IN THE COURT OF CRIMINAL APPEALS
STATE OF TEXAS

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

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

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

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

INTRODUCTION

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

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

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

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

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

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

STATEMENT OF THE CASE

I. TRIAL

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

II. DIRECT APPEAL

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

III. STATE POST-CONVICTION PROCEEDINGS

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

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

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

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

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

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

IV. FEDERAL HABEAS PROCEEDINGS

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

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

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

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

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

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

AUTHORIZATION STANDARD

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

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

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

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

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

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

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

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

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

CLAIMS FOR RELIEF

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Yet trial counsel never bothered to question Springs, Duffer, or another key witness, Whitley Daniels, who testified [redacted] at the trial's guilt phase that, [redacted]

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Omitted evidence pertaining to Springs and Jefferson

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. There Was A *Buck* Violation

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

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

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

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

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

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

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

2. The Deficiency Prejudiced The Sentencing-Phase Result

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

A. Trial Counsel Performed Deficiently Under *Wiggins*

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1. Omitted Mitigation Evidence

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

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

[21] Subsequent postconviction counsel later interviewed these witnesses.

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

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

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

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

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

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

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

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

2. Effects of Deficiency On Expert Testimony

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

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

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

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

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

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

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

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

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

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

* * *

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

CONCLUSION AND PRAYER FOR RELIEF

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

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

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

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

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

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

Date: January 15, 2025

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VERIFICATION

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

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

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

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

Signed under penalty of perjury:

Lee Kovarsky

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

Notary Public, State of Texas

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

CERTIFICATE OF COMPLIANCE

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

/s/ Lee B. Kovarsky
Lee B. Kovarsky

CERTIFICATE OF SERVICE

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

Ms. Fredericka Sargent
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/s/ Lee B. Kovarsky
Lee B. Kovarsky