule); *Beck v. Alabama*, 447 U.S. 625 (1980) (requiring instruction on lesser included offenses supported by the evidence in the guilt phase of a capital trial); *Bullington v. Missouri,* 451 U.S. 430 (1981) (holding that double jeopardy bars death sentence on retrial after defendant sentenced to life at first trial); *Estelle v.*

Smith, 451 U.S. 454 (1981) (recognizing that Fifth Amendment right against self-incrimination and Sixth Amendment right to counsel are applicable to penalty phase of capital trial); *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (forbidding prosecutorial argument which, by assuring the jury that any error it made could be corrected on appeal, had the effect of diminishing the jury's sense of responsibility for its sentencing decision); *Turner v. Murray*, 476 U.S. 28 (1986) (requiring the states to permit voir dire about racial prejudice in interracial crimes); *Lankford v. Idaho*, 500 U.S. 110 (1991) (recognizing that capital defendant is entitled to fair notice of issue to be resolved at trial); *Riggins v. Nevada,*

504 U.S. 127 (1992) (finding error in involuntarily administering anti-psychotic medication to capital defendant).

Applied to Holiday, these decisions required the CCA to reach only one conclusion: that hiding from jurors, indeed deliberately deceiving them, of knowledge that a third option existed for deciding the special issues, either as single jurors or as a group decision, reduced the accuracy of the jury decision making and reduced reliability of Holiday's verdict. The CCA had no choice under then existing Supreme Court precedent but to sustain Holiday's claim and order a new sentencing hearing. Instead, the CCA refused to even analyze the claim.

3. Violation of Smith (I) v. Texas. Eighth Amendment jurisprudence in 2006 barred courts from providing instructions in charge to mislead jurors in a manner that caused jurors to answer special issues other than how they truly believed.

In *Smith (I) v. Texas*, 543 U.S. 37 (2004), the Supreme Court rebuked the CCA for ignoring its instructions in *Penry v. Lynaugh* to permit jurors the means and opportunity for considering and acting upon mitigating evidence offered by a defendant to avoid execution. In *Smith*, before the jury reached its sentence, the trial judge instructed jurors to give effect to mitigation evidence, but

allowed the jury to do so only by negating what would otherwise be affirmative responses to two special issues relating to deliberateness and future dangerousness. *Smith*, 543 U.S. at 37-38.

The Supreme Court rejected the superficial reasoning by the CCA, just as this Court should do, and criticized the trial court's instructions to jurors because the instructions compromised the jurors' decision making process, writing that "it would have been both logically and ethically impossible for a juror to follow both sets of instructions." *Id.* at 46. "Indeed, jurors who wanted to answer one of the special issues falsely to give effect to the mitigating evidence would have had to violate their oath to render a true verdict." *Id*.

So why would this make a difference? Precisely because manipulating jurors violates the *Woodson* reliability requirement of the Eighth Amendment discussed above. The Court explained, "The mechanism created by the supplemental instruction thus inserted an element of capriciousness into the sentencing decision, making the jurors' power to avoid the death penalty dependent on their w illing ness to elevate the supplemental instruction over the verdict form instructions." *Id.* at 47.

So it is with *Holiday.* By informing jurors that they only had two options (answer the special issues uninimously for death, or ten votes for non-death), when Texas procedures actually provided a third option (one or all jurors withhold any answer on a special issue, compelling a life sentence), the court "inserted an element of capriciousness into the sentencing decision," by undermining those jurors who might have been willing to withhold an answer from a special issue, or advocate to the group to do so, had they known (1) that such an option existed, (2) that the result would compel a non-death sentence, and (3) no future jury would be burdened by a necessitated new trial at considerable public time, inconvenience and expense.

Claim 8: The State violated Holiday's Sixth Amendment right to fair jury trial by denying his challenge for cause of Juror Linda Masters.

Exhaustion. The claim was timely presented to the trial court which denied relief on the merits. RR 15, pp. 186–87. The Defense struck Masters. *See* Clerk's record, Vol. 4, at 480 (State's strike List) and at 476 (Clerk's strike list). The Defense's request for additional peremptory challenges was denied. *See* exchange: Vol 29 RR @ 58-62.

The claim was presented to CCA as points of error number 8, 11, 12 and 13 in direct appeal brief (see p. 55 reliance on *Penry v. Lynaugh*, and p. 57 on *Eddings v. Oklahoma* and *Morgan v. Illinois* and p. 59, *Caldwell v. Mississippi*). The claim was denied on direct appeal by the CCA. *See Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *27-35 (Tex. Crim. App. Feb. 8, 2006) (page 9-10 of decision). The CCA held that point of error 12 in Holiday's direct appeal was procedurally defaulted under state law; Holiday does not assert POE 12 here (consideration of Holiday's age).

Introduction. Linda Masters was summoned as a potential juror. She was questioned individually. She was challenged for cause by Holiday. The judge denied. RR 15, pp. 186–87. Holiday was forced to use one of his precious preemptory challenges to eliminate her, allowing another challenged juror on the jury. *See* Vol. 29 RR @ 58-62. The question, therefore, is whether her removal violated the Sixth Amendment right to a fair jury trial.

Regarding Special Issue Number 1, when asked by Holiday's lawyer on the future dangerousness issue whether the State would have to prove that the defendant "is going to kill again?" Ms. Masters responded, "I'm thinking if that person had already killed three children that should be enough." RR 15, p. 147. Continuing, she explained, "I think my job would to be speak

for those dead children as a juror. . . . so to ask me not to take that into consideration I think is just ridiculous." RR 15, p. 150.

> [DEFENSE COUNSEL] Let me tell you - I want to make sure I understand where you are on this. I'm [sic] got a second set of children; six-year-old, another year old. Now, before they were born if I would look at a capital murder case, a history of child abuse to me for someone who was charged with capital murder didn't affect me as much as it does now. But now for some reason I think if I was on a jury and in a capital murder case even, if I found somebody guilty, guilty of capital murder, and if I found they were a threat to society, if I heard evidence of a lot of child abuse when they were growing up I don't believe I could kill that person. I just don't believe I could.
>
> [MASTERS] When you say you don't believe you could kill that person, you mean you don't believe you could give them the death penalty?
>
> Q I don't believe I could get give [sic] the death penalty. I don't believe I could do it anymore.
>
> A I would like to make a statement.
>
> Q Okay.
>
> A I do not like to be - I don't like that you have said to me if I am on the jury and I decide for the death penalty that I, in fact, am killing that person.
>
> Q Okay.
>
> A That is offensive to me. Because, in fact, I know that that person would have appeals and that will not totally rest in my lap. And I will be one of several people, not an individual committing an act of murder against that person.
>
> Q I realize that. But you understand, though, that in the appeal process that the case may not get reversed?
>
> A That's right.
>
> Q So the responsibility that you have could be the end result. You understand that?
>
> A I do.

Holiday challenged her for cause claiming that she has a bias or prejudice against the law in that she would automatically answer Special Issue Number 1 "YES." RR 15, p. 186. The challenge

was denied, and Holiday exercised a peremptory challenge on Ms. Masters. *See* Clerk's record, Vol. 4, at 480 (State's strike List) and at 476 (Clerk's strike list).

CCA Analysis. The CCA denied Holiday's challenge that Masters was an automatic death penalty juror excludable under *Morgan*. The CCA cited Holiday's rehabilitation answers that she would consider the evidence honestly. *Holiday,* slip op. at 9; LEXIS *31.

Further, the court concluded that under state law a juror is never challengeable for cause based upon the type and amount of evidence they would require to establish future dangerousness. *Id.* at LEXIS *32. Instead, using state law analysis, the CCA decided that a juror is challengeable only when the juror places an "unless" condition, "Only a refusal to answer the issue "yes" *unless* a particular type of evidence is presented, even if the other evidence presented were sufficient to convince them of the special issue beyond a reasonable doubt, would render the venireperson challengeable for cause." *Id.* (emphasis in original).

Concluding that the context of her statements indicated that she was a fair juror, the CCA also rejected Holiday's challenge to Masters on ground that she refused to accept personal responsibility for deciding a death sentence because she knew that appellate courts would review his case. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985) (forbidding prosecutorial argument which, by assuring the jury that any error it made could be corrected on appeal, had the effect of diminishing the jury's sense of responsibility for its sentencing decision).

The CCA did not cite any federal constitutional law in its analysis, and it is debatable whether the CCA even adjudicated Holiday's federal claims, notwithstanding that he based his challenge to Mrs. Masters on the Sixth Amendment. *See* Appellant's Brf. at 47, 59 (POEs 8, 13); *also* (see p. 55 reliance on *Penry v. Lynaugh*, and p. 57 on *Eddings v. Oklahoma* and *Morgan v. Illinois* and p. 59, *Caldwell v. Mississippi*). This Court, therefore, could hold that the CCA failed to

review Holiday's properly presented federal claim and therefore review the claim *de novo*. AEDPA section 2254(d)(1) expressly limits federal review of claims that were "adjudicated on the merits in State court proceedings." 28 U.S.C. § 2254(d)(1) (2008). Therefore, if a claim was not "adjudicated on the merits," then a federal court is permitted to use pre-AEDPA de novo standard of review of legal and mixed legal factual findings, precisely what Swain asks this Court to remand and order. *See, e.g., Miller v. Johnson,* 200 F.3d 274, 281 & n.4 (5th Cir.), *cert. denied*, 121 S. Ct. (2000); *accord* James S. Liebman & Randy Hertz, 2 Federal Habeas Corpus Practice and Procedure 1422, § 32.2 (4th ed. 2001)..

In addition, there is no basis in federal law for the CCA's dichotomy between "type and amount" of evidence and "unless certain evidence" for deciding a *Morgan* claim. The Supreme Court has never mentioned such a test, and for this reason, the CCA's analysis is vulnerable to an AEDPA 2254(d)(1) and (d)(2) failure for failing to following then existing Supreme Court jurisprudence or properly applying facts of Mrs. Masters's testimony. For this self-created test, the CCA cited one of its earlier decisions, *Howard v. State*, 941 S.W.2d 102, 129 (Tex. Crim. App. 1996), which did not apply any federal constitutional analysis.

Supreme Court Jurisprudence. Supreme Court jurisprudence in effect when the CCA denied this claim in 2006 compelled a new trial.

In *Morgan v. Illinois,* 504 U.S. 719, 729 (1992), the Court held that just as the state may excuse for cause those jurors whose beliefs against the death penalty would substantially impair their performance of their duties as jurors, a defendant may excuse for cause those jurors whose beliefs in favor of capital punishment would lead them to ignore the court's instructions, not to consider mitigating circumstances, and to vote for the death penalty in every case. This violates "the requirement of impartiality embodied in the Due Process Clause." *Id.* Furthermore, the Court

noted, jurors who would automatically vote to impose the death penalty would not "in good faith . . . consider evidence of aggravating and mitigating circumstances" as may be required by law and included in jury instructions.

"[A]n expressed willingness to follow the law does not necessarily overcome other indications of bias." *Varga v. Quarterman,* 321 Fed. Appx. 390, 394 (5th Cir. Tex. 2009), *cert. denied*, 2009 U.S. LEXIS 8859 (U.S., Dec. 7, 2009). The Court noted that "a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining . . . dogmatic beliefs about the death penalty would prevent him or her from doing so." *Morgan v. Illinois*, 504 U.S. 719, 735, (1992). The Supreme Court's concern is that "a prospective juror may believe she can follow the law and yet will actually be so biased in one direction or another that her inclusion would infect a trial with fundamental unfairness. The corollary, of course, is that such a venire member would be properly excluded for cause because her beliefs would prevent or substantially impair the performance of her duties as a juror." *Varga*, 321 Fed. Appx. at 395 (citation omitted).

Fifth Circuit Precedence. We have been unable to find any instance in which the Fifth Circuit has found a *Morgan* violation. *See, e.g., United States v. Simpson,* 645 F.3d 300, 2011 U.S. App. LEXIS 12702 (5th Cir. 2011), *cert. denied*, 2011 U.S. LEXIS 7609 (U.S., Oct. 31, 2011). And we found only one instance in which another circuit considered relief. *Conaway v. Polk,* 453 F.3d 567, 2006 U.S. App. LEXIS 17304 (4th Cir. N.C. 2006) (remanding for evidentiary hearing on *Morgan* claim);

Fifth Circuit Standard of Review. "The exclusion of a juror for bias under the *Witherspoon-Witt* standard is a question of fact subject to deferential review under AEDPA. The state court's resolution of this claim is thus presumed correct, and a habeas petitioner must rebut this presumption by clear and convincing evidence." *Varga*, 321 Fed. Appx. at 395 (citation

omitted). While this standard applies to *Witherspoon-Witt* exclusions, the same standard logically applies to a *Morgan* failure to exclude.

Claim 9: The State violated Holiday's Sixth Amendment right to fair jury trial by denying his challenge for cause of Venireman Kenny Penny.

***Exhaustion*.** This claim was timely presented to the trial court which denied relief, forcing Holiday to use a precious peremptory challenge. RR 20, pp. 118, 120. Holiday raised the claim as point of error number 12 in his direct appeal brief. *See* Holiday Direct Appeal Brf. at 56, 57 (reliance on *Penry v. Lynaugh*, p. 56 and p. 57 on *Eddings v. Oklahoma* and *Morgan v. Illinois*).

The CCA held that Holiday's argument that Penny could not consider age as a mitigating factor was procedurally defaulted. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *38 (Tex. Crim. App. Feb. 8, 2006) (page 11 of decision). Holiday does not carry his age claim here.

The CCA held that Holiday's challenge that Penny could not consider Holiday's state of mind as a mitigating circumstance was not procedurally defaulted, but denied the claim on the merits, finding that the record was undeveloped and the decision within the trial court's discretion. *See id*. The CCA did not address Holiday's reliance on federal constitutional law, allowing this Court to review the claim *de novo*. (*See* AEDPA discussion under claim 8, page 67, *supra*.)

When Penny was asked whether he could "envision in a proper case" finding sufficient mitigating circumstances to warrant a life sentence instead of death, he said, "The only thing that comes to mind would be was that person mentally competent to have known what they had done." RR 20, p. 77. When asked if he would consider the state of mind of Holiday in determining his answers to the special issues he stated that he would consider state of mind "only if we are talking about an insanity." Holiday's attorney told Penny that state of mind was "not about sanity issues,"

but like "rage or something of that nature," and Penny said "I wouldn't consider that, no." RR 20, p. 118.

Here is the exchange with the prosecutor, RR20:76-79 (emphasis added):

> STATE: "Now, if you find the State has met its burden on this question, ie, we have proved to you beyond a reasonable doubt that the defendant will probably be — will probably commit future acts of violence, then you answer the question yes and you go to the second question. If you think that we haven't met our burden here then you answer this question no and the trial is over and the defendant gets a life sentence.
>
> STATE: "In answering this question you will be instructed to consider all the evidence you heard at the guilt/innocence stage and all the evidence you heard at the punishment stage. Also, you will be asked to consider the defendant's background and character in answering that question. Now, if you answer it yes then you go to this second question. So you have — if you arrived at the question you have found the defendant guilty of capital murder and you have found that he is a future danger to society. I saw you reading this question. I will let you finish up."
>
> PENNEY: All right. Okay.
>
> STATE: "So you found him guilty of capital murder and you found that he is a danger to society. Now we are asking you despite having found both of those things is (p. 77) there some mitigating circumstance or circumstances that are sufficient to make you think he deserves a life sentence instead of a death sentence. And mitigating circumstance or circumstances are not going to be defined for you. Again, these term is what you as jurors decide what is mitigating and what is not. If it is mitigating you decide whether it's sufficient or not to warrant life instead of death.
>
> **STATE: "Can you envision in a proper case where you could find someone guilty of capital murder and find that they are a future danger to society and still find that there are some mitigating circumstance out there that are sufficient enough to make you answer this question yes and give the defendant a life sentence instead of a death sentence?**
>
> **PENNEY: "The only thing that comes to mind would be was that person mentally competent to have known what they had done."**
>
> STATE: "Okay. Now, what we would ask you to do in answering this question is you will be asked to consider the circumstances of the offense, the defendant's character and background and his personal moral culpability. By that I mean how blameworthy is he for the offense with which he has been convicted.

STATE: “In considering his character and background you (p. 78) would be asked to consider anything that is brought up at trial that may lessen his culpability. It could be things like a defendant's age at the time of the crime, his upbringing, if he was abused as a child, if he had a drug or alcohol problem, if he had mental incapacity or mental infirmity of some sort. If he has remorse of the crime, his past behavior, things like that. And what we ask you to do in answering this question is keep an open mind and consider all of those things and anything else that may come up. And then after considering them determine for yourself whether it is mitigating or not. And if it is, is it sufficient?

STATE: “So, in other words, if a defendant's age were at issue and you were on the jury we would ask you to consider his age and then decide for yourself if it's mitigating. And the same thing would be asked of other jurors. And you may decide after considering it that age is not mitigating to me. The guy sitting next to you may think well, to me if the guy was seventeen or eighteen years old, you know, at that age he's not emotionally mature enough to know the consequences of his actions and, therefore, it's mitigated, something like that. So it's an individual thing. It's up to individual jurors to decide what is mitigating and what's not. And then after you have hashed that out (p 79) between the other jurors then as a whole you make a decision as to whether there is sufficient mitigating circumstances to warrant life instead of death.

STATE: “If you decide there that there are not you answer the question no and the defendant gets the death sentence. If you decide that there are sufficient mitigating circumstances you answer the question yes, the defendant gets a life sentence. So do you understand how the process works?”

PENNEY: I believe I do.

STATE: You don't go back there and write life or death.

PENNEY: No, I understand.

STATE: You answer these questions based on the evidence.

Here is the relevant portion of the exchange with the defense attorney, RR20:116-18 (emphasis added):

DEFENSE: Okay. And you realize in answering at least special issue two we are talking about, you know, would you consider the defendant's age in determining your answer to special issue two?” (p. 114)

PENNEY: A Now, you referring to his age or in general?

DEFENSE: Just hypothetical sense, a defendant's age or his youth?

PENNEY: If he was a juvenile being tried as an adult I would consider age.

DEFENSE: What if he was not a juvenile? What if he was a young guy? Would age be something you would consider in determining your answer to special issue one or two?

PENNEY: If he's above the age of twenty-one probably would not.

STATE: Okay. Now, what about remorse of a defendant, if any? Would you consider that in answering special issue two?

PENNEY: Remorse has nothing to do with guilt or innocence.

DEFENSE: "You have already found guilty. We are talking only about special issue two now. Would remorse be something that you would want to know about or consider in answering this special issue?"

PENNEY: "If we got to this stage it could be, yes."

DEFENSE: "Okay."

THE COURT: "You're five minutes over, Mr. Carter."

MR. CARTER: "Let me just go through a couple of quick things."

THE COURT: "It's all right with this lady waiting in the hall."

DEFENSE (By Mr. Carter): "All right. State of mind of the defendant at the time of the commission of the crime that you had found him guilty of, would that be something that you would consider in determining your answer to special issue one and two?"

PENNEY: "Yes."

DEFENSE: "Why us that important to you, Mr. Penny? State of mind? Not crazy state of mind, though."

PENNEY: "Okay. Now, when you said state of mind, only if we were talking about an insanity —"

DEFENSE: "No, we're not."

PENNEY: "We are not."

DEFENSE: "I'm not talking about sanity issue."

PENNEY: "A State of mind being rage or something of that nature?"

DEFENSE: "Yes."

PENNEY: "Would that be — I wouldn't consider that, no."

DEFENSE: "Okay. That's all I have, Judge. Thank you."

Supreme Court Jurisprudence. Prior to the CCA's 2006 decision, the Supreme Court settled required juror consideration of mitigating evidence. In the post-*Furman* era, the Supreme Court established that the Eighth Amendment prohibition against cruel and unusual punishment requires the individualized consideration of mitigating circumstances in determining a sentence of death. In *Lockett v. Ohio*, 438 U.S. 586 (1978), and later in *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court ruled that the sentencer must consider all relevant mitigating evidence in a capital case. In *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986), the Court, quoting *Eddings,* stated that the sentencer may "not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Thus, the capital sentencer must consider both statutory and nonstatutory mitigating evidence.

In *Penry v. Lynaugh*, 492 U.S. 302 (1989) (*Penry I*), the Court held that the trial judge must instruct the jury that it may consider evidence presented by the defendant of nonstatutory mitigating factors. In *Delo v. Lashley,* 507 U.S. 272 (1993), the Court clarified its precedent on mitigating jury instructions holding that such instructions are constitutionally required only when supported by evidence.

In *Penry v. Johnson,* 532 U.S. 782 (2001) (*Penry II*), the Court held that Mr. Penry's second sentencing trial was constitutionally flawed because the jury instructions were internally inconsistent. Although the additional supplemental instruction mentioned mitigating evidence, in order to consider the evidence in mitigation, the jury would have to disregard the instructions on answering the special issues. (Note: Source of text of these two paragraphs: Ninth Circuit Capital Punishment Handbook, § 4.8 Mitigating Circumstances.)

Eddings v. Oklahoma, 455 U.S. 104 (1982), said:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence. ... they may not give it no weight by excluding such evidence from their consideration.

Evaluation of the Record. Mr. Penny announced that he would not consider Holiday's distorted state of mind. Though Penny did not had to attach any weight to state of mind, he did have to consider that aspect. Any juror to whom mitigating factors are irrelevant should be disqualified for cause. *Cf. Morgan v. Illinois*, 504 U.S. 719, 739 (1992). The CCA's decision otherwise was an unreasonable application of *Penry*, *Lockett* and *Eddings.*

Claim 10: The State trial court violated the Due Process Clause of the 14th Amendment when it permitted the State's expert, Dr. John DeHaan, to testify: (1) that the fire could not have been ignited by an electrical appliance or a pilot light, and (2) that the injuries suffered by Holiday were consistent with the hypothesis that he bent down and ignited the gasoline.

Exhaustion. This claim was timely presented to the trial court which denied relief. RR 36, p. 93 – RR 37, p. 142. It was presented to CCA as points of error number 18 and 19 in direct appeal brief. *See* Appellant's Brf. CCA at 68-76.

The CCA denied relief under state law grounds. *See Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *44-49 (Tex. Crim. App. Feb. 8, 2006) (page 12-14 of decision).

The Claim was Not Procedurally Defaulted. This claim was not procedurally defaulted because the substance of the federal claim was faily present ed to the CCA which adjudicated the claim on the merits. Although Holiday's direct appeal brief did not cite the 14th Amendment or due process as the basis for his challenge, it is clear from context this is so. He argued that the scientific methodology applied by Dr. DeHaan was flawed and unrecognized, and failed to eliminate other potential causes of the fire. As discussed below, challenges to the sufficiency of evidence on an element of the government's prosecution, here causation, and to an expert's qualifications and methodology, per *Daubert*, are due process challenges.

Generally, a petitioner satisfies the exhaustion requirement if he presents the federal claim to the state court in a manner required by state law, thereby "afford[ing] the state courts meaningful opportunity to consider [the] allegations of legal error." *Vasquez v. Hillery*, 474 U.S. 254, 257 (1986); *e.g., Duncan v. Henry,* 513 U.S. 364, 365 (1995); *also Liebman, supra* at 958, § 23.3. Whether a claim was fairly presented to a state court is a federal question; a federal court is not bound by a state court declaration of procedural default. *Manning v. Alexander,* 912 F.2d 878, 881-83 (6th Cir. 1990); *Harris v. Rees,* 794 F.2d 1168, 1174 (6th Cir.1986) ("question really is whether [state] courts had a fair opportunity to consider appellee's claim . . . ."); *e.g., Justices of Boston Mun. Court v. Lydon,* 466 U.S. 294, 302-03 (1984) ("In our view, therefore, Lydon had exhausted his double jeopardy claim in the state courts..."); Liebman, *supra* at 958 n.1, §23.3.

To exhaust a claim for federal habeas purposes, the petitioner must "apprise" the state court "of the facts and the legal theory upon which the petitioner bases his assertion." *Galtieri v. Wainwright,* 582 F.2d 348, 353 (5th Cir. 1978) (en banc). Meeting this standard requires that the petitioner previously have given the state court the opportunity to grant relief on the federal claim, and that claim is in "substance" the same claim for which the petitioner now seeks federal review.

Professors Liebman and Hertz explain, "If the appropriate state courts have had sufficient opportunity to rule on the claim even though the petitioner did not specifically present it, the presentation requirement will be excused." Liebman, *supra* at 960, § 23.3a; *e.g., Walton v. Caspari,* 916 F.2d 1352, 1356-57 (8th Cir. 1990), *cert. denied,* 499 U.S. 931 (1991). It is sufficient that a petitioner rely on state cases employing constitutional analysis in factually similar circumstances, or assert the claim in terms so particular as to call to mind a specific right protected by the Constitution, or to allege a pattern of facts well within the mainstream of constitutional litigation.

Some courts have found exhaustion even when the petitioner did not raise the claim and the state court did not explicitly decide the claim on the merits *sua sponte*, because state court could not have decided the petitioner's case without implicitly ruling on the claim. *See Vela v. Estelle*, 708 F.2d 954, 960 (5th Cir. 1983), *cert. denied,* 464 U.S. 1053 (1984); *also Lufkins v. Solem,* 716 F.2d 532, 536-37 (8th Cir. 1983), *cert. denied,* 467 U.S. 1219 (1984); Liebman, *supra* at 960, § 23.3a.

Here, it is clear that the CCA was fairly presented with a 14th Amendment due process claim and evaluated it both in that manner, as well as under a state evidentiary rule.

Evaluation. The State trial court violated the Due Process Clause of the 14th Amendment when it permitted the State's expert, Dr. John DeHaan, to testify that the injuries suffered by Holiday were consistent with the State's hypothesis that Holiday bent down and ignited the gasoline, and that the fire could not have been ignited by an electrical appliance or a pilot light. He based his opinions on junk science.

Despite the complexity of DeHaan's testimony, it boiled down to two points:

1. The pilot lights and electrical switches in the appliances could not have ignited the fire; and,

2. The injuries suffered on Holiday's hand, arm and chin were consistent with bending over to start the fire.

In Dr. DeHaan's opinion, an ignitible concentration of gasoline vapors would not have reached the pilot light or the electrical switches in the time period required to start the fire. No evidence was offered relating to the rate of diffusion of gasoline vapors in the atmosphere. DeHaan conceded that many indeterminable factors, such as weather, air conditioners and ceiling fans, might affect the spread of those vapors. RR 36, pp. 116–118.

Dr. DeHaan is a criminalist specializing in fire and explosion investigations. Fire is a chemical process governed by the rules of physics and chemistry. If provided enough information, certain predictions about the behavior of a fire can be made, he said. The progress of a fire is difficult to predict with certainty because they are affected by small random processes that do not repeat. RR 36, pp. 94–97. Dr. DeHaan described what he asserts passes as a methodology:

> You have a puzzle. You look for a potential solution. You find some data, some information about what could be causing it. You test that and then basically develop a better understanding of what was actually happening. RR 36, p. 99.

The State failed to offer clear and convincing evidence that the scientific principles of fire cause and origin were properly applied to reach the witness's conclusions. There was no way to determine a potential error rate to this field of science. There was no evidence of a valid scientific theory to support his conclusions. The factual basis for his opinions was insufficient because he did not know the nature of the sealing on the refrigerator compressor, and he was speculating about the effect of weather and air currents which may have affected the movement and concentration of the gasoline vapors.

Dr. DeHaan based his opinions, in part, on looking at clothes taken from Holiday, photographs of injuries he received, and statements made by Beverly Mitchell. The evidence shows that Beverly Mitchell poured gasoline through certain portions of the home. She was watching Holiday at the time the fire started. She did not see Holiday do anything to start the fire. Mitchell's recollection at the time of trial was that she saw Holiday bend over at the time the fire started. There were pilot lights and electrical switches in the house that may have been sources of ignition. Dr. DeHaan testified that the pilot lights and various electrical switches could not be the source of ignition, therefore, someone must have lit the fire. Dr. DeHaan testified that the proper mixture of gasoline vapors and oxygen could not have reached the pilot lights and electrical switches to allow them to have ignited the fire. RR 36, pp. 147–183.

DeHaan relied on the description and observations of the burns received by Holiday during the fire—the location, distribution and severity of the burns. He admitted that an examination of the burn evidence would not show whether the burn was caused by radiated, convected or conducted heat. He admitted that the burn pattern could have been caused in a relatively short time period or over a longer period and through a series of events during the fire. RR 36, p. 108.

In excluding the refrigerator as a source, he relied on prior experience with other refrigerators. He did not consult with a manufacturer representative to get information about the particular model in question. RR 36, p. 109. He was told by a man named David Reiter that the compressor unit was sealed but the nature of the seal was not offered. RR 36, pp. 110–112. On further examination he conceded that the type of seal on the compressor would not prevent it from being a source of ignition. RR 36, p. 113.

Part of his conclusion is based on his guess at the likely path traversed by the gasoline vapors after being poured and prior to ignition. RR 36, p. 116. Weather conditions could affect the

pattern of spread, however. RR 36, p. 116. And a ceiling fan can affect how the vapors were spread. RR 36, p. 117.

He could not find any evidence that Holiday's scalp hair or facial hair was singed. By contrast, he simply assumed that there was some singeing as part of the ignition process. RR 36, p. 119. There was no evidence that making this assumption was an acceptable practice in his field of expertise. RR 36, p. 120.

He testified that if Holiday were to have ignited the fire, there would be a brief flash of flame that would have singed the hair if it were nearby, and this assumption constitutes his explanation of the burns received by Holiday on the underside of his right arm, the outside of his right hand and the underside of his chin.

The State did not offer any scientific formula, rule or law that would prevent gasoline vapors from reaching the possible ignition sources in an ignitible concentration of gasoline and oxygen. This is an area of hard science, in contrast to the so-called soft social sciences. Yet, Dr. DeHaan tended to rely on his unscientific skills of observation and memory to characterize the phenomena he was studying.

The State, rather than offering scientific evidence, chose to rely on DeHaan's preeminence in the field and the certitude of his opinion to convince the court of its reliability. Dr. DeHaan did not try to recreate the factors involved in this fire by modeling. He did not rely on any known scientific principles that relate to the diffusion of gasoline molecules in a room to determine what possible concentrations might exist at any location in that room. The State merely established that DeHaan was well recognized and traveled as a witness who gave opinions as to the cause and origins of fires. Assuming arguendo that Dr. DeHaan is an expert does not render his opinions admissible. There must be a reliable scientific basis in the record for the opinion.

As was apparent to the manufacturers of the air conditioner, the refrigerator and the range, such appliances should not be used where gasoline vapors are present. No one, not even the preeminent Dr. DeHaan, can safely predict that an ignitible concentration will not be present.

His opinion that the burns suffered by Holiday "were consistent" with bending down and igniting the fire was neither scientifically sound nor helpful to the jury. Those injuries were merely indicative that Holiday was near a source of heat sufficient to cause the injuries.

When he uses the phrase "consistent with," he means that he has several possible explanations but is unable to say which one is more likely. RR 36, p. 128. The injuries that Holiday suffered are in his opinion "consistent with" but not "indicative" of the State's theory that Holiday bent down to start the fire. RR 36, p. 129. Although gasoline vapors tend to go down due to gravity, they may go back up depending on the movement of air. RR 36, p. 130. Other materials such as sheer fabrics or loose paper could be ignited by the heat from the initial flash. RR 36, p. 132.

The use, or misuse, of the phrase "consistent with" is misleading and unhelpful to the jury and, in fact, would mislead the jury. This is the type of testimony that illustrates the "danger" of expert testimony, which is the basis of requiring a trial court to exercise its gate keeping function. The phrase "consistent with" erroneously implies to the jury that the scenario described by the expert is likely to have occurred. Dr. DeHaan's testimony was most likely received by the jury as evidence that "science" shows that Holiday bent down to start the fire.

To the extent that the jurors accurately perceived the honest intent of the evidence, that Holiday's hand, arm and chin were burned and at some point those parts of his anatomy were near a source of heat sufficient to cause the injuries, then such testimony is not helpful at all. There was no dispute that Holiday was inside a burning house in a room filled with gasoline vapors that suddenly ignited. His injuries could have been caused any number of ways, none of which were

more likely than another. Consequently, resting the causation element on the testimony of unsubstantiated junk science is a violation of federal due process.

Claim 11: The State trial court violated the Due Process Clause of the Fourteenth Amendment when it permitted evidence that Holiday committed the extraneous offense of raping of Tierra Lynch.

Exhaustion. The claim was timely presented to the trial court which denied relief. RR 32, pp. 52–53; RR 32, p. 27; RR 32, pp. 189–215. It was presented to CCA as points of error number 23, 24, 25, 26 and 27 in direct appeal brief. *See* Appellant's Brf. at 84-90. Points of error 26 and 27 challenged the reliability of a portion of the source of evidence from a physician under state law grounds. But points 23, 24 and 25 explicitly relied upon the 14th Amendment and *Old Chief v. United States*, 519 U.S. 172 (1997). *See id.* at 87.

The CCA denied the claim on state law grounds, ignoring the federal claim. *See Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *60-64 (Tex. Crim. App. Feb. 8, 2006) (page 17-18 of decision). As discussed, *see* page 67, the CCA's failure to address properly presented federal claim allows this Court to decide the claim *de novo*.

Evaluation. The prosecution, during its opening argument, suggested its intent to prove that Holiday had raped Tierra Lynch and had been indicted for raping Tierra Lynch prior to the killing of the children. RR 32, p. 27. Tami Wilkerson testified that on Friday, March 5, 2000, Tierra stayed home from school because she was ill. Wilkerson went to work and Holiday was at home with Tierra. When she returned home that night, she found Tierra's panties in the dirty clothes pile with blood on them.

The prosecution offered expert testimony as to the nature of Tierra's injuries that indicated sexual assault and the child's statement to a nurse indicating that Holiday was alone with her when the injuries occurred. RR 32, p. 204.

In an attempt to avoid substantial prejudice of the detailed evidence of the extraneous offense, Holiday offered to stipulate that Holiday had been accused of sexually assaulting Tierra Lynch. Holiday objected to this evidence out of the presence of the jury. The trial court overruled.

The State claimed that this evidence showed Holiday's motive to kill Tierra Lynch. But in doing so, the State was focused the jury's attention on an issue that they did not need to resolve. The State established motive merely by offering evidence that Tami was accusing Holiday of sexually assaulting the child.

To avoid prejudicial evidence of the details of the injury, Holiday offered to stipulate that the child suffered penetrating injuries that could have resulted from a sexual assault. RR 32, p. 119; RR 32, p. 188. Further, Holiday offered to stipulate that he had been accused of the sexual assault of the child and that he did not intend to contest the extraneous offense in the presence of the jury. RR 32, pp. 52–53.

Demonstrating how the rape allegation fouled the trial, consider what the prosecutor told jurors in closing, pp. 32—40 (emphases added):

> STATE @ p. 32: Now, I want to talk to you a little bit about - well, for some of you at least, I talked to you during individual voir dire about how you go about determining someone's state of mind during a crime. Because it's easy to come in after the fact and, you know, put forth theories that it's an accident, whatnot. But actions always speak louder than words, especially in a criminal (p. 33) case like this. **And we talked about how if you wanted to determine what is in someone's mind at the time that they are committing a crime the best way to do that is to look at their actions. Look at their actions before, during and after the crime and see what those tell you about their behavior.** And usually that will tell you exactly what was going on. And the question becomes first and foremost, usually in cases like this, is why, why would someone do something like this? Why would someone kill their own child? It's so hard to believe that someone would do that. Even though we know that happens every single day in this country.
>
> MR. BLAZEK: Your Honor, I object going into extraneous matters, what happens in other cases. We are supposed to focus on the facts of this case.

THE COURT: Overruled.

STATE (MRS. POPPS): **That's where the rape of Tierra comes in, okay? The defense, I suspect, will try to convince you that that is a completely collateral issue, that has nothing to do with why we are here today. I'm here to tell you that has everything to do with why we are here today, everything to do with why we are here today. And the reason for that being the rape of Tierra by the defendant –**

MR. BLAZEK: I object to saying has everything to do, you know, the Judge has instructed the jury to limit its consideration solely to the issues of intent or motive with regard to any extraneous offense. So I object to her argument that it has everything to do with this case.

THE COURT: The jury will be bound by the instructions in the Charge in connection with this or any other matter of law raised by the case.

MR. BLAZEK: We ask the Court instruct the jury to disregard the prosecutor's last comment.

THE COURT: Overruled.

MRS. POPPS: **The reason the rape of Tierra by the defendant has everything to do with why we are here today —**

MR. BLAZEK: Again, I object to saying has (p. 34) everything to do.

MRS. POPPS: If I could finish -

THE COURT: Overruled.

MRS. POPPS: --**1 could explain why the proof is motive. The reason for that is that rape had consequences, consequences that the defendant never foresaw, he never thought he would be held accountable to, consequences that were unacceptable to him. I mean, let's face it, the day the defendant took Tierra back into the bedroom and raped that little girl, that was (p. 35) the day that marked the end of his life as he knew it. I mean, he had things going pretty good there for a while. He had a pretty cush life. And he went from having that to having no home, being kicked out of his home, no family, no means of support, to having a protective order filed against him and to having rape charges filed against him. These things weren't acceptable to him. And the person he blamed for those consequences wasn't himself. He didn't hold himself accountable for those things. He held Tammy responsible for those things. It was Tammy that he believed was ruining his life, ruining his life, and things were about to get a whole lot worse when he was going to court on those**

rape charges. Things were about to get even worse for him. And he was worried about those rape charges. And he was worried about going to court and going to trial on those charges. And the reason we know that is because his own friend, Robert Lowery, came in here and told you that. And that young man clearly did not want to be there testifying against the defendant. They were friends, they hung out around the time that this happened. He didn't want to be here telling you the things that the defendant had been telling him right before this happened. So what he did tell you was that the (p. 36) defendant was worried about this rape trial. He talked about it several times. And he told him that he was worried he was going to be convicted on these charges. So we know based on some of the things so far that have gone on and have been said that when the defendant went out the family's house on September 5th, 2000, that he had two purposes in mind. One, to keep from going to prison on these rape charges. And, two, to make Tammy pay for ruining his life. These things are confirmed by his statement out at the crime scene that night. One of the first things he said as to why he was there when he was confronted — or actually when he confronted Beverly and Tami in the house **was I'm going to make Tami pay for what she has done to me. And Tami told you he said that he was going to make us pay for the pain we had caused him.** We also know that when he was outside with Terry and Beverly and the kids and he was ranting and raving and shooting off the gun and burning things on the ground and lighting fires and scaring everyone half to death**, that what he said as the reason he was out there was I'm not going to take the rap on these rape charges. I'm not going to do it. I'm going to take care of it tonight.** I'm going to burn the house down with everyone in it. That's what he said. Those statements have not been refuted and there has (p. 37) been no attempt—

MR. BLAZEK: Your Honor, could we approach the bench? (Following discussion at the bench)

MR. BLAZEK: Those charges have not been refuted. It's a charge against the defendant, I guess she expects to defendant to refute them.

MRS. POPPS: No, I don't.

MR. BLAZEK: It's clear inference that the defendant has not elected to refute these charges, more evidence of his guilt and a comment on his failure to testify.

THE COURT: Are you referring to the -

MR. BLAZEK: The comments she made apparently about the statements she claims were made at the scene by him and that he chose not to refute the statements.

THE COURT: She didn't say that.

MR. BLAZEK: Didn't say — she said these charges have not been refuted. The clear implication is that he should have been the one to refute them. Who else is there?

THE COURT-. She quoted somebody that testified. I don't know -

MRS. POPPS: My next statement was going (p. 38) to be there have been no attempts to impeach Terry in saying those were the statements that the defendant said. But I will be happy to just move off the subject if you would rather. That's fine, I just would like to not be harassed throughout my closing argument. I can't concentrate.

THE COURT: All right. I will sustain the objection.

MR. BLAZEK: We ask the jury to be instructed to disregard the prosecutor's last comment. (Back in open court)

THE COURT: All right. The jury is so instructed. At the request of defense counsel the Court will at this time instruct you to disregard the last statement made by the prosecutor.

MR. BLAZEK: Move for a mistrial.

THE COURT: Overruled.

MRS. POPPS: We also know while out at the scene that at least at one point the defendant said to Beverly that he would kill all of us and himself before he would go to prison. **So clearly these things are foremost in the defendant's mind when he goes out there that night. The fact that he does not want to go to prison on these rape charges and the fact that Tami is responsible for all the bad things in his life and he is (p. 39) going to make her pay for it.** How best to make someone pay something they have done, especially a mother of young children? What is the best revenge you could possibly seek? The answer is obvious. I mean, any mother would die a thousand deaths before they would want to see their children die. The defendant knew exactly how to accomplish both goals that night and that is what he set out to do. **And you say well, you know, the rape occurred six months before these murders. Why hadn't he done anything before that? Why didn't he commit these murders before this point in time? And the reason being up until the point -- up until a few days before this murder the defendant still had some hope that he could get things reversed. And the reason for that is because he still had some control over Tami. Tami was still willing to do a lot of what he wanted her to do. She was still willing to meet him, willing to have sex with him, talk to him on the phone, bring the child out**

there. He had control over her up until this point in time. And it wasn't until a few days before the murders occurred that he lost that control. The reason for that being that last meeting between Tami and the defendant out at Robert Lowery's house that scared Tami. That meeting in particular scared her to the core. (p. 40) The defendant forced her to have sex with him. Sounds like rape. He took her in a car, drove her ninety miles-an-hour threatening to kill them both. And then his friends told you that during that same incident he came out after she left and bragged about having whipped her, spanked her with a coat hanger. This meeting scared her and she finally decided that that was it. **You know, despite all the threats he had made and manipulation he had done to get her to do some of these things she wasn't going to do it anymore. And at that point in time she quit going out to see him, quit returning his calls, quit talking to him on the phone and whatnot. And that's when the defendant realized he had lost all control over her. And once he lost all control over Tami he lost all control over the situation. He know longer had the hope that she could get him out of this mess because, if you think about it, if she would have been willing to get back together, to him pretty much all of these problems would have gone away.** But if not, that's when the defendant decides, you know, it's all or nothing At this point. It's time to go for broke. And that was his mind set leading up to these murders.

Here is what the prosecutor told jurors about the rape in rebuttal closing argument, pp. 103— (emphases added):

STATE @ p. 103: In the days leading up to this fire Holiday was staying with some friends and family members of his over in the Shiro area or Bedias area. And he was talking to them about the problems he was having in life. **He was talking to his buddy, Robert Lowery, about this rape charge he had out of Madison County against his older stepdaughter, Tierra. Told him he was worried about it, worried about getting convicted of it. Didn't know what was going to happen.** He also talked to him about the fact that Tami Wilkerson, his wife, had a new boyfriend and he didn't like it, made him mad. What was he going to do? That remains to be seen. But he told them that this new boyfriend was trying to take his kids from him (p. 104) and he didn't want him taking those kids**. So he was upset about the rape charges, he's upset about the fact that his wife has a boyfriend who was spending time with his kids, one of which he has raped.** So what does he do? We move forward to the night of the fire.

STATE @ p. 105: Lets them no through his own words that he's not playing around, this is not a game. All the while the kids are in the car. **One kid is still in the house. And at some point he tells Terry Keller I am not going to take the rap on this rape charge. I'm going to take care of that tonight. I'm going to burn the house down with everybody in it.** He didn't say he was going to burn the house down with nobody in it, he didn't say he was going to burn the house down

with the (p. 106) grown ups in it, he is going to burn the house down with everybody in it.

STATE @ p. 106: **Meanwhile, Holiday has got Beverly in the car and he tells her if I see the law I'm going to kill everybody and myself before I go to prison.** Once again he's (p. 107) telling you what he's thinking. He's telling you what he's going to do. You know what his intent was out there.

STATE, @ p. 117: And that is a man whose life had gone bad due to his own actions. He didn't like it. And in order to try and right the ship, so to speak, he took drastic measures. **He got rid of or tried to get rid of all the witnesses that could hurt him on the sexual assault case.**

By offering detailed evidence that tended to show that Holiday committed the offense of sexual assault of Tierra Lynch, the State went far beyond establishing motive and fundamentally deprived Holiday of a fair trial. If the evidence is admissible at all, it could have come in by stipulation to which Holiday had offered. By allowing the evidence of extensive details and by not requiring the State to accept Holiday's offer of stipulation, Holiday was denied 14th Amendment due process of law Amendments and *Old Chief*.

***Discussion of the Due Process Clause and* Old Chief.**

Old Chief v. United States, 519 U.S. 172 (1997), discussed the limitation on admitting relevant evidence set forth in Federal Rule of Evidence 403. Under this rule, otherwise relevant evidence may be excluded if the probative value of the evidence is substantially outweighed by the danger of unfair prejudice, confusion of the issues, misleading the jury, or considerations of undue delay, wasting time, or needless presentation of cumulative evidence. In this case, Old Chief offered to stipulate to the fact of a prior conviction, which was an element of the crime with which he was charged. The prosecution resisted this stipulation, arguing that it had the right to present its case in any manner it chose. In *Old Chief*, the Court applied Rule 403 to the particular situation

presented by this case, and concluded that Rule 403 required the trial court to accept the defendant's stipulation to a prior conviction over the prosecution's objection.

Rule 403 allows the exclusion of relevant evidence on the grounds of "unfair prejudice." Unfair prejudice to a criminal defendant means the danger that the jury will "generaliz[e] a defendant's earlier bad act into bad character and taking that as raising the odds that he did the later bad act now charged (or worse, as calling for preventive conviction even if he should happen to be innocent momentarily)." Rule 404(b) addresses this danger directly, to be sure; however, prior convictions also present a danger of unfair prejudice and are thus subject to the Rule 403 balancing test.

Because Rule 403 contemplates a balancing test, the Court then had to describe how to conduct that balancing. Two possibilities arose for doing so. First, "an item of evidence might be viewed as an island," such that its probative value and danger for unfair prejudice would be assessed in a vacuum. Second, the item of evidence in question could be measured in relation to "the full evidentiary context of the case as the court understands it when the ruling must be made." Under the first approach, the party offering the evidence would have an incentive to organize its case around the most unfairly prejudicial evidence it can find that is highly probative, and leave out equally probative evidence that is less prejudicial. Thus, even if the trial court were to exclude the proffering party's preferred evidence, that party would still have equally probative evidence to fall back on. Thus, the Court reasoned that an assessment of prejudice must be conducted with reference to all the other actually available evidence in the hands of the proffering party.

As a general rule, the prosecution is generally entitled to prove its case in the manner it sees fit. Jurors come to court expecting that evidence will be presented to them in narrative fashion, and there is a possibility that jurors may punish a party that does not meet this expectation. Even if

jurors do not expressly punish the prosecution for the sin of making its case with stipulations, they may still be confused by a story that moves in fits and starts, with essential gaps filled in by stipulations instead of succinct storytelling. Yet, as far as the element of a prior conviction is concerned, a defendant's stipulation is just as conclusive as the underlying facts of the crime. The prosecution's need to prove its case via storytelling has no force when it comes to the fact of a prior conviction. In order to find this element of the felon-in-possession crime satisfied, all the jury needs to know is that the defendant has been convicted of a crime that qualifies him as a prohibited possessor, and this can just as easily be accomplished by stipulation as by narrative storytelling. Therefore, although the prosecution ordinarily may insist on proving its case via narrative evidence, Rule 403 allows the defendant to stipulate to prior convictions in order to avoid the unfair prejudice that would result from the prosecution introducing the facts of that prior crime into evidence during the later prosecution.

(This discussion of *Old Chief* is taken verbatim from an excellent discussion in Wikipedia. *See* http://en.wikipedia.org/wiki/Old_Chief_v._United_States).

Due Process Analysis. While *Old Chief* is an application of Federal Rule of Evidence 403, its analysis is perfectly suited to the due process clause, thereby prohibiting a state from applying procedures that permit prosecutors to introduce highly and unfairly prejudicial evidence to which the defendant is perfectly willing to stipulate.

Claim 12: The State violated the Due Process Clause of the Fourteenth Amendment by refusing to instruct jurors on the law of parties.

***Exhaustion*.** The claim was timely presented to the trial court which denied relief. RR 41, p. 16, 18; CR 573-90. Holiday presented it to the CCA as point of error number 28 in his direct appeal brief. *See* Appellant's Brf. at 90-94 (page 94 references 14th Amendment DPC).

The CCA denied this claim on a state law ground, ignoring the federal aspects, thereby permitting *de novo* review. *See Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *64-65 (Tex. Crim. App. Feb. 8, 2006) (page 18 of slip opinion); *see supra*, at 67.

Introduction. The trial court submitted three separate charges to jurors, one for each capital murder allegation against Holiday. These charges did not include any instruction concerning the law of parties, which Holiday wanted because there was sufficient record evidence that Beverly Mitchell caused arson and the deaths. As mentioned, the State theorized that Beverly Mitchell poured gasoline through the house while three children sat on a couch:

> [T]hat the three children: Tierra, Jasmine and Justice were sitting on the couch huddled together. That he (Holiday) forced her (Beverly Mitchell) to place one can of gasoline down in the kitchen area and take the other can of gasoline and start pouring it out in the house. The State contended either that Holiday ignited the gasoline or that the gasoline was ignited by spark or pilot light before anyone could cause the ignition. *See* RR 32, p. 36 (Prosecution opening argument:).

Further, Ms. Mitchell described her pouring of the gasoline in her testimony. RR 33, pp. 97–100. The prosecutor argued to jurors:

> [I]f for some reason you didn't think that the defendant lit the fire here you could still convict him of capital murder if you concluded that his intent was to kill those kids. And that but for him having Beverly pour gasoline throughout that house they never would have died this night. RR 41, pp. 53–54.

In each charge the trial court instructed the jury on the law of causation:

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient. CR 4, pp. 574, 580, 586.

Holiday objected to this instruction. *See* Vol. 41, RR pp. 1—18; CR Vol. 4 @ 573—90. Further, Holiday objected that the two jury charges did not include any instruction concerning criminal responsibility for the conduct of another. *See* Vol. 41, RR pp. 16-20. The defense attorney

said: "Specifically, with regard to Cause No. 10,423 ... With regard to number six, which is the application of the law to the facts paragraph ... We would request that that instruction include a specific application of the law to the facts concerning the principal of law of criminal responsibility for the conduct of another. We believe that that is raised by the evidence of the conduct of Beverly Mitchell." RR 41, pp. 15–16.

The attorney also argued:

> With regard to the next two cause numbers ... 10,425 and 10,427 ... With regard to paragraph number six in both of these causes ... We believe that that does not properly instruct the jury as to the legal principles of criminal responsibility for the conduct of another. RR 41, p. 17.

Worse, not only did the court fail to instruct the jury on the principles of criminal responsibility for the conduct of another, over objection, the court included a charge concerning causation, *see* Tex. Penal Code art. 6.04 (2004):

> A person is criminally responsible if the result would not have occurred but for his conduct, operating either alone or concurrently with another cause, unless the concurrent cause was clearly sufficient to produce the result and the conduct of the defendant clearly insufficient. CR 4, 574, 580, 586.

The failure to instruct the jury on the law of parties left the jury unguided with regard to the State's theory that Holiday was solely responsible for the burning deaths of the children, even though another person was in the chain of causation, Beverly Mitchell. As a result, Holiday was unable to obtain instruction to jurors that another person caused the deaths, which was his defense.

Discussion. Under Texas law, under some circumstances a person may be criminally responsible for the conduct or results caused by another. Tex. Penal Code, art. 7.02 (2004).

Taken together with the absence of a proper instruction on criminal responsibility for the conduct of another, a jury may well have been led to believe that Holiday was guilty of capital murder, even if the deaths would not have resulted by his conduct alone. The jury was never told

by the court that in order to convict Holiday of capital murder by causing gasoline to be poured in a home occupied by three children, they must believe beyond a reasonable doubt that Holiday either intended to kill the children or was aware that his conduct was reasonably certain to result in the killings. Nothing in the charge guides the jury as to the proper consideration of what circumstances must be found before they can conclude that Holiday is criminally responsible for the conduct of Beverly Mitchell. The failure to give the required instruction is compounded by the instruction concerning causation.

This paragraph in the charge was the only instruction to the jury that allowed them to consider the acts of Beverly Mitchell in determining Holiday's culpability. Such an instruction is misleading and lowers the burden of proof required of the State. The failure to properly instruct on the law of parties allows the jury to convict without regard to his intent. This charge error violates the Due Process Clause of the Fourteenth Amendment.

In *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Supreme Court unanimously held that a defendant has a fundamental due process and confrontation right to present a complete defense that someone else committed the crime, rejecting state rules assigning low relevancy to the defendant's evidence compared to the State's evidence of guilt. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes*, 547 U.S. at 324 (citations and marks omitted); *see California v. Trombetta,* 467 U.S. 479, 485 (1984); *Washington v. Texas,* 388 U.S. 14 (1967) (right to present complete defense that another committed the crime violated); *Chambers v. Mississippi,* 410 U.S. 284, 302-303, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (same).

"[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky,* 476 U.S. 683, 690 (1986).

Here, without instructions authorizing jurors to find Holiday not guilty because causation had not be established because any actions taken by him were not the cause in fact of the deaths, and that cause in fact actually occurred through Beverly Mitchell, Holiday's right to present a complete defense.

Claim 13: The State violated the Right to Remain Silent Clause of the Fifth Amendment and the Due Process Clause of the Fourteenth Amendment by commenting to jurors on Holiday's failure to testify.

Exhaustion. This claim was timely presented to the trial court which denied relief. RR 41, p. 16, 18; CR 573-590. It was presented to CCA as point of error number 29 in Holiday's direct appeal brief. *See* Appellant's Brf. at 94-99 (see page 96 for reference to Fifth Amendment).

The CCA denied relief on the merits. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *65-68 (Tex. Crim. App. Feb. 8, 2006) (pages 18-19 of slip opinion).

This claim was presented to this Court in Holiday's initial federal habeas petition as claim 12. In our rush to file, we incorrectly labeled this claim as number 12, when it should have been number 13. *See* Holiday App. Habeas Corpus at 75 (filed May 4, 2011). And we incorrectly recopied the heading of claim 11 and inserted it as claim 12. The text of claim 12 presented Holiday's Fifth Amendment complaint, copied from his direct appeal brief, *ibid* at 75-79, and referred to its Fifth Amended basis on page 76. The claim is safely preserved.

Improper Statements by Prosecutor.

> Statement 1: For instance if I was charged with murder and the evidence showed that I shot someone in the head three times, but at my trial I got up and testified, well— RR 41, p. 25.

DEFENSE RESPONSE: @ p. 25—26: Objection to comment on failure of D to testify

a. Defense objected: "Your Honor, I object to the comment on the failure of defendant to testify."
b. Judge sustained. @ 26.
c. Judge instructed jury to disregard. @ 26.
d. Judge denied motion for mistrial. @ 26.

Statement 2: Now, I want to talk to you a little bit just about what is not in dispute in this trial. What we believe based on the evidence is not in dispute at this trial. RR 41, p. 29.

DEFENSE RESPONSE @ p. 29: Objection to comment on failure of D to testify

e. Defense objected: "I object to comment on the failure of the defendant to testify." @ 29.
f. Judge *overruled*. @ 29.

Statement 3: I don't think there is any dispute that the defendant is involved in this case. RR 41, p. 29.

DEFENSE RESPONSE: @ p. 30: Objection to comment on failure of D to testify

g. Defense objected:
   i. DEFENSE: Prosecutor's comment that there was no dispute that the defendant is involved in this case is a comment on the failure of the defendant to testify because he does not dispute his presence or involvement in the case. That's Fifth Amendment self-incrimination violation conduct comment not to testify. @ 30.
   ii. MRS. POPPS: They, too, are not saying this is a different guy.
   iii. MR. BLAZEK: The defendant doesn't have to prove —
h. Judge sustained. @ 30.
i. Judge instructed jury to disregard. @ 30.
j. Judge denied motion for mistrial. @ 30.

Statement 4: There is no dispute that there were three children killed here which means two or more people— RR 41, p. 30.

DEFENSE RESPONSE: @ p. 31: Objection to comment on failure of D to testify

k. Defense objected:

i. DEFENSE: Your Honor, may we approach the bench again? Every time she uses the word no dispute, these are elements that my client could choose to dispute or not dispute. The fact that he has chosen not to testify is not something she should put into her argument. She shouldn't make hay on the fact that my client did not testify, the comment on his failure to testify.
ii. MRS. POPPS: Are you saying disputed?
iii. THE COURT: If you say it's not controverted.
iv. MR. BLAZEK: There is cases where people say all the evidence shows, sometimes, depending upon the circumstances, means it's a comment.
v. THE COURT: We think under the evidence that -
vi. MRS. POPPS: Okay, that will be fine.
vii. MR. BLAZEK: I make my objection, Your Honor.

l. Judge sustained. @ 31.
m. Judge instructed jury to disregard. @ 31.
n. Judge denied motion for mistrial. @ 32.

Statement 5: We also know that when he was outside with Terry and Beverly and the kids and he was ranting and raving and shooting off the gun and burning things on the ground and lighting fires and scaring everyone half to death, that what he said as the reason he was out there was I'm not going to take the rap on these rape charges. I'm not going to do it. I'm going to take care of it tonight. I'm going to burn the house down with everyone in it. That's what he said. Those statements have not been refuted and there has been no attempt— RR 41, p. 36-37.

DEFENSE RESPONSE: @ p. 36—38: Objection to comment on failure of D to testify

o. Defense objected:
i. MR. BLAZEK: Your Honor, could we approach the bench? (Following discussion at the bench)
ii. MR. BLAZEK: Those charges have not been refuted. It's a charge against the defendant, I guess she expects to defendant to refute them.
iii. MRS. POPPS: No, I don't.
iv. MR. BLAZEK: It's clear inference that the defendant has not elected to refute these charges, more evidence of his guilt and a comment on his failure to testify.
v. THE COURT: Are you referring to the -
vi. MR. BLAZEK: The comments she made apparently about the statements she claims were made at the scene by him and that he chose not to refute the statements.
vii. THE COURT: She didn't say that.

viii. MR. BLAZEK: Didn't say — she said these charges have not been refuted. The clear implication is that he should have been the one to refute them. Who else is there?

ix. THE COURT-. She quoted somebody that testified. I don't know -

x. MRS. POPPS: My next statement was going (p. 38) to be there have been no attempts to impeach Terry in saying those were the statements that the defendant said. But I will be happy to just move off the subject if you would rather. That's fine, I just would like to not be harassed throughout my closing argument. I can't concentrate.

xi. THE COURT: All right. I will sustain the objection.

p. Judge sustained. @ 38.
q. Judge instructed jury to disregard. @ 38.
r. Judge denied motion for mistrial. @ 38.

CCA Analysis. The CCA addressed the Fifth Amendment claim on its merit, but impermissibly manufactured a state law test to do so, thereby allowing Holiday past the AEDPA 2254(d)(1) barrier: (1) "The comment must clearly refer to the defendant's failure to testify," and (2) "the language used was manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify." *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *66-67 (Tex. Crim. App. Feb. 8, 2006) (page 18 of slip opinion) (*citing Canales v. State*, 98 S.W.3d 690, 695 (Tex. Crim. App. 2003).

Supreme Court Jurisprudence in Effect in 2006. Analysis of the Fifth Amendment prohibition on comments by prosecutors and judges on a defendant's decision not to testify begins with *Griffin v. California*, 380 U.S. 609 (1965). Although the CCA referred to *Griffin* in *Canales*, the CCA did not apply the Supreme Court's test for violations, and instead created one of its own, making the burden far heaver than federal constitutional law requires.

In *Griffin*, the Court stated the test: "We take that in its literal sense and hold that the Fifth Amendment, . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Griffin v. California,* 85 S. Ct.

1229, 1233 (U.S. 1965). This is a bright-line test. Comment on a defendant's failure to testify violates the Fifth Amendment. The Court did not require a subjective investigation into the prosecutor's intent, or as the CCA terms, "manifestly intended," or a subjective investigation into the jurors' interpretation, who would "necessarily and naturally take it as a comment."

The Supreme Court explained precisely why it found a violation in *Griffin* and it had nothing to do with these invented tests by the CCA:

> This Court set aside Griffin's conviction because "the Fifth Amendment . . . forbids either comment by the prosecution on the accused's silence or instructions by the court that such silence is evidence of guilt." *Id.,* at 615. n11 It condemned adverse comment on a defendant's failure to testify as reminiscent of the "'inquisitorial system of criminal justice,'" *id.*, at 614, *quoting Murphy v. Waterfront Comm'n,* 378 U.S. 52, 55, and concluded that such comment effected a court-imposed penalty upon the defendant that was unacceptable because "[it] cuts down on the privilege by making its assertion costly." 380 U.S., at 614.
>
> *Carter v. Kentucky*, 450 U.S. 288, 297-98 (U.S. 1981).

Therefore, to establish a violation, we see that the Court requires only that the defendant show that the prosecutor made a comment on his silence.

Here is another example. In *Lakeside v. Oregon,* 435 U.S. 333 (1978), the Court held that a judge is permitted to instruct jurors not to consider the defendant's failure to testify. The Court later explained, "The Lakeside Court reasoned that the Fifth and Fourteenth Amendments bar only adverse comment on a defendant's failure to testify, . . ." *Carter*, 450 U.S. at 298. Therefore, again, a Fifth Amendment violation occurs when there is a comment by prosecutors on a defendant's failure to testify.

In *United States v. Robinson*, 485 U.S. 25, 32 (1988), the Court clarified slightly, stating that "Where the prosecutor on his own initiative asks the jury to draw an adverse inference from a defendant's silence, Griffin holds that the privilege against compulsory self-incrimination is

violated." Court said nothing to give a basis for the CCA's self-created modifications of the simple *Griffin* test.

If the CCA was required to conduct a federal constitutional claim harm analysis, it would have been under *Chapman v. California,* 386 U.S. 18 (1967), which holds that when an appellant establishes that the lower court proceedings contained error impacting his or her federal constitutional rights, the error requires reversal unless the prosecution can establish it was harmless beyond a reasonable doubt. The CCA conducted no such analysis. Failing to do so was an unreasonable application of Supreme Court law.

We do not agree that the Court should apply the *Brecht* standard. On collateral review, a federal court is sometimes required to find an error to be harmless unless the error "had a substantial and injurious effect or influence in determining the jury's verdict." *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993); *see Robertson v. Cain*, 324 F.3d 297, 306-07 (5th Cir.2003). If any harm analysis standard is required to apply, we believe it must be the *Chapman* standard plus AEDPA deference. *Eddleman v. McKee,* 471 F.3d 576, 2006 WL 3627200, at *5 (6th Cir. Dec. 14, 2006), provides the analysis we prefer.

Analysis. Holiday did not testify. But during closing argument, the prosecutor made the following arguments to the jury::

> For instance if I was charged with murder and the evidence showed that I shot someone in the head three times, but at my trial I got up and testified, well— RR 41, p. 25.
>
> Now, I want to talk to you a little bit just about what is not in dispute in this trial. What we believe based on the evidence is not in dispute at this trial. RR 41, p. 29.
>
> I don't think there is any dispute that the defendant is involved in this case. RR 41, p. 29.

> There is no dispute that there were three children killed here which means two or more people— RR 41, p. 30.
>
> We also know that when he was outside with Terry and Beverly and the kids and he was ranting and raving and shooting off the gun and burning things on the ground and lighting fires and scaring everyone half to death, that what he said as the reason he was out there was I'm not going to take the rap on these rape charges. I'm not going to do it. I'm going to take care of it tonight. I'm going to burn the house down with everyone in it. That's what he said. Those statements have not been refuted and there has been no attempt— RR 41, p. 36-37.

Holiday objected to each statement as a Fifth Amendment violation, which the trial court *sustained* — correctly creating an AEDPA binding finding of fact that the Fifth Amendment was violated — then instructed jurors to disregard, but inexplicably denied Holiday's motion for mistrial.

Further, the State's expert criminalist, Dr. DeHaan, told the jury that he relied on Holiday's statement to assist in forming his expert opinion that the appliances were excluded as potential ignition sources of the fire. The judge instructed the jury to disregard the comment but denied Holiday's motion for mistrial. RR 36, p. 166.

The fifth and final comment by the prosecutor standing alone could not be cured by any instruction. Here the prosecutor referred to the testimony of Beverly Mitchell and Terry Keller. Both witnesses testified that Holiday made statements at the scene indicating he was going to burn down the house and kill everyone. This testimony is critically important because it directly relates to the issue of intent. To argue as the prosecutor did that such testimony was not refuted is clearly directed at Holiday's failure to testify.

The only witness who could have possibly refuted the testimony of Mitchell and Keller would have been Holiday. The prosecutor's arguments that these statements "have not been

refuted" is a direct comment on failure to testify. There is no other interpretation. The comment directs to the most critical issue of the case, intent. The comment is manifestly improper because it came after four previous such comments had been the subject of objections, rulings and instructions. The harmful impact of this argument is compounded by the exposure of the jury to the improper testimony of Dr. DeHaan that he reached his opinions after reading Holiday's out-of-court statement, falsely suggesting to the jury that Holiday admitted starting the fire.

The record meets the standard required for a finding of error, harm and reversal. The evidence and circumstances of the offense do not clearly indicate Holiday's guilt of capital murder. As to motive, there was ample evidence that Holiday loved the children and cared for them. Beverly Mitchell and Tami Wilkerson both testified that at the time they did not believe that Holiday planned to hurt the children. The evidence was conflicting as to the ignition of the fire. Holiday's fire cause and origin expert concluded that the fire started by either an electrical appliance spark or a pilot light coming in contact with gasoline vapors. Two of the State's experts could not exclude this accidental source of ignition.

AEDPA Analysis. Unequivocally, the CCA has manufactured its own test for impermissible comments by prosecutors on a defendant's silence, unsanctioned by the Supreme Court. The CCA's failure to comply with then-existing Supreme Court jurisprudence permits Holiday to overcome 2254(d)(1).

Further, the CCA was faced with facts in which the trial judge *sustained* a string of Holiday's Fifth Amendment objections. The trial judge's ruling constitutes a state judicial finding that there was in fact a violation. Yet the CCA set aside these findings. On the first comment, it did so on the basis of its self-created "manifestly intended" or "necessarily and naturally take it as a comment" tests, not on the basis of the test required by *Griffin* and *Robinson* that merely require

showing that the prosecutor, on his own initiative, commented on Holiday's failure to testify. *See Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *65-68 (Tex. Crim. App. Feb. 8, 2006) (page 18-19 of slip opinion) ("manifestly intended or was of such a character that the jury would necessarily and naturally take it as a comment on the defendant's failure to testify.")

On the fifth comment, the CCA agreed that there was a violation, but summarily concluded that it was cured by instruction, without a *Chapman* analysis. On the second, third and fourth comments, the CCA did not even believe that a comment had occurred. All of these denials are unreasonable applications of fact, permitting Holiday past the 2254(d)(2) barrier to relief.

Claim 14: **The State trial court violated the Due Process Clause of the Fourteenth Amendment by permitting a State expert, Dr. Edward Gripon, to testify that Holiday would likely commit future acts of violence.**

Claim 15: **The State trial court violated the Cruel and Unusual Punishment Clause of the Eighth Amendment by permitting a State expert, Dr. Edward Gripon, to testify that Holiday would likely commit future acts of violence.**

***Exhaustion*.** These claims were timely presented to the trial court which denied relief. RR 44, pp. 3–110, specifically pages 54-55. They were presented to the CCA as point of error number 31 in direct appeal brief. *See* Appellant's Brf. at 102-09 (see pages 108-09 for constitutional references).

The CCA denied relief, and may or may not have addressed the merits of the claims. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *69-75 (Tex. Crim. App. Feb. 8, 2006) (pages 19-21 of slip opinion). The CCA evaluated the claim under the rubric of *Daubert* and its state law equivalent, without mention of the constitutional claims, but the substance of its analysis is identical to what would be required to resolve the constitutional claims.

Discussion of CCA Reliance on American Psychiatric Association. First, it must be said that one of the central points made the CCA is dead wrong: "While making predictions about future behavior is controversial among psychiatrists, forensic psychiatry is a legitimate and recognized field by the American Psychiatric Association." *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *69-75 (Tex. Crim. App. Feb. 8, 2006) (pages 19-21 of slip opinion).

This is a bit of disingenuous slight of hand by the CCA, which tries to blur two distinct concepts, predictions of future dangerousness in capital cases, and the broader concept of forensic psychiatry. The APA absolutely does not accept future dangerousness predictions in capital trials, and the CCA should know it because the APA filed an *amicus* brief in a Texas death row appeal in *Barefoot v. Estelle,* 463 U.S. 880 (1983), challenging that very concept. While the Supreme Court rejected Barefoot's and the APA's position, *ibid* at 899-902, the APA's opposition to future dangerousness predictions was clear: "The American Psychiatric Association (APA), participating in this case as *amicus curiae*, informs us that '[t]he unreliability of psychiatric predictions of long-term future dangerousness is by now an established fact within the profession.' Brief for American Psychiatric Association as Amicus Curiae 12 (APA Brief). The APA's best estimate is that two out of three predictions of long-term future violence made by psychiatrists are wrong. *Id.* at 9, 13." *Barefoot*, 463 U.S. at 920 (Blackmun, J., dissenting).

Similarly, the APA filed an *amicus* brief opposing the scandalous and cavalier testimony by infamous Dr. Grigson in *Estelle v. Smith,* arguing that "clinical predictions as to whether a person would or would not commit violent acts in the future are 'fundamentally of very low reliability,' and that psychiatrists possess no special qualifications for making such forecasts." *Estelle v. Smith,* 451 U.S. 454, 472 (1981) (citing among others Brief for American Psychiatric Association as Amicus Curiae 11-17.).

Trial Testimony. Dr. Gripon is a psychiatrist with experience in general and forensic psychiatry. He has testified on numerous occasions on areas relating to forensic psychiatry. He was disciplined February 1, 2010 by the Texas Medical Board for quality of care violation as a result of record keeping violations. The Board found "that Dr. Gripon failed to meet the standard of care, maintain adequate medical records and prescribe controlled substances in a manner consistent with public health and welfare for a patient with a psychiatric disorder as well as chronic pain." 12 News KBMT, "Prominent Beaumont Psychiatrist Disciplined by State," (Feb. 17, 2010) (http://www.12newsnow.com/Global/story.asp?S=12000321).

He testified here about Holiday's future dangerousness. RR 44, p. 12. He explained that he knew of three basic techniques used by psychiatrists to form such opinions: the clinical, the demographic and the actuarial. He uses the first two methods. In forming his opinion about Holiday he reviewed offense reports, school records, medical records, historical information as to prior allegations and the psychological testing and testimony of the defense expert, Dr. Fason. He did not conduct a clinical interview of Holiday. He knew of no study that would review the potential error rate in the techniques he used. RR 44, p. 20. He has not performed any research to determine whether his methodology is accurate. RR 44, p. 23.

There is no accepted term to describe the methodology he used, but he had no problem accepting the label of "clinical slash demographic." With regard to the clinical aspect of his approach he looks for information related to Axis One and Two for mental health issues. With regard to the demographic part, "that takes into account other factors: educational level, family support system, any number of factors." From his knowledge, others in the field of forensic psychiatry each have a different set of factors that they consider to predict future danger. RR 44, p. 28.

He had never counted the demographic factors he uses. When asked here, he indicated that he used the demographic factors of age and education. The primary factor being age. He was unable to identify any other demographic factor that he used. RR 44, pp. 28–30.

He indicated that he considered and used actuarial factors. He recognizes that studies in this field indicated that most people are not a future danger and he knows of no actuarial study that would indicate that Holiday was a future danger. RR 44, pp. 30–31.

He does not know if any of his predictions are accurate. RR 44, p. 34. He believes it is impossible to do any kind of study that will either validate or invalidate the issue (determining the reliability of the prediction of future danger). He believes there is no consensus as to the reliability of such predictions. RR 44, p. 35. In the field of psychiatry, he said there is no diagnosis available for future dangerousness. The DSM–4 "doesn't give you a diagnosis of future dangerousness and it doesn't give you certainty as to prediction." RR 44, p. 37.

The focus of a psychiatric training is on the diagnosis and treatment of mental illness. RR 44, p. 38. Future danger is not a mental illness, he said. There is no consensus in the field as to what methodology should be used to predict future danger, he claimed. RR 44, p. 42. Gripon was generally aware that various groups advocate various methods, but he claimed ignorance of who they are and what they require to make predictions of future danger. RR 44, p. 44. He is familiar with one other person that uses a methodology similar to his in making such predictions, Richard Countz, a lawyer and psychiatrist. RR 44, p. 45.

Despite this astounding lack of knowledge or scientific validity, Gripon predicted that Holiday would be a future danger in prison and without. Vol. 44, @ pp. 89-90.

Holiday's attorney called Dr. Fred Fason, a noted forensic psychiatrist, in response. Fason listened to Dr. Gripon's testimony and explained in detail the deficiencies of the methodology used

by Dr. Gripon. He concluded that Dr. Gripon's opinion as to future danger was not scientifically sound or reliable. RR 44, pp. 46–51.

Discussion. Gripon was unqualified. He did not study solved cases to understand the dynamics of what had occurred. He did not study other capital cases that concerned the issue of future dangerousness. He conducted no research at all on the issue.

Unique to this case, Dr. Gripon did not know the details of the methodology used by others in making such predictions. His methodology created a great risk of unreliability. His reliance on demographic factors is particularly troubling. He could articulate only two factors that he considered, age and education. Gripon did not offer any explanation or theory as to how age and education were appropriate factors to consider in making such predictions. Dr. Gripon said other experts used other demographic factors but he did not know what factors they used. Thus, it was impossible to determine whether this "expert properly applied the principles of the field."

The trial court did not believe that Dr. Gripon's opinion was accurate or reliable, but decided that the jury should nonetheless be allowed to consider it, a clear contradiction, and disregard of the court's gate keeping responsibilities:

> THE COURT: He basically says that – I don't know what his words were, but he's not guaranteeing that he's correct.
>
> . . .
>
> THE COURT: Or reliable. He's saying this is what he thinks, this is his opinion.
>
> . . .
>
> THE COURT: Whether or not he can predict doesn't help me one bit.
>
> RR 44, pp. 40–41.

Psychiatry is not novel science. Predicting future danger is junk science. As Dr. Gripon stated:

> There are different methodologies and all of them are criticized by the various individuals using one or another. There is no consensus of opinion as to specifically what should be done. If there was we would all be doing it I would assume.
>
> RR 44, p. 42.

At the preliminary hearing, the State did not even attempt to establish that the science was properly applied in this case. The State did not offer the factual basis of Dr. Gripon's opinion and did not ask him what methodologies were available to predict future danger. The discussion of the three "models" came in incidentally in response to the State's question: "Did you use the valid underlying scientific theories that we have discussed?" RR 44, p. 12. At that point only the basic science of psychiatry had been discussed.

I. UNSTRUCTURED CLINICAL TESTIMONY LIKE THAT AT ISSUE IS NOT BASED ON SCIENCE AND SHOULD NOT BE RELIED UPON TO ESTABLISH FUTURE DANGEROUSNESS

Studies have long established that unstructured clinical approaches cannot assess future dangerousness with reliability comparable to structured approaches. It is now widely accepted that "[u]nstructured clinical judgment by itself is no longer a useful or necessary approach to appraising violence risk." Heilbrun et al., *Violence Risk Assessment Tools*, in *Handbook of Violence Risk Assessment* 1, 5 (Otto & Douglas eds., 2010).[6]

[6]Sections I and II of this claim are quoted verbatim from the *Amicus* brief written by Washington, D.C. attorney David W. Ogden and filed for the American Psychological Association and Texas Psychological Association in *Billie Wayne Coble v. Texas*, No. 10-1271 on May 18, 2011, with minor adaptations for this case.

The unstructured clinical approach is "basically a 'free-form' approach to risk assessment" based solely on "the evaluator's judgment about risk unaided by additional materials." Heilbrun, *Evaluation for Risk of Violence in Adults* 52 (2009). This approach imposes no structure on any of the four key decisions in the assessment process: (1) determining which risk factors to consider; (2) determining how to measure them; (3) combining the factors into "a single overarching estimate of violence risk"; and (4) "generating a final risk estimate." Monahan, *Structured Risk Assessment of Violence*, in *Textbook of Violence Assessment and Management* 17, 20-21 (Simon & Tardiff eds., 2008). Instead, "[w]hat these risk factors are, or how they are measured, might vary from case to case depending on which seem most relevant to the professional doing the assessment." Monahan, *Structured Risk Assessment* 19. The evaluator then combines the risk factors in an "intuitive" manner to generate an opinion about an individual's level of violence risk. *Id.* This lack of structure allows cognitive biases to skew the future-dangerousness analysis. These biases include: (a) ignoring base-rate information (not knowing or not using the rate at which the predicted event occurs in the population of interest); (b) assigning nonoptimal weights to factors (combining and weighing factors based on intuitive judgments …); and (c) employing the representativeness heuristic (the tendency to make decisions or judge information in a manner that fits preconceived categories or stereotypes of a situation …)[.] Krauss & Lieberman, *Expert Testimony on Risk and Future Dangerousness*, in *Expert Psychological Testimony for the Courts* 227, 229 (Costanzo et al. eds., 2006); *see also* Krauss & Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision-Making in Capital Sentencing*, 7 Psychol. Pub. Pol'y & Law 267, 280 (2001) (confirmation bias can result in overestimating dangerousness due to evaluators' propensity "to ignore evidence that disconfirms their initial opinion" while continuing

"to select information that supports it"). Additionally, those employing unstructured clinical approaches often make the "fundamental attribution error," which causes individuals to incorrectly perceive that another's behavior is based on stable dispositions (*i.e.*, traits) rather than situational contexts. Melton et al., *Psychological Evaluations for the Courts* 300 (3d ed. 2007).

Such biases can render the future-dangerousness assessment unreliable. For example, evaluators using unstructured clinical approaches often fail to take into account the "base rate"[7] of violence in the subject's particular population. Heilbrun, *Evaluation for Risk of Violence* 45-46. "[I]gnorance of base rates ... [is] one of the most serious shortcomings associated with violence risk assessment" because the base rate of violence in the relevant population (*e.g.*, prison, hospital, or community) directly affects the accuracy of the assessment of an individual's future dangerousness. *Id.* at 46. Where base rates are not considered, any assessment would necessarily be "skewed" because "there is no basis for comparison of a given individual to 'average' propensities" for the trait being examined.[111] Sandys et al., *Aggravation and Mitigation*, 37 J. Psychiatry & L. 189, 213 (2009); *see also* DeMatteo et al., *Forensic Mental Health Assessments in Death Penalty Cases* 270 (2011) ("Base rates allow us to tether risk estimates to known facts—in the form of group data—rather than to intuition or assumptions."). Failure to account for low base rates often causes evaluators to over-predict the likeli-hood of violence. Additionally, an evaluator using unstructured clinical analysis might intuitively—but incorrectly—"place excessive weight on the heinousness of the defendant's most recent act (a factor not commonly associated with

[7]The base rate is the frequency that a particular behavior occurs within a specified population over a specified time period. *See* Sandys et al., *Aggravation and Mitigation*, 37 J. Psychiatry & L. 189, 213 (2009) (base rates measure the "statistical prevalence of a particular behavior over a set period of time" (internal quotation marks omitted)).

[1]For example, if an individual is at "twice" the risk of having a particular disease, it matters whether that person belongs to a population with a base rate of one-in-ten chance or one-in-one thousand chance of having that disease.

future violence) in arriving at a conclusion that the defendant will be dangerous in the future." Krauss & Lieberman, *Expert Testimony* 229.

Early studies indicated that unstructured clinical assessments of future dangerousness were "accurate in no more than one out of three predictions of violent behavior over a several-year period." Monahan, *The Clinical Prediction of Violent Behavior* 47 (1981).

Since those early studies, "[l]ittle has transpired … to increase confidence in the ability of mental health professionals, using their unstructured clinical judgment, to accurately assess risk of violence in the community." Monahan, *Structured Risk Assessment* 19. The unstructured clinical mode of analysis has been consistently found only slightly more reliable than chance in assessing future dangerousness. *See, e.g.*, Mossman, *Assessing Predictions of Violence*, 62 J. Consulting & Clinical Psychol. 783, 790 (1994).

Dr. Gripon's analysis in this case reflects the flaws typical of unstructured clinical assessments. For instance, there is no indication that Dr. Gripon accounted for any base rates (in the community or in prison), an error that can severely skew any risk analysis. Moreover, even if he had considered the base rate of violence in prison where Mr. Holiday would most likely spend the rest of his life if spared the death penalty,[9] that low rate would have rendered his unstructured assessment of Mr. Holiday's future dangerousness flawed. Low base rates of prison violence, if not properly accounted for, result in an unacceptably high number of false predictions that subjects are likely to commit future violent acts. Monahan, *Clinical Prediction* 33 ("[I]t is virtually impossible to predict any 'low base rate' event without at the same time erroneously pointing the finger at many false positives."). Although structured risk-assessment approaches can account for

[9]Although not the exclusive focus of the future dangerousness issue, the TCCA acknowledged that, under Texas law, "the likelihood that a defendant does not or will not pose a heightened risk of violence in the structured prison community is a relevant, indeed important, criterion." Pet. App. 19a-20a.

such difficulties, the low base rate of prison violence makes the *unstructured* prediction of future dangerousness of individuals in prison exceedingly difficult. *See* Cunningham et al., *An Actuarial Model for Assessment of Prison Violence Risk Among Maximum Security Inmates*, 12 Assessment 40, 40 (Mar. 2005).

Dr. Gripon's assessment also relied heavily on Mr. Holiday's history of violence and past behavior in the community, factors that studies have demonstrated have little correlation with an individual's propensity for violence in prison. *See* Cunningham, 12 Assessment at 42. In other words, Dr. Gripon intuitively selected factors he believed were likely to predict future violence, rather than relying on factors that have been empirically demonstrated to relate to the risk of future violence among individuals in a particular context.

In sum, "a substantial body of research suggests that expert predictions of future dangerousness, when based solely on the testifying expert's clinical experience, demonstrate an unimpressive ability to accurately forecast the long-term future behavior of criminal defendants." Krauss & Lee, *Deliberating on Dangerousness and Death*, 26 Int'l J. of L. & Psychiatry 113, 113-114 (2003).

Accordingly, unstructured clinical assessments of future dangerousness like Dr. Gripon's are insufficiently reliable to satisfy ordinary *Daubert*-like evidentiary standards. Their admission is inconsistent with the Eighth Amendment's heightened reliability requirement in capital cases. *See, e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 190 (1976).

II. IN CONTRAST TO DR. GRIPON'S UNSTRUCTURED APPROACH, STRUCTURED

RISK-ASSESSMENT METHODS ARE SCIENTIFICALLY BASED AND CAN RELIABLY INFORM ASSESSMENTS OF FUTURE DANGEROUSNESS IN A VARIETY OF CONTEXTS

In *Barefoot*, the Supreme Court expressed concern that concluding "that expert testimony about future dangerousness is far too unreliable to be admissible would immediately call into question those other contexts in which predictions of future behavior are constantly made." *Barefoot* v. *Estelle*, 463 U.S. 880, 898 (1983) (referring to civil commitment). Since *Barefoot*, however, researchers have developed better methods of assessing future dangerousness in a number of contexts. *See* Monahan, *Violence Risk Assessment*, in 11 *Handbook of Psychology* §§ 1.1, 4-5 (Goldstein & Weiner eds., 2003). These "structured" approaches, grounded in science and empirical data, have proven more reliable than unstructured clinical approaches and can validly assess future dangerousness in appropriate cases. *See id.* § 4 (describing "general superiority of statistical over clinical risk assessment"). Progress since *Barefoot* therefore has substantially addressed the Court's concern about "other contexts."

A. Structured Risk-Assessment Methods Are Grounded In Scientific Methods And Are Reliably Used To Assess Future Dangerousness In Many Contexts

In the last two decades, mental health professionals have made much progress in developing three risk assessment approaches that are based on scientific principles and can be reliable in assessing risk of future dangerousness in appropriate cases. These three methods—(1) actuarial assessment, (2) structured professional judgment, and (3) the anamnestic approach—incorporate varying degrees of structure in one or more of the four steps of the risk-assessment process. *See supra*. The use of predetermined methodologies or factors empirically proven to relate to future violence provides the structure on which these approaches are based. Monahan, *Structured Risk Assessment* 20-21; Heilbrun et al., *Violence Risk Assessment Tools* 5-6.

The actuarial approach uses statistical information according to clear rules. The "defining feature of actuarial assessment entails using an objective, mechanistic, reproducible combination of predictive factors, selected and verified through empirical research against known outcomes." Heilbrun, *Evaluation for Risk of Violence* 53. The actuarial approach structures and determines in advance all four components of risk assessment. *See* Skeem & Monahan, *Current Directions in Violence Risk Assessment*, 20 Current Directions in Psychol. Sci. 38, 39 (2011).

For instance, to assess future dangerousness in the community, evaluators rely on "empirically verified risk factors" that "have demonstrated the ability to predict the outcome of interest for the population being studied." Krauss & Lieberman, *Expert Testimony* 231. These predetermined risk factors are combined in a predetermined formula (*i.e.,* through an algorithm or equation) to generate an estimate of the probability of risk attributed to an individual with a score in a certain range. Mental-health professionals currently use a number of actuarial tools to assess future dangerousness in a variety of settings. For example, the Violence Risk Appraisal Guide ("VRAG") assesses the risk of future violence in the community among mentally ill offenders upon their release from prison or forensic hospitalization. Monahan, *Structured Risk Assessment* 26-27.

The VRAG measures twelve predetermined factors statistically shown to correlate with a risk of violence in mentally ill persons. *Id.* at 27. Each of these factors "is statistically weighted, and the weighted scores are summed together to yield an overall estimate of violence risk." *Id.* This tool has proven successful in assessing mentally ill offenders' potential for violence. *Id.* (recent study showed 11% of patients who scored in the lowest category of violence risk on the VRAG were found to have committed a new violent act, compared with 42% of patients in the middle category and 100% of patients in the highest category).

A second approach, structured (or guided) professional judgment ("SPJ"), "combine[s] the benefits of actuarial instruments with the flexibility of clinical judgments." Krauss & Lieberman, *Expert Testimony* 232. As opposed to the actuarial approach, which structures all four risk assessment components (and the unstructured approach, which structures none of them), this method structures only the first two. Specifically, SPJ uses predetermined risk factors that have been empirically shown to relate to an increased risk of violence. *Id.* at 233. In addition, the method of measuring those risk factors is predetermined using specified procedures rather than left to the evaluator's discretion. *See* Skeem & Monahan, *Current Directions* 39. Unlike the actuarial approach, however, SPJ allows for evaluator discretion at the final two stages of the risk assessment inquiry, the combination of factors and the ultimate risk estimate that includes consideration of case-specific facts. *See* Krauss & Lieberman, *Expert Testimony* 233.

Many professionally accepted risk-assessment tools incorporate SPJ and have been successfully used. For instance, the HCR-20 is an SPJ tool used to assess the future dangerousness of mental patients, including those who are involuntarily hospitalized following acquittal of criminal charges by reason of insanity. *See* Monahan, *Structured Risk Assessment* 21-22. The HCR-20 uses twenty ratings consisting of historical, clinical, and risk management factors selected based on dozens of empirical studies of factors likely to indicate a risk of future violence. *Id.* at 22. Each factor is measured on a scale that assesses points based on the extent to which the factor is present. *Id.* The HCR-20 then allows the evaluator to exercise discretion in combining the factors and reaching an overall risk estimate. *Id.* The HCR-20 has been effective: One study that followed formerly committed individuals with mental disorders after their release into the community found that 11% of the patients that scored in the lowest risk category of the HCR-20 committed or threatened a physically violent act, compared with 40% of those in the middle

category and 75% of those in the highest risk category. *Id.* at 21.

Another tool, the Classification of Violence Risk ("COVR"), is a computer program designed to assess the probability that an individual with a mental disorder will behave violently toward others. *See* Monahan, *Structured Risk Assessment* 23-24. The COVR structures the selection and measurement of risk factors and how those factors are combined to yield a risk estimate in one of five categories. *Id.* at 23, 30. Specifically, the COVR program can measure up to forty predetermined

risk factors. *Id.* at 23. The program then uses an interactive "classification tree methodology" to combine the risk factors. *Id.* at 23-24. Before making a final risk determination, the evaluator considers the results generated by the program in the context of additional information such as interviews with the subject's family, medical records, and clinical interviews. *Id.* at 24. Although currently less extensively studied than the HCR-20 or the VRAG, the COVR has also proven effective. In one study, 9% of the patients assessed using COVR as being at a low risk for violence committed a violent act, compared to 49% who were assessed as high risk. Monahan et al., *An Actuarial Model of Violence Risk Assessment for Persons with Mental Disorders*, 56 Psychiatric Servs. 810, 814 (2005) ("proportion of patients who were successfully classified was 76 percent").

Finally, the anamnestic approach involves a detailed consideration of an individual's life history to determine which risk factors associated with past acts of violence are now present. This approach requires extensive interviews of the subject, corroborated by collateral information about the specific incidents and circumstances on which the analysis relies. Heilbrun et al., *Violence Risk Assessment Tools* 6.

For instance, an individual may be questioned regarding thoughts, feelings, behaviors, and situationally relevant details (*e.g.*, whether alcohol or drugs were involved) associated with each

prior violent act. *Id*. The evaluator then detects patterns based on the subject's answers and determines which risk factors apply based on the subject's individual history. Heilbrun, *Evaluation for Risk of Violence* 55. The evaluator can also use information learned during this process to increase the accuracy of the ratings of the individualized risk factors if a formal risk-assessment tool is used. Heilbrun et al., *Violence Risk Assessment Tools* 6. Intended for use in conjunction with other structured risk-assessment approaches, the "strength of [the] anamnestic assessment involves the identification of risk factors and the gauging of patterns that are directly applicable to the individual being served." Heilbrun, *Evaluation for Risk of Violence* 55.

Dr. Gripon's methodology should not be mistaken for an anamnestic approach. Dr. Gripon failed to rely on factors empirically demonstrated to correlate with risk of future violence and did not identify individualized risk factors (aside from age) based on reviewing documents associated with Holiday regarding Holiday's life history. As Dr. Gripon testified, his conclusions were based entirely on documents provided by the prosecution. Dr. Gripon identified risk factors based solely on his own personal methodology, and whether a factor means something to him in terms of his education or experience or background.

B. Structured Risk-Assessment Tools Are Scientifically Grounded And Modestly But Consistently More Reliable Than The Unstructured Clinical Approach

In appropriate cases, expert testimony based on structured risk-assessment approaches can be scientifically reliable and provide a modest advantage over unstructured approaches. Indeed, "[t]here is a great deal of evidence that validated risk assessment tools provide a way of effectively distinguishing those at different levels of risk for violence, violent offending, and certain other antisocial outcomes." Heilbrun, *Evaluation for Risk of Violence* 74. Moreover, structured techniques

have repeatedly "demonstrate[d] superiority to unstructured clinical judgment in forecasting dangerousness." Krauss & Lieberman, *Expert Testimony* 230; *see also* Monahan, *Structured Risk Assessment* 31.

For instance, a number of meta-analyses (which examine and statistically combine the results of several studies) provide "considerable evidence for the utility of the actuarial prediction of violent behavior, including criminal recidivism." Heilbrun et al., *Violence Risk Assessment Tools* 10. In a number of head-to-head comparisons, "[a]ctuarial-based risk predictions of future dangerousness have outperformed unstructured clinical judgments." Krauss & Lieberman, *Expert Testimony* 232.

Likewise, multiple studies show that structured professional judgments "are significantly predictive of violent recidivism" and superior to the unstructured clinical approach. Heilbrun et al., *Violence Risk Assessment Tools* 12. The "enhanced structure associated with" these approaches eliminates many of the problems that render unstructured clinical approaches unreliable. *See* Heilbrun, *Evaluation for Risk of Violence* 64.

For example, structured risk-assessment tools account for base rates. This minimizes the chance that an evaluator will ignore or incorrectly estimate that rate, which often occurs with unstructured approaches. *See id.* at 45-46. As discussed *supra* Part I, absent consideration of base rates, risk assessments are likely to be skewed because there is no basis to compare a particular individual to the average. Moreover, because they are based on established, peer-reviewed methodology with known error rates, structured approaches provide greater transparency, allowing the jury to make a more informed decision when evaluating expert conclusions. *Cf. Daubert* v. *Merrell Dow Pharms., Inc.*, 509 U.S. 579, 595 (1993) (expert testimony "'can be both powerful and quite misleading because of the difficulty of evaluating it'").

To be sure, these more reliable approaches to assessing future dangerousness have largely been developed outside the capital context where populations of sufficient size have afforded the basis for analysis. Reliably assessing future dangerousness of capital offenders is more challenging, at least to the extent the law requires an assessment of future risk outside prison, because capital offenders spared the death penalty typically receive life in prison and consequently there is very little data with which to make the assessment. On the other hand, the fact that release into the community is rare means that the risk of future violence *in prison* is almost always the more relevant inquiry in the death penalty context. *See* Cunningham & Sorenson, *Capital Offenders in Texas Prisons*, 31 L. & Hum. Behav. 553, 554 (2007) (in assessing capital offenders' future dangerousness, "only prison is relevant or measurable" because "[c]urrent capital life inmates face multi-decade prison confinement or life-without parole"). And structured risk-assessment tools are currently being developed to increase the reliability of future-dangerousness assessments of capital offenders in prison. *See id.* at 555.[10]

III. UNSTRUCTURED CLINICAL RISK-ASSESSMENT TESTIMONY IS UNDULY PERSUASIVE TO JURIES

Admitting testimony based on unstructured clinical future-dangerousness assessments, like that offered by Dr. Gripon, poses a special danger in capital cases. Despite the scientific invalidity of such evidence, research demonstrates that capital juries give it undue weight in their deliberations. The risk that such testimony will lead capital juries to the wrong conclusion is great. Whether the Constitution bars its admission is therefore significant because that question

[10]Empirical evidence suggests that inmates serving life sentences have similar or lower rates of violence than other offenders. Sorensen & Cunningham, *Conviction Offense and Prison Violence*, 56 Crime & Delinquency 103, 105, 122-123 (2010). As discussed *supra* Part I, "[l]ow base rates of serious violent misconduct in prison are a primary barrier to any predictive scheme," Cunningham et al., 12 Assessment at 40, and are a particular barrier to unstructured clinical judgments such as Dr. Coons's. However, structured risk-assessment tools (such as the Risk Assessment Scale for Prison) are being developed to increase the reliability of such assessments by taking account of those low base rates.

determines whether the constitutional harmless-error standard will apply.

Studies show that in determining whether to assess the death penalty, juries spend a significant amount of time deliberating a defendant's propensity for dangerousness. Where a jury must decide whether a defendant poses a future danger before it can impose the death penalty, "[v]irtually all [jury] disagreements and prolonged discussions concerned" future dangerousness. Costanzo & Costanzo, *Life or Death Decisions*, 18 L. & Hum. Behav. 151, 168 (1994). Even when a futuredangerousness finding is not a prerequisite to a capital sentence, "topics related to the defendant's dangerousness should he ever return to society … are second only to the crime itself in the attention they receive during the jury's penalty phase deliberations." Blume et al., *Future Dangerousness in Capital Cases*, 86 Cornell L. Rev. 397, 404 (2001). This is true even when the prosecution has made little to no mention of the issue. *See id*. at 406-407.

Moreover, empirical data demonstrate that purportedly expert testimony regarding a defendant's future dangerousness "strongly affects final outcomes when it is presented." Krauss & Sales, 7 Psychol., Pub. Pol'y & L. at 274. Because jurors are already inclined to believe that a capital defendant poses a future danger, they tend to overvalue expert assessments confirming those beliefs. Showalter & Bonnie, *Psychiatrists and Capital Sentencing*, 12 Bull. Am. Acad. Psychiatry L. 159, 165 (1984). In fact, studies indicate that jurors are often less influenced by the content of an expert's

testimony than by his mere presence or credentials. *See* Greenberg & Wursten, 19 *The Psychologist*

and the Psychiatrist as Expert Witnesses, Prof. Psychol., Res. & Prac. 373, 376-377 (1988).

Strong evidence suggests that jurors weigh unstructured clinical testimony regarding a

defendant's future dangerousness more heavily than empirically based risk-assessment approaches across a variety of legal contexts, Krauss & Sales, 7 Psychol., Pub. Pol'y & L. at 305; *see also* Sandys et al., 37 J. Psychiatry & L. at 23 217 (mock jurors "rate clinical opinion as equally scientific, more persuasive and more influential than actuarial testimony"), even though their relative scientific

value is precisely the reverse. Although empirically based instruments "have improved the accuracy of [future-dangerousness] predictions" and "outperform[ed] clinical assessments," jurors continue to place greater weight on unstructured clinical expert testimony. Sandys et al., 37 J. Psychiatry & L. at 217 (citing studies); *see also supra* Part II. Researchers have hypothesized that this is so because unlike anecdotal or individualized data about the defendant, jurors have greater difficulty processing "complex and statistical information." *Id.* at 218; *see also* Cutler & Kovera, *Expert*

Psychological Testimony, 20 Current Directions in Psychol. Sci. 53, 55-56 (2011) (jurors may have difficulty distinguishing valid research from "junk science").

Notably, jurors' reliance on clinical expert testimony persists even after exposure to adversary procedures like cross-examination and the presentation of competing experts. Krauss & Sales, 7 Psychol., Pub. Pol'y & L. at 302, 305. These effects have also been found after juries are allowed to deliberate. Krauss & Lee, 26 Int'l J. of L. & Psychiatry at 116-117, 130-131.

This research indicating that the presentation of additional evidence cannot undo the prejudicial effect of unreliable unstructured clinical testimony calls into question one of the core premises in *Barefoot*: that the adversary process may be trusted "to sort out the reliable from the unreliable evidence" especially when the defendant "has the opportunity to present his own side of the case." *See* 463 U.S. at 901.

The empirical evidence also strongly suggests that although Dr. Gripon's testimony added nothing probative on the future dangerousness issue, it likely had a significant prejudicial effect on jury deliberations.. As one judge has explained, "the problem here … is not the introduction of one man's opinion on future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as an 'expert') gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact." *Flores* v. *Johnson*, 210 F.3d 456, 465-466 (5th Cir. 2000) (Garza, J., concurring). Because capital juries tend to give far greater weight to clinical as opposed to statistical expert testimony, the defense's presentation of

statistical expert testimony in this case cannot eliminate the taint of Dr. Gripon's testimony.

IV. ADMISSION OF DR. GRIPON'S TESTIMONY, AND THE CCA'S REFUSAL TO CORRECT THE ERROR, VIOLATED THE EIGHTH AMENDMENT UNDER THE SUPREME COURT'S SETTLED 8TH AND 14TH AMENDMENT JURISPRUDENCE, EXISTING AT THE TIME OF THE CCA'S 2004 DECISION.[11]

It is true that the Supreme Court in *Barefoot* rejected the petitioner's categorical claim that every admission of expert testimony about future dangerousness violates the Eighth Amendment. 463 U.S. at 896, 900 (rejecting the argument that the entire "category of testimony should be excised entirely from all trials" because of the variability in the reliability of different psychiatrists' testimony). However, the Court also considered and rejected the argument that "*in the particular circumstances of this case*, the testimony of the psychiatrists was so unreliable that the sentence should be set aside." *Id*. at 896 (emphasis added).

[11]With modifications for this case, section IV is quoted verbatim from the petition for writ of *certiorari* written and filed in the Supreme Court on behalf of Billie Wayne Coble by Ms. Cassandra Stubbs, Mr. Brian Stull, and Mr. Steven R. Shapiro, of the American Civil Liberties Union Foundation. *See Billie Wayne Coble v. Texas*, No. 10-1271 (U.S.).

The standard for whether the admission of unreliable expert testimony in a particular case violates the Constitution is found in the Court's Eighth Amendment jurisprudence. The Court has long recognized that the Eighth Amendment demands heightened reliability and accuracy in capital trials. *See e.g., Oregon v. Guzek,* 546 U.S. 517, 525 (2006) ("The Eighth Amendment insists upon 'reliability in the determination that death is the appropriate punishment in a specific case.'") (quoting *Penry v. Lynaugh,* 492 U.S. 302, 328 (1976)); *Johnson v. Mississippi*, 486 U.S. 578, 584 (1988) ("The fundamental respect for humanity underlying the Eighth Amendment's prohibition against cruel and unusual punishment gives rise to a special need for reliability in the determination that death is the appropriate punishment in any capital case.") (citation and internal quotation marks omitted); *Gregg v. Georgia*, 428 U.S. 153, 190 (1976) (stating that "accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or

die").

Thus, in *Caldwell v. Mississippi*, 472 U.S. 320, 340 (1985), the Court relied upon the Eighth Amendment's demand for heightened reliability to invalidate the defendant's death sentence because the prosecutor's argument misled the jury regarding their responsibility for the death sentence. *Id*. at 329 ("Accordingly, many of the limits that this Court has placed on the imposition of capital punishment [under the Eighth Amendment] are rooted in a concern that the sentencing process should facilitate the responsible and *reliable* exercise of sentencing discretion.") (emphasis added). Similarly, in *Johnson,* the Court found an Eighth Amendment violation when the defendant's death sentence was based in part on a reversed conviction, and the jury was permitted to make its determination from "materially inaccurate" evidence. *Johnson,* 486 U.S. at 584-86.

Barefoot carved no exception to these settled principles. The CCA, therefore, erred by failing to consider whether, in light of the undisputed facts showing Dr. Gripon's testimony was unreliable and inaccurate, its admission violated the Eighth Amendment. *See, e.g.*, *Redmen v. State*, 828 P.2d 395, 400 (Nev. 1992) (holding that the admission of psychiatric expert testimony was constitutional error because it was "highly unreliable").

The Court has also identified similar reliability concerns rooted in the Due Process Clause. In *Payne v. Tennessee,* 501 U.S. 808 (1991), it recognized that the Due Process Clause serves as protection against the admission of unduly prejudicial victim impact evidence. *See id.* at 825 *("* In the event that evidence is introduced that is so unduly prejudicial that it renders the trial fundamentally unfair, the Due Process Clause of the Fourteenth Amendment provides a mechanism for relief."). Due process was the foundation for the rule in *Simmons v. South Carolina,* 512 U.S. 154, 169 (1994), that a capital defendant is entitled to introduce evidence regarding parole ineligibility when the State has raised future dangerousness to avoid misleading the jury, and the rule in *Gardner v. Florida*, 430 U.S. 349, 362 (1977), that a capital defendant must be afforded the opportunity to deny or explain information used against him in capital sentencing hearings.

Barefoot's reliance on now out-of-date evidentiary principles has led numerous commentators to conclude that the decision is inconsistent with the approach today to admission of expert scientific evidence. *See e.g.,* Erica Beecher-Monas & Edgar Garcia-Ril, *The Law and the Brain: Judging Scientific Evidence of Intent,* 1 J. APP. PRAC. & PROCESS 243, 274 (1999) ("The point is not that *Daubert* overrules *Barefoot*. It does not. Rather, the point is that the conceptual underpinnings of *Daubert* are anathema to the result in *Barefoot*."); David L. Faigman, *The Evidentiary Status or Social Science Under Daubert: Is It "Scientific," "Technical, or "Other"*

Knowledge?, 1 PSYCHOL. PUB. POL'Y & L. 960, 967 n.32 (1995) ("*Barefoot* is inconsistent with *Daubert.*"); Paul C. Giannelli, *Daubert: Interpreting the Federal Rules of Evidence*, 15 CARDOZO L. REV. 1999, 2021 (1994) ("*Barefoot* is inconsistent with *Daubert* . . . *Daubert* required a higher standard of admissibility for money damages than *Barefoot* required for the death penalty."); John H. Mansfield, *Scientific Evidence Under Daubert,* 28 ST. MARY'S L.J. 1, 37 (1996) ("If *Barefoot* does not necessarily conflict with *Daubert*, it certainly is in tension with it."); Craig J. Albert, *Challenging Deterrence: New Insights on Capital Punishment Derived from Panel Data,* 60 U. PITT. L. REV. 321, 338 (1999) ("Notwithstanding the fact that *Barefoot* and *Daubert* can stand together as a matter of law, it may be fair to say that they cannot co-exist as a matter of common sense.")

Had the CCA considered Holiday's constitutional claim, or done so correctly, it would have concluded that the admission of Dr. Gripon's testimony violated Holiday's Eighth Amendment rights. Absent any assurance of reliability, Dr.Gripon's testimony may have been as accurate as soothsayers or the phrenologists who purport to make predictions based on skull size. *Cf., Flores v. Johnson*, 210 F.3d 456, 458 (5th Cir. 2000) (J. Garza, concurring) (finding that similar expert future dangerousness testimony fails the *Daubert* standards, "defies scientific rigor and cannot be described as expert testimony"). The jury, however, was ill-equipped to recognize the limitations in his testimony, precisely because it was presented to them as the testimony of a qualified expert. *Id*. at 465-66 ("As some courts have indicated, the problem here (as with all expert testimony) is not the introduction of one man's opinion on another's future dangerousness, but the fact that the opinion is introduced by one whose title and education (not to mention designation as 'expert') gives him significant credibility in the eyes of the jury as one whose opinion comes with the imprimatur of scientific fact."); *United States v. Sampson*, 335 F. Supp. 2d

166, 220 (D. Mass. 2004) ("Jurors, however, may give great deference to the testimony of a psychiatrist as a supposed expert for purposes of determining future dangerousness.").

Here, there were particular risks that Holiday's jury would have been unable to disregard the kind of unreliable expert testimony about future dangerousness offered by Dr. Gripon. *See* Erica Beecher-Monas, *The Epistemology of Prediction*, 60 WASH. & LEE L. REV. 353 (2003); Erica Beecher-Monas, *Heuristics, Biases, and the Importance of Gatekeeping,* 2003 MICH. ST. L. REV 987, 1003, 1018-19 (2003); Daniel A. Krassu & Bruce D. Sales, *The Effects of Clinical and Scientific Expert Testimony on Juror Decision Making in Capital Sentencing,* 7 PSYCH. PUB. POL'Y & L. 267, 300 (2001).

First, juries are more likely to credit unreliable "clinician" experts, such as Dr. Gripon, than more reliable actuarial experts, even when the shortcomings of the clinician's approach are exposed through cross-examination. Beecher-Monas, 60 WASH. & LEE L. REV. at 386-87; Krauss & Sales, 7 PSYCH. PUB. POL'Y & L. at 300-302. (This may be due to juror's trust and familiarity with medical diagnoses. Beecher, *supra* at 387.)

Second, juries are more likely to embrace expert testimony that confirms their opinions of the crime. *See* Beecher-Monas, 2003 MICH. ST. L. REV at 1018-19 (describing the risk with future dangerousness experts that "jurors may be overconfident in their decision of guilt and subsequently overvalue the expert prediction that confirms their decision, giving disproportionate weight to any information that confirms their initial decision of guilt"). Thus, it is no answer that Dr. Gripon's unreliable testimony was subjected to crossexamination. *See also*, *United States v. Scheffer*, 523 U.S. 303, 312-13 (1998) (acknowledging the risk that juries may give polygraph experts excessive weight).

The sentencing evidence presented at Holiday's penalty trial from Dr. Gripon was no more

reliable than the misleading arguments struck in *Caldwell* or the inaccurate evidence criticized in *Johnson.* Dr. Gripon's testimony was neither reliable nor accurate. It was based on a subjective, unsubstantiated methodology that had no scientific foundation. The admission of his testimony thus allowed the jury to make its life or death determination based on unreliable, inaccurate information in violation of Holiday's Eighth Amendment rights. *Caldwell*, 472 U.S. at 341 (holding that where the State's impermissible argument may have had an affect on the jury's verdict, the case "does not meet the standard of reliability that the Eighth Amendment requires"); *Johnson,* 486 U.S. at 578 (reversing based on the use of illegitimate evidence in the sentencing hearing because of the possibility that this evidence was decisive in the "choice between a life sentence and death sentence") (*quoting Gardner,* 430 U.S. at 359).

Claim 16: **The State court violated the Due Process Clause of the Fourteenth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment and *Skipper v. South Carolina*, 476 U.S. 1 (1986), by refusing to permit Holiday's expert, Carroll Pickett, to explain how the death penalty would be administered against Holiday if ordered.**

Claim 17: **The State court violated the Due Process Clause of the Fourteenth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment and *Skipper v. South Carolina*, 476 U.S. 1 (1986), by refusing to permit Holiday's expert testimony of Carroll Pickett of the effect that administration of the death penalty would have on prison employees required to carry out the execution of Holiday.**

Claim 18: **The State court violated the Due Process Clause of the Fourteenth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment and *Skipper v. South Carolina*, 476 U.S. 1 (1986), by refusing to permit Holiday's expert testimony of Carroll Pickett to concerning the effect of the death penalty on the survivors of the victim.**

Claim 19: **The State court violated the Due Process Clause of the Fourteenth Amendment, the Cruel and Unusual Punishment Clause of the Eighth Amendment and *Skipper v. South Carolina*, 476 U.S. 1 (1986), by refusing to permit Holiday's expert testimony of Carroll Pickett to**

explain how inmates permitted to serve life sentences often make positive changes in their lives.

Exhaustion. These claims appear as claims 15, 16, 17 and 18 in Holiday's original federal habeas May 2011 filing in this Court. They were renumbered to correct an error.

These claims were timely presented to the trial court which denied relief. RR 43, pp. 94–113. (Note: We are not certain that the trial attorney made a reference objection to *Skipper* and the constitutional provisions listed. But we believe that the attorney's objections were broad enough, and explained sufficiently, to have alerted the trial court to these constitutional bases. *See Bill of Exception* RR Vol 42, @ p. 100, 110-115; *see specifically* @ 112, and @ 113.)

The claims were presented to the CCA as points of error 32, 33, 34 and 35 in Holiday's direct appeal brief. *See* Appellant's Brf. at 109-14 (see page 112-13 for constitutional references and reliance on *Skipper v. South Carolina*, 476 U.S. 1 (1986)). The CCA denied relief on state law grounds without addressing the merits of Holiday's constitutional claims. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *75-78 (Tex. Crim. App. Feb. 8, 2006) (page 21 of slip opinion). Consequently, this Court is entitled to decide the federal claims *de novo. See* discussion, *supra* at 67.

Introduction. At the punishment phase of the trial, Holiday tried to present testimony by Rev. Carroll Pickett. Pickett has a Doctorate in Clinical Pastoral Education. He served as a minister of several different churches in Texas. After thirteen years at First Presbyterian Church in Huntsville, he became a chaplain to the inmates at the Walls Unit of the Texas Department of Corrections. He served there for fifteen years ministering to the inmates regularly housed there, and to psychiatric patients and problem cases transferred from other units. During that time he also served as president of the local school board and the Huntsville Drug and Alcohol Abuse Program.

Rev. Carroll serves as the Warden's representative to the inmates at the Walls death house in the hours leading up to the executions. RR. 42, pp. 94–99. Rev. Picket consequently developed an intimate and enlightening understanding of the operations of the prison system at his unit, including how the death penalty is administered to inmates.

Holiday tried to offer testimony from Rev. Pickett related to an execution, for the purpose of convincing jurors to answer favorably on the mitigation special issue:

- the inmates enter the death house shackled and chained;
- they are completely stripped and searched;
- the inmates receive assistance preparing his last statement;
- the inmates receive help designating the disposition of their body;
- that he would lead each inmate, followed by four or five guards to the death chamber;
- the inmate takes the eight steps into the chamber and climbs on to the table (gurney);
- nine straps would be placed across the inmate's body by the tie down team;
- the warden will ask if he was in any discomfort and make any adjustment to clothing or straps to suit the inmate;
- the needles will be inserted;
- sometimes it is difficult for the medical technicians to insert the needles;
- everyone will leave the chamber except the inmate and the Reverend;
- witnesses will be brought into the viewing area;
- the inmate will be allowed to make his last statement;
- Rev. Pickett would keep his hand on the inmate's right leg, to permit the inmate to feel that someone was with him as he died;
- the Warden will signal and the two executioners to allow the lethal chemical to

flow;

- the Warden will wait a few minutes and then call in a doctor; and
- the doctor will enter, examine the body and announce the time of death.

RR 42, pp. 101–107.

Holiday also tried to offer Pickett's testimony concerning the emotional effects executions have on guards who must carry out the executions:

- some became nauseated or sick and had to be replaced;
- some quit;
- one guard became seriously ill and began visualizing the faces of every inmate he had strapped down for execution;
- the guards have difficulty working the next day; and
- "You just don't watch people die and just say let it go because these were people."

RR 42, pp. 108–109.

Holiday also attempted to offer Pickett's testimony concerning the effects on the victims of the family that some of them felt that it did not bring closure or that it did any good at all. RR 42, pp. 109–110. And Holiday tried to offer Pickett's testimony that he had seen many inmates change their lives after lengthy incarcerations — they adjust to incarceration, and they develop positive relationships and favorable views toward law enforcement. Consequently, many inmates follow the law, coming into prison as real outlaws, but leaving as good members of the community. RR 42, pp. 112–115.

Analysis of Eighth Amendment Law in Effect in 2006.

In *Lockett v. Ohio,* 438 U.S. 586 (1978), the Court established that the bedrock Eighth Amendment principle emanates from the "the fundamental respect for humanity underlying the

Eighth Amendment. [This regard mandates the] ... consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304; *see also Roberts (Harry) v. Louisiana*, 431 U.S. 633 (1977); *Roberts (Stanislaus) v. Louisiana*, 428 U.S. 325 (1976).[12] Only through a process which requires the sentencer to "consider, in fixing the ultimate punishment of death[,] the possibility of compassionate or mitigating factors stemming from the diverse frailties of humankind," *Woodson v. North Carolina,* 428 U.S. at 304, can capital defendants be treated "as uniquely individual human beings." *Id.* The Lockett principle "is the product of a considerable history reflecting[] the law's effort to develop a system of capital punishment at once consistent and principled but also humane and sensible to the uniqueness of the individual. *California v. Brown*, 479 U.S. at 562 (Blackman, J. dissenting). Or, in Justice O'Connor's terms: "Under lying *Lockett* and *Eddings* is the principle that punishment should be directly related to the personal capability of the criminal defendant." *Penry v. Lynaugh,* 492 U.S. 302, 319 (1989).

Because of the need for individualized treatment, the states have been required to permit the sentencer to consider and, in appropriate cases, base a decision to impose a life sentence upon any relevant mitigating factor, not simply the mitigating factors specified in a statute. *Hitchcock v. Dugger,* 481 U.S. 393 (1987). As explained in *Eddings v. Oklahoma,* 455 U.S. at 112, "*Lockett* followed from the earlier decisions of the Court and from the Court's insistence that capital punishment be imposed fairly, and with reasonable consistency, or not at all.… By holding that the

[12]As Justice O'Connor noted in her concurring opinion in *California v. Brown, supra*, evidence about the defendant's background and character is relevant because of the belief, held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable that defendants who have no such excuse. 479 U.S. at 545.

sentencer in capital cases must be permitted to consider any relevant mitigating factor, the rule in Lockett recognizes that a consistency produced by ignoring individual differences is a false consistency."

It is important to note that the definition of "mitigating" is extremely broad. In *Lockett,* the Court defined a mitigating circumstance as "any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." 438 U.S. at 604. While this explanation seems to allow the defendant the freedom to define what is "mitigating," the Court has since given a more objective cast to this explanation. In *Skipper v. South Carolina,* 476 U.S. 1 (1986), the Court held that evidence of the defendant's good behavior during his pretrial incarceration was "'mitigating' in the sense that [it] might serve 'as a basis for a sentence less than death.'" 476 U.S. at 7 (quoting *Lockett v. Ohio,* 438 U.S. at 604).[13] Thus, any evidence that "might" serve to reduce the urge to punish harshly must be deemed mitigating.

Tennard v. Dretke, 542 U.S. 274 (2004), demonstrates the Court's emphasis that a jury hear whatever a capital defendant believes is mitigating. It is important to understand that the Supreme Court places only a single hurdle for mitigating evidence offered by a capital defendant. The Court explained that the relevance test for a trial judge's decision whether some aspect of mitigating evidence is admissible is *only* the same low threshold associated with Rule 401 of the rules of state and federal evidence: "When we addressed directly the relevance standard applicable

[13]The Court stated:

> Although it is true that any [favorable] inferences [drawn from the defendant's good behavior in jail] would not relate specifically to petitioner's culpability for the crime he committed, . . . there is no question but that such inferences would be 'mitigating' in the sense that they might serve 'as a basis for a sentence less than death.' 476 U.S. at 7.

to mitigating evidence in capital cases in *McKoy v. North Carolina,* 494 U.S. 433, 440—441 (1990), we spoke in the most expansive terms. We established that the 'meaning of relevance is no different in the context of mitigating evidence introduced in a capital sentencing proceeding' than in any other context, and thus the general evidentiary standard — any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence — applies." *Tennard*, 542 U.S. at ____ (citations and internal quotes omitted).

By this statement, the Court reconfirmed that a state judge, and therefore the CCA, must allow the defendant to present what the defendant believes is mitigating, subject only to asking whether the proferred evidence possesses any tendency to be perceived as mitigating by a single juror. This is why the Court declared, "Thus, a State cannot bar the consideration of … evidence if the sentencer could reasonably find that it warrants a sentence less than death." *Tennard*, 542 U.S. at _____ (citation and internal quote omitted). The CCA, however, did not apply this standard when it denied Holiday's claim, thereby demonstrating that Holiday is able to hurdle the barrier of AEDPA 2254(d)(1).

Pickett's testimony concerning how inmates change after lengthy incarcerations is generally mitigating, and is directly relevant to the questions of Holiday's future danger. The State did not object to Rev. Pickett as an expert on the effects of lengthy incarceration, but instead on relevance, generally. (This was after the Bill of Exception was made. RR 42, @ 114—115: STATE: State would object, also, that is not relevant. COURT: I sustain the objection.)

Excluding such unchallenged evidence violated the Eighth and Fourteenth Amendments, denying him due process of law and his protection against cruel and unusual punishment.

Similarly, Rev. Pickett's testimony concerning the administration of the death penalty and its affect on the guards and the victim's survivors were powerfully relevant mitigating circumstances within the scope of the mitigation special issue. To exclude such evidence, solely on the lowest threshold of Rule of Evidence 401 relevance grounds, violated Holiday's rights under the same constitutional provisions.

Claim 20: **The State court violated the Due Process Clause of the Fourteenth Amendment by restricting Holiday's cross-examination of Beverly Mitchell at the punishment phase of trial.**

Claim 21: **The State court violated the Cruel and Unusual Punishment Clause of the Eighth Amendment by restricting Holiday's cross-examination of Beverly Mitchell at the punishment phase of trial.**

Claim 22: **The State court violated *Franklin v. Lynaugh*, 487 U.S. 164, 173 (U.S. 1988), by restricting Holiday's cross-examination of Beverly Mitchell at the punishment phase of trial.**

Exhaustion. These claims were presented in Holiday's original May 2011 federal habeas petition as claims 19-21, renumbered here to correct an error.

These claims were timely presented to the trial court which denied relief. RR 42, pp. 143–146. (Note: Our review of the record seems to indicate that the trial attorney did not make a specific reference to these constitutional provisions or *Franklin*, but the context of the challenge is broad enough to have preserved review. *See Bill of Exception*: RR Vol 42, @ p. 140—146.)

These claims were presented to the CCA as point of error number 36 in Holiday's direct appeal brief. *See* Appellant's Brf. at 114-17 (see page 115 for reference to *Franklin v. Lynaugh,* and page 117 constitutional provisions).

The CCA denied relief on state law grounds without addressing the merits of Holiday's constitutional claims. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *78-80 (Tex.

Crim. App. Feb. 8, 2006) (pages 21-22 of slip opinion). Consequently, this Court is entitled to decide the federal claims *de novo. See* discussion, *supra* at 67.

Introduction. During the liability phase of trial, state star witness Beverly Mitchell testified that she watched Holiday bend down just as the fire started. Holiday's lawyer, on cross, impeached her with prior statements and testimony she made, asserting that she did not see Holiday do anything to start the fire, and never before mentioned observing Holiday bending down at the moment the fire started.

In closing argument, the prosecutor tried to explain away this contradiction:

> The defense had gone to great lengths to make you think that her testimony from January to today is inconsistent. Well, you heard Judd Clayton testify. You heard him say that he reviewed the testimony of Beverly Mitchell from the January pre-trial hearing. And you also heard him say that in his review of that testimony he couldn't find one place where she was asked whether or not she saw him bend down. She was asked by the defense whether or not she saw him light the fire. We have never claimed that she said she saw him light the fire. She never said she saw him light the fire. Its not inconsistent. The question was not asked before.

RR 41, p. 114.

In the punishment phase of the trial, Holiday's attorney attempted to cross-examine Beverly Mitchell further, and by doing so, ask Mitchell all the relevant questions put to her at the January hearing, in response to the State's argument that: (1) her statements were not inconsistent, and (2) she had not been asked probative questions earlier.

Further, Holiday's attorney attempted to ask Mitchell whether, at the pre-trial hearing, she was asked: "What was he (Holiday) doing immediately prior to the fire starting?" Holiday's attorney wanted to destroy her credibility by proving that her answer at the pre-trial hearing to that question was as follows: "He had his foot propped up on the high chair and he said something, I don't remember what it was."

Holiday's attorney attempted to ask Mitchell whether that pre-trial line of questioning was put in the full context. Further, he attempted to ask Mitchell whether, had someone at the pre-trial hearing had asked her whether Holiday was bending down immediately prior to the start of the fire, she would have testified that Holiday was in fact bending down. Mitchell, however, responded that she did not recall. RR 42, p. 144–146.

Analysis of Supreme Court 8th and 14th Amendment Jurisprudence in Effect in 2006.

If Holiday bent down and ignited the vapors that would certainly be an aggravating circumstance. If he did not bend down and the fire was ignited by an alternative source, that would certainly be a mitigating circumstance.

Mitchell was the witness who sealed Holiday's death sentence, because she was the only person to testify that Holiday took affirmative steps to light the house on fire. Having been convicted, it was vital for Holiday's lawyer to extract from her inconsistencies about (1) her certainty, and (2) Holiday's actions, thereby creating a mitigating circumstance justifying a favorable answer to the mitigating special issue.

We have already discussed the open mitigation evidence demands of *Lockett* and *Skipper*. *See supra* at 120.Holiday is entitled to present evidence relevant to the mitigation issue that would reduce his moral blameworthiness. It certainly reduces the moral blameworthiness if, during the punishment hearing, a man facing a capital trial is able to demonstrate, with the witnesses own words, that she is not as certain that she saw him trigger the deaths and than she previously claimed to be. The jury may not be precluded from considering as mitigating the circumstances of the offense. *Franklin v. Lynaugh*, 487 U.S. 164, 173 (U.S. 1988).

Holiday's lawyer's attempt to muster fragments of evidence from a belligerent witness was central to Holiday's defense that he did not bend down to start the fire, but that the fire started

because the pilot light ignited the gasoline vapors. The attempt to demonstrate lack of causation is precisely the type of exonerating defense to which a defendant has a due process right to present under *Holmes* and *Crane*.

As explained, in *Holmes v. South Carolina*, 547 U.S. 319 (2006), the Supreme Court unanimously held that a defendant has a fundamental due process and confrontation right to present a complete defense, rejecting state rules assigning low relevancy to the defendant's evidence compared to the State's evidence of guilt. "Whether rooted directly in the Due Process Clause of the Fourteenth Amendment or in the Compulsory Process or Confrontation Clauses of the Sixth Amendment, the Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Holmes*, 547 U.S. at 324 (citations and marks omitted); *see California v. Trombetta,* 467 U.S. 479, 485 (1984); *Washington v. Texas,* 388 U.S. 14 (1967) (right to present complete defense that another committed the crime violated); *Chambers v. Mississippi,* 410 U.S. 284, 302-303, 93 S. Ct. 1038, 35 L. Ed. 2d 297 (1973) (same). "[T]he Constitution guarantees criminal defendants 'a meaningful opportunity to present a complete defense.'" *Crane v. Kentucky,* 476 U.S. 683, 690 (1986).

Here, the instructions to Holiday's jury at the guilt phase allowed the jury to convict him of capital murder even if the pilot light ignited the vapors. As the prosecutor explained the instruction of the law of causation, "But what that means is even if for some reason you didn't think that the defendant lit the fire here you could still convict him of capital murder . . . ." RR 41, p. 53.

Holiday attempted to extract from Mitchell reluctant, and therefore powerful, testimony evidence that precisely rebutted the prosecutor's claim that the only reason Mitchell did not mention prior to trial that Holiday bent over was that no one asked. The prosecutor argued that her prior testimony, taken in proper context, was not inconsistent with her testimony at trial. The State

left what can fairly be characterized as a false impression with the jury — one that Holiday was entitled to dispel, in order to remove an aggravating circumstance, deadly to him on the mitigating special issue, and a mitigating circumstance once proven that Mitchell's assertions are untrue, recently contrived, or inconsistent.

The evidence elicited by Holiday, but banned, would have shown jurors that Beverly Mitchell was extensively questioned at a pre-trial hearing, and that her answers taken in context were utterly inconsistent with what she was now telling them, thus eliminating the only direct evidence that Holiday solely ignited the fire. If allowed to hear that testimony, at least one juror may have concluded that Holiday did not bend over and ignite the fire and, therefore, a sentence of less than death imposed.

Claim 23: Texas Code of Criminal Procedure article 37.071 violates the Cruel and Unusual Punishment Eighth Amendment because it impermissibly restricts mitigating evidence to merely that evidence which the jurors might regard as reducing moral blameworthiness.

Exhaustion. The trial court overruled Holiday's pretrial motion claiming that the Texas death penalty scheme under Texas Code of Criminal Procedure article 37.071 is unconstitutional because it limited mitigating evidence to only that evidence which the "jury might regard as reducing the defendant's moral blameworthiness." *See* Clerk's Record, Vol. 5, "Defendant's Objections to the Charge at Punishment." @ 598—606; Specific objection to claim 23 issue, found in Paragraph 23, at p. 601; Order of Court: Objections Denied at p. 606.

The claim was presented to the CCA as point of error number 38 in Holiday's direct appeal brief. *See* Appellant's Brf. at 129-31. The CCA denied relief on the merits, finding no constitutional flaws. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *80-83 (Tex. Crim. App. Feb. 8, 2006) (pages 22-23 of slip opinion).

Discussion. Article 37.071, section 2(f)(4) of the Texas death penalty scheme impermissibly restricts the jury's consideration of mitigating evidence to only that evidence which the jurors believe "might reduce the defendant's moral blameworthiness." This definition is unconstitutional because it violates the 8th amendment to the United States Constitution and *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L. Ed.2d 346 (1972).

The CCA has repeatedly denied this claim, repeatedly affirmed by the Fifth Circuit, but never decided by the Supreme Court, although its precedence augers Holiday's way. *See, e.g., Lawton v. State,* 913 S.W.2d 942 (Tex. Crim. App. 1995).

Without doubt, states are prohibited from limiting the jury's consideration of any relevant circumstance that could cause it to decline to impose the death penalty, and must allow the jury to consider any relevant information offered by the defendant. *McCleskey v. Kemp*, 481 U.S. 279, 306, 107 S.Ct. 1756, 1774 (1986). The jury must be able to consider and give effect to mitigating evidence so that "the sentence imposed ... reflects a reasoned moral response to the defendant's background, character, and crime." *Penry v. Johnson*, 121 S.Ct. 1910, 1915-1916; 532 U.S. 782 (U.S. Tex. 2001). In order "[T]o meet constitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors." *Lockett, supra*, 2966–67. The Supreme Court held that North Carolina's sentencing scheme violated the 8th Amendment because it impermissibly limited jurors' consideration of mitigating evidence. *McKoy v. North Carolina*, 110 S.Ct. 1227, 494 U.S. 433 (1990).

The definition of mitigating evidence is unconstitutional because it restricts the jury's consideration to only evidence that "reduces moral blameworthiness." The jury can give weight only to the evidence that "reduces moral blameworthiness" and no other in answering the mitigation special issue. This definition precludes consideration of evidence that might weigh

against death, but not reduce moral blameworthiness. In the discussion above under claims 16-19, Holiday has discussed the application of *Lockett,* which forbids placing brakes on the ability of jurors to consider and apply mitigating evidence. *See* discussion *supra* at 120.

Claim 24: The Trial Court Violated the Sixth, Eighth and Fourteenth Amendments to the United States Constitution by Failing to Instruct the Jury That the a "No" Vote by a Single Jury Member Would Result in a Life Sentence Instead of Death Despite the Statutory Requirement of 10 Votes for a "No" Answer to Article 37.071 § 2(b)(1) or for a "Yes" Vote to Article 37.071 § 2(e).

Exhaustion. This claim was presented in Holiday's initial skeletal federal habeas petition in claims 24 - 29. These segregated claims are combined here.

This claim was timely presented to the trial court which denied relief. *See* CR 1, p. 19. It was presented to this CCA as points of error number 39 and 40 in Holiday's direct appeal brief. *See* Holiday Brf. at 132-34.

The CCA denied relief on the merits, finding neither procedural default nor constitutional flaws. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *81-83 (Tex. Crim. App. Feb. 8, 2006) (pages 22-23 of slip opinion). *See also Eldridge v. State*, 940 S.W.2d 646, 1996 Tex. Crim. App. LEXIS 235, *4-7 (Tex. Crim. App. 1996); *Draughon v. State,* 831 S.W.2d 331, 337-38 (Tex. Crim. App. 1992); *Emery v. State,* 881 S.W.2d 702, 711 (Tex. Crim. App. 1994); *Sattiewhite v. State,* 786 S.W.2d 271, 278 (Tex. Crim. App. 1989), and to *Clark v. State,* 881 S.W.2d 682, 692 (Tex. Crim. App. 1994).

I. Article 37.071 V.A.C.C.P., is unconstitutional because the "12-10 rule" creates a sentencing process that violates the 8th Amendment. The jury instructions suggest that a sentence of life imprisonment is not possible unless ten jurors agree to answer one or more special punishment questions in the negative. Thus, it is conceivable that the jurors will surmise later instructions requiring ten votes for a negative answer means that a life sentence will not be imposed otherwise.

The Supreme Court has held that, in judging the constitutionality of a capital sentencing statute, a court must ask how a reasonable juror could view his or her role under the statutory scheme. *California v. Brown*, 479 U.S. 538, 541 (1985). The 12-10 Rule is perceived by reasonable jurors as suggesting that one juror will not be able to determine if a person lives. This feature of Article 37.071 creates the potential for unwarranted confusion among reasonable jurors. It diminishes the individualized role of each juror because it suggests—as *Draughon* says—that a life sentence cannot be assessed unless ten jurors vote for life. Thus, this 12-10 Rule encourages majority rule instead of the individual rule; it encourages collective thinking instead of individualized decision-making; it creates the danger that a juror—who might be vote for life—will conform to the majority rule because the juror wrongfully believes that his or her individual vote will never result in a life sentence. In effect, this statute creates the impression that a single holdout is meaningless. The reliability of the decision to impose death is reduced impermissibly when, among other reasons, jurors are misled into believing that their decision may be less momentous than it really is. This 12–10 Rule is so misleading to the jurors that it reduces the reliability of the decision to impose death.

The Supreme Court "has always premised its capital punishment decisions on the assumption that a capital sentencing jury recognizes the gravity of its task and proceeds with the appropriate awareness of its 'truly awesome responsibility'." *Caldwell,* 472 U.S. at 2646. Each jury should be made fully aware that their individual vote can determine if a person lives or dies. What better way to insure a reasoned moral response? The failure to provide such information violates the 8th and 14th amendments.

II. Holiday's Fourteenth Amendment Due Process Rights as Interpreted in *Apprendi v. New Jersey* Were Violated Because the Statute under Which Holiday Was Sentenced to Death it Implicitly Put the Burden of Proving the Mitigation Special Issue on Holiday Rather than

Requiring a Jury Finding Against Holiday on That Issue under the Beyond a Reasonable Doubt Standard and Because the Charging Instrument Did Not Give Holiday Notice of the Facts That the State Intended to Prove in Order to Establish Holiday's Statutory Qualification for the Death Penalty.

Holiday argues that the Texas capital sentencing scheme violates an important decision by the Supreme Court. He contends that the jury was impermissibly instructed that there was no burden of proof assigned to the mitigation special issue. Consequently, the burden of proof was implicitly placed on him. In addition, the indictment did not provide notice of the facts that the State intended to prove in order to establish Holiday's eligibility for the death penalty.

Under the Texas statutory scheme, Holiday's jury was not instructed on a burden of proof on the mitigation special issue. *See Lawton v. State*, 913 S.W.2d 542 (Tex. Crim. App. 1995), *cert. denied*, 519 U.S. 826 (1996) ("the Texas legislature has not assigned a burden of proof regarding mitigating evidence"). Moreover, because of the juxtaposition of the reasonable doubt instruction with the Special Issue Number 3, the jury could have read the charge to mean that Holiday had the burden of proving beyond a reasonable doubt mitigation sufficient to warrant life rather than death. *See id.* ("the burden is implicitly placed upon appellant to produce and persuade the jury that circumstances exist which mitigate against the imposition of death in his case").

The Supreme Court's decision in *Apprendi v. New Jersey*, 530 U.S. 466 (2000), necessitates a finding that the Texas death penalty scheme is unconstitutional because it does not place the burden of proof on the State that would require the jury to find beyond a reasonable doubt that there are no mitigating circumstances sufficient to warrant the imposition of life rather than death and because the charging instrument does not give notice of the facts that will proven to statutorily qualify a particular defendant for the death penalty.

A. What *Apprendi* Decided

In *Apprendi* the Supreme Court reviewed a New Jersey state prosecution, where a judge had increased the maximum punishment for possession of a firearm under a New Jersey statute which allowed an increased punishment if a defendant "acted with a purpose to intimidate an individual or group of individuals because of race, ..." The Court framed the question as follows: "Whether the Due Process Clause of the Fourteenth Amendment requires that a factual determination authorizing an increase in the maximum prison sentence for an offense from 10 to 20 years be made by a jury on the basis of proof beyond a reasonable doubt." *See Apprendi*, 530 U.S. at 469.

Apprendi focused on a footnote in *Jones v. United States*, 526 U.S. 227 (1999), that stated "under the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in the indictment, submitted to a jury, and proven beyond a reasonable doubt." *See Apprendi*, 530 U.S. at 476 (citing *Jones*, 526 U.S. at 243 n.6)).

While *Jones* was a federal prosecution, and therefore was concerned with Fifth Amendment due process, *Apprendi* took the next step of applying the rule from the *Jones* footnote to Fourteenth Amendment due process, which applies in state prosecutions. *Apprendi* stressed that it was dealing with "constitutional protections of surpassing importance." 530 U.S. at 476. After a lengthy historical discussion, the Court in *Apprendi* stated:

> Other than the fact of a prior conviction, *any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt*. With that exception, we endorse the statement of the rule set forth in the concurring opinions in [*Jones*]: "[I]t is unconstitutional for a legislature to remove from the jury the assessment of facts that increase the prescribed range of penalties to which a criminal defendant is exposed. It is equally clear that such facts must be established beyond a reasonable doubt."

> *See Apprendi*, 530 U.S. at 490 (emphasis added) (quoting *Jones*, 526 U.S. at 252-253 (Stevens, J., concurring); *Jones*, 526 U.S. at 253 (Scalia, J., concurring)).

Thus, *Apprendi* created three requirements: inclusion in an indictment of the punishment-enhancing factor, submission of the factor to a jury, and the allocation of proof beyond a reasonable doubt to the prosecution.

One other aspect of *Apprendi* which is particularly significant with regard to the Texas death penalty scheme is the holding that the placement of the statute at issue within the sentencing provisions of New Jersey's criminal code, rather than in the definition of offenses, did not negate the treatment of the factual issue as the equivalent of an "element" which must be proved beyond a reasonable doubt. *See Apprendi*, 530 U.S. at 494-96. In Texas the decisive factual issues are found in the Code of Criminal Procedure rather than the Penal Code, but that makes no difference for purposes of *Apprendi*. *See id.*

B. The Texas Statute and its Interpretation

Apprendi should be applied to article 37.071, section 2(e)(1). Under that statute, a jury is asked to decide:

> Whether, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed.

See TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(e)(1) (Vernon Supp. 2002).

As stated above, that issue was submitted to the jury in Holiday's trial. The jury was also instructed that if ten or more jurors answer the special issue in the affirmative, a sentence of life imprisonment would be imposed. *See* TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(f)(2) (Vernon

Supp. 2002). Although they could not be instructed as such,[14] if the jurors had reached a stalemate and been unable to agree, a sentence of life imprisonment would have been imposed. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 2(g) (Vernon Supp. 2002). Thus, in Holiday's trial, the absence of a jury decision on the mitigation issue would have automatically capped Holiday's punishment at life imprisonment. Only if all twelve jurors answer in the negative, as was the case here, could the death penalty have been imposed. *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, §§ 2(f)(2), 2(g) (Vernon Supp. 2002). Thus, section 2(e)(1) plainly fits the mold of an issue on which *a factual determination raises the maximum punishment which is available*.

Because the statute under which Holiday was sentenced to die does not require the jury enter a negative finding on the mitigation special issue only if the State had proven beyond a reasonable doubt that there was no mitigating evidence sufficient to warrant imposition of a life sentence rather than death, that statute is unconstitutional.

[14] *See* TEX. CODE CRIM. PROC. ANN. art. 42.12, § 2(a) (Vernon Supp. 2002).

Further, in the present case, there is no dispute that the indictment does not contain any reference to the enhancing provisions of the Capital Murder statute. In the absence of the required answers to the special issues, the maximum punishment allowed for capital murder in Texas is life imprisonment. *See* TEX. PENAL CODE ANN. § 12.31 (Vernon 1994); TEX. CODE CRIM. PROC. ANN. art. 37.071, § 2(g) (Vernon Supp. 2002). Thus, under *Apprendi*, the State is required to allege the aggravating factors necessary to increase the punishment from life, the maximum without the special questions, to death if the special questions are submitted and the jury answers them in the affirmative.

Even prior to the Supreme Court's ruling in *Apprendi*, Texas rules have required that all matters that must be proved must be alleged in the indictment, including the fact of prior convictions (which is not required by *Apprendi*). In Texas, everything that must be proved must be contained in the indictment in order to give proper notice. *See* TEX. CODE CRIM. PROC. ANN. art. 21.03 (Vernon 1989). Under a proper reading of article 21.03 and *Apprendi*, the State must allege the aggravating factors in order to rely upon the enhanced punishment of death. The indictment did not give the required notice.

Consequently, Holiday's conviction was obtained in violation of his right to Due Process as secured by the Fourteenth Amendment as interpreted in *Apprendi*. Therefore, this Court should vacate Holiday's conviction and sentence, and remand this cause to the trial court.

III. Lower Court Law is Generally Adverse, So Far.

The Fifth Circuit has rejected attacks on the Texas 12-10 rule. See *Alexander v. Johnson*, 211 F.3d 895, 897, n. 5 (5th Cir.2000). Worse for Holiday, in *Smith v. Spisak,* ____ U.S. ____, 130 S. Ct. 676 (2010), the Supreme Court rejected assertion that the instructions given to the jury were

unconstitutional, because they did not require the jury to unanimously find the existence of any mitigating factor, which a prior case, *Mills v. Maryland,* forbid.

The Fifth Circuit has also held that any ruling that "the 12-10 rule" violated the federal Constitution would be a new constitutional rule of criminal procedure as defined in *Teague v. Lane*, 489 U.S. 288, 311-13, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), and therefore could not form the basis for federal habeas-corpus relief. See *Hughes v. Dretke*, 412 F.3d 582 (5th Cir.2005); *Davis v. Scott*, 51 F.3d 457, 467 (5th Cir.1995); *Webb v. Collins*, 2 F.3d 93 (5th Cir.1993).

Mr. Holiday argues that the precedential value of the Fifth Circuit cases cited above has diminished in light of the *en banc* ruling in *Nelson v. Quarterman*, *supra,* which simply followed and enforced the principles of *Penry II.* Mr. Holiday takes from the *Penry II* line of cases the principle that a capital sentencing system must afford the sentencing jurors a vehicle with which to give full consideration and full mitigating effect to a capital defendant's mitigation case. When the Texas 12-10 rule is viewed against this principle, the conclusion is inescapable that the 12-10 rule must give way to *Nelson* and the cases upon which it relies. It is beyond serious dispute that this rule is designed to discourage lone or minority jurors from holding to their convictions, and to encourage them to "cave in" and join the majority to form a unanimous verdict. (By minority jurors, we mean jurors who are fewer in number on the jury, not that the jurors will belong to minority groups in society at large, such as racial minorities, etc.) Further, this end is accomplished by withholding material facts from the minority jurors. This introduces an element of dishonesty into the capital sentencing process. A jury system that operates dishonestly commands little of the respect for the law that is essential for accurate fact finding and proper sentencing decisions.

This odd and frankly dishonest feature of the Texas 12-10 rule bears great similarity to the former "nullification instruction" condemned in *Penry II* and progeny. The trouble with the

nullification instruction as a vehicle for handling mitigating circumstances was that, in a fairly wide range of circumstances, it required jurors who were sworn to return a true verdict according to the law and the evidence, to disregard that oath, and sign a false verdict in order to give effect to record evidence of mitigating circumstances. The 12-10 rule also encourages jurors to lie about their true response to the special issue, and to sign a false verdict form in order to go along with the majority on the jury. Further, the 12-10 rule explicitly requires the judge and the attorneys to withhold material information; that a failure to reach a unanimous verdict amounts to a life verdict after all. Thus the common thread that runs within the nullification instruction and the 12-10 rule is reliance on the jurors' violation of their oaths to produce a verdict. The 12-10 rule is actually somewhat worse because it not only encourages jurors to violate their oaths, it also requires officers of the court and the court itself to withhold from the jurors the truth about how the system actually works.

Mr. Holiday argues that the 12-10 rule is another one of the Texas crippling amendments that destroyed or greatly diminished the ability of his sentencing jury to fully consider and give effect to his mitigation case. The crippling of the statutory vehicle for the consideration of mitigating circumstances has placed the jury charge before this Court in a posture very similar to the one before the Supreme Court in *Penry I*: mental health evidence and poor decision making skills cannot be fully considered or given effect in the deliberation or future dangerousness special issues. A properly functioning mitigation inquiry is required to meet the demands of *Penry I.* The Supreme Court has never issued an opinion that approves the present Texas capital sentencing system that was overhauled in the wake of *Penry I.* Thus, the controlling principles of capital sentencing law are those laid down in *Furman*, supra. requiring the discretion of the jury to be properly guided by the trial court. As justice Rehnquist put it in *Boyde v. California*, 494 U.S. 370

(1990), "... States are free to structure and shape consideration of mitigating evidence "in an effort to achieve a more rational and equitable administration of the death penalty." *Id.*, citing *Franklin v. Lynaugh*, 487 U. S. 164, 487 U. S. 181 (1988) (plurality opinion).

The encouragement of dishonesty on the part of jurors, judges and lawyers hardly qualifies as an effort to achieve rationality and equity in capital sentencing. Instead, it offends the principles of rational guided discretion announced in *Furman*, and confirmed in *Penry I*. The refusal by the Texas CCA to remove this crippling amendment from its capital sentencing system was objectively unreasonable. The writ must issue.

Claim 25: **Texas Code of Criminal Procedure article 37.071 violates the Cruel and Unusual Punishment Clause of the Eighth Amendment because it fails to place the burden of proof on the mitigation special issue to the State to establish a "No" answer, and thereby implicitly assigned the burden of proof to Holiday.**

Claim 26: **Texas Code of Criminal Procedure article 37.071 violates *Ring v. Arizona* because it fails to require the State to prove beyond a reasonable doubt that the mitigating evidence is sufficient to warrant a life sentence.**

Exhaustion. These claims were presented as claims 30 and 39 in Holiday's skeletal federal habeas petition and renumbered here. The *Ring* challenge was included within the argument and in claim 39. We have separated it here for clarity.

The claim was timely presented to the trial court which denied relief. CR 5, pp 598–607; CR Supp. 2, pp. 101–110; Clerk's Record, Vol. 5, "Defendant's Objections to the Charge at Punishment." @ 598—606; Specific objection to claim 23 issue, found in Paragraph 25, at p. 602; Order of Court: Objections Denied at p. 606.

In objection number 25 to the jury charge Holiday claimed the court's charge failed to instruct the jury that in Special Issue Two that the State had the burden of proof to prove beyond a

reasonable doubt that there was not sufficient mitigating circumstances to warrant a life sentence. The objection was overruled. *See ibid.*

The claim was presented to the CCA as points of error number 41, 42 and 48 in Holiday's direct appeal brief. *See* Appellant's Brf. at 135-39. The CCA denied relief on the merits, finding neither procedural default nor constitutional flaws. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *80-83 (Tex. Crim. App. Feb. 8, 2006) (pages 22-23 of slip opinion).

Discussion. Texas Code of Criminal Procedure article 37.071 violates the Due Process Clause of the Fourteenth Amendment because it fails to place the burden of proof on the mitigation special issue to the State to establish a "No" answer, and thereby implicitly assigned the burden of proof to Holiday.

A bit of the history that produced this special issue and its surrounding legislation may be helpful here. The original Texas special issue capital sentencing system was constructed in response to the Supreme Court decision in *Furman v. Georgia*, 408 U.S. 238 (1972). The lack of a vehicle to permit consideration of a good many types of mitigating circumstances was quickly noticed, but it took some 17 years for the Supreme Court to mandate the use of a vehicle that would permit sentencing jurors to fully consider and give effect to mitigating circumstances. See *Penry I*.

The Texas legislative response to *Penry I* was a grudging one. Here is a list and description of what this writer calls the "crippling amendments" that were enacted with the legislation providing for the special issue set forth above. First, in a departure from the long accepted practice that prevailed in Texas as of the date of the *Penry* amendments, the Texas legislature relieved the

prosecutors from the burden of proving the lack of sufficient mitigating circumstances beyond a reasonable doubt. *See e.g., Steadham v. State*, 119 Tex.Crim. 475, 43 S.W.2d 944 (1931)[15]

[15] Prior to the 1972 amendments in response to *Furman*, Texas prosecutors had an onerous burden of proof of "malice aforethought" defined as follows: "Malice aforethought" is the voluntary and intentional doing of an unlawful act by one of sound memory and discretion, with the purpose, means, and ability to accomplish the reasonable and probable consequence of the act; and includes all of those states of mind under which the killing of a person takes place without any cause which will, in law, justify, excuse, or extenuate the homicide. It is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken." *Steadham, supra.*

Second, in the face of *Skipper v. South Carolina*, *supra*, the Texas legislature enacted a mandatory supplemental instruction limiting Texas capital sentencing jurors, in deciding the mitigation inquiry, to the consideration of evidence that they believe to reduce "moral blameworthiness." Intended or not, this instruction directs many jurors away from consideration of mitigating facts other than the circumstances of the offense, especially background facts like abuse as a child or mental illness less severe than insanity, where the nexus to the crime is not present or less pronounced.

Third, the Texas legislature provided that jurors must be told that a life verdict requires 10 votes, and not told the practical result of a failure to reach a unanimous verdict, when the law actually only requires that 1) a life verdict results if there is one vote dissenting from a death verdict, and 2) no mistrial or new trial will result from a failure to reach a unanimous verdict.

The result of these crippling amendments is to deny full consideration of mitigating evidence, especially the kind Mr. Holiday presented to his sentencing jury. A reasonable, law abiding Texas capital sentencing juror after hearing the horrific crime facts, and the evidence of extraneous misconduct, including an attempt to escape from death row, might well decide to place the burden of proving facts in mitigation of sentence upon Mr. Holiday. Absent a proper jury instruction, such a juror could very well require proof *beyond all doubt* that Mr. Holiday suffered from depression and had poor internal mechanisms for coping with stress and frustration.. A Texas capital sentencing juror that placed such an impossibly high burden of proof and persuasion on Mr. Holiday in the mitigation inquiry would not be violating his oath as a juror to render a true verdict based on the law and the evidence. Such a Texas capital sentencing juror would not be in violation of any law given him by the trial court because the charge does not purport to set any

burden of proof or persuasion on any fact for any party. This feature of the charge, even considered alone, demonstrates an egregious violation of the principles of *Furman v. Georgia.*

While the *Furman* Court "did not hold that the infliction of the death penalty per se violates the Constitution's ban on cruel and unusual punishments," *Gregg v. Georgia*, 428 U.S. 153, 188 (1976), it did recognize that "the penalty of death is different in kind from any other punishment imposed under our system of criminal justice." *Id.* Because of its uniqueness, the death penalty can not be imposed under sentencing procedures that "create a substantial risk that it [will] ... be inflicted in an arbitrary and capricious manner." *Id.* Because the Court found that the capital sentencing procedures then being utilized did create such a risk, the *Furman* Court invalidated those procedures as incompatible with contemporary standards of decency.

There is another feature of the failure to assign a burden of proof or persuasion in the mitigation inquiry that leads directly to the arbitrary and capricious infliction of death as a penalty that *Furman* forbids. The state will often offer evidence of its own that tends to rebut the defense mitigation case. In this case, as discussed at length, *see supra*, the state offered the expert opinion of a forensic psychiatrist that Holiday had an anti-social personality disorder, and that he was likely to constitute a future danger of violent conduct. A reasonable law abiding Texas capital sentencing juror, exposed to the horrific crime facts and the extraneous misconduct, might well decide to believe this expert, and to use the expert's opinion against Holiday if he or she thought there was even a one percent chance that the expert's opinion was true and accurate. Again, such a Texas capital sentencing juror would not violate his or her oath to render a true verdict according to the evidence and the law because the court's charge, the only law the jurors are to follow, leaves the evidentiary threshold for consideration of facts adverse to the defendant completely up to the sentencing juror. The Texas mitigation inquiry simply does not provide the guided discretion

required in *Furman* that saved the Texas system from facial attack in *Jurek* or the vehicle for reasoned moral response that the Supreme Court required in *Penry I.* Whether a sentencing juror will conclude that a mitigating circumstance exists or whether life or death is "warranted" depends heavily on how the court channels his or her thought processes.

Mr. Holiday argues that the constitutional principles, derived from *Furman*, and more recently acknowledged by the Supreme Court in *Kansas v. Marsh*, 548 U. S. 163 (2006) are offended by the Texas CCA's refusal to grant relief from the constitutional frailties of the Texas capital sentencing system, and the mitigation inquiry in particular.

The *Marsh* opinion, authored by Justice Thomas, acknowledged that the high court had long required due process in the capital sentencing process, citing to the concurrence by Justice Thomas in *Graham v. Collins*, 506 U.S. 461 (1993), which, in turn cited *Gardner v. Florida* 430 U.S. 349 (1977)[due process required that the capital defendant be afforded an opportunity to rebut and explain the evidence adduced to support the state's death aggravators] and *Walton v. Arizona*, 497 U.S. 639, 672 (Scalia, J., concurring in part and concurring in judgment). Other Supreme Court cases have upheld the notion that the right to present mitigating evidence and to rebut aggravating evidence can only be vindicated with a rational process, one that will permit a reasoned moral response to the body of evidence before the jury.[16]

[16] See *Simmons v. South Carolina*, 512 U.S. 154 (1994) [right to inform the sentencing jury that the capital defendant will never parole.]

As Justice Thomas noted in his concurrence in *Graham*, supra., the major emphasis of our Eighth Amendment jurisprudence has been on "reasoned" sentencing. The Supreme Court has continually sought to verify that States' capital procedures provide a "rational basis" for predictably determining which defendants shall be sentenced to death[1]. States may satisfy *Furman*'s demands--providing objective standards to ensure that the sentencer's discretion is "guided and channeled by . . . examination of specific factors." [2] "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he [or she] should have in the correctness of the factual conclusions for a particular type of adjudication.'" *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)). With respect to guilt phase elements, the beyond a reasonable doubt standard is "indispensable" to due process, because "it impresses on the trier of fact the necessity of reaching a subjective state of certitude of the facts in issue." *In re Winship,* 397 at 364 (internal quotation marks and citation omitted). The same principle applies to aggravating factors in death penalty cases. See *Ring v. Arizona*, supra., *Apprendi v. New Jersey,* 530 U.S. 466 (2000), and *Blakely v. Washington*, 542 U.S. 296 (2004). The principles of *Ring,* derived from *Furman,* require that the same rule must apply to the prosecution's facts offered to rebut the defense mitigation case, such as the state's forensic psychologist testimony here.

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[1] *Furman*, supra, at 294 (Brennan, J., concurring). See also *Spaziano v. Florida*, 468 U.S. 447, 460 (1984); *California v. Brown*, supra, at 541; *Barclay v. Florida*, 463 U.S. 939, 960 (1983) (Stevens, J., concurring in judgment) ("A constant theme of our cases . . . has been emphasis on procedural protections that are intended to ensure that the death penalty will be imposed in a consistent, rational manner"); *McCleskey v. Kemp*, 481 U. S., at 323 (Brennan, J., dissenting) ("[C]oncern for arbitrariness focuses on the rationality of the system as a whole, and . . . a system that features a significant probability that sentencing decisions are influenced by impermissible considerations cannot be regarded as rational").

[2] *Proffitt v. Florida*, 428 U.S. 242, 258 (1976) (opinion of Stewart, Powell, and Stevens, JJ.).

In *Ring*, 122 S. Ct at 2439, the United States Supreme Court wrote: "The dispositive question, we said, 'is one not of form, but of effect.' If a State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt."

Since Article 37.071 does not assign a burden of proof on the mitigation special issue it violates *Ring, supra*. Holiday contends that Ring requires the State to prove beyond a reasonable doubt that the answer to the mitigation special issue should be "NO." Article 37.071 does not require the State to prove beyond a reasonable doubt a "NO" answer to the mitigation special issue. In truth, the statute requires the defendant to prove that the mitigating evidence is sufficient to warrant a life sentence. This is a violation of *Ring,* supra.

Applying these principles to Mr. Holiday's case, the Court can readily see that Holiday explained his misconduct as the product of depression and poor mechanisms for copying with problems and stress, whereas the prosecutors argued to the contrary, that he was a remorseless antisocial personality. To decide these issues without the application of a burden of proof to any party at all is a clear violation of our traditional notions of due process that all members of the *Marsh* court acknowledge are applicable in capital sentencing.

Though Mr. Holiday does claim that the constitution requires the state to prove its basic, underlying facts used to rebut the defense mitigation case beyond a reasonable doubt, he does not go so far as to demand that the overall burden of proof and persuasion on the ultimate mitigation inquiry be placed on the prosecution in this case. What Mr. Holiday asks the Court to require the prosecution to prove beyond a reasonable doubt is just the truth of the adverse facts — like the state's expert testimony — that the state presented in response to his mitigation case. As to the ultimate mitigation issue, Mr. Holiday merely asks for our usual adversarial process, the

traditional means of assuring reliability and due process of law in the resolution of important disputes. In the present state of capital sentencing law, this could mean that the burden of proof might be assigned to either party by one of the three recognized burdens of persuasion, a preponderance, clear and convincing and beyond a reasonable doubt. See *Walton v. Arizona, 497 U.S. 639 (1990)*[19] and *Ring v. Arizona*, and cases cited therein. But it cannot mean that the court does not assign any burden of proof or persuasion to any party on any issue bearing on mitigation of punishment in a capital case. The failure to afford even the most rudimentary features of our traditional adversarial process at capital sentencing is objectively unreasonable in light of the principles of *Furman* and progeny requiring the proper guidance of the discretion of the sentencing jury.

[19]In *Martin v. Ohio,* 480 U.S. 228 (1987), the high court upheld the Ohio practice of imposing on a capital defendant the burden of proving by a preponderance of the evidence that she was acting in self defense when she allegedly committed the murder. In *Leland v. Oregon*, 343 U.S. 790 (1952), the Supreme Court upheld, in a capital case, a requirement that the defense of insanity be proved beyond a reasonable doubt by the defendant, see also *Rivera v. Delaware*, 429 U.S. 877 (1976), and in *Patterson v. New York*, 432 U.S. 197 (1977), the Supreme Court rejected the argument that a State violated due process by imposing a preponderance of the evidence standard on a defendant to prove the affirmative defense of extreme emotional disturbance.

The sentencing jury in this case selected Mr. Holiday for the death penalty without the benefit of any burden of proof or persuasion on any party at all. No reviewing court can possibly divine whether or how the sentencing jury gave full consideration and effect to Mr. Holiday's mitigation case. The *Richardson v. Marsh* presumption that jurors follow their instructions simply has no application here, because the sentencing jurors had inadequate instructions guiding the great discretion given them in deciding their response to the mitigation inquiry. Without proper guidance, the jury's decision may have been entirely irrational and arbitrary. This not only offends the Due Process Clause, it violates the principle of heightened reliability in capital proceedings right up to the point of execution. See, e. g. *Ford v. Wainright*, 477 U.S. 399 (1986)

The sentencing process that produced Mr. Holiday's death sentence is constitutionally flawed for failure to provide for and enforce the rule of guided discretion in another way. *Gregg* and its companion cases reviewing the several state's responses to the *Furman* mandate stressed the fact that all of the approved statues required meaningful appellate review. 428 U.S. at 153. The purpose of appellate review is to provide "a means to promote the evenhanded, rational, and consistent imposition of death sentences . . ." *Jurek v. Texas,* 428 U.S. at 276. In *Parker v. Dugger*, 498 U.S. 308 (1991), the Court re-emphasized "the crucial role of meaningful appellate review in ensuring that the death penalty is not imposed arbitrarily or irrationally.". . . It is a "crucial protection." *Id.* While the Court has held that comparative proportionality review is not required by the Eighth Amendment, *see Pulley v. Harris*, 465 U.S. 37 (1984), some form of meaningful appellate review is still required. *See also Sochor v. Florida*, 504 U.S. 527 (1992). In this respect, Mr. Holiday says that the Texas system that produced his death sentence is facially flawed in that the CCA simply does not review this aspect of the process. It was objectively unreasonable for the

CCA to uphold Mr. Holiday's death sentenced over his *Furman* based claim of error presented in the Texas trial court and the CCA.

To our knowledge, the previous attacks on the application of the crippling amendments to the fairly straightforward terms of the special issue itself have taken the form of a global demand for the assignment of the burden of proof and persuasion to the state in the mitigation inquiry. *See Rowell v. Dretke*, 398 F.3d 370, 376-77 (5th Cir. 2005); *Granados v. Quarterman*, 455 F.3d 529, 537 (5th Cir.), cert denied, 127 S. Ct. 732 (2006); *Ortiz v. Quarterman*, No. 06-70020, 2007 WL 2936244, at *10 (5th Cir. Oct. 10, 2007); *Scheanette v. Quarterman*, 482 F.3d 815, 828 (5th Cir. 2007).

Mr. Holiday's argument is different, and it rests on a much firmer foundation. The demand here is also a more modest one, to simply require Texas to honor the Due Process Clause and the heightened reliability requirement of the Eighth Amendment by requiring the trial courts to tell the parties and the jurors who has the burden of proof at mitigation and how high is the standard of proof of the facts at issue. Put another way, Mr. Holiday's complaint is that he and the sentencing jurors did not know the rules of the mitigation game before play started, or, indeed, at any later time. There is no justification for jettisoning our usual adversarial process right at the point where life or death is to be finally decided. To do so is objectively unreasonable.

The Texas CCA overruled Mr. Holiday's *Furman* argument in a single paragraph without citing any federal authority. The failure to require proper guidance to the discretion to the sentencing jury was objectively unreasonable in light of *Furman* and its progeny.

Claim 27: Texas Code of Criminal Procedure article 37.071 violates the Eighth Amendment because the mitigation special issue demands that jurors apply key terms which are undefined, ambiguous and subject to divergent interpretation: "probability," "sufficient mitigating

circumstances," "personal moral culpability," and "moral blameworthiness."

Exhaustion. This claim appears as claim 33 in Holiday's May 2011 initial federal habeas petition. It was presented to the trial court, which denied relief. CR 1, p. 20. (Note: counsel did not have time to verify, but the objection may have been preserved in the following pre-trial motion. Clerk's Record, Vol. 5, "Defendant's Objections to the Charge at Punishment." @ 598—606; Order of Court: Objections Denied at p. 606.)

The claim was presented to the CCA as point of error number 43 in the direct appeal brief. *See* Appellant's Brf. at 139-42. The CCA denied relief on the merits, finding neither procedural default nor constitutional flaws. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *80-83 (Tex. Crim. App. Feb. 8, 2006) (pages 22-23 of slip opinion).

CCA Analysis. This vagueness issue, at least in part, was first addressed by the CCA in *Jurek v. State*, 522 S.W.2d 934 (Tex. Crim. App. 1975), which summarily rejected it, though there were vigorous dissents by two members, Judges Odom and Roberts. Judge Odom wrote that the "essential indefiniteness of the word 'probability' is ignored." He asked whether probability meant "some probability, any probability?" To him, "[O]ur common sense understanding of the term leaves the statute too vague to pass constitutional muster." *Id.*, at 944–945. Judge Odom was right. Even more illuminating was Judge Roberts' dissent where he wrote "a probability is simply a chance—however large or small", and, concluded that the future danger special issue would be answered "in the affirmative for all individuals, no matter how saintly." Id. at 947–948. These dissents have been ignored without good reason. The United States Supreme Court affirmed *Jurek*, finding that the then existing death penalty statute was constitutional. *Jurek v. Texas*, 96 S.Ct. 2950, 428 U.S. 262 (1976).

Since 1975, the CCA has repeatedly rejected this claim. *See Chamberlain v. State*, 998 S.W.2d 230, 237-238 (Tex. Crim. App. 1999); *Wright v. State*, 28 S.W.3d 526, 537 (Tex. Crim. App. 2000), cert. denied, 531 U.S. 1128, 121 S.Ct. 885, 148 L.Ed.2d 793 (2001); *Ladd, supra*, at 572-73; *Raby*, *supra,* at 8.

Introduction. Article 37.071 violates the 8th Amendment because it contains words and phrases which are left undefined and whose meanings are subject to multiple and quite alarming individual interpretations. "Probability," "sufficient mitigating circumstances," "moral blameworthiness," and "personal moral culpability" are vague and ambiguous, and their meanings are left to the unfettered whim and caprice of each juror. Claims of vagueness directed at capital punishment statutes are analyzed under the 8th Amendment. *Maynard v. Cartwright*, 486 U.S. 356, 108 S.Ct. 1853, 1858, (1988). Generally, such claims assert that the challenged provision fails adequately to inform the jurors what they must find to impose the death penalty, and, as a result, leaves them and the appellate courts with the kind of open-ended discretion which has been held invalid in *Furman. Id*. Only when the jury's discretion is "guided and channeled by requiring examination of specific factors that argue in favor of or against imposition of the death penalty" are the requirements set out in *Furman* satisfied. *Proffitt v. Florida*, 96 S.Ct. 2960, 2969, 428 U.S. 242 (1976). Where discretion is afforded a [jury] on a matter so grave as the determination of life or death, that discretion must be "suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S.Ct. 2909, 2932 (U.S. Ga. 1976).

Mr. Holiday contends that several of his constitutional rights were violated by the use of jury instructions in the sentencing phase which failed to permit the jury to consider and give effect to mitigating evidence. The point here is that because of the language used in the instructions, a

reasonable juror would not have believed he or she was permitted to consider mitigating evidence. This ground for relief requires a comprehensive explanation of the demand by the Supreme Court that jury instructions not only be technically accurate, but actually succeed in conveying vital concepts to the ordinary men and women called upon to decide life and death issues.

A. Overview of Constitutional Law

Accurate and well-understood jury instructions are not simply a good idea, they are required by the federal and state constitution. Instructions which do not state the law properly or which cannot be adequately understood by a jury violate no the Eighth Amendment's guarantee against cruel and unusual punishment and the due process clause of the Fourteenth Amendment.

Parenthetically, the terms "instruction" and "charge" will be used interchangeably to refer to the written instructions on the law supplied to a jury and designed to guide the jury to a verdict. There is a technical distinction between the two, however. The charge is often referred to as the final address to the jury by the judge in which he instructs the jury as to the law it is to apply to the case. Black's Law Dictionary 233 (6th ed. 1990). Conversely, instructions are oral statements made to the jury at various points throughout the trial. *Id.* at 356; *see also* J. Patrick Jones, Note, *Jury Instructions v. Jury Charge*, 82 W. Va. L. Rev. 555, 555-56 (1980).

The due process clause of the Fourteenth Amendment requires that juries receive adequate guidance in applying the law. *Sandstrom v. Montana*, 442 U.S. 510, 524 (1979); *Cupp v. Naughten*, 414 U.S. 141, 147-48 (1973). Its concern is with what might be called the "accuracy" of the verdict and in assuring that no citizen is convicted unless the government is held to the high standard of "beyond a reasonable doubt." "The Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." *In re Winship*, 397 U.S. 358, 364 (1970). "The reasonable doubt

standard reduces the risk that an error in fact finding could deprive an innocent man his good name and freedom." *Cupp v. Naughten,* 414 U.S. 141, 155 (1973) (Brennan, J., dissenting). Further, the standard "impresses the jurors with their solemn responsibility to avoid being misled by suspicion, conjecture, or mere appearance." *Id.* Thus, it is because of the Due Process Clause's demand for accuracy, that jury instructions which can be read by a juror to presume an element of the State's case are unconstitutional. *See, e.g., Sandstrom v. Montana*, 442 U.S. 510, 524 (1979). Likewise, the Due Process Clause prohibits a charge requiring, as a predicate to considering a witness' testimony, that the jury find the witness' evidence true beyond a reasonable doubt. *See Cool v. United States*, 409 U.S. 100, 104 (1972). Obviously, the quality of instructions supplied to a jury is vital to conducting a fair trial because the accuracy with which law is applied is largely a function of each juror's ability to understand a correct statement of the law.

In capital cases, the Cruel and Unusual Punishment Clause of the Eighth Amendment requires the jury to weigh mitigating and aggravating circumstances in order to assure that death is the appropriate punishment in a particular case. *Lockett v. Ohio*, 438 U.S. 586, 604-05 (1978); *Woodson v. North Carolina*, 428 U.S. 280, 304-05 (1976). As with the Due Process Clause, the concern underlying the Constitution's protection against Cruel and Unusual Punishment is accuracy that the punishment should be "directly related to the personal culpability of the criminal defendant." *Penry v. Lynaugh*, 492 U.S. 302, 109 S. Ct. 2934, 2947 (1989). The Court will reject a jury charge which restricts a jury from considering all relevant mitigating factors. *See id.*, 109 S. Ct. at 2947; *Lockett v. Ohio*, 438 U.S. 586, 605-09 (1978). Further, the instructions in a capital case must go beyond merely allowing a jury to consider the defendant's mitigating circumstances and must direct jurors to give effect to any mitigating factors in favor of a sentence short of death. *See Penry*, 492 U.S. at _____, 109 S. Ct. at 2947, 2951. Obviously, a jury cannot appropriately balance

various mitigating and aggravating aspects of the defendant's life and conduct without clear instructions which methodically guide jurors through the necessary considerations.

In order for a defendant to receive a fair trial in compliance with these constitutional imperatives, the Supreme Court has determined that jury instructions must be technically corrects as well as comprehensible to the juror. A verdict will be reversed for faulty instructions when (1) there is a *reasonable likelihood* that the jury misinterpreted the instructions, (2) the resulting error was harmful, and (3) the error was not corrected. Each of the concepts raised by these rules will be examined in detail.

B. Social Science Studies

Legal scholars have long suspected that juries have difficulty understanding court instructions. *See, e.g.,* Jerome Frank, Law and the Modern Mind 181-82 (1930); Lawrence Friedman, A History of American Law 137 (1973) (lamenting instructions as "stereotyped, antiseptic statements of abstract rules"); Robert M. Hunter, *Law in the Jury Room*, 2 Ohio St. L.J. 1 (1935) (collection of anecdotal observations). *See generally* Arthur D. Austin, Complex Litigation Confronts the Jury System: A Case Study 55-65 (1984) (author interviewed two sets of jurors in a complex antitrust suit and found that jurors had a great deal of difficulty with the concepts involved and the poor language of instructions); John Guinther, The Jury in America 70-73 (1988) (survey of jury decision making); Saul M. Kassin & Lawrence S. Wrightsman, The American Jury on Trial 141-63 (1988) (criticism of the incomprehensibility of jury instructions); Edith Greene, *Judge's Instruction on Eyewitness Testimony: Evaluation and Revision*, 18 J. Applied Soc. Psychol. 252, 259 (1988) (standard instruction on eyewitness testimony did not increase juror understanding); Saul M. Kassin & Lawrence S. Wrightsman, *On the Requirements of Proof: The Timing of Judicial Instruction and Mock Juror Verdicts*, *in* In the Jury Box 143,

144-45 (Lawrence S. Wrightsman et al. eds., 1977) (summarizing criticisms of jury instructions); Robert L. Winslow, *The Instruction Ritual*, 13 Hast. L.J. 456 (1962) (recommending that pattern instructions define abstract legal concepts by describing within factual context).

Serious empirical testing of juror comprehension, however, did not begin until the early 1970's. *See, e.g.,* Robert F. Forston, *Judge's Instructions: A Quantitative Analysis of Jurors' Listening Comprehension*, Today's Speech, Fall 1970, at 34. All studies consistently point to failure by jurors to understand jury instructions. For example, the 1990 Michigan Juror Comprehension Project tested actual jurors who had rendered verdicts in criminal trials only a few minutes before being interviewed by researchers. As jurors completed jury duty, they were asked to complete an extensive questionnaire regarding their understanding of the pattern jury instructions used in the trial just completed. Kramer & Koenig, *supra*, at 410. The researchers found that many jurors failed to understand critical aspects of the law even after having heard the judge read the instructions, after having read the instructions themselves, and after having discussed the instructions in deliberation. *Id.* at 429-33. For example, when asked whether an assault must include actual physical injury to the victim, only 32% of those jurors who heard patterns instructions on assault--jurors who had completed only minutes before a trial in which the defendant had been charge with assault--answered correctly that an assault did not require a physical injury. *Id.* at 423; *see also id.* at 409-10.

Findings by other social scientists consistently confirm that lay persons are frequently bewildered by the wording of jury instructions. Reid Hastie et al., Inside the Jury (1983) (examination of dynamics of jury decision making); Ellsworth, *supra*, at 218-23 (finding that deliberation did not cure juror misunderstanding); Amiram Elwork, et al., *Juridic Decisions in Ignorance of the Law or in Light of It?* 1 L. & Hum. Behav. 163, 175-76 (1977) (finding that mock

jurors were much more likely to comprehend and remember revised instructions than pattern ones.); Norman J. Finkel & Sharon F. Handel, *Jurors and Insanity*: *Do Test Instructions Instruct?* 1 Forensic Reports 65, 75 (1988) (finding that jury instructions on insanity had no more effect on verdicts than giving no instructions at all); Forston, *supra*, at 610-12 (finding that jurors were confused by legal concepts as well as by deliberation proceedings); Jane Goodman & Edith Greene, *The Use of Paraphrase Analysis in the Simplification of Jury Instructions*, 4 J. Soc. Behav. & Personality 237, 246-50 (1989) (finding that jurors failed to understand intent and burden of proof); Harold M. Hoffman & Joseph Brodley, *Jurors on Trial*, 17 Mo. L. Rev. 235 (1952) (revealing from juror interviews that jurors misunderstand a variety of aspects of trial); Irene Glassman Prager, *Improving Juror Understanding For Intervening Causation Instructions*, 3 Forensic Reports 187, 187-88 (1989) (finding that jurors were far more likely to understand revised instruction on intervening causation than pattern version); William W. Schwarzer, *Communicating with Juries: Problems and Remedies*, 69 Calif. L. Rev. 731, 738-39 (1981) (describing comprehensibility problems with pattern jury instructions); Laurence J. Severance & Elizabeth F. Loftus, *Improving the Ability of Jurors to Comprehend and Apply Criminal Jury Instructions*, 17 L. & Soc'y Rev. 153, 183 (1982) (finding that mock jurors given pattern instructions on intent and reasonable doubt did not perform any better than jurors who received no instructions at all); Walter M. Steele, Jr. & Elizabeth G. Thornburg, *Jury Instructions: A Persistent Failure to Communicate*, 67 N.C.L. Rev. 77, 88-89 (1988) (finding that jurors had a poor grasp of pattern instructions but improved with revised versions).

Researchers blame poor understanding on legal phraseology and undefined terms by lawyers. *See, e.g.,* Robert P. Charrow & Veda R. Charrow, *Making Legal Language*

Understandable: A Psycholinguistic Study of Jury Instructions, 79 Colum. L. Rev. 1306 (1979) (ground-breaking research on jury misunderstanding).

Even research in the last twenty years continues to bear out earlier studies, finding over and over that jurors commonly fail to understand capital sentencing instructions. *See* Shari S. Diamond & Judith N. Levi, *Improving Decisions on Death By Revising and Testing Jury Instructions*, 79 Judicature 224 (Mar.-Apr. 1996) (Review of *Free* Zeisel study and proposing revisions); William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 Ind. L.J. 1043 (1995); Shari S. Diamond & Jonathan D. Casper, *Empirical Evidence and the Death Penalty*, 50 J. Soc. Issues 177 (1994); Shari S. Diamond, *Instructing on Death*, 48 Am. Psychol. 423 (Apr. 1993) (analyzing affect of instructions on comprehension); James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions Guided or Misguided*, 70 Ind. L.J. 1161 (1995) (finding 41% of tested jurors believed mitigating evidence required proof beyond reasonable doubt).

C. Application to Mr. Holiday's Trial.

Having examined the Supreme Court's requirements at length and further considered social science reports demonstrating that jurors commonly fail to understand jury instructions, one can now turn to the case at hand. Despite the Supreme Court's demand in *Lockett* and *Penry* that capital juries be permitted to give independent mitigating weight to the defendant's character and evidence offered in mitigation of a capital murder, the trial court submitted instructions and special issues at punishment to the jury which prohibited the jury from giving full consideration to mitigating evidence offered by Mr. Holiday.

Several shortcomings of Mr. Holiday's instructions are apparent immediately. The most critical terms are left undefined. The term "reasonable expectation" in the first issue is undefined.

Jurors were left to guess the meaning of vital words in the second issue such as "probability," "criminal acts of violence," "continuing threat," and "society." There is no option permitting jurors to sentence Mr. Holiday to life without parole. Nor is there any indication that jurors could consider "society" to mean Holiday's society among inmates in a structured prison environment.

Applying the test initiated by Chief Justice Rehnquist in *Boyde*, there is a reasonable likelihood that the jurors in Mr. Holiday's trial failed to understand the court's charge to the jury in two critical respects. First, the jurors almost certainly failed to understand that the law permitted them to consider and give wide and full effect to the mitigating evidence and circumstances offered by his lawyers in the punishment phase. Second, the jurors failed to understand that the term "deliberately" used in the first special punishment issue had special legal significance that meant far more than "intentionally."

The next step is to determine whether these errors were harmful to Mr. Holiday and went uncorrected by other events at trial. The careful analysis required by *Yates* indicates that these errors were vitally important in relation to everything else the jury considered on these special issues. Given the brief number of words in the special issues and the irresistible force by the court's instructions and State's effort to concentrate jurors' attention on the deaths and Holiday's past crimes, it is beyond reasonable doubt that the jurors relied on these misleading instructions to reach their verdict of death against Mr. Holiday. Recalling the harmless error analysis, one must first identify precisely what evidence the jury actually considered in reaching its verdict and secondly, conclude whether this evidence possessed sufficient probative force to cause the jury to reach the proper verdict despite the demand of the improper instruction.

Here, the evidence was overwhelming that a violent and senseless deaths of lovely children had occurred. In answering the first question regarding the murders at hand, the jury obviously

considered the circumstances of the killings in determining whether it was committed "deliberately," regardless of whatever that term may have mean to the jurors. In the second question regarding future dangerousness, there was evidence that Mr. Holiday had committed other violent acts. One can reasonably conclude that the jury considered this evidence in answering the future dangerousness issue.

The real question then is whether the jury could have considered Mr. Holiday's mitigating evidence in answering these three questions. One must conclude that they did not. Mr. Holiday offered substantial mitigating evidence. The jury would have been constrained by the instructions to consider such evidence irrelevant in answering the first issue on deliberateness. Moreover, such evidence is of no use as to whether he is a future threat to society. The third special issue likewise does not sufficiently allow wide consideration of mitigating evidence and places the burden of proof on Mr. Holiday.

Having identified that the jury would have considered the State's evidence but not Mr. Holiday's, the second step in the harmful error analysis is to determine whether the evidence presented to by the State possessed such probative force to cause the jury to reach the proper verdict despite the demand of the improper instructions. Here too, the instructions fall short. The State presented powerful evidence asserting the viciousness of the attacks and Holiday's past violent crimes. The State did not present any evidence to overcome the error in the instructions that would have permitted the jury to realize they could consider a wider range of mitigating evidence and circumstances despite the poorly worded instructions compelling them to believe otherwise. Indeed, given the adversarial relationship, the State was not interested in presenting evidence to compel the jury to consider mitigating circumstances or evidence, or to suggest that "deliberately" meant far more than "intentional."

Notwithstanding the evidence presented by the State in punishment and presumptively relied upon by the jury, the State's evidence cannot be said to have been so strong (*i.e.,* of such probative force) — especially on the causation element — that it is beyond reasonable doubt that the jury would have reached the same verdict even if the jury instructions (1) clearly contained language explicitly permitting unrestrained mitigating evidence and circumstances, and (2) contained a carefully drafted definition of "deliberately." In the plainest language, the Court can only deny Holiday's writ petition if it concludes that it is beyond any reasonable doubt that the State's evidence was so overwhelming that the jury would have still voted for death even if the instructions had flawlessly permitted full consideration of mitigating evidence and defined "deliberately." It is impossible to do so in this case. There is no mechanism therefore, for the jury to grant a sentence of life to Holiday notwithstanding whatever else it may think about him or his crime.

In *Free v. Peters,* 806 F. Supp. 705 (N.D. Ill. 1992), *rev'd* 12 F.3d 700 (7th Cir. 1993), *cert. denied*, 115 U.S. 433 (1994), a federal district court ordered Illinois to resentence a death row inmate, concluding that the instructions to the jury in his case were fatally flawed. The basis for the court's decision was a detailed study by a social scientist named Dr. Hans Zeisel. The court determined that there was a reasonable likelihood under the *Boyde v. California* standard that the instructions failed to provide sufficient guidance as the allocation of the burden of persuasion when determining whether to impose the death penalty upon consideration of the aggravating and mitigating factors. The district court also accepted Dr. Zeisel's finding that tests on mock jurors indicated the instructions would cause jurors to limit consideration of mitigating evidence. *Id.*

The Seventh Circuit Court of Appeals reversed, unwilling to void a state court's sentencing based on social science tests it viewed as flawed. *Free*, 12 F.3d at 704-05.

In *McDougall v. Dixon*, 921 F.2d 518 (4th Cir. 1990), *cert. denied*, 111 S. Ct. 2840 (1991), the Fourth Circuit Court of Appeals turned back a challenge to North Carolina's capital jury instructions based on testimony by a set of distinguished social science professors who determined the instructions limited consideration of mitigating evidence.

D. Conclusion

Having considered the jury instructions in careful detail, one must conclude that they are flawed beyond repair. The analysis called for by *Sandstrom v. Montana* and *Boyde v California* demonstrates that the instructions are defective because they limited the jury's ability to consider Holiday's mitigating evidence. Moreover, the error was harmful and uncorrected. For these reasons, the Court must reverse and remand for a new trial with instructions to define deliberately, and instruct that the jury that it may consider and give effect to any offered mitigating evidence offered by Mr. Holiday.

Claim 28: Texas Code of Criminal Procedure article 37.071 violates the Eighth Amendment because the statute does not permit meaningful appellate review of the jury's answers to the three special issues.

Claim 29: Texas Code of Criminal Procedure article 37.071 violates the Fourteenth Amendment due process clause because the statute does not permit meaningful appellate review of the jury's answers to the three special issues.

Exhaustion. These claims were presented as claims 34 and 35 in Holiday's initial federal filing. The claims were timely presented to the trial court which denied relief. CR 1, p. 21. (Note: counsel did not have time to verify, but the objection may have been preserved in the following pre-trial motion. Clerk's Record, Vol. 5, "Defendant's Objections to the Charge at Punishment." @ 598—606; Order of Court: Objections Denied at p. 606.)

The claims were timely presented to the CCA as point of error number 44 in Holiday's direct appeal brief. *See* Appellant's Brf. at 142-44 (see last sentence of argument for constitutional reference). The CCA denied relief on the merits, finding neither procedural default nor constitutional flaws. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *80-83 (Tex. Crim. App. Feb. 8, 2006) (pages 22-23 of slip opinion).

Analysis. The Supreme Court has consistently recognized the crucial role of appellate review in guaranteeing that the death penalty is not imposed arbitrarily or capriciously. *Whitmore v. Arkansas*, 495 U.S. 149, 110 S.Ct. 1717, 1730 (1990). The Court approved Texas' appellate review system in *Jurek, supra*, at 2958: "By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the evenhanded, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be 'wantonly' or 'freakishly' imposed, it does not violate the Constitution."

Enabling a reviewing court to examine the specific findings underlying the verdict facilitates appellate review, which the Supreme Court has described as "an important additional safeguard against arbitrariness and caprice." Gregg, 96 S.Ct. at 2936. But the CCA has conceded that it is "impossible to a conduct a sufficiency review to the mitigation special issue," but such impossibility does not "render our capital punishment scheme unconstitutional." *Lawton v. State*, 913 S.W.2d 542, 556-57 (Tex. Crim. App. 1995), *cert. denied*, 519 U.S. 826 (1996). The CCA concluded that the "United States Constitution does not require a sufficiency review of the jury's decision regarding mitigation." *Id.*

There are cracks in the CCA's structure. In *Allen v. State*, 108 S.W.3d 281 (Tex. Crim. App. 2003), Judges Meyers and Womack wrote that the CCA can no longer summarily dismiss

requests to review the sufficiency of the evidence in support of the jury's answers to the special issues. Judge Meyers wrote: "There are also possible situations where this Court should conduct a factual sufficiency review of the future dangerousness special issue. If a defendant is granted a retrial after serving several years as a model prisoner, this Court should be able to conduct a factual sufficiency review of the future dangerousness special issue." *Id*., at 287.

Appellate review in Texas consists of a legal sufficiency review of the future dangerousness special issue, and nothing more. This is not a meaningful appellate review and violates the 8th Amendment and due process of law.

In these grounds, Mr. Holiday makes precisely the same argument rejected in *Eldridge v. State*, 940 S.W.2d 646, 1996 Tex. Crim. App. LEXIS 235, *12-13 (Tex. Crim. App. 1996). The second special issue asks jurors to decide whether the defendant is a future danger to society. The problem is that the jury's answer is not capable of appellate review. *Eldridge* resolved the matter this way:

> Under Article 37.071 § 2(f), the jury determines whether any evidence has mitigating effect and, if so, how much. We have said that these two decisions are normative and therefore are not reviewable by this Court. *Lawton v. State,* 913 S.W.2d 542, 557 (Tex. Crim. App. 1995). So long as the jury has all potentially relevant evidence before it, we continue to defer to the jury and believe its unfettered discretion under Article 37.071 § 2(e) is constitutionally valid. *Id*. As we have consistently done in the past, we decline to review the jury's decision on the mitigation special issue. *See Hughes v. State,* 897 S.W.2d 285, 294 (Tex. Crim. App. 1994), *cert. denied,* 131 L. Ed. 2d 857, 115 S. Ct. 1967 (1995); *Colella v. State*, 915 S.W.2d 834 (Tex. Crim. App. 1995).
>
> Appellant is therefore correct to say that appellate review of a capital jury's Article 37.071 § 2(e) decision is impossible. But this is not enough to render the capital sentencing scheme unconstitutional. This Court makes sufficiency reviews of Texas juries' guilt/innocence and Article 37.071 § 2(b)(1) future dangerousness decisions. These decisions are factbound and hence reviewable for sufficiency of the evidence. As long as these determinations can be reviewed, we are satisfied that the constitutionality of Article 37.071 is not contingent on appellate review of the second special issue. In *Burns v. State,* 761 S.W.2d 353 (Tex. Crim. App. 1988), we

said that "it is doubtful [that] Eighth Amendment or Due Process considerations absolutely require this Court to reweigh punishment evidence . . ." *Id.,* at 356, n. 4., citing *Pulley v. Harris,* 465 U.S. 37, 104 S. Ct. 871, 79 L. Ed. 2d 29 (1984). We have never regarded a mitigation sufficiency review as a prerequisite to the constitutionality of Article 37.071. See Lawton, 913 S.W.2d at 547. Accordingly, we overrule appellant's fourth point of error.

Eldridge v. State, 940 S.W.2d 646, 1996 Tex. Crim. App. LEXIS 235 at *14-15.

Claim 30: **Texas Code of Criminal Procedure article 37.071 violates (a) *Ring v. Arizona*, (b) the Sixth Amendment right to fair jury trial clause, (c) the Fourteenth Amendment Due Process Clause, and (d) the Eighth Amendment Cruel and Unusual Punishment Clause, because the future dangerousness special issue fails to define "probability" that Holiday will commit future acts of violence, permitting jurors to answer "Yes" if there is any statistical probability of future violence, rather than a preponderance of likelihood.**

Claim 31: **Texas Code of Criminal Procedure article 37.071 violates (a) *Ring v. Arizona,* (b) the Sixth Amendment right to fair jury trial clause, (c) the Fourteenth Amendment Due Process Clause, and (d) the Eighth Amendment Cruel and Unusual Punishment Clause, because the future dangerousness special issue fails to define "criminal acts of violence" anticipated by Holiday, thereby permitting his execution even for minor contact or solely use of words.**

Claim 32: **Texas Code of Criminal Procedure article 37.071 violates (a) *Ring v. Arizona,* (b) the Sixth Amendment right to fair jury trial clause, (c) the Fourteenth Amendment Due Process Clause, and (d) the Eighth Amendment Cruel and Unusual Punishment Clause, because the future dangerousness special issue fails to define "continuing threat to society" that Holiday will commit future acts of violence, permitting jurors to answer "Yes" when there is no possibility that Holiday would ever be in free society.**

Exhaustion. These claims were presented as claims 36, 37, and 38 in Holiday's initial federal habeas filing last year.

These claims were timely presented to the trial court, which denied relief. Holiday filed written objections to the Court's Punishment Charge. CR 5, pp 598–607; CR Supp. 2, pp. 101–110 (Order of Court: Objections Denied at p. 606.) In objections numbers 1 through 10, he claimed the

charge failed to instruct the jury that "probability" meant a high probability of at least 95%, and if denied, then descending to at least 50%. The court overruled the objections.

In objections number 11, 21, and 22, he claimed that the court failed to instruct the jury that "criminal acts of violence" meant "serious criminal activity that caused serious bodily injury or death which was not trivial, accidental, reckless, or highly provoked acts," and "not a property crime committed without serious bodily injury or death," or a "property crime which was not committed in conjunction or in combination with a crime against a person." The trial court overruled these objections.

In objection number 29 he objected that the court failed to instruct the jury as follows: “that continuing threat to society does not mean any threat of harm or death, no matter how minor or remote, that might hypothetically be posed, in any place, in or out of prison, for any length of time after the jury verdict, no matter how short, but instead means a clear and present threat of serious bodily injury or death to others while in prison or free society, which will continue after the defendant becomes parole eligible, unless death is imposed as a sentence.”

In objection number 30 he objected that the court failed to instruct the jury as follows: “that continuing threat to society does not mean any threat of harm or death, no matter how minor or remote, that might hypothetically be posed, in any place, in or out of prison, for any length of time after the jury verdict, no matter how short, but instead means that the defendant will be so incorrigible that his serious misconduct will continue after the defendant becomes parole eligible, unless death is imposed as a sentence.”

These objections were overruled. (Order of Court: Objections Denied at Vol. CR5 at p. 606.)

Holiday also objected to failure of the trial court's jury charge at punishment to instruct the jury as to the meaning of "probability," "criminal acts of violence" and "continuing threat to society."

All of these objections were made on Holiday's right to a jury trial under the 6th and 14th Amendments to the United States Constitution. The court overruled the objections.

All of these claims were presented to CCA as points of error number 47 and 49 in direct appeal brief. *See* Appellant's Brf. at 145-50, 151-53. The CCA denied relief on the merits, finding neither procedural default nor constitutional flaws. *Holiday v. State*, 2006 Tex. Crim. App. Unpub. LEXIS 737, *80-83 (Tex. Crim. App. Feb. 8, 2006) (pages 22-23 of slip opinion).

I. Introduction.

In a criminal prosecution the accused has a right under the 6th and 14th amendments to the United States Constitution to a trial by an impartial jury. Holiday argues that he was denied his 6th amendment right to a trial by an impartial jury because the court's charge failed to properly instruct the jury. *See Ring, supra.*

More than 100 years ago, the Supreme Court said that on the trial court rests the responsibility of declaring the law; upon the jury, the responsibility of applying the law so declared to the facts as they, upon their conscience, believe them to be. *Sparf v. United States*, 156 U.S. 51, 15 S. Ct. 273, 293 (1895). Of course, the trial court declares the law through its charge to the jury. It is the function of the trial court's charge to instruct the jury on how to apply the law to the facts and to "lead and prevent confusion" during jury deliberations.

Because the jurors are "unlikely to be skilled in dealing with the information they are given" it is important to give the appropriate guidance to the jurors because it is a "hallmark of our legal system that juries be carefully and adequately guided in their deliberations." *Gregg, supra,*

96 S. Ct. at 2934. The need for heightened reliability in death penalty cases mandates recognition of a capital defendant's right to require instructions on the meaning of the legal terms a jury is required to consider. *Simmons v. South Carolina,* 512 U.S. 154, 114 S. Ct. 2187, 2198 (1994). In fact, whenever there is a reasonable likelihood that a juror will misunderstand a sentencing term, a defendant may demand instruction on its meaning, and a death sentence following the refusal of such a request should be vacated as having been "arbitrarily or discriminatorily" and "wantonly and ... freakishly imposed." *Id.*

Texas Code of Criminal Procedure Article 37.071 — the death penalty sentencing scheme — "does not preclude additional instructions . . . because it is the trial court's duty and within its power to instruct the jury." *Matchett v. State,* 941 S.W.2d 922, 949 (Tex. Crim. App. 1996). *Furman* mandates that where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action. *Gregg,* 96 S. Ct. at 2932.

The trial court erred when it overruled Holiday's objections to the punishment charge. The actions of the trial court insured that the jury would wander haphazardly through the dark death penalty wasteland and reach a death verdict that was capricious and arbitrary. Such misguided wanderings violate the 8th Amendment, due process, as well as *Furman* and its progeny. Most times, such misguided wanderings result in a death verdict. The law should oppose such a result.

When the State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact — no matter how the State labels it — must be found by a jury beyond a reasonable doubt. *Ring,* 122 S. Ct 2439. Holiday contends that *Ring* is applicable to this State's punishment scheme in death penalty cases because death is contingent on the answers to

the special issues. Since "probability," "criminal acts of violence" and "continuing threat to society" are not defined in order to satisfy Ring, the jury must be instructed as to their meaning. The failure to properly instruct the jury denied Holiday a jury trial in violation of *Ring*. How did Holiday have a jury trial on Special Issue 1 when "probability," "criminal acts of violence" and "continuing threat to society" were not defined? A jury trial is based on the instructions given to the jury, and without proper instructions Holiday was denied his right to a jury trial at punishment. *Ring* held that a capital defendant is entitled to a "jury determination of any fact on which the legislature conditions an increase in their maximum punishment." Holiday contends that he was denied his right to jury trial in violation of Ring because the trial court failed to properly instruct the jury as to the meaning of "probability," "criminal acts of violence" and "continuing threat to society."

II. Claim Number 12: Under a *Ring* and *Apprendi v. New Jersey* analysis, Texas Code Crim. P. Art. 37.071 § 2(b)(1) Operates As the Functional Equivalent of an Element of a Greater Offense. Accordingly, Jury Determination of a Defendant's "Future Dangerousness" in Art. 37.071 § 2(b)(1), Which If Established is an Aggravating Circumstance or Element the Effect of Which Causes a Defendant's Execution, Must Be Proven Beyond a Reasonable Doubt, Rather Than by the Current Statutory Requirement of a "Probability" of Future Dangerousness Beyond a Reasonable Doubt, Which is a Much Lower Standard. Accordingly, Texas Code Crim. P. Art. 37.071 §2(b)(1) is Unconstitutional. As such, Holiday must not be executed.

Art. 37.071 § 2(b)(1) of the Texas Code of Criminal Procedure states that a jury must decide beyond a reasonable doubt, before capital punishment may be imposed on a criminal defendant, "whether there is a *probability* that [the] defendant would commit criminal acts of violence that would constitute a continuing threat to society." *Id*. Under a *Ring* and *Apprendi* analysis, Article 37.071 § 2(b)(1) operates as the functional equivalent of an element of a greater offense. See *Ring v. Arizona*, 122 S.Ct. 2428 (U.S. 2002), pp. 10-23, and *Apprendi v. New Jersey*, 530 U.S. 466, 494, n. 19 (U.S. 2000). Why is this? The answer is that if a jury decides there is a

mere probability beyond a reasonable doubt that a defendant will commit criminal acts that would constitute a continuing threat to society, the *effect* of the jury's decision (if the other elements of Art. 37.071 §§ (b)-(c) are also established) is the *execution* of the defendant, rather than the default life sentence imposed by statute under Art. 37.071. No reasonable person can argue that execution, death, being killed by the State, is somehow not a *massive* increase in punishment over the statutory default delineated in Art. 37.071 of life in prison. *Apprendi* certainly finds that it is. And *Apprendi* notes very clearly that it is the *effect* of a determination that increases a defendant's sentence, rather than the *form* of the statute in question, that matters. *Apprendi v. New Jersey,* 530 U.S. at 494.

As discussed earlier in this Application, in *Ring v. Arizona*, the Supreme Court noted that its holding in *Walton v. Arizona,* 497 U.S. 639, cannot be reconciled with the Court's holding in *Apprendi v. New Jersey*, 530 U.S. 466, that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." *Apprendi* 530 U.S. at 490. The Supreme Court struck down the Arizona Supreme Court's argument that because Arizona law specified death or life imprisonment as the only sentencing options for the first-degree murder of which Mr. Ring was convicted, he was thus sentenced within the statutory range of punishment authorized by the jury verdict.

In its *Ring* decision, the Supreme Court bluntly pointed out that the Arizona Supreme Court had missed in its arguments a main point of *Apprendi*, namely that *Apprendi's* instruction *is* one of *effect, not form* (emphasis mine). 530 U.S. at 494. The Supreme Court noted that Arizona's first-degree murder statute (which is remarkably similar to Texas' death penalty statute) authorized a maximum penalty of death only in the formal sense, for it explicitly cross-referenced

the statutory provision requiring the finding of an aggravating circumstance before imposition of the death penalty. The Supreme Court noted that if the Arizona Supreme Court's argument was deemed valid, then *Apprendi* was nothing more than a "meaningless and formalistic" rule of statutory drafting. *Id*. at 541. The Supreme Court promptly rejected this view. The *Ring* Court decided that only a jury can determine whether aggravating circumstances exist sufficient to justify a defendant's execution, and that such rule is afforded to defendants because of the Sixth Amendment's jury trial guarantee. The *Ring* Court held that because Arizona's enumerated aggravating factors operate as the "the functional equivalent of an element of a greater offense," *Apprendi,* 530 U.S. at 494, n. 19, the Sixth Amendment requires that such aggravating factors be found by a jury, beyond a reasonable doubt.

Accordingly, then, under *Ring* and *Apprendi,* the "future dangerousness" determination in Texas Code Crim. P Art. 37.071 § 2(b)(1), is an aggravating circumstance or element the effect of which causes a defendant's execution. The *effect* of this decision by the jury is to dramatically and significantly increases the *effect* of a capital punishment conviction in Texas far beyond the statutory default of life in prison. As such, Art. 37.071 § 2(b)(1) is unconstitutional at the present time, and was unconstitutional when a jury applied said statute to Holiday.

In order for the "future dangerousness" element of Art. 37.071 § 2(b)(1) to be constitutional, Texas Courts must treat this provision of the statute as an element. This element must be proven by the State and decided by a jury beyond all reasonable doubt, rather than by a "probability" of future dangerousness beyond a reasonable doubt. The latter standard is an entirely different, and significantly less burdensome, factor or element to prove, yet its *effect*, if decided by a jury in the affirmative, is to kill an criminal defendant. Under *Apprendi* and *Ring,* it is unconstitutional. That portion of Art. 37.071 § 2(b)(1) which uses the phrase "probability" must be

stricken in order for the statute to be constitutional. Indeed, for Art. 37.071 § 2(b)(1) to be constitutional, the statute should state something similar to the following: "We, the Jury, find that the defendant, beyond all reasonable doubt, will commit future acts of violence that constitute a grave and continuing threat to society, to include loss of life and serious bodily injury." *This* suggested revision of Art. 37.071 § 2(b)(1) might be constitutional, but the current version is certainly not because it is vague, it is nebulous, and because it deprives the jury of *specifically* deciding the crucial issue, beyond a reasonable doubt, of whether Holiday is *specifically* is a continuing grave threat to society. In its current form, the statute is not treated as an element of an offense, but its *effect* is certainly that of one, which is unconstitutional. As such, Holiday must not be executed. It should also be noted that under the above analysis, Art. 37.071 §2(b)(1), albeit revised to be in compliance with the U.S. Constitution and the Sixth and Eighth Amendments thereof, should have been plead in the State's Indictment against Holiday. It was not. Accordingly, and again, Holiday cannot be executed.

Claim 40: The State violated Holiday's right to Due Process under the 5th and 14th Amendments of the U.S. Constitution by presenting False or Misleading Scientific testimony by the State's expert, John DeHaan.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 1. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 16 through 53 of the Findings of Fact and 1 through 9 of the Conclusions of Law of the FFCL.

Claim 41: The State violated Holiday's right under the 8th Amendment of the U.S. Constitution by presenting False or Misleading Scientific testimony by the State's expert, John DeHaan.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 1. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 16 through 53 of the Findings of Fact and 1 through 9 of the Conclusions of Law of the FFCL.

Claim 42: The State violated Holiday's right to Due Process under the 5th and 14th Amendments of the U.S. Constitution by presenting unreliable scientific evidence from John DeHaan which undermined the fundamental fairness of the fact-finding proceedings.

Exhaustion: This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 2. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 16 through 53 of the Findings of Fact and 1 through 9 of the Conclusions of Law of the FFCL.

Claim 43: The State violated Holiday's right under the 8th Amendment of the U.S. Constitution by presenting unreliable scientific evidence from John DeHaan which undermined the fundamental fairness of the fact-finding proceedings.

Exhaustion: This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 2. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 16 through 53 of the Findings of Fact and 1 through 9 of the Conclusions of Law of the FFCL.

Claim 44: The State violated Holiday's Due Process rights under the 5th and 14th Amendments and to the U.S. Constitution and *Napue* and *Giglio v. U.S.* by withholding evidence tending to impeach the state's witness John DeHaan.

Exhaustion: This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 3. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 16 through 53 of the Findings of Fact and 1 through 9 of the Conclusions of Law of the FFCL.

Claim 45: The State Violated Holiday's right under 8th Amendment to the U.S. Constitution by withholding evidence tending to impeach the state's witness John DeHaan.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 3. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 16 through 53 of the Findings of Fact and 1 through 9 of the Conclusions of Law of the FFCL.

The State contacted the Bureau of Alcohol, Tobacco and Firearms in April 2001 to assist in determining the possible causation of the fire at the Wilkerson household. David Opperman, a Certified Fire Investigator employed by the BATF, met with the prosecutors in this case to review the evidence and to interview the key witness to the fire, Beverly Mitchell. As a result of his evaluation, Opperman advised in a written report that the possibility of accidental ignition of gasoline vapors by the gas stove could not be ruled out as a possible ignition source: "Opperman advised the DA that the piloted natural gas stove and other appliances in the area could not be ruled

out as ignition sources." [See, BATF Report by David Opperman (hereinafter "Opperman Report", p. 2: Exhibit "B"].

2. Opperman concluded that the prosecution theory should include the possibility of conviction on lesser charges due to the possibility of accidental ignition:

Opperman suggested approaching prosecution with Holiday making the threats to burn everyone in the house, Holiday forcing Mitchell to pour the gasoline, and the [sic] that the fumes may have prematurely ignited or were intentionally set by Holiday. The fact that the fumes ignited before Holiday was prepared as irrelevant, and take the approach that he was committing the overt act and he already said he was going [sic] set the fire. It was also suggested to include possible lesser charges in the jury instruction to allow the jury to convict him and not limit it to capital murder. Opperman suggested that this approach should take the defense out of the argument by th prosecution admitting an appliance may have prematurely ignited the flames.

[See, Opperman Report, p. 3: Exhibit "B"].

3. The State subsequently retained John DeHaan, a fire investigator, and president of Forensic Scientists, Inc., from Viejo, California, to evaluate the crime scene and to provide testimony relating to the cause of the fire at the Wilkerson residence.

4. DeHaan's educational background displays an educational background in physics. He holds a B.S. in Physics from the University of Illinois. DeHaan claims to have received a Ph.D in 1995

from the University of Strathclyde, in Glasgow, Scotland in the field of "Pure and Applied Chemistry – Forensic Science." [See, Resume of John D. DeHaan: Exhibit "C"].

5. An investigation into the causes of fire is based upon established scientific principles.

6. DeHaan determined there to have been a number of potential sources for ignition in the Wilkerson residence: the water heater, the room heater, the refrigerator, the oven, the air conditioner, and Holiday himself. [Vol. 36 RR: 182]. DeHaan excluded the appliances as possible sources of ignition. [Vol. 36 RR: 182 - 183]. [See, Testimony of John DeHaan: Exhibit "D"].

7. DeHaan excluded the oven pilot light as a possible source of ignition because the pilot light was in a closed broiler compartment, the pilot light was located approximately six inches off the floor, and the broiler pan had not been blown out by an explosion resulting from the ignition of the gas vapors. [Vol. 36 RR 182 - 187].

8. DeHaan explained that the location of the pilot light, approximately 6 inches above the floor, was a significant factor in his analysis because it was similar to an experiment which he had conducted with spilled gasoline and a burning heat source placed six inches off the floor– the candle experiment – which he had conducted in Australia approximately 10 - 12 years previously, which did not result in ignition. DeHaan explained:

The stove unity was in the northwest corner of the kitchen and it had a pilot flame. However, the pilot flame was in the broiler compartment in a closed but not air tight compartment, a drawer type compartment, and the flame itself, was about six inches above the floor level. This is significant because – and the other condition was that it was a number of feet away from the area in which one of the witnesses reported gasoline as having been poured. And these are important factors because – especially the height of the flame above the floor. Because I have actually done tests or demonstrations in which I had an open flame, essentially a six inch tall candle lighted and trying to create an incindiary device. Had a gallon of gasoline released from an open container right at the foot of the candle. I expected immediate ignition. After twenty minutes of waiting for the gasoline to be ignited with the candle standing in a lake of gasoline we still have no ignition. And finally somebody reached in with a long stick and tipped the candle over so we got ignition of the gasoline.

* * *

. . . the [demonstration] that I remember most vividly was a demonstration for the Australian Fire Service. And it was a room about fifteen by twenty feet and – fifteen by twenty feet. And that candle was near the center of the room.

* * *

[The candle] was six a six inch tall candle.

* * *

And [sic] container of gasoline next to it with a trip wire. And we simulated somebody coming in the door, pulling the trip wire and tipping the container of gasoline over and had no ignition. And it was, in fact, a couple of instances like that which prompted me to do the research I did for my thesis and that was on why there was no ignition. And we now have a reason why there was no ignition.

* * *

We waited about twenty minutes [for ignition of the candle]

* * *

. . .That's why the position of the pilot light in the broiler unit was significant. It was some inches above the floor. So if I had vapors spreading through the house or through that common room then I wold have had to get vapors not only into the corner where the stove was but I would have to get them to rise to six inches before I had ignition.

[See, Testimony of John DeHaan: Vol. 36 RR: 184 - 186; Vol. 37 RR: 55 - 56; Exhibit "D."].

9. DeHaan also excluded the broiler pilot light as a possible ignition source of the gasoline vapors because it was encased within the broiler. He explained to the jury:

The position of that pilot flame inside the closed broiler compartment was also significant. It wasn't air tight. I could eventually get vapors in there, but because it was in this largely closed box that would further slow down the movement of vapors into that – into the vicinity of that pilot flame.

[See, Testimony of John DeHaan: Vol. 36 RR: 186; Exhibit "D"].

10. Finally, DeHaan based his exclusion of the broiler pilot light as a possible ignition source on the fact that the broiler door had not been blown open by an explosion. DeHaan explained:

And finally even if there had been ignition with vapors getting into that space and being ignited by the pilot flame, the immediate effect of that would have been to push the broiler compartment open. Basically push the drawer completely out of the stove. That had been witnessed in a number of demonstrations and actual accidental fires that I have documented over the years. And when the stove was found the broiler drawer was in its original position. And when I examined it a week or so ago the burn patterns, the fire damage patterns indicated that he broiler pan was still in that position. And there was no mechanical latch. It was easily pulled out. So had there been an ignition that broiler pan would have expected to be blown out of the stove and it was not.

[See, Testimony of John DeHaan: Vol. 36 RR: 186; Exhibit "D"].

11. Opperman testified for the State as a rebuttal witness. Opperman explained the scientific process involved in fire investigation: an investigator determines all the outstanding hypothesis of fire causation and tests them; if he cannot rule out the hypothesis, then it remains a possible ignition source. [Vol. 40 RR: 56 - 58]. Opperman was present for DeHaan's testimony and "as far as what is set forth by the guidelines . . . agree[d] with" the procedures which DeHaan followed to exclude possible ignition sources. Opperman also agreed with DeHaan's conclusions. [Vol. 4 RR 65].

12. The accidental ignition of gasoline vapors by a pilot light is, and has been a documented phenomena for accidental fires among individuals within the field of fire investigation. Numerous articles existed prior to, and leading up to the time of John DeHaan's testimony in this case, regarding instances in which gasoline vapors were ignited by pilot lights in gas powered water heaters: Teenager Sniffing Gasoline Fatally Burned When Vapors Ignite, NFPA Journal, May, p. 26 (1992); Man Dies When Furnace Ignites Gasoline Vapors, NFPA Journal, June, p. 28 (1992); One Child Dies, Another Injured When Water Heater Ignites Vapors, NFPA Journal, February, p. 21 (1993); Two Die in Garage Fire, NFPA Journal, January, p. 26 (1997). [See, NFPA Journal Articles Regarding Gasoline Vapor Ignition by Pilot Lights: Exhibit "E."]. These articles were written after after DeHaan's "Candle experiment" and provided anecdotal information which demonstrated incidents in which gasoline vapors had ignited after coming into exposure with pilot lights.

13. DeHaan is a member of the National Fire Protection Association (NFPA) and served as a member of the Committee drafting the NFPA 921 Guide to Fire and Explosion Investigation. [See, Resume of John D. DeHaan: Exhibit "D"].

14. The dangers of accidental ignition of gasoline vapors through inadvertent exposure to pilot lights had also been documented by industry and government organizations. In 1994, the Consumer Product Safety Commission (CPSC) was provided test data commissioned by the Gas Appliance Manufacturer's Association (GAMA) which addressed safety hazards associated with the ignition of gasoline vapors by the pilot lights and/or burners of water heaters. Arthur D. Little Inc (ADL), an engineering safety consulting firm commissioned by GAMA, conducted extensive testing on the ignition of gasoline vapors by water heaters. The test data were ultimately provided to the CPSC and published in a memorandum entitled Briefing Package for Gas-Fired Water Heater Ignition of Flammable Vapor. The CPSC identified the problem of gasoline vapor ignition by water heaters as a considerable phenomena:

Gas-fired water heaters igniting flammable vapors cause an estimated 1,961 fires each year, resulting in an estimated 316 injuries, 17 deaths, and $26 million in property damage for a total societal cost which may be as high as $395 million. Typically, injuries occur when the victim is using flammable liquids (usually gasoline) for cleaning purposes, or when the liquid leaks or accidentally spills near the water heater.

[See, Consumer Product Safety Commission, Briefing Package for Gas-Fired Water Heater Ignition of Flammable Vapor: Exhibit "F"].

15. Testing data provided by Arthur D. Little, Inc. (ADL) in relation to gasoline vapor ignition from floor mounted gas fired water heater pilot lights demonstrates the real possibility that gasoline vapors resulting from a limited gasoline spill occurring several feet from a pilot light can result in fire in less than one minute. [See, Consumer Product Safety Commission, Briefing Package for Gas-Fired Water Heater Ignition of Flammable Vapor, Appendix L [Arthur D. Little data]: Exhibit "G"].

16. John DeHaan's testimony, as well as the other evidence in Holiday's case has been reviewed by Dr. Gerald Hurst, a Cambridge educated PhD. in chemistry who has worked as a research scientist and consultant in the field of fire and explosion analysis since 1972.

17. Based upon the evidence in this case, Dr. Hurst has identified several instances in which John DeHaan made false or misleading statements in order to exclude the broiler pilot light as a possible ignition source for the fire in the Wilkerson home. DeHaan's testimony is false or misleading because his conclusion do not follow from an application of the scientific method in excluding possible sources of fire, and the falsity or misleading nature of this testimony would have been reasonably apparent to DeHaan, and any other individual trained in the scientific method to examine the causation for fires. As a result, neither DeHaan, nor any other trained individual using the scientific method to render an opinion on the possible causation of the fire in this case would have been able to render an objective opinion excluding the broiler pilot light as a possible ignition source. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."].

18. DeHaan's "expert" opinion excluding the broiler pilot light on the basis of his "Candle experiment" is not supported by scientific methodology. The "Candle experiment" was not a controlled, replicated and published experiment, subject to peer evaluation and testing. As result, its scientific value is merely as an "anecdotal" and is not based upon established scientific methodology. DeHaan's anecdotal experience with the candle appears to be contradicted by reported incidents of gasoline vapor ignition. The fact of contrary incidents of gasoline vapor ignition is significant for two key reasons: first, to the extent that DeHaan was simply unaware of these incidents when arriving at a conclusion that the gasoline vapors could not have been ignited by the broiler pilot light, then his science-based evaluation of the fire scene did not follow established basic principles of scientific methodology – to gather all reasonably available pertinent evidence which supports, and contradicts the hypothesis sought to be proven. Secondly and equally important, to the extent that DeHaan intentionally or knowingly did not refer to these incidents of gasoline vapor ignition because they would have contradicted his own candle experiment, and undermined his ultimate conclusion regarding the fire causation in this case, then his testimony was not only scientifically invalid, but false and misleading on key aspects. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."].

19. DeHaan's exclusion of the broiler pilot light as a possible ignition source is also undermined by DeHaan's failure to review, or by his decision to ignore publicly available testing data provided by ADL in relation to the water heater pilot light ignition of gasoline vapors. The environmental and testing circumstances of ADL's "Test No. 7" are particularly applicable to a conclusion based on established scientific methodology that the broiler pilot light could be excluded as a possible ignition source in the Wilkerson fire. ADL's Test No. 7 involved the

spilling of one gallon of gasoline in a 10' x 20' x 8' room, with still air conditions, from a distance of 8 feet from the heat source, a pilot light, and resulted in ignition after only 51 seconds. This test materially conflicts with the "demonstration" purportedly conducted by DeHaan, which involved spilling one gallon of gasoline one or two feet from an open flame source, in a 10' X 20' room with unknown air conditions, producing no ignition. The ADL testing is material data which contradicts the data – the Candle experiment – on which his ultimate conclusion heavily relied. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."]. DeHaan did not mention the ADL testing during his testimony, nor did he reveal this information to Holiday's counsel prior to, or after his testimony. None of the other State's expert witnesses revealed this information to Holiday's counsel.

20. The ADL testing circumstances is analogous to the circumstances in the Wilkerson fire, but not identical. In both the ADL experiment and the Wilkerson fire, gasoline was poured a considerable distance from the heat source, on a smooth, non-carpeted floor surface, in comparable sized rooms. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."].

21. The differences between the ADL experiment and the circumstances in the Wilkerson household present a greater likelihood of ignition in the Wilkerson house. While the ADL experiment involved only one gallon of gasoline, the amount of gasoline poured on the floor of the Wilkerson residence was estimated to have been between 3 - 5 gallons. Thus, the amount of gasoline to vaporize was considerably larger in the present case. Further, unlike the ADL experiment, in which there was no air movement, in the present case, the air conditioner(s) were likely running, as well as possible movement by the occupants in the house, contributing to air

movement and consequent vapor distribution. ADL identified air movement as the most significant factor in decreasing ignition time of gasoline vapors. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."].

22. DeHaan testified to facts which are scientifically false in addressing criticism by Holiday's defense counsel that the Candle experiment was disanalogous to the circumstances in the Wilkerson fire. De Haan contended that the moving air within the Wilkerson house would have inhibited or delay ignition as compared to the conditions of relatively still air in his Candle experiment. Scientific research has shown, however, that moving air actually increases both the speed and frequency of the ignition of gasoline vapors by open flame sources near the floor. This information would have been known to anyone who had reviewed the CPSC's Briefing Package and accompanying ADL data. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."].

23. DeHaan also testified to the fact that gasoline poured on the vinyl floor of the Wilkerson house would generate vapor at a lesser rate than gasoline absorbed in a porous medium, such as in his experiment, which involved a carpeted floor. DeHaan's testimony is contradicted by research conducted under the auspices of the National Institute of Justice , which demonstrates that when equal quantities of gasoline are poured on carpet and on vinyl, the liquid spreads over an area of the vinyl averaging 10 time the area of a corresponding spill on carpet. Anthony D. Putorti, Jr., Daniel Madrzykowski and Jay A. McElroy, "Flammable and Combustible Liquid Spill/Burn Patterns," NIJ Report 604–00 (March 2001). It follows that the gasoline will evaporate faster from the much larger area. This conclusion is verified by the measured heat release rates of the ignited pools, which show that the evaporation rate during the fire is substantially greater from the vinyl

surface. This information was publicly available from the National Institute of Justice's website prior to the time of Holiday's trial in May 2000. www.ncjrs.org/ pdffiles1/ nij/ 186634.pdf. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H" to state habeas petition].

24. The ADL testing data, as well as other anecdotal instances of pilot light ignition of gasoline vapors were available prior to DeHaan's evaluation of the evidence in Holiday' case. Not only do the ADL test data conflict with DeHaan's demonstration – on which he appears to have heavily relied for his exclusion of the broiler pilot light, but it would concurrently have supported the reasonableness of the hypothesis that the broiler pilot light was a possible source of ignition. It would have been unreasonable for an individual trained in the scientific method and purporting to render an objective opinion based upon a scientific evaluation of the evidence to disregard these data in excluding as a possible ignition source the broiler pilot light. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."].

25. DeHaan testified to another assumption not supported by objective science in his conclusion that the broiler box would have significantly impeded the gasoline vapors from reaching the pilot light. A broiler is not sealed against air flow in the sense that DeHaan suggested in his testimony. Broilers are designed to draw air into the chamber to facilitate burning because the broiler fire cannot burn without sufficient oxygen. It is not accurate to suggest that a closed broiler would impair the ingress of gasoline vapors in a significant way as to preclude possible ignition in this case. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H."].

26. DeHaan also testified to a scientifically false or misleading assumption, by stating as a conclusive basis to exclude the broiler pilot light that the ignition of gasoline vapors by the broiler pilot light would have resulted in an explosive type force which would have opened the broiler drawer, or pushed the drawer out of the broiler. DeHaan's statement was misleading because it suggested to the jury that in order for gasoline vapors to ignite within the broiler, it would necessarily have required sufficiently high quantity of gasoline vapor to produce an explosive effect. This conclusion is not simply incorrect, but it would have been recognizably incorrect by any individual scientifically trained in evaluating fire causation. It is universally recognized in the scientific community that the ignition of gas vapors does not necessarily always result in an explosion. Whether an explosion occurs may depend upon many factors, such as the amount of premixed gas present and the degree of confinement of the mixture. If the gas simply flows as a layer into and under the pilot light, the subsequent burning at the interface of the gas layer and air may proceed at the low rate of about 1.5 feet per second, resulting in no more than a gentle whoosh of combustion gases back out of the inlet vents. Explosions generally occur after enough time has passed to build up a substantial quantity of well-mixed air and gas. The gas in the broiler would have failed to explode for the same reason that the room itself did not explode: insufficient time for mixing. This fact is recognized in the NFPA 921. [See, NFPA 921: Guide for Fire and Explosion Investigators, p. 48, Secs. 6.19.2 - 6.19.2.1 (2004 ed); Exhibit "I"]. Thus, a low quantity of mixed gasoline vapor in the broiler box would not have produced an explosion, but would simply have produced a flash fire which would have run along the vapor trail, ultimately igniting secondary sources of fuel. A conclusion that the pilot light could not have been an ignition source based on the lack of explosion evidence is not scientifically reasonable, and was a plainly inaccurate and highly misleading statement.

27. The State violates a defendant's right to Due Process of Law under the 5th, 8th and 14th Amendments to the United States Constitution, as well as due course of law under Article I, Sec. 19 of the Texas Constitution when the State knowingly presents false or misleading testimony, *United States v. Agurs*, 427 U.S. 97, 103 (1976); *Pyle v. Kansas*, 317 U.S. 213, 216 (1942); *Mooney v. Holohan*, 294 U.S. 103, 112 (1935); and, *Thomas v. State*, 841 S.W.2d 399, 402 (Tex.Cr.App. 1992), or fails to correct false or misleading testimony. *Alcorta v. Texas*, 355 U.S. 28, 31 (1957); and, *Napue v. Illinois*, 360 U.S. 264, 269 (1959). Knowledge of the falsity of testimony is imputed among all members of the prosecution team. *Giglio v. United States*, 405 U.S. 150, 154 (1972); *Ex parte Castellano*, 863 S.W.2d 476, 480 & n.3 (Tex.Cr.App. 1993); and, *Ex parte Adams*, 768 S.W.2d 281, 291 (Tex.Cr.App. 1989)). Concurrently, the right to Due Process imposes upon the State an affirmative obligation to search out and disclose to the defense favorable evidence known among any members of the prosecution team, including evidence which demonstrates the falsity of testimony of the State's witnesses. *Kyles v. Whitley*, 514 U.S. 499, 437 (1995)("the individual prosecutor has a duty to learn of favorable evidence known to the others acting on the government's behalf in the case . . .").

28. False testimony requires the conviction be reversed if the testimony was "material." United *States v. Bagley*, 473 U.S. 667, 679 n.9 (1985); and, *Castellano*, 863 S.W.2d at 485. False testimony is material unless the Court is convinced beyond a reasonable doubt that the testimony had no effect upon the jury's verdict. *Bagley*, 473 U.S. at 679 n.9; and, *Castellano* 863 S.W.2d at 485.

29. Independent of the dictates of *Agurs*, supra, and *Alcorta*, supra, the presentation of materially false and unreliable scientific testimony violates the right to Due Process under the 5th, 8th and 14th Amendments to the United States Constitution and the right to due course of law under the Texas Constitution because it undermines the fundamental fairness of the fact-finding process. *See*, *Dawson v. Delaware*, 503 U.S. 159, 179 (1992); *Payne v. Tennessee*, 510 U.S. 808, 825 (1991); and, *Barnard v. Henderson*, 514 F.2d 744 (5th Cir.1975). *See also*, *Beck v. Alabama*, 447 U.S. 625, 637 - 638 (1980) (Due Process concerns of the 8th Amendment apply to procedures during the guilt-innocence phase of trial which affect the reliability of the guilt-innocence determination). The admission of scientific opinion testimony is predicated upon its reliability: opinions predicated upon scientific knowledge are admissible precisely because they are derived from the strict application of objectively ascertainable scientific method and principles. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 589 - 595 (1993). Whether the expert's opinion follows from a strict application of the scientific method is what differentiates an "expert" opinion from lay speculation:

[A] key question to be answered in determining whether a theory or technique is scientific knowledge that will assist the trier of fact will be whether it can be (and has been) tested. Scientific methodology today is based on generating hypotheses and testing them to see if they can be falsified; indeed, this methodology is what distinguishes science from other fields of human inquiry.

Daubert, 509 U.S. at 593.

The failure to recognize, analyze and distinguish alternative hypothesis which contradict an expert's desired hypothesis regarding causation does not comport with the scientific method and renders the expert's resulting opinion unreliable. *E.I. Du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d 549, 559 (Tex. 1995). "Unreliable . . . scientific evidence simply will not assist the [jury] to understand the evidence or accurately determine a fact in issue; such evidence obfuscates rather than leads to an intelligent evaluation of the facts." *Kelly v. State*, 824 S.W.2d 568, 572 (Tex.Cr.App. 1992)(citation omitted). The concern with heightened reliability comes into play in the context of expert testimony because jurors may tend to place disproportionate weight upon the opinion of an "expert." *Cf. Flores v. Johnson*, 210 F.3d 456, 465 - 466 (5th Cir. 2000) (Garza, J., concurring).

30. DeHaan testified as a member of the prosecution team, assisting the prosecution in presenting its adopted theory of prosecution – that Holiday intentionally ignited the gasoline vapor, hence, Holiday's conduct amounted capital murder, as opposed to felony murder.

31. Alternatively DeHaan's testimony, regardless of whether he was a member of the prosecution team, was materially false in that his opinions were not based upon established principles of scientific methodology, and for that reason, fell so are below the requirements for reliability under Daubert and Kelly, as to materially mislead the jury about the scientific reliability of excluding the broiler pilot light as a possible source of ignition, thereby rendering trial fundamentally unfair.

32. DeHaan's testimony, presented in the form of a scientifically supported opinion, based upon a proper application of the scientific method of inquiry is false and/or misleading. DeHaan's exclusion of the broiler pilot light as a possible source of ignition was not supported by objectively valid scientific methodology because his opinion was derived based objectively false assumptions, and either ignorance of, or an intentional disregard of data contrary to his hypothesis. *See*, *Robinson*, 923 S.W.2d at 559. As a trained scientist, DeHaan would have had to have recognized the material flaws of his methodology in reaching a conclusion necessary to support State's desired theory of prosecution. As a result of the lack of methodology, or clearly erroneous methodology, DeHaan's opinion had no more probative value to the issues of trial than mere lay opinion.

33. DeHaan's testimony was "material" in that his was the only testimony, presented in the form of expert opinion which established the exclusive cause of the ignition in the Wilkerson residence. In the absence of DeHaan's opinion, the jury would have been confronted with an open question regarding the actual cause of the ignition. This question is more than academic: if any one of the jurors had harbored doubts about whether Appellant actually ignited the fire, then the resulting verdict could well have been for the lesser charge of felony murder, Tex.Penal Code Sec 19.02(b)(3), as opposed to capital murder, Sec. 19.03. In the alternative, even if the jury had concluded that the evidence had supported a verdict of guilty of capital murder, such verdict would not have been sustainable on appellate review, either on the grounds of legal insufficiency of the evidence, or of factual insufficiency of the evidence. Alternatively, had DeHaan disclosed the data and other information which challenged his methodology and conclusion, his opinion would

reasonably have been ruled inadmissible under Rule 702 for failure to satisfy the requirements of Daubert and Kelly.

34. The prosecution has a constitutional obligation, under the 5th and 14th Amendments to the United States Constitution, and Article I, Sec. 19 of the Texas Constitution to timely disclose evidence which is favorable to the accused. *Strickler v. Greene*, 527 U.S. 263, 280- 281 (1999); *Kyles v. Whitley*, 514 U.S. 419; *Brady v. Maryland*, 373 U.S. 83 (1963); and, *Ex parte Mobray*, 943 S.W.2d 461, 466 (Tex.Cr.App. 1997). Favorable evidence is evidence which is exculpatory of the offense, mitigating as toward punishment, or which impeaches any witness in the State's case. *United States v. Bagley*, 473 U.S. at 676. The failure to disclose favorable evidence violates the right to Due Process and due course of law irrespective of the good or bad faith of the prosecution. Brady, 373 U.S. at 87. The rule extends to information known by members of the prosecution team, but not actually known by the individual prosecutor. *Strickler*, 527 U.S. at 280 - 281 (citing *Kyles*, 514 U.S. at 438).

Suppressed favorable evidence is "material," and hence, harm is established if there is a reasonable probability that, had the evidence been disclosed, the results of the proceeding could have been different. *Strickler*, 527 U.S. at 280; *Kyles*, 514 U.S. at 433 - 434; *Bagley*, 473 U.S. at 675; and, *Thomas v. State*, 841 S.W.2d at 404. A reasonable probability is not equivalent to a preponderance of the evidence, but is whether in the absence of disclosure, the defendant received a fair trial, understood as a trial resulting in a verdict worthy of confidence. *Strickler*, 527 U.S. at 289 - 290 (citing *Kyles*, 514 U.S. at 434).

35. To the extent that the prosecutors were actually aware of deficiencies in DeHaan's methodology, or that DeHaan was aware of, or even consciously disregarded the existence of data which could have contradicted his hypothesis excluding the broiler pilot light as a possible source of ignition, the failure to disclose such information violated Brady because the information, if used effectively, could have impeached the scientific basis of DeHaan's opinion regarding the possible ignition source, Thomas, 841 S.W.2d at 405 n.8, or even been sufficient to exclude DeHaan's opinion altogether under Tex.R.Evid 702.

36. There is a reasonable possibility that the failure to disclose contrary data to DeHaan's s hypothesis regarding the impossibility of ignition by the broiler pilot light undermined the integrity of the jury's verdict. The existence of significant contrary data, that which was "anecdotal," as well as that which was specifically established through ADL testing, and that which was based on established scientific principles seriously challenges the scientific basis of DeHaan's conclusion, with respect to both the ultimate conclusion itself, as well as the scientific methodology utilized by DeHaan in reaching that conclusion. Had the jury been presented with this information, there is a significant probability that one or more jurors would have been persuaded of either the falsity, or of the objective unreliability of DeHaan's conclusions vis-a-vis the broiler pilot light.

37. Accordingly, for the reasons stated above, Holiday has been denied his right to Due Process of Law and Due Course of Law . His conviction and sentence should be reversed.

Claim 46: **The State violated Holiday's 5th and 14th Amendment Due Process rights by presenting false or misleading testimony regarding "pour patterns."**

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 4. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 54 through 63 of the Findings of Fact and 10 through 14 of the Conclusions of Law of the FFCL.

Claim 47: **The State violated Holiday's 8th Amendment rights by presenting false or misleading testimony regarding "pour patterns."**

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 4. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 54 through 63 of the Findings of Fact and 10 through 14 of the Conclusions of Law of the FFCL.

Claim 48: **The State violated Holiday's right to Due Process under the 5th and 14th Amendments to the U.S. Constitution by presenting scientifically unreliable testimony regarding "pour patterns" which undermined the fundamental fairness of the fact-finding process**.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 5. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 54 through 63 of the Findings of Fact and 10 through 14 of the Conclusions of Law of the FFCL.

Claim 49: The State violated Holiday's right under the 8th Amendment to the U.S. Constitution by presenting scientifically unreliable testimony regarding "pour patterns" which undermined the fundamental fairness of the fact-finding process.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 5. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 54 through 63 of the Findings of Fact and 10 through 14 of the Conclusions of Law of the FFCL.

1. The State's prosecution against Holiday relied in part upon evidence of alleged "pour patterns" on the concrete slab of the Wilkerson household to suggest that Holiday had the intention of causing the decedent's deaths.

2. During the investigation, State Fire Marshall's Office Investigator Harry Bowers prepared several diagrams of the arson scene as well as prepared a report based on his investigation of the crime scene. Within the report, Bowers stated that investigators had identified from an examination of burn patterns on the concrete slab specific pour patterns extending from the front door of the house to the couch area, behind the couch, then to the area of the space heater. Bowers attributable these pour patterns to Holiday because witness Beverly Mitchell had denied pouring gasoline in these areas. The State proceeded upon the theory that unbeknownst to Mitchell, Holiday had poured gas from a second gas can in the areas of the front door way and couch area while Mitchell's was herself pouring gasoline throughout the residence. Holiday then ignited the gasoline. [See, State Fire Marshall's Office Diagram Sheet (Pour Patterns) and Texas Department of Insurance/State Fire Marshall's Office Report (by Harry Bowers): Exhibit "J"].

3. At trial, Beverly Mitchell, testified that she poured gasoline throughout the Wilkerson residence, but had not poured gasoline by the front door/hallway, nor near the couch, on which the decedent's were sitting when the fire started. [Vol. 33 RR: 97, 116 - 119] [See, Testimony of Beverly Mitchell (Excerpt): Exhibit "K."].

4. Bowers subsequently testified at trial and referred to the "irregular" burn patterns on the slab. The appellate record suggests that Bowers demonstrated to the jury the alleged pour patterns depicted upon the diagram he prepared. [Vol. 35 RR: 83 - 84, 110 - 112] [See, Testimony of Tommy Bowers (Excerpt): Exhibit "L."]. Bowers did not state that the irregular burn patterns might be caused by factors apart from the pouring of gasoline.

5. Bowers also testified that the State Fire Marshall's Office utilized the NFPA 921 Guide for Fire and Explosion Investigators as an authoritative source on fire investigation and relied upon it as a guide in conducting fire investigation. [Vol. 35 RR: 48 - 49] [See, Testimony of Tommy Bowers (Excerpt): Exhibit "L."]

6. Bower's testimony regarding "pour patterns" on the slab, taken in conjunction with Beverly Mitchell's testimony about the locations in the house in which she poured gasoline leads to a clear inference that the specific "pour patterns" leading into the house from the front door, and by the couch resulted from Holiday having pouring gasoline in those areas. The necessary inference from Holiday having allegedly pouring gasoline within this area, but specifically on and near the couch containing the three decedents, is that he intended to immolate them along with the house.

7. Testimony regarding alleged "pour patterns" based upon the burn patterns discerned from the concrete slab is scientifically unreliable and hence, materially misleading. Dr. Gerald Hurst, in reviewing the testimony and evidence has advised that the burn patterns on the slab cannot be relied upon as a basis to conclude that Holiday or anyone else poured gasoline on those areas. Where a prolonged fire results in structural collapse, the burning debris may produce burn patterns on the flooring which mimic or mask patterns which may be caused by the pouring of flammable liquids. This fact is well recognized in the arson investigation community, including John DeHaan, who assisted in a renown fire experiment, "The Lime Street Fire" which demonstrated that burn patterns could be produced in a fire not involving the use of gasoline, but which mimicked the appearance of "pour patterns." [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H"].

8. According to Dr. Hurst, the fire in this case involved a full structural collapse of the Wilkerson residence, which would have resulted in burning debris upon the floor, producing burn patterns. These burn patterns could mimic those patterns produced by poured gasoline. To the extent that the arson investigators and possibly DeHaan relied upon pour patterns for a determination of the origins of the fire, such reliance would have been scientifically unreliable because it would have been impossible under the circumstances to differentiate the burn patterns as caused by a poured flammable liquid, from a pattern resulting from burning debris. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H"].

9. To the extent that Bowers conveyed the impression that these patterns were necessarily the result of poured gasoline, without acknowledging the possibility that the patterns could also have

been caused by burning debris, the testimony would have been misleading. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H"].

10. Dr Hurst's discussion of the possible confusion between burn patterns caused by debris and pour patterns is also expressed in NFPA 921, the standard operating procedure for arson investigations in the State Fire Marshall's Office. NFPA 921 cautions:

Irregular, curved, or "pool-shaped" patterns on floors and floor coverings should not be identified as resulting from ignitable liquids on the basis of observation of the shape alone. In cases of full room involvement, patterns similar in appearance to ignitable liquid burn patterns can be produced when no ignitable liquid is present.

* * *

These patterns are common in situations of post flashover conditions, long extinguishing times, or building collapse. These patterns may result from the effects of hot gasses, flaming and smoldering debris, melted plastics, or ignitable liquids. . . . In any situation where the presence of ignitable liquids is suggested, the effects of flashover, airflow, hot gasses, melted plastic, and building collapse should be considered.

[See, NFPA 921: Guide for Fire and Explosion Investigators, pp. 45 - 46, Secs.6.17.8.2, 6.17.8.2.2 (2004 ed); Exhibit "M"].

11. The State violates a defendant's right to Due Process of Law under the 5th, 8th and 14th Amendments to the United States Constitution and the right to due course of law under Art. I, Sec 19 of the Texas Constitution by knowingly presenting false or misleading testimony, *United States v. Agurs*, 427 U.S. at 103 (1976); *Pyle v. Kansas*, 317 U.S. at 216; and, *Thomas v. State*, 841 S.W.2d 399, 402 (Tex.Cr.App. 1992), or by failing to correct false or misleading testimony. *Alcorta v. Texas*, 355 U.S. at 31; and, *Napue v. Illinois*, 360 U.S. at 269. Knowledge of the falsity of testimony is imputed among all members of the prosecution team. *Giglio v. United States*, 405 U.S. at 154 (1972); and, *Ex parte Castellano*, 863 S.W.2d at 480 & n.3. If the false or misleading testimony is material, then the conviction must be reversed. *United States v. Bagley*, 473 U.S. at 679 n.9; and, *Castellano*, 863 S.W.2d at 485.

12. Bower's testimony and demonstration of alleged pour patterns throughout the Wilkerson residence was false and/or misleading because it conveyed the necessary implication to the jury, when considered in conjunction with Beverly Mitchell's testimony, that Holiday had poured gasoline in the door – entryway area of the Wilkerson residence, as well as the couch containing the decedents. This impression, conveyed under the auspices that Bowers, a certified arson investigator had arrived at his conclusion of a pour pattern based upon his application of established scientific principles, was, in reality, little more than speculation. Due to the circumstances of he fire, Bowers would have been unable to differentiate whether the burn patterns resulted from poured gasoline, or from falling debris. Bowers essentially chose the hypothesis which best suited the prosecution theory that Holiday had poured gasoline in the designated areas, regardless of whether scientific principles of arson investigation could establish this as a fact beyond a reasonable doubt. This impression was both false, and it was misleading to the jury, which was

ultimately called upon to determine whether Holiday intended to kill the decedents. Testimony which suggested, without a proper scientific foundation, that Holiday had poured gasoline on the couch containing the decedents improperly directed the jury to arrive at this conclusion.

13. Bowers testimony was material, and hence prejudicial to Holiday because a court could not reasonably conclude beyond a reasonable doubt that the testimony and evidence of suggesting that Holiday had poured gasoline in the area of the couch did not influence the jury to conclude that Holiday intended to kill the decedents, rather than simply burn down the Wilkerson residence. In addition to the probative value of the evidence in its own right, this testimony about a pour pattern fit like the piece of a jig saw puzzle with other testimony and evidence presented at trial. For this reason, the false/misleading testimony presented by Bowers is inextricably tied to the other evidence, and cannot be separated and considered harmless.

14. Similarly, the presentation of scientifically unreliable evidence violates a defendant's right to due process and due course of law because it denigrates the accuracy, integrity and fundamental fairness of the fact-finding process. See, *Dawson v. Delaware*, 503 U.S. at 179 (1992); *Payne v. Tennessee*, 510 U.S. at 825, and, *Barnard v. Henderson*, 514 F.2d 744. *See also*, *Beck v. Alabama*, 447 U.S. at 637 - 638. Scientifically unreliable testimony presented in the guise of an "expert" opinion, in essence "junk science", threatens principles of fundamental fairness because it interferes with the accuracy demanded in the fact-finding process. See generally, *E.I. Du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d at 557 (" Scientific evidence which is not grounded "in the methods and procedures of science" is no more than "subjective belief or unsupported

speculation." . . . Unreliable evidence is of no assistance to the trier of fact and is therefore inadmissible under Rule 702)); and, *Kelly v. State*, 824 S.W.2d at 572.

15. Bower's conclusions regarding the alleged "pour patterns" on the floor, and by the couch are without scientific validation; although the burn patterns may demonstrate pour patterns, they are just as likely, if not more likely in the context of the total structural collapse of the Wilkerson residence to demonstrate burn patterns from debris. Bowers was unable to – and in fact, apparently made no effort – to determine the precise origin of the patterns which he suggested resulted from poured gasoline. Both his methodology and conclusion were the epitome of junk science and the admission of this testimony affected the fundamental fairness of the fact-finding process by providing a pseudo scientific basis for the jury to have concluded that Holiday poured gasoline on the couch, and the decedents.

16. For precisely the same reason as argued in the foregoing claim for relief, Bower's testimony was not harmless beyond a reasonable doubt because, taken both individually and in context with the other evidence, was probative toward the State's theory of prosecution that Holiday intended to kill the decedents.

17. In the alternative, the admission of the fundamentally unreliable testimony had a substantial and injurious influence on the jury's verdict. *Brecht v. Abrahamson*, 507 U.S. 619, 637 - 638 (1993).

18. Accordingly, for the foregoing reasons, Holiday has been denied his right to Due Process of Law and Due Course of Law . His conviction and sentence should be reversed.

Claim 50: **The State Violated Holiday's Right to Due Process of Law Under the 5th and 14th Amendments to the United States Constitution by Presenting False or Misleading Testimony by State's Expert John DeHaan Regarding the Applicability of his Doctoral Thesis to the Issue of Broiler Pilot Light Ignition.**

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 9. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 124 of the Findings of Fact, and 22 through 23 of the Conclusions of Law of the FFCL.

Claim 51: **The State Violated Holiday's Right Under the 8th Amendment to the United States Constitution by Presenting False or Misleading Testimony by State's Expert John DeHaan Regarding the Applicability of his Doctoral Thesis to the Issue of Broiler Pilot Light Ignition.**

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 9. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 124 of the Findings of Fact, and 22 through 23 of the Conclusions of Law of the FFCL.

Claim 52: **The State Violated Holiday's Right to Due Process of Law Under the 5th and 14th Amendments to the United States Constitution by Presenting False Testimony from John DeHaan Regarding the Applicability of his Doctoral thesis to the Issue of the Broiler Pilot Light Ignition.**

Exhaustion: This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 10. The trial court's FFCL adopted by the CCA denied this claim

on the merits in paragraphs 124 of the Findings of Fact, and 22 through 23 of the Conclusions of Law of the FFCL.

Claim 53: The State Violated Holiday's Right Under the 8th Amendment to the United States Constitution by Presenting False Testimony from John DeHaan Regarding the Applicability of his Doctoral thesis to the Issue of the Broiler Pilot Light Ignition.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 10. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 124 of the Findings of Fact, and 22 through 23 of the Conclusions of Law of the FFCL.

1. These claims for relief are alleged on a contingent basis within this post-conviction writ application and is based on a good faith belief that the State's expert may have presented false or misleading testimony regarding his experience or knowledge in the area of gasoline vapor ignition by virtue of his doctoral thesis, "The Reconstruction of Fires Involving Highly Flammable Hydrocarbon Liquids." Holiday has recently obtained DeHaan's thesis to determine whether the matters within the thesis pertain to, support or contradict DeHaan's testimony at trial, but as of the date of filing, he has been unable to review the thesis and specifically determine the extent to which it is applicable to the issues at trial, or whether it is inconsistent with the testimony and/or evidence at trial, or whether it is false or misleading in any other manner. [See, DeHaan doctoral thesis: "The Reconstruction of Fires Involving Highly Flammable Hydrocarbon Liquids" Exhibit "X"]. In the event that a review of the thesis does not support the claim, then Holiday intends to abandon the claim.

2. During trial, DeHaan a testified that he held a PhD from the University of Strathclyde, in Glasgow, Scotland. DeHaan claimed that his doctoral thesis involved the "reconstruction of fires involving highly flammable liquid fuels." He stated:

. . . from 1991 to '95 I studied the evaporation of flammable liquids and the propogation of or the generation of vapor layers and the manner which those vapor layers spread and mix in order to support flame. The ignitability of those pool fires on materials like carpets and floors.

[Vol. 36 RR: 148].

3. Later during his testimony in which he opined that the broiler pilot light could not have been a possible ignition source of gasoline vapors based upon his "Candle experiment" DeHaan again referred to his thesis as following from his observations during the candle experiment. [Vol. 36 RR: 185]. DeHaan claimed that his thesis demonstrated why the broiler pilot light could not have produced ignition of the gasoline vapors: "And it was, in fact a couple of instances like [the candle experiment] which prompted me to do the research I did for my thesis and that was on why there was no ignition. And we now have a reason why there was no ignition." [Vol. 36 RR: 185]. DeHaan's reference to his doctoral thesis in the context of his exclusion of the broiler pilot light added scientific cache to an opinion, which, for reasons detailed in claims for relief one through three, lacked support by objective scientific methodology.

3. Prior to trial, defense counsel issued a subpoena duces tecum to DeHaan to produce the following items: "Any research or studies that support as reliable, the scientific theory and/or technique that the witness has or will utilize in formulating any opinions that will be a part of his testimony in this case . . . [and] any literature that supports or rejects the underlying scientific theory that the witness has or will utilize in formulating any opinions that will be given as a part of his testimony upon the trial of this cause." [Vol 4 Clerk's Record (10,423): 538]. To the best of his belief, Holiday believes DeHaan failed to comply with the subpoena duces tecum and produce his thesis to defense counsel at any time during this case.

4. Holiday believes that DeHaan's testimony regarding his thesis may be false or misleading regarding the extent of applicability of the thesis to the subject matter at trial, or to its implied support of DeHaan's ultimate opinion.

5. The State violates a defendant's right to Due Process of Law under the 5th, 8th and 14th Amendments to the United States Constitution, as well as due course of law under Article I, Sec. 19 of the Texas Constitution when the State knowingly presents false or misleading testimony, United *States v. Agurs*, 427 U.S. at 103, or fails to correct false or misleading testimony. *Alcorta v. Texas*, 355 U.S. at 31; and, *Napue v. Illinois*, 360 U.S. at 269.

6. The State similarly violates due process of law and due course of law where it presents unreliable scientific testimony. See, *Dawson v. Delaware*, 503 U.S. at 179; *Payne v. Tennessee*, 510 U.S. at 825, and, *Barnard v. Henderson*, 514 F.2d 744. See also, *Beck v. Alabama*, 447 U.S. at 637 - 638. This is because scientifically unreliable testimony threatens principles of fundamental

fairness by undermining the accuracy demanded in the fact-finding process. See generally, *E.I. Du Pont de Nemours and Co. v. Robinson*, 923 S.W.2d at 557, and, *Kelly v. State*, 824 S.W.2d at 572.

7. To the extent that DeHaan's thesis does not apply, or does not otherwise support his conclusions in excluding the broiler pilot light as a possible ignition source, then the evidence is false and misleading, and undermined the accuracy of the fact-finding process by masking DeHaan's lay opinion under the guise of objectively verified science.

Claim 54: Holiday was denied effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution Due to Counsel's Inadequate Investigation of Possible Ignition Sources of Gasoline Vapors and Consequent Preparation of a Viable Defensive Theory.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 6. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 64 through 68 of the Findings of Fact and 15 through 16 of the Conclusions of Law of the FFCL.

1. The defensive theory was predicated on the possibility of accidental ignition of the gasoline vapors. A jury finding that the gasoline vapors had ignited prematurely, and that Holiday had intended only to burn down the Wilkerson residence, rather than kill the decedents in the fire, would have resulted in a verdict of felony murder. Tex. Penal Code Sec.19.02 (b)(3).

2. Prior to trial, defense counsel received discovery prior to trial consisting of owners manuals for the household appliances, including the kitchen stove.

3. Defense counsel also received a copy of the report generated by the State's arson expert, John DeHaan.. Within his report, and during trial, DeHaan identified the kitchen stove as containing a continuously burning gas pilot light in the broiler. DeHaan nevertheless exclude the broiler pilot light as a possible ignition source of the gasoline vapors. [Vol. 36 RR: 103, 114, 183 - 187] [See, Testimony of John DeHaan, Exhibit "D."].

4. During cross-examination, counsel did not confront DeHaan with scientific data relating to the ADL testing which refuted his candle experiment, or with other independent data challenging the scientific reliability of DeHaan's exclusion of the broiler pilot as a possible source of ignition. [Vol. 37 RR: 3 - 142]. Rather, defense counsel's questions focused on the possibility that the gasoline vapors could have been ignited by an electrical spark from one of the electrical appliances, or from the gas space heater. [Vol. 37 RR: 27 - 32].

5. Aside from DeHaan's evaluation, there was additional evidence which established that the broiler had a continuously burning gas pilot light. Louis Mitchell, Tammy Wilkerson's father testified during the State's case-in - chief that the stove was gas operated. [Vol. 33 RR: 153]. Mitchell subsequently testified several days later in the defense's case-in-chief that the stove was contained gas pilot lights in both the upper burners and in the broiler. [Vol.38 RR: 27 - 29]. When specifically pressed by defense counsel, Mitchell insisted that the stove contained a pilot light in the broiler, and that he had personally observed, and lit the broiler pilot light. [Vol. 38 RR: 30].

6. Mitchell initially testified on May 29, 2002 and then later testified during the defense's case-in-chief on June 10, 2002. DeHaan testified on June 4, 2002.

7. During defense counsel's opening statement to the jury on June 10, 2003, defense counsel advised that it was proceeding under a theory that the stove had an electrical ignition system in the broiler, but that the stove top burners had a pilot light which was a likely source of ignition. [Vol. 38 RR: 12 - 13].

8. The defense expert was Judd Clayton, an electrical engineer who owned an engineering and consulting firm. [Vol. 39 RR: 46 - 48]. Clayton testified on the second day of the Defense's case-in-chief, June 11. 2002. Clayton identified the oven stove as having an electrical ignition system in the broiler, rather than having a continuously burning pilot light. [Vol. 39 RR: 103 - 104, 105]. Clayton explained that had the stove had a gas pilot light in the broiler it would have increased the possibility of ignition of gasoline vapors, but he concluded that this was not a realistic possibility in the Wilkerson fire because of the electronic pilot. [Vol. 39 RR: 105]. Clayton identified the most likely sources of accidental ignition as: the water heater located in the bathroom, the refrigerator, the window mounted air conditioner units, and the pilot lights on the stove top. [Vol. 39 RR: 107].

9. Ken Moore, a technical manager for Sears testified during the State's rebuttal that the stove purchased by the Mitchell's and placed in the Wilkerson residence had three gas burners, two on top and one located in the broiler box. [Vol. 40 RR: 91 - 92]. A computer check of the model

number indicated that the stove had no power cord or igniters, hence, it had to be a gas model. [Vol. 40 RR: 95- 96].

10. The defense did not attempt to independently determine prior to trial whether the particular stove model in the Wilkerson residence had a gas or electrical ignition source. Although the defense was provided with documents which indicated the broiler contained a gas pilot light, and independent investigation would have indicated that the broiler contained a gas pilot light, defense counsel did not determine this fact prior to, or during trial, when formulating a defensive strategy on possible sources of ignition.

11. Even after having formulated an initial defensive strategy which excluded the broiler pilot light as a possible ignition source, but having learning during trial that the broiler contained a gas pilot light, defense counsel did not request Clayton re-evaluate his earlier conclusions relating to ignition via the broiler pilot light in order to determine the scientific viability of a defense based on this theory, or to determine the strength of this hypothesis as compared to the alternative hypothesis presented by the defense at trial.

12. Due to the defense counsel's failure to recognize the broiler pilot lights' possibility as an ignition source, or defense counsel's failure to evaluate the necessity of a change of strategy in light of the evidence developed at trial, the defense did not conduct any independent evaluation of available scientific, government, or industry data which supported a hypothesis that a gas pilot light would present a reasonable possible basis for the defense's theory of accidental ignition. Similarly, the defense did not conduct an independent investigation for data which would have been

useful in specifically challenging DeHaan's exclusion of the broiler pilot light as possible ignition source.

12. Dr. Gerald Hurst has evaluated Clayton's testimony and concluded that Clayton's mistaken evaluation of the broiler pilot light necessarily have affected his advice to the defense, and as a result, the defense's ability to present scientifically reasonable alternatives to the State's hypothesis that the sole cause of ignition lay with Holiday. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H"].

13. Clayton's conclusion that the stove was a "hybrid" kitchen range, that is, a stove with mixed electronic ignition/pilot light systems was unreasonable. Reference to Sears' publicly available databases on its Kenmore products, coupled with the owner's receipts for the stove would have revealed that the stove's broiler had a standing pilot light equipped with a thermomagnetic safety valve. Dr. Hurst believes that Clayton simply confused the probe for the thermomagnetic valve as an electric wire suggesting an electronic ignition system. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H"].

14. By misidentifying the broiler ignition system, Clayton's consequent advice to counsel on defensive theories of ignition lead defense counsel to reject the broiler pilot light as a possible ignition source of the gas vapors. As a result of this, defense counsel did not investigate or significantly prepare a cross-examination of DeHaan based scientific inaccuracy in his methodology for excluding the broiler pilot light.

15. The defense's chosen theory of possible ignition sources, the water heater, the refrigerator, the heater, and the stove top pilot light presented only remote possibilities of ignition. It is improbable that an electrical spark from the refrigerator, or the relatively high level stove top burners would have resulted in the fire in the Wilkerson residence given the time interval between the pouring of the gasoline and the broiler pilot light. A more scientifically viable, and sustainable explanation would have been the broiler pilot light. [See, Affidavit of Gerald Hurst, Ph.D: Exhibit "H"].

16. The Sixth and Fourteenth Amendment to the United States Constitution, and Article I, Section 10 of the Texas Constitution guaranty the right to the effective assistance of counsel. *Strickland v. Washington*, 466 U.S. 668, 686 (1984); and, *Hernandez v. State*, 726 S.W.2d 53, 56-57 (Tex.Cr. App. 1986). In order to render effective assistance of counsel, trial counsel must conduct an extensive and thorough investigation of the facts of the case. *Butler v. State*, 716 S.W.2d 48, 54 (Tex.Cr.App. 1986); and, *Ex parte Duffy*, 607 S.W.2d 507, 516 (Tex.Cr.App. 1980). Trial counsel's failure to adequately investigate the facts of a case constitutes ineffective assistance where the result is that any viable defense available to the accused is not advanced. *Butler*, 716 S.W.2d at 54; *Ex parte Lilly*, 656 S.W.2d 490, 492 (Tex.Cr.App. 1983); *Ex parte Ybarra*, 629 S.W.2d 943, 946 (Tex.Cr.App. 1982); *Duffy*, 607 S.W.2d at 517; and, *Bryant v. Scott*, 28 F.3d 1411 (5th Cir. 1994). "As is so often the case in those situations where any viable defense has not been raised, the dereliction is because the attorney is not familiar with the defense or he has not adequately investigated the facts of the matter." *Ybarra*, 629 S.W.2d at 948.

17. A defendant has been prejudiced by counsel's errors if there is a reasonable probability that the results of trial would have been different absent counsel's deficient conduct. Strickland, 466 U.S. at 693. A reasonable probability is measured by whether counsel's errors are sufficient to undermine confidence in the outcome of the proceedings, not by whether it is more likely than not that the result would have been different. *Williams v. Taylor*, 529 U.S. 362, 405 - 406 (2000); *Strickland*, 466 U.S. at 694; and, *Snow v. State*, 697 S.W.2d 663, 666 (Tex.App.- Hous. [1st Dist.] 1985).

18. Counsel may render ineffective assistance of counsel based upon the malfeasance or misfeasance of members of the defense team, see, *Guy v. Cockrell*, 343 F.3d 348 (5th Cir. 2003), relief granted on remand, *Guy v. Dretke*, No. 5:00-CV-191-C, slip op. at 4 (N.D.Tex– Lubbock, June 29, 2004) ("Petitioner received ineffective assistance of counsel . . . because . . . the defense investigator, failed to thoroughly investigate Petitioner's mitigation evidence.), or through counsel's failure to effectively make use of the defense experts. *Hooper v. Mullin*, 314 F.3d 1162, 1170 - 1171 (10th Cir. 2002); *Skaggs v. Parker*, 235 F.3d 261, 269 - 270 (6th Cir. 2000); *Bloom v. Calderon*, 132 F.3d 1267 (9th Cir. 1997); and, *Clabourne v. Lewis*, 64 F.3d 1373 (9th Cir. 1995).

19. Trial counsel's representation fell below objectively reasonable limits in the instant case because counsel, either independently, or in conjunction with the advice rendered by the defense's expert failed to accurately ascertain all possible sources of gasoline vapor ignition in the Wilkerson residence. This failure rendered defense counsel unable to make a reasoned strategic decision on the best defensive theories of accidental/premature ignition to pursue at trial. Additionally, the

failure to accurately ascertain all possible sources of ignition rendered defense counsel unprepared to intelligently and effectively cross-examine the State's expert, DeHaan, on his exclusion of the broiler pilot light as a possible cause of ignition.

20. In the alternative, defense counsel, upon learning of new facts which undermined or marginalized his adopted defensive theory regarding ignition failed to make either make effective use of his expert, and/or adequately adjust his defensive theory to address the new evidence. In either event, any strategic decision made by defense counsel was objectively unreasonable given the facts which confronted him, and were made without adequate understanding of the material facts of the case.

21. Defense counsel's errors lead him to ignore or otherwise reject the strongest defensive theory available to Holiday – that the broiler pilot light, in light of existing scientific and anecdotal data – had presented a significant likelihood of the accidental or premature ignition of the gasoline vapors. Had defense counsel pursued this theory, either in lieu of, or in addition to his other theories of ignition by electrical spark, there is a reasonable probability that one or more jurors would have harbored doubt about whether Holiday intentionally ignited the gasoline vapors, as presented by the State.

21. For the foregoing reasons, and any other reasons which arise during the litigation of this claim, Holiday was denied his right to the effective assistance of counsel under the Federal and State Constitutions. His conviction should be reversed and this case should be remanded for a new trial.

Claim 55: Holiday was denied effective assistance of counsel in violation of the Sixth Amendment to the U.S. Constitution Due to Counsel's Inadequate Investigation of Available Mitigation Evidence Relating to Holiday's Background.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 7. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 69 through 122 of the Findings of Fact and 17 through 20 of the Conclusions of Law of the FFCL.

1. Defense counsel adopted a defensive strategy of presenting evidence of Holiday's background for the purpose of establishing mitigating aspects of his childhood, and to implicitly demonstrate the reason for his character and personality. Counsel advised the jury during opening statements at the punishment phase of trial that it would present evidence of Holiday's childhood which would assist in explaining Holiday's character and personality, and that this type of information about a defendant's background was highly relevant evidence which was necessary for the jury's consideration of Holiday as an individual:

"These sorts of facts just sort of tell you what his life is about , what it the nature of his background so you can put it into context. It's not just a plea for mercy. It's context, it's understanding, to understand where he was, his psyche, how his personality was constructed or failed to be constructed to deal with the stresses of life and the unusual situation he found himself in this relationship. And how he failed to cope which resulted in the tragedy of September 06th. Barely struggling, living with his grandmother, his uncles, his child mother, calling his grandmother

momma, calling his mother Diane . . .at an early age one of his uncles shoots one of his cousins right there at home. The young man bleeds to death in the presence of the entire family.

These early childhood dramas are not something that are just about how children may not be able to remember with any detail events early in their lives. But the impact of shaping personalities and shaping their health shaping the way they grow and develop is probably greater than the things that happened yesterday, last week or last month and far more recent because of the formative years. That's when children are shaped. That's when they develop their personalities. That's when they develop their understanding of the world and the need for security and safety and stability if ever in a person's life it's in those early formative years. And clearly it was absent in the formative years of Raphael Holiday.

[Vol. 42 RR 12 - 13].

2. Defense counsel offered the testimony of Holiday's mother, Angela Nickerson, stepfather, James Nickerson, Jr., an individual who knew Holiday and during his adolescence, J.C. Henry, several individuals who knew of Holiday's good behavior while incarcerated, Sheriff Dan Dauget, Officer Bill Matzke and Deputy Paul Cannon, and a psychiatrist, Dr. Fred Fason.

3. Angela Nickerson testified that there were no significant problems in the home between Holiday and his step-father, or between Holiday and anyone else. She also stated that Holiday had been raised in a religious environment, and that he had been taught to pray and go to church. She further stated that prior to the incident, she had made an appointment for Holiday to receive mental

health services, but she did not explain in detail his need for these services. Mrs. Nickerson also stated that Holiday had lived with a woman named Janet Wilkerson for a period of time while he was a teenager.

4. James Nickerson, Holiday's stepfather testified that he never had any troubles with Holiday and that he never disciplined Holiday.

5. J.C. Henry, who knew Holiday as an adolescent, testified that Holiday had done work for him and was respectful. [Vol. 42 RR: 119 - 121]. He was impressed by Holiday's concern for his well being. [Vol. 42 RR: 124].

6. Jerry High testified that Holiday had obtained his GED in a very short period of time while incarcerated in the Madison County Jail. [Vol. 42 RR: 129 - 130]. Holiday was a dedicated student and respectful toward High. [Vol. 42 RR: 131 - 133]. Holiday also attended Bible Study on a religious basis while jailed. [Vol. 136 - 137].

7. Sheriff Dan Dauget, Officer Bill Matzke and Deputy Paul Cannon all testified that Holiday had been a courteous, well behaved inmate while incarcerated and had not been involved in any disciplinary violations. [Vol. 42 RR: 137 - 146].

8. Dr. Fred Fason, a forensic psychiatrist testified for the defense based upon his clinical evaluation coupled with the results of a personality test, the Minnesota Multi-phasic Personality Inventory (MMPI) which had been administered to Holiday pending trial. Holiday's profile on

the MMPI indicated Holiday had an "unusually mixed profile, with paranoid, passive-aggressive, depressive and hysterical conversion and dissociative elements. [Vol. 43 RR: 162 - 163]. He also demonstrated severe depression, tension, worrying, irritability, poor tolerance for frustration. [Vol. 43 RR: 164]. Fason attributed Holiday's low frustration level as a result of his failure to make an adequate transition during his childhood development. [Vol. 43 RR: 169 - 171]. Holiday's method of dealing with rejection or frustration was "by regression back to an earlier level of development. And then he becomes self-centered, hostile, and the other things in the report come out." [Vol. 43 RR: 171]. Holiday had clearly impaired coping mechanisms. [Vol. 43 RR: 175- 177].

8. Dr. Edward Gripon, a forensic psychiatrist testified for the State according to a hypothetical that included a description of Holiday's childhood as "happy," and a relatively stable home family." [Vol. 43 RR:77]. Gripon testified, based upon the facts of the hypothetical that Holiday more likely than not would possess a threat of future dangerousness. [Vol. 43 RR: 90].

9. The post-conviction writ investigation has revealed material facts relating to Holiday's background which were available at the time of trial, but which were not investigated, and therefore not presented. Janet Wilkerson, the girlfriend of Holiday's uncle, and with whom Holiday lived for a period of time as an adolescent has provided an affidavit regarding her personal knowledge of Holiday's home life. Had defense counsel interviewed Janette Wilkerson, she would have provided the following information regarding Holiday:

Raphael Deon Holiday spent many days in my house as he was growing up. I dated his uncle Eddie Nickerson. I knew his family well.

Life was so hard on Raphael. He never had a chance to live. He never had one.

I used to bring Raphael to my house as often as I could, because of the way his family treated him.

Raphael was his mom's punching bag. I remember one time after my son spent the night with Raphael's family, my son told me Diane woke him up by hitting him with board. When my son popped out from under the blanket, she apologized and said she was 'trying to hit that motherfucker there,' and pointed at Raphael. Diane was angry that Raphael had not got up to warm the house and make his brother's breakfast before she got up. I remember Diane beating on Raphael because he let the baby spill something one time. Raphael was punished for everything and responsible for everything. I remember Diane and James whooping Raphael with sticks or a belt then making him pray to God that his wounds would heal by Monday so he could go to school. Both Diane and James whooped Raphael all the time. As Raphael got bigger, James would even get his dad to come over to help beat Raphael. I remember James hitting Raphael, and Raphael asking 'why are you hitting me?' James told Raphael 'because you aint mine and you got no business being here.' On a different day, Raphael was visiting me and told me that he thought 'Boo' [James] was going to kill him one day anyway. Raphael told me, that day, and many times "don't nobody care about me anyway."

Raphael had to wait on his brothers, hand and foot. He had to do all of the cooking, cleaning, getting the fire ready, dressing them, catering to them. Diane got in his face and he would get a

whooping when he wouldn't wait on the brothers. Diane even kept Raphael out of school to babysit Tarver or Chase when they couldn't go to school. They treat that boy like a slave. He was a disgrace to them to be around. He had a constant reminder that he didn't belong. He was everybody's scapegoat.

I remember when Raphael was scalded by a pot of beans that was too heavy for him when he was cooking for his brothers. He was trying to take a heavy pot of beans off the stove and slipped and ran down his arm. I remember this because Raphael was too young to have to cook for the kids and got hurt in the process.

With Raphael, it was always gotta, gotta, gotta. James made Raphael get out and help him hauling hay by the time he was 10 years old. Raphael was not allowed to play or hang out even though the brothers could, because he had to work whenever possible. Whenever Raphael wasn't working or at school, he had to clean the house or do the wash or do other chores around the house.

Diane constantly told Raphael that he was worthless and didn't amount to nothing.

When Raphael was spending the weekend with me, and when he was living with me, would curl up in a ball and cry. When he got like that we would have to wait it out.

Raphael would not respond to us when he was like that. I saw Raphael curling up outside beside the house after an argument with Tay. The argument started because Raphael jumped up to do something for me that I asked Tay to do. Tay was upset and told Raphael 'she aint your

momma.' Raphael was deeply hurt by that and ran outside crying. We found him a few minutes later, beside the house, all curled up and out of it. He cried and cried till his eyes swollen shut. That hurted Raphael so bad. He wanted to have a momma.

Raphael couldn't read anything or write when he lived with me in highschool. When the older kids found out he couldn't read, they'd tease him and he wouldn't go to school anymore. The older kids would say "you dummy," and pick at Raphael and it would freak him out.

Raphael tried to kill himself when he thought I was going to send him back to his family. He had skipped school one day. He knew I was going to find out. I worked late at night. Raphael slept with a boxcutter under his pillow so he could cut his wrists when I came home and told him he had to leave. He was so cared of being sent back home.

Raphael came to live with me because James' mom called me crying and begged me to come get him. The whole family was upset and James and Diane were both beating on Raphael when grandma came over to break the fight up. James had ripped Raphael's shirt off of him and was beating him badly. Raphael had whelps on him from the fight. Grandma had enough of the trouble between James and Raphael and wanted to get him out of the house. Grandma stayed in the middle, of what was going on in James' home.

Raphael could never stand to be around adult women when he was a teenager or child. When he would stay with me and my sisters would come over, he would not let them hug him or rub on the top of his head. He would physically stay away from adult women.

Raphael used to cry in his sleep, when he lived with me.

When Raphael was around me and at my house as a child, he kept his head down, and kept out of everyone's way. When he finally trusted me, he opened up and cried, about how he was treated at home.

My boyfriend Eddie, Raphael's uncle, was such a brute. He'd get jealous if another man even looked at me. He didn't like another guy looking at me.

I suspected both Boo and Eddie were on crack while Raphael was in high school. Boo eventually got off the pipe and kept his job but Eddie was terrible about his addiction. Eddie's family took up for him, whenever he wronged me. When Eddie was on crack, he'd take my car and be gone for days. I had to call his mom and threaten to call the police before he gave the car back.

[See, Affidavit of Janette Wilkerson: Exhibit "N"].

9. Janette Wilkerson's identity, and indications of her available testimony was available to defense counsel independent from any information specifically conveyed by Holiday. Counsel received open file discovery from the State in this case. Within the State's file, and presumably given to defense counsel, is a document entitled "Conroe Independent School District Application for Determination of Residence" signed by Ms. Wilkerson acting as Holiday's guardian. The document recites that Holiday came to reside in Conroe because of "problems at home" and "child abuse." [See, Conroe ISD Application for Determination of Residence; Exhibit "O"].

10. Chas Nickerson, Holiday's younger half-brother was briefly interviewed, but not interviewed in depth regarding Holiday's family life. Had trial counsel interviewed Chas, he would have learned that Chase could have proved the following testimony regarding Holiday:

Growing up, me and my other brothers didn't have it nearly as hard as him. It seemed like as he got older, he couldn't let go of what happened to him growing up.

Our mom and dad, but especially dad was a lot tougher on him than they were on the rest of us. All of the us kids got our share of hard whoopings but his share was a lot more than ours. Raphael had an attitude often with dad. Raphael and dad didn't see eye to eye. My dad would get drunk and come home and trip. When dad came home drunk, it was always 'the house aint clean - this aint good enough . . .' He come in and trip for nothing. Dad always got in Raphael's face and used to try to jump on him when he was tripping. Raphael would almost always stand up for himself and get into a fight. Raphael finally went to live with Janette because him and my dad was fighting too much.

When Raphael was sent away, I chased the car down the street crying, 'don't go! Don't go!' Raphael was the only one that protected me from Eric and the older kids picking on me. Raphael raised and cared for me. I remember Raphael stopped the car and got out and hugged and patted me, telling me ' you gonna be alright, stop crying.' Raphael walked me back to the house.

Raphael had to do most of the work taking care of me and my brothers. Raphael did everything for us. He'd cook for us. He'd clean up the house. He had to do it all. I depended on him growing up.

Fights and stuff wasn't just from my dad, we grew up around a lot of fights. If we have a get together with mom's family, at the end of the night somebody gonna fight and we all gonna cry. There was always violence. There gonna be a fight. I know this affected Raphael because you can't forget where you come from.

My mom's family liked to pick on Raphael at our get togethers. They wouldn't hit him but they were always teasing him and making him feel or look dumb. They did that to uncle Kenneth all the time too.

Mom and dad fought too when we were young. The fights were physical. It was just as likely that mom hit dad first, as dad hitting first. Me and my brothers would stand at the end of hall during fights. We would stand there and cry.

My mom and dad both used to drink. They would come home drunk and ready to fight. They stopped fighting when I was about 7 or 8 years old after Raphael got in the middle of a fight.

We stayed in a chicken coop. The two room house we first lived in was like an old chicken coop. You could see the ground through the floors. We had to run a hose from grandfathers' house

to have water in the house. We had to fill a bucket with water to flush the commode. There were animals in the house all the time. The rats that came in were very big.

The other kids in the neighborhood used to pick on us because of our ragged clothes and terrible house. The house we lived in was hard.

I know my brother took his life hard because as a teenager, he would sit and cry while listening to music. Raphael would put on the headphones and sit by himself, thinking no one was watching and cry. Raphael also would cry and shake in his sleep. He was very bothered about his life but he wouldn't let you know directly.

Raphael felt like his dad wasn't there so he was an outsider. Raphael complained that he wasn't part of the family because he had a different dad. Raphael or any other kid treated like him could easily make hisself believe don't nobody love you.

Raphael was in his own world, growing up. He would sometimes space out and if he didn't talk to you, you wouldn't know.

Raphael had a hard time learning new things. If you talked to him about something for a long time he could understand; if you made him understand. Raphael didn't get anything new without a lot of talking. Raphael never was a good reader.

. . . .

I heard that Tammy called Raphael the night of the incident and hung up in his face.

[See, Affidavit of Chas Nickerson: Exhibit "P"].

11. Marjorie Minor, Holiday's maternal grandmother attended Holiday's trial and spoke briefly with defense counsel. However, had defense counsel questioned Ms. Minor in depth, counsel would have learned of the following available testimony from Ms. Minor:

I had seven brothers and several sisters growing up. Out of all the girls in my family, I was the one that had to stay home and do laundry and cook and clean for my brothers. I was the mother.

Diane was my oldest child. Before Raphael was born, I was proud of Diane, keeping her grades up and working hard in school. Diane was going to go to college until she got pregnant.

Diane never told me she was pregnant. I noticed it one evening when we were sitting watching 'Sanford and Son,' and Diane had a hard time getting out of a chair. Diane had started spreading and had to be 3 or 4 months pregnant at the time. When I found out Andrew Taylor got Diane pregnant, I was angry enough at him to want to shoot him. Diane was only 15 years old. Andrew was in his twenties and married.

Diane told me, just a year or two ago, that Andrew raped her after blowing marijuana smoke in her face. It made really angry to find out he had done her that way.

I was married for a while, when Diane was growing up. I got off work early one night and came home unexpectedly. I went pushed in the bedroom and saw my husband had Diane in bed and had thrown her panties on the floor. Diane was in tears. I got my gun and went after my husband. I ran him off.

After Raphael was born, I got a babysitter for him and let his momma go back to high school. When I wasn't working, I brought Raphael everywhere with me. I used to even bring him to the beer joints. I didn't want nobody else to keep him. Raphael called me 'momma' more than he called Diane 'momma' when he was little.

When Diane married James, she moved and took Raphael off to Stoneham. Raphael's life was much different in Stoneham than it had been with me. The first house they had in Stoneham wasn't fit to live in.

Raphael was the child that was made to do all the work in the family. Raphael would have to come in from playing to change his brother's diaper or give him a bottle or rock the baby. As he got bigger, he still had to do the majority of the chores. He cook, clean; he do it all for them little brothers. He raised all them children. Diane could be watching t.v. or resting on the couch and she would call Raphael, 'the baby wet, come take care of him.'

Raphael wanted to play football while he was going to school in Navasota. Neither James nor Diane wanted to be bothered by picking him up after practice. Both James and Diane would

jump on him when he got home for missing the bus and having to stay with their family in town. They punished him because they couldn't be bothered by picking him up. They was against it and James wouldn't pick him up.

It seemed like James and Raphael could never get along. James would constantly pick at Raphael. All of the kids could be sitting around and James would say 'come here and do this here,' to Raphael and let the other brothers be. James and Raphael never did get along.

Raphael was upset by his daddy James picking at him. Raphael used to call to me crying "momma I aint doing nothing and they jumping on me." Raphael felt like nobody cared about him. He has told me grandmother many times that his mom doesn't care about him and James doesn't like him.

Raphael loved his kids. Raphael always took good care of his child and her sisters. He fixed them food, cleaned up after them, made sure they had a bath, etc. I just can't see Poochie man hurting his kids intentionally.

While Raphael was growing up, I used to cook big dinners most Sundays. My whole family would come to my house and hang out and eat.

Kenneth is my son and Raphael's uncle. Raphael hung around and looked up to Kenneth while growing up. My son Kenneth tried to rape me when he was high. I eventually put Kenneth

out of my house and don't talk to him anymore. I try to support all of my children but Kenneth keeps on smoking and doing bad.

I get mad and lose my temper sometimes. When I get lose my temper, I can get mad 'til I just don't have no sense.

[See, Affidavit of Marjorie Minor: Exhibit "Q"].

12. Michael Blackshear is a cousin to Holiday's step-father, James Nickerson but is only two years older than Holiday. Mr. Blackshear lived in Navasota and visited in Stoneham throughout Holiday's life, and for that reason, possessed personal knowledge relating to the circumstances of Holiday's upbringing. Mr. Blackshear was not interviewed by counsel prior to trial. Had defense counsel interviewed Mr. Blackshear, he would have been able to provide the following testimony regarding Holiday:

When Raphael was growing up in Stoneham, It was all about Eric, Tarvis, and Chase. Raphael was the odd one out in the family. He wasn't James' son. He was treated like he was the worker. He was the oldest had to take care of the younger children. He was doing all the chores.

James treated Raphael like anything he was doing was wrong. Raphael could be doing chores or sitting around not working and either way whatever he was doing was wrong. He was doing the chore wrong or he was being lazy and not doing anything. I remember when Raphael was pushing a baby carriage back and forth when he was up in age. He hit a rock and dumped the baby

over and James jumped on him for it. James started pushing and smacking Raphael. It was not James way, to sit and talk to a child. James would get in Raphael's face or jump on him.

Raphael's mom treated him the same way. Diane was the one that would slap or hit whenever she was mad at Raphael. Diane could hit Raphael for talking back or for not doing a chore right. I saw Diane throw a cordless phone at Raphael because he stayed out in her car longer than he was supposed to.

I remember one time Raphael stood up to Diane. She called her brothers in Navasota and they all went out to Stoneham to jump on Raphael.

Raphael got blamed when anything went wrong or was broken in the family home. Half the time it'd be the other boy's fault, and Raphael would get the blame and get beaten.

James used to jump on Diane all the time when we were little. I've seen Diane with black eyes, busted lips, bruises. James can be a jealous type guy. He'd come home late or suspect mom was gone longer than she should be and he would jump on her. The talk in the family was that James would run around with other women and then come home and accuse Diane of running around and jump on her.

I stayed out at Raphael's house for a little while one summer. I called and asked to come home because they were feeding me sandwiches everyday. The family had something to eat but the food was poor and not much.

I was at the house in Bedias when Raphael, Anthony [Robert], and Pooh were leaving to go rob the store in Shiro. I didn't want to have anything to do with it and thought they shouldn't do it. I was like 'don't do that.' They were drinking and high and sure they were going to get some money. The talk that evening was that they were going to rob the store. Neither Raphael nor anyone else was talking about going over to Tammy's or causing trouble with Tammy's family.

When they came back from the store in Shiro, I first saw the gun. When they left again, they were taking Raphael to meet Tammy in Madisonville. I thought Tammy was going to meet Raphael in Madisonville.

I thought that Raphael and Tammy were going to work things out. She came by to see him in Bedias when he was staying there. She would call him on the phone and he would get happy. Raphael wanted to get through the problems and get married with Tammy. I've seen Raphael crying over being separated from the kids and Tammy. At Bedias, Raphael had a bottle with his kids picture in it that he looked at all the time.

[See, Affidavit of Michael Blackshear: Exhibit "R"].

13. Eric James Nickerson is Holiday's half- brother. Although the trial investigator spoke with Nickerson briefly over the telephone, defense counsel did not interview or otherwise discuss with Mr. Nickerson information he might possess regarding the circumstances of Holiday's childhood.

Had he been interviewed in a meaningful manner, Mr. Nickerson would have revealed the following information regarding Holiday:

My brother raised us. Raphael had to cook, clean, everything. Raphael did everything for me and my brothers. Our mom and dad worked often and Raphael did all the work around the house. Grandma was next door whenever mom wasn't home but Grandma put him to cooking and taking care of us.

We had a wood-burning stove for warmth and to cook. Raphael had to cut all the wood when we was kids. I remember Raphael cutting wood and me and Chase watching and picking up the little pieces when Raphael was about 7 years old.

When Raphael was not working around the house, he would go find odd jobs to do. He worked and brought momma home the money. Raphael was working in the hayfields or mowing grass or working on farms at 10 or 11 years old.

Raphael used to black out every once in a while. Raphael kicked and fell out at school one time, hitting his head on a desk. It was big news at school. I remember my brother frequently had headaches growing up.

My brother never could read very well, he wasn't at all a good reader. Raphael wasn't good in math either. He could barely do homework and had a very hard time at school.

Raphael and my dad always had trouble getting along because Raphael would think he can run things, and his dad would knock him back down. My dad was very strict about the house. My dad would get mad if we were sitting around running the air conditioner or had the lights on all day. If dad said something to Raphael and Raphael said anything back, my dad wasn't trying to hear it.

The house we grew up in didn't have running water, then didn't have hot water, for a long time. We had to bring a hose from Grandpa's house to have water. We had to fill a bucket up to flush the commode. We had to cut wood up to keep warm on cold nights.

As a family, we went over to my mom's mom's house on Sundays for dinner. The get togethers with mom's family got rowdy, all the time. We went over to grandmother's almost every Sunday and there would always be drinking and brothers fighting.

[See, Affidavit of Eric James Nickerson: Exhibit "S"].

14. John "Pooh" White lived on the same street as Holiday growing up, and was a close friend to Holiday's younger brother, Eric. Mr. White testified during the guilt portion of the trial. Despite his status as a witness, no one from Holiday's trial team interviewed Mr. White prior to trial. Had he been approached, John White would have advised Holiday's trial team of the following:

Raphael Holiday is one of the guys I grew up with. I was very close to his brother, Eric Nickerson. I lived down the street from Raphael and Eric, next to the store in Stoneham. My nickname is Pooh. I testified at Raphael's trial. Raphael's trial lawyers never talked to me before trial.

. . . .

Raphael went to live in Conroe after a big fight between him and James. Raphael and James fought all the time. The fights were mostly about 'you aint grown yet.' Raphael would be trying to be a man or make some decision and James would jump on him.

Chas was very close to Raphael growing up. Eric wasn't as close to Chas because Chas always wanted to tag along and Eric wouldn't have it. When Raphael left for Conroe, Chas would call him all the time. When Raphael had the first baby, Chas would call and ask Raphael to bring the baby around.

The first house the family had in Stoneham was not in good shape. I pray they don't ever have to go back to live in something like that. It was an 1800s house and the floors all up and down. They had problems with animals coming in through the floor and the house just falling apart.

Me and Eric got to be good friends because we would sneak each other food or other things when our momma's weren't looking. I remember sneaking around the backdoor to Eric's house. Eric snuck out some popcorn and gave it to me. I ran off and Eric got whipped for giving food away. Both of our mom's told us not to share food with the neighbors but Eric and me would give each other whatever we had when we were hungry. I watched out for Eric and he watched out for me.

I spent many, many days hanging out at Eric's house until his mom or dad got home and I run off 'cause they wasn't supposed to have no company.

Diane and James used to argue regularly before she became a minister. I always left when they started arguing because I was a child and it wasn't any of my business.

Raphael went down to Conroe to spend the weekend many times while we were growing up. I didn't know Jeanette Wilkerson very well but I knew when Raphael was gone and where he went.

Growing up in the country was much more rowdy and much freer than the city. Everybody in Stoneham drank or used drugs. The older ones drank and the kids smoked pot. They'd get drunk. We'd get high. No one called the police for fights or other troubles. The police were rarely out in Stoneham. The area was policed by Grimes County Sheriff but we never saw patrols growing up.

Every family get together that I knew about in Stoneham involved drinking and people being rowdy. That's just the way it was out there.

There wasn't anything going on around Stoneham other than walking around the country roads and getting high. The older folks didn't do anything other than get drunk until crack came around. There was nothing to but chill out there.

Raphael was on the phone with Tammy at my house the day before it happen. They was on the phone a couple hours off and on. Raphael had to get off the phone a few times so someone else could use it.

When Raphael and Tammy were living in the trailer behind his momma's house, he kicked me out of the house when Tammy came home or was hanging around. Raphael and Tammy fought often. I remembers Raphael turning up with a big ass knot on his forehead, and saying he fell off the porch. Everyone assumed Tammy beat his ass.

I saw Raphael with Tammy's kids countless times. Raphael loved the kids and would play with them all the time. Raphael aint trying to burn the children. I know he didn't do that.

[See, Affidavit of John White: Exhibit "T"].

15. Holiday's mother, Angela Diane Nickerson, testified at the punishment phase. Although she was presented as a witness at punishment, neither defense counsel nor investigator interviewed her in depth regarding available mitigation. The trial investigator met with Mrs. Nickerson approximately two times, once at a restaurant. Defense counsel met with Mrs. Nickerson possibly two times, once in his office, and once as part of a group meeting along with other family members.

16. Post-conviction counsel contacted Diane Nickerson numerous times. Post-conviction counsel and an investigator both spoke with Mrs. Nickerson on the phone in excess of ten times, emailed her several times and made three personal visits to interview her. During the course of this

on-going, trust building mitigation investigation, Diane Nickerson revealed the following, which would have been available at the time of trial had defense counsel established a level of trust:

"I was the oldest of my brothers and sisters. I used to have to take care of all of them when my mom was at work. I had to do the cleaning and cooking and housework.

When I was young, my mom used to say horrible things to me . She drank and called me names like 'bitch,' and 'mother-fucker.'

I was 15 years old when Raphael was born. I was living with my mom. I remember my mom effected the way I raised Raphael. I remember my mom used to take him and I to clubs and let him drink a little beer. He might have been big enough to walk. When he was a baby, if I smacked him to correct him, mom would tell him to hit me back.

Raphael always talked back. He could make me so mad. I often whooped him.

Whenever he made me real mad, I'd whoop him.

I was young when I was raising Raphael. I used to call him stupid and cuss him when I got mad. He had a hard time learning things. I had a hard time teaching him his ABCs and sometimes it made me mad.

Raphael had a lot of responsibility around our house. He had to change diapers, clean, cook. He took care of the house a lot of the way I had to.

At this same time, while Raphael was young, James and I were both drinking. When we drank, we'd argue or fight. Sometimes I'd get physical and smack James. The fights were seen by Raphael.

At times, I felt James wasn't very responsible. He would be taking care of us like a man should. We struggled with getting the lights turned off, water turned, etc.

I know Raphael felt like he didn't belong growing up. He felt like he was outside the family and not loved. He did get called names and berated. He is still my baby but I can see how he thought he had a hard time.

[See, Affidavit of Angela Nickerson: Exhibit "U"].

17. Gerald Byington was retained by defense counsel as a mitigation specialist. Mr. Byington advised trial counsel on the mitigating nature of the evidence developed by the trial investigator, Kay Sanders and by defense counsel. Mr. Byington did not supervise or direct Ms. Sanders in the interviews of family members, but acted in an advisorial capacity based upon the information provided to him.. Mr. Byington has been provided the information uncovered during the post-conviction writ investigation and recognizes that the information varies greatly from the information developed by the trial investigator or which was otherwise known to defense counsel.

Mr. Byington agrees the information uncovered during the post-conviction writ investigation, which relates to the infliction of physical violence and neglect upon Holiday, the exposure to drug and/or alcohol usage, the parental conflict, the delegation of age-inappropriate responsibilities, and his relegation to near servant status would have been important mitigation evidence Similarly, Mr. Byington agrees the cycle of abusive treatment received and expressed by Holiday's mother and grandmother was important mitigating evidence. The inter-generational abuse could have shown the jury that the forces which affected Holiday's character development were not specific to him, but were part of a larger family-cultural process. Had this information been made available to Mr. Byington, he would have strongly advised trial counsel to present this information to the jury. [See, Affidavit of Gerald Byington: Exhibit "V"].

18. The right to the effective assistance of counsel under the Sixth and Fourteenth Amendment to the United States and Article I, Sec. 10 of the Texas Constitution entails a thorough evaluation of a defendant's background and personal characteristics. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); and, *Ex parte Duffy*, 607 S.W.2d 507, 516 (Tex.Cr.App. 1980). Counsel's failure to conduct an adequately thorough investigation deprives counsel of a sufficient factual familiarity with the case in order to make a reasoned strategic decision on what evidence to present. *Wiggins*, 539 U.S. at 517; *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003); *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Cr. App.1990); and, *Duffy*, 607 S.W.2d at 526. As a result, counsel's failure to present testimony with which he was unaware, but would have been aware had he undertaken an adequate investigation, is not regarded as a matter of strategy. *Duffy*, *supra*. Prejudice, in the context of ineffective assistance of counsel in a capital sentencing proceeding is measured by whether there is a reasonable probability that had

counsel presented the omitted evidence, one juror might have arrived at a different verdict. *Wiggins*, 539 U.S. at 537.

19. The information developed during the post-conviction investigation, information which was unknown to defense counsel, was unknown due to a deficient pre-trial factual investigation. Defense counsel failed to interview, or to effectively interview witnesses who possessed information which was facially relevant to the defense's professed mitigation strategy. As a result of the inadequate investigation, defense counsel were unable to present a comprehensive picture of Holiday's childhood as a means of providing an "explanation" for Holiday's conduct, an explanation of his character, or simply as an offer of evidence in mitigation. Defense counsel was similarly rendered unable to effectively challenge the State's psychological expert, who predicated his hypothetical evaluation of Holiday's future dangerousness based upon the erroneous factual recitation that he had had a "happy" and normal childhood. Similarly, in the absence of a comprehensive and adequate understanding of Holiday's background, counsel was unable to effectively challenge, or otherwise mitigate against the psychological expert's diagnosis of Holiday as being "anti-social." An accurate and comprehensive understanding of Holiday's background would have enabled defense counsel to present an etiological explanation of Holiday's personality/character disorder. In the absence of an adequate pre-trial investigation, defense counsel was simply unable to develop or present a reasoned defense at the punishment phase of trial.

20. There is a reasonable probability that had the jury been presented with the available mitigation evidence, at least one juror would have been persuaded to return a different verdict at the punishment phase of trial.

Claim 56: Holiday was denied effective assistance of counsel at trial in violation of the Sixth Amendment to the U.S. Constitution Due to Counsel's Failure to Investigate and Present Evidence of Organic Brain Damage.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 8. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 123 of the Findings of Fact and 21 of the Conclusions of Law of the FFCL.

1. This claim for relief is alleged on a contingent basis within this post-conviction writ application and is based on a good faith belief that Holiday may have organic brain damage which was not investigated by trial counsel. In the event that factual investigation of the claim post-filing does not substantiate this claim, then Holiday intends to abandon the claim.

2. Holiday is indigent, and at all times through his trial, appellate, and post-conviction proceedings has been represented by appointed counsel. For this reason, Holiday has required the assistance of court-funded experts and investigative assistance during trial and post-conviction proceedings.

3. Prior to the filing of this writ application, Holiday, acting through counsel filed with the 278th District Court an ex parte motion seeking approval for funds to retain the assistance of a neuropsychologist to evaluate Holiday for the purposes of determining whether Holiday has

organic brain damage. As of the date of filing, the 278th District Court has not approved Holiday's request for funding and for this reason, Holiday has been unable to retain a neuropsychologist to evaluate Holiday. Holiday is unable to plead with specificity the existence of organic brain impairment absent a thorough neuropsychological evaluation.

4. The belief that Holiday may have organic brain impairment is based upon a number of factors which have been determined from an investigation into Holiday's background: Holiday, as well as family members and friends have reported a history of "black out" periods, there are or two identified instances in which Holiday has received a head injury of unspecified severity, Holiday has a history of migraine headaches, and Holiday has displayed cognitive dysfunction/educational impairment as reflected in his school grades, and measured deficiencies in his reading and mathematical abilities. [See, Affidavit of Gerald Bierbaum: Exhibit "W"].

5. Although Holiday had the assistance of psychological professionals during trial, Dr. Wendell Dickerson, a consulting psychologist, and Dr. Fred Fason, a testifying psychiatrist, the extent of psychological testing of Holiday consisted of an MMPI, which is a test designed to measure personality and psychological disorders, but is not specifically designed to measure the existence and extent of organic brain damage. Holiday was not specifically tested or otherwise evaluated to determine whether he suffered any form of organic brain damage. Therefore, no evidence of brain damage – if such damage exists – was presented at either phase of Holiday's trial.

6. The right to the effective assistance of counsel under the Sixth and Fourteenth Amendment to the United States and Article I, Sec. 10 of the Texas Constitution entails a thorough evaluation of a

defendant's background and personal characteristics. *Wiggins v. Smith*, 539 U.S. 510, 522 (2003); *Williams v. Taylor*, 529 U.S. 362, 396 (2000); and, *Ex parte Duffy*, 607 S.W.2d 507, 516 (Tex.Cr.App. 1980). Counsel's failure to conduct an adequately thorough investigation deprives counsel of a sufficient factual familiarity with the case in order to make a reasoned strategic decision on what evidence to present. *Wiggins*, 539 U.S. at 517; *Anderson v. Johnson*, 338 F.3d 382, 392 (5th Cir. 2003); *Ex parte Welborn*, 785 S.W.2d 391, 393 (Tex. Cr. App.1990); and, *Duffy*, 607 S.W.2d at 526. As a result, counsel's failure to present testimony with which he was unaware, but would have been aware had he undertaken an adequate investigation, is not regarded as a matter of strategy. *Duffy*, supra. Prejudice, in the context of ineffective assistance of counsel in a capital sentencing proceeding is measured by whether there is a reasonable probability that had counsel presented the omitted evidence, one juror might have arrived at a different verdict. *Wiggins*, 539 U.S. at 537.

7. In the event that funds are made available for a neuropsychological evaluation and that such an evaluation uncovers evidence of organic brain damage in Holiday, then Holiday would seek to show that defense counsel's failure to investigate this possibility, based on the evidence available to counsel, and/or to subsequently present such evidence fell below objective professional conduct and that such deficient conduct prejudiced Holiday at either the guilt-innocence or punishment portions of his trial.

Claim 57: Holiday Has Been Denied His Right to the Effective Assistance of Counsel on Appeal, or to the Effective Assistance of Counsel at Trial Under the 6th and 14th Amendment to the United States Constitution as a result of inadequate briefing on state direct appeal or other procedural default.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 11. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 125 of the Findings of Fact and 24 of the Conclusions of Law of the FFCL.

1. Holiday is represented on direct appeal from his conviction and sentence for capital murder by attorneys William Carter and Frank Blazek. Carter and Blazek (hereinafter "Appellate counsel") represented Holiday during the trial.

2. Appellate counsel filed an appellate brief with the Texas Court of Criminal Appeals on or about June 24, 2004. A copy of Appellant's brief on direct appeal is included as Exhibit "Y".

3. As of the filing of Holiday's application for post-conviction writ of habeas corpus, the resolution of his direct appeal is still pending with the Texas Court of Criminal Appeals. Because the direct appeal is still pending, it is impossible to determine whether any ground for relief on direct appeal has been rejected on procedural grounds, either because it has been inadequately briefed by appellate counsel, see, Tex.R.App.Pro. Rule 38.9; *Hankins v. State*, 132 S.W.3d 380, 385 (Tex.Cr.App. 2004) and *Bell v. State*, 90 S.W.3d 301, 305 (Tex.Cr.App. 2002), or procedurally defaulted by trial counsel through inadequate preservation of error. Tex.R.App. Pro. Rule 33.1; and, Tex.R.Evid. Rule 103(a).

4. Instances of procedural default at trial or on appeal and legal-factual "facts" which are unavailable at the time of filing the writ application. Holiday would contend that instances of procedural default by appellate or trial counsel, which may ultimately be determined by the Texas Court of Criminal Appeals may constitute instances of ineffective assistance of counsel at trial and/or on appeal, in violation of the 6th and 14th Amendments to the United States Constitution and Art. I, Sec. 10 of the Texas Constitution, by virtue of counsel's failure to properly present an issue on appeal, or by counsel's failure to properly preserve error.

5. Holiday would accordingly seek leave to supplement this post-conviction writ application with any claims relating to the performance of trial and appellate counsel which are resolved on the grounds of procedural default or inadequate briefing.

Claim 58: During jury selection and trial, Holiday may have been denied his 14th Amendment right to due process, his 6th Amendment right to be tried by an impartial verdict, and his 6th Amendment right to the effective assistance of counsel.

***Exhaustion*:** This claim was presented to the CCA and the trial court in Holiday's state application for writ of habeas corpus in claim 12. The trial court's FFCL adopted by the CCA denied this claim on the merits in paragraphs 126 of the Findings of Fact and 25 of the Conclusions of Law of the FFCL.

1. Holiday was tried to a jury in Huntsville, Walker County, Texas. The jury consisted of 10 Caucasian jurors and two African-American jurors.

2. Although the instant case involved domestic violence in the course of an inter-racial relationship between Holiday, who is African-American, and Tammy Wilkerson, who is Caucasian, trial counsel did not meaningfully voir dire the jurors on their racial attitudes.

3. Holiday's counsel has discussed the matter of racial attitudes among Walker County jurors with an attorney practicing law in Walker County, who has advised that the issue of racial bias is a reasonable ground for inquiry, both in voir dire, as well as in post-conviction proceedings.

4. Holiday is also aware that the instant case involved considerable press coverage during trial and that the jurors were not sequestered during trial.

5. Based upon these facts, Holiday, through an investigator, has attempted to contact jurors in this case to discuss the possibility of racial prejudice, exposure to extraneous information, or other potential jury misconduct, but his inquiries have been rebuffed.

6. To the extent that any juror concealed racial prejudice, falsely stated, or withheld material information from defense counsel during voir dire, or was exposed to extraneous information during trial, then Holiday would have a cognizable ground for relief under the 5th, 6th and 14th Amendments to the United States Constitution and Article I, Secs 10 and 19 of the Texas Constitution.

The Sixth Amendment right to a jury trial "guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). "A fair trial in a

fair tribunal is a basic requirement of due process." *Id*. The jury must be "capable and willing to decide the case solely on the evidence before it." *Smith v. Phillips*, 455 U.S. 209, 217 (1982). Even if only a single juror is unduly biased or prejudiced, the defendant is denied his constitutional right to an impartial jury. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992); *Salazar v. State*, 562 S.W.2d 480, 482 (Tex. Cr. App. 1978); and, *Norwood v. State*, 58 S.W.2d 100, 101 (Tex. Cr. App. 1933). Voir dire is an important method of protecting a defendant's right to a fair trial. *McDonough Power Equip. Co. v. Greenwood*, 464 U.S. 548, 554 (1984). "The voir dire process is designed to insure, to the fullest extent possible, that an intelligent, alert, disinterested, impartial, and truthful jury will perform the duty assigned to it." *Armstrong v. State*, 897 S.W.2d 361, 363 (Tex. Cr. App. 1995). A juror's failure to honestly disclose to counsel material matters violates the defendant's right to Due Process, right to a fair trial, and right to the effective assistance of counsel.

Similarly, if counsel fails to properly inquire during voir dire regarding material issues, counsel may render ineffective assistance of counsel.

Finally, a defendant is deprived of his right to a fair trial where the jury is exposed to, or otherwise considers matters which were not admitted as testimony or evidence.

7. Post-conviction counsel requests the authority to subpoena jurors for personal interviews or in the alternative, that this Court grant an evidentiary hearing to allow him to further investigate and develop this claim, or otherwise supplement this claim should evidence in support become available.

Claim 59: Holiday was denied conflict free effective assistance of counsel in violation of the 6th Amendment to the U.S. Constitution because, unknown to Holiday, his trial attorney, Mr William Carter was the attorney who helped Tammy Wilkerson with the divorce from Raphael while he was in county jail and then he became Raphael's attorney for the case.

We have received information that Holiday's trial attorney, William Carter, represented Tammy Wilkerson to divorce Holiday while he was in the county jail. If true, then Mr. Carter would have been conflicted from representing Holiday. Wilkerson later testified for the State against Holiday.

This conflict adversely affected the attorney's performance and prejudiced Holiday because the attorney's duty of loyalty to Wilkerson prevented the attorney from aggressive cross examination of her and establishing other causes for the deaths other than Holiday. As a result, Holiday was denied his Sixth Amendment right to effective assistance of counsel and is therefore entitled to relief.

The Sixth Amendment guarantees defendants effective assistance of counsel at trial. Pursuant to *Strickland*, 466 U.S. at 686-87, a petitioner must show that counsel's deficient performance resulted in prejudice in order to establish a constitutional violation. However, "prejudice is presumed when counsel is burdened by an actual conflict of interest." *Id*. at 692 (citing *Cuyler*, 446 U.S. at 345-50); *Cuyler*, 466 U.S. at 349-50 ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief."). An actual conflict of interest exists when the conflict adversely affects counsel's performance. *Mickens v. Taylor*, 535 U.S. 162, 171 (2002).

Claim 60: Holiday's death sentence by lethal injection, as it will be imposed, is cruel and unusual punishment in violation of his rights under the Eighth and Fourteenth Amendments of the United States Constitution.

If executed under Texas's current lethal injection protocol, Holiday's sentence will be carried out in a manner that is in violation of the Eighth and Fourteenth Amendments to the United States Constitution. In light of the recent decision in *Baze*, 128 S. Ct. at 530 (plurality), Holiday is entitled to, at a minimum, discovery and a hearing on the issue.

Prior to *Baze*, there was no binding constitutional precedent holding that a death-sentenced prisoner could potentially prove, through discovery and a hearing, that a state's lethal-injection protocol violated the Eighth Amendment. *Id.* at 1526 (Roberts, C.J., plurality) (observing that in the absence of "extensive hearings," it will be difficult to ascertain whether the "risk of pain from maladministration" of lethal-injection protocols is sufficient to trigger Eighth Amendment protections). Of particular significance was that in *Baze*, unlike in Holiday's case, "the [state] trial court held extensive hearings and entered detailed Findings of Fact and Conclusions of Law" relating to the state's lethal-injection procedures and practice. *Id.* at 1526. Only "[a]fter a 7-day bench trial during which the trial court received the testimony of approximately 20 witnesses, including numerous experts," did the state court in *Baze* decide the Eighth Amendment question. *Id.* at 1529. Because there has been no post-*Baze* determination by any state or federal court as to the constitutionality of Texas's lethal injection protocol, this Court should hold an evidentiary hearing to determine precisely that issue.

On information and belief, the Texas Department of Criminal Justice intends to execute Holiday by means of lethal injection as set out in the current lethal injection protocol. If Holiday's sentence is carried out under the current protocol, there is a "substantial risk" that he will suffer "serious harm" and there are "feasible, readily implemented" alternatives that the State refuses to adopt without legitimate penological justification. *Id.* at 1531.

The current protocol is problematic for many reasons, including but not limited to its failure to: (1) set out the execution procedures in a sufficiently clear manner to ensure that the execution is carried out in a manner that does not cause a substantial risk of pain and suffering; (2) adhere to contemporary standards of care in the administration of percutaneous central lines and to eliminate the risk that a cut-down may be used to create IV access; (3) ensure that the Department Director does not authorize deviations from the procedures that would further heighten the substantial risk of serious pain and suffering; (4) assure adequate visualization of the IV sites and IV patency before and during an execution, and to properly assess anesthetic depth throughout an execution; (5) appropriately address the individual condemned inmate's particular medical condition and history; (6) ensure the participation of qualified and trained personnel in the execution process; and (7) provide the appropriate physical conditions to safely perform the execution, and (8) violation of federal or state import laws or regulations pertaining to the acquisition of the drugs used to conduct the execution.

Unlike the protocol in *Baze*, which "put in place several important safeguards to ensure that an adequate dose of sodium thiopental is delivered to the condemned prisoner," 528 S. Ct. at 1533 (plurality), Arizona's current execution procedure lacks the necessary safeguards to ensure that

Holiday will not be executed in a cruel and unusual manner. Under *Baze*, Holiday has stated a claim and is entitled to discovery and an evidentiary hearing on this issue and will further develop facts in support of his claim at that time.

Claim 61: Holiday will be denied a fair clemency process in violation of the Eighth and Fourteenth Amendments.

Holiday has not yet presented this claim to the Texas courts because his opportunity to seek executive clemency has not yet become ripe. Holiday presents this claim now in order to avoid future difficulties with raising this claim in future federal habeas proceedings. *See Stewart v. Martinez-Villareal*, 523 U.S. 637, 643-46 (1998).

Under Texas law, Holiday has a right to seek executive clemency before execution. This is part of the constitutional scheme that ensures the reliability of criminal convictions and the propriety of sentences. *See Herrera*, 506 U.S. at 415. Accordingly, Holiday has a due process liberty interest in the impartiality of the system by which clemency may be afforded to him. *See generally Mathews v. Eldridge*, 424 U.S. 319 (1976).

Holiday's clemency proceedings will not be impartial. On information and belief, Holiday asserts that both the selection process for members of Texas's Board of Executive Clemency ("the Board") and the conflicting roles of the Texas Attorney General's Office will work to deprive him of a fair clemency proceeding. Without judicial review of the bias inherent in Texas's clemency process, Holiday will never have an opportunity to vindicate his right to a fair and impartial clemency process.

The Board consists of 18 members appointed by the Governor. The Governor may remove members of the Board for cause. On information and belief, Holiday asserts that the Attorney General's Office is responsible for training the members of the Board regarding their duties. Also on information and belief, Holiday asserts that the Attorney General's Office will also be an advocate against him when it comes time for him to seek clemency from the Governor. On information and belief, Holiday asserts that he will neither have notice of the time and place of the hearing, the evidence the Governor will use when he decides whether to grant or deny clemency, or an opportunity to present evidence to her in favor of granting clemency.

Moreover, the current governor, Rick Perry, has made clemency proceedings a sham. He has no interest in granting clemency to any inmate. During his ten years in office he has granted only one clemency petition, and that was merely because the inmate did not actually commit the murder. For political reasons, he has decided in advance to deny all clemency petition, absent proof that the inmate did not actually commit the murder.

For all these reasons, Texas's clemency procedures do not comport with the procedural due process protections guaranteed to him by the Fourteenth Amendment. Holiday is entitled to habeas corpus relief.

CONCLUSION

As this petition demonstrates, Holiday's rights under the federal constitution were violated, unremedied by Texas courts.

RELIEF REQUESTED

Prayer for Relief

WHEREFORE, Holiday respectfully prays this Court:

1. Order that Holiday be granted leave to conduct discovery pursuant to Rule 6 of the Rules Governing § 2254 Cases and permit Holiday to utilize the processes of discovery set forth in Federal Rules of Civil Procedure 26-37, to the extent necessary to fully develop and identify the facts supporting his petition, and any defenses thereto raised by the Respondents' Answer;

2. Order that upon completion of discovery, Holiday be granted leave to amend his petition to include any additional claims or allegations not presently known to him or his counsel, which are identified or uncovered in the course of discovery and that Holiday be granted to leave to expand the record pursuant to Rule 7 of the Rules Governing § 2254 Cases to include additional materials related to the petition;

3. Grant an evidentiary hearing pursuant to Rule 8 of the Rules Governing § 2254 Cases at which proof may be offered concerning the allegations of this petition;

4. Issue a writ of habeas corpus to have Holiday brought before it to the end that he may be discharged from his unconstitutional confinement and restraint;

5. In the alternative to the relief requested in Paragraph 4, if this Court should deny the relief as requested in Paragraph 4, issue a writ of habeas corpus to have Holiday brought before it to the end that he may be relieved of his unconstitutional sentences;

6. Grant such other relief as may be appropriate and to dispose of the matter as law and justice require.

WHEREFORE, PREMISES CONSIDERED, the Holiday RAPHAEL DEON HOLIDAY asks this Court to hold hearings, make its findings of fact and conclusions of law, and find that he was denied rights. He requests the Court to vacate his conviction and issue a writ to the Respondent, or the warden of the Polunsky Unit, ordering release of Holiday from custody, or alternatively, to reverse Holiday's conviction and order a new trial, or alternatively, to vacate his sentence of death and order a new trial on sentencing.

Holiday also asks the Court to allow a reasonable time to amend this petition rather than to dismiss for failure to exhaust remedies. He also requests reasonable time to respond to the State's answer to this petition. Finally, he asks for such other relief as the Court finds the Holiday justly entitled.

Respectfully submitted this 1 day of March 2012,

/s/ Seth Kretzer

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of this pleading has been delivered this 1st day of March 2012 to:

Ms. Tina Dettmer
Office of the Attorney General — *Counsel for the State*
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by the following means:

_____ By U.S. Postal Service Certified Mail, R.R.R.
_____ By First Class U.S. Mail
_____ By Special Courier _____
_____ By Hand Delivery
_____ By Fax before 5 p.m.,
_____ By Fax after 5 p.m.
_X___ By Email at Tina.dettmer@oag.state.tx.us.

Seth Kretzer

_____

SETH KRETZER