It's a fine fine day

74930

CAUSE NO. 9407130
248TH DISTRICT COURT
DNA MOTION ONLY
CHARLES DOUGLAS RABY
VS.

THE STATE OF TEXAS

CRIMINAL COURT OF APPEALS
VOLUME I OF II

FILED IN
COURT OF CRIMINAL APPEALS
APR 0 1 2004
Troy C. Bennett, Jr., Clerk

DNA MOTION ONLY

CLERK'S RECORD

VOLUME I of II

Trial Court Cause No. 9407130

In the County Criminal Court at Law # of Harris County, Texas

In the 248TH District Court of Harris County, Texas

Honorable JOAN CAMPBELL, Judge Presiding

CHARLES DOUGLAS RABY, **APPELLANT**

VS

THE STATE OF TEXAS

Appealed to the Court of Criminal Appeals of Texas, at Austin, Texas

---

Attorney for Appellant(s)

MICHAEL W. PERRIN

ATTORNEY OF RECORD

1100 LOUISIANA STE. # 4000

HOUSTON, TEXAS 77002

Telephone No: (713) 751-3200

SBOT No: 15795700

Delivered to the Court of Criminal Appeals of Texas, at Austin, Texas on the 24th day of March, 2004.

CHARLES BACARISSE, District Clerk
Harris County, Texas

By: Paula Gibson
P. Gibson, Deputy

(Court of Appeals) Cause No. _____
Filed in the (Supreme Court of Texas at Austin, Texas,
Or Court of Criminal Appeals of Texas at Austin, Texas,
Or Court of Appeals for the _____ District of Texas, at _____, Texas)
This _____ day of _____, _____
_____, Clerk
By _____, Deputy

TRANSCRIPT REFERRAL PAGE

CAUSE#: 9407130

CHARLES DOUGLAS RABY	{ IN THE 248th DISTRICT COURT
VS.	{ OF
THE STATE OF TEXAS	{ HARRIS COUNTY, TEXAS

Refer to the transcript, which was forwarded to the CRIMINAL Court of Appeals on 10-11-1994 for designated material.

000001

INDEX

	DATE FILED	PAGE
TRANSCRIPT REFERRAL PAGE		1
MANDATE / OPINION	6-15-98	2
JUDGEMENT	6-09-94	26
MOTION FOR POST- CONVICTION DNA TESTING AND OR APPOINTMENT OF COUNSEL	11-19-02	29
MOTION FOR APPOINTMENT OF COUNSEL POST-CONVICTION DNA TESTING	1-29-03	366
STATE'S MOTION REQUESTING COURT TO DENY DNA TESTING	12-17-03	367
STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON DEFENDANT'S MOTION FOR DNA TESTING	12-17-03	406
AGREED SETTING	12-17-03	411
NOTICE OF APPEAL ON DNA TESTING	3-1-04	412
APPELLANT'S DESIGNATION OF RECORD ON APPEAL	3-01-04	414
UPDATED DOCKET SHEET		418
TRIAL COURT'S CERTIFICATION OF DEFENDANT'S RIGHT OF APPEAL	3-22-04	419
LETTER OF ASSIGNMENT TO THE CRIMINAL COURT OF APPEALS	3-22-04	420
CERTIFICATE OF THE CLERK		421

MANDATE

FROM
COURT OF CRIMINAL APPEALS
Austin, Texas

FILED
CHARLES BACARISSE
District Clerk
JUN 19 1998
Harris County, Texas
Deputy

THE STATE OF TEXAS,

TO THE 248th JUDICIAL DISTRICT COURT OF HARRIS COUNTY - GREETINGS:

Before our COURT OF CRIMINAL APPEALS, on the 22nd day of APRIL A.D. 1998

the cause upon appeal to revise or reverse your Judgment between;

RECORDER'S MEMORANDUM:
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

CHARLES DOUGLAS RABY

VS.

THE STATE OF TEXAS

V2469 P0042 8

CCRA No. 71,938
Tr. Ct. No. 9407130

was determined: and therein our said COURT OF CRIMINAL APPEALS made it's order in these words:

"This cause came on to be heard on the record of the Court below, and the same being considered, because it is the Opinion of this Court that there was no error in the judgment, it is **ORDERED, ADJUDGED AND DECREED** by the Court that the judgment be **AFFIRMED**, in accordance with the Opinion of this Court, and that this Decision be certified below for observance."

The Appellant's Motion for Rehearing is Denied.

WHEREFORE, We command you to observe the Order of our said **COURT OF CRIMINAL APPEALS** in this behalf and in all things have it duly recognized, obeyed and executed.

WITNESS, THE HONORABLE MICHAEL J. McCORMICK, Presiding Judge

of our said **COURT OF CRIMINAL APPEALS,**

with the Seal thereof annexed, at the City of Austin,

this **8th** day of **MAY** A.D. 1998.

TROY C. BENNETT, JR. Clerk

Deputy Clerk
Abel Acosta

000002

CHARLES DOUGLAS RABY, JR., Appellant

NO. 71,938 v. - - - - Appeal from HARRIS County

THE STATE OF TEXAS, Appellee

Keller, J., delivered the opinion of the Court in which McCormick, P.J., and Mansfield, Holland and Womack, JJ., joined. Baird, J., filed a concurring and dissenting opinion. Overstreet, J., filed a concurring and dissenting opinion. Meyers, J., filed a concurring opinion.

O P I N I O N

Appellant, Charles Douglas Raby, Jr., was convicted of capital murder in June of 1994.[1] TEX. PENAL CODE ANN. §19.03(a)(2). Pursuant to the jury's answers to the special issues set forth in Texas Code of Criminal Procedure art. 37.071 §§ 2(b) and 2(e), the trial judge sentenced appellant to death.[2] Article 37.071 § 2(g). Direct appeal is automatic. Article 37.071 § 2(h). We will affirm.

Edna Mae Franklin, the 72-year-old complainant in this case, lived with her two grandsons, who were appellant's friends. Although Franklin had barred appellant from her home, her grandsons often snuck him in through a window and allowed him to spend the night. On the night of the offense, the two grandsons left their grandmother at home and went out. Upon their return, one of them discovered Franklin dead on the living room floor. She had been

---

[1] The crime was committed in October of 1992.

[2] Any subsequent references to Articles are to those in the Texas Code of Criminal Procedure unless otherwise identified.

special issue "yes" and the second special issue "no." As required by statute, the trial court then sentenced appellant to death.

In his first point of error, appellant complains that he was erroneously denied the right to voir dire prospective jurors on whether they could "consider" particular types of mitigating evidence during the capital sentencing phase. Prior to the commencement of voir dire, appellant filed a "Motion to Permit Voir Dire of Prospective Jurors on Mitigating Evidence." By that motion, appellant requested that his attorneys be permitted to question prospective jurors about "whether . . . they could consider or would be willing to consider, at least in some cases, the following types of evidence in mitigation of punishment:"

> (i) A capital defendant's relative youth at the time of the crime (*e.g.*, twenty-two years old);
>
> (ii) The fact that a capital defendant was intoxicated at the time of the crime;
>
> (iii) The fact that a capital defendant suffers from a medically-diagnosed form of mental or emotional illness;

> mitigating [sic] of punishment, assuming it was introduced and jurors in fact believed that such mitigating factors were found to exist.

Appellant then continued in his motion to state that he recognized that this Court has held such questions to be improper.[3] He also recognized that this Court has held that, if such questions should be allowed and a prospective juror states that he would not consider a particular type of evidence as mitigating, that prospective juror cannot be removed for cause on that basis. See Morrow v. State, 910 S.W.2d 471 (Tex. Crim. App. 1995), cert. denied 116 S.Ct. 1683 (1996). However, appellant propounded in his motion, as he propounds on appeal, that these cases were erroneously decided and should be revisited.

We reiterated in Green v. State, 912 S.W.2d 189 (Tex. Crim. App. 1995), pet. for cert. filed (Jan. 2, 1996) (No. 95-7651), that the law does not require a juror to consider any particular piece of evidence as mitigating; all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence if the jury finds it to be mitigating. A trial court does not abuse its discretion by refusing to allow a defendant to ask

---

[3] For authority for this proposition, appellant cites us to the non-published case of Hood v. State, No. 71,167 (Tex. Crim. App. Nov. 24, 1993)(not designated for publication).

___, 114 S.Ct. 2765 (1994); McCleskey v. Kemp, 481 U.S. 279 (1987). We overrule point of error two.

Appellant avers in his third point of error that the trial court erred in denying his motion to voir dire prospective jurors regarding evidence of voluntary intoxication. Specifically, at trial, appellant requested the following:

> Defendant intends to offer, during both the guilt-innocence and punishment phases of trial, evidence that he was highly intoxicated at the time of the alleged offense.
>
> Section 8.04(a) of the Texas Penal Code provides that evidence of voluntary intoxication cannot be used as a defense to the commission of a crime. Section 8.04(b) provides that voluntary intoxication that rises to the level of "temporary insanity" -- as defined by § 8.01 of the Penal Code -- may be considered in mitigation of punishment, but only if it rises to the level of "temporary insanity." Defendant believes that both § 8.04(a) and § 8.04(b), and any instructions submitted pursuant to those statutory provisions, are unconstitutional. Accordingly, Defendant wishes to voir dire the members of the array in a manner that would, admittedly, be inconsistent with § 8.04's statutory commands. However, Defendant believes that such voir dire questions are permitted by both the federal and state Constitutions.

The motion then proceeds to set out argument and authorities for why the trial court should declare §§ 8.04(a) and (b) unconstitutional and allow him to ask venire members two different questions.[5] In his brief, which is simply a restatement of his

[5] These two questions consist of the following:

(continued...)

consequences of his voluntary acts." The Court held that a reasonable juror might have interpreted the instruction as shifting the burden on the requisite element of criminal intent in violation of the Fourteenth Amendment's requirement that the State prove each and every element of a criminal offense beyond a reasonable doubt.

Appellant argues that the § 8.04(a) instruction, "Voluntary intoxication does not constitute a defense to the commission of the crime," suffers the same defect as the above utilized instruction because a reasonable juror could interpret it as precluding consideration of such intoxication evidence for any purpose, including as evidence negating specific intent. We do not find appellant's unsupported argument persuasive.

In Sandstrom, the jury was essentially instructed, *to the State's benefit*, that the defendant was presumed to have the requisite criminal intent. If the jury found that the defendant committed a voluntary act, *e.g.* becoming intoxicated, then they were authorized to conclude, without more, that he intended to engage in any behavior resulting from that intoxication, *e.g.* committing murder. Proof of intoxication, therefore, amounted to proof of criminal intent. In Texas, on the other hand, the State is required to specifically prove, beyond a reasonable doubt, that a defendant *intended to commit murder*, regardless of any state of intoxication. Unlike the instruction in Sandstrom, the utilization of § 8.04(a) does not directly work to the benefit of the State.

> [T]hat jurors should consider and give mitigating effect to Defendant's evidence of voluntary intoxication even if jurors do not believe that Defendant was rendered "temporarily insane" because of his intoxication.

Furthermore, the instruction that appellant requested advised the jurors that:

> In deliberating over the special issue, you should consider as a mitigating factor the Defendant's voluntary intoxication at the time of the crime . . . .
>
> Consideration of mitigating evidence does not mean that you necessarily must give such evidence any particular weight. Rather, each of you must individually decide how much weight this mitigating factor deserves, assuming that you believe that the Defendant was in fact intoxicated at the time of the crime.
>
> Assuming that you believe that the Defendant was in fact intoxicated, you cannot give this mitigating factor no weight by entirely excluding it from your consideration. Your consideration of voluntary intoxication as a mitigating factor does not require that you find that the Defendant was so intoxicated that he did not know the difference between right and wrong at the time of the crime. Rather, assuming that you believe that the Defendant's ingestion of drugs or alcohol impaired the Defendant's sense of judgment in any appreciable manner, you must consider the evidence of voluntary intoxication as a mitigating factor.

Appellant again asserts that the alleged unconstitutionality of § 8.04(b) makes both of these requests proper. However, the constitutionality of § 8.04(b) notwithstanding, we noted in point of error one, supra, that the law does not require a juror to

with a sufficiently cogent argument to warrant departure from our present jurisprudence, we decline to accept his invitation. We overrule point of error six.

In his seventh, eighth, and ninth points of error, appellant avers that he should have been allowed to voir dire prospective jurors about Texas' parole law in capital cases and to inform them about the specifics involved. Specifically, appellant alleges that denying jurors the knowledge of a defendant's 35 year minimum incarceration if sentenced to life in prison results in the arbitrary imposition of the death penalty in violation of the Eighth Amendment to the United States Constitution and of his due process rights under the Sixth and Fourteenth Amendments.

We have already decided these issues adversely to appellant. Smith v. State, 898 S.W.2d 838 (Tex. Crim. App.)(plur. op.), cert. denied, ___ U.S. ___, 116 S.Ct. 131 (1995); Willingham v. State, 897 S.W.2d 351 (Tex. Crim. App.), cert. denied, ___ U.S. ___, 116 S.Ct. 385 (1995); Broxton v. State, 909 S.W.2d 912 (Tex. Crim. App. 1995); Sonnier v. State, 913 S.W.2d 511 (Tex. Crim. App. 1995); Lawton v. State, 913 S.W.2d 542 (Tex. Crim. App. 1995). Appellant has given us no reason to revisit our analyses in these cases, nor has he shown us any distinguishing evidence in the record or provided us with any other reason why these cases should not control in the instant case. We overrule points of error seven, eight, and nine.

under the Eighth and Fourteenth Amendments to the United States Constitution. Appellant adopts the dissenting opinion of Justice Blackmun in Callins v. Collins, ____ U.S. ____, 114 S.Ct. 1127 (1994). We have recently addressed this precise argument and found adversely to appellant. Lawton, 913 S.W.2d at 558. Appellant has provided us with no new arguments. We overrule point of error eleven.

In his twelfth point of error, appellant asserts that the capital sentencing scheme is unconstitutional under the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment because of the many different schemes that have been in effect since 1989.

This Court has held that, when challenging the constitutionality of a statute:

> [I]t is incumbent upon the defendant to show that in its operation the statute is unconstitutional as to him in his situation; that it may be unconstitutional as to others is not sufficient.

Santikos v. State, 836 S.W.2d 631 (Tex. Crim. App.), cert. denied, 506 U.S. 999 (1992). Appellant was tried under the 1992 version of Article 37.071.[9] Since appellant has simply made a global argument as to all capital defendants since 1989, and has not shown us how his specific rights were violated by application of the statute, his contentions are without merit. Sonnier, 913 S.W.2d at 520-21; Lawton, 913 S.W.2d at 559-560. We overrule point of error twelve.

---

[9] The version which went into effect September 1, 1991.

> Each juror may or may not believe certain evidence is mitigating; however, the constitution only requires that where a juror believes there is relevant mitigating evidence, that juror must have a vehicle to give his or her reasoned moral response to such evidence.
>
> * * *
>
> Appellant was not entitled to an instruction on what evidence was mitigating or on what weight to give any mitigating evidence presented at trial.

In light of these statements, appellant's first requested charge is a misstatement of the law in that it essentially instructs jurors that youth and mental health are implicitly mitigating. Id. Furthermore, appellant's second requested instruction is also a misstatement of law in light of Penry v. Lynaugh, 492 U.S. 302 (1989). Penry does not require that, if a jury finds evidence to be both mitigating and aggravating, then it should give the evidence only its mitigating weight. Zimmerman v. State, 860 S.W.2d 89, 102 (Tex. Crim. App. 1993).[10] In fact, Penry specifically refers to the double-edged nature of some evidence. We overrule point of error fourteen.

Appellant contends in his fifteenth point of error that the definition of "mitigating evidence" in Article 37.071 § 2(f)(4) makes the article facially unconstitutional because it limits the concept of "mitigation" to "factors that render a capital defendant

---

[10] Zimmerman was remanded by the United States Supreme Court to review in light of Johnson v. Texas, 509 U.S. 350 (1993). However, we reaffirmed the original holding on appeal. Zimmerman v. State, 881 S.W.2d 360 (Tex. Crim. App.), cert. denied, ___ U.S. ___, 115 S.Ct. 586 (1994).

of proof to the mitigation issue does not render the scheme unconstitutional. In instances where mitigating evidence is presented, all that is constitutionally required is a vehicle by which the jury can consider and give effect to the mitigating evidence relevant to a defendant's background, character, or the circumstances of the crime. Barnes v. State, 876 S.W.2d 316, 329 (Tex. Crim. App.), cert. denied, ____ U.S. ____, 115 S.Ct. 174 (1994); Penry v. Lynaugh, 492 U.S. 302 (1989); Johnson v. Texas, 509 U.S. 350 (1993). A capital sentencer need not be instructed how to weigh any particular mitigating fact in the capital sentencing decision. Tuilaepa v. California, ____ U.S. ____, 114 S.Ct. 2630 (1994). The absence of an explicit assignment of the burden of proof does not render Article 37.071 § 2(e) unconstitutional. See Walton v. Arizona, 497 U.S. 639 (1990); Lawton, supra; McFarland, supra. We overrule point of error sixteen.

Finding no reversible error, we affirm the judgment of the trial court.

KELLER, J.

Delivered: March 4, 1998
Publish
En Banc

With these comments, I concur in the disposition of point of error one and otherwise join the opinion.

MEYERS, J.

Delivered March 4, 1998
Publish

(v) The fact that a capital defendant has exhibited positive character traits, such as acts of kindness towards family members;

(vi) Any other relevant mitigating factor that would tend to militate in favor of a life sentence rather than a death sentence.

The trial judge granted the motion. During voir dire, the State objected to some questions framed along the lines requested in the motion. The trial judge sustained the State's objections which are the basis of this point of error.

A.

The Sixth Amendment guarantees the "assistance of counsel" and a trial before "an impartial jury." U.S. Const. amend. VI. Part of this constitutional guarantee is an adequate voir dire to identify unqualified jurors. Morgan v. Illinois, 504 U.S. 719, 729, 112 S.Ct. 2222, 2230 (1992) (citing Dennis v. United States, 339 U.S. 163, 171-172, 70 S.Ct. 519, 523-524 (1950); and, Morford v. United States, 339 U.S. 258, 259, 70 S.Ct. 586, 587 (1950)). Essential to this guarantee is the right to question veniremembers in order to intelligently exercise peremptory challenges and challenges for cause. Linnell v. State, 935 S.W.2d 426,428 (Tex.Cr.App. 1996) (citing Nunfio v. State, 808 S.W.2d 482 (Tex.Cr.App.1991)); Dinkins v. State, 894 S.W.2d 330, 344-345 (Tex.Cr.App.1995); Burkett v. State, 516 S.W.2d 147, 148 (Tex.Cr.App.1974); Hernandez v. State, 508 S.W.2d 853 (Tex.Cr.App.1974) ("[T]he right to propound questions on voir dire, in order to intelligently exercise peremptory challenges, is of the greatest importance."); McCarter

must be able to make an independent determination based on the facts presented at trial, not on any personal opinions they may have. In his classic formulation of the standard for an impartial jury, Chief Justice Marshall explained:

> Were it possible to obtain a jury without any prepossessions whatever respecting the guilt or innocence of the accused, it would be extremely desirable to obtain such a jury; but this is perhaps impossible, and therefore will not be required. The opinion which has been avowed by the court is, that light impressions which may fairly be supposed to yield to the testimony that may be offered, which may leave the mind open to a fair consideration of that testimony, constitute no sufficient objection to a juror; but that those strong and deep impressions which will close the mind against the testimony that may be offered in opposition to them, which will combat that testimony and resist its force, do constitute a sufficient objection to him. Those who try the impartiality of a juror ought to test him by this rule ... The question must always depend on the strength and nature of the opinion which has been formed.

1 Burr's Trial 416.

A general opinion formed without examination of the facts of a case will not automatically disqualify a veniremember. Black v. State, 42 Tex. 377, 381 (1875). By the same token, it is improper to give the facts of the case to prospective jurors during voir dire and ask them to form an opinion. We have long recognized prospective jurors should not leap in advance of the law and judicial evidence and settle on issues to be decided at trial. Rothschild v. State, 7 Tex. App. 519, 546 (1880). Therefore, while the parties are entitled to a voir dire that fairly and adequately probes a prospective juror's qualifications, the parties are not necessarily entitled to test the veniremember on his willingness to accept

improper question tending to commit that prospective juror. In recognizing the difficulty in articulating a bright-line rule for this area, Judge Campbell stated:

> Unfortunately, I can conceive of no bright line rule for determining when a question contains too much detail or seeks to commit the venire to a particular answer. Due to the very nature of the issues involved, these decisions will require review on a case-by-case basis.

Maddux v. State, 862 S.W.2d 590, 599 (Tex.Cr.App. 1993) (Campbell, J., concurring).

Nevertheless, certain principles have emerged as to what kind of questions would and would not constitute an attempt to commit prospective jurors.

1. Veniremembers cannot be asked in advance of trial what facts would cause them to vote a certain way.

Asking prospective jurors what circumstances would cause them to vote a certain way is committing them toward a certain position. Maddux, 862 S.W.2d at 599 (Campbell, J., concurring). For example, "tell me what type of cases you think should always result in the death penalty" would be an improper attempt to commit prospective jurors toward a certain position because they are being asked what facts would always cause them to vote a certain way. Allridge v. State, 762 S.W.2d 146, 163 (Tex.Cr.App. 1988). If selected, a committed juror would be partial because he would be compelled to stick to his previous opinion, instead of listening to all the evidence before forming an opinion.

the defendant had an extramarital affair before he allegedly shot his wife, the question would have been relevant in uncovering bias. Shipley, 790 S.W.2d at 609.

However, a question may contain too many details. For example in White v. State, 629 S.W.2d 701, 706 (Tex.Cr.App. 1981), the following question was held to be improper:

> [Would you be able to] consider the penalty of confinement for life if it were proved that the defendant went into a store, attempted to rob it or robbed it, aimed a pistol at a woman's head at short range and shot her, killing her instantly, and if the woman's husband testified to that?

This question went beyond questioning prospective jurors about bias toward certain types of punishment. The question resonated with the distinct facts of the case, attempting to gauge the veniremember's feelings, not in any hypothetical situation, but in the case being tried.

In Atkins v. State, 951 S.W.2d 787, 789 (Tex.Cr.App. 1997), we held the following hypothetical was not a proper question because it was too fact specific:

> ... If the evidence, in a hypothetical case, showed that a person was arrested and they had a crack pipe in their pocket, and they had a residue amount in it, and it could be measured, and it could be seen, is there anyone who could not convict a person, based on that...

We held the trial judge erred in overruling the defense's objection to this improper question because the answering of this question would serve "no purpose other than to

evidence does not come with any predetermined weight. Cuevas v. State, 742 S.W.2d 331, 346 (Tex.Cr.App. 1987). And neither side is entitled to a commitment from a juror as to how he or she will ultimately regard the evidence. If jurors are committed prior to trial as to how they would consider certain evidence, then the case is, in essence, being tried at the voir dire stage and the panel would no longer be impartial. Bailey v. State, 838 S.W.2d 919 (Tex.App.--Fort Worth 1993, writ ref'd) (citing Cadoree v. State, 810 S.W.2d 786, 789 (Tex.App.--Houston 1991, pet. ref'd)).

i.

While jurors are free to give any amount of weight to a particular piece of evidence, refusal to consider all relevant evidence disqualifies the juror under the law. See, art. 35.16; and, Morgan, 504 U.S. 738, 112 S.Ct. 2234. However, it is insufficient to only ask veniremembers if they are law-abiding citizens, whether they would be able to follow the law as instructed, or if they would be able to listen to all evidence with an open mind. Such questions invite an affirmative answer. Few veniremembers will declare in open court that they refuse to follow the law or are narrow-minded by nature or circumstance. Therefore, further probing is necessary to remove veniremembers who will not be able to evaluate all the evidence.

In order to place voir dire examination in context, both sides must be able to ask whether veniremembers will be able to consider certain types of evidence during the

not committal per se. Veniremembers are not (and should not be) asked whether they will consider that type of evidence as mitigating or aggravating in the case at hand. Rather, veniremembers are being asked whether they could find a particular type of evidence in mitigation or in aggravation, in a proper case. However, it should be made clear to the veniremembers that they are not being asked to assess the weight to be given to a particular piece of evidence in the case at hand.

D.

While generic examples of aggravating or mitigating evidence may be given during voir dire, neither side can preview the details of the evidence to be introduced at trial; questions peculiar to the case are prohibited. For the defense, this means details such as the defendant's actual age, family history and background should not be alluded to during voir dire to test veniremembers' reactions. For example, the defendant may not ask whether veniremembers will be able to consider the defendant's particular background during sentencing; e.g., the fact the defendant was only a certain age when he committed the crime, has a particular IQ, was sexually abused as a child or became dependent on drugs at an early age. See also, Coleman v. State, 881 S.W.2d 344, 351 (Tex.Cr.App. 1994); (defendant's good conduct in jail); Trevino, 815 S.W.2d at 621-622 (defendant was an average student and a good worker); Johnson, 773 S.W.2d at 331 (19-year-old

imposing the death penalty," followed perhaps by other questions regarding the same issue would be improper even though the first question by itself is a proper question. Sometimes it can be a fine line, but, as Judge Campbell noted in Maddux, supra, a bright line rule for determining when a question constitutes committal is difficult due to the nature of the issues involved. 862 S.W.2d at 600.

E.

In his Motion to Permit Voir Dire of Prospective Jurors on Mitigating Evidence, appellant sought to ask prospective jurors whether they would[2] be willing to consider appellant's particular background (i.e., 22 years old at the time of the crime, was voluntarily intoxicated on drugs at the time of the crime, has exhibited positive character traits, etc.) in mitigation of punishment. While jurors have to be able to consider[3] all evidence admitted during any stage of trial, veniremembers should not be asked to form an opinion regarding specific evidence before the trial has begun. The determination of weight is to be made during the sentencing phase by the jury, not by the parties during voir dire. What is mitigating in one person's mind may be aggravating to another, or the jurors

---

[2] Just as the words "consider," "could," and "can," the words "would," and "will" evince no magical quality and are neither committal or non-committal words by their mere utterance.

[3] As stated earlier, the word "consider" is not a committal word in and of itself. Neither is it a non-committal word. Rather, one has to see what the venire is being asked to consider.

objected to and sustained were clearly proper. For example, the question "could you consider alcohol as a mitigating circumstance" is not in itself committal and should have been allowed.

In the instant case, however, there is no reversible error because either: (1) the error was cured when the veniremember was successfully challenged for another reason; Jones v. State, 843 S.W.2d 487, 496 (Tex.Cr.App. 1992); (2) a proper question was asked, objected to and sustained, but appellant was able to ask essentially the same question later; Etheridge v. State, 903 S.W.2d 1, 9 (Tex.Cr.App. 1994); Wheatfall v. State, 882 S.W.2d 829, 844 (Tex.Cr.App. 1994)(Baird, J., concurring); or (3) the question was improper. Atkins v. State, 951 S.W.2d 787, 789 (Tex.Cr.App. 1997). **With these comments, I concur in the disposition of point of error number one.**

---

[5](...continued)
certain types of evidence; i.e., youth, family background, intoxication, etc. Appellant did not seem to understand the prohibition was on the weight he proposed to associate with the evidence, not the subject matter. Nonetheless, appellant made clear that, if permitted, his intention was to question each prospective juror along the lines delineated in his Motion to Permit Voir Dire of Prospective Jurors on Mitigating Evidence. As we stated earlier, however, the questions proposed in appellant's motion are improper.

The majority states: "Appellant has given us no reason to revisit our analysis in these cases ...." Ante, at ___; slip op. pg. 12. Appellant's brief was filed on August 11, 1995. Therefore, appellant was not in a position to bring to our attention the case of Brown v. Texas, ___ U.S. ___, ___ S.Ct. ___ 1997 WL 333359 (October 20, 1997), which called our precedent into question. Although the Brown Court denied certiorari, four justices joined a concurring opinion and stated: "The Texas rule unquestionably tips the scales in favor of a death sentence that a fully informed jury might not impose." Id., at ___.

The concurring justices recognized "an obvious tension" between the basic holding of Simmons v. South Carolina and the Texas rule of not allowing defendants to inform juries of exactly what a "life" sentence entails. Brown, ___ U.S. at ___, ___ S.Ct. at ___.[6] In Simmons, the Supreme Court held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible." Simmons v. South Carolina, 512 U.S. 154, 161, 114 S.Ct. 2187, 2192-2193 (1994). The Court held:

---

[6] Currently Tex. Code Crim. Proc. Ann. art. 42.18, § 8(b) provides that a prisoner serving a life sentence for a capital crime is not eligible for release on parole until the actual calender time the prisoner has served, without consideration of good conduct time, equals 40 calender years. Petitioner was convicted under a prior version of the law where a life sentence was 35 years before parole eligibility.

114 S.Ct. at 2194. As the Court determined "where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal." Ibid., (citing Skipper v. South Carolina, 476 U.S. at 5, n. 1, 106 S.Ct. at 1671, n. 1). In Gardner, the Court held that sending a man to his death "on the basis of information which he had no opportunity to deny or explain" violated fundamental notions of due process. Gardner, 430 U.S. at 362, 97 S.Ct. at 1207.

Appellant requested an instruction regarding the mandatory 35 years he would have been required to serve before becoming parole eligible. In at least five separate instances, the State argued appellant should be sentenced to death because he would be a future danger to society. Without being able to rebut that claim with valid, truthful information about what a life sentence really meant, appellant's right to due process was violated. At least four members of the Supreme Court think Texas law "[p]erversely ... prohibits the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death." Brown, 1997 WL 333359, at 1.

The majority does not mention the Brown concurrence. Perhaps because they question whether that opinion has any precedential value.[7] This is, in fact, a good

---

[7] The denial of a writ of certiorari imports no expression of opinion upon the merits of the case, and opinions accompanying the denial of certiorari do not have the (continued...)

CHARLES DOUGLAS RABY, JR., Appellant

No. 71,938 v. Appeal from HARRIS County

THE STATE OF TEXAS

CONCURRING AND DISSENTING OPINION

I dissent to the majority's holding on points seven, eight, and nine, which complain about the trial court's refusal to inform jurors, or allow appellant to inform prospective jurors, that he would have to serve 35 calendar years before becoming eligible for parole on a life sentence for capital murder.

I continue to dissent to the majority's treatment of this issue. See, e.g., Smith v. State, 898 S.W.2d 838 (Tex.Cr.App. 1995)(plurality opinion), cert. denied, ___ U.S. ___, 116 S.Ct. 131, 133 L.Ed.2d 80 (1995); Morris v. State, 940 S.W.2d 610 (Tex.Cr.App. 1996), cert. denied, ___ U.S. ___, 117 S.Ct. 2461, ___ L.Ed.2d ___ (1997). As I discussed in some detail in my dissent to Rhoades v. State, 934 S.W.2d 113, 131-44 (Tex.Cr.App. 1996), in light of the United States Supreme Court's holding in Simmons v. South Carolina, 512 U.S. ___, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), I believe that the United States Constitution's guarantees of due process required appellant's jury be informed of the 35-year parole eligibility law.

I also note that four members of the United States Supreme Court have recently commented upon the "[p]erverse[ness]" of our death penalty scheme not letting the jury know when the defendant will become eligible for parole if he is not sentenced to death. Brown v. Texas, ___ U.S. ___, ___ S.Ct. ___, ___ L.Ed.2d ___ (1997

WL 333359). I likewise find rather perverse this Court's continued approval of keeping jurors ignorant and uninformed of such a critical legal fact when making life and death decisions as to whether the death penalty will be assessed. Capital jurors deserve to be so informed so that they can make an informed decision. Hopefully a majority of this Court will soon realize this; before the Supreme Court explicitly informs us via a myriad of our opinions being reversed.

I respectfully dissent to the majority's discussion and holding as to points seven, eight, and nine. Otherwise, I concur in the disposition of all the other points.

OVERSTREET, JUDGE

Delivered: March 4, 1998

Publish

En Banc

Price, J., joins as to points 7, 8, and 9.

5C

NO. 9407130

IN THE 248 DISTRICT

THE STATE OF TEXAS

VS. CHARLES DOUGLAS RABY

COURT OF HARRIS COUNTY, TEXAS

Change of Venue From: n/a

V2490 P0710

JUDGMENT - DEATH JUDGMENT

Judge Presiding: WOODY DENSEN

Date of Judgment: JUN 09 1994

Attorney for State: ROBERTO GUTIERREZ

Attorney for Defendant: FELIX CANTU / MICHEAL FOSHER

Offense Convicted of: CAPITAL MURDER

and the Court further found that a deadly weapon, to wit, a KNIFE was used during the commission of this offense

V1256 P0469

Degree: CAPITAL Punishment Assessed: DEATH Date Offense Committed: 10-15-1992

Charging Instrument: Indictment Plea: Not Guilty

The Defendant having been indicted in the above entitled and numbered cause for the felony offense indicated above and this cause being this day called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person with Counsel as named above, and both parties announced ready for trial.

A Jury composed of DAVID LEON GIBSON and eleven others was selected, impanelled, and sworn. The indictment was read to the Jury, and the Defendant entered a plea of not guilty thereto, after having heard the evidence submitted; and having been charged by the Court as to their duty to determine the guilt or innocence of the Defendant and having heard argument of counsels, the Jury retired in charge of the proper officer and returned into open Court on JUNE 09, 1994, the following verdict, which was received by the Court and is here entered on record upon the minutes:

"We, the Jury, find the defendant, Charles Douglas Raby, guilty of capital murder as charged in the indictment.

/s/ David Gibson
FOREPERSON OF THE JURY."

Thereupon, the Jury, in accordance with law, heard further evidence in consideration of punishment, and having been again charged by the Court, the jury retired in charge of the proper officer in consideration of punishment and returned into open Court on the JUN 17 1994 day of _____, 19____, the following verdict, which was received by the Court and is here entered of record upon the minutes:

(Special Issues/Verdict/Certification):

SPECIAL ISSUE #1 : Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant, Charles Douglas Raby, would commit criminal acts of violence that would constitute a continuing threat to society?

ANSWER: "YES.
/s/ David Gibson."
FOREPERSON

RECORDER'S MEMORANDUM:
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

000026

CRM-95 R04-11-94

SPECIAL ISSUE NO.2: Do you find from the evidence, taking into consideration all of the evidence, including the circumstances of the offense, the defendant's character and background, and the personal moral culpability of the defendant, Charles Douglas Raby, that there is a sufficient mitigating circumstances or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?

ANSWER: "NO.
/s/ David Gibson."
FOREPERSON

VERDICT: "We, the Jury, return in open court the above answers to the SPECIAL ISSUES submitted to us, and the same is our verdict in this case.
/s/ David Gibson."
FOREPERSON

It is therefore considered, ordered, and adjudged by the Court that the Defendant is guilty of the offense indicated above, a felony, as found by the verdict of the jury, and that the said Defendant committed the said offense on the date indicated above, and that he be punished as has been determined by the Jury, by death, and that Defendant be remanded to jail to await further orders of this court.

And thereupon, the said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof.

Whereupon the Court proceeded, in presence of said Defendant to pronounce sentence against him as follows, to wit, "It is the order of the Court that the Defendant named above, who has been adjudged to be guilty of the offense indicated above and whose punishment has been assessed by the verdict of the jury and the judgment of the Court at Death, shall be delivered by the Sheriff of Harris County, Texas immediately to the Director of the Institutional Division, Texas Department of Criminal Justice or any other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institutional Division in accordance with the provisions of the law governing the Texas Department of Criminal Justice, Institutional Division until a date of execution of the said Defendant is imposed by this Court after receipt in this Court of mandate of affirmance from the Court of Criminal Appeals of the State of Texas.

The said Defendant is remanded to jail until said Sheriff can obey the directions of this sentence. From which sentence an appeal is taken as a matter of law to the Court of Criminal Appeals of the State of Texas.

Signed and entered on this the _____ day of JUN 17 19__.

WD Dimmick
JUDGE 248 DISTRICT COURT
Harris County, Texas

RW 2/99

CRM-95 04-11-94

6-15-1998 Mandate of affirmance received from Court of Criminal Appeals

000027

V2490 P0711

V1250 P0470

RECORDED: VOLUME 2490 PAGE 0711 COMBINED MINUTES OF THE DISTRICT COURTS OF HARRIS COUNTY, TEXAS.

CAUSE NO. 9407130

THE STATE OF TEXAS	§	IN THE 248TH DISTRICT COURT
	§	
VS.	§	IN AND FOR
	§	
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

MOTION FOR POST-CONVICTION DNA TESTING AND FOR APPOINTMENT OF COUNSEL

I. INTRODUCTION

Charles Douglas Raby was wrongly convicted and sentenced to death for the October 15, 1992 murder of Edna Franklin, despite the fact that absolutely no physical evidence linked Mr. Raby to the crime. Notwithstanding attempted fingerprint analysis, microscopic hair analysis, and examination of Mr. Raby's and the decedent's clothes, the State's case at trial consisted solely of an involuntary, false confession and a mere scintilla of circumstantial evidence. No witness testified to seeing Mr. Raby at the scene of the murder; no murder weapon was ever found. The evidence that could have acquitted Mr. Raby was either not presented to the jury, or not developed. For example, Mr. Raby's jury never learned that police had identified, yet failed to investigate, another suspect with the motive and opportunity to commit the crime, nor that this same suspect had a prior history of violent crimes against similar elderly women. Mr. Raby maintains his innocence, and requests DNA testing because, although the state repeatedly ordered DNA testing of physical evidence found at the crime scene, *no one has ever performed that DNA testing*, even though it could positively establish the identity of Ms. Franklin's actual attacker.

Pursuant to article 64.01 *et seq.* of the Texas Code of Criminal Procedure, Mr. Raby now moves this Court to compel the State of Texas to release for DNA testing the biological material in the possession of the State during the prosecution of this case, that could establish with a high

degree of certainty the identity of the person who murdered Ms. Franklin and exclude Mr. Raby as her attacker.[1] That biological material is as follows:

(1) the decedent's fingernail clippings;

(2) a hair found clenched in the decedent's hand;

(3) a pair of blue, blood-smeared panties found near the decedent's body;

(4) the blood-soaked nightshirt the decedent was wearing at the time of her death.

II. PROCEDURAL HISTORY

Mr. Raby was convicted of capital murder on June 9, 1994, and sentenced to death on June 17, 1994. His conviction was affirmed by the Texas Court of Criminal Appeals on March 4, 1998, over the dissent of three judges.[2] On July 16, 1998, Mr. Raby filed an application for a writ of habeas corpus. This Court entered findings of fact and conclusions of law in which it concluded that some of Mr. Raby's claims should be denied on the merits, and that others were procedurally defaulted because they were or should have been raised on direct appeal.[3] The Court of Criminal Appeals adopted this Court's findings on January 31, 2001.[4]

On March 20, 2001, the United States District Court for the Southern District of Texas, Houston Division, appointed the undersigned counsel to represent Mr. Raby in proceedings under 28 U.S.C. § 2254. Mr. Raby's federal petition for a writ of habeas corpus was filed on January 30, 2002, amended on May 8, 2002, and is still pending in the Southern District of Texas. In the course of preparing Mr. Raby's federal petition, counsel for Mr. Raby have concluded that DNA testing of previously untested biological material in the possession of the State is necessary to prevent a fundamental miscarriage of justice.

---

1 TEX. CRIM. PROC. CODE ANN. art. 38.39(b) (Vernon Supp. 2001).

2 *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 1998), *cert. denied*, 526 U.S. 1003 (1998).

3 *Ex Parte Raby*, No. 9407130-A (248th Dist. Ct., Harris County, Tex., Nov. 14, 2000).

4 *Ex Parte Raby*, No. 48131-01 (Tex. Crim. App. Jan. 31, 2001).

III. THE DNA TESTING STATUTE

On April 5, 2001, Governor Perry signed a law amending article 38.39 and creating Chapter 64 of the Texas Code of Criminal Procedure. To assist the Court, Mr. Raby will briefly summarize the rights and obligations created by the legislation that governs these proceedings.

A. The State Must Preserve Certain Biological Evidence.

Article 38.39 of the Code of Criminal Procedure was amended to ensure the preservation of biological material for post-conviction DNA testing. The amendment applies to evidence that:

> (1) was in the possession of the state during the prosecution of the case; and
> (2) at the time of conviction was known to contain biological material that if subjected to scientific testing would more likely than not:
> (A) establish the identity of the person committing the offense; or
> (B) exclude a person from the group of persons who could have committed the offense.[5]

All of the evidence that Mr. Raby seeks to have tested was in the custody of the State during the prosecution of the case.[6] For the reasons described below, all of the biological evidence sought for testing could potentially establish the identity of Ms. Franklin's attacker or exclude a person from those who could have committed the offense. Consequently, the State, including the Harris County Medical Examiner's Office, HPD, and the Harris County District Attorney's Office, is obligated to preserve the evidence sought to be tested.

B. Mr. Raby Has a Right to Petition This Court for DNA Testing of Previously Untested Evidence.

Article 64.01 provides that a convicted person may petition for DNA testing of biological evidence:

---

5 TEX. CRIM. PROC. CODE ANN. art. 38.39(b) (Vernon Supp. 2001).

6 The Houston Police Department ("HPD") has recently produced to undersigned counsel an inventory ("HPD Inventory") of physical evidence collected during investigation of Ms. Franklin's murder and held in HPD's property room, which is attached as Exhibit 9. All evidence sought to be tested is included in this inventory. Please see also HPD's crime laboratory report ("Lab Report") at Raby 26, Raby 29, Raby 38, excerpts attached as Exhibit 3, which also confirms that the HPD had custody of the fingernail clippings, the hair found in Ms. Franklin's fist, and the pair of blue panties. (Undersigned counsel have Bates-labeled the Lab Report as Raby 1-Raby 42). References to the Lab Report herein will be to Bates-numbered pages.

(a) A convicted person may submit to the convicting court a motion for forensic DNA testing of evidence containing biological material. The motion must be accompanied by an affidavit, sworn to by the convicted person, containing statements of fact in support of the motion.

(b) The motion may request forensic DNA testing only of evidence described by Subsection (a) that was secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense, but:
  (1) was not previously subjected to DNA testing:
    (A) because DNA testing was:
      (i) not available; or
      (ii) available, but not technologically capable of providing probative results; or
    (B) through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing; or
  (2) although previously subjected to DNA testing, can be subjected to testing with newer testing techniques that provide a reasonable likelihood of results that are more accurate and probative than the results of the previous test.[7]

As is plainly demonstrated below in section IV, the evidence at issue in this case, through no fault of Mr. Raby, has never been subjected to DNA testing. Furthermore, there is no doubt that all evidence sought to be tested was "secured in relation to the offense that is the basis of the challenged conviction and was in the possession of the state during the trial of the offense."[8]

C. This Court Is Required to Appoint Counsel to Represent Mr. Raby in These Proceedings.

Article 64.01(c) requires this Court to appoint counsel for Mr. Raby. It provides:

> (c) A convicted person is entitled to counsel during a proceeding under this chapter. If a convicted person informs the convicting court that the person wishes to submit a motion under this chapter and if the court determines that the person is indigent, the court shall appoint counsel for the person.[9]

The only requirements for appointment of counsel under this provision are: (1) a request for

---

7 TEX. CRIM. PROC. CODE ANN. art. 64.01(a)-(b) (Vernon Supp. 2001).

8 *Id.* 64.01(b) (Vernon Supp. 2001); *see supra* at n. 6.

9 *Id.* 64.01(c) (Vernon Supp. 2001).

counsel and (2) indigence. Once a convicted person meets those requirements, appointment of counsel is a mandatory, ministerial duty.[10] In his affidavit attached to this motion,[11] Mr. Raby has averred that he wishes to submit a motion pursuant to article 64.01 and that he is indigent.[12] Mr. Raby has been incarcerated on death row since his conviction in 1994. This Court must appoint counsel to represent him in this article 38.39 proceeding.

Further, this court should appoint the undersigned counsel to represent Mr. Raby in this article 38.39 proceeding. Undersigned counsel have represented Mr. Raby since April of 2001 in his federal habeas corpus proceedings, presently before a federal district court in the Southern District of Texas. The appointment of separate counsel for this state proceeding would disrupt Mr. Raby's representation in his federal proceedings and would be grossly inefficient. As one important example, the facts at issue in this proceeding related to DNA analysis are of a complex scientific nature. These same facts arise in Mr. Raby's federal proceeding as well, and counsel have therefore worked with an expert in DNA testing for some time. Appointment of separate counsel at this date would prejudice Mr. Raby and likely cause delay in this Court. 9

D. The District Attorney Must Deliver the Biological Evidence to This Court, Or Explain in Writing Why He Cannot Do So.

Article 64.02 contains a mandatory provision requiring this Court, upon receipt of this motion, to compel the State to produce the evidence at issue, or explain why it cannot do so:

> Art. 64.02. NOTICE TO STATE; RESPONSE. On receipt of the motion, the convicting court shall:
>
> (1) provide the attorney representing the state with a copy of the motion; and
> (2) require the attorney representing the state to:

---

10 *In re Rodriguez*, 77 S.W.3d 459, 461-62 ("Conspicuously absent from article 64.01(c) is any requirement of a prima facie case of entitlement to DNA testing before the right to counsel attaches."); *Gray v. State*, 69 S.W.3d 835, 837 (Tex.App.–Waco 2002, no pet. h.).

11 Affidavit of Charles D. Raby ("Raby Aff.") at § 1, attached as Exhibit 2.

12 Affidavit of indigency, attached as Exhibit 1.

(A) deliver the evidence to the court, along with a description of the condition of the evidence; or

(B) explain in writing to the court why the state cannot deliver the evidence to the court.[13]

This language is clear: this Court *must* require the State to account for and deliver the physical evidence sought, as a preliminary step before deciding the merits of this motion.[14] Without knowing first what evidence has been preserved, and the circumstances under which it has been preserved, it is impossible to know whether the evidence is suitable for testing.[15]

Undersigned counsel have personally viewed the hair recovered from the victim's fist, the victim's fingernail clippings, and the blue panties, all of which are currently in the possession of the Harris County District Clerk's Office in a property box.[16] The nightshirt that Mrs. Franklin was wearing when she was attacked, however, is apparently missing. After repeated Open Records Act requests, HPD produced a property room inventory for Mr. Raby's case, which undersigned counsel received on Friday, September 13, 2002.[17] That inventory records that a "white print blouse" was checked out of the property room "permanent to Div," meaning Homicide Division, on April 19, 1994.[18] Several other items collected in the case, such as a tray and a purse, are listed on the inventory as released to the Homicide Division a month later, on March 25, 1994, shortly before trial in the case began.[19] Those other items, which were all admitted into evidence, are in the property box kept by the Harris County District Clerk's

---

13 TEX. CRIM. PROC. CODE ANN. art. 64.02 (Vernon Supp. 2001).

14 *See In re McBride*, 2002 WL 389450 (Tex. App.–Austin, March 14, 2002, no pet.) (acknowledging the requirement that the State formally respond to a DNA motion by either delivering the evidence or stating why it cannot, but noting lack of harm to that movant from the failure to respond).

15 Affidavit of Elizabeth Johnson, Ph.D. ("Johnson Aff.") at ¶ 17, attached as Exhibit 4.

16 Affidavit of Sarah M. Frazier ("Frazier Aff.") at ¶ 3, attached as Exhibit 10.

17 *Id.* at ¶ 4.

18 *See* HPD Inventory at 1.

19 *See id., passim.*

office.[20] But the nightshirt that Mrs. Franklin wore at the time she was killed, or "blouse" as it is listed in HPD's inventory, was never admitted into evidence, and undersigned counsel did not find it in that box.[21]

On September 19, 2002, Lt. Jett of the Homicide Division confirmed by telephone that the property room no longer possesses any physical evidence in the case.[22] The nightshirt's disappearance remains unexplained. Given the date on which the nightshirt was checked out, the nightshirt may have been sent to a laboratory for forensic testing. Undersigned counsel have attempted to obtain physical evidence inventories from the HPD crime lab and Harris County Medical Examiner's office, but these agencies have refused to produce such information.[23]

By the clear terms of the statute, the State does not have the discretion to decline to deliver the evidence to this Court. The State must deliver the evidence to this Court, or otherwise account for why it cannot. 10

E. The Standards by Which This Court Must Assess Mr. Raby's Motion for DNA Testing.

After receiving the evidence to be tested, the court must assess a request for post-conviction DNA testing according to the following standard:

> Art. 64.03. REQUIREMENTS; TESTING.
>
> (a) A convicting court may order forensic DNA testing under this chapter only if:
>
> (1) the court finds that:
>
> (A) the evidence:

---

20 Frazier Aff. at ¶ 3.

21 *Id.*

22 *Id.* at ¶ 5.

23 *Id.* at ¶ 6. Art. 64.01 imposes no burden on Mr. Raby to show that the evidence to be tested is in a condition making DNA testing possible, and has been subjected to a sufficient chain of custody. *Compare* TEX. CRIM. PRO. CODE art. 64.03(1)(A)(ii) (requiring only that *the Court find* a sufficient chain of custody) with TEX. CRIM. PRO. CODE art. 64.03(2) (requiring *the convicted person to establish* by a preponderance of the evidence that there is a reasonable probability he would not have been convicted or prosecuted if exculpatory results had been obtained).

(i) still exists and is in a condition making DNA testing possible; and

(ii) has been subjected to a chain of custody sufficient to establish that it has not been substituted, tampered with, replaced, or altered in any material respect; and

(B) identity was or is an issue in the case; and,

(2) the convicted person establishes by a preponderance of the evidence that:

(A) a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing; and

(B) the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or administration of justice.[24]

The evidence in this case exists, with one possible exception, and, so far as can be determined without actually testing it, is in a condition that would make DNA testing possible.[25] As explained more fully *infra* in Section IV, Mr. Raby has clearly satisfied the remaining prerequisites for DNA testing in this case.

F. Because Mr. Raby Can Satisfy the Preconditions For Testing Pursuant to Article 64.03(A), This Court Is Required to Order DNA Testing.

Pursuant to article 64.03(c), if a movant satisfies the prerequisites for testing, the convicting court must order DNA testing:

(c) If the convicting court finds in the affirmative the issues listed in Subsection (a)(1) and the convicted person meets the requirements of Subsection (a)(2), the court ***shall*** order that the requested forensic DNA testing be conducted. The court may order the test to be conducted by the Department of Public Safety, by a laboratory operating under a contract with the department, or, on agreement of the parties, by another laboratory.[26]

Upon receiving the results of the testing, this Court is required to hold a hearing:

Art. 64.04. FINDING. After examining the results of testing under Article 64.03, the convicting court shall hold a hearing and make a finding as to whether the

---

24 TEX. CRIM. PROC. CODE ANN. art. 64.03(a) (Vernon Supp. 2001).

25 Johnson Aff. § 17.

26 TEX. CRIM. PROC. CODE ANN. art. 64.03(c) (Vernon Supp. 2001) (emphasis added).

> results are favorable to the convicted person. For the purposes of this article, results are favorable if, had the results been available before or during the trial of the offense, it is reasonably probable that the person would not have been prosecuted or convicted.[27]

Because Mr. Raby meets all requirements for DNA testing under this statute, as demonstrated in this motion, Mr. Raby is entitled to DNA testing, followed by a hearing to examine the results of that testing.

IV. MR. RABY IS ENTITLED TO DNA TESTING

Mr. Raby seeks the following DNA testing of biological evidence in this case: (1) DNA testing by PCR methods of Ms. Franklin's fingernail clippings; (2) DNA testing by PCR methods or mitochondrial DNA testing by PCR methods of a whole hair found among other hair in Ms. Franklin's hand, previously identified (by simple microscopic comparison) as the hair of Ms. Franklin's grandson; (3) DNA testing by PCR methods of potentially blood-smeared panties found at the scene; and (4) DNA testing by PCR methods of blood found on the nightshirt Ms. Franklin was wearing at the time of her death. Mr. Raby is entitled to DNA testing pursuant to article 64.01 *et seq.* because: (1) the evidence has never been tested because testing was unavailable at trial, but in any case through no fault of Mr. Raby; (2) identity was, and remains, an issue in Mr. Raby's case; (3) there is a reasonable probability that Mr. Raby would not have been prosecuted or convicted if exculpatory results had been obtained; and (4) this request is not made to unreasonably delay the execution of sentence or administration of justice.

A. Through No Fault of Mr. Raby, the Biological Evidence at Issue Has Never Been Tested, Nor Could It Have Been.

No DNA testing has ever been performed in this case, even though homicide investigators requested such testing from HPD's crime lab.[28] Evidence that qualifies for DNA

---

27 *Id.* art. 64.04 (Vernon Supp. 2001).

28 *See* Lab Report at Raby 35 - Raby 37. We know that the lab failed to find any evidence of blood on the

testing under article 64.01 is evidence that was not previously subjected to DNA testing for one of the following reasons: (1) the test was not available; (2) the test was available, but not technologically capable of providing probative results; ***or*** (3) the evidence was not tested through no fault of the convicted person, for reasons that are of a nature such that the interests of justice require DNA testing.

1. Testing technology was unavailable or not technologically capable of providing probative results.

It is beyond dispute that mitochondrial DNA testing by PCR methods, the only DNA test suitable to test the hair shaft found in Ms. Franklin's clenched fist, was not available outside of the military at the time of Mr. Raby's trial.[29] Therefore, Mr. Raby has satisfied the requirements of article 64.01 with respect to the hair requested to be tested.

The other physical evidence at issue in this motion probably requires testing by the PCR method. The HPD crime lab did not have the capability to perform PCR testing in 1992, when the crime occurred; this type of testing was not yet widely available.[30] Although RFLP DNA testing was available, that test requires a large amount of evidence in order to get a conclusive result, probably not possible in this case.[31] According to the HPD crime lab, PCR testing became available at that facility in 1993.[32] While that was before Mr. Raby's 1994 trial, the

---

jacket, jeans, and t-shirt collected from Mr. Raby. *See id.* at Raby 33. It can only be assumed that the crime lab failed to perform DNA testing as requested either because of this lack of evidence tying Mr. Raby to the crime scene that was available for testing, or because the blood or tissue samples that did exist and could help identify Ms. Franklin's attacker, such as fingernail clippings, could not be tested by any DNA testing technology available at the time, because samples were too small. See subsection 1, below, for discussion of DNA technologies available at the time of Mr. Raby's arrest and trial.

29 Johnson Aff. ¶ 11. It is unclear from the Lab Report whether this hair's root is intact. *See* Lab Report at Raby 26. If so, it could have been analyzed through DNA testing by PCR methods.

30 *Id.* at ¶ 15.

31 *Id.*

32 Frazier Aff. at ¶ 2 (attesting to telephone conversation between Sarah M. Frazier, undersigned counsel, and Joseph Chu of Houston Police Department Crime Laboratory, July 8, 2002).

HPD crime lab did not revisit the case after its initial analysis in 1992, with one exception.[33] The lab never performed any DNA testing.

2. Alternatively, testing was practically unavailable to an indigent defendant such as Mr. Raby

Regardless of whether the HPD crime lab possessed the technological ability to perform PCR testing of the nightshirt, panties, and fingernails, this testing was not available in Harris County to an indigent criminal defendant such as Mr. Raby. Dr. Elizabeth Johnson performed DNA testing and serology analysis during her tenure at the Harris County Medical Examiner's office from 1991 to 1996.[34] At that office — which, along with the HPD lab, performs the majority of DNA testing for criminal cases brought in Harris County — Dr. Johnson cannot recall a single instance in which the State or the court paid for DNA testing at an indigent defendant's request.[35] Conversely, defendants with retained attorneys paid for their own testing by that office on several occasions.[36] It is all too clear that DNA testing was not an avenue available to Mr. Raby or his trial counsel in 1994, and Mr. Raby challenges the State to show otherwise.

3. Alternatively, the failure to test evidence was through no fault of Mr. Raby.

In this case, it is immaterial whether DNA testing techniques capable of providing probative results were available at the time of Mr. Raby's trial, because it is clear that the failure to perform DNA testing was not through any fault of Mr. Raby. At the time of his trial, Mr. Raby was not even aware of the *existence* of DNA testing, much less what DNA testing techniques were available, what those techniques could show, and that the Court might provide

---

33 *See* Homicide Report at. 2.063 (04/06/94 supplement in which elastic band on panties was examined, probably at the prosecutor's request in preparation for trial), excerpts attached as Exhibit 6,.

34 Johnson Aff. ¶ 3.

35 *Id.* at ¶ 15.

funds for the DNA testing of biological evidence on request.[37] Moreover, Mr. Raby's trial counsel did not inform Mr. Raby that Ms. Franklin's attacker may have left DNA at the crime scene, and that DNA testing could identify that DNA.[38] If Mr. Raby's trial counsel had told him of the existence of DNA tests that could be performed on the fingernail clippings, nightshirt, or any of the other evidence sought to be tested, Mr. Raby would have instructed his attorneys to attempt to order those tests in an effort to develop crucial evidence that his DNA was not present where the attacker's DNA should be found, and that *the DNA of another person was*.[39] Mr. Raby cannot be faulted for his ignorance of novel, sophisticated scientific techniques, especially in light of his attorneys' utter failure to discuss these issues with him.

B. Identity Was an Issue in Mr. Raby's Trial, and Continues to be an Issue Now

Article 64.03(c) requires the Court to order DNA testing if, assuming the other requirements of Art. 64.03 have been met, "identity ***was or is*** an issue in the case."[40] Because the statute is written in the disjunctive, the Court should find this element satisfied *either* if identity was an issue at trial *or* if identity is an issue now. In this case, identity was an issue at trial, and it remains an issue now.

Texas courts have never interpreted this provision of the DNA testing statute. This court can look to the decisions interpreting the Illinois DNA testing statute, which is structurally and substantively similar to Texas' in most regards, for some guidance.[41] The Illinois statute's identity requirement is more stringent than the Texas statute's parallel provision, requiring: "The defendant must present a prima facie case that . . . identity was the issue in the trial which

---

36 *Id.*

37 Raby Aff. ¶ 2.

38 *Id.* at ¶ 2.

39 *Id.*

40 TEX. CRIM. PROC. CODE ANN. art. 64.03(a)(1)(B) (Vernon Supp. 2001) (emphasis added).

resulted in his or her conviction . . ."[42] While the Illinois statute, enacted in 1998, requires identity to be *the* issue at trial, Texas legislators, who had the benefit of reviewing Illinois' law before enacting the Texas law in 2001, chose to require only that identity be "*an* issue" at trial, and not necessarily the only issue, or even the most hotly contested issue that led to conviction. Further, the Texas statute does not explicitly place the burden of proof on a defendant to show that identity was or is at issue – it is pointedly silent on that count.

Applying this stricter standard in *People v. Urioste*, 736 N.E.2d 706, 714 (Ill. App. 2000), the Illinois appellate court explained under what circumstances identity is *not* an issue, which should assist this Court in the instant case:

> Where a defendant contests guilt based upon self-defense, compulsion, entrapment, necessity, or a plea of insanity, identity ceases to be the issue. Insanity is like an affirmative defense in the sense that the defendant admits to the charged conduct but claims that he is not criminally responsible for that conduct because of a mental disease or defect. *See People v. Kashney*, . . . 490 N.E.2d 688, 693 (1986).[43]

Urioste demonstrates that even under Illinois' more stringent standard, identity is considered to have been an issue at trial as long as identity is not formally ceded though a plea or affirmative defense such as self-defense.

As noted below, the Texas statute explicitly holds that even a guilty plea does not preclude relief under the statute. Thus, the Texas statute is considerably broader that the Illinois statute. But even if it were not, Mr. Raby clearly satisfies the Illinois identity requirement, as interpreted in *Urioste,* because he has never raised self-defense, insanity, or any other affirmative defense in conflict with his assertion that someone else murdered Ms. Franklin.

---

41 *See* Ill. Comp. Stat. 5/116-3.

42 725 Ill. Comp. Stat. 5/116-3(b) (2002) (first enacted in 1998).

1. *The fact that police obtained a custodial statement from Mr. Raby does not preclude, as a matter of law, a finding that identity was or is an issue in the case.*

Even though the State presented a custodial statement at trial that police had obtained from Mr. Raby, identity nonetheless was an issue at Mr. Raby's trial and remains an issue now. Under Art. 64.03(b), a convicted person who pleaded guilty nonetheless may submit a motion for DNA testing, and "the convicting court is *prohibited* from finding that identity was not an issue in the case solely on the basis of that plea."[44] Under Texas law, a plea of guilty is a binding admission of all the elements of the charged offense, including—obviously—identity.[45] If a solemn confession of guilt before the Court does not itself preclude the Court from finding that identity was an issue in the trial, it follows logically that a confession of guilt to police—especially under coercive and involuntary circumstances—does not itself preclude the Court from finding that identity was an issue in the trial.

Furthermore, as described in more detail below, it is apparent that identity simply *was* an issue at trial, and *is* an issue now, despite the existence of a custodial statement. Identity was an issue at trial because both the prosecution and the defense presented evidence and/or argument to the jury on the issue of identity. Moreover, identity is an issue now because Mr. Raby seeks to present claims in habeas corpus that he is actually innocent, but was convicted due to the ineffective assistance of his trial counsel in failing to develop and present evidence to the Court and jury that his confession was involuntary, and that somebody else committed the crime.

2. *Counsel for both the prosecution and defense presented evidence on the issue of identity at Mr. Raby's trial.*

Despite the existence of a custodial statement, counsel for both the prosecution and the

---

43 *Urioste*, 736 N.E.2d at 714.

44 *In re Dimas*, No. 04-02-00398-CV, 2002 WL 1758241 at *1 (Tex. App.–San Antonio July 31, 2002, orig. proceeding).

defense fully litigated the issue of identity at trial.[46] The State introduced testimony from several witnesses the sole relevance of which was to establish that Mr. Raby was the person who stabbed Ms. Franklin. For instance, Ms. Shirley Gunn testified that she saw Mr. Raby in the afternoon of October 15, 1992, in possession of a pocketknife with a two- to three-inch blade.[47] The medical examiner testified, however, that several of the stab wounds to Ms. Franklin were 4" deep.[48] The State spent substantial time at trial presenting testimony that a pocketknife with a 2" blade could cause a 4" wound, by depressing the body at the point of impact.[49] (The medical examiner also testified, however, that he found no hiltmarks on Ms. Franklin's body, and that hiltmarks are clues that the knife penetrates all the way into a body).[50] The State's evidence attempting to show that Ms. Franklin's wounds could have been caused by the knife seen in Mr. Raby's possession was presented for the sole purpose of establishing that Mr. Raby was Ms. Franklin's attacker. 13

The State also presented evidence from two witnesses who testified that they saw a man who resembled Mr. Raby near Ms. Franklin's house on the day of the crime. Mary Alice Scott testified that she saw Mr. Raby leaving her house—right around the block from Ms. Franklin's house—just before dark on the evening of October 15.[51] Mr. Raby's trial counsel cross-examined Ms. Scott about how well she saw the person she had identified as Mr. Raby, and she

---

45 *See, e.g., Wilkerson v. State*, 736 S.W.2d 656, 658 (Tex. Cr. App. 1987).

46 Unfortunately for Mr. Raby, his attorneys did not litigate the issue as vigorously as the prosecution did, or as vigorously as they could and should have. One of the purposes of this motion is to develop additional evidence of prejudice flowing from the ineffectiveness of Mr. Raby's trial counsel in failing to develop evidence that someone other than Mr. Raby killed Ms. Franklin.

47 S.F. 28:293-94.

48 S.F. 27:36.

49 S.F. 27:35-36.

50 *Id.*

51 S.F. 28:304-05.

responded that she saw the back of his head at dusk.[52] Similarly, the State called Martin Doyle, who testified that he saw a man who resembled Mr. Raby jump the fence of a house behind Ms. Franklin's house around 8:00 p.m. on October 15.[53] The sole relevance of this evidence was to attempt to establish that Mr. Raby was in the vicinity of Ms. Franklin's house on the evening of the crime. NO. HE DESCRIBES SOMEONE BIGGER.

The State also attempted to develop a motive to support its case against Mr. Raby. One of Ms. Franklin's grandsons was asked to describe an occasion on which Ms. Franklin allegedly angered Mr. Raby by asking him to leave her house, supposedly supporting the notion that Mr. Raby afterwards wanted Ms. Franklin dead.[54]

Admittedly, identity was not the *focus* of the State's case or the defense's case at trial. Identity was *an* issue at trial, however, and that is all that is required by Art. 64.03(a)(1)(B). Moreover, identity would have been a much more significant issue at trial—indeed, the central issue—had Mr. Raby's trial counsel rendered effective assistance by developing evidence to show that his confession was involuntary, and that someone else committed the crime.

3. Mr. Raby has presented claims in habeas corpus that he is actually innocent but was convicted due to the ineffective assistance of trial counsel.

Mr. Raby has asserted his innocence in his federal petition for a writ of habeas corpus, and presented claims that the jury's guilty verdict resulted not from overwhelming evidence of guilt, but from egregious ineffective assistance of counsel.[55] Because his claims were not raised in his initial state application for habeas corpus, those claims may be procedurally barred. Mr.

---

52 S.F. 28:307-12.

53 S.F. 28:314-19.

54 S.F. 27:161-63.

55 *See* First Amended Petition for Writ of Habeas Corpus ("First Am. Petition"), filed in the U.S. District Court for the Southern District of Texas on May 8, 2002, attached as Exhibit. 11 (without exhibits).

Raby can overcome any procedural bar, however—in both state and federal court—by establishing at any point in his appeals his "actual innocence."[56]

Because Mr. Raby's actual guilt or innocence is an issue in his habeas corpus proceedings, identity is *now* an issue in the case.

Below are brief descriptions of evidence probative of Mr. Raby's innocence that was available, but not developed, at trial. Because Mr. Raby bases his claims of ineffective counsel, as well as possible future claims of actual innocence, on these grounds among others, all of this evidence demonstrates that identity remains an issue in Mr. Raby's case.[57]

i. Despite his statement to police, which was erroneously admitted into evidence, Mr. Raby has no memory of this crime.

Mr. Raby's trial lawyers (and previous appellate lawyers) have consistently assumed his guilt. His trial lawyers failed to ask Mr. Raby to relate his actions and whereabouts on the day of the murder.[58] Because they did not ask, they did not learn the truth: that Mr. Raby remembers walking around that day in the neighborhood where he was living at the time, which was also Ms. Franklin's neighborhood, and becoming increasingly intoxicated, *but he has no memory of seeing Ms. Franklin that day, much less attacking her.*[59] Late that night, as he headed out of the neighborhood to his mother's house, Mr. Raby experienced alcohol-induced memory loss, after which he remembers waking up by the side of the highway.[60] Mr. Raby had no desire to harm Ms. Franklin, and does not believe that he attacked or killed her.[61] Mr. Raby's federal petition

---

56 *See* 28 U.S.C. § 2254(e)(2)(B); TEX. CRIM. PROC. CODE art. 11.071, sec. 5(a)(2).

57 This section does not attempt to lay out all Mr. Raby's points regarding his actual innocence claim, as the sole purpose of this section is merely to show that identity is now at issue in the case. For a comprehensive discussion of Mr. Raby's innocence and wrongful conviction, please see his First Amended Petition for Writ of Habeas Corpus, attached as at Exhibit 11.

58 *See* Raby Aff. at ¶ 3.

59 *Id.*

60 *Id.*

61 *Id.*

fully details Mr. Raby's memory of the day of the murder and the ineffective assistance of counsel that failed to develop these facts earlier, despite their obvious importance in conducting a proper defense at trial, and despite the fact that they cast in doubt the very identity of Ms. Franklin's killer.

ii. Trial counsel unreasonably failed to develop evidence to show that Mr. Raby's custodial statement was involuntary and therefore unreliable, or that Mr. Raby asserted but was denied his right to counsel during interrogation.

Trial counsel moved to suppress Mr. Raby's confession on the grounds that his waiver of his right to remain silent was not voluntary. Trial counsel, however, only presented evidence that Mr. Raby waived his right to remain silent because police had threatened to arrest his girlfriend.[62] Additional facts that trial counsel should have presented at the suppression hearing were that: (1) Mr. Raby unequivocally requested a lawyer as he was arrested, but his request was ignored;[63] (2) Mr. Raby was highly intoxicated on codeine at the time he gave his statement to police; (3) Mr. Raby's girlfriend was threatened with arrest during his interrogation, while she was detained at the police station with her six-week old child; and (4) Mr. Raby did not understand that his Fifth Amendment right to remain silent included the right not to have his silence used against him at trial.[64] In particular, a forensic psychologist would have testified that Mr. Raby did not (and still does not) understand that his silence could not be used against him at trial. A waiver of the Fifth Amendment privilege against self-incrimination is valid only if the waiver was "made with a full awareness of both the *nature of the right being abandoned and the consequences of the decision to abandon it.*"[65] Trial counsel did not discover these facts before

---

62 S.F. 25:68-73.

63 *See* Raby Aff. at ¶ 5.

64 *See id.* at ¶ 7.

65 *Moran v. Burbine*, 106 S. Ct. 1135, 1140-41 (1986) (emphasis added).

the suppression hearing because they did not consult with Mr. Raby, and as a result trial counsel failed to develop substantial evidence that Mr. Raby's confession was not only coerced but also unknowing and unintelligent.

iii. Trial counsel unreasonably failed to develop evidence from an expert pathologist that Mr. Raby's knife could not have caused Ms. Franklin's wounds.

As noted above, at trial the State argued that Mr. Raby stabbed Ms. Franklin with a pocketknife having a two-inch blade, even though some of Ms. Franklin's wounds were *four inches deep*. The State attempted to explain this contradiction with testimony from the medical examiner that a two-inch blade could cause a four-inch wound by depressing the flesh around the wound, but the medical examiner equivocated about whether a short blade could cause such wounds without leaving hiltmarks.[66] Testimony from an expert pathologist, however, would have demonstrated that Mr. Raby's small pocketknife likely would *not* have caused Ms. Franklin's wounds without leaving hiltmarks,[67] which could have caused the jury to have reasonable doubts about whether Mr. Raby committed the crime.

iv. Trial counsel unreasonably failed to develop evidence to show that an extremely violent friend of Ms. Franklin's grandsons, Edward Bangs, was living in Ms. Franklin's home at the time of the crime.

Edward Bangs was identified in the homicide report as a suspect early in the police investigation, because he had been painting the Franklin house in the weeks before the crime.[68] Trial counsel, however, did not investigate anything about Bangs, including Bangs' whereabouts and whether Bangs had access to the Franklin house at the time of the crime. Testimony from various witnesses would have established that Bangs was living in the Franklin house at the time

---

66 S.F. 27:36.

67 *See* Affidavit of Paul B. Radelat, M.D. ("Radelat Aff.") at ¶ 16, attached as Exhibit 7.

68 *See* Homicide Report at pp. 2.017, 2.021.

of the crime. In addition, Bangs had a considerable criminal history that included a theft-motivated attack on an elderly woman acquaintance.[69] This evidence could have caused the jury to have reasonable doubts about whether Mr. Raby committed the crime, and about whether Mr. Raby had consent to enter the Franklin house at the time of the crime (negating the underlying offense of burglary).

C. There Is A Reasonable Probability That Mr. Raby Would Not Have Been Prosecuted Or Convicted If Exculpatory Results Had Been Obtained

Mr. Raby's right to DNA testing requires a finding that "a reasonable probability exists that [Mr. Raby] would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing."[70] The Texas Court of Criminal Appeals recently interpreted this provision in the decision *Kutzner v. State*, 75 S.W.3d 427, 439 (Tex. Crim. App. 2002). Five judges joined in a majority opinion that held that this clause requires more than a finding that exculpatory DNA results would have changed the outcome in the defendant's case. Relying on legislative history, the majority held that this standard required a finding that exculpatory results would prove actual innocence.[71]

Applying that rule, the Court considered the DNA testing Kutzner requested. Kutzner had been convicted of strangling a woman by tying a plastic tie wrap around her neck, as well as her ankles, while her wrists were tied with red electrical wire.[72] She was found in her real estate business office.[73] Kutzner was linked to that crime scene through substantial physical evidence.

---

69 *See* Bangs criminal record, attached as Exhibit 5.

70 TEX. CRIM. PROC. CODE ANN. art. 64.03(a)(2)(A).

71 *Kutzner*, 75 S.W.3d at 438-39. Four justices concurred in the result. Of these, Justice Keasler wrote a concurring opinion, joined by Justice Johnson, disagreeing with the majority's interpretation of this phrase as requiring proof of actual innocence, arguing, "The majority disregards the plain language of Art. 64.03 and instead relies on the legislative history. But that legislative history is not even relevant when the statute's plain language is clear, as it is here." *Id.* at 443.

72 *Id.* at 436.

73 *Id.*

Red electrical wire was found in his home and his truck.[74] Plastic tie wraps were found in his garage, driveway, and truck.[75] Tin snips found in his truck were determined to be of the type that had cut the tie wraps.[76] In addition, Kutzner had been convicted of a second murder "strikingly similar in many ways" to the case in which he sought DNA testing, which conviction was supported by substantial evidence.[77] Kutzner sought DNA testing of fingernail scrapings from the victim, a strand of white hair recovered from the tie wrap around the victim's neck, and a small black hair recovered from a piece of cellophane on the victim's body.[78] The fingernail scrapings to be tested did not include blood.[79] The State argued that, in light of the evidence against Kutzner, which already linked him to the scene, DNA results would only be significant if the DNA matched Kutzner, "since an accidental scratch could put someone's DNA under the victim's fingernails."[80] Similarly, the State argued that the results from the hairs would only be significant if they matched Kutzner's, "because the hairs were found in a common area of a real estate office and anyone's hair could be on the floor."[81] Reviewing the circumstances surrounding Kutzner's motion for DNA testing, the Court concluded that the DNA testing Kutzner requested could not prove his innocence; it could at most "merely muddy the waters" of the State's case against Kutzner.[82]

Indeed, the evidence Kutzner wished to have tested would have suggested at most who had contact with the victim, or who had frequented the business office. No permutation of

---

74 *Id.*

75 *Id.*

76 *Id.*

77 *Id.*

78 *Id.*

79 *Id.* at 441.

80 *Id.* at 436.

81 *Id.* at 437.

82 *Id.* at 439. The court's reference to "muddying the waters" relies on a quote from legislative history. *See* House Research Organization, Bill Analysis of SB 3 at 6, 77th Leg., R.S. (March 21, 2001).

exculpatory DNA results in that case could have yielded probative evidence as to the identity of the *attacker*. While DNA testing can identify individual skin cells under the victim's nails even in the absence of blood, under the circumstances in *Kutzner*, possible innocent explanations existed for why another's skin cells would have been under the victim's nails.[83] Similarly, hairs found loosely at a public scene could have shown that a person was at the scene, but could not have connected that person any more specifically to the crime.[84]

That impediment to relief in *Kutzner* is absent here: in Mr. Raby's case, if DNA testing yields exculpatory results, they could potentially exclude him as Ms. Franklin's attacker. They could even conclusively establish the identity of the attacker. In other words, DNA testing could prove Mr. Raby's innocence.

Mr. Raby has asked for DNA testing of Ms. Franklin's fingernail clippings (not scrapings, as in *Kutzner*). There is evidence to suggest that more than one person's blood may be under the fingernails - not just the victim's blood, but the attacker's. The homicide report in this case noted, "The Complainant's fingernails are long and there is blood *caked* underneath the nails ... ."[85] All ten nails were clipped off during the homicide investigation and subjected to blood-type testing. Two samples were tested, each representing one hand: one showed consistent results of blood type AB, while the other revealed B-type activity.[86] Ms. Franklin's blood type was B,[87] while Mr. Raby's is type O,[88] which means that his blood lacks both the A and B blood group substances.[89] The possible presence of type A blood group substance is a

---

83 *See Kutzner*, 75 S.W.3d at 437; Johnson Aff. ¶ 9.

84 *See Kutzner*, 75 S.W.3d at 437.

85 Homicide Report at 2.013 (emphasis added).

86 *See* Lab Report at Raby 32.

87 Autopsy Report, excerpt attached as Exhibit 8.

88 Lab Report at Raby 43.

89 Johnson Aff. ¶ 8.

mystery. While the lab technician performing this blood typing deemed it inconclusive, the blood typing could indicate the presence of blood *foreign both to the victim and to Mr. Raby.*[90]

A second indicator suggests that these fingernail scrapings may be caked in more than one person's blood. All evidence from the crime scene, including the defensive wounds and bruises on the victim's body and the contusions on her head, indicates that Ms. Franklin fought her attacker.[91] She likely clawed at her attacker's forearms while held from behind, and may have broken the attacker's skin as she did so.[92] In addition, in stabbing cases, an assailant often cuts himself during the assault.[93] For these reasons, it is likely that the substantial blood and debris underneath Ms. Franklin's fingernails amy contain DNA from her attacker, as well as her own.[94] In that case, even if DNA testing revealed more than one person's DNA attached to a fingernail, DNA testing could still exclude Mr. Raby, and it could still inculpate a third person.[95] If DNA testing reveals DNA that is neither Ms. Franklin's nor Mr. Raby's, this would be probative evidence that he was not her attacker.[96]

There are three additional reasons why fingernail evidence in this case could exonerate Mr. Raby, unlike in the *Kutzner* case. First, unlike the decedent in *Kutzner*, Ms. Franklin was an elderly woman who had considerable trouble walking and rarely left the house.[97] She kept to herself in her bedroom in the back of the house, watching television, and even her grandsons, who lived with her, left her to her own devices much of the time.[98] Ms. Franklin did not have

---

90 *Id.* ¶ 8

91 S.R. 27:43; Radelat Aff. ¶ 15; Johnson Aff. ¶ 7.

92 Radelat Aff. ¶ 15.

93 Johnson Aff. ¶ 13.

94 *Id.* ¶ 7, 13.

95 *Id.* ¶ 12.

96 *Id.* ¶ 9.

97 S.F. 27:79-80.

98 S.F. 27:146.

frequent or intimate contact with anyone other than her grandsons and perhaps one of her daughters. Certainly the "accidental scratch" proposed by the State in *Kutzner* as a possible innocent explanation for third party's skin cells under the victim's nails is less likely here: Ms. Franklin had very little physical interaction with other human beings.[99]

Second, fingernail clippings, unlike mere scrapings, could contain chunks of skin cells whose presence could be explained only by her attempts to defend herself.[100] DNA tests on these clumps of skin would be highly probative of the identity of Mrs. Franklin's attacker.[101] Third, and perhaps most important, if DNA testing reveals the same person's DNA under two or more nails, especially from different hands, and that DNA is not Ms. Franklin's or Mr. Raby's, then that result is indicative that someone other than Mr. Raby attacked the decedent.[102]

Mr. Raby also seeks DNA testing of a hair found clenched in Ms. Franklin's right fist. This hair was identified prior to trial as belonging to Ms. Franklin's grandson, Eric Benge. The hair was identified through "microscopic hair analysis;" in other words, a scientist closely examined the hair through a microscope for similarities to Mr. Benge's hair.[103] This method is subject to considerable human error and judgment and is inferior to DNA testing.[104] Although at trial the State attempted to explain away this hair evidence as hair of household members that Ms. Franklin likely picked up off the floor, that explanation would evaporate if the hair belonged to a nonmember of the household, *or if the hair DNA matched the DNA under Ms. Franklin's nails*. Unlike in *Kutzner*, the scene of this crime was not a public business, but a private home, and a hair found on Ms. Franklin's body is accordingly more probative of the identity of Ms.

---

99 *Id.*
100 Johnson Aff. ¶ 9
101 *Id.*.
102 *Id.*
103 *Id.* ¶ 10.

Franklin's attacker than were the hairs at issue in *Kutzner*.

Mr. Raby also seeks to test blue panties found near Ms. Franklin's body. The homicide report described these, saying that they "appeared to have blood smeared on them."[105] Evidence at the crime scene indicates that the attacker did wipe his hands before leaving the house, because no blood stains were found on any doorknobs or windows, including the back door through which the attacker is thought to have exited.[106] The blood on the panties could be the attacker's if he cut himself during the attack, and then used the panties to wipe his hands, or drops of blood fell on the panties.[107] DNA testing can detect DNA of multiple individuals that has been mixed, and can be very definitive in eliminating someone as a donor, even in a mixed sample.[108] Again, if blood other than Ms. Franklin's or Mr. Raby's is found on the panties, that evidence, standing alone, would be probative evidence of the identity of her attacker.[109] It would be even more probative if this blood matches the blood found under Ms. Franklin's nails or the hair found in her fist.[110]

Finally, Mr. Raby's counsel have never been given access to the nightshirt Ms. Franklin was wearing when she was killed. The nightshirt would have been stained extensively with her blood. Stains that are not obviously associated with the stab wound could indicate the presence of Ms. Franklin's attacker's blood,[111] however, and Mr. Raby seeks access to that nightshirt so that it can be determined whether any stains on this item are likely Ms. Franklin's attacker's, so that they may be tested. Any blood found on this nightshirt that is not Ms. Franklin's could well

---

104 *Id.* ¶ 10.

105 Homicide Report at 2.025.

106 *See id.* at 2.011.

107 Johnson Aff. ¶ 12.

108 *Id.*

109 *Id.*

110 *Id.*

indicate the attacker's identity.[112]

Each of these four items of evidence may provide probative evidence of the identity of Ms. Franklin's killer. Standing alone, three of these items, the fingernail clippings, panties, and nightshirt, each has the potential to exonerate Mr. Raby. But if matching DNA that is not Ms. Franklin's or Mr. Raby's is found from more than one of these items, that would be extremely indicative that it was someone other than Mr. Raby who attacked and killed Ms. Franklin.[113] Because two or more DNA samples from different types of evidence may match, DNA testing has the potential to identify the DNA of Ms. Franklin's attacker with near absolute certainty.

In sum, DNA testing in this case has the potential to put aside all reasonable doubt as to Ms. Franklin's killer, and to prove Mr. Raby's innocence. Because of the nature of DNA analysis, we can never know for sure whether testing will provide this kind of conclusive result until we attempt it. Because the DNA testing Mr. Raby seeks has the undeniable potential to prove Mr. Raby innocent, Mr. Raby is entitled to pursue that testing.

D. Mr. Raby Does Not Seek DNA Testing In Order To Delay The Execution Of His Sentence

Article 64.03(a)(2)(B) provides that DNA testing may not be permitted under the statute if the request for the DNA testing is made "to unreasonably delay the execution of sentence or administration of justice." This is patently not the case here. Mr. Raby does not yet have an execution date, as he is currently pursuing federal habeas corpus review of his conviction. Those federal proceedings are in district court, with Fifth Circuit and U.S. Supreme Court appeals to follow if his petition is denied. Mr. Raby did not move for DNA testing earlier for three important reasons: (1) the DNA statute was enacted only last year; (2) until last year, Mr. Raby

---

111 *Id.* ¶ 12.

112 *Id.* ¶ 13.

did not have counsel willing to investigate the crime, his trial, and his prior appeals; and (3) undersigned counsel did not learn what physical evidence police had collected in this case, and therefore what evidence was available for testing, until a little over a month ago. In the course of performing the investigation in this case that should have been performed before Mr. Raby's trial, undersigned counsel came to the realization that DNA testing had not been performed, but was necessary, particularly in light of the lack of any physical evidence linking Mr. Raby to the scene of the crime and the unreliability of his confession. In contrast, the Court of Criminal Appeals in *Kutzner* affirmed the trial court's finding of intent to reasonably delay where Kutzner moved for testing a mere nine days before his scheduled execution date, after all other avenues of relief had been exhausted.[114]

V. CONCLUSION

This biological material Mr. Raby seeks to have tested is potentially the only direct evidence of who killed Ms. Franklin. Mr. Raby has satisfied every requirement the DNA statute mandates, and he is entitled to DNA testing as a matter of law.

VI. PRAYER

Mr. Raby requests that this Court appoint undersigned counsel to represent him for purposes of proceedings related to this motion for DNA testing. Mr. Raby further requests that the Harris County District Attorney be ordered to deliver to this Court the following biological material collected in connection with the death of Ms. Edna Franklin, or to explain in writing why the District Attorney cannot deliver the evidence to the Court:

(1) fingernail clippings of Ms. Franklin;

(2) hairs found in Ms. Franklin's fist;

---

113 *Id.* ¶ 14.

(3) blue ladies' panties; and

(4) clothes worn by Ms. Franklin at the time of her death.

Finally, Mr. Raby requests that this Court grant his motion for DNA testing and order the above biological evidence to be released to a laboratory mutually agreed upon by the parties for DNA testing. In the alternative, Mr. Raby requests a hearing to be held on this motion.

Respectfully submitted,

Michael W. Perrin
Texas Bar No. 15795700
Tracey M. Robertson
Texas Bar No. 00792805
Kevin D. Mohr
Texas Bar No. 24002623
Sarah M. Frazier
Texas Bar No. 24027320
KING & SPALDING
1100 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 751-3200
(713) 751-3290 - Fax

ATTORNEYS FOR CHARLES D. RABY

---

114 *Kutzner*, 75 S.W.3d at 429.

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing to be served on counsel for all parties to this action by U. S. certified mail, return receipt requested to:

Chuck Rosenthal
Harris County District Attorney
1201 Franklin Avenue, Suite 600
Houston, TX 77002

Dated: November 18, 2002
Houston, Texas

Sarah M. Frazier

CAUSE NO. 9407130

THE STATE OF TEXAS	§	**IN THE 248TH DISTRICT COURT**
	§	
VS.	§	**IN AND FOR**
	§	
CHARLES DOUGLAS RABY	§	**HARRIS COUNTY, TEXAS**

ORDER

This Court, having considered movant Charles D. Raby's motion for DNA testing and appointment of counsel, and all arguments of Counsel,

ORDERS that Michael W. Perrin, Tracey M. Robertson, Kevin D. Mohr, and Sarah M. Frazier, all of the law firm of King & Spalding, are hereby appointed as counsel for purposes of proceedings pursuant to article 64.01 *et seq.* of the Texas Code of Criminal Procedure. This Court further

ORDERS the Harris County District Attorney to deliver to this Court the following biological material collected in connection with the death of Ms. Edna Franklin, or to explain in writing why the District Attorney cannot deliver the evidence to the Court:

(1) fingernail clippings of Ms. Franklin;

(2) hairs found in Ms. Franklin's fist;

(3) blue ladies' panties; and

(4) clothes worn by Ms. Franklin at the time of her death.

This Court further ORDERS that the motion for DNA testing is GRANTED, and the above biological evidence is to be released to a laboratory mutually agreed upon by the parties for DNA testing consistent with the before mentioned motion.

SIGNED this the _____ day of _____, 2002.

_____

JUDGE PRESIDING

CAUSE NO. 9407130

THE STATE OF TEXAS	§	IN THE 248TH DISTRICT COURT
VS	§	IN AND FOR
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

TABLE OF EXHIBITS
TO MOTION FOR POST-CONVICTION DNA TESTING
AND FOR APPOINTMENT OF COUNSEL

Exhibit No.	Description
1	Affidavit of Indigency
2	Affidavit of Charles D. Raby
3	Houston Police Department's Crime Laboratory Report (excerpts)
4	Affidavit of Elizabeth Johnson, Ph.D.
5	Edward Bangs' Criminal Record (excerpts)
6	Houston Police Department's Homicide Report (excerpts)
7	Affidavit of Paul B. Radelat, M.D.
8	Office of the Medical Examiner of Harris County Autopsy Report of Edna Mae Franklin (excerpt)
9	Houston Police Department Property Room Inventory
10	Affidavit of Sarah M. Frazier
11	First Amended Petition for Writ of Habeas Corpus with Affidavit In Support

CAUSE NO. 9407130

THE STATE OF TEXAS	§	IN THE 248TH DISTRICT
	§	COURT
	§	
VS.	§	IN AND FOR
	§	
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

INDIGENCY AFFIDAVIT OF CHARLES D. RABY

County of Polk §

State of Texas §

1. My name is Charles D. Raby. I am a resident of Polk County, Texas. I am over the age of eighteen and I am competent to make this affidavit. All the facts stated here are true and correct and within my personal knowledge.

2. I am seeking DNA testing of physical evidence collected in my capital case pursuant to Article 64.01 of the Texas Code of Criminal Procedure.

3. I am financially unable to employ counsel to represent me for the purposes of this motion and related proceedings.

4. I presently reside at the Polunsky Unit of the Texas Department of Criminal Justice correctional facility at 1322 Regena, Houston, Harris County, Texas 77039. I am 32 years old and was born on March 22, 1970. I have no regular income. I sometimes receive small gifts of money from friends and relatives. ~~Within the last 12 months, these gifts have totaled $ _____, for an average of about $ _____ a month.~~

5. Within the last 12 months, I have not received any other income, whether in the form of rent payments, interest, dividends, pensions, annuities, life insurance payments, inheritance, or income from business. I do not own any real estate, stocks, bonds, notes, automobiles, or other valuable property, excluding household furnishings and clothes.

6. I have money in a prison account. At present, that account holds $ 420.70.

Under the pain and penalty of perjury, I swear that the above is true and correct to the best of my knowledge. I give this statement of my own free will.

Charles D. Raby

SWORN TO and SUBSCRIBED before me on this the 14th day of October, 2002, to certify which witness hereof my hand and seal of office.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

RONALD M. BUSH
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires 05-14-2006

My Commission Expires: 5-14-2006

CSINIB02/CINIB02 TEXAS DEPARTMENT OF CRIMINAL JUSTICE 10/14/02
TL49/RBU0034 IN-FORMA-PAUPERIS DATA 10:40:13
TDCJ#: 00999109 SID#: 04129425 LOCATION: POLUNSKY INDIGENT DTE: 00/00/00
NAME: RABY, CHARLES DOUGLAS BEGINNING PERIOD: 04/01/02
PREVIOUS TDCJ NUMBERS: 00550664
CURRENT BAL: 420.70 TOT HOLD AMT: 0.00 3MTH TOT DEP: 339.85
6MTH DEP: 1,044.85 6MTH AVG BAL: 422.63 6MTH AVG DEP: 174.14

MONTH	HIGHEST BALANCE	TOTAL DEPOSITS	MONTH	HIGHEST BALANCE	TOTAL DEPOSITS
09/02	462.50	127.85	06/02	558.45	125.00
08/02	532.25	50.00	05/02	533.55	320.00
07/02	564.20	162.00	04/02	385.89	260.00

PROCESS DATE HOLD AMOUNT HOLD DESCRIPTION

STATE OF TEXAS COUNTY OF Polk
ON THIS THE 14th DAY OF October 2002, I CERTIFY THAT THIS DOCUMENT IS A TRUE, COMPLETE, AND UNALTERED COPY MADE BY ME OF INFORMATION CONTAINED IN THE COMPUTER DATABASE REGARDING THE OFFENDER'S ACCOUNT. NP SIG:
PF1-HELP PF3-END ENTER NEXT TDCJ NUMBER: _____ OR SID NUMBER: _____

Ronald M. Lynch
Notary Public

CAUSE NO. 9407130

THE STATE OF TEXAS	§	IN THE 248TH DISTRICT
	§	COURT
	§	
VS.	§	IN AND FOR
	§	
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

AFFIDAVIT OF CHARLES D. RABY

County of Polk §

State of Texas §

My name is Charles D. Raby. I am a resident of Polk County, Texas. I am over the age of eighteen and I am competent to make this affidavit. All the facts stated here are within my personal knowledge.

1. I am seeking DNA testing of physical evidence collected in my capital case pursuant to Article 64.01 of the Texas Code of Criminal Procedure. I am not asking for this testing because I want to unreasonably delay my execution. I want this DNA testing to be performed because I want the truth to come out.

2. At the time of my trial, I was not even aware that DNA testing existed. I certainly did not know what DNA testing techniques were available, or what those techniques could show. I did not know of any chance that the Court might pay for DNA testing if my lawyers requested it. My lawyers did not tell me anything about DNA testing. They certainly did not tell me that there was a possibility that the attacker's DNA might have been left on various objects at the crime scene and that DNA testing could identify whose DNA that was. If they had told me that DNA tests could be performed on the fingernail clippings, nightshirt, panties or hair, I would have asked my lawyers to try to have that evidence tested, to show that my DNA was not present, but someone else's was. But no DNA testing was performed in my case.

3. Identity was an issue at my trial. For instance, the prosecutor called witnesses who claimed to see me in Ms. Franklin's neighborhood that afternoon, and he also tried to show that I had a motive to kill Ms. Franklin. My lawyers tried to cross-examine some of that evidence. Identity is still the issue now. I have no memory of seeing Ms. Franklin on the day that she was killed. I had a lot to drink that night, and late in the evening after I headed out of Ms. Franklin's neighborhood to my mother's house, I must have passed out, because I woke up by the side of the highway. But I don't believe that I attacked her, and I never had anything against her. I don't think my attorneys at trial ever learned that

I don't remember committing this crime, because they never asked. It did not come out at trial. Although my trial attorneys did not make identity as much of an issue as they should have, identity is an issue now because I don't believe that I killed Ms. Franklin, and my innocence is one of the grounds for my federal habeas petition.

4. When I was arrested, I had just taken a handful of Tylenol 3 pills with codeine - probably between five and eight pills. I got them from my girlfriend, Merry's purse just before the police arrived. I was feeling intoxicated on the pills by the time I got to the station. Once I got there, during interrogation, I kept falling asleep. Then later on during the interrogation, as the pills wore off, I felt really agitated. That never came out at my suppression hearing.

5. While I was being arrested, I asked a police officer for a lawyer. A few other police officers heard this. The officer said, "We will talk about all of that later. We are fixing to go downtown right now." I told one of my trial lawyers about this, but it never came up at my suppression hearing.

6. In the car on the way to the police station, I wanted to know where the police officers were taking Merry. The police officer who was driving told me that they might charge Merry with aiding and abetting, but probably they would just take her home. Sometime during my interrogation at the police station, I found out that the police had taken Merry and her six-week old baby to the station. I wanted to see Merry and make sure that she was all right. I was worried she was going to be charged. At one point the officer interrogating me said that Merry broke the law by not telling the police where I was. He said that she could get in some trouble. He didn't say "aiding and abetting," but I understood what he was talking about. The officer also said that if Merry were arrested, they could hold on to her baby there in the child ward. I was afraid her baby would end up in foster care like I did. I kept saying, "I want to see her," but I was not allowed to see Merry until I signed a statement. I just agreed to what the officer was saying that I did, and he typed out a statement that I signed but never read.

7. On top of worrying about Merry if I didn't confess to something, I didn't understand that I was about to get charged with capital murder. I thought I was facing eight to ten years in prison at most - I knew people who served that amount of time for killing a person. Also, I figured that if I didn't cooperate with them, then I was going to get a longer sentence or the judge would hold it against me somehow.

8. At trial, the prosecutor tried to show that a hair that was found in Ms. Franklin's and was not mine had an innocent explanation. A witness matched it to Ms. Franklin's grandson by comparing the hairs under a microscope. I believe that if this hair were DNA-tested, it would not match Ms. Franklin's grandson or me, because the hair belongs to the true attacker.

9. At trial, the prosecutor showed the jury a pair of panties with bloodstains that was found at the crime scene. I believe that if this pair of panties were DNA-tested, the bloodstains

would reveal DNA in addition to Ms. Franklin's that is not mine.

10. The prosecutor introduced into evidence Ms. Franklin's fingernail clippings. I believe that DNA testing of these would reveal DNA in addition to Ms. Franklin's that is not mine.

11. At trial, the prosecutor had access to the nightshirt that Ms. Franklin was wearing when she was killed, but he did not introduce it into evidence. I believe that DNA testing of this bloodstained nightshirt would reveal DNA in addition to Ms. Franklin's that is not mine.

12. If the Court grants my motion for DNA testing, I do not believe that my DNA will not be found on any of the physical evidence. The State has never argued that more than one person attacked and killed Ms. Franklin, and there has never been any evidence of that. If the tests find someone else's DNA on this evidence, it will prove once and for all that I never killed or assaulted Ms. Franklin.

Under the pain and penalty of perjury, I swear that the above is true and correct to the best of my knowledge. I give this statement of my own free will.

Charles D. Raby

SWORN TO and SUBSCRIBED before me on this the 14th day of October, 2002, to certify which witness hereof my hand and seal of office.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

RONALD M. BUSH
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires 05-14-2006

My Commission Expires: 5-14-2006

CRIMINALISTIC EXAMINATION SHEET

LAB. # 92-10378 DATE 16 October 92 ANALYST RH

Description: one ziploc bag & one piece of paper + hairs from comb's right hand

Origin:

Sgt. Thomas → RH

Analysis requested:

Comparison with Knowns

EXAMINATION:

Hairs from hand - three slides

slide ① - two animal hairs and two head hair fragments unsuitable for comparison purposes.

slide ② - one head hair micro. cons. with the known head hair of E. Frank. one head hair dissimilar to Knowns of C. Raby and E. Franklin, body hair unsuitable for comparison; animal hairs

slide ③ - animal hairs; fibers

10/4/93

→ Consistent with the head hairs of Eric Benge

CONCLUSION:

CRIMINALISTIC EXAMINATION SHEET

LAB. # L92-10898 DATE 12 Nov 92 ANALYST RH

Description: one cardboard box ☆ one plastic bag ☆ Blue panties
one plastic bag ☆ one pair blue pants
one plastic bag ☆ one piece of carpet
one plastic bag ☆ glassine envelope ☆
hairs from compl.'s left hand

Origin:
Prof Room—

Analysis requested:
Hair comparison

EXAMINATION:
- Blue panties - slide ① - three animal hairs, one human body hair unsuit. for comp. purp. slide ② - six animal hairs one Caucasian head hair micro. cons. with known head hairs of E Franklin
Blue pants (stretch) - flea infested - fleas killed with dry ice (CO2) one slide - two head hairs micro. cons. with known head hairs of E. Franklin - one fragment unsuit. for comp. purposes
Carpet - many animal hairs (not collected) slide ① - ~~three~~ animal hairs slide ② two animal hairs, one grey featureless hair unsuitable for comparison purposes, one head hair microscopically cons. with the knowns of E. Franklin
~~CONCLUSION:~~
Left hand - slide ① two animal hairs - one hair fragment unsuitable for comparison purposes (pinched off tip) slide ② one body hair unsuitable for comparison purposes, animal hairs, hair fragment unsuit. for comp. purposes.

Raby 39

Blue ink - added by Debra Baker 2-1-94

DATE 11-10-92

HOUSTON POLICE DEPARTMENT
LABORATORY EXAMINATION

LAB. REFERENCE L92-10848

ANALYST JAC

LEGEND (+) OR POS = POSITIVE
(-) OR NEG = NEGATIVE

Evidence Submitted	Envelope & (ML92-6582)					Rec 16, 1992
DESCRIPTION OF EVIDENCE	Rectal swab	Vaginal Swab	Oral Swab	hairs samples	Fingernail clipping (Right)	Fingernail clipping (Left)
SCREENING TEST (ORTHO-TOLUIDINE / PHENOLPHTHALEIN)	Indicator Blood				POS	POS
CONFIRMATORY TEST (TAKAYAMA) Takayama	Confirms Blood				POS	POS
ANTI HUMAN SERUM anti-human serum	Human Blood				POS	POS
LATTES Lattes	Anti Bodies	shows A B O Blood Type	For Fresh Blood		A — B —	A — B —
ABSORPTION ELUTION Absorption-elution	Antigens	shows A B H	Dry or Fresh Blood		A +2 B +2 O +1	A — B +2 O +1
DIRECT TYPING Direct Typing						
LEWIS TYPING Lewis Typing						
ABSORPTION INHIBITION Absorption-Inhibition						
ACID PHOSPHATASE TEST acid phosphatase test						
ANTI - P-30 anti-p30	Neg	Neg	Neg.			
MICROSCOPIC EXAM microscopic exam						
OTHER other					blood observed on the fingernail	blood observed on the fingernail
EVIDENCE TRANSFERRED						

Form No. LAB 0008

H is present in Every one.

H. is the Building Block of All Blood types

Blood types are listed A- B-

is that NEG? To stop Just Because it is present

I Can not Be Excluded, is insane.

The new TEST Exclude me 100%.

DATE 11-10-92

HOUSTON POLICE DEPARTMENT
LABORATORY EXAMINATION

LAB. REFERENCE L92-406

ANALYST

LEGEND (+) OR POS = POSITIVE
(-) OR NEG = NEGATIVE

Evidence Submitted	Envelope A (ML92-680)					
DESCRIPTION OF EVIDENCE	Rectal swab	Vaginal Swab	Oral Swab	hairs samples	Fingernail Clipping (Right)	Fingernail (Left)
SCREENING TEST (ORTHO-TOLUIDINE/ PHENOLPHTHALEIN)					POS	POS
CONFIRMATORY TEST (TAKAYAMA)					POS	POS
ABO-HUMAN SERUM					POS	POS
ABO-HUMAN SERUM					A — B —	A — B —
ABSORPTION-ELUTION					A +2 B +2 H +1	A — B + O +
DIRECT TYPING						
INDIRECT TYPING						
ABSORPTION-INHIBITION						
ACID PHOSPHATASE TEST						
ABO - PGM	Neg	Neg	Neg.			
MICROSCOPIC EXAM						
OTHER					blood observed on the fingernail	blood observed on the
EVIDENCE TRANSFERRED						

Raby 32

L92-406

ORIGINAL INFORMATION REPORT NON-PUBLIC

HOUSTON POLICE DEPARTMENT PAGE 1.001
OFFENSE REPORT Incident no. 111321392 R

SUPPLEMENT(S)

L92-10848
JNC.

No 0000

Offense- CAPITAL MURDER

Street location information

Number- 417 Name-WESTFORD Type- Suffix-
Apt no- Name-HEIMERS Type- Suffix-
Date of offense-10/15/92 Date of supplement-10/17/93
Compl(s) Last-FRANKLIN First-EDNA Middle-MATTOON
Last-

Recovered stolen vehicles information

Stored- by- Phn- (000) 000-0000
Officer1-W J STEPHENS Empl#-071252 Shift-1 Div/Station-HOMICIDE
Officer2-W C WENDELL Empl#-041494 Shift-1

SUPPLEMENT NARRATIVE

OCTOBER 19, 1992.....MONDAY***

THIS SUPPLEMENT IS GENERATED FOR THE CRIME LAB AND IS TO BE USED FOR THE EXAMINATION OF THE EVIDENCE COLLECTED IN THIS CASE.....

THE COMPL IN THIS INCIDENT IS A 71 YEAR OLD WHITE FEMALE. SHE WAS FOUND ON THE FLOOR OF HER RESIDENCE STABBED TO DEATH. SHE HAD MULTIPLE STAB WOUNDS TO HER CHEST AND BACK, DEFENSIVE WOUNDS ON HER ARM, AND TWO SLICING WOUNDS TO HER NECK. SHE WAS CLOTHED IN A WHITE AND PURPLE NIGHTGOWN TOP AND SHE WAS NUDE FROM THE WAIST DOWN. IT IS POSSIBLE THAT SHE WAS SEXUALLY ASSAULTED. SWABS AND SMEARS WERE DONE BY THE MEDICAL EXAMINER. HAIR SAMPLES WERE ALSO OBTAINED FROM THE COMPL, AS WELL AS FINGERNAIL CLIPPINGS AND HAIR SAMPLES COLLECTED FROM THE COMPL'S CLINCHED HANDS.

THE SUSPECT IN THIS CASE IS A WHITE MALE, AGE 22. HE HAS BROWN HAIR AND BLUE EYES. A BLOOD SAMPLE AND A HAIR SAMPLE WAS TAKEN FROM THIS SUSPECT, CHARLES DOUGLAS RABY, 3-22-70.

ALSO COLLECTED WAS RABY'S BLACK LEATHER JACKET, A PAIR OF BLUE JEANS, AND A BLACK T-SHIRT. THIS CLOTHING SHOULD BE CHECKED FOR THE COMPL'S BLOOD. A SAMPLE OF HER BLOOD IS IN THE MORGUE KIT.

PLEASE CHECK THE VAGINAL, ORAL, AND ANAL SMEARS AND SWABS FOR SEMEN AND A DNA COMPARISON. THE SAME FOR ANY BLOOD FOUND ON THE CLOTHING OF THE SUSPECT.

THE CLOTHING OF THE SUSPECT IS IN THE HOMICIDE EVIDENCE CLOSET AND WILL BE LOGGED IN THE PROPERTY ROOM ON 10-20-92. THE MORGUE EVIDENCE IS IN THE PROPERTY ROOM UNDER THIS CASE NUMBER.

THE HAIR SAMPLES ARE ALREADY IN THE CRIME LAB AS THEY WERE TAGGED ON 10-16-92. THESE AND THE REST OF THE HAIR OBTAINED DURING THE AUTOPSY SHOULD

CRIMINAL INFORMATION REPORT NON-PUBLIC

HOUSTON POLICE DEPARTMENT
OFFENSE REPORT

Incident no. 111471792

SUPPLEMENT(S)

No-0013

Offense- CAPITAL MURDER

Street location information
Number- A/ Name-WESTPARK Type- Suffix-
Apt no- Name-HELMERS Type- Suffix-
Date of offense-10/15/92 Date of supplement-10/29/92
Compl(s) last-FRANKLIN First-ERMA Middle-MATTOON
Last-

Recovered stolen vehicles information

Stored-
Officer-W.O. ALLEN, SGT. by- Phn- (000) 000-0000
Emp#-051105 Shift-1 Div/Station-HOMICIDE

SUPPLEMENT NARRATIVE

L92-10848

PROGRESS REPORT

THIS REQUEST IS TO THE CRIME LAB TO RECOVER THE SUSPECT'S CLOTHING FROM THE PROPERTY ROOM AND EXAMINE THE CLOTHING FOR BLOOD AND HAIR SAMPLES. THE SUSPECT IN THIS CASE IS CHARLES RABY, WHITE MALE 22 YEARS OF AGE. RABY WAS ARRESTED ON MONDAY, OCTOBER 19, 1992. RABY SIGNED A CONSENT FOR BLOOD AND HAIR AND BOTH WERE COLLECTED BY THE CRIME LAB.

PRIOR EVIDENCE HAS BEEN SUBMITTED IN THIS CASE. A SEXUAL ASSAULT KIT, BLOOD AND HAIR FROM THE MORGUE SHOULD HAVE BEEN FORWARDED TO THE CRIME LAB. WE ARE REQUESTING SWABS BE EXAMINED FOR ANY EVIDENCE OF SPERM. PHYSICAL EVIDENCE AT THE SCENE INDICATED A POSSIBLE SEXUAL ASSAULT. THE COMPLAINANT WAS NUDE FROM THE WAIST DOWN AND HER TURNED INSIDE OUT. THE COMPLAINANT'S PANTIES WERE TORN OFF OR CUT OFF HER BODY.

PLEASE COMPARE HAIR SAMPLED FROM THE SCENE TO THE HAIR COLLECTED FROM RABY AT THE HOMICIDE OFFICE. PLEASE CHECK FINGERNAIL SCRAPINGS COLLECTED AT THE MORGUE.

WE ARE REQUESTING D.N.A. BE DONE IF POSSIBLE IN THIS CASE.....PLEASE ADVISE SERGEANTS ALLEN AND WENDEL OF THE RESULTS. 247-8128.

Supplement entered by = 51105
Date cleared- 10/19/92

BE COMPARED TO THE HAIR OF CHARLES DOUGLAS RABY. A DNA COMPARISON ON THE HAIR IS ALSO REQUESTED.

TWO COPIES OF THIS SUPPLEMENT HAVE BEEN SENT TO FAI ON THIS DATE, 10-19-92 AT 1930 HOURS.....

I N V E S T I G A T I O N T O C O N T I N U E ****

L92-10248

Supplement entered by = /1252

ON FRIDAY, OCTOBER 30 1992, I, OFFICER F.L. HALE BEING ASSIGNED TO THE CRIME SCENE SECTION COMPLETED THE MORGUE INVESTIGATION ON THE COMPLAINANT IN THIS CASE EDNA FRANKLIN 92-6802. I OBTAINED THE FOLLOWING EVIDENCE.

(2) PLASTIC CUPS, CONTAINING FINGERNAILS.

(3) SWABS. ORAL, VIGINAL, RECTAL

(3) PLASTIC BAGS CONTAINING HAIRS.

THE EVIDENCE WAS RECOVERED AND KEPT IN OFFICER'S CARE, CONTROL AND CUSTODY UNTIL TAGGED IN THE POLICE PROPERTY ROOM.

NO OTHER EVIDENCE RECOVERED BY THIS OFFICER.

Supplement entered by = 54247
Report reviewed by-GLASS Employee number-077290
Date cleared- 10/19/92

No-0015

Offense- CAPITAL MURDER

Street location information
Number- 617 Name-WESTFORD Type- Suffix-
Apt no- Name-HELMERS Type- Suffix-
Date of offense-10/15/92 Date of supplement-12/17/92
Compl(s) Last-FRANKLIN First-EDNA Middle-MATTOON
Last-

Recovered stolen vehicles information
Stored- by- Ph#- (000) 000-0000
Officer1-CHU Emp#-093070 Shift- Div/Station-CRIME LAB

SUPPLEMENT NARRATIVE

SUSPECT : CHARLES RABY
REFERENCE : L92-10848

ON OCTOBER 19, 21, NOVEMBER 04, AND DECEMBER 16, 1992, AT THE REQUEST OF SERGEANT, EMP# 51105, THE FOLLOWING ITEMS WERE RETRIEVED FROM THE PROPERTY ROOM OR TAKEN FROM MR. CHARLES RABY :

CARTON BOX (BAR CODE# TJYO) CONTAINING,
PANTS
CARPET
PANTIES

CARTON BOX (BAR CODE# TKQO) CONTAINING,

PENGAD 800-631-6989

STATE'S EXHIBIT 79

P 30
Test

DATE 11-19-92

HOUSTON POLICE DEPARTMENT
LABORATORY EXAMINATION

LAB. REFERENCE ...... Ser ... 22

ANALYST JH

LEGEND (+) OR POS = POSITIVE
(-) OR NEG = NEGATIVE

Evidence Submitted	Cartonbox Ⓔ plastic Ⓔ	plastic Ⓔ	plastic Ⓔ			
DESCRIPTION OF EVIDENCE	blue pants	large carpet	blue panties			
SCREENING TEST (~~ORTHO-TOLIDINE~~) (PHENOLPHTHALEIN)		was Tested by DPS they found no male [illegible] found	PUB. (03-30-94)			
CONFIRMATORY TEST (TAKAYAMA)				Ω		
ANTI-HUMAN SERUM						
LATTES						
ABSORPTION ELUTION						
DIRECT TYPING						
LEWIS TYPING						
ABSORPTION-INHIBITION						
ACID PHOSPHATASE TEST	Neg. (Crotch area)	Neg.	Neg. (crotch area)			
ANTI - P. 30						
MICROSCOPIC EXAM						
OTHER			Panties was torn (03-30-94) (~~[illegible]~~) torn completely by Davis			
EVIDENCE TRANSFERRED						

Form No LAB 0006

STATE'S EXHIBIT 78

PENGAD 800-631-6989

ORIGINAL INFORMATION REPORT NON-PUBLIC

HOUSTON POLICE DEPARTMENT PAGE 1.001
OFFENSE REPORT Incident no. 111471392 R

SUPPLEMENT(S)

No-0015

Offense- CAPITAL MURDER

Street location information

Number- 617 Name-WESTFORD Type- Suffix-
Apt no- Name-HELMERS Type- Suffix-
Date of offense-10/15/92 Date of supplement-12/17/92
Compl(s) Last-FRANKLIN First-EDNA Middle-MATTOON
Last-

Recovered stolen vehicles information

Stored- by- Ph#- (000) 000-0000
Officer1-CHU Emp#-093070 Shift- Div/Station-CRIME LAB

SUPPLEMENT NARRATIVE

SUSPECT : CHARLES RABY
REFERENCE : L92-10849

ON OCTOBER 19, 21, NOVEMBER 04, AND DECEMBER 16, 1992, AT THE REQUEST OF SERGEANT, EMP# 51105, THE FOLLOWING ITEMS WERE RETRIEVED FROM THE PROPERTY ROOM OR TAKEN FROM MR. CHARLES RABY :

CARTON BOX (BAR CODE# TJYD) CONTAINING;
PANTS
CARPET
PANTIES

CARTON BOX (BAR CODE# TKQQ) CONTAINING;
CAP
T-SHIRT
JACKET
PANTS (JEANS)

ENVELOPE (BAR CODE# SWVM) CONTAINING;
SWABS - VAGINAL, RECTAL, ORAL (ML92-6802)
HAIRS
FINGERNAILS - RIGHT, LEFT

FROM MR. CHARLES RABY :
VIAL OF BLOOD
SWAZE WITH SALIVA

Raby 38

AN ANALYSIS OF THE ABOVE ITEMS REVEALED :

1) SEMEN WAS DETECTED ON THE CARPET, PANTS, PANTIES, JEANS OR SWABS.
2) BLOOD WAS INDICATED ON THE CAP. BLOOD SAMPLE WAS INSUFFICIENT FOR FURTHER ANALYSIS.
3) HUMAN BLOOD HAVING INCONCLUSIVE TYPING RESULT WAS DETECTED ON THE FINGERNAILS.

000076

MR. CHARLES RABY WAS DETERMINED TO HAVE TYPE "O" BLOOD.

ALL ABOVE EVIDENCE WILL BE RESUBMITTED TO THE PROPERTY ROOM, AFTER ANALYSIS.

L92-10848

Supplement entered by = 93070
Date cleared-- 10/19/92

JHC

This Shows He Knew my Blood
Type 10-19-92.
So why didnt he do the DNA Test
That were Requested

15

CAUSE NO. 9407130

THE STATE OF TEXAS	§	IN THE 248TH DISTRICT COURT
	§	
V.	§	IN AND FOR
	§	
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

AFFIDAVIT OF ELIZABETH JOHNSON, Ph.D.

My name is Elizabeth Johnson. I am a resident of Ventura County, California. I am over the age of eighteen and I am competent to make this affidavit. All the facts stated here are within my personal knowledge, or have been made known to me and are of a type reasonably relied upon by experts in my field.

1. I am a Senior Forensic Scientist with Technical Associates, Inc. ("TAI"), in Ventura California. Since 1980, TAI has provided a complete range of criminalistics services, including DNA analysis, serological analysis, and general crime scene analysis.

2. I obtained a Ph.D. from the Department of Microbiology and Immunology of the Medical University of South Carolina in 1987. I continued my education with postdoctoral studies at that institution from September 1987 through September 1988, and then with the M.D. Anderson Cancer Research Hospital, in Houston, Texas, from October 1988 through November 1991.

3. Following my postdoctoral studies, from November 1991 through December 1996, I worked in the DNA Laboratory at the Joseph A. Jachimczyk Forensic Center in the Office of the Harris County Medical Examiner. During that time, I was technical director of the DNA laboratory and attained the title "Director of the DNA Laboratory." I also assumed supervision of the serology laboratory for a period of time.

4. Since February 1997, I have worked as a Senior Forensic Scientist with TAI. My duties at TAI and at the Jachimczyk Forensic Center have included evidence examination, body fluid identification and various serology testing, and DNA analysis. I am qualified by education and experience to offer expert opinions on these subjects.

5. In connection with the above-captioned criminal matter, I have reviewed the homicide report, the medical examiner's report, the lab report, and crime scene and autopsy photos. I also have received descriptions from Mr. Raby's attorneys of physical evidence that has been maintained in the case.

6. It is my professional opinion that DNA testing of four kinds of physical evidence would be highly probative of the identity of the decedent's attacker in this case. It is my understanding that the statutory right to DNA testing in Texas depends on a showing that exculpatory results from DNA testing would prove a petitioner's innocence. While DNA testing of these four kinds of evidence could produce inconclusive results, such DNA testing could also produce results sufficiently exculpatory to prove Mr. Raby's innocence.

7. First, there is a possibility that blood or skin under fingernail clippings taken from the decedent contains DNA of her attacker. The deposition of blood or skin under the decedent's fingernails would be more likely if the decedent struggled with her attacker. In addition, I understand that the decedent died from knife wounds. It is common in cases of direct assault with a knife that there will be a struggle in which biological material from the attacker can be transferred to the fingernails of the victim. Finding tissue under the fingernails of the decedent may provide probative evidence as to the identity of the attacker.

8. HPD crime lab's blood typing results suggest that the fingernails may hold blood other than Mr. Raby's or the decedent's. The decedent's blood type was B, while Mr. Raby's is type O, which means that his blood lacks both A and B blood group substances. Two samples were taken from the decedent's fingernails, each representing one hand: one showed consistent results of blood type AB, while the other revealed B type activity. These results could indicate the presence of blood group substance A on the nails, which is foreign both to the decedent and to Mr. Raby.

9. In light of the evidence that the decedent was an elderly woman who had little intimate contact with other people, the likelihood that discernible tissue of another person would become lodged underneath her fingernails by innocent means is limited. If found, large clumps of skin under the nails would indicate considerably more contact than could be explained by the transfer of DNA by an innocent handshake or common use of a towel. If such clumps of tissue are found, DNA tests on these clumps would be highly probative of the decedent's attacker. Similarly, if DNA tests reveal the same person's DNA under two or more nails, especially from different hands, and that DNA is not the decedent's or Mr. Raby's, then regardless of whether the DNA derives from skin cells or blood cells, it could indicate that someone other than Mr. Raby attacked the decedent.

10. Second, there is a possibility that a hair found in the decedent's right hand is the hair of her attacker. At trial, an HPD crime lab employee testified that the hair likely belonged to the decedent's grandson. The hair was identified through "microscopic hair analysis;" in other words, a scientist closely examined the hair through a microscope for similarities to other hair samples. Microscopic hair analysis is a scientifically unreliable basis for hair identification.

11. The appropriate DNA testing technique for the hair found in the decedent's right hand is nuclear DNA testing by PCR methods if there is an intact root present, or mitochondrial testing by PCR methods of the hair shaft if no root exists. While nuclear DNA testing by PCR methods became available within the Harris County laboratories in the first half of 1994, mitochondrial testing was not available for any nonmilitary purpose in 1994. If the hair contains the DNA of a person other than the decedent, her grandson, or Mr. Raby, that would be probative evidence that someone other than Mr. Raby may have attacked the decedent. If the DNA results from testing this hair match DNA results from any of the other evidence sought to be tested, then these results would together constitute highly probative evidence of the identity of the attacker.

12. Third, the blue panties found near the body at the crime scene could yield probative evidence as to the identity of the victim's attacker. The homicide report described these, saying

that they "appeared to have blood smeared on them." Evidence at the crime scene indicates that the attacker did wipe his hands before leaving the house, because no blood stains were found on any doorknobs or windows. If the attacker himself were cut, and if he used the panties to wipe his hands after the attack, then some of the blood on the panties could be the attacker's. DNA testing can detect DNA of multiple individuals that has been mixed and can be very definitive in eliminating someone as a donor, even in a mixed sample. If blood other than Ms. Franklin's is found on the panties, that could indicate the identity of the attacker. Such evidence would be even more probative if the DNA from the panties matched DNA found under one of Ms. Franklin's nails or from the hair in her fist.

13. Lastly, there is a substantial possibility that blood on the decedent's nightshirt contains blood of the attacker as well as blood of the decedent. Given the possibility that a person stabbing may cut himself during the attack, it is possible to find the attacker's blood as well as the decedent's blood on clothing in stabbing cases. Stains that are not obviously associated with the stab wound could indicate the presence of the attacker's blood. If the DNA of a person other than the decedent and Mr. Raby is found in a bloodstain on the decedent's clothing, that could indicate that someone other than Mr. Raby stabbed the decedent.

14. If the DNA of a person other than Mr. Raby or the decedent were found in more than one of the victim's clothing, the fingernail clippings, the hair, or the panties, the probative value of that evidence would increase substantially. That would be extremely indicative that it was someone other than Mr. Raby who attacked the decedent.

15. Only the RFLP method of DNA testing was available within the law enforcement laboratories in Harris County in 1992, but that test requires a very large sample in order to obtain a conclusive result and is often not a feasible test for this reason. It is likely that RFLP testing of the panties, fingernail clippings, and nightshirt was not capable of producing probative results because of the size of the samples. PCR testing became available in the first half of 1994 in the Harris County labs, but I do not know whether DNA testing of any kind was actually available to an indigent defendant in Harris County. While I was employed there, the Harris County Medical Examiner's Office, along with the HPD lab, performed the majority of DNA testing for criminal cases brought in Harris County. During my tenure there at that office, from 1991 to 1996, I cannot recall a single instance in which biological evidence was sent for DNA testing by a defendant at the expense of the State or the court. Conversely, I can recall several instances in which defendants with privately retained attorneys paid for such testing in the mid-1990s at their own expense.

16. It is my professional opinion that Mr. Raby's trial counsel should have, at the very least, further investigated the appropriateness of DNA testing with an expert in the field to determine what DNA testing should have been performed.

17. Based on my understanding of the condition of the hair, fingernail clippings, and panties as described to me by Mr. Raby's counsel, it is my professional opinion that the evidence is in a condition making DNA testing possible. Furthermore, it is my professional opinion that the evidence is in a condition such that DNA testing will likely yield determinate results. It is impossible to be certain that evidence is in a condition such that DNA testing will yield

determinate results without performing DNA tests.

18. I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 7th day of November, 2002.

Elizabeth Johnson, Ph.D.

Subscribed and sworn to before me, the undersigned authority, under oath duly administered, on this 7th day of NOVEMBER, 2002.

Notary Public in and for the State of California

My commission expires: NOVEMBER 20, 2005

MATTHEW WHITNEY
Commission # 1331294
Notary Public - California
Ventura County
My Comm. Expires Nov 20, 2005

CURRENT INFORMATION REPORT NON-PUBLIC

HOUSTON POLICE DEPARTMENT PAGE 1.001
CURRENT INFORMATION REPORT Incident no. 087557093 J

ffense- ROBBERY-THREAT / BY THREAT
CR Offense codes- 03005/00000/00000
remises- STREETS Weather- CLEAR

ocation: Street no- 005500 Name- AIRLINE
City-HOUSTON County-HARRIS Kmap-453B Dist- 6 Beat- 6B10
ighborhood code-00202 Desc-LITTLE YORK

egin date- SA 08/14/93 Time- 2145 End date- / / Time-
ceived/Employee: Name-LAPTOP No.-000000 Date-08/15/93 Time-0325
ng crime related-N Hate crime related-N

COMPLAINANT(S)

-01 Name: Last-DAVIS First-GEORGIA Middle-EARLINE
Race-W Sex-F Age-63 Hispanic-N
Address-2301 KOWIS;HOUSTON,TX 77093
Phone: Home-(713) 442-1722 Business-(713) 000-0000 Ext-
Driver license#-16410837
Force used against complainant- Y DOB- 08/15/30
Relation to susp-ACQUAINTANCE OF SUSP#01

WITNESS(S)

-01 Name: Last-COOPER First-TERRI Middle-LAINE
Race-B Sex-F Age-33 Hispanic-N
Address-706 E ROGERS #1/2;HOUSTON,TX
Phone: Home-(713) 000-0000 Business-(713) 000-0000 Ext-
Driver license#[redacted] SOCIAL SECURITY[redacted]
Force used against complainant- N DOB- 07/03/60
Relation to susp-ACQUAINTANCE OF SUSP#01

REPORTEE(S)

ONE

This that. "Sweetest guy" my talked about.

16

000084

Securities

No- 01 Disposition-STOLEN Property tag no-0-0000-00
Denomination-5 Type- FEDERAL RESERVE BANK NOTE
Issuer-US GOVT Value-$ 7.00
Security date- Complaint no- 01 SSN- / /

ARTICLES

No- 01 Disposition-STOLEN Property tag no-0-0000-00 Complainant no-01
Item type-PURSE UCR class-03
Serial number- Value-$ 10.00
Description-LIGHT BROWN WITH STRAP

No- 02 Disposition-STOLEN Property tag no-0-0000-00 Complainant no-01
Item type-ID CARD UCR class-12
Brand-TEXAS ID Model-
Serial number-[redacted] Value-$ 0.00
NCIC misc-IDENTIFICATION CARD NCIC case-

No- 03 Disposition-STOLEN Property tag no-0-0000-00 Complainant no-01
Item type-SOCIAL SECURITY CRD UCR class-00
Serial number-UNK Value-$ 0.00

No- 04 Disposition-STOLEN Property tag no-0-0000-00 Complainant no-01
Item type-MEDICINE UCR class-00
Brand-HEART Model-

No- 05 Disposition-STOLEN Property tag no-0-0000-00 Complainant no-01
Item type-RING UCR class-02
Serial number- Value-$ 700.00
Description-SILVER WITH CLUSTER OF DIAMONDS LOCATED IN PURSE.

DETAILS OF OFFENSE

MINOR OFFENSE 1-THEFT / (MISD)

THE COMPL AND SUSP WERE WALKING TO A CHURCHES CHICKEN WHEN THE SUSP GRABBED AT THE COMPLS PURSE. THE COMPL PULLED BACK ON HER PURSE AND THE SUSP THREATENED THE COMPL SO SHE GAVE THE PURSE TO HIM.

Officer1: Name-RA GILLHAM Employee no-093547 Shift-3
Division/Station #-NS PATROL Unit #-6B25B

Call received: Date-08/14/93 Time-2331 Report made: Date-08/15/93 Time-0158

SUSPECT(S)

ɔ-01 Disposition-ARRESTED /CHARGED HPD-no-523911
Name: Last-BANGS First-EDWARD Middle-DALE
Address-5619 AIRLINE #304;HOUSTON,TX
Race-W Sex-M Age-23-00 Hispanic-N Date of birth-10/21/69
Height-603 To- Weight-210 To-
Hair: Color-BROWN Type-WAVY/CURLY Length-SHORT
Complexion-FAIR Facial hair- LIGHT MUST/BEARD
Speech/Accent- Eye color-HAZEL
ress-SHIRT PULOV-S WHI/CUT OFFS BLK/HAT BASEBALL BLK/SHOE TENIS LO WHI
isc-TDL# [redacted] SS# [redacted]

M.O. SUMMARY

.eport entered by-RA GILLHAM Employee number-093547

tatus: Open- Cleared-X Inactive- Unfounded-
leport reviewed by-RICHARD Employee number-064566
)ate cleared-08/14/93

NARRATIVE

:NTRODUCTION:
OFFICER GILLHAM, RIDING 6B25B, WAS DISPATCHED TO 5619 AIRLINE AT 2331 HRS IN REGARDS TO A ROBBERY OF AN INDIVIDUAL. OFFICER ARRIVED AT 2329 HRS AND OBSERVED THE LOCATION TO BE A HOTEL.

:OMPLAINANT:
COMP-#01, DAVIS,GEORGIA EARLINE WF63
THE COMPL TOLD THE OFFICER THAT SHE WAS WALKING TO CHURCHES FRIED CHICKEN WITH THE SUSP. THE COMPL HAS KNOWN THE SUSP FOR ABOUT TWO WEEKS. WHILE THEY WERE WALKING ALONG THE STREET, THE SUSP GRABBED THE COMPLS PURSE. THE PURSE WAS HANGING FROM THE COMPLS RIGHT SHOULDER. THE COMPL PULLED BACK ON HER PURSE AND SAID "EDWARD WHAT ARE YOU DOING". THE SUSP WAS STILL PULLING ON THE PURSE. THE SUSP THEN SAID "I WILL KILL YOU IF YOU DONT GIVE ME YOUR PURSE". THE COMPL LET GO OF HER PURSE AND THE SUSP TOOK OFF RUNNING BEHIND A BUILDING.
THE COMPL THEN RAN BACK TO HER MOTEL ROOM AND TOLD HER SON. THEN THEY WENT TO LOOK FOR THE SUSP AND THE PURSE. THE COMPL THEN RETURNED TO HER ROOM AND CALLED THE POLICE. THE COMPL DID WANT CHARGES FILED ON THE SUSP.

WITNESS:
WITN-#01, COOPER,TERRI LAINE BF33
THE WIT TOLD THE OFFICER THAT SHE OBSERVED THE SUSP AND COMPL LEAVE THE MOTEL AND THAT THE COMPL STOPPED TO TELL HER THEY WERE GOING TO CHURCHES FRIED CHICKEN. AFTER THE COMPL HAD BEEN ROBBED, THE WIT SAW THE SUSP GO INTO ROOM

04. BEFORE HE WENT INTO THE ROOM, THE WIT ASKED HIM WHY DID HE ROB THE COMPL. E SAID NOTHING AND WENT OUTSIDE. THE WIT THEN OBSERVED THE OFFICER GO INTO HE COMPLS ROOM. WHILE THE OFFICER WAS IN THE ROOM, THE SUSP CAME OUT OF HIS ND TOLD HER TO BE QUIET. HE THEN WENT INTO THE STAIR WAY AND TRIED TO JUMP VER THE FENCE.
HE WIT WENT TO THE OFFICER AND TOLD HIM OF THE SUSPS WHEREABOUTS.

REPORTEE:
THE COMPL IS THE REPORTEE.

OFFICER'S PARAGRAPH:
THE SCENE IS THE 5500 BLOCK OF AIRLINE. AIRLINE RUNS NORTH AND SOUTH. THE INCIDENT OCCURRED ON THE EAST SIDE OF THE STREET.

OFFICER'S ACTION:
UPON ARRIVAL, OFFICER MET WITH THE COMPL. WHILE THE OFFICER WAS INTERVIEWING THE COMPL, THE WIT WALKED INTO THE ROOM AND TOLD THE OFFICER THAT THE SUSP WAS IN THE STAIR WAY TRYING TO CLIMB THE FENCE. THE OFFICER WENT TO THE STAIR WAY AND OBSERVED A W/M WHO FIT THE DESCRIPTION OF THE SUSP TRYING TO CLIMB OVER THE FENCE. THE OFFICER TOLD THE SUSP TO GET OFF THE FENCE AND GET DOWN ON HIS KNEES. THE SUSP DID AND THE OFFICER ARRESTED THE SUSP AT 2335 HRS. THE OFFICER WALKED THE SUSP TO THE PATROL CAR AND PLACED HIM INSIDE. THE OFFICER HAD THE COMPL COME OUT TO THE CAR AND SHE POSITIVELY IDENTIFIED HIM AS THE ONE WHO TOOK HER PURSE. THE OFFICER CONTINUED GATHERING THE COMPLS AND WIT INFORMATION. OFFICER THEN SPOKE WITH D.A. ALCALA WHO TOOK ROBBERY BY THREAT CHARGES. OFFICER THEN SPOKE WITH OFF. SAMPSON OF HOMICIDE WHO TOOK A HOLD ON THE SUSP FOR ROBBERY. [redacted] OFFICER CONFIRMED THE [redacted] OFFICER THEN TRANSPORTED THE SUSP TO SOUTHEAST WHERE HE WAS BOOKED. OFFICER THEN FILED CHARGES OVER THE CRT TRANS# 057304. OFFICER THEN COMPLETED THIS REPORT.

SUSPECT:
SUSP-#01, BANGS,EDWARD DALE WM23
THE SUSP WAS SPOTTED TRYING TO CLIMB A FENCE. THE SUSP WAS ORDERED DOWN AND TO GET ON HIS KNEES. OFFICER THEN HANDCUFFED HIM AND PLACED HIM THE PATROL CAR.

DISPOSITION:
THE SUSP WAS TRANSPORTED TO 1301 FRANKLIN TO BE WARNED BY A JUDGE BECAUSE HE HAD A SETCIC WARRANT. THE SUSP WAS THEN TRANSPORTED TO SOUTHEAST JAIL WHERE HE WAS BOOKED.

EVIDENCE:
NONE

FOUND OR RECOVERED PROPERTY:
NONE OF THE COMPLS PROPERTY WAS FOUND.

ATROL OFFICERS, AND POSITIVELY IDENTIFIED BY THE COMPLAINANT AS THE SAME SUS-
ECT THAT ROBBED HER OF HER PURSE.

[redacted]

****
CHARGES FILED
****

USPECT CHARGED; EDWARD DALE BANGS, W/M DOB 10/21/69, HPD #523911, SPN#899805

HARGES FILED; ROBBERY BY THREAT

OURT; 208TH DISTRICT COURT

AUSE # 671962
BOND AMOUNT; $10,000.
****

OFFICER TORRES SUBMITTED A CRIME ANALYSIS SHHET TO THE ROBBERY DIVISION RIME ANALYST TO CHECK FOR POSSIBLE RELATED CASES INVOLVING THE SAME SUSPECT. FFICER TORRES RELEASED THE HOLD ON THE SUSPECT AND FAXED A COPY OF THE CHARGE NFORMATION TO THE SOUTHEAST JAIL.

SINCE THE ONLY SUSPECT HAS BEEN ARRESTED AND CHARGED, THIS CASE IS CLEARED BY RREST MADE AND CHARGES FILED IN THIS CASE.

****
CASE CLEARED BY ARREST MADE AND CHARGES FILED IN THIS CASE
****

ASE DISPOSITION (MARK ONLY ONE CATEGORY) ANY SUSPECTS MUST BE LISTED ON PAGE 9
X ARRESTED AND CHARGED IN THIS CASE (INCLUDES JUVENILES ARRESTED AND REFERRED)
_ ARRESTED AND CHARGED IN OTHER CASES (BUT NOT THIS CASE)
_ EXCEPTIONAL CLEARANCES -- MUST HAVE THE FOLLOWING CONDITIONS IN NARRATIVE:
IDENTITY OF OFFENDER IS ESTABLISHED, AND ENOUGH INFORMATION EXISTS TO SUPPORT AN ARREST, CHARGE, AND PROSECUTION, AND EXACT LOCATION OF THE OFFENDER IS KNOWN, AND THERE IS SOME REASON BEYOND LAW ENFORCEMENT CONTROL THAT PROHIBITS THE ARREST AND/OR CHARGING OF THE OFFENDER (MARK ONLY ONE).
_ LACK OF PROSECUTION BY BY D. A. FOR NON-EVIDENTIARY REASON
_ LACK OF PROSECUTION BY COMPLAINANT _ ORAL CONFESSION WITH MINIMAL EVIDENCE
_ MINOR OFFENSE (JUVENILE ONLY) _ DEATH OF DEFENDANT
_ OTHER _____
_ UNFOUNDED _ INACTIVE _ CLEARED BY INVESTIGATION (INVESTIGATION CASES ONLY)
_ CASE OPEN AND ACTIVE INVESTIGATION CONTINUING

Supplement entered by = 84142
Report reviewed by-RICHARD Employee number-064566
Date cleared- 08/14/93

SYSTEM ADVISORY: REPORT ENTERED USING PERSONAL COMPUTER VER-2.05

```
***************************************************************
*  ENTRY DEVICE: ZENITH 286 109073                            *
*  ENTRY FROM DATE-081593 TIME-0158  TO  DATE-081593 TIME-0309 *
*  TRANSFER DEVICE: AST 386/16 073512 PMU                      *
*  TRANSFER DATE-081593 TIME-0325  LOAD DATE-081593 TIME-0331  *
*  LOCATION OF OFFENSE: POLICE DISTRICT-NORTH SHEPHERD  DIST-06 *
***************************************************************
```

SUPPLEMENT(S)

No-0001

Offense- ROBBERY-THREAT / BY THREAT

Street location information

Number- 5500 Name-AIRLINE Type- Suffix-
Apt no- Name-05502 Type- Suffix-
Date of offense-08/14/93 Date of supplement-08/15/93
Compl(s) Last-DAVIS First-GEORGIA Middle-EARLINE
Last-

Recovered stolen vehicles information

Stored- by- Ph#- (000) 000-0000
Officer1-R.TORRES Emp#-084142 Shift-1 Div/Station-ROBBERY

SUPPLEMENT NARRATIVE

****
CASE SUMMARY/FOLLOW-UP INVESTIGATION
****

OFFICER R.TORRES WAS ASSIGNED THIS CASE FOR REVIEW AND FURTHER INVESTIGATION. THE INCIDENT INVOLVES A ROBBERY BY THREAT WHERE THE COMPL'S LIFE WAS THREATENED BY A KNOWN SUSPECT WHO WAS ATTEMPTING TO SNATCH HER PURSE AWAY FROM HER. THE SUSPECT WAS ARRESTED SHORTLY AFTER THE INCIDENT, BROUGHT BACK TO THE SCENE BY

I understand the above allegations and I confess that they are true and that the acts alleged above were committed on August 14, 1993

In open court I consent to the oral and written stipulation of evidence in this case and to the introduction of affidavits, written statements, of witnesses, and other documentary evidence. I am satisfied that the attorney representing me today in court has properly represented me and I have fully discussed this case with him.

I intend to enter a plea of guilty and the prosecutor will recommend that my punishment should be set at 8 years TDCJID and I agree to that recommendation. I waive any further time to prepare for trial to which I or my attorney may be entitled.

X [signature]
DEFENDANT

Sworn to and Subscribed before me on SEP 22 1993

[signature]
HARRIS COUNTY DEPUTY DISTRICT CLERK

I represent the defendant in this case and I believe that this document was executed by him knowingly and voluntarily and after I fully discussed it and its consequences with him. I believe that he is competent to stand trial. I agree to the prosecutors recommendation as to punishment. I waive any further time to prepare for trial to which I or the defendant may be entitled.

GLENN V. VAN NORDEEN
DEFENDANT'S ATTORNEY (PRINT)

[signature]
SIGNATURE OF DEFENDANT'S ATTORNEY

I consent to and approve the above waiver of trial by jury and stipulation of evidence

[signature]
ASSISTANT DISTRICT ATTORNEY
OF HARRIS COUNTY, TEXAS

This document was executed by the defendant, his attorney, and the attorney representing the State, and then filed with the papers of the case. The defendant then came before me and I approved the above and the defendant entered a plea of guilty. After I admonished the defendant of the consequences of his plea, I ascertained that he entered it knowingly and voluntarily after discussing the case with his attorney. It appears that the defendant is mentally competent and the plea is free and voluntary. I find that the defendant's attorney is competent and has effectively represented the defendant in this case. I informed the defendant that I would not exceed the agreed recommendation as to punishment.

FILED
KATHRYNE TYRA
District Clerk

SEP 22 1993

Time: 10:15 am
Harris County, Texas

By [signature] Deputy

[signature]
JUDGE PRESIDING

PLEA OF GUILTY

SX-1

THE STATE OF TEXAS
VS.
EDWARD DALE BANGS
5619 AIRLINE #304
HOUSTON, TX 77000

D.A. LOG NUMBER: 57304
CJIS TRACKING NO.: 9000533317-A001
SPN: [redacted]
DOB: WM 10-21-69
DATE PREPARED: 8/15/93
BY: LJ DA NO: 507
AGENCY: HPD
O/R NO: 87557093
ARREST DATE: 08-14-93

NCIC CODE: 1205 02 / 2300 11
FELONY CHARGE:
ROBBERY / THEFT FROM PERSON
CAUSE NO: [redacted]
HARRIS COUNTY
DISTRICT COURT NO: [redacted]

RELATED CASES:

BAIL: $ 10,000.
PRIOR CAUSE NO:

WAIVER OF CONSTITUTIONAL RIGHTS, AGREEMENT TO STIPULATE, AND JUDICIAL CONFESSION

In open court and prior to entering my plea, I waive the right of trial by jury. I also waive the appearance, confrontation, and cross-examination of witnesses, and my right against self-incrimination. The charges against me allege that in Harris County, Texas, **EDWARD DALE BANGS**, hereafter styled the Defendant, on or about **AUGUST 14, 1993**, did then and there unlawfully, while in the course of committing theft of property owned by GEORGIA EARLINE DAVIS and with intent to obtain and maintain control of the property, intentionally and knowingly threaten and place GEORGIA EARLINE DAVIS in fear of imminent bodily injury and death by GRABBING HER PURSE AND THREATENING TO KILL HER.

It is further presented that in Harris County, Texas, EDWARD DALE BANGS, hereafter styled the Defendant, heretofore on or about AUGUST 14, 1993, did then and there unlawfully appropriate by acquiring and otherwise exercising control over property, namely, A PURSE, owned by GEORGIA EARLINE DAVIS, a person having possession of the property and hereafter styled the Complainant, with the intent to deprive the Complainant of the property, and without the effective consent of the Complainant, and the Defendant stole the property from the person of the Complainant.

Before the commission of the offense alleged above on July 7, 1988, in Cause No. 488392, in the 262nd District Court of Harris County, Texas, the Defendant was convicted of the felony of Burglary of a Motor Vehicle.

State abandons 2nd charging paragraph

AGAINST THE PEACE AND DIGNITY OF THE STATE

671962 - 208

Edward Dale Bangs

COURT OF HARRIS COUNTY, TEXAS

Change of Venue From: —

JUDGMENT ON PLEA OF GUILTY OR NOLO CONTENDERE BEFORE COURT - WAIVER OF JURY TRIAL

Judge Presiding: D. Collins Date of Judgment: Sept 22, 1993

Attorney for State: Sally Ring Attorney for Defendant: G. Youngblood [ ] Waived Counsel

Offense Convicted of: Robbery

Degree: 2nd (Enhanced to 1st) Date Offense Committed: Aug. 14, 1993

Charging Instrument: Indictment/~~Information~~ Plea: Guilty/~~Nolo Contendere~~

Terms of Plea Bargain (In Detail): 8 yrs TDCJ

DUPLICATE

Plea to Enhancement Paragraph(s): True Finding on Enhancement: True

Affirmative Findings: (Circle appropriate selection – N/A = not available or not applicable)
DEADLY WEAPON: Yes | No (N/A) FAMILY VIOLENCE: Yes | No (N/A) HATE CRIME: Yes | No (N/A)

Date Sentence Imposed: Sept 22, 1993 Costs: 99.00

Punishment Imposed and Place of Confinement: 8 yrs / ~~Fine~~ Institutional Division Date To Commence: Sept 22, 1993

Time Credited: 40 Days Total Amount of Restitution/Reparation/Reward:

Concurrent Unless Otherwise Specified: Restitution/Reward to be Paid to: Name: Address:

Statement of Amount of Payment(s) required/Terms of Amount:

This cause being called for trial, the State appeared by her District Attorney as named above and the Defendant named above appeared in person and either by Counsel as named above or knowingly, intelligently and voluntarily waived the right to representation by counsel as indicated above, and both parties announced ready for trial. The Defendant, waived his right of trial by jury, and pleaded as indicated above; thereupon the Defendant was admonished by the Court as required by Article 26.13, Code of Criminal Procedure. And it appearing to the Court that the Defendant is mentally competent to stand trial, the plea is freely and voluntarily made, and the Defendant is aware of the consequences of his plea, the plea is hereby received by the Court and entered of record. The Court, having heard the evidence submitted, found the Defendant guilty of the offense indicated above, a felony.

On Sept 22 the Court assessed punishment as indicated above.

DUPLICATE

It is therefore CONSIDERED, ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the offense indicated above, a felony, and that the said Defendant committed the said offense on the date indicated above, and that he be punished by confinement in the Institutional Division, Department of Criminal Justice for the period indicated above, and that the State of Texas do have and recover of the Defendant all costs of the prosecution, for which execution will issue.

And thereupon said Defendant was asked by the Court whether he had anything to say why sentence should not be pronounced against him, and he answered nothing in bar thereof. Whereupon the Court proceeded in the presence of said Defendant, to pronounce sentence against him as follows, to wit: "It is the order of the Court that the Defendant, named above who has been adjudged to be guilty of the offense indicated above, a felony, and whose punishment has been assessed at confinement in the Institutional Division, Department of Criminal Justice for the period indicated above, be delivered by the Sheriff of Harris County, Texas, immediately to the Director of Institutional Division of the State of Texas, or other person legally authorized to receive such convicts, and said Defendant shall be confined in said Institutional Division for the period indicated above, in accordance with the provisions of the law governing the Institutional Division, Department of Criminal Justice.

The said Defendant was remanded to jail until said Sheriff can obey the directions of this sentence.

DUPLICATE

000092

BILL OF COSTS

Bonds 671562

Payment Type: ___ (S, I, D, M or L:) (NOTE: If "I" or "D" see attached order)
Jail Time: ___ H/D/M/Y CC: Y/N ___ Y=Yes N=No (jail/fine/cost concurrent)
Time Assessed Texas Department of Criminal Justice, Institutional Div.: ___ D/M/Y
Jail Credit: ___ H/D/M/Y Sentence to Begin Date: ___
Jail as a Term of Probation: ___ H/D/M/Y Additional Jail Credit: ___ H/D/M/Y
Payable on or Before: ___ PLO: ___ Reward SPN: ___ COC: ___
___ Hours of Sentence to be Served by Performing Community Service
Defendant to Serve Sentence by Electronic Monitoring: (Y or N): ___
NOTE TO SHERIFF: ___

Transcript at: ___ Pages.....			Crime Stoppers Fee.....	2	00
Serving Capias: ___/Summons: ___..			Jury Fee.....		
Summoning ___ Witness/Mileage.....			CJPF.....	20	00
Jury Fee.....			LEOSEF.....	1	50
Taking: ___ Bonds.....			CVCF.....	~~45~~ 50	00
Commitment.....			DCLCF.....		
Release.....	5	00	JCTF.....	1	00
Attachment.....			Video Fee.....		
Arrest W/O Warrant/Capias.....			DWI Evaluation Fee.....		
Fine Amount.....			Reward Repayment.....		
Miscellaneous Costs.....			Security Fee.....	~~5~~	~~00~~
Judicial Fund Fee.....			Records Preservation Fee.	10	00
Special Expense.....			ACCA.....		
Trial Fee.....			Financial Responsibility.		
District Attorney Fee.....			PTR Fee.....		
Clerk's Fee.....	40	00	Attorney Fee.....		
Sheriff's Fee.....	5	00	Breath Alcohol Testing...		
Misdemeanor Costs.....			Rehabilitation Fund.....		
MAP Traffic Costs.....			Amount Probated/Waived...		
			TOTAL AMOUNT OWED.....	99	50

Signed and entered this the 22 day of Sept., A.D., 19 93.

Notice of Appeal: ___, 19___

Probation Expires: ___, 19___

Mandate Received: ___, 19___

Billie Collins
PRESIDING JUDGE

(Check if Applicable)

DUPLICATE

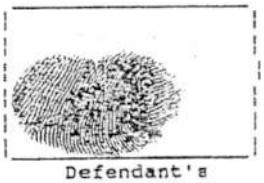
[ ] Defendant to be placed in the "S.A.I.P." (Boot Camp) program in the Texas Department of Criminal Justice, Institutional Division persuant to Art. 62.03 (c)-91 Revised Statutes, Article 42.12, Section 8, C.C.P.

Received on 22ND day of SEPT., A.D., 1993 at 10:15 o'clock A M.

Sheriff, Harris County, Texas

By: J. Hackler Deputy

KM



Defendant's
Right Thumbprint

Entered 9/24/93
Verified KM

RECORDER'S MEMORANDUM
This instrument is of poor quality and not satisfactory for photographic recordation; and/or alterations were present at the time of filming.

V1053 P0812

CRM-2 R09-07-93 -2-

000093

SAM NUCHIA, CHIEF OF POLICE

HOUSTON POLICE DEPARTMENT

HOMICIDE DIVISION

CITYWIDE INVESTIGATIVE SERVICES

COMPLAINANT:	EDNA MATOON FRANKLIN W/F 71
DEFENDANT:	CHARLES DOUGLAS RABY W/M 22
OFFENSE:	MURDER
CHARGE:	MURDER
DATE OF OFFENSE:	10-15-92
LOCATION:	617 WESTFORD
OFFICERS:	W.C. WENDEL W.O. ALLEN

COPY: HOMICIDE FILE

:COND DOOR WAY THAT LEADS INTO THE GARAGE. THERE IS A DRESSER WEST OF THIS IOR WAY. THIS DRESSER IS COVERED WITH A PILE OF MISCELLANEOUS ARTICLES. THE "ITH WEST CORNER HAS A LARGE PILE OF ASSORTED ARTICLES SCATTERED ABOUT. THIS _UDES A CRUTCH, CHAIR AND BOXES. THERE IS A T.V./DINING TYPE STAND WITH :LASSICAL" CASSETTE TAPES LOCATED ON TOP OF IT. THERE IS A SMALL CASSETTE .AYER ALSO ON THIS STAND. THERE IS A VACAUMN CLEANER STANDING NEXT TO THIS ıBLE.

IERE ARE THREE WINDOWS IN THE WEST WALL OF THIS ROOM. THEY ARE ALL COVERED :TH MINI BLINDS. THERE IS A SMALL TWIN BED EXTENDING FROM THE WEST WALL NEAR IE SOUTH WEST END TO THE EAST IN THE BEDROOM. THERE IS ANOTHER SMALL TABLE I THE FLOOR (NORTH) THAT HAS A NUMBER OF ARTICLES ON TOP OF IT. THIS INCLUDES GRAY TELEPHONE(PRINCESS TYPE), ANSWERING MACHINE, ASSORTED OVER THE COUNTER :DICINE, KLEENIX BOX AND A GLASS CONTAINING A BROWN COLORED LIQUID(SOFT DRINK). IERE IS A SMALL ELECTRIC FAN ON THE FLOOR NEXT TO THIS TABLE. THERE IS A WHITE .ASTIC BAG, (TRASH) ON THE FLOOR NEXT TO THE TABLE. THERE IS A LADIES PURSE IAT IS UNZIPPED AN OPEN AT THE TOP. THERE IS A MONTGOMERY CREDIT CARD ON THE .OOR NEXT TO THE PURSE. THERE ARE THREE OTHER CREDIT CARDS OBSERVED ON THE .OOR UNDERNEATH THE BED. THERE IS ALSO A PAIR OF HOUSE SHOES AND A PINK GOWN I THE NORTH SIDE OF THE BED ON THE FLOOR.

IERE IS A GREEN SOFA ALONG THE WEST WALL NORTH OF THE BED. THERE IS A MATCHING :EEN CHAIR SETTING IN THE MIDDLE OF THE ROOM, EAST OF THE SOFA. THERE IS A NDOW AIR CONDITIONER UNIT IN THE WINDOW BEHIND THE SOFA. THIS AIR CONDITIONER IIT IS RUNNING.

IERE IS A BOOK SHELF IN THE NORTHWEST CORNER OF THE BEDROOM. TO THE EAST ALONG E NORTH WALL IS A CABINET STYLE TELEVISION WITH MAGAZINES AND BOOKS STACKED ON ? OF IT. THERE IS ANOTHER TELEVISION CABINET NEXT TO AND SOUTH EAST OF THE RST. THERE IS ASSORTED PAPERS STACKED ON TOP OF THIS CABINET.

ERE IS A WINDOW IN THE EAST WALL, NORTH EAST CORNER. IN FRONT OF THIS WINDOW A GRAY METAL COLORED FILE CABINET. THE TOP OF THE CABINET IS OPEN AND IT NTAINS ASSORTED PAPERS. THERE IS AN OLD TABLE IN THIS CORNER ALSO AND IT HAS PERS AND OTHER MISCELLANEOUS ARTICLES ON TOP OF IT. THERE IS A RED COLORED ASTIC CONTAINER TO THE SOUTH OF THE METAL CABINET.

ERE IS A SET OF DOUBLE DOORS IN THE EAST WALL THAT LEADS TO A SCREENED IN BACK RCH. THE DOUBLE DOOR IS MISSING THE DOOR KNOB. THERE IS A SINGLE DEAD BOLT CK IN THIS DOOR WAY AND THE KEY IS VISBLE IN THE LOCK. THIS DOOR WAS STANDING EN UPON THE REPORTEE/WITNESSES ARRIVAL TO THE SCENE. THERE IS A COFFEE TABLE THE WEST OF THIS DOOR THAT HAS THE DOOR KNOB ON TOP OF IT ALONG WITH OTHER SCELLANEOUS ARTICLES. THERE IS A PAIR OF LADIES EYE GLASSES ON THE FLOOR DERNEATH THE COFFEE TABLE. THE EYE GLASSES WERE EXAMINED AND ARE COVERED WITH NT AND APPEAR TO HAVE BEEN ON THE FLOOR FOR SOMETIME.

ERE IS AN ARTIFICIAL FIRE PLACE SOUTH OF THE DOUBLE DOORS ALONG THE EAST WALL. E FIRE PLACE TOP IS COVERED WITH ASSORTED TOOLS AND OTHER ARTICLES.

E COMPLAINANT'S BED IS A FOCAL POINT WITHIN THIS ROOM. THERE ARE FOUR BED LLOWS AT THE WEST END OF THIS BED. THERE IS A LIGHT OVER THE BE, MOUNTED ON E WEST WALL. THIS LIGHT IS ON.

==========

ICER NORRIS CAME TO THE SCENE OF THIS MURDER AND ASSISTED WITH THIS ESTIGATION. OFFICER NORRIS PHOTOGRAPHED THE SCENE WITH A 35MM CAMERA AND O RECORDED THE SCENE. OFFICER NORRIS ALSO TOOK MEASUREMENTS AND DREW A NE DIAGRAM.
ENT EXAMINER CHUCK SHELDON ALSO CAME TO THE SCENE OF THIS OFFENSE AND CESSED A NUMBER OF ARTICLES IN AN EFFORT TO RECOVER LATENT PRINTS. SHELDON MINED THE BLOOD STAINED COFFEE TABLE, SOUTH EAST BEDROOM WINDOW AND FILE INET FROM THE NORTHWEST BEDROOM. SEE SHELDON'S SUPPLEMENT FOR COMPLETE AILS.

ITION OF BODY

==========

COMPLAINANT IS LYING IN THE LIVING ROOM FLOOR IN THE VICINITY OF THE ING ROOM/KITCHEN ENTRANCE. THE COMPLAINANT'S HEAD IS TO THE SOUTHWEST AND FEET ARE POINTED TO THE NORTH EAST. THE COMPLAINANT'S HEAD IS SLIGHTLY TED BACK WITH HER FACEUP AND IN THE DIRECTION OF THE CEILING. THE PLAINANT'S EYES ARE FIXED AND DILATED. THE COMPLAINANT'S MOUTH IS OPEN. THERE SEVERAL SLASH WOUNDS TO THE COMPLAINANT'S THROAT AND THERE IS BLOOD ON HER ST AND UNDERNEATH THE HEAD AND UPPER TORSO. THE COMPLAINANT IS SLIGHTLY LED TO HER RIGHT AND IS PARTIALLY ON HER BACK AND RIGHT SIDE. THE RIGHT ARM SLIGHTLY BENT AT THE ELBOW WITH THE RIGHT ARM EXTENDING TO THE EAST. THE HT HAND IS PALM UP WITH THE FINGERS OF THE RIGHT HAND CURLED INWARD. THERE SEVERAL HAIRS OBSERVED ON THE FINGERS OF THE RIGHT HAND THAT ARE BROWN IN OR. THE COMPLAINANT'S HAIR IS GRAY. THERE ARE ALSO SOME SHORT BLACK COLORED RSE HAIR ALSO ON THE COMPLAINANT'S ARM. 18

LEFT ARM OF THE COMPLAINANT IS BENT AT THE ELBOW IN A 45 DEGREE ANGLE. THE ARM ALSO EXTENDS TO THE EAST. THE PALM IS CLENCHED IN A SEMI FIST. THERE THREE RINGS OBSERVED ON THE COMPLAINANT'S LEFT INDEX FINGER. THE PLAINANT'S FINGERNAILS ARE LONG AND THERE IS BLOOD CAKED UNDERNEATH THE NAILS IN THE HANDS OF THE COMPLAINANT. 19

COMPLAINANT'S LEGS ARE SLIGHTLY APART AND THE RIGHT FOOT OF THE COMPLAINANT POINTING TO THE SOUTHWEST AND TYHE LEFT FOOT IS POINTED SLIGHTLY TO THE NORTH T.

COMPLAINANT WAS MEASURED BY OFFICER NORRIS. THE COMPLAINANT'S HEAD IS ROXIMATELY 4'2" SOUTH OF THE NORTH WALL AND 5'3" WEST OF THE EAST WALL. THE PLAINANT'S LEDT FOOT IS 1'2" SOUTH OF THE NORTH WALL AND 1'9" WEST OF THE T WALL.

NTIFICATION OF VICTIM

==========

COMPLAINANT IS IDENTIFIED BY HER GRANDSON, ERIC BENGE AS MS. EDNA FRANKIN. GEANT ALSO FOUND THE COMPLAINANT'S TEXAS DRIVER'S LICENSE WITH PHOTO AND THE ENSE #[redacted] IS ISSUED TO EDNA MATTOON FRTANKIN W/F 71, D.O.B. 11/27/20 RESS 617 WESTFORD STREET, HOUSTON, TEXAS. THE COMPLAINANT'S DAUGHTERS HAVE N NOTIFIED BY THE COMPLAINANT'S GRANDSON.

GS OF VICTIM

ALLED 9-1-1.

ASKED ERIC BENGE TO MAKE A LIST OF PEOPLE WHO HAVE BEEN OVER TO HIS GRAND-
HER'S HOUSE WITHIN THE LAST FEW WEEKS. HE THEN BEGAN TO TELL ME ABOUT A
TE MALE FRIEND OF THEIRS BY THE NAME OF CHARLES RABY. RABY HAD JUST BEEN
ELEASED FROM PRISON AND HAD BEEN OVER TO HIS HOME. RABY HAD COME OVER ON
ATURDAY, OCTOBER 10TH AND WAS LOOKING FOR A PLACE TO STAY. ERIC SAID THAT
IS GRANDMOTHER RAN HIM OFF BECAUSE HE WAS DRUNK. RABY THREW A BOTTLE ON THE
RONT PORCH. ERIC SAID THAT HE AND LEE WERE NOT HOME WHEN THIS HAPPENED AND
HEY WERE AWARE OF IT FROM THE COMPLAINANT.

RIC ALSO INCLUDED THE NAME OF EDWARD BANGS. HE SAID THAT BANGS HAD PAINTED THE
OUSE. OTHER NAMES ON THE LIST INCLUDE: JOHN PHILLIPS, ANTHONY CHARLES,
ARY SMITH, MONDO AND JEFF HATTENBACK. LEE ROSE WAS ASKED TO LIST ANYONE WHO
E KNOWS THAT HAS BEEN TO HIS GRANDMOTHER'S HOUSE RECENTLY. HIS LIST INCLUDED
HE SAME NAMES AS ERIC AS WELL AS WARREN FLANNERY.

20 INTERVIEWS WITH ADDITIONAL WITNESSES

. DONNA ESPADAS, W/F, 614 WESTFORD, 692-7364
SPADAS LIVES ACROSS THE STREET FROM THE COMPLAINANT. SHE WORKS AT THE VA
EALTH CENTER AND SHE GETS OFF OF WORK AT 5:30PM. SHE ARRIVED HOME SOMETIME
ETWEEN 5:50PM AND 6:00PM. WHEN SHE WAS ALMOST IN FRONT OF HER HOUSE SHE
OTICED A MAN STANDING AT THE WINDOW. SHE SAID THAT THE MAN APPEARED TO BE
HITE AND SHE THOUGHT THAT IT WAS SOMEONE WORKING ON THE HOUSE. SHE DID
OT THINK THAT IT WAS UNUSUAL. SHE SAID THAT SHE WENT INSIDE HER HOUSE FOR
T A FEW MINUTES AND GOT READY TO GO TO HER DAUGHTER'S SCHOOL OPEN HOUSE.
WENT NEXT DOOR TO MR. PARKER'S AND WAS THERE FOR A FEW MINUTES AND THE
F THEM WALKED TO THE SCHOOL A COUPLE OF BLOCKS AWAY. SHE CAME HOME ABOUT
:30 FIX DINNER AND LATER NOTICED THE FIRE TRUCK PULL UP IN FRONT OF MRS
RANKLIN'S. SHE WAS QUESTIONED FURTHER ABOUT THE PERSON SHE SAW NEXT TO THE
INDOW. SHE SAID THAT THIS PERSON WAS NOT ERIC. SHE COULD NOT GIVE ANY KIND
F PHYSICAL DESCRIPTION OTHER THAT SHE THOUGHT THAT IT WAS A WHITE MALE AND
LIGHT TO MEDIUM BUILD AND WEARING A T-SHIRT AND JEANS.

. WALTER RILEY SENN, W/M, 610 WESTFORD, 692-4146
ENN LIVES ACROSS THE STREET FROM THE COMPLAINANT. HE HAS KNOWN HER FOR AS
ONG AS HE HAS LIVED THERE, 17 YEARS. HE STATED THAT HE GOT HOME FROM WORK
S A SOUTHER PACIFIC RAILROAD CLERK AT ABOUT 3:30PM. HE WAS STANDING IN HIS
OUSE AND SAW A SMALL WHITE OR GREY PICKUP TRUCK WITH A WOODEN BED PARKED IN
RONT OF THE HOUSE NEXT TO THE COMPL'S. HE LEFT HIS HOUSE ABOUT 7PM AND THE
RUCK WAS GONE. HE WENT TO HIS KIDS' SCHOOL OPEN HOUSE AND GOT HOME ABOUT
PM. HE DID NOT SEE THE TRUCK WHEN HE CAME HOME FROM THE SCHOOL OPEN HOUSE.

. HERMANN PARKER, W/M, 620 WESTFORD, 692-4146
R. HERMANN LIVES ACROSS THE STREET FROM THE COMPLAINANT. HE HAD GONE TO THE
EIGHBORHOOD SCHOOL OPEN HOUSE WITH HIS NEIGHBOR AND RETURNED HOME ABOUT 8:30.
E DID NOT SEE OR HEAR ANYTHING FROM THE FRANKLIN HOUSE ACROSS THE STREET.

AUDRA RHAMES, W/F, 619 WESTFORD, 699-3143
HERMANN GAVE ME MRS. RHAMES PHONE NUMBER. I CALLED HER FROM HIS PHONE AND
POKE WITH HER. SHE HAD HEART PROBLEMS AND APPRECIATED THAT I CALLED HER RATHER

FICER THEN SPOKE TO GRANDSON OF FEMALE WHO HAD CALLED POLICE AND ALSO HAD UND BODY. ERIC BOTEPHFURE BENGE STATED THAT HE HAD LEFT LOCATION TO GO TO RK AT APPROX 1600HRS THIS DATE AND THAT HIS COUSIN LEE WAS ALSO GOING TO AVE. BENGE STATED THAT WHEN HE GOT HOME AT APPROX 2150HRS HE WENT INTO RES D NOTED THAT FRONT WOOD DOOR WAS OPEN,SCREEN DOOR ALMOST CLOSED. BENGE ATED THAT THERE WERE NO LIGHTS ON IN LIVINGROOM SO HE WENT INTO KITCHEN TO OUND UP THE DOGS THAT HE STATED WERE RUNNING LOSE AROUND THE RES. BENGE ATED THAT WHEN HE WALKED THROUGH LIVINGROOM HE RAN INTO SOMETHING AND ASSUMED AT HE HAD HIT SOME LAUNDRY SINCE THAT WAS NOT UNUSUAL. BENGE STATED AT THAT ME HE HAD NO IDEA THAT IT WAS HIS GRANDMOTHER. BENGE STATED THAT HE WENT TO HIS GRANDMOTHERS ROOM AND FOUND STUFF IN DIS-ARRAY AND THAT HE PICKED UP ME PAPERS THAT WERE LAYING ON THE GROUND. BENGE STATED THAT HE CAME BACK TO VINGROOM AND PULLED BACK THE SHEET WHICH THEY USED AS A MAKE-SHIFT DOOR OM KITCHEN TO LIVINGROOM. BENGE STATED THAT THE LIGHT IN THE KITCHEN WAS ON D IT SHONE INTO THE LIVINGROOM,THAT IS WHEN HE SAW HIS GRANDMOTHER LAYING ON E GROUND,PARTIALLY ON HER BACK,SIDEWAYS(SHE HAD A CURVED SPINE ICH CAUSED HER TO NOT BE ABLE TO LAY FLAT ON HER BACK). BENGE STATED THAT HE RNED HER TOWARDS HIM AND SAW ALL THE BLOOD. BENGE STATED THAT HE THOUGHT E HAD BEEN SHOT AND WAS GOING TO TRY TO DO CPR,BUT THEN REALIZED HER THROAT D BEEN CUT. BENGE STATED AT THAT POINT HE FREAKED AND WENT TO CALL THE LICE,BUT WASHED HIS HANDS REAL QUICK IN THE BATHROOM. BENGE STATED THAT AT AT TIME HIS COUSIN LEE SHOWED UP. 21

NGE STATED THAT HE THOUGHT THE SUS COULD BE A CHARLES RAGBY, W/M 22-23, WHO D BEEN RECENTLY RELEASED FROM THE PENITENTIARY FOR AGGRAVATED ROBBERY. BENGE ATED THAT RAGBY AND HIS GRANDMOTHER HAD GOTTEN INTO AN ARGUMENT ABOUT A WEEK O BECAUSE HIS GRANDMOTHER DID NOT LIKE RAGBY AND HAD TOLD HIM TO LEAVE. GE STATED THAT HE WAS NOT AT RES WHEN THIS HAPPENED BUT THAT HIS GRANDMOTHER D HIM ABOUT IT LATER THAT NIGHT AND THAT SHE SAID RAGBY HAD BROKEN A BOTTLE THE GROUND AND BEEN VERY VERBALLY ABUSIVE.

NGE ALSO STATED THAT IT MAY HAVE BEEN EDWARD BANGS, W/M 21-23, WHO IS A DRUG DICT AND WHO HAS BEEN HELPING TO PAINT RES. BENGE STATED THAT BANGS STOLE S PAYCHECK AND SHOTGUN A WHILE AGO AND THAT BANGS IS THE ONLY OTHER PERSON CAN THINK OF THAT MAY HAVE DONE THIS. BENGE STATED THAT BANGS AND RAGBY ULD BE THE ONLY ONES THAT WOULD KNOW ABOUT THE SE BEDROOM WINDOW FACING EAST AT HAS A BROKEN PANE AND CAN BE EASILY OPENED. ★ 22

FICER ALSO SPOKE TO WITNESS ACROSS THE STREET, DONNA ESPADAS W/F 7-30-58 ; .4 WESTFORD #692-7364, WHO STATED THAT AT APPROX 1750-1800 HRS SHE SAW A W/M EAST SIDE OF COMPL RES BY SE BEDROOM WINDOW LOOKING LIKE HE WAS TAKING THE CREEN OFF. ESPADAS STATED THAT SHE DID NOT THINK ANYTHING OF IT BECAUSE COMP D BEEN HAVING HOUSE PAINTED AND THAT SHE THOUGHT THAT WAS WHAT SUS WAS DOING. SPADAS STATED SHE DID NOT GET A GOOD LOOK AT ALL AT SUS.

FFICER THEN SPOKE TO WALTER RILEY SENN, W/M 6-26-53 ; 610 WESTFORD #694-6024, HO STATED THAT BETWEEN 1700-1800 HRS HE SAW A GRY OR WHI SMALL 83-84 P/U WITH RIGINAL BED REMOVED AND REPLACED WITH A WOODEN BED,PAINTED GRY. SENN STATED HAT HE SAW THE VEH PARKED ON N SIDE OF STREET FACING EAST,JUST WEST OF COMP RIVEWAY,BUT DID NOT SEE ANY SUS.

FFICER WAITED AT SCENE FOR SGT WENDEL AND SGT ALLEN WITH HOMICIDE WHO HANDLED SCENE INVESTIGATION. OFFICER NOTED THAT CSU#15 ARRIVED ALONG WITH M.E.-OBAR (CASE#92-6902). OFFICER NOTED THAT HEIGHTS FUNERAL HOME CAME AND CKED UP COMPLS BODY. COMPL NAME: EDNA MAE FRANKLIN,DOB 11-27-19.

OOR JUST TO THE EAST OF THE CHAIR WERE TWO FLOOR OSCILLATING FANS. ONE S IN TACT AND THE OTHER APPEARED AS IF IT WERE BEING WORKED ON AT ONE TIME. THE NORTH OF THE FANS AND JUST EAST OF THE CHAIR WAS A OLD STYLE CLOCK RADIO THAT HAD A CASSETTE PLAYER BUILT INTO ITS OLD FASHION LOOK. ON THE OOR JUST TO THE WEST OF THE CHAIR WAS A FLOOR STYLE ASHTRAY THAT WAS PARTIALLY LL OF WHITE FILTERED CIGARETTE BUTTS.

HIND THE BLUE RECLINER WAS A LARGE PICTURE WINDOW THAT WAS COVERED BY EN PINK VERTICAL BLINDS. EVEN THOUGH THESE BLINDS WERE OPEN WHEN OFFICERS RIVED, VISIBILITY WAS POOR LOOKING THRU THE WINDOW DUE TO HOW DIRTY THEY WERE.

I THE SOUTHWEST CORNER OF THE ROOM WAS A FLOOR MODEL TV SET. THIS SET WAS OFF IEN OFFICERS ARRIVED. LAYING BEHIND THE TV SET WERE TWO LARGE GARBAGE BAGS NTAINING AUTO PARTS.

AR THE CENTER OF THE WEST WALL WAS A BROWN WOODEN BOOKCASE TYPE CABINET. ANING UP AGAINST THE NORTHWEST CORNER OF THIS CABINET WAS AN OLDER STYLE SHING ROD. IN THE NORTHWEST CORNER OF THE ROOM WAS A GAS HEATER FOLLOWED I THE EAST AND AGAINST THE NORTH WALL BY A ROUND TABLE WITH A LAMP ON TOP. IE LAMP WAS UNPLUGED AND THEREFORE NOT WORKING. TO THE EAST OF THE TABLE S A LOVE SEAT. ON TOP OF THE LOVE SEAT WERE SEVERAL PILES OF CLOTHING. AR THE SOUTHWEST CORNER OF THE LOVESEAT AND ON THE FLOOR WAS A LAUNDRY SKET FULL OF CLOTHING.

JST TO THE EAST OF THE LOVE SEAT AND ON THE FLOOR WAS A PAIR OF BLUE STRECH NIM JEANS. THESE WERE FOLDED INSIDE OUT AND BELIEVED TO BE THE PANTS THE MPS WAS WEARING PRIOR TO HER ATTACK. EAST OF THE JEANS ON THE FLOOR WAS A RGE OPENING IN THE WALL ALLOWING ACCESS TO THE KITCHEN AREA. THIS OPENING 3/4 COVERED BY A BLUE SHEET THAT WAS NAILED UP.

I THE SOUTHEAST CORNER OF THE ROOM AND JUST BEHIND THE OPEN ENTRENCE DOOR S A STACK OF SEVEN CUSHIONS MATCHING THE COUCH. BEHIND THE COUCH WAS A FLOOR CEILING LAMP POST WITH THREE LAMPS ATTACHED. (WHILE AT THE SCENE, ONE SUCH MP WAS TURNED ON AND WAS THE ONLY ONE USED DURING THIS INVESTIGATION).

JST TO THE NORTH OF THE CUSHIONS WAS A LONG COUCH. LAYING ON THE COUCH WERE EVERAL ITEMS TO INCLUDE; A PINK SHEET, PURPLE BLANKET, LAYING ON THE PURPLE ANKET WAS WHAT APPEARED TO BE A PIECE OF PANTY LINING AND A SMALL PIECE OF EAR PLASTIC ATTACHED. THIS PANTY LINING HAD WHAT APPEARED TO BE SMEARED OOD ON IT. ALSO ON THE COUCH WAS A WHITE PILLOW AT THE NORTH END, LAYING ON HE PILLOW WAS A WHITE T-SHIRT. THERE WAS ALSO A WHITE SOCK WITH BLOOD DROPS BSERVED.

AYING ON THE FLOOR JUST TO THE WEST OF THE PILLOW AREA OF THE COUCH WAS A PAIR F BLUE PANTIES. THESE PANTIES APPEARED TO HAVE SMEARED BLOOD ON THEM AND WERE JT AT THE WAIST BAND AREA.

JST TO THE WEST OF THE COUCH WAS A GLASS TOPED COFFEE TABLE WITH A GOLD COLORED RAME. LAYING ON TOP OF THIS COFFEE TABLE WAS A PINK SCARF, A CRYSTAL CANDY ISH WITH LID, A PACK OF OATMEAL COOKIES THAT WERE 2/3RD'S GONE, TWO MAJIC 02 RADIO ADVERTISEMENTS AND ONE HALF OF A MAJIC 102 RADIO ENVELOPE. ON THE LOOR JUST TO THE EAST OF THE COFFEE TABLE WAS A MAJIC 102 RADIO LETTER. ON THE LOOR JUST UNDER THE SOUTH END OF THE COFFEE TABLE WAS A CLOSED GARLIC SALT TAINER. THE ONLY OTHER ITEM ON TOP THE COFFEE TABLE WAS LOCATED NEAR THE THWEST CORNER AND WAS OBSERVED TO BE A WHITE SOCK WITH BLOOD DROPS ON IT.

0023

ffense- CAPITAL MURDER
Street location information
umber- 617 Name-WESTFORD Type- Suffix-
pt no- Name-HELMERS Type- Suffix-
ate of offense-10/15/92 Date of supplement-04/06/94
ompl(s) Last-FRANKLIN First-EDNA Middle-MATTOON
Last-
Recovered stolen vehicles information
Stored- by- Ph#- (000) 000-0000
fficer1-CHU Emp#-093070 Shift- Div/Station-CRIME LAB

SUPPLEMENT NARRATIVE

EFERENCE : L92-10848
USPECT : CHARLES RABY

N MARCH 30, 1994 THE FOLLOWING ITEM WAS RETRIEVED FROM THE PROPERTY ROOM :

ANTIES

NALYSIS AND RESULT :

OD WAS INDICATED ON THE PANTIES.

RACE CHEMIST DEETRICE WALLACE DETERMINED THAT THE ELASTIC PART OF THE PANTIES
TORN BY THE FORCE.

upplement entered by = 93070
eport reviewed by-GLASS Employee number-077290
ate cleared- 10/19/92

---

o-0024

ffense- CAPITAL MURDER
Street location information
umber- 617 Name-WESTFORD Type- Suffix-
pt no- Name-HELMERS Type- Suffix-
ate of offense-10/15/92 Date of supplement-05/12/96
ompl(s) Last-FRANKLIN First-EDNA Middle-MATTOON
Last-
Recovered stolen vehicles information
Stored- by- Ph#- (000) 000-0000
fficer1-W.O. ALLEN,SGT. Emp#-051105 Shift-1 Div/Station-HOMICIDE

County of Harris)
)
)
State of Texas)
)

AFFIDAVIT OF PAUL B. RADELAT, M.D.

My name is Paul B. Radelat. I am a resident of Harris County, Texas. I am over the age of eighteen and I am competent to make this affidavit. All the facts stated here are within my personal knowledge.

1. I attended Loyola University of the South from 1951 to 1953. I received a medical degree from Louisiana State University Medical School in 1957. I am licensed to practice medicine in the state of Texas.

2. I was board certified in Anatomic and Clinical Pathology by the American Board of Pathology in 1962.

3. From 1958 to 1959, I was a Teaching Fellow at Columbia University's College of Physicians and Surgeons. I was a resident in pathology at Gorgas Hospital in the Canal Zone, Panama from 1959-1960, then served as Research Fellow in Pathology at Louisiana State University School of Medicine from 1960 to 1962.

4. I served as Chief of Laboratory Service at the Unites States Naval Hospital, United States Naval Academy in Annapolis, Maryland from 1962 to 1964. From 1964 to 1965, I acted as a consultant pathologist to the U.S. Naval Hospital, staff pathologist for Driscoll Children's Hospital, and staff pathologist for Spohn Hospital, all of which are located in Corpus Christi, Texas.

5. From 1965 to 1966 I served as Chief Deputy Medical Examiner for Clark County, Nevada (Las Vegas), and from 1966 to 1991 I served as Pathologist at Diagnostic Center Hospital in Houston Texas and was Chief of Pathology for approximately half of that time.

6. At the current time, I hold the position of Assistant Professor of Pathology (Clinical) at Baylor University College of Medicine in Houston, Texas. I am on the Honorary Staff for the Department of Pathology at Diagnostic Center Hospital in Houston, the Courtesy Staff for the Department of Pathology at St. Mary's Hospital in Port Arthur, Texas, and the Active Staff for St. Joseph's Hospital's Department of Pathology in Houston, Texas.

7. I am a member of the College of American Pathologists, American Medical Association, the Texas Medical Association, the Harris County Medical Society, and Alpha Omega

Alpha at the School of Medicine at Louisiana State University.

8. I received a J.D. from Bates College of Law at the University of Houston in 1969, and am admitted to the Texas State Bar, the United States District Courts for the Southern District of Texas, the Fifth Circuit Court of Appeals, and the Supreme Court of the United States. I am currently Of Counsel at the Houston, Texas law firm of Beirne, Maynard & Parsons, L.L.P.

9. I was asked by the attorneys currently representing Mr. Charles Raby to review the forensic evidence presented at trial related to pathology. I have therefore reviewed the trial testimony of Dr. Eduardo Bellas, Assistant Medical Examiner for Harris County, Texas in 1994, as well as his autopsy report. In addition, I have reviewed external autopsy photographs and photographs from the crime scene.

10. It is my opinion that in reasonable medical probability, Mrs. Edna Franklin was not sexually assaulted. None of the materials reviewed reveal any affirmative physical evidence of vaginal or anal penetration. Dr. Bellas testified that no semen or sperm was found on or inside the decedent's body or at the scene. Yet, according to my medical training and experience, it is my opinion that ejaculation does occur in most sexual attacks. In addition, the decedent's body bore no bite marks, which are not infrequently found on victims of sexual assault.

11. Dr. Bellas noted in his report that Mrs. Franklin had a condition called *senile purpura*, common in the elderly, which means that she would have bled very easily. The slightest trauma to her body would therefore have caused bruising. No bruising was described surrounding the decedent's genitalia, anus, or mouth, nor on her inner thighs. Given the complete lack of bruising around her genitalia and thighs, it is unlikely that her attacker either attempted a sexual assault or completed a sexual assault. According to my review of Dr. Bellas' testimony, defense counsel did not question Dr. Bellas about *senile purpura* or its importance in determining whether an attempted sexual assault occurred.

12. Nothing about the decedent's leg posture in the photographs I studied presents evidence of a sexual assault. Normally, a sexual assault victim's legs would be spread quite widely in order to accommodate the attacker's torso. If, in fact, Mrs. Franklin's body was first found on its side, that would tend to suggest that she was not sexually assaulted.

13. As a physician and pathologist, I can infer nothing about the likelihood that a sexual assault or an attempted sexual assault took place based on Mrs. Franklin's state of undress at the time her body was found.

14. The bruise on Mrs. Franklin's head, which I understand was discussed at Mr. Raby's sentencing hearing, could well have occurred when Mrs. Franklin hit her head as she fell to the floor. The coffee table post seen in the photos of the scene could easily have been the object struck.

THEY FORGET EMS FOUND HER ON HER SIDE
HE ROLLED HER OVER TO GIVE CPR. SO HE IS THE REASON
HER LEGS WERE SPREAD EGEM! (See Police Report AT 2.021
OR 000099.)

15. It is more likely than not that Mrs. Franklin's attacker would have received bruises or scratches during the attack. In reasonable medical probability, Mrs. Franklin was being held from behind when her throat was cut several times. She likely grasped or scratched the forearm that held her, as well as the forearm holding the knife. Mrs. Franklin's nails were long at the time of her death.

16. The knife with which Mrs. Franklin was attacked was probably three to four inches in length. While it is possible for a two inch blade to inflict a three inch wound, usually in that case a "hiltmark" is visible. A hiltmark is the mark left by the hilt of a knife on the skin surrounding a wound when a knife is thrust fully into flesh. Dr. Bellas pointed out at trial that he found no hiltmarks on the decedent's body. In addition, some of the decedent's wounds appear to be close to four inches in depth. NO hilt MARKS.

17. I understand that an attorney for the defense, Mr. Michael Fosher, underwent a cervical laminectomy on June 27, 1994, shortly after trial. This procedure involves the cutting of bone and nerve fibers in the neck. If Mr. Fosher underwent this surgical procedure, he was likely unable to work for at least four days, during which the skin and subcutaneous tissue at the site of surgery would have begun to fuse, but yet remain painful. The healing process is slow following this procedure: it takes three to four weeks for the skin and tissue to heal completely together. I understand that Mr. Fosher faced a deadline of July 8, 1994 for the filing of his motion for a new trial, twelve days after his surgery.

Under the pain and penalty of perjury, I swear that the above is true and correct to the best of my knowledge. I give this statement of my own free will.

DR Paul B. Radelat

Dr. Paul B. Radelat

SWORN TO and SUBSCRIBED before me on this the 27 day of February, 2002, to certify which witness hereof my hand and seal of office.

Patsy McDonald

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

My Commission Expires: 9/14/05

PATSY MCDONALD
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
SEPT. 14, 2005

)SEPH A. JACHIMCZYK, M.D., J.D.
FORENSIC PATHOLOGIST
ATTORNEY AT LAW
CHIEF MEDICAL EXAMINER

(713) 796-9292
(713) 796-6815
FAX: (713) 796-6838

OFFICE OF THE MEDICAL EXAMINER OF HARRIS COUNTY
JOSEPH A. JACHIMCZYK FORENSIC CENTER
1885 OLD SPANISH TRAIL
HOUSTON, TEXAS 77054-2098

TOXICOLOGY REPORT

MEDICAL LEGAL #: 92-6802

DATE: 10/20/92

NAME: Edna Mae Franklin

LABORATORY RESULTS

ALCOHOL: Blood = Negative
Cerebrospinal Fluid = Negative

BLOOD GROUP: B Negative

DRUG SCREEN: Stomach Content = Caffeine trace
Bile = Negative

CITY OF HOUSTON

Houston Police Department
1200 Travis Houston, Texas 77002-6000 713/247-1000

Lee P. Brown, Mayor

CITY COUNCIL MEMBERS: Bruce Tatro Carol M. Galloway Mark Goldberg Ada Edwards Addie Wiseman Mark A. Ellis Bert Keller Gabriel Vasquez
Carole Alvarado Annise D. Parker Gordon Quan Shelley Sekula-Rodriguez, M.D. Michael Berry Carroll G. Robinson CITY CONTROLLER: Sylvia R. Garcia

C. O. "Brad" Bradford
Chief of Police

September 9, 2002

Sarah M. Frazier
King & Spalding
1100 Louisiana Street, Suite 4000
Houston, Texas 77002-5213

Dear Ms. Frazier:

On July 23, 2002, you submitted a Public Information request for a copy of "inspection of the physical evidence collected during the investigation of the murder of Edna Franklin. We are providing you with these documents of the investigation. Ms. Frazier, you may want to coordinate viewing of evidence, if any, with the Houston Police Department's, Homicide Division at 713-308-3600.

Also enclosed you will find two invoices. Please return one invoice along with your payment by check or money order made payable to the City of Houston, to the Houston Police Department; Records Division; Attn: Carmen Flores; 1200 Travis, Houston, Texas 77002. You may also pay for the material in person in the Records Division on the 23rd floor of the Houston Police Station at 1200 Travis.

If you have any questions about the enclosed material, please contact Mary Haisten of the Media Relations Division at (713) 308-1800.

Sincerely,

Robert C. Hurst, Director
Media Relations Division

RCH/ma
OR #12947

000109

Case Report

7/11/02 10:48:24 AM

Case

Case Number 1113713-92
Date Created 10/16/92
Responsible Officer 81421
Notes

Agency Code 6 - HOMICIDE
Incident Code 1 - EVIDENCE

Evidence

Report Label 0UW5 Location CLOSED OUT Evidence 0UW6 In Date 4/13/93
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect UNKNOWN Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 4/19/94 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description 1-WHITE PRINT BLOUSE LE236

Transactions

Date/Time 4/19/94 9:17 am	Issuer 51105	Receiver 98590	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:40 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label 1285 Location CLOSED OUT Evidence 1286 In Date 5/18/93
Category 11 - CONTAINER ONLY Collected By Control
Serial Number N/A Suspect UNKNOWN Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 5/25/94 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description CARDBOARD BOX CONTAINING BELOW LISTED ITEMS 027

Transactions

Date/Time 9/1/93 2:22 pm	Issuer 51105	Receiver 101274	Tx 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:40 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label 1287 Location CLOSED OUT Evidence 1288 In Date 5/18/93
Category 9 - KNIVES Collected By Control
Serial Number N/A Suspect UNKNOWN Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 5/25/94 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description KNIFE 027

Transactions

Date/Time 9/1/93 2:22 pm	Issuer 51105	Receiver 101274	Tx 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:41 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label 1289 Location CLOSED OUT Evidence 128A In Date 5/18/93
Category 1 - MISCELLANEOUS Collected By Control
Serial Number N/A Suspect UNKNOWN Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 5/25/94 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description SCREWDRIVER 027

Transactions

Date/Time 9/1/93 2:22 pm	Issuer 51105	Receiver 101274	Tx 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:41 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Case Report

7/11/02 10:48:24 AM

Evidence

Report Label 128B Location CLOSED OUT Evidence 128C In Date 5/18/93
Control
Category 1 - MISCELLANEOUS Collected By Owner FRANKLIN,EDNA
Serial Number N/A Suspect UNKNOWN Last Count 12/30/97
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 5/25/94 Dispose Date
Last Dispose 1 - Unknown
Description PLASTIC TRAY 027

Transactions

Date/Time 9/1/93 2:22 pm	Issuer 51105	Receiver 101274	Tx 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:41 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label 128D Location CLOSED OUT Evidence 128E In Date 5/18/93
Control
Category 1 - MISCELLANEOUS Collected By Owner FRANKLIN,EDNA
Serial Number N/A Suspect UNKNOWN Last Count 12/30/97
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 5/25/94 Dispose Date
Last Dispose 1 - Unknown
Description PURSE CONT ASST CREDIT CARDS & PAPERS 027

Transactions

Date/Time 9/1/93 2:22 pm	Issuer 51105	Receiver 101274	Tx 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:41 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label 1SM5 Location CLOSED OUT Evidence 1SM6 In Date 9/8/93
Control
Category 1 - MISCELLANEOUS Collected By Owner FRANKLIN,EDNA
Serial Number Suspect RABY,CHARLES Last Count 12/30/97
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 12/13/93 Dispose Date
Last Dispose 1 - Unknown
Description ME CONT HAIRS/HEAD HAIRS/PUBIC HAIR/HAIR * (ME108)

Transactions

Date/Time 12/13/93 4:01 pm	Issuer 41494	Receiver 94035	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:40 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label SWVL Location CLOSED OUT Evidence SWVM In Date 10/30/92
Control
Category 11 - CONTAINER ONLY Collected By Owner FRANKLIN,EDNA MATTON
Serial Number Suspect N/A Last Count 12/30/97
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Dispose Date
Last Dispose 1 - Unknown
Description ME (FZ180) CONT. BELOW LISTED ITEMS

Transactions

Date/Time 11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time 12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time 12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time 1/20/93 1:50 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time 2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time 11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 12:24 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Case Report

7/11/02 10:48:24 AM

Evidence

Report Label SWVN Location CLOSED OUT Evidence SWVO In Date 10/30/92
Control
Category 1 - MISCELLANEOUS Collected By Owner FRANKLIN,EDNA MATTON
Serial Number Suspect N/A Last Count 12/30/97
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Dispose Date
Last Dispose 1 - Unknown
Description (2) PLASTIC CUPS CONTAINING FINGER NAILS

Transactions

Date/Time	11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time	12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time	12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time	1/20/93 1:50 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time	2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 12:24 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label SWVP Location CLOSED OUT Evidence SWVQ In Date 10/30/92
Control
Category 1 - MISCELLANEOUS Collected By Owner FRANKLIN,EDNA MATTON
Serial Number Suspect N/A Last Count 12/30/97
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Dispose Date
Last Dispose 1 - Unknown
Description (3) SWABS ,VAGINAL-ORAL-RECTAL

Transactions

Date/Time	11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time	12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time	12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time	1/20/93 1:48 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time	2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 12:24 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D
Date/Time	6/6/94 12:25 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label SWVR Location CLOSED OUT Evidence SWVS In Date 10/30/92
Control
Category 1 - MISCELLANEOUS Collected By Owner FRANKLIN,EDNA MATTON
Serial Number Suspect N/A Last Count 12/30/97
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Dispose Date
Last Dispose 1 - Unknown
Description (3) PLASTIC BAG COTAINING HAIR

Transactions

Date/Time	11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time	12/2/92 10:46 am	Issuer 93158	Receiver 94035	Tx 99 -
Date/Time	12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time	1/20/93 1:49 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time	2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 12:25 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO I

Case Report

7/11/02 10:48:24 AM

Evidence

Report Label TJYN Location CLOSED OUT Evidence TJYO In Date 10/16/92
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 12/2/92 Last Count 12/2/92
Last Dispose 1 - Unknown Dispose Date
Description 1-PIECE OF CARPET;CLOTHING;LOOSE HAIRS (028)

Transactions

Date/Time 10/21/92 10:30 am	Issuer 97124	Receiver 94715	Tx 4 - OUT TO LABS
Date/Time 12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time 3/30/94 3:03 pm	Issuer 97646	Receiver 102193	Tx 4 - OUT TO LABS
Date/Time 5/4/94 1:40 pm	Issuer 102193	Receiver 92842	Tx 1 - RETURN PROPERTY
Date/Time 6/6/94 12:22 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label TKQN Location CLOSED OUT Evidence TKQO In Date 10/20/92
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect RABY,CHARLES D. W/M (22) Owner FRANKLIN,EDNA M
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 10/28/93 Last Count 12/2/92
Last Dispose 1 - Unknown Dispose Date
Description SUSPECTS ASSORTED CLOTHING

Transactions

Date/Time 10/21/92 10:30 am	Issuer 97124	Receiver 94715	Tx 4 - OUT TO LABS
Date/Time 12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time 1/25/93 1:13 pm	Issuer 51105	Receiver 94035	Tx 5 - HOLD BY DIVISION
Date/Time 10/28/93 12:52 pm	Issuer 51105	Receiver 94035	Tx 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:38 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label TNQD Location FZ023 Evidence TNQE In Date 11/30/92
Category 5 - FREEZER Collected By Control
Serial Number Suspect RABY,CHARLES Owner FRANKLIN,ENDA
Last Tx 15 - INFORMAL DESTRUCT Tx Date 12/27/99 Last Count 11/30/92
Last Dispose 13 - Thrown Away Dispose Date 12/27/99
Description SALIVA,BLOOD (FZ023)

Transactions

Date/Time 1/19/93 1:30 pm	Issuer 41494	Receiver 94035		Tx 5 - HOLD BY DIVISION
Date/Time 12/7/93 4:45 pm	Issuer 51105	Receiver 98360		Tx 5 - HOLD BY DIVISION
Date/Time 6/28/95 8:58 am	Issuer 51105	Receiver 94094		Tx 5 - HOLD BY DIVISION
Date/Time 1/7/99 7:41 am	Issuer 51105	Receiver 107254		Tx 5 - HOLD BY DIVISION
Date/Time 12/9/99 7:07 am	Issuer 41494	Receiver 105752		Tx 7 - DISPOSE CITY ORD.
Date/Time 12/27/99 5:38 am	Issuer 41494-HOMICIDE	Receiver 92370	KP	Tx 15 - INFORMAL DESTRUCT

Total Cases: 1 Total Evidence: 14 Total Transactions: 64

e Number 111371392R

pect Name UNKNOWN

horized By SGT FRANK Emp# ____ Division HOMICIDE

ense MURDER Location 617 WESTFORD

ident Type: Evid ☒ Found ☐ Safe Keeping (Jail) ☐ Invest ☐

Date Tagged 4-13-93 Time 0800

Compl./Owner EDNA FRANKLIN

Officer's Name N. CARMAN Division HOM/CSU

Officer's Signature & Emp.# N Carman 80355

Property Officer's Sign. & Emp.# O.E. CHUKUANI/PR#97124

Bar Code Sticker	Description (Quantity, Make, Model, Serial #, Any Damage, etc.)
V2236	(1) WHITE PRINT BLOUSE — permanent out to Division Homicide Robert Gutierrez Assistant D.A. 06-05-94
0UW5	PROPERTY PACKAGE OPENED FOR ____ BY [illegible] DATE MAR 28 1994
	24

000114

Hou[illegible] Department

Case Number 111 371392 R	Date Tagged 18 MAY, 1993 Time 0800 HRS
Suspect Name UNKNOWN	Compl./Owner FRANKLIN, EDNA
Authorized By SGT. FRANK Emp# 15892 Division Homicide	Officer's Name WC Sheldon Division ID
Offense CAP. MURDER Location 617 WESTFORD	Officer's Signature & Emp.# WC Sheldon 38788
Incident Type: Evid [X] Found [ ] Safe Keeping (Jail) [ ] Invest [ ]	Property Officer's Sign. & Emp.# O.E. CH[illegible]/PR#97124

Bar Code Sticker	Description (Quantity, Make, Model, Serial #, Any Damage, etc.) L/L# 7605-92
1287	(1) KNIFE
1289	(1) SCREW DRIVER
1288	(1) PLASTIC TRAY
128D	(1) PURSE CONTAINING BELOW LISTED ITEMS
	ASST. CREDIT CARDS
	ASST. PAPER ARTICLES
	PROPERTY PACKAGE OPENED FOR Roberto Gutierrez Assistant D.A. BY V. Palmer #98590 DATE MAR 28 1994
	28

BIN# 027

1285

Permanent out to Division - Homicide 6-05-94

000115

se Number 111371392 | Date Tagged 8 SEP 93 | Time 0831

spect Name Charles Raby | Compl./Owner Edna Franklin

uthorized By W.I. Stephens Emp# 71252 Division Homicide | Officer's Name R.M. Hilleman Division Crime Lab

ffense Murder Location 617 Westford | Officer's Signature & Emp.# Rudun Hilleman R1265

ıcident Type: Evid [x] Found [ ] Safe Keeping (Jail) [ ] Invest [ ] | Property Officer's Sign. & Emp.# [illegible] 9835

Bar Code Sticker	Description (Quantity, Make, Model, Serial #, Any Damage, etc.)
1SM5	loose and pulled head hairs of Lee Rose; loose and pulled head hairs of Eric Benge loose and pulled head and pubic hairs of Charles Raby hair from complainant's right hand 06-05-94 Permanent out to Division - Homicide - L92-10848 RH

NG 108

000116

Case Number 111371392 e **CLOSED 00?** Date Tagged CLOSED Time

Suspect Name ~~Suspect Name~~ Compl./Owner EDNA MATTOON FRANKLIN

Authorized By _____ Emp# _____ Division CSU/HOM Officer's Name F.L. HALE Division CSU

Offense MURDER Location 617 WEST FORD Officer's Signature & Emp.# F. L. Hale 54247

Incident Type: Evid ☐ Found ☐ Safe Keeping (Jail) ☐ Invest ☐ Property Officer's Sign. & Emp.# Luisa Batiste 9871

JAN 29 1993 2

Bar Code Sticker	Description (Quantity, Make, Model, Serial #, Any Damage, etc.)
SWVN	(2) PLASTIC CUPS - CONTAINING FINGERNAILS
SWVP	(3) SWABS, VAGINAL, ORAL, RECTAL
SWVR	(3) PLASTIC BAGS, CONTAINING HAIRS

FZ-180

SWVL

ME 107

permanent out to division Homicide 06-05-94

000117

Case Number 111371392 R CLOSED OUT	Date CLOSED OUT Time 4 20 PM
Suspect Name:	Compl./Owner EDNA FRANKLIN.
Authorized By J. NORRIS Emp# 81421 Division HOMICIDE	Officer's Name JIM NORRIS Division HOMICIDE
Offense CAPITAL MURDER Location 617 WESTFORD	Officer's Signature & Emp.# 81421
Incident Type: Evid [XX] Found [ ] Safe Keeping (Jail) [ ] Invest [ ]	Property Officer's Sign. & Emp.# 73867

Bar Code Sticker	Description (Quantity, Make, Model, Serial #, Any Damage, etc.)
028 TJYN	ONE PIECE OF CUT CARPET (APPROX. 1'x1'); ONE PAIR OF BLUE STRECH DENIM JEANS: ONE PAIR OF BLUE PANTIES WITH BLOOD DROPS; LOOSE UNKOWN HAIRS. permanent out to division 06-05-96 Assistant D.A.
	PROPERTY PACKAGE OPENED FOR BY Palmer # 9310 DATE MAR 28 1994

000118

e Number 1113-713-92	Date Tagged 10/20/92 Time 9:15 AM
pect Name RABY, CHARLES D. W/M (22)	Compl./Owner FRANKLIN, EDNA M
thorized By SGT WENDEL Emp# 41494 Division HOMICIDE	Officer's Name SAME Division SAME
fense MURDER Location 617 WESTFORD	Officer's Signature & Emp.# K Wendel PR#41494
cident Type: Evid ☒ Found ☐ Safe Keeping (Jail) ☐ Invest ☐	Property Officer's Sign. & Emp.# BANKS Banks PR#98133

Bar Code Sticker	Description (Quantity, Make, Model, Serial #, Any Damage, etc.)
TKON	permanent out to division SUSPECTS ASSORTED CLOTHING - Homicide - 06-05-94 Roberto Gutierrez Assistant D.A.
	PROPERTY PACKAGE OPENED FOR Roberto Gutierrez BY Palmer #98310 DATE MAR 28 1994

in #183

000119

Houston Police Department

CLOSED 000120

Case Number 111371392 R

Suspect Name CHARLES RABY

Authorized By T. THOMAS Emp# 54281 Division HOMICIDE

Offense MURDER Location 617 WESTFORD

Incident Type: Evid [x] Found [ ] Safe Keeping (Jail) [ ] Invest [ ]

Date Tagged 11-25-92 Time 10:15 AM

Compl./Owner ENDA FRANKLIN

Officer's Name T. THOMAS Division HOMICIDE

Officer's Signature & Emp.# #54281

Property Officer's Sign. & Emp.# C. L. [illegible] 6596

JAN 15 1993 8 Bar Code Sticker

	Description (Quantity, Make, Model, Serial #, Any Damage, etc.)
F203	TNQD SALIVA, BLOOD
	L92-10848 RH/JHC

INFORMAL DESTRUCT
DEC 27 1999 VP #92570

26

000120

Hous Police Property Division
D_position Authorization

Property Room Use Only

DEC 1999
HPD PROPERTY ROOM
RECEIVED

te Sent: 11/30/9 9 Division: HOMICIDE

Incident No.: 1113713-92

e property listed on this report was authorized by your Division to be tagged in the Property Room. Disposition ormation is required by the Property Division. Indicate the current status of the property, date, and sign. This form UST be returned to the Property room within thirty (30) days. (General Order 700-1)

Hold for Court Case
Defendant's Name _____
Charge Filed _____
Court Filed In _____

Hold for further investigation:
Signature of Investigative Shift Commander Required _____

Hold for Possible Surety or Indemnity Bond Agreement
Type of Bond Required: _____
Person must be advised that he has 30 days to secure bond and retrieve property
Name of person to whom release was refused: _____
Date & Time notified that property would be returned: _____
* Method of Notification _____

Hold for Property Hearing:
Hearing Date: _____

Photograph & Release to Owner:
Date & Time Notified to Reclaim Property: _____
* Method of Notification _____
(Note: Investigator is responsible for photographing property BEFORE it is released to owner).

6. Release to Owner (or Authorized Person)
Owners Name _____
Date & Time Notified to Reclaim Property: _____
* Method of Notification: _____

7. Dispose of as Authorized by City Ordinance
(Use only after the property is no longer needed as evidence or for investigation, and all reasonable efforts to return the property to the owner have been exhausted by the Investigative Division.

8. Transfer of Responsibility:
Division transferred to: _____
Authorized by: _____
(Note: Authorizing Person MUST be assigned to Division Accepting Transfer of Responsibility)

9. Destroy/Forfeiture Property as Ordered by Court
(Court Orders for destruction of property to be kept on file by the Investigative Division).

* Method of Notification: Indicate if in person, by phone, or by mail. (If property value is $200 or more, mail must be certified, return receipt). Return address on envelope should include the Division and Investigator's Name.

Disp. Code

TNQE Location: FZ023 Last Disp:8 Date Evidence In: 11/30/92 **7**

Deser: SALIVA,BLOOD (FZ023) Serial:

Officer: 81421 Complainant/Owner: FRANKLIN,ENDA Suspect: RABY,CHARLES

Capital Murder

W.C. Wendel
W.S. Allen

12/6/99 — W C Wendel — 41494

Date — Signature of Investigative Officer — Employee Number

Property Room Use Only

Final Supervisory Review by: _____ 12-12-99

Name — Date

000121

CAUSE NO. 9407130

THE STATE OF TEXAS	§	IN THE 248TH DISTRICT COURT
	§	
V.	§	IN AND FOR
	§	
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

AFFIDAVIT OF SARAH M. FRAZIER

County of Harris §

State of Texas §

My name is Sarah M. Frazier. I am a resident of Harris County, Texas. I am over the age of eighteen and I am competent to make this affidavit. All the facts stated here are within my personal knowledge.

1. I am one of the attorneys currently representing Charles D. Raby in his post-conviction proceedings. I am with the firm of King & Spalding in Houston, Texas.

2. On July 8, 2002, I spoke by telephone with Joseph Chu of the Houston Police Department Crime Laboratory. During that conversation, Mr. Chu told me that PCR testing became available at that facility in 1993.

3. I have personally viewed the hair recovered from the victim's fist, the victim's fingernail clippings, and the blue panties, all of which are currently in the possession of the Harris County Clerk's Office in a property box. The box did not contain the nightshirt worn by Ms. Franklin at the time she was killed.

4. After inquiry by telephone and by letter, HPD produced to King & Spalding a property room inventory for physical evidence related to Mr. Raby's case, which I received on Friday, September 13, 2002.

5. On September 19, 2002, Lt. Jett of the Homicide Division confirmed by telephone message to me that the property room no longer possesses any physical evidence in the case.

6. Undersigned counsel have attempted to obtain physical evidence current inventories from the HPD Crime Lab and Harris County Medical Examiner's office, but these agencies have refused to produce such information.

Executed on this 15th day of October, 2002.

Sarah M. Frazier

Subscribed and sworn to before me, the undersigned authority, under oath duly administered, on this 15th day of October, 2002.

Lisa W. Cavazos

Notary Public in and for the State of Texas

My commission expires: 9-12-04

LISA W. CAVAZOS
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
SEPT. 12, 2004

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

United States Courts
Southern District of Texas
FILED
CT MAY 0 8 2002
Michael N. Milby, Clerk

CHARLES D. RABY,	§	
	§	
Petitioner,	§	
	§	
v.	§	NO. H-02-0349
	§	
JANIE COCKRELL,	§	
	§	
Director, Texas Department of Criminal Justice, Institutional Division	§	

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

CHARLES D. RABY, through his undersigned appointed counsel, hereby files this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, Mr. Raby is being held under a sentence of death by the Texas Department of Criminal Justice in violation of the United States Constitution. Mr. Raby respectfully asks this Court to grant an evidentiary hearing, at which Mr. Raby will offer proof of the facts alleged herein, demonstrating his entitlement to a writ of habeas corpus ordering the State of Texas (the "State") to afford him, in the alternative, a new trial, a new capital sentencing proceeding, or a new direct appeal.

TABLE OF CONTENTS

INTRODUCTION 4

PROCEDURAL HISTORY 8

STANDARD OF REVIEW 9

CLAIMS FOR RELIEF 10

I. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SUPPRESSION HEARING AND GUILT-INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS 10

A. Mr. Raby's Trial Counsel Failed to Develop and Present an Available, Compelling Case for Suppression of the Statement to Police 11

B. Mr. Raby's Trial Counsel Abandoned Their Advocacy Role at the Guilt-Innocence Phase of Trial, Resulting in the Constructive Denial of Counsel 21

C. Mr. Raby's Trial Counsel Made Numerous, Nonstrategic Errors at the Guilt-Innocence Phase of Trial 26

D. The Overall Performance of Mr. Raby's Trial Counsel at the Guilt-Innocence Phase Fell Below Constitutionally Permissible Standards and Prejudiced Mr. Raby 33

II. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 33

A. Mr. Raby's Trial Counsel Failed to Develop and Present Available Evidence to Contest the Probability That Mr. Raby Would Commit Acts of Criminal Violence, and Instead Presented an Unreliable Expert Who *Exaggerated* the Risk That Mr. Raby Would Commit Acts of Criminal Violence if Sentenced to Life in Prison 34

B. Mr. Raby's Trial Counsel Failed to Develop and Present Available Mitigating Evidence 44

C. Mr. Raby's Trial Counsel Failed to Impeach a Critical State Witness, Karianne Wright 78

D. Trial Counsel's Closing Argument At Sentencing Fell Below Constitutionally Permissible Standards And Prejudiced Mr. Raby In Assigning Responsibility For The Crime To The Elderly Victim 80

E. The Overall Performance of Mr. Raby's Trial Counsel Fell Below Constitutionally Permissible Standards 82

III. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 83

IV. MR. RABY WAS CONVICTED OF CAPITAL MURDER IN VIOLATION OF THE SIXTH AMENDMENT, EIGHTH AMENDMENT, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE HE WAS NOT PERMITTED TO INFORM THE JURY THAT EXTREME INTOXICATION COULD NEGATE THE CONSTITUTIONALLY REQUIRED ELEMENT OF SPECIFIC INTENT 88

V. MR. RABY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HE WAS NOT ALLOWED TO PRESENT RELEVANT MITIGATING EVIDENCE TO THE JURY AT SENTENCING 91

VI. MR. RABY WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH EVERY ELEMENT OF THE OFFENSE OF CAPITAL MURDER 92

A. The State Introduced Insufficient Evidence of Either Aggravated Sexual Assault or Attempted

Aggravated Sexual Assault 93
B. The State Introduced Insufficient Evidence of Either Robbery or Attempted Robbery 96
C. The State Introduced Insufficient Evidence of Either Burglary or Attempted Burglary 101

VII. MR. RABY WAS CONVICTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS PERMITTED TO CONVICT HIM OF CAPITAL MURDER BASED ON A BURGLARY FINDING PREDICATED ON THE MURDER ITSELF 103

A. Texas Penal Code § 19.03(a)(2) Did Not Give Fair Warning at the Time of the Offense, as Required by the Due Process Clause of the Fourteenth Amendment, That an Intentional Murder Occurs "In the Course of" Burglary When the Murder Itself Is the Conduct That Creates the Burglary 104
B. Texas Penal Code § 19.03(a)(2), as Applied to Mr. Raby, Does Not Sufficiently Narrow the Class of Persons Eligible for the Death Penalty, as Required by the Eighth and Fourteenth Amendments 107

VIII. MR. RABY WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE JURY WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON WHICH UNDERLYING FELONY ALLEGED IN THE INDICTMENT ELEVATED THE OFFENSE OF MURDER TO CAPITAL MURDER 108

A. The Trial Court's Refusal to Instruct the Jury That They Had to Agree Unanimously on Which Underlying Felony Was Committed Violated the Due Process Clause of the Fourteenth Amendment 109
B. The Texas Court of Criminal Appeals' Failure to Provide a Remedy for the Trial Court's Refusal to Instruct the Jury That They Had to Agree Unanimously on Which Underlying Felony Was Committed, as Required by Texas Law, Violated the Due Process Clause of the Fourteenth Amendment 110

IX. MR. RABY WAS CONVICTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THE STATE COMMENTED IMPERMISSIBLY ON HIS SILENCE DURING ORAL ARGUMENT AT THE GUILT-INNOCENCE PHASE OF TRIAL 111

X. MR. RABY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HE WAS NOT PERMITTED TO QUESTION OR INFORM THE JURY THAT A LIFE SENTENCE WOULD RENDER MR. RABY PAROLE INELIGIBLE FOR AT LEAST 35 YEARS 114

A. Mr. Raby Was Sentenced to Death in Violation of the Fourteenth Amendment Because He Was Not Permitted to Inform the Jury That a Life Sentence Would Render Him Parole Ineligible for at Least 35 Years 115
B. Mr. Raby Was Sentenced to Death in Violation of the Eighth and Fourteenth Amendments Because He Was Not Permitted to Offer Constitutionally Relevant Mitigating Evidence Regarding Age and Recidivism at the Punishment Phase of His Trial 118
C. Texas Law Giving the Trial Judge *Discretion* Whether to Inform the Jury About the Parole Ineligibility of a Life Sentence Violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment 118

XI. MR. RABY WAS CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF THE FOURTEENTH AMENDMENT BECAUSE HE WAS NOT PERMITTED TO CONDUCT MEANINGFUL VOIR DIRE OF PROSPECTIVE JURORS 119

XII. MR. RABY WAS CONVICTED ON THE BASIS OF A FALSE AND INVOLUNTARY STATEMENT THAT WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS 121

XIII. THE CUMULATIVE IMPACT OF THE FLAWS IN MR. RABY'S TRIAL ROBBED MR. RABY'S STATE TRIAL OF FUNDAMENTAL DUE PROCESS 122

REQUEST FOR EVIDENTIARY HEARING 116

PRAYER 117

INTRODUCTION

Mr. Raby was convicted of capital murder and sentenced to death for the October 15, 1992, homicide of Edna Franklin. Ms. Franklin was found dead in her home by her two adult grandsons, Eric Benge and Lee Rose, both of whom lived in Ms. Franklin's house. Ms. Franklin had been stabbed with a knife that was never found. Mr. Raby was a friend of Ms. Franklin's two grandsons and was seen in the same neighborhood on the day of the crime, but *no physical evidence* tied Mr. Raby to the crime.

Mr. Raby was convicted solely on the basis of a statement that he gave while in police dy four days after the crime occurred. The series of constitutional violations that led ultimately to Mr. Raby's wrongful conviction began with that custodial interrogation. Police obtained Mr. Raby's statement after he requested counsel, while he was intoxicated on narcotics, and under the coercive pressure of threats to arrest his girlfriend and to put her infant child into the custody of Child Protective Services (police were holding the two at the station during Mr. Raby's interrogation). Mr. Raby's waiver of his Fifth Amendment rights was not voluntary, both because of these coercive circumstances, and because he did not (and still does not) understand that his right to remain silent includes the right not to have his silence used against him. In addition, the story Mr. Raby recounted in his statement to police differs markedly from the evidence police officers found at the crime scene, most significantly in that Mr. Raby stated that he entered the victim's house through the unlocked front door, whereas the State presented substantial evidence that the attacker entered through a window.

Virtually none of these facts came out at the hearing on the motion to suppress the statement, because Mr. Raby's court-appointed attorneys did almost nothing to prepare for that hearing (or any other part of the case). With respect to these and many other key issues at trial,

Mr. Raby's attorneys did not interview and call important witnesses (such as Mr. Raby's girlfriend), and did not follow up on important information supplied by Mr. Raby (such as his unanswered request for counsel). The product of trial counsel's failure to prepare, and Mr. Raby's resulting misunderstanding of his rights, was a formalistic suppression hearing at which only a sliver of the entire picture of the interrogation was revealed, and at which Mr. Raby appeared to confirm his custodial statement.

Mr. Raby's trial lawyers then compounded their errors at the suppression hearing by failing to challenge the voluntariness of the statement at trial. Remarkably, although Mr. Raby's statement to police (obtained under highly coercive circumstances) was the only evidence linking Mr. Raby to this crime, Mr. Raby's attorneys: (1) put on *no evidence* of any kind at the guilt-innocence phase of the trial; (2) *conceded* the validity of the custodial statement and that Mr. Raby committed the murder; and (3) attempted—through argument and rhetoric alone—to challenge *only* whether he committed the predicate felonies (sexual assault, robbery, burglary, or attempt thereof) that would elevate the crime to capital murder. But even then, trial counsel's fundamental misunderstanding of the law rendered their challenge meaningless. Trial counsel focused on whether Mr. Raby had entered the house through a window, apparently believing that a *breaking and entering* was required to establish a burglary. Of course, it is not. Whether Mr. Raby entered the house through a window (as the State alleged) or through the unlocked front door (as Mr. Raby stated in his statement to police) was irrelevant to whether a burglary occurred; the only relevant facts were whether he entered at all and whether he had consent to do so. By completely failing either to challenge the voluntariness of the statement, or to develop evidence that Mr. Raby had his friends' consent to enter the Franklin home (the only issue that remained open after trial counsel conceded the statement), trial counsel conceded essentially all

elements of capital murder, and failed to provide Mr. Raby with even a semblance of a defense at the guilt-innocence phase of his trial.

Trial counsel committed numerous other errors during the guilt-innocence phase of the trial. Tellingly, trial counsel's cross-examination of witnesses and closing argument mostly reiterated the State's case, in complete abandonment of any effort to advocate on Mr. Raby's behalf. And perhaps worst of all, trial counsel failed to object to the State's highly improper and prejudicial suggestions in closing arguments that Mr. Raby's post-arrest silence on the predicate felonies and failure to testify at trial was evidence of his guilt. Given that the State presented extremely weak—indeed, legally insufficient—evidence on all of the predicate felonies, trial counsel's failure to object to these comments was inexcusable.

At the punishment phase, trial counsel's errors of unpreparedness, fundamental misunderstanding of the law and facts, and simple incompetence continued unabated. On the issue of future dangerousness, trial counsel presented an expert witness who became involved in the case only a week before he testified, who prepared no report to give trial counsel a preview of his opinion, and who made numerous fundamental errors in his methodology. This expert's methods have since been discredited by, among others, the Texas Attorney General's office. On the issue of mitigation, trial counsel conducted almost no investigation of Mr. Raby's social history. Trial counsel uniformly called mitigation witnesses with whom they had never met or spoken, ignorant of what knowledge or insight those witnesses might possess. As a result, Mr. Raby's mitigation witnesses were often confused and mistrustful on the stand, and counsel was unable to discover, much less elicit, crucial mitigating evidence.

The adequacy of Mr. Raby's counsel did not improve on direct appeal. Remarkably, one of Mr. Raby's trial lawyers was appointed to represent him on direct review, even though he

suffered from an obvious conflict of interest: during trial he was wearing a neck brace and taking prescription painkillers for a neck injury he admitted was extremely painful. Indeed, appellate counsel underwent major neck surgery shortly after the trial concluded, and less than two weeks before he filed the motion for new trial that defined the scope of the direct appeal. Whether because of his obvious conflict of interest, his surgery during the preparation of the motion for new trial, or because of general ineffectiveness, appellate counsel failed to raise a number of valid claims that should have been raised on direct appeal, including ineffective assistance claims, and failed to brief claims that he did raise properly.

The state trial court, and the Court of Criminal Appeals also made a number of serious, prejudicial constitutional errors, including:

- *First*, the state courts prohibited Mr. Raby from meeting the evidence against him on the constitutionally required element of specific intent or reckless indifference to human life, by barring him from introducing evidence to show that his extreme intoxication prevented him from forming the necessary mental state;
- *Second*, the courts did not permit Mr. Raby to make proper jury argument during the punishment phase of the trial regarding voluntary intoxication as mitigation;
- *Third*, these courts allowed Mr. Raby to be convicted of capital murder despite insufficient evidence to establish every element of the offense beyond a reasonable doubt;
- *Fourth*, these courts allowed Mr. Raby to be convicted on a novel interpretation of the Texas capital murder statute, which the Court of Criminal Appeals has admitted is ambiguous, thus denying Mr. Raby fair notice of the crime with which he was charged;
- *Fifth*, the state courts allowed Mr. Raby to be convicted without a verdict on every element of capital murder because his jury was not required to agree about which predicate felony Mr. Raby committed;
- *Sixth*, the State commented improperly on Mr. Raby's silence during oral argument at the guilt-innocence phase of the trial;

- *Seventh*, the Texas courts did not permit Mr. Raby to give the jury accurate information about Texas parole law to rebut the State's case of future dangerousness;

- *Eighth*, the Texas courts convicted Mr. Raby on the basis of a false and involuntary statement that police obtained in violation of the Fifth, Sixth, and Fourteenth Amendments;

- *Ninth*, the Texas courts did not permit Mr. Raby to conduct adequate voir dire so that unqualified jurors could be excused for cause; and

- *Tenth*, the cumulative impact of the flaws in Mr. Raby's trial robbed Mr. Raby's state trial of fundamental due process.

For these reasons, as stated more fully in the claims below, and as the evidence submitted herewith and to be presented at the evidentiary hearing will show, this petition for habeas corpus should be granted, and Mr. Raby's conviction and death sentence should be reversed.

PROCEDURAL HISTORY

Mr. Raby was tried by a jury in June of 1994. At trial, Felix Cantu and Michael Fosher were appointed to represent Mr. Raby. He was found guilty of capital murder on June 9, 1994, and sentenced to death on June 17, 1994. On appeal, Mr. Fosher was appointed as Mr. Raby's appellate counsel.[1] Nearly four years later, on March 4, 1998, the Court of Criminal Appeals affirmed the conviction and death sentence, over the dissent of three Judges.[2] A Motion for Rehearing was denied on April 22, 1998.[3] A Petition for Writ of Certiorari to the United States Supreme Court was filed on July 3, 1998, and was denied on November 16, 1998.[4]

---

1 *See* C.R. at 561. In this petition, citations to "Ex." refer to the evidentiary exhibits and other materials being filed by Mr. Raby contemporaneously with this petition, followed by the exhibit number. Citations to "S.F." refer to the Statement of Facts (i.e., the trial transcript), followed by the volume: page number. Citations to "C.R." refer to the Clerk's Record, followed by the page number.

2 *Raby v. State*, 970 S.W.2d 1 (Tex. Cr. App.), *cert. denied*, 119 S. Ct. 515 (1998), a true and correct copy of which is attached hereto as Exhibit 39.

3 *Id.*

4 *Raby v. Texas*, 119 S. Ct. 515 (1998).

While Mr. Raby's direct appeal was pending before the United States Supreme Court, Mr. Raby proceeded with state habeas corpus proceedings. On July 16, 1998, Mr. Raby filed a state application for writ of habeas corpus.[5] Although Mr. Raby requested an evidentiary hearing, the trial court adopted the State's proposed findings of fact and conclusions of law, without holding an evidentiary hearing, on November 14, 2000.[6] The Court of Criminal Appeals adopted the trial court's findings and conclusions, and denied relief on January 31, 2001.[7]

On March 20, 2001, this Court appointed King & Spalding to represent Mr. Raby in proceedings under 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 2244(d)(1)(A), as tolled by 28 U.S.C. § 2244(d)(2), Mr. Raby filed his habeas petition on January 30, 2002, within one year from the date on which his conviction became final by the conclusion of direct review. Pursuant to Fed. R. Civ. P. 15(a) and *U.S. v. Saenz*,[8] Mr. Raby timely files this First Amended Petition for Writ of Habeas Corpus.

STANDARD OF REVIEW

A federal court reviewing a habeas petition from a person in State custody reviews claims that were presented to the State courts, but not decided on their merits, *de novo*.[9] With respect to any claim that was adjudicated on the merits in State court proceedings, a federal court reviewing a habeas petition may grant relief if the State court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

---

5 *See* Application for Writ of Habeas Corpus, in the 248th Dist. Ct. of Harris Cty., Tex., Ex. 43.

6 A true and correct copy of the trial court's findings of fact and conclusions of law is attached hereto as Exhibit 40.

7 *Ex Parte Raby*, No. 48131-01 (Tex. Cr. App. Jan. 31, 2001), a true and correct copy of which is attached hereto as Exhibit 42.

8 *U.S. v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002).

9 *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000).

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.[10]

Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision," as determined by this Court upon an independent review.[11] A decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts."[12] A decision is an unreasonable application of federal law "if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case."[13] Factual findings of the State court are presumed to be correct, "unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[14]

CLAIMS FOR RELIEF

I. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SUPPRESSION HEARING AND GUILT-INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

It is clearly established that a felony defendant has the right to the effective assistance of counsel at all critical stages of criminal proceedings.[15] This right is violated if counsel's performance falls below an objective standard of reasonable competence, and if the deficient performance prejudices the defendant.[16] The defendant is prejudiced if, considering the attorney's performance as a whole, there is a reasonable probability that the outcome would have

---

10 28 U.S.C. § 2254(d).
11 *Williams v. Taylor*, 120 S. Ct. 1495, 1518, 1523 (2000).
12 *Id.* at 1523; *see also Gardner v. Johnson*, 247 F.3d 551, 557 (5th Cir. 2001).
13 *Williams*, 120 S. Ct. at 1518, 1523.
14 *Gardner*, 247 F.3d at 557.
15 *See Strickland v. Washington*, 104 S. Ct. 2052, 2063-64 (1984).

been different but for the attorney's unreasonable errors.[17] This "reasonable probability" standard requires something less than a showing that it is more likely than not that counsel's deficient conduct altered the outcome of the case.[18] Moreover, if an attorney's conduct so deviates from the standards of reasonable competence as to amount to a constructive denial of counsel, prejudice is presumed.[19]

In this case, Mr. Raby was denied the effective assistance of counsel both at his suppression hearing, and at the guilt-innocence phase of trial. Prejudice should be presumed, because counsel's complete abandonment of any advocacy role at the guilt-innocence phase of trial amounted to a constructive denial of counsel. Moreover, but for counsel's unprofessional errors, there is a reasonable probability that Mr. Raby would not have been convicted.

A. Mr. Raby's Trial Counsel Failed to Develop and Present an Available, Compelling Case for Suppression of the Statement to Police

The State had no physical evidence tying Mr. Raby to this crime, and no eyewitness testimony placing him inside the house. Other than Mr. Raby's statement to police, the State's evidence showed at most that Mr. Raby was in Ms. Franklin's neighborhood on the evening of the crime. It is beyond serious dispute that, in the absence of Mr. Raby's statement to police, Mr. Raby would not have been convicted, and likely would not have been prosecuted.

Despite the overwhelming significance of the custodial statement to this case, however, Mr. Raby's trial counsel failed to develop what would have been his best chance at acquittal—the case for suppression. Trial counsel's failure stems from their blind acceptance of Mr. Raby's custodial statement and guilt. Presuming that Mr. Raby's statement to police was substantially

---

16 *Id.*

17 *Id.* at 2067-68.

18 *Id.* at 2068; *see also Haynes v. Cain*, 272 F.3d 757, 759 (5th Cir. 2001).

19 *Strickland*, 104 S. Ct. at 2067.

true, trial counsel failed to conduct a sufficient interview of their client to learn *what really happened* on the night of the crime, or how the statement was obtained.[20]

Trial counsel never learned that Mr. Raby has no memory of going into the house or committing this crime. Yet by all accounts, including the account in Mr. Raby's statement to police, Mr. Raby was extremely intoxicated on the night of the crime.[21] Mr. Raby smoked marijuana and took several Valium pills that day, in addition to drinking malt liquor and Mad Dog wine.[22] Had trial counsel interviewed Mr. Raby on the subject, they would have learned not only of his memory loss that night, but that Mr. Raby had been abusing alcohol from at least the age of eleven, and had a history of similar alcohol-related memory loss.[23]

If trial counsel had understood Mr. Raby's lack of memory, the potential meaninglessness of his "statement" would have become apparent: Mr. Raby could have admitted killing Mrs. Franklin not because he remembered having done so, but because he supposed that he must have, as everyone seemed to agree that he had. With just a little probing—of both Mr. Raby and the people to whom he "confessed"—it becomes apparent that Mr. Raby has consistently said that he does not remember what happened, other than being near the house on the night of the crime. This is entirely consistent with the story of the interrogation told by Sergeant Waymon Allen, the interrogator, who described the critical moment at which he contends Mr. Raby began to tell him the truth:

---

20 Trial counsel never interviewed Mr. Raby in detail about either the day of the crime, or the day of the interrogation. (Aff. Charles D. Raby ("Raby") ¶ 43, Ex. 17.) Although trial counsel did visit Mr. Raby several times before trial, trial counsel never spent more than twenty minutes with Mr. Raby at a time. (*Id.*) Furthermore, during many of trial counsel's visits, trial counsel simply "visited," reading a newspaper or chatting about matters unrelated to the case. (*Id.*)

21 *See* Charles D. Raby Custodial Statement ("Custodial Statement"), Ex. 45 at 1-2.

22 Raby ¶ 28.

23 Raby ¶ 3; Aff. Paul Wayne Taylor ("Taylor") ¶¶ 12-13, Ex. 23; Aff. James Daniel Jordan ("Jordan") ¶ 15, Ex. 10.

> [Mr. Raby denied] that he had actually gone to the victim's house. I told him that I knew he wasn't being truthful, that he had been identified as going over a fence from the victim's backyard, and at that time Raby looked down at the floor and his eyes teared up and he stated that *he was there* . . . . I asked him if he would be willing to give a written statement, and he said that he would.[24]

Tellingly, Mr. Raby said, "I was *there*," not "I *did it*." Allen then began to draft Mr. Raby's statement, although Mr. Raby had not admitted the crime. For Mr. Raby, admitting being at the house was significant, because knowing that he had the opportunity to commit the crime made him *fear* that he was the killer; but he did not speak out of knowledge.[25]

Similarly, after Mr. Raby was charged with the murder, his girlfriend, Merry Alice Gomez, visited him in jail and asked him whether it was true that he had signed a statement. He answered, "yeah," with a tone of finality.[26] But when Ms. Gomez asked why, he replied, "Because they told me that they were going to lock you up and put Chris [her newborn child] in foster care."[27]

If Mr. Raby's trial counsel had not uncritically accepted the truth of the statement, they would have learned from Mr. Raby that the statement was a narrative constructed of two parts: (1) Mr. Raby's own description of his whereabouts during the day and early evening of October 15; and (2) Sergeant Allen's own word-for-word description of the crime itself, posed to Mr. Raby in the form of yes-or-no questions.[28] The statement does not directly describe the killing itself, but instead contains only a vague description that Mr. Raby and Ms. Franklin "went to the

---

24 S.F. 25:40-41 (emphasis added).

25 Again, soon after Mr. Raby was incarcerated in Harris County Jail awaiting trial, his friend, James Jordan visited him and asked Mr. Raby whether he had killed Mrs. Franklin. (Jordan ¶ 18.) Mr. Raby assented, but then explained that he did not actually remember what happened that night, as he had been drinking and had blacked out. (*Id.*)

26 Aff. Merry Alice Wilkin ("Wilkin") ¶ 33, Ex. 25.

27 *Id.*

28 Raby ¶ 41.

floor" and that Mr. Raby saw blood on his hands.[29] In the last paragraph of the statement, Mr. Raby is purported to state, "The next day I knew I had killed Edna."[30] Sergeant Allen suggested this wording to Mr. Raby, however, after Mr. Raby repeatedly refused to describe, *because he had no recollection of,* the actual killing he purportedly committed.[31]

Trial counsel also could have discovered that the statement was not recorded on audiotape or on video, even though recording statements was a common police practice at the time.[32] Recording the statement would have been an easy way to show that the statement was voluntary, and the failure to record is evidence that Sergeant Allen had something to hide.

Furthermore, a video recording would have revealed that throughout much of the interrogation, presumably a stressful time, Mr. Raby was nodding off to sleep.[33] Trial counsel failed to develop evidence that at the time of his interrogation, Mr. Raby had ingested between five and eight tablets of Tylenol with codeine, an opiate known to cause drowsiness.[34] He took these prescription painkillers from his girlfriend's purse, just before turning himself over to

---

29 Custodial Statement, p. 2.

30 Custodial Statement, p. 3.

31 Raby ¶¶ 28, 29.

32 A cursory review of reported decisions from the early 1990's reveals many cases in which confessions were recorded. *See, e.g., Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992, *cert. denied,* 113 S. Ct. 2418) (videotape); *Gibbs v. State*, 819 S.W.2d 821, 825 (Tex. Crim. App. 1991, *cert. denied*, 112 S. Ct. 1205) (videotape); *Hardie v. State*, 807 S.W.2d 319, 320 (Tex. Crim. App. 1991, no pet.) (videotape); *Higginbotham v. State*, 807 S.W.2d 732, 735 (Tex. Crim. App. 1991, no pet.) (audiotape); *Gordon v. State*, 801 S.W.2d 899, 902 (Tex. Crim. App. 1990, no pet.) (videotape); *Fuentes v. State*, 846 S.W.2d 527, 529 (Tex. App.—Corpus Christi 1993, pet. ref'd) (videotape); *Nguyen v. State*, 1992 WL 258910 at *1 (Tex. App.—Hous. [14th Dist.] Oct. 8, 1992, no pet.) (videotape); *Hiser v. State*, 830 S.W.2d 338, 340 (Tex. App.—Hous. [14th Dist.] 1992, no pet.) (audiotape and videotape); *Dumas v. State*, 812 S.W.2d 611, 614 (Tex. App.—Dallas 1991, pet. ref'd) (videotape); *Alford v. State*, 788 S.W.2d 436, 441 (Tex. App.—Hous. [14th Dist.] 1990, no pet.) (videotape).

33 Raby ¶ 36; Aff. I. Bruce Frumkin, Ph.D., ABFP ("Frumkin") ¶ 12, Ex. 3.

34 Raby ¶ 30; Frumkin ¶ 12; *see also* Tylenol with codeine entry, printed from Physician's Desk Reference website, Ex. 46.

police.[35] (Ms. Gomez had been prescribed opiates for pain associated with the C-section birth of her son.[36]) Mr. Raby informed Mr. Cantu of this fact before the suppression hearing.[37]

Trial counsel also failed to learn that Mr. Raby believed he would face about a ten-year prison sentence if he confessed to the crime, and had no idea he was "confessing" to something punishable by death.[38] Trial counsel further failed to discover that Mr. Raby did not (and still does not) understand that his silence could not be used against him in any way.[39] Finally, trial counsel failed to follow up when Mr. Raby told them he had requested counsel prior to his interrogation. While Mr. Raby was sitting in a car waiting to be transported to the police station, one of the arresting officers (probably Sergeant Stephens) began to question Mr. Raby.[40] In response to Mr. Raby's denials that he had been involved in the crime, the officer responded, "Don't lie. We know you did it."[41] Mr. Raby replied, "if that's how you're going to be, I want a lawyer."[42] The officer replied, "We will talk about all that later. We are fixing to go downtown right now."[43] Although Mr. Raby did not fully understand the significance of this fact at the time, because he believed that his subsequent waiver of his right to counsel was effective, he told his trial counsel about the request, but trial counsel failed to investigate this claim and to raise it at the suppression hearing.[44]

Trial counsel's next error was their failure to develop evidence to show how Mr. Raby's personality and background, combined with the circumstances of interrogation, resulted in a false

35 Raby ¶ 30.
36 *Id.*
37 Raby ¶ 31.
38 Raby ¶ 42; Frumkin ¶ 18.
39 Frumkin ¶ 9.
40 Raby ¶ 33.
41 *Id.*
42 *Id.*
43 *Id.*
44 Raby ¶ 34

statement. Mr. Raby has traits associated with borderline personality disorder, which is characterized by intense (but stormy) emotional attachments, and consistent feelings of guilt and low self-worth.[45] It was natural for Mr. Raby to fill in the holes in his "guilty knowledge" that he was near the crime scene with the assumption from his generally guilty conscience that because he remembered being near the house, he must have committed the crime.[46] Whether he intended to or not, Sergeant Allen took advantage of Mr. Raby's natural suggestibility by feeding him the facts Allen wanted to hear Mr. Raby say. If trial counsel had consulted and presented an expert psychologist at the suppression hearing, it would have been apparent how Mr. Raby could have confessed to a crime he did not remember committing.

Instead, trial counsel focused only on the coercive circumstances of the interrogation caused by the police officers' taking Mr. Raby's girlfriend, Merry Alice Gomez, and her infant son Chris into custody. But even with respect to that limited issue, trial counsel failed to develop the significant evidence. Mr. Raby had formed a very close relationship with Merry Alice and her son, spending nearly every day with her during the previous two months, spending several nights with her at the hospital when she delivered her son by C-section, and helping to take care of her baby.[47] Mr. Raby was with Ms. Gomez and her baby on the morning of his arrest.[48] En route to the station, Mr. Raby was anxious to know what would happen to Ms. Gomez and Chris.[49] Sergeant Shirley, who was driving the car, answered that while it was possible that Ms.

---

45 *See* Frumkin ¶ 4.
46 *See* Frumkin ¶ 17.
47 Wilkin ¶¶ 7, 10, 13.
48 Homicide Report, Ex. 43, at 2.045.
49 Raby ¶ 35.

Gomez could be booked with aiding and abetting for failure to give Mr. Raby's location to police, he believed that she was being taken home.[50]

At the station, Sergeant Allen became frustrated with the interrogation after Mr. Raby repeatedly denied having murdered Ms. Franklin.[51] Mr. Raby was escorted to the restroom and, while he was in the hallway of the homicide office, he heard Chris crying and Ms. Gomez soothing the baby in an adjoining room.[52] Ms. Gomez' and her child's presence at the station filled Mr. Raby with fear that Ms. Gomez was to be charged with aiding and abetting, as Officer Shirley had suggested.[53] He demanded to know why Ms. Gomez and her son were being held, but Sergeant Allen said, "We will talk about that later, in a little while."[54] Back in the interrogation room, Mr. Raby asked again why Ms. Gomez was in custody, and Sergeant Allen said, "You want to tell me what I want to know?"[55] Mr. Raby asked, "What do you want to know?" and Sergeant Allen resumed asking yes-or-no questions.[56] Mr. Raby began to answer yes, and demanded at regular intervals to see Ms. Gomez.[57] Each time, Sergeant Allen answered, "We'll talk about that some more later," or "you can see her later."[58] Mr. Raby's deep emotional attachment to Ms. Gomez and her infant son, and his fear that Ms. Gomez would get into trouble if he did not satisfy the police, put intense pressure on Mr. Raby to go along with whatever Sergeant Allen wanted. The codeine pills Mr. Raby had taken were wearing off, leaving him

---

50 *Id.*

51 Raby ¶ 37; *see also* Homicide Report at 2.047.

52 Raby ¶ 37.

53 Raby ¶ 39. In fact, Sergeant Wendell interviewed Ms. Gomez while she was detained at the station, asking, among other questions, whether Mr. Raby had said anything to Ms. Gomez about having committed the crime. (Wilkin ¶¶ 27-28). She told him no, and Sergeant Wendell told Ms. Gomez in unequivocal terms that she could be arrested and her baby placed in foster care. (*Id.*)

54 Raby ¶ 37.

55 Raby ¶ 38.

56 *Id.*; Homicide Report at 2.048 ("The statement is taken in a narrative, question/answer format and reduced to a typed statement by Sergeant Allen.")

57 Raby ¶ 41.

feeling increasingly agitated, as Sergeant Allen could observe by his restless body movements.[59] At one point, in answer to Mr. Raby's question about what police would do with Ms. Gomez, Sergeant Allen stated that she had broken the law by failing to tell the police where Mr. Raby was, and "could get in some trouble."[60]

The interrogation continued, and Sergeant Allen pieced together a statement for Mr. Raby to sign.[61] This purported confession does not include any statement that Mr. Raby was of sound mind or free from the influence of mind-altering substances, which he was not.[62] Only afterwards was Mr. Raby allowed to see Ms. Gomez and her child, for three minutes, before he was taken to be booked.[63] Police records show that Mr. Raby was allowed to telephone Ms. Gomez after booking, in order to confirm that she really had been taken home.[64]

Because Sergeant Allen would not let Mr. Raby see Merry Alice before he finished giving his statement, Mr. Raby had a strong incentive to tell Sergeant Allen whatever he wanted to hear. Ms. Gomez had never been in trouble with the law, and Mr. Raby thought that if she were booked she would be strip-searched and subjected to other humiliations.[65] He did not want to be the cause for her experiencing that, and could not bear to think of what she would think of him in that case.[66] Furthermore, Mr. Raby believed that Chris would be put in State custody; having been a Ward of the State as a child himself, Mr. Raby could not stand the thought of causing Chris the same fate.[67] Mr. Raby was encouraged to believe that Ms. Gomez was in

---

58 *Id.*
59 Raby ¶ 38.
60 *Id.*
61 *See* Custodial Statement.
62 *See id.*
63 Raby ¶ 41; Wilkin ¶ 31.
64 Homicide Report at 2.049.
65 Raby ¶ 39.
66 *Id.*
67 *See* Raby ¶ 40.

danger of being charged, and reacted by being highly protective of her and her child. Because trial counsel did not interview Merry Alice, much less call her at the suppression hearing, trial counsel failed to develop this important available evidence about Mr. Raby's susceptibility to coercion.

Notably, while Allen testified at the suppression hearing that he allowed Mr. Raby to see Merry Alice *before* he took down the statement,[68] Allen's credibility has since been called into question by a Texas appellate court, which found that Allen had improperly obtained a statement from a juvenile suspect after denying her access to her family.[69] In *Jeffley v. State*, the court described Allen's interrogation method, which closely resembles Allen's tactics in this case:

> [Allen] never made arrangements for [the suspect] to return home, *as promised*. Instead, the officer, who believed she had lied in her first statement, confronted appellant for three hours about discrepancies in her statements until she gave a statement inculpating herself in the murder.[70]

Moreover, while the coercive circumstances of the interrogation are certainly important, they paint only a part of the entire picture. On the flip side of coercion is *susceptibility* to coercion. Without establishing the entire context of the interrogation, the mere fact that Mr. Raby's girlfriend was in the police station is likely to leave any court thinking, "yes, but is that sufficient to overcome a suspect's will and cause him to confess a capital murder he didn't commit?" But viewed in light of the entire context—Mr. Raby's intoxicated blackout on the evening of the crime, Mr. Raby's natural tendency to view himself as guilty, the strength of Mr. Raby's emotional attachment to Merry Alice and her son, the fact that Mr. Raby was high on codeine during the interrogation, the fact that Mr. Raby thought he would serve ten years in prison if he confessed, the fact that he thought he'd get in just as much trouble if he remained

---

68 S.F. 25:41.

silent, not to mention the fact that he had requested a lawyer—the case for suppression becomes far more compelling. The fact is that people sometimes *do* confess to crimes they did not commit, even capital crimes, and trial counsel's failure to explain why this case fits the profile of a false confession was unreasonably incompetent.

Finally, a statement should be suppressed if it was given involuntarily, which can occur *either* when the police obtain the statement through coercive means, *or* when a suspect's waiver of his rights is not knowing and intelligent.[71] In this case, regardless of the coercive tactics used by police, Mr. Raby's waiver of his Fifth and Sixth Amendment rights was not knowing and intelligent. If trial counsel had not focused solely on coercion, but instead had developed and presented the compelling case of unintelligent waiver, there is a reasonable probability that the statement would have been suppressed. In this case, in the absence of Mr. Raby's statement, the State had absolutely no evidence to prove that Mr. Raby even entered the Franklin house, much less that he killed Ms. Franklin. Mr. Raby could not have been convicted on the State's evidence that Mr. Raby was in the neighborhood on the evening of the crime,[72] and that a witness saw a man who compared favorably in build to Mr. Raby—but that the witness could not identify as Mr. Raby—jumping the fence from the direction of Ms. Franklin's home later that night.[73] Accordingly, Mr. Raby was prejudiced by his trial counsel's unreasonable failure to present the compelling case for suppression of Mr. Raby's coerced and involuntary statement.

---

69 *See Jeffley v. State*, 38 S.W.3d 847, 857 (Tex. App.—Hous. [14th Dist.] 2001, pet. ref'd).
70 *Id* (emphasis added).
71 *Moran v. Burbine*, 106 S. Ct. 1135, 1140-41 (1986); *see also* Frumkin ¶ 10.
72 S.F. 28:304-05.
73 S.F. 28:314-19.

B. Mr. Raby's Trial Counsel Abandoned Their Advocacy Role at the Guilt-Innocence Phase of Trial, Resulting in the Constructive Denial of Counsel

Trial counsel made no opening statement and presented no evidence at the guilt-innocence phase of trial.[74] Despite the fact that Mr. Raby's statement was the only piece of evidence tying Mr. Raby to the crime, and that there was a compelling story to explain why Mr. Raby gave that statement and why it wasn't true, trial counsel made no attempt to show that the statement was involuntarily given or that Mr. Raby did not remember committing the crime. Even when the State called Merry Alice Gomez to the stand to establish that Mr. Raby had fled the police early in their investigation, trial counsel did not ask Ms. Gomez any questions to establish the depth of her emotional attachment to Mr. Raby, or what happened at the police station, or, in fact, any questions at all.[75] Trial counsel did not call an expert psychologist to explain to the jury why suspects sometimes give false statements, and why a defendant with a borderline personality disorder might believe he committed a crime that he couldn't remember, or confess to a crime to protect a girlfriend.[76] Trial counsel did not even question Sergeant Allen to raise any doubt about the circumstances of the interrogation. Quite the opposite, trial counsel simply invited Sergeant Allen to reiterate the State's case:

> Q. Mr. Raby spoke to you about the incident? He spoke to you ***freely*** about the incident after speaking to him and indicating his desire to speak to you about it?
>
> A. Yes, sir, he did.[77]

In short, trial counsel did nothing to challenge the validity of the statement. Instead, they *conceded* that Mr. Raby had committed murder. Indeed, at closing arguments, trial counsel

---

74 S.F. 27:12; 29:416.
75 S.F. 28:328.
76 Without an expert, there was no one to explain how false confessions can occur. *See* Frumkin ¶ 20.
77 S.F. 28:255 (emphasis added).

never once even invited the jury to question whether the statement was given voluntarily, but instead *expressly conceded* no less than seven times that Mr. Raby committed the murder. Specifically, trial counsel told the jury:

> We know that Ms. Franklin was killed and Mr. Raby admitted killing her. We know that.[78]
>
> * * *
>
> [T]he state has proved there was a killing, they have proved that Mr. Raby committed this killing . . . .[79]
>
> * * *
>
> Well, we have had what is it, four days of testimony? Some of it interesting, some of it not. Some of it revealing, some not so. But what we do have, of course, is a confession.[80]
>
> * * *
>
> [Mr. Raby] signs a document that indicates that he's going to make a confession. He and Officer Allen get along and Charles wants to get this off his chest, and then he makes a confession.[81]
>
> * * *
>
> [Y]ou can conclude only one thing, that . . . Charles Raby made a confession. He made a confession about a very horrible thing he had done. He made a confession about doing something to a lady he had known almost all his life.[82]
>
> * * *
>
> And if you do that, you look at all the evidence that's been given to you and make those reasonable conclusions that you have, because all of you are real people of common sense, and you can conclude only one thing, that Charles made a confession, confessed to a horrible thing he did on the 16th of October.[83]
>
> * * *

---

78 S.F. 30:442.
79 S.F. 30:444.
80 S.F. 30:445.
81 S.F. 30:458.
82 S.F. 30:460.
83 S.F. 30:461. Actually, the crime occurred on October 15, 1992.

> We have the evidence, and I know you will make a conclusion and I think you will conclude with us is that the truth is that ***Charles Raby killed Mrs. Franklin and nothing more.***[84]

In *Haynes v. Cain*, the Fifth Circuit recently granted a writ of habeas corpus for a defendant whose lawyers told the jury, "the evidence will show that Brandon Haynes ***is guilty of second degree murder. Nothing more.***"[85] The court held that because Haynes' trial lawyers expressly conceded that Haynes committed the underlying offense of second degree murder, and did not contest the State's evidence, they failed to subject the prosecution's evidence to meaningful adversarial testing, and worked a constructive denial of counsel.[86] *Haynes* is indistinguishable from this case. As in *Haynes*, trial counsel conceded that Mr. Raby murdered Ms. Franklin, despite his plea of not guilty and his desire to maintain his innocence. Trial counsel's abandonment of their role as advocates for Mr. Raby constructively denied him the assistance of counsel.

As is demonstrated by *Haynes*, trial counsel's total abandonment of advocacy cannot be dismissed as strategy. To be sure, trial counsel's decision to concede Mr. Raby's guilt of the murder may have been a conscious one, in order to focus on whether Mr. Raby had committed the predicate felony necessary for capital murder. Any such "strategy" was patently unreasonable, however, because it was based on a misunderstanding of the law, which resulted in conceding the predicate felony as well as the murder.[87] This supposed "strategy" was based on a misunderstanding of the law because, judging from trial counsel's obsession with showing that Mr. Raby entered through the door rather than through a window, trial counsel obviously

---

84 S.F. 30:461-62 (emphasis added).

85 *Haynes v. Cain*, 272 F.3d 757, 759 (5th Cir. 2001).

86 *Id.* at 761-65.

87 It is well-established that an attorney's decision is not entitled to deference as a "strategy" when it is based on an unreasonable misunderstanding of the law. *See, e.g., Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999).

believed that the State had to prove that Mr. Raby *broke into* the house in order to prove burglary.[88] A breaking-and-entering is not required to establish burglary,[89] however, and thus Mr. Raby's statement to police that he walked in the front door and then murdered Ms. Franklin established every element of burglary except consent. Because trial counsel also did not contest consent—the one element of burglary that was not established by the statement itself—trial counsel effectively conceded the entire charge of capital murder by conceding the validity of the statement.[90] This case thus is indistinguishable from *Haynes*, in which trial counsel conceded second-degree felony murder, but in so doing conceded the very felonies from which the state asked the jury to infer the intent element of first degree murder.[91] As in *Haynes*, a patently unreasonable choice to concede virtually the entire case is not insulated from review on the grounds that it may have been a conscious "strategy."[92]

The only way that trial counsel's decision not to contest the statement possibly could have been reasonable trial strategy is if counsel reasonably believed that capital murder in the course of a burglary required some substantial element that the statement did not provide.[93] This arguably was a reasonable belief because the statement did not prove that Mr. Raby committed an *independent* burglary, e.g., that he entered the house with intent to commit a felony, or

---

88 S.F. 27:148-56 (questioning Eric Benge extensively about the alleged entry window); 30:438 (stating in closing argument that there was no evidence of forced entry to prove burglary); 28:232-240 (questioning Sergeant Allen extensively about the alleged entry window); 30:440 (stating in closing, "[o]n the burglary, if he would have broke in, there would have been some type of forced entry . . . .The door was probably open and he just went in. There was no forced entry"); 30:452 (stating in closing, "[t]here is no entry through the window. There's no such testimony about entry through the window. So what do we have? We go back to the 19th of October, 1992, when Charles made a confession: entry through the door").

89 *See, e.g., Clark v. State*, 667 S.W.2d 906, 908 (Tex. App.—Dallas, 1984, writ ref'd).

90 Although Mr. Raby contends that the State nonetheless failed to prove that he did ***not*** have consent, *see* section V.C.2, *infra*, trial counsel's decision to concede all the elements of capital murder except consent could not be reasonable strategy when they did not even argue consent to the jury.

91 *Haynes*, 272 F.3d at 764.

92 *Id.* at 763.

93 *See, e.g., Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999).

committed a felony other than the murder while in the house. As discussed more fully in section VII, *infra*, it would have been entirely proper to object to the charge permitting Mr. Raby to be convicted of capital murder without proof of an independent felony because the Texas Court of Criminal Appeals did not hold until 1993, ***after*** the crime in this case, that capital murder predicated on a felony does not require proof of an *independent* felony. (As discussed in section VII, *infra*, the court's retroactive application of this novel interpretation of the ambiguous capital murder statute here clearly violates due process fair warning principles.) Neither trial counsel nor appellate counsel *did* object to this interpretation of the capital murder statute, however—just as they did not argue that Mr. Raby had consent to enter the house—and thus their failure to challenge the validity of the statement cannot be viewed as a reasonable trial strategy. (In addition, both trial counsel and appellate counsel were ineffective for their failure to raise the fair warning claim.)

Trial counsel abdicated their role as advocates for Mr. Raby, by conceding nearly every element of capital murder (at least, as retroactively interpreted by the Court of Criminal Appeals), and by failing to challenge the remaining element of consent. Under *Haynes*, trial counsel's complete failure to subject the State's case to the "crucible of meaningful adversarial testing" is a constructive denial of counsel.[94] Prejudice must be presumed, and Mr. Raby's capital murder conviction must be reversed.

Even if prejudice is not presumed, Mr. Raby's conviction still must be reversed because he was prejudiced by trial counsel's unreasonable failure to challenge the validity of the statement and contest consent before the jury. The statement was obtained under highly coercive circumstances, in which Mr. Raby did not understand the consequences of his decision. Given

the vagueness of the statement, and the fact that it deviates materially from the evidence of the crime scene introduced at trial, the circumstances of the statement likely would have caused the jury to question not just the voluntariness of the statement, but its truthfulness. Given that there was no other significant evidence of Mr. Raby's guilt, *see* section I.A, *supra*, there is a reasonable probability that but for this deficient conduct by trial counsel, at least one juror would have entertained a reasonable doubt.

C. Mr. Raby's Trial Counsel Made Numerous, Nonstrategic Errors at the Guilt-Innocence Phase of Trial

In addition to choosing an unreasonable strategy not to challenge the statement, thus conceding nearly every element of capital murder, trial counsel made numerous nonstrategic errors at trial. These nonstrategic errors fall into the following categories: (1) failure to cross-examine State witnesses effectively on important issues; (2) failure to obtain experts to contradict State witnesses on important issues; (3) questioning of witnesses that served no purpose other than to reinforce the State's case or inflame the jury; (4) failure to develop and present evidence of alternative suspects; (5) failure to object to mischaracterizations of testimony; (6) focusing on irrelevant issues; (7) failure to make relevant points at closing argument; and (8) most strikingly, failure to object to the State's highly improper and prejudicial comment during closing argument on Mr. Raby's post-arrest silence and failure to testify.

First, trial counsel failed to cross-examine State witnesses effectively on important issues, including:

- trial counsel's failure to cross-examine the medical examiner to clarify ambiguities in his testimony regarding whether the two-inch pocketknife that was seen in Mr. Raby's possession could have caused the four-inch wounds to Ms. Franklin. The medical examiner testified

---

94 *Haynes*, 272 F.3d at 761-65.

that a two-inch blade can cause four-inch wounds by depressing the body, but noted that he found no hiltmarks and that a hiltmark "is a clue in the autopsy table to tell us that that blade came all the way down...."[95] The medical examiner's testimony was ambiguous, however, about whether a two-inch blade likely could have caused a four-inch wound without leaving hiltmarks, yet trial counsel asked no questions about this critical issue;

- trial counsel's failure to cross-examine the medical examiner to establish and emphasize the absence of any bruises on Ms. Franklin's body that would be consistent with attempted sexual assault, as well as to demonstrate that Ms. Franklin suffered from *senile purpura*, meaning that she bruised easily;[96]

- trial counsel's failure to cross-examine witnesses who testified that Ms. Franklin was found "nude from the waist down"[97] wearing only a "shirt," or "blouse,"[98] with the medical examiner's report which stated that she was wearing a *gown*.[99] Because the only evidence even arguably suggesting a sexual assault was the fact that Ms. Franklin was found "nude from the waist down,"[100] evidence that Ms. Franklin was apparently dressed for bed, in a gown that could have ridden up during the attack, was highly probative on a critical issue[101];

- trial counsel's failure to call or cross-examine police officers who worked the crime scene about other garments of clothing that were strewn about the room where Ms. Franklin was found,[102] in addition to the pants and panties that the State contended were removed from Ms. Franklin in the attack;

- trial counsel's failure to cross-examine the "elastic expert" who testified that panties that police officers found near the crime scene appeared to be "torn and not cut,"[103] to establish that it was possible that the elastic in the panties had simply worn out or had been severed at another time;

---

95 S.F. 27:35-36.

96 Aff. Paul B. Radelat, M.D. ("Radelat") ¶ 11, Ex. 5.

97 *See* S.F. 28:188 (Sergeant Allen)

98 *See* S.F. 27:131 (Eric Benge)

99 Office of the Medical Examiner of Harris County Autopsy Report of Edna Mae Franklin, Investigator's Report appendix, Ex. 49.

100 *See* section VIA, infra.

101 In fact, sexual assault could not be scientifically inferred from the state of Mrs. Franklin's dress. (Radelat ¶ 13.)

102 *See* section VIA, infra.

103 S.F. 29:391-93.

- trial counsel's failure to cross-examine Sergeant Allen to challenge whether a stain on panties found at the scene was fresh, and actually blood; and

- trial counsel's failure to cross-examine Sergeant Allen to establish that Mr. Raby had no cuts or scratches on his arms when he was arrested;[104] and

- trial counsel's failure to cross-examine Sergeant Allen to establish the absence of blood on Mr. Raby's jeans when he was arrested, even though Mr. Raby stated in his statement that he was wearing the same jeans on the day of the crime.[105]

Second, trial counsel failed to present expert witnesses to contradict State witnesses on important issues, including:

- expert pathological evidence to show that a two-inch to three-inch knife is not likely to have made four-inch wounds, especially not without leaving hiltmarks;[106] and

- expert criminalistics evidence to show that an attacker in a stabbing such as this one: (a) likely would have gotten scratches or cuts on his hands, either from struggling with the victim or after the knife became slippery with blood;[107] and (b) likely would have gotten blood on his clothes.[108]

- expert criminalistics evidence to show that the stain on the panties collected from the crime scene, if indeed it was blood, was not fresh at the time of collection.[109]

Third, the bulk of trial counsel's examination of State witnesses served no purpose other than to lead the witnesses into reiterating the State's case. Although it is not possible to include every instance of this practice in this pleading, good examples include:

---

104 Mrs. Franklin's attacker probably received bruises or scratches on his or her arms during the attack. (Radelat ¶ 16.)

105 *See* Custodial Statement at 3.

106 In fact, the knife used to attack Mrs. Franklin was probably three to four inches in length. (Radelat ¶ 16.)

107 Aff. Elizabeth Johnson, Ph.D. ("Johnson") ¶ 7; Radelat ¶ 16.

108 Johnson ¶ 7.

109 It is the observation of undersigned counsel that the stain was an old one, but this cannot be confirmed until access to the evidence is provided to Dr. Johnson, Mr. Raby's criminalistics expert. The "blood stain" was not challenged on cross-examination of Sergeant Allen, who testified to it. (S.F. 28:195.)

- the vast majority of trial counsel's cross-examination of the medical examiner simply walked the witness through all the gruesome and inflammatory injuries to Ms. Franklin, without even attempting to make a point relevant to the defense;[110] and

- in questioning Eric Benge, trial counsel emphasized—indeed, he even got on the floor and demonstrated—that Benge allegedly found Ms. Franklin in a "spread eagle" position. [111] This questioning had no conceivable purpose other than to inflame the jury on the sexual assault allegation.

Fourth, trial counsel failed to develop and present evidence to implicate alternative suspects in the crime, and thus to generate reasonable doubts in the minds of the jurors. For example, Donna Perras, Eric Benge's girlfriend, would have testified that she observed that drugs were likely sold out of the Franklin house, and that Benge had told her on the night of the murder that he suspected the killer was someone to whom he owed money.[112] In addition, trial counsel should have investigated Edward Bangs' potential involvement in the crime. Benge named Bangs as a possible suspect on the night of the crime.[113] Bangs was living at the house at the time,[114] and was painting Mrs. Franklin's house at the time,[115] in exchange for which he expected money which he may or not have been paid by the evening of the crime. Significantly, Bangs was arrested for assaulting another elderly woman less than a year after Ms. Franklin's murder.[116]

---

110 S.F. 27:44-56.

111 S.F. 27:141-42.

112 Aff. Donna Lynn Perras ("Perras") ¶¶ 3, 8, Ex. 15.

113 Homicide Report at 2.021. Benge told police that Bangs was a drug addict and in the past had stolen Benge's shotgun and paycheck. Benge pointed out that Bangs, like Raby, knew about a broken pane in the southeast bedroom window. (*Id.*)

114 Benge and Rose both reported that Bangs had recently been in the house. Homicide Report at 2.017. Someone was likely sleeping on the couch, as crime scene photographs and descriptions show. (See Homicide Report at 2.025; Crime scene photo, State Ex. 42A, Ex. 48.)

115 Homicide Report at 2.017.

116 Edward Bangs criminal record, Ex. 47. In fact, police officers for a time put a hold on Bangs' case when he was arrested for another crime soon after the murder. (*Id.*).

Fifth, trial counsel failed repeatedly to object to mischaracterizations of important evidence, unqualified expert opinions, and conclusions of law. Instances include:

- failure to object to Sergeant Allen's testimony that Ms. Franklin's "pants had been turned inside out and pulled off the body and discarded a couple of feet from the body. Her panties had been ripped off and discarded . . . . [W]hen someone has been disrobed in this manner, the pants turned inside out, that would be indicative of an attempted sexual assault;"[117]

- failure to object to Sergeant Allen opining on (and misstating) what constitutes a burglary and robbery;[118] and

- failure to object to Sergeant Allen opining that he "knew [Ms. Franklin's injuries] occurred with a small pocketknife" and could have been inflicted with a two-inch blade.[119]

Sixth, trial counsel focused on irrelevant issues. Specifically, trial counsel focused obsessively on whether Mr. Raby had entered through a window, suggesting instead that he entered through the door.[120] It is irrelevant whether Mr. Raby entered the house through the window (as the State alleged) or through the front door (as Mr. Raby stated in his statement to police). Nonconsensual entry is all that is required for burglary; *forced entry* is not required.[121] Furthermore, the evidence at trial demonstrated that Mr. Raby had been permitted to enter the house through a window on a number of occasions,[122] thus entry through the window was at least as consistent with consent, if not more so, than entry through the door.

Seventh, trial counsel failed utterly to emphasize critical, relevant facts to the jury in closing arguments, including:

---

117 S.F. 28:188-89.
118 S.F. 28:189.
119 S.F. 28:264.
120 *See* notes 87-88 and accompanying text, *supra*.
121 *See, e.g., Clark*, 667 S.W.2d at 908.
122 S.F. 27:65-66 (Benge and Rose allowed Mr. Raby to enter through the window on "quite a few occasions").

- the fact that Mr. Raby was a friend of the grandsons and had been allowed to sneak into the house on numerous occasions,[123] and thus may have had consent to enter the house;

- the fact that Ms. Franklin's grandsons, and their friends, used and sold drugs in the Franklin house, and thus there were many unsavory characters around the house;[124]

- the fact that a small restaurant waiter's tray and paring knife (probable drug paraphernalia) were found where they did not belong in Eric Benge's room;[125]

- the fact that the housepainter, Edward Bangs, knew where Eric Benge kept his tools (such as Benge's screwdriver, found in the alleged entry window);[126]

- the fact that Bangs had a reputation for violence, and unpredictable violent behavior;[127]

- the fact that the eyewitness who observed a man hopping a fence from the direction of the Franklin house testified that the man was around 6' tall, whereas Mr. Raby is only 5'6" tall.[128] Only under extensive leading by the State did the witness change his testimony to say the man he saw "compared favorably" in build to Mr. Raby;[129] and

- the fact that Edward Bangs was over six feet tall,[130] more closely matching the original description in the testimony of a neighbor who saw a man hopping the fence from the direction of the Franklin house on the night of the crime.

Eighth, and perhaps most significantly, trial counsel themselves stood silent while counsel for the State, in his closing argument, made highly improper and prejudicial comments on Mr. Raby's post-arrest silence as to the predicate felonies and his failure to testify at trial. As discussed above, Mr. Raby's statement to the police, on which the State's case relied heavily, did

---

123 *Id.*
124 Perras ¶ 3.
125 S.F. 28:247.
126 S.F. 27:152-53.
127 *See* notes 113-16 and accompanying text, *supra.*
128 S.F. 28:316-18; Homicide Report at p. 2.033.
129 S.F. 28:316-18.
130 Homicide Report at p. 2.033.

not support the State's argument that Mr. Raby had broken into Ms. Franklin's house and attempted to sexually assault and rob her. In closing argument, counsel for the State attempted to neutralize and possibly "flip" this fatal flaw in his capital murder case, saying to the jury early in his argument:

> [I]s it any wonder that a person who would attack a helpless, fragile, arthritic little old lady and stab her as many times as he did, brutalize her, slit her throat, ripped her clothes off, ripped her panties, anyone who would do something so cowardly, *is it any wonder that when he runs, that* ***he is silent after he runs***? He doesn't go to the police. He isn't filled with remorse. When he gets the call that the police are coming, when he gets that call from his mother, he flees, indicating guilty knowledge. *Is it any wonder that that type of coward* ***would not fess up to all the details of his statement to the police***? Of course not.[131]

The State's repeated emphasis on Mr. Raby's silence, whether the comments are interpreted as comments on Mr. Raby's silence on the predicate felonies during his statement to police, Mr. Raby's failure to testify at trial, or both (the only reasonable interpretations), are plainly meant to equate Mr. Raby's silence and his guilt. There can be no question that defense counsel and the jury heard the State argue that someone who would kill Ms. Franklin is the kind of person that would stay silent afterwards, and that the kind of person that would run from police ("indicating guilty knowledge") is someone who would not confess to "all the details" of his crime. Yet trial counsel failed to object, much less request a mistrial, in response to any of the repeated references to Mr. Raby's silence, each one of which constitutes such serious prosecutorial misconduct that it would independently support a mistrial.[132] (*See* section IX, infra.) These repeated failures cannot be dismissed as strategic choices.[133]

---

131 S.F. 30:462-63 (emphasis added).

132 *See United States v. Edwards*, 576 F.2d 1152, 1155 (5th Cir. 1978) ("The prosecutor by his comments brought the defendant's silence upon arrest and at trial to the attention of the jury, apparently intending to shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence. We must therefore reverse. In so doing we note that the comment upon silence of the accused is a crooked knife and one

D. The Overall Performance of Mr. Raby's Trial Counsel at the Guilt-Innocence Phase Fell Below Constitutionally Permissible Standards and Prejudiced Mr. Raby

The adequacy of trial counsel's performance, and the prejudice flowing therefrom, is not to be judged on an error by error basis, but on the totality of the evidence.[134] In this case, the complete failure of trial counsel to contest the voluntariness of the statement, combined with trial counsel's numerous, nonstrategic errors, including their failure to object to the State's comments on Mr. Raby's silence, resulted in representation that fell below constitutionally reasonable standards of adequacy. In essence, trial counsel presented no defense at all, which cannot be reasonable. Because Mr. Raby's custodial statement was the only evidence linking Mr. Raby to the crime, there was a compelling case why the statement was both involuntary and inaccurate, and there was evidence to suggest other possible suspects, there was at least a reasonable probability that but for trial counsel's deficiencies the jury would have entertained a reasonable doubt about Mr. Raby's guilt.

II. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Mr. Raby's trial counsel put up no opposition to the State's evidence at the guilt-innocence phase, and presented no evidence themselves, in the apparent belief that resisting conviction was futile and that their energies should be concentrated towards Mr. Raby's presumably inevitable sentencing hearing. Yet, at the punishment phase, trial counsel simply

---

likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete."); *see also Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996) (reversing conviction based on ineffective assistance of counsel where "[t]he most compelling evidence of counsel's incompetence was her failure to object to very serious instances of prosecutorial misconduct," including prosecutor's comments to jury on defendant's silence); *Freeman v. Class*, 95 F.3d 639, 644 (8th Cir. 1996) ("[D]efense counsel's inaction allowed the jury to equate [defendant's] silence with guilt. There was no reasonable tactical basis not to object to these comments. On the contrary, a motion for a mistrial would have been appropriate and should have been made." (citations omitted)).

went through the motions, and failed to put on available, compelling cases on both special issues. On the "future dangerousness" special issue, trial counsel failed to rebut the State's evidence of Mr. Raby's prior bad acts with compelling evidence that Mr. Raby likely could adjust well to the prison context, and instead put on an alleged expert psychologist who exaggerated the risk that Mr. Raby would commit future violent acts. On the mitigation special issue, although trial counsel did call several witnesses who described aspects of Mr. Raby's life, trial counsel failed to develop substantial mitigating testimony, and terribly mishandled the little evidence they did produce. Combined with trial counsel's failure to generate any doubt about Mr. Raby's guilt at the guilt-innocence phase, there is a reasonable probability that, but for trial counsel's deficient conduct, the outcome of the punishment phase would have been different.

A. Mr. Raby's Trial Counsel Failed to Develop and Present Available Evidence to Contest the Probability That Mr. Raby Would Commit Acts of Criminal Violence, and Instead Presented an Unreliable Expert Who *Exaggerated* the Risk That Mr. Raby Would Commit Acts of Criminal Violence if Sentenced to Life in Prison

In order to return a sentence of death, the jury was required to find beyond a reasonable doubt that there was a probability that Mr. Raby would commit criminal acts of violence in the future that would constitute a continuing threat to society.[135] The State presented evidence that Mr. Raby had engaged in violent behavior in his past, and asked the jury to conclude that he would continue to commit criminal acts of violence in the future. Trial counsel did almost nothing to rebut the State's case, except to present testimony from a supposed expert, Walter Y. Quijano, Ph.D. The "future dangerousness" case that trial counsel presented was unreasonably inadequate, however, for two related reasons. *First*, trial counsel did not present the available,

---

133 *See, e.g.*, *Freeman*, 95 F.3d at 644.
134 *See Strickland*, 104 S. Ct. at 2066, 2069.
135 Tex. Code Crim. Proc. § 37.071(2)(b)(1).

powerful evidence that the probability that Mr. Raby would commit criminal acts of violence if sentenced to life in prison was negligible. *Second*, the testimony of Dr. Quijano was methodologically unreliable, and as a result tended to *exaggerate* the risk that Mr. Raby would commit criminal acts of violence if sentenced to life in prison.

1. Trial Counsel Failed to Present Critical Expert Testimony to Assist the Jury in Making a Reliable Prediction of Mr. Raby's Risk of Future Acts of Criminal Violence

To make a reliable assessment of the risk that a defendant will commit criminally violent acts in the future, a jury needs accurate statistical information and guidance in assessing that risk.[136] It is well-established that uninformed jurors, in the absence of such information and guidance, frequently base their decisions on a number of faulty concepts that result in substantially over-estimating the likelihood of future violence.[137] In short, uninformed jurors are much more likely simply to guess that a defendant will commit violent acts in the future simply because he has in the past, and to be inflamed by passion and prejudice.[138]

The first important piece of information that should have been presented to the jury by an expert is the importance of base rates to risk assessment.[139] Group statistical information provides one of the most reliable bases for long-range violence risk assessment.[140] Statistical evidence shows that prisons in general, and capital murderers in particular, are far less violent than most people assume, and can be managed effectively in administrative segregation.[141]

---

136 *See* Aff. Mark D. Cunningham, Risk Assessment ("Cunningham Risk Assess.") ¶ 12, Ex. 1.

137 *Id.*

138 *Id.*

139 *Id.* at ¶ 13.

140 *Id.*

141 For example, base rate data regarding capital offenders and their disciplinary outcome in the general prison population reveals that fewer than 10% commit chronic violent rule infractions, and that those inmates can be managed in administrative segregation. Multiple studies in varying jurisdictions and across varying decades indicate that over two-thirds of commuted capital inmates never have a disciplinary write-up for assaultive conduct. Base rate data thus demonstrates probabilities that are well below the "more likely than not" probability standard. Group

Moreover, trial counsel should have challenged the State's assertion, and Dr. Quijano's agreement, that there is "a great deal of violence in prison," and that "folks are sometimes killed."[142] That testimony would almost certainly lead the jury to a conclusion that homicide in the Texas Department of Criminal Justice ("TDCJ") is a routine event and, by implication, a significant aspect of any violence risk presented by Mr. Raby. In fact, homicide and assault are relatively rare in prison—less common than outside prison.[143] Had the jury been advised of the actual rates of homicide in TDCJ, their perceptions of the likelihood that Mr. Raby would commit violent acts in prison probably would have been quite different.

Second, the jury should have been informed about the central importance of context in making a reliable assessment of the likelihood of future violence. Quite simply, the likelihood of violence is always a function of context.[144] Because prison is a different context than the free society, the defendant may not repeat past violent acts in prison.[145] Most of the factors identified by Dr. Quijano as predictive of violence (personality characteristics, drug and alcohol abuse, gender, family instability, work instability, weapons use history, recidivism) apply only to the open community, and are not predictive of violence in prison.[146] Trial counsel presented no testimony regarding the primacy of context in making a violence risk assessment or to

---

statistical information also would have countered the State's assertion that Mr. Raby's history of prior violence or re-offending put him at a disproportionate risk of prison violence; such histories are common in TDCJ, yet rates of prison violence and parole recidivism among capital offenders are low. *Id.* at ¶¶ 47-67.

142 *Id.* at ¶¶ 14, 82.

143 *Id.* At the time of Mr. Raby's capital sentencing trial in June of 1994, it had been *12 years* since an inmate-on-staff homicide occurred in TDCJ. During the five years prior to Mr. Raby's 1994 punishment phase trial, the inmate-on-inmate homicide rate in TDCJ was 3.72 homicides per 100,000 inmates annually. For comparison purposes, the murder rate *in the community* in Texas was 11.9 per 100,000 persons annually in 1993, and 37 per 100,000 persons annually in Dallas in 1992. While assault in prison is more common than homicide, this offense still is relatively rare. Fewer than 1.3% of inmates were written up for assault on staff or other inmates in 1993. *Id.* at ¶¶ 83-90.

144 *Id.* at ¶¶ 15, 72-91.

145 *Id.*

146 *Id.*

differentiate Mr. Raby's likelihood of violence in prison from the capital offense or other violent acts that he may have committed in the community.

Third, trial counsel should have educated the jury about misconceptions and "illusory correlations," so that the jury would not base its risk assessment on faulty premises. One faulty premise, which the State argued and with which Dr. Quijano inexplicably agreed, is that the severity of the offense is a good predictor of criminal violence in prison.[147] To the contrary, prison violence simply does not predictably follow from pre-confinement violence or the capital offense of conviction.[148] Also, Mr. Raby's supposed "attitude problem" toward correctional staff, as it was described by the State at closing argument,[149] does not correlate with risk of violence in prison.[150] Although hostility to staff, manipulation, exploitation, irresponsibility, denial, and the like may be unlikable personality traits, they are nearly ubiquitous among prison inmates, and are not predictive of serious violence in prison.[151] Finally, the State's assertion that an inmate facing a capital life sentence likely would be violent because he has "nothing to lose" is an illusory correlation. Again, while having an air of plausibility, the reality is that the increasing length of sentence appears actually to *reduce* the risk of violence in prison.[152]

Fourth, and perhaps most importantly, trial counsel should have educated the jury that a pattern of violence in the community is not predictive of violence in prison. The best predictive factor in predicting risk of criminal violence in prison is prior patterns of behavior in TDCJ

---

147 *Id.* at ¶¶ 16, 92-93.

148 *Id.* This fact is not surprising when the makeup of a state prison population is considered. First, over 45% of prison inmates have been convicted of a serious violent felony, and 70% have had a prior adult prison term – implicating histories of community violence, violent offenses of conviction, and offense deliberation. When the rate of these characteristics is sufficiently high, they cease to differentiate which particular inmates will be violent. *Id.* at ¶¶ 16, 92-03, 95.

149 S.F. 37:1050-51.

150 Cunningham Risk Assess. ¶¶ 16, 97.

151 *Id.*

152 *Id.* at ¶¶ 16, 98. This may be explained by the fact that long-term inmates adopt a perspective regarding

incarceration.[153] Trial counsel essentially ignored significant evidence that Mr. Raby's prior record in TDCJ custody reflected only minor infractions, was characterized by extensive compliance, and did not demonstrate a pattern of serious prison violence.[154] Until his confinement in the Harris County Jail prior to his capital murder trial, Mr. Raby had not displayed a pattern of serious violence or staff assault in juvenile custody, prior county jail confinement, or TDCJ custody.[155] Mr. Raby's history of custodial adjustment therefore was particularly important to present to the jury, because it shed light on the controversy regarding whether Mr. Raby's violent acts in the Harris County jail resulted from harassment or provocation related to the capital murder trial itself.

Finally, trial counsel should have presented a risk assessment from a competent expert that started with applicable base rates, and then incorporated the particular characteristics of Mr. Raby in light of differences in context.[156] Capital offenders have a relatively low base rate of serious violence when confined in the general prison population.[157] Several factors particular to Mr. Raby would be expected to reduce his risk of serious violence across a capital life prison term in TDCJ below applicable base rates, including his history of no serious violence in multiple, extended confinements in juvenile facilities and prior TDCJ incarceration, and the

---

doing time that promotes adaptation, and have more time to adapt. *Id.*

153 *Id.* at ¶¶ 17, 123.

154 *Id.* at ¶¶ 17, 124-126.

155 *Id.*

156 *Id.* at ¶¶ 18, 135-138.

157 *Id.* 70%-80% of capital inmates have no institutional violence after 15 years. This is consistent with research regarding the lower rates of institutional misconduct of other long-term prisoners. Approximately 90% of non-death row capital offenders in TDCJ ultimately function as trustees, which is evidence that correctional staff do not regard them as an eminent or disproportionate risk of violence to inmates or staff. The lifetime actuarial likelihood of a capital inmate killing another inmate is estimated to be 1% or less. In 1994, the base likelihood that Mr. Raby would kill a correctional officer was approximately 1 chance in a million during any given year, with that likelihood subsequently falling with age. *Id.*

substance dependence/intoxication context of Mr. Raby's capital offense.[158] On the other hand, several factors would tend to increase Mr. Raby's risk in relation to applicable base rates, including his relative youthfulness (although he is nearing a neutral age-point), and his altercations with staff in the Harris County Jail (although these are complicated by testimony asserting harassment, provocation, and falsification).[159] On balance, Mr. Raby's risk of serious violence across a capital life term is estimated as modestly above the base group risk rate, but this risk rate is nonetheless far below the standard of "more likely than not."[160] Furthermore, because Mr. Raby would have been at least 57 years old if released on parole, it is highly unlikely that he would commit acts of criminal violence in the parole context.[161]

Trial counsel called Dr. Quijano to testify at the punishment phase, but did not ask him to offer any opinion on the relevant issue of how likely it was that Mr. Raby would commit acts of criminal violence if sentenced to life in prison. Instead, trial counsel only asked Dr. Quijano to opine about prison conditions and classification levels, without even attempting to relate that information to Mr. Raby's risk of future violent acts. In exchange for Dr. Quijano's testimony on the obvious fact that prisons have security, however, the defense also got Dr. Quijano's numerous, unreliable, and prejudicial opinions that, as described in the next section, exaggerated Mr. Raby's risk of future violence.

---

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at ¶ 138. There is a large body of evidence showing that men become substantially less likely to commit acts of criminal violence as they age. Because the jury is not supposed to consider the possibility of parole at all in assessing punishment under the Texas capital punishment scheme, it technically should not be necessary to present evidence about future dangerousness on parole because the jury should assume that parole is impossible. As is discussed in section X, *infra*, however, the fact that juries in fact do not assume that a life sentence means life without parole requires that the jury be informed that a life sentence renders a defendant parole ineligible for 35 years in Texas.

2. *Trial Counsel Presented an Unreliable Expert Who Exaggerated Mr. Raby's Risk of Future Acts of Criminal Violence*

Instead of presenting a competent expert who could explain to the jury why Mr. Raby posed a negligible risk of committing future acts of criminal violence if sentenced to life in prison, trial counsel presented an incompetent expert who used unreliable methodologies, improperly labeled Mr. Raby a "psychopath" with no conscience, and acceded to the State's improper reframing of the issue from whether Mr. Raby likely would commit acts of criminal violence to whether Mr. Raby was a "threat."[162] In short, Dr. Quijano became an excellent—albeit, scientifically unqualified—expert ***for the State***. The reason that trial counsel did not anticipate the deficiencies in Dr. Quijano's testimony may have been that Dr. Quijano did not evaluate Mr. Raby until four days before he testified, and did not produce a written report of his evaluation until months after the trial ended.[163] In any event, Dr. Quijano did not present reliable expert testimony for the following reasons, and should not have been called as a witness.

First, Dr. Quijano's testimony that Mr. Raby is a psychopath, a sociopath, or an individual with an antisocial personality disorder ("APD")—which he identified as synonyms[164]—reflects fundamental misunderstandings of these disorders.[165] APD is ***not*** synonymous with "sociopath" or "psychopath."[166] These disorders reflect ranges on a continuum of disorders involving difficulty forming intimate attachments, but they have different levels of severity and different diagnostic criteria.[167] Most specifically, psychopathology has a very

---

162 *Id.* at ¶ 20.

163 *Id.*; *see* Dr. Walter Y. Quijano's psychological forensic evaluation ("Quijano"), Ex. 39. Interestingly, Dr. Quijano's written report contains information suggesting that Dr. Quijano confused Mr. Raby with another defendant, and failed to understand that Mr. Raby was charged with capital murder. (Quijano, *passim*).

164 S.F. 34:545.

165 Cunningham Risk Assess. at ¶¶ 21, 110-119.

166 *Id.* at ¶¶ 21, 114.

167 *Id.* at ¶¶ 21, 115.

specific meaning, different from APD, and is measured by a separate instrument, the Psychopathology Checklist-Revised.[168] Finally, APD was in 1994, and continues to be, a diagnostic construct of significant scholarly controversy and questionable reliability.[169]

Second, Dr. Quijano's diagnosis that Mr. Raby is a psychopath/sociopath/APD-individual is fraught with errors. To begin with, Dr. Quijano's testimony that the MCMI personality test "showed" that Mr. Raby is a sociopath and psychopath[170] reflects a fundamental misunderstanding of the basic tools of psychological assessment.[171] The MCMI, like the MMPI and most other personality tests, does not "show" that an individual has any particular personality disorder, but rather generates hypotheses that must be investigated and integrated with client interviews, records review, third party interviews, and other testing data.[172] In Mr. Raby's case, the diagnosis of APD is inconsistent with other findings in Dr. Quijano's report, including that Mr. Raby is socially withdrawn, passive-aggressive, and shows symptoms of a borderline personality disorder.[173] Moreover, there is no basis for Dr. Quijano's inflammatory conclusions that an APD-individual has "no conscience," and that a sociopath/psychopath/APD-individual "would despise the most . . . that very person that showed him the greatest act of kindness."[174]

Third, psychopath, sociopath, and APD disorders are not predictive of future violent

---

168 *Id.* at ¶¶ 21, 114.

169 *Id.* at ¶¶ 21, 118.

170 S.F. 34:545.

171 Cunningham Risk Assess. at ¶¶ 22, 106.

172 *Id.* There also is no basis for Dr. Quijano's assertion that the MCMI is "much better" than the Minnesota Multiphasic Personality Inventory ("MMPI") in the assessment of psychological disorders. *See* S.F. 34:533; Cunningham Risk Assess. at ¶¶ 22, 105.

173 Cunningham Risk Assess. at ¶¶ at 22, 107.

174 S.F. 34:546. The essence of this continuum of disorders is that the individual does not experience enduring emotional reactions that would give rise to loving *or* despising. *Id.*

behavior in prison.[175] Even inmates classified as psychopaths by the PCL-R have not been reliably demonstrated to be more likely to commit acts of serious violence in prison than non-psychopaths.[176] Furthermore, there is no reliable correlation between APD and violence in prison.[177] A generally accepted estimate is that seventy-five percent of state prison inmates can be diagnosed as exhibiting an antisocial personality disorder.[178] Because of the pervasiveness of these personality disorders among prison inmates, their presence in an individual inmate predicts little about his prison behavior and prison violence potential.[179] It predicts only that the individual is similar to most prison inmates, including the many inmates who adjust well to the prison setting.[180]

Dr. Quijano's concurrence and agreement with the State's assertion that Mr. Raby was a sociopath/psychopath/APD-individual, combined with his subsequent descriptions of those personality descriptions, had ominous implications for the jury's sentencing determinations.[181] To begin with, these labels carry very negative connotations among lay people that are different from their distinct meanings in the psychological community, so that these labels are problematic even if they are properly applicable.[182] Second, when improper, these diagnoses tend to have a profoundly aggravating effect on a jury's sentencing considerations, because they suggest that no rehabilitation is possible and that future criminal violence is inevitable.[183] Dr. Quijano's misinformed testimony regarding sociopath/psychopath/APD formed a significant basis for the

---

175 Cunningham Risk Assess. at ¶¶ 23, 111.
176 *Id.* at ¶¶ 23, 117.
177 *Id.* at ¶¶ 23, 111.
178 *Id.*
179 *Id.*
180 *Id.* at ¶ 23.
181 S.F. 34:545-47.
182 Cunningham Risk Assess. at ¶¶ 24, 110.
183 *Id.*

State's final argument,[184] creating a grave risk that the jury was misled regarding the violence risk assessment and mitigation determinations they had to make.

Finally, Dr. Quijano acceded to the State's subtle but critical (and improper) shifts in what was being measured. Although the special issue asked the jury to determine whether there was a ***probability*** that Mr. Raby would commit acts of criminal violence, the State subtly refocused the issue in terms of whether Mr. Raby is a "threat" who posed any possibility of committing future acts of violence.[185] The issue is not simply one of "threat." All violent felons are considered to be a threat. That is an important aspect of securely segregating them in prison away from the rest of society, and for maintaining a high degree of supervision over them in prison. Thus, if the issue were one of "threat" alone, this special issue would have no particularizing effect – as every capital offender would be deemed a threat. Instead, the issue as defined in this case is whether it is more likely than not that that Mr. Raby would *commit* acts of criminal violence [of sufficient severity and magnitude] to constitute a continuing threat to society. In other words, it is the probability of "acts" and not simply the potential of "threats" that is at issue.

3. *Mr. Raby Was Prejudiced By Trial Counsel's Unreasonable Failure to Put On Competent and Appropriate Expert Testimony on the Probability of Future Acts of Criminal Violence*

Like any other issue that a jury must decide, the first special issue in the Texas capital sentencing scheme presents a fact question that the jury must decide based on the evidence: is it probable that the defendant will commit acts of criminal violence in the future if sentenced to life in prison? It is natural for juries to believe that the answer to this question must nearly always be

---

184 S.F. 37:1044-1046.

185 S.F. 34:558; Cunningham Risk Assess. at ¶¶ 25, 128-134.

yes because, after all, the defendant is a convicted capital murderer. The truth is, however, that a substantial majority of capital murderers, even those with histories of violence worse than Mr. Raby's, never commit acts of criminal violence in prison or on parole.[186] Severity of offense and patterns of behavior outside prison are not highly predictive of behavior inside prison, for reasons that are easy to understand but not necessarily obvious.[187] A better predictor is past behavior during incarceration, and while there was some evidence of violence by Mr. Raby in the Harris County Jail awaiting trial, the majority of his incarceration record was clean.[188] Furthermore, if trial counsel had properly focused the jury on this issue, the differences between TDCJ and county jail—primarily the fact that a defendant in a capital murder trial is a prime target for provocation in county jail—might reasonably have caused the jury to conclude that Mr. Raby would adapt (as he had before) to TDCJ custody.

Mr. Raby's jury was not asked to focus on the fact question before them, and instead was permitted to make this decision on the basis of passion, prejudice, and faulty premises. If the jury had been shown how to think about this issue logically and scientifically, there was a reasonable probability that the jury would have concluded that Mr. Raby's risk of future violence in prison was small.

B. Mr. Raby's Trial Counsel Failed to Develop and Present Available Mitigating Evidence

Mr. Raby's trial counsel failed to present and develop compelling mitigating evidence at the punishment phase of trial that probably would have resulted in a life sentence. There was substantial available evidence to show that a number of adverse developmental factors, such as child abuse and neglect, family mental illness, possible sexual abuse, and early and pervasive

---

186 Cunningham Risk Assess. at ¶¶ 47-67.

substance abuse, shaped and affected Mr. Raby's development during childhood and young adulthood. There also was substantial available evidence that, for all of Mr. Raby's negative qualities, he had positive qualities of compassion and loyalty, and was working—indeed, struggling—to put his life on the right track. Much of that evidence, the jury simply never got to hear. Trial counsel lacked the understanding of Mr. Raby's background and character necessary to elicit the significant testimony from the witnesses that were called. Worse still, trial counsel's ignorance caused them to mishandle most of the evidence that was elicited, resulting in testimony that appeared aggravating when it could have been mitigating. Perhaps trial counsel's most damaging error was their failure to explain to the jury why the jury should consider Mr. Raby's extraordinarily disadvantaged childhood as mitigating in favor of sparing his life, while at the same time holding him criminally responsible. Mr. Raby is entitled to a new sentencing hearing, because it is reasonably probable that the outcome of Mr. Raby's sentencing hearing would have been different had competent counsel presented and explained the significance of all the available mitigation evidence.[189]

1. Trial Counsel Should Have Called a Mitigation Expert or Otherwise Explained the Concept of Mitigation

While trial counsel presented some evidence to show that Mr. Raby had an underprivileged childhood, trial counsel did not argue, or call an expert to explain, why Mr. Raby's childhood was important for the jury to consider at sentencing. Texas' capital sentencing scheme requires a jury to consider all evidence of a defendant's background or character that "mitigates" against the imposition of the death penalty.[190] It was therefore critical that the jury understand the nature of

---

187 *Id.* at ¶¶ 92-99.
188 *Id.* at ¶¶ 17, 123-126.
189 *Williams*, 120 S. Ct. at 1513, 1515.
190 *See* Tex. Code Crim. Proc. 37.071(d)(1).

mitigation evidence.

In particular, the jury needed to know that they were not being asked to excuse Mr. Raby from responsibility. In finding him guilty, the jury had already assigned criminal responsibility and determined that Mr. Raby had made the choice to commit a murder. Instead, at the heart of the concept of mitigation is the concept of *moral culpability*, which considers the experience of being adversely shaped or limited by forces not personally chosen.[191] In other words, while Mr. Raby's unfortunate background, which was largely beyond his control, did not render his alleged crime involuntary, it placed more obstacles in the way of Mr. Raby's development into a mature adult who could readily conform his conduct to the expectations and mores of society. An expert could have explained that what is easy for many of us might have been harder for Mr. Raby, and therefore it was appropriate to take this reduced moral culpability into account in assessing his punishment.

Trial counsel at no point explained or defined either "mitigation" or "moral culpability." In all likelihood, this lack of guidance may well have caused the jury to absorb mitigating evidence instead as evidence simply of *bad character*. In the absence of an explicit discussion of both the damaging developmental factors present in Mr. Raby's life and their formative impact, the jury likely confused or failed to differentiate moral culpability from criminal responsibility.[192]

---

191 Aff. Mark D. Cunningham, Ph.D., Mitigation ("Cunningham Mitig.") ¶11, Ex. 2.

192 Explanation of the difference between moral culpability and criminal responsibility was particularly important given the State's emphasis on choice:

Q: You [Betty] said Charles had a home but he did not stay there.
A: Yes, sir.
Q: That was his choice?
A: Yes, sir.
Q: Him running away from those places, that was his choice, too?
A: Yes, sir. (S.F. 34: 521, ll. 13-20)
...
Q: The bottom line with Charles, Ms. Perteet, is people would give advice, there were programs. The bottom line is, no one could make him do what he didn't want to do.
A: Right. (S.F. 34: 523, l. 13)

30

2. *The Mitigation Story That Could Have Been Presented*

Charles Raby's true life history reveals both the overwhelming obstacles blocking his development into a fully mature and well-adjusted man, and his largely unsuccessful, sometimes misguided, but real struggle to cope with and conquer these obstacles. Though his life depended upon it, this story has never been told.

Charles Raby was born in Houston, Texas in 1970 to Betty Perteet and Charles Elvis Raby.[193] Elvis, a violent alcoholic,[194] abandoned Mr. Raby's mother when Mr. Raby was one-and-a-half years old, never to return.[195] The family went to live with Betty's mother, Wanda,[196] a paranoid schizophrenic who was committed to mental hospitals several times throughout Mr. Raby's youth.[197] Also in the house were Wanda's husband, Roy Robinson, a convicted rapist who molested both his stepdaughters and his daughters,[198] and Betty's brother, Junior, a violent schizophrenic with a penchant for impulsively holding knives to family member's throats and threatening to kill them.[199]

Betty married again, and Mr. Raby and his younger sister, also named Wanda, spent about seven years living with a stepfather who beat them so regularly and savagely that neighbors called Child Protective Services after seeing the children's legs covered in bruises and hearing their screams.[200]

When Mr. Raby was 12 years old, Betty checked herself into a mental hospital and asked

---

193 Charles D. Raby Birth Certificate, Ex. 27.
194 Aff. Wanda (Benefield) Robinson ("Robinson") ¶ 23, Ex. 20; Aff. Betty Perteet Wearstler ("Wearstler") ¶ 12, Ex. 24.
195 Wearstler ¶ 12; Aff. Mary Lanclos ("Lanclos") ¶ 14, Ex. 11.
196 Lanclos ¶ 15.
197 Lanclos ¶ 10; Cunningham Mitig. ¶ 44.
198 Aff. Louise Richards ("Richards") ¶¶ 8, 9, 11, Ex. 19.
199 Aff. John Sowell ("Sowell") ¶¶ 5-7, Ex. 22.
200 Child Protective Services ("CPS") Case Record, 6/4/1978, Ex. 29.

Child Protective Services to take him and Wanda into its care.[201] Mr. Raby then lived in a succession of foster home residences,[202] only one of which met his minimal needs.[203] That placement was ended after a year.[204] When Mr. Raby was allowed to return to live with his mother as a young teenager, he began to get in trouble for truancy, and eventually was sent to a juvenile detention center, where he spent the rest of his childhood.[205]

a. Adverse Developmental Factors

Mr. Raby has faced a number of obstacles that psychologists consider "adverse developmental factors," because they tend to delay an individual's development of maturity. The following adverse development factors were present in Charles' childhood and adolescence:

1. Multi-generational family distress, including pervasive incest, domestic abuse, and family violence
2. Genetic predisposition to substance abuse and dependence
3. Genetic predisposition to mental illness
4. Teenage mother
5. Parental alcohol and drug abuse
6. Abandonment by father
7. Mother's mental illness and personality inadequacy
8. Chaotic household and serial placement outside the home
9. Physical and emotional abuse
10. Child neglect
11. Observed family violence
12. Personal violent victimization
13. Sexually traumatic exposure, including possible sexual abuse by mother and placement in the care of a sex offender
14. Untreated Attention Deficit Hyperactivity Disorder
15. Psychological disorders
16. Academic failure and learning disabilities
17. Corruptive surrogate family and peers and adolescent onset alcohol and drug abuse
18. Neglect and inadequate interventions[206]

---

201 Wearstler ¶ 23; Bob at 14; CPS Foster Care Intake Study, 9/18/1982, Ex. 31.
202 Wearstler ¶ 27.
203 Raby ¶¶ 6-10.
204 *See* S.F. 35: 680.
205 *See* S.F. 35: 682-83, 692.
206 Cunningham Mitig. ¶ 20.

Each of these factors increased the likelihood that Mr. Raby's development would be delayed or thwarted. The existence of each of these factors in Mr. Raby's life is described below, including an explanation of how each factor posed an obstacle to Mr. Raby's development.

1. **Multi-generational family distress, including pervasive incest, domestic abuse, and family violence**

The phrase "multi-generational family distress" refers to the influence of events taking place over several generations within Mr. Raby's family, even events that did not affect him directly.[207] These events are influential because they point to genetic predispositions (treated separately below); they also reveal pathological "family scripts," or patterns of behavior over several generations that become "normal" within a family.[208] In addition, a child may model himself after a family member's dysfunctional or harmful behavior - this is known as "corruptive modeling."[209] Finally, such events may point to "sequential damage": one family member's damaging behavior to another may in turn cause the damaged individual to cause damage to a child, intentionally or not.[210] Mr. Raby's extended family history is characterized by extensive dysfunction from one generation to the next, including extensive sexual abuse and incest.

Betty Perteet is the eldest of four children born to Wanda Jean and Clarence Perteet, Sr.[211] Beginning when Betty was eight years old, her father began to sexually abuse her while her mother was out working the night shift.[212] The abuse continued for the next six or so years.[213]

---

207 Cunningham Mitig. ¶ 21.
208 Cunningham Mitig. ¶ 35.
209 Cunningham Mitig. ¶ 36.
210 Cunningham Mitig. ¶ 37.
211 Wearstler ¶ 6.
212 Wearstler ¶ 8.
213 Wearstler ¶ 8.

Betty told her mother about the abuse when she was about 14 years old.[214] Wanda ultimately divorced Clarence, Sr., who then had little or no contact with his children.[215] As a teen, Betty would cry over and over to her mother that she was sorry she had broken up the family.[216] 31

Wanda married a second child molester less than a year after her separation from Clarence, Sr.[217] Roy Robinson had already served fifteen years in a California prison for rape when they were married.[218] Betty's half-sister Charlotte Jean, or "C.J.," was born two years later, and Charlotte Marie, known as "Padoo," followed ten years later.[219] Roy Robinson was violent and abusive toward Wanda throughout their marriage.[220] Louise frequently called the police on Roy, who was jailed for domestic violence several times.[221] 31

Roy began sexually preying on Louise, Betty's sister, almost immediately after he married her mother, when she was seven or eight years old.[222] A few years later, after Roy began to rape Betty's other sister, Mary, and to show increasing violence towards Louise and their mother, Louise reported the abuse to the police.[223] Roy was arrested and jailed for raping Mary.[224]

Betty lived with her mother and Roy for at least two years after they married, but moved out and got married at about the time her half-sister, C.J., was born.[225] Even though Wanda had divorced Roy after he was arrested for raping Mary, he returned to live with the family after his

---

214 Wearstler ¶ 9; Lanclos ¶ 4.
215 Wearstler ¶ 9.
216 Wearstler ¶ 10; Richards ¶ 5
217 Wearstler ¶ 11; Lanclos ¶ 6.
218 CPS Memo from Odessa Sayles, 10/31/1983, Ex. 35; Roy Robinson CA state criminal records, Ex. 26.
219 Wearstler ¶ 6.
220 Richards ¶ 7.
221 Richards ¶ 7.
222 Richards ¶ 8.
223 Richards ¶ 9.
224 Lanclos ¶ 6; Richards ¶ 9
225 Wearstler ¶ 6, 12.

release from custody,[226] and Padoo was born during this period.[227] After Roy's return, Mary and Louise followed Betty's lead and escaped their mother's house at their first opportunity through early marriage.[228] His stepdaughters gone, Roy began to molest his own daughter, C.J., and it was again Betty who spoke out.[229] Betty suspected that Junior, who by this time was a teenager, was also involved in this abuse.[230] Children's Protective Services ("CPS") intervened, and C.J. and Padoo were sent to live with relatives.[231] The CPS worker who investigated the reports of abuse commented in her report, "*This family appears to be thoroughly ingrained in incest.*"[232] Indeed, Betty's immediate family appears to have been comprised of three groups: male abusers of children, females they victimized, and a mother in denial regarding this abuse.

Mr. Raby's father's history is less known, but is also typified by family violence. Charles Elvis Raby, known as Elvis, was the fourth of five children born to Cleta Mae and Roy Elvis Raby.[233] Elvis' brother, Alec, spent most of his life in prison for a series of robberies and assaults.[234] One of Shirley's husbands sexually abused her daughter.[235] Elvis grew increasingly violent as he reached his teenage years.[236] Elvis's mother and siblings were afraid of him and did whatever he asked of them for fear of retaliation.[237] Elvis has been in jail several times, mostly related to his fighting or his pattern of abducting his children without the permission of his

---

226 Lanclos ¶ 7; Richards ¶ 10.
227 Richards ¶ 11; Lanclos ¶ 8.
228 Richards ¶ 10.
229 Richards ¶ 11; Lanclos ¶ 9; CPS Memo from Odessa Sayles, 10/31/1983.
230 CPS Memo from Odessa Sayles, 10/31/1983.
231 Lanclos ¶ 9.
232 CPS Memo from Odessa Sayles, 10/31/1983 (emphasis added).
233 Robinson ¶ 5.
234 Robinson ¶ 7.
235 Robinson ¶ 8.
236 Robinson ¶ 11.
237 *Id.*

former wives.[238]

In Mr. Raby's multigenerational family system, available "role models" led lives characterized by chaotic relationships, precipitous violence, volatile reactions and relationships, irresponsibility, exploitation, perverse sexual boundaries, alcoholism, and other deviant behavior.[239] The damaging effects of sexual abuse in the family – combined with the genetic predispositions and faulty modeling in the family – were ultimately demonstrated in Betty's own disastrous relationship choices, psychological disturbance, and limited coping capacity. Thus, she carried the emotionally scarring legacy of this trauma, and its resulting predispositions, into her adulthood and parenting. Her damaged emotional status resulted in Mr. Raby having little semblance of a functional parent.[240]

Almost none of this family history of profound dysfunction was described at trial. Betty Perteet's description of her family history was limited to acknowledging: "my daddy molested me and they [her parents] got divorced".[241] Testimony regarding the impact on her of this molestation or the broader context of pathological family experience was not elicited. Wanda Robinson, Mr. Raby's maternal grandmother, testified to the sexual abuse,[242] but defense counsel failed to elicit any testimony from Betty or Wanda regarding the broader dysfunction of this family system or its impact on Betty's psychological well-being or subsequent parenting capabilities.[243]

2. <u>Genetic predisposition to substance abuse and dependence</u>

Several members of Mr. Raby's father's family have had severe problems with alcohol. Elvis' brother, Donald Ray, was a violent alcoholic who, like their father, focused much of his

---

238 *Id.*
239 Cunningham Mitig. ¶ 36.
240 Cunningham Mitig. ¶ 37.
241 S.F. 34: 463, l. 24.
242 S.F. 34: 580-581.

violence on his wife.[244] Donald died in an auto accident caused by his drunk driving.[245] An alcoholic and chronic drug abuser, Elvis has been physically and sexually violent towards his wives.[246] One former wife, Wanda Robinson (no relation to Mr. Raby's maternal grandmother), claims Elvis smoked marijuana during their marriage, which seemed to "mellow him out."[247] Elvis was reportedly jealous, demanding, and violent with Betty.[248] He drank heavily, sometimes staying out all night.[249] On Mr. Raby's maternal side, Betty has at times drunk heavily, Mr. Raby's uncle Junior has a long history of alcohol and drug abuse, his younger half-brother, Robert, has abused drugs heavily since adolescence, and his sister, Wanda, abuses cocaine.[250]

An established body of research confirms that there is a genetically transmitted predisposition to alcohol and drug abuse/dependence, independent of environmental factors.[251] That Mr. Raby was involved in extensive drug as well as alcohol abuse is also consistent with research regarding genetic predisposition - alcohol abuse by a family member is significantly correlated to drug abuse.[252] Evidence of family substance abuse was not elicited at trial. In the absence of discussion of the genetic predispositions realized in Mr. Raby's substance abuse and dependence, the jury had no scientific foundation to consider that this dependence was not simply a free and unencumbered exercise of free will – and thus had little basis to consider it as a mitigating factor. Because Mr. Raby was intoxicated on the night of the offense, this factor was critically important.

---

243 Cunningham Mitig. ¶ 38.
244 Robinson ¶ 9.
245 *Id.*
246 Robinson ¶¶ 17-20.
247 Robinson ¶ 23
248 Wearstler ¶ 12.
249 Wearstler ¶ 12; Louise at 15.
250 Wearstler ¶ 10; Raby ¶ 3; *see* Cunningham Mitig. ¶ 39.
251 Cunningham Mitig. ¶ 40.
252 Cunningham Mitig. ¶ 41.

3. **Genetic predisposition to mental illness**

Mental illness is rampant in Mr. Raby's maternal family, and appears to be present in his paternal family as well, as family members believe that Elvis was placed in a psychiatric hospital as a juvenile.[253]

On the maternal side, Betty's father, Clarence, Sr., is described by his wife of 35 years, Jane Perteet, as exhibiting bizarre behavior characterized by paranoia and barricading their residence.[254] Mr. Raby's grandmother, Wanda, had a long history of hospitalizations for depression and paranoid schizophrenia.[255] Wanda began showing serious signs of mental illness during her pregnancy with Padoo, when she was forty-two.[256] After Padoo's birth, Wanda's mental illness worsened, eventually causing her second husband, Roy, to throw her out of her own house.[257] Later in life, she left her home and retreated to live in the woods in a makeshift tent.[258] 35

Family members report that both of Betty's full sisters have had bouts of mental illness.[259] Betty's brother, Junior, suffers from paranoid schizophrenia and epilepsy, and for much of his life has had a penchant for sudden outbursts of rage in which he searches out a family member at random to terrorize with a knife, machete, or Chinese throwing star.[260]

Many psychological disorders, including schizophrenia, depression, personality disorder,

---

253 Robinson ¶ 11.

254 Aff. Jane Perteet ("Perteet") ¶ 12, Ex. 16.

255 Lanclos ¶ 10; Wearstler ¶ 28; Perteet ¶ 7; Cunningham Mitig. ¶ 44; *see also* Aff. Harry Robert Butler ("H.R. Butler") ¶ 5, Ex. 7.

256 Lanclos ¶ 8.

257 Lanclos ¶ 8.

258 Aff. Wanda Mayes ("Mayes") ¶ 8, Ex. 14; Aff. Robert Butler ("B. Butler") ¶ 12, Ex. 6.

259 Perteet ¶ 9 (Mary Lanclos); Wearstler ¶ 7; Betty's half sister, Padoo, tried to commit suicide as a teenager following a miscarriage. (Lanclos ¶ 9).

260 Wearstler ¶ 7, 17, 21; Lanclos ¶ 11; Richards ¶ 13; C.J. at 15; Mayes ¶ 15; H.R. Butler ¶ 6.

and learning disabilities, have a genetically transmitted predisposition.[261] This predisposition may be reflected in either full penetration of the disorder, *or "partial penetration,"* meaning that some characteristics occur but not the full syndrome.[262] The presence of serious mental disorders in Mr. Raby's family system placed him at higher risk for these psychiatric disorders, for substance dependence (in order to "self-medicate"), *and for partial penetration of these disorders.*[263] Trial counsel did not explain partial penetration or raise the issue of self-medication. Consequently, it is extremely likely that the jury *dismissed* the little evidence of familial mental illness that was presented, based on the misconception that if Mr. Raby was not himself "insane," this genetic evidence was irrelevant. 36

In fact, as discussed in the section on Mr. Raby's psychological disorders, below, Mr. Raby's genetic background of mental illness likely played a part in the behavioral problems he has displayed since early childhood, particularly temper control problems and impulsivity.[264]

4. <u>Teenage mother</u>

Mr. Raby's mother was 18 years old at his birth.[265] A number of developmental risks are associated with having a teenage mother, including birth and development complications, abuse, neglect, academic difficulty, and delinquency.[266] Virtually all of these adverse outcomes were realized across Mr. Raby's development. There was no testimony elicited regarding Betty's limited parenting capability at the time of Mr. Raby's birth, or the increased developmental risk stemming from having a teenage mother.

---

261 Cunningham Mitig. ¶ 50
262 Cunningham Mitig. ¶ 50
263 Cunningham Mitig. ¶ 50
264 Cunningham Mitig. ¶ 51.
265 Charles D. Raby Birth Certificate.
266 Cunningham Mitig. ¶ 63

5. Parental alcohol and drug abuse

37

As described above, Betty has dealt with depression by drinking heavily, and Elvis is a sometimes heavy drinker and substance abuser. Alcoholism has a number of adverse impacts on parental functioning, in addition to being an important genetic factor. First, parents who abuse alcohol display "corruptive modeling" of how to cope with life's demands and stresses.[267] Second, a parent who is substance dependent is more likely to be emotionally detached – a product of both being under the influence and being preoccupied with drug seeking behavior.[268] Third, the children of a substance abusing parent are more likely to be neglected and inadequately supervised, more likely to be abused, and more likely to live in a chaotic, unstable household.[269] Fourth, in the face of the impairment of a substance abusing parent, the children of an alcoholic parent are frequently compelled to assume roles of *premature responsibility*.[270] This role reversal of the child assuming responsibility for the parent, in an adaptation of precocious "maturity," is ultimately damaging to the child – who experiences feelings of incompetence in not being able to prevent the parent from drinking, and rejection at being abandoned to this role by the non-alcoholic parent.[271] Mr. Raby's CPS. caseworker's testimony at trial,[272] as well as a report from a girlfriend, Pam Langenbauhn,[273] show that he felt compelled to assume the role of head of household because his mother's inability to take care of even herself, often causing him to run away from foster placement in order to help the family. No evidence, however, of the *effects* of Mr. Raby's premature responsibility, or other effects of his mother's substance dependence, was elicited

---

267 Cunningham Mitig. ¶ 55.
268 Cunningham Mitig. ¶ 56.
269 Cunningham Mitig. ¶ 57.
270 Cunningham Mitig. ¶ 58.
271 Cunningham Mitig. ¶ 58.
272 S.F. 35: 678. *See also* CPS records in trial transcript, *passim.*
273 Aff. Pam Langenbauhn ("Langenbauhn") ¶ 6, Ex. 12.

at trial. 38

6. **Abandonment by father**

Elvis abandoned Betty for another woman when Mr. Raby was one-and-a-half years old. Father absence is associated with an increased likelihood of inadequate parental supervision and associated delinquency, as well as criminal violence.[274] No evidence of the effect of the absence of Mr. Raby's father on Mr. Raby's development was presented at trial. 39

7. **Mother's mental illness and personality inadequacy**

Betty has never gotten over her feelings of guilt for breaking up her parents' marriage and depriving her sisters of their father.[275] She attributes her often-disabling bouts of depression and her tendency to self-medicate with alcohol to this guilt.[276] Despite her bravery in reporting family abuse more than once, during Mr. Raby's childhood Betty most often felt helpless and overwhelmed by the difficulties of caring for herself and her family.[277] 40

Mental illness in a parent is a risk factor for disrupted attachment, neglect, abuse, and mental illness in the child.[278] Betty acknowledged at trial that she once had a "nervous breakdown" and committed herself to a psychiatric facility, following her separation/divorce from Bob Butler.[279] There was no testimony at trial, however, regarding the implications of parental mental illness on the emotional welfare and psychological development of the children in such a home.

---

274 Cunningham Mitig. ¶ 61.

275 Wearstler ¶ 10.

276 *Id.*; *see also* Lanclos ¶ 12; Richards ¶ 14. Betty has a poor memory, which she believes may stem from her childhood trauma, and can remember only pieces of her own childhood or that of Charles and his younger sister, (*Id.* at ¶ 33. Trial counsel's reliance on Betty's memory limited the information they received considerably.

277 Wearstler ¶¶ 16, 18, 20, 23-25; *see also* Cunningham Mitig. ¶ 64.

278 Cunningham Mitig. ¶ 65.

279 Cunningham Mitig. ¶ 66; S.F. 34: 471-472.

8. Chaotic household and serial placement outside the home

Within a few months of Mr. Raby's birth, his parents lost their apartment, beginning the pattern of instability and frequent relocations that characterized Mr. Raby's youth.[280] Making matters worse, there was often little to eat,[281] and Betty's family would secretly bring her groceries.[282] After Elvis left, Betty was forced to move back in with her mother.[283] There were up to nine people living in Wanda Jean's modest house at a time, including Wanda, Roy Robinson, Junior, C.J., Betty, Mr. Raby, and little Wanda.[284]

After Betty married Bob Butler, Wanda would sometimes come to live with them[285] with C.J., Padoo, and Junior often in tow[286]—after Roy would evict her from her house.[287] Wanda's symptoms during those periods included staring emptily into space, paranoia, and violence.[288] One of her grandsons remembers once finding her stabbing one of his teddy bears.[289] Wanda Jean's and Junior's disruptive presence in Bob's house caused much conflict between Betty and Bob.[290]

After Betty gave up care of her children when Mr. Raby was 12, he spent 18 of the next 24 months in seven different CPS shelters, residential placements, and the juvenile jail.[291] The weeks and months Mr. Raby was not at these facilities were times he had run away from them.[292] When Mr. Raby was at home, as a run-away from the foster placements, he received neither care

---

280 Wearstler ¶ 13.
281 *Id.*; *see also* Richards ¶ 15.
282 Wearstler ¶ 13.
283 Wearstler ¶ 15.
284 Lanclos ¶ 15; Richards ¶ 17; Sowell ¶ 4.
285 Wearstler ¶¶ 17, 18.
286 Wearstler ¶¶ 17, 19-20.
287 Richards ¶ 12; Wearstler ¶ 17.
288 H.R. Butler ¶ 5.
289 *Id.*
290 B. Butler ¶ 8; Wearstler ¶ 17-18.
291 *See* CPS records, *passim*; Cunningham Mitig. ¶ 81-83.

nor supervision.[293] Betty led Mr. Raby to believe she needed him to help provide for her and his newborn brother, Timmy, and told him she wished he could stay home with her. But whenever Mr. Raby came home, Betty would call the authorities and report him as a runaway.[294] 41

After several years of struggling at various placements, torn by his compulsion to return to his mother, Mr. Raby was placed at New Horizons Ranch.[295] There, at age 13, Mr. Raby at last received one-on-one help with reading, and soon learned to read and to write competently.[296] 42 Mr. Raby and another boy, Jack, started reading Mr. Raby's first real book together - Jack London's *Call of the Wild*.[297] That first book opened a new world to Mr. Raby, and he has since become an avid reader.[298] New Horizons also provided Mr. Raby with his first meaningful exposure to the outdoors.[299] Not always confident in social settings, Mr. Raby benefited greatly from interacting with horses for the first time, and quietly enjoying the ranch's natural surroundings.[300] It was also at New Horizons that Mr. Raby first had the opportunity to work with paints, initiating a lifelong interest in drawing.[301]

Mr. Raby spent almost a year at New Horizons, during which time he flourished. 43 Caseworkers noted that Mr. Raby was making great academic progress.[302] He had also begun to think more maturely, and to develop self-esteem and leadership abilities—for instance, he served as group leader in his cottage.[303] Against the advice of his social worker, however, staff

---

292 Cunningham Mitig. ¶ 81-83; Wearstler ¶ 27.
293 Wearstler ¶ 27; CPS Child Dictation, 6/22/1983; 4/11/84; 9/18/84, Ex. 32.
294 CPS *passim*.
295 CPS Child Dictation, 4/11/84
296 *Id.*; CPS Child Dictation, 7/19/1984; Raby ¶ 6.
297 Raby ¶ 6.
298 *Id.*
299 CPS Child Dictation, 4/16/1984; Raby ¶ 7.
300 CPS Child Dictation, 4/16/1984; Raby ¶ 7.
301 Raby ¶ 9.
302 CPS. Child Dictation, 4/16/1984; Child Dictation, 7/19/1984.
303 CPS Child Dictation, 4/16/1984; Child Dictation, 7/10/1984.

determined that Mr. Raby was ready to return home, and Mr. Raby was forced to leave the one environment where he had ever seemed to move forward.[304] Mr. Raby did not want to leave New Horizons, and his family was in no better position to care for him than ever before.[305]

Mr. Raby was transferred to Clarewood, another residential placement.[306] He promptly ran away to his family.[307] Betty sent him to live with her father, Clarence, Sr., and his wife, so that he could escape Junior's violent behavior.[308] Mr. and Mrs. Perteet requested that CPS perform a home study to determine whether Charles would be allowed to live with them on a more permanent basis, but later retracted the request.[309] After that, Mr. Raby moved in with his mother, who was again staying with Bob Butler.[310] Hostilities between Mr. Raby and Bob quickly reemerged, and Bob forced Mr. Raby to leave the house.[311] Mr. Raby was soon arrested for attempted burglary after he attempted to enter an acquaintance's house through the window, looking for a place to sleep.[312] Mr. Raby was eventually placed in juvenile detention.[313]

In the absence of external structure and guidance, such as in the chaos of Mr. Raby's childhood household and periodic homelessness of his adolescence, self-control does not develop and aggression can unfold.[314] In Mr. Raby's life, this is borne out by his benefiting from the increased structure of institutional placements – particularly at New Horizons.

Mr. Raby's serial placement disrupted his attachment to any particular parent figure - a

---

304 CPS Child Dictation, 9/7/1984.
305 *Id.*; Child and Family Dictation, 9/20/1984.
306 Child Dictation, 9/18/1984.
307 *Id.*
308 Wearstler ¶ 28.
309 CPS Letter from Carrie L. Lenzy to Jeffrey Page, 8/24/1983, Ex. 30.
310 Child and Family Dictation, 9/20/1984.
311 Child Dictation, 10/11/1984.
312 *Id.*
313 S.F. 35: 682-83, 692.
314 Cunningham Mitig. ¶ 85.

crucial factor in healthy psychological development.[315] In addition, as described above, there are multiple indications that Mr. Raby's mother did not establish a strong, secure attachment or emotional bond to Mr. Raby. Disrupted attachment is a broad risk factor for psychological disorder, delinquency, criminal activity, and violent criminal activity.[316] Unfortunately, there was no testimony at sentencing that described this attachment damage from maternal abuse, neglect, and rejection - or its effects.

9. **Physical and emotional abuse**

There was only limited testimony at trial regarding abuse that Mr. Raby suffered in childhood: Betty acknowledged in her testimony that Bob Butler had made Mr. Raby "eat a pencil" as punishment for chewing on his pencils, and stated that Bob Butler had made Mr. Raby wear a brick around his neck.[317] Wanda Robinson, maternal grandmother of Mr. Raby, testified that Bob Butler called Mr. Raby "ugly, dirty names" and that Bob made Mr. Raby stay in bed all day.[318] Mr. Raby's sister, Wanda, testified that Bob Butler "punished us pretty hard," and detailed that he made them kneel for periods of time, kicked Mr. Raby, confined Mr. Raby to his room for a day or two at a time, and spanked them.[319] This testimony did little, though, to capture the chronic and extreme nature of the abuse experienced by Mr. Raby.[320]

Charlotte Jean Hicks ("C.J."), Mr. Raby's maternal aunt, lived off and on in the household of Bob Butler and Betty between 1973 and 1978.[321] C.J. has reported that for minor misbehavior, Bob would beat Mr. Raby on the buttocks with a belt – striking him several times,

---

315 Cunningham Mitig. ¶ 86.
316 Cunningham Mitig. ¶ 87.
317 S.F. 34: 506, ll. 8-10.
318 S.F. 34: 587-88, l. 22.
319 S.F. 34: 598-600.
320 Cunningham Mitig. ¶ 88.
321 Aff. Charlotte Jean Hicks ("Hicks") ¶¶ 3, 6, Ex. 9.

usually while in a rage.[322] She reported that Bob beat Mr. Raby when notes came home from school describing Mr. Raby's fidgeting.[323] Bob would kick Mr. Raby in the buttocks every time he walked past him.[324] Mr. Raby wet the bed as late as the age of nine, and Bob beat him for that.[325] Mr. Raby was continually grounded for days or weeks at a time – and was never "ungrounded" for more than a day.[326] C.J. has vivid memories of Mr. Raby looking out his bedroom window, watching all the other children play.[327] Mr. Raby was grounded so pervasively that C.J. could recall only a few instances of playing with Charles during the years she was in the household.[328] C.J. was never called to testify at trial. 45

In May or June of 1978, when Mr. Raby was eight years old, two neighbors reported Bob to CPS after watching him kick Mr. Raby in the stomach and beat Mr. Raby all over his body with a belt.[329] A CPS social worker who investigated the complaint learned that Bob often hired a neighbor, Elvira Robles, to babysit his own son, but told her not to bother to watch or feed Mr. Raby and Wanda.[330] Witnesses who resided in the house recall Bob beating Mr. Raby with a belt

---

322 Hicks ¶ 8.

323 Hicks ¶ 11.

324 Hicks ¶ 9.

325 Hicks ¶ 10.

326 Hicks ¶ 12.

327 *Id.*

328 *Id.*

329 CPS Caseworker Liz Mast's handwritten notes, 1978 ("CPS Mast notes"), Ex. 30: "Bob Butler beats Charles [age 8] and Wanda [age 7] all the time. Today Bob Butler beat Charles all over his body with a belt and kicked Charles in his stomach and back. Wanda was beaten about two weeks ago but worker was unable to get any details of this. Bob Butler allegedly doesn't care about Charles and Wanda as he supposedly tells babysitter not to bother feeding or watching them, but to watch Robert Butler, Jr. [age 3] ... [redacted] seen bruises on Charles and Wanda for the 6-7 months [redacted]. The focus seem to be more on Charles. [redacted] never seen bruises on Robert. [redacted] he wished that [redacted] did not have the children that they were a 'pain.' Charles has bruises on him no less than 3X a week. [redacted] is a 'good' child who is 'reaching out for love.' He acts afraid of Bob Butler. He is always hungry. Last Sunday Charles was playing with a neighbor's boy at the Bayou at the back of their house. Bob Butler came after him and the neighbor went after the boys. Bob Butler caught Charles in front of Ms. Alvarado's house and beat Charles. He took Charles to their house and continued. Charles screams could be heard over Mr. Alvarado's TV and air conditioner. The whole neighborhood was watching and 'no rescue was offered.'"

330 *Id.*; CPS Case Record, June 4-13, 1978, at 3; see also CPS Intake Study, 11/11/1978, Ex. 31.

every day,[331] while neighbors could hear Mr. Raby screaming "up and down the street."[332] The social worker assigned to the case commented in her report that Wanda and Mr. Raby were living in a constant state of fear.[333] She determined that Bob's beatings were "arbitrary, unclear and severe."[334] Yet that social worker concluded that Betty could protect her children from their stepfather, and closed the case.[335] Betty's reactions to Bob's abuse of the children varied from anger to passivity.[336] At times, Betty would react to slight misbehavior with comments such as, "If I had a gun, I'd shoot you all."[337] 46

Betty was unfortunately in no position to protect the children from Bob's abuse, despite the assessment of Child Protective Services. When Mr. Raby was 11 years old, Betty and Bob separated, according to Betty, because she was afraid that Mr. Raby was getting big enough to eventually fight back.[338] 47

Experienced and/or observed physical abuse is associated with Posttraumatic Stress Disorder (PTSD), depression, relationship disturbances, personality disorder, and/or antisocial behavior. Chronic victimization can also result in survival responses in which the victim emulates the toughness of the victimizer.[339] Abuse can also interfere with development of the ability to regulate one's emotions,[340] evident in Mr. Raby's erratic emotions and behavior in training school settings.[341] In late adolescence, there may be either an inappropriately rapid thrust toward self-sufficiency or, out of concern for other family members' safety and security, postponement of plans

---

331 CPS Case Record, June 4-13, 1978, at 3.
332 *Id.*
333 *Id.*
334 *Id.*
335 CPS Case Record, June 4-13, 1978.
336 *See id.*
337 Mayes ¶ 5.
338 Wearstler ¶ 22.
339 Cunningham Mitig. ¶ 95.
340 Cunningham Mitig. ¶ 97.

to leave home, both of which are evident in Mr. Raby's behavior when not in institutional care.[342] Traumatic experience in childhood can result in lasting damage to beliefs in fundamental reason and justice, the shattering of one's basic trust and feeling of control over one's existence.[343] Child abuse can also cause pervasive low self-esteem, a chronic and inescapable sense of shame and worthlessness, and behavioral misconduct and criminal conduct.[344]

The full extent of the emotional and physical abuse Mr. Raby suffered, and the likely effects of that abuse, were never explained at trial. In fact, evidence of abuse was undermined when Mr. Raby's trial counsel called Bob Butler as a friendly witness and allowed him to portray himself as a strict father who insisted that Mr. Raby attend school, but who loved to take the children to the zoo.[345] Trial counsel did not impeach Bob with an early CPS report of abuse, or draw from him evidence of abuse described in that report. On cross-examination, the State elicited testimony that Bob punished Mr. Raby because he refused to go to school, and that he "kept telling [the children] that there ain't nothing in the world like an education, you know."[346] As a result, the jury was at grave risk to believe that Bob Butler provided the kind of structure and discipline that Mr. Raby needed, when in fact his arbitrary and severe punishment, neglect, and indifference to Mr. Raby's welfare *exacerbated* Mr. Raby's developmental problems.

10. <u>Child neglect</u>

When Mr. Raby was three, his family was living in an apartment and Betty was working two jobs.[347] Betty's mother and sisters often watched Mr. Raby and Wanda while she was at

---

341 Cunningham Mitig. ¶ 99.
342 Cunningham Mitig. ¶ 100.
343 Cunningham Mitig. ¶ 104.
344 Cunningham Mitig. ¶ 105.
345 S.F. 34: 601-12.
346 S.F. 34:617.
347 Wearstler ¶ 16.

work, but even while not at work, Betty was often too exhausted to stay awake, and the children were left to their own devices.[348] Family members would find Betty asleep while Mr. Raby and Wanda tore the apartment apart.[349] 48

During the period after Betty left Bob Butler, she again worked two jobs to support her children.[350] Again, while she was at work, Betty left Mr. Raby, Wanda, and Robert in the care of her mother, and when she was not working, she was too tired to do anything but sleep.[351] Wanda was increasingly mentally ill during this period, and increasingly unable to watch the children.[352] Mr. Raby and Wanda were left to get themselves to school, and seldom went.[353]

C.J. has described that Betty seldom interacted with her children or showed them affection.[354] C.J. cannot recall Mr. Raby ever having a birthday party or ever receiving any gifts for Christmas or his birthday.[355] 49

John Sowell, former maternal uncle by marriage, recalled that as a teen, Mr. Raby was thrown out of the house, and was forced to live off friends, neighbors, and even under a bridge.[356] A friend of Mr. Raby's, Paul Wayne Taylor, has also described the extent of Betty's neglect, and notes that he always called Mr. Raby "the throwaway child."[357] 50

Neglect has been identified as even more psychologically and developmentally damaging than physical abuse.[358] The long-term impact of child neglect includes distorted perception of the world, anxiety, insufficient capacity for emotional self-regulation and behavioral control, and

---

348 *Id.*; Lanclos ¶ 15; Richards ¶ 17.
349 Lanclos ¶ 15.
350 Wearstler ¶ 23.
351 *Id.*
352 *Id.*
353 Wearstler ¶ 26.
354 Hicks ¶ 13.
355 Hicks ¶ 17.
356 Sowell ¶ 10.
357 Taylor ¶ 3.

violent and criminal conduct.[359] Testimony detailing Betty's psychological vulnerabilities, parenting deficiencies, and maternal neglect was important to counter the suggestions from the State that her parenting had been adequate and well-intentioned, while Mr. Raby's behavior was willful and disobedient.[360]

11. **Observed family violence**

Mr. Raby has witnessed Bob Butler's abuse of his sister, as described above. He likely has also witnessed Roy Robinson's violence towards his grandmother. Finally, Mr. Raby has observed his uncle Junior's almost daily violence towards family members, which is described below.

The observation of violence directed towards others in the family is associated with emotional distress, psychological disorder, and adverse developmental outcomes equivalent with

---

358 Cunningham Mitig. ¶ 109.

359 Cunningham Mitig. ¶ 109.

360 *See, e.g.*, S.F. 34:515-518. See also S.F. 34:516:22 – 517:18 and S.F. 34:523, l. 13.
Q: And you [Betty] did your best to discipline Charles with what you had: is that correct?
A: I tried, but...
Q: But at the time you did your best?
A: Yes, sir.
Q: You also taught Charles the difference between right and wrong?
A: Yes, sir.
Q: You taught him it was wrong to steal?
A: Yes, sir.
Q: You taught him it was wrong to drink?
A: Yes, sir.
Q: That it was wrong to use drugs?
A: Yes, sir.
Q: That it was wrong to hurt other people?
A: Yes, sir.
Q: And you told him that he shouldn't stay out in the streets, walk the streets day and night. You told him that, didn't you?
A: Yes, sir.
Q: Did Charles listen?
A: No.

Q: The bottom line with Charles, Ms. Perteet, is people would give advice, there were programs. The bottom line is, no one could make him do what he didn't want to do.

those associated with the direct experience of physical abuse.[361]

12. Personal violent victimization

Mr. Raby's Uncle Junior, who lived with Mr. Raby intermittently during his childhood, is a violent schizophrenic whose paranoia, unpredictable anger, and random violence terrorized family members daily.[362] He would hold his mother against the wall, using a machete to threaten her.[363] Constantly armed with Chinese Stars and knives,[364] Junior regularly threatened to kill family members.[365] Wanda always defended her son, saying he had "water on his brain."[366] C.J.'s husband at the time, John Sowell, who was not asked to testify, remembers witnessing several instances of Junior's bizarre and violent behavior.[367] John's sister, Donna Hamner, remembers receiving distressed telephone calls from Charles on several occasions asking for help.[368] When she would pick Charles up in her car, Donna could see visible injuries, such as claw marks that Junior had left on Charles's neck.[369] Neither John, nor C.J., nor Donna, was asked to testify, and the jury heard no evidence regarding Junior's victimization of Mr. Raby, and, indeed, Mr. Raby's entire family. 57

Like child abuse by a parent or caretaker, personal violent victimization by others can result in or exacerbate Post Traumatic Stress Disorder, interpersonal distrust, desensitization to violence, disruption of values and other risks.[370]

A: Right.

361 Cunningham Mitig. ¶ 116.
362 Hicks ¶ 16; *see also* Wearstler ¶ 19; Mayes ¶ 15; H.R. Butler ¶ 6.
363 Mayes ¶ 15.
364 *Id.*
365 *Id.*
366 *Id.*
367 Sowell ¶¶ 6-9.
368 Aff. Donna Hamner ("Hamner") ¶5, Ex. 8.
369 *Id.*
370 Cunningham Mitig. ¶ 119.

13. **Sexually traumatic exposure, including possible sexual abuse by mother and placement in the care of a sex offender**

Bob Butler has reported that Betty had extra-marital encounters during her marriage to Bob.[371] Bob has also reported that after their separation, Betty routinely had men in and out of the house.[372] Robert, Mr. Raby's half brother, echoes Bob's reports.[373] 52

As described above, Roy Robinson, probably along with Junior, was sexually molesting Roy's daughters, Mr. Raby's aunts, Padoo and C.J.[374] Mr. Raby and his sister spent much of their childhood living in the same household with Roy Robinson and Junior, along with their aunts, who were close in age. In fact, at age 12, Harris County Child Welfare for a time placed Mr. Raby in the care of Roy Robinson, a convicted rapist.[375] Mr. Raby has therefore lived extensively with multiple child molesters, who exposed him to observing the abuse of others, and perhaps victimized him as well. 53

Most significantly, Betty once told her son, Robert, and his wife that she had sexually abused Mr. Raby.[376] She has never admitted this conduct since that time. 54 Shirlene Guthrie, a faculty member at New Horizons, believes that during his placement there Mr. Raby showed several indications of having been sexually abused.[377] 55 Mr. Raby himself has no memory of entire years during this period in his life.[378] Betty has similar memory loss, both of her own childhood and of this time during Mr. Raby's childhood, possibly because of the trauma of sexual abuse in

---

371 B. Butler ¶ 10.
372 B. Butler ¶ 11.
373 H.R. Butler ¶ 8.
374 *See also* Sowell ¶ 8 (Junior tried to rape C.J. once, and Padoo slept with Betty for protection from him).
375 Roy Robinson CA state crim record.
376 H.R. Butler ¶ 13.
377 Cunningham Mitig. ¶ 123.
378 Raby ¶ 4.

her childhood,[379] and Mr. Raby's lack of memory may also be attributable to sexual abuse.

There was no testimony at trial regarding sexually traumatic exposure. Sexually damaging or "traumatic" experience is broader than inappropriate genital contact. Other sexual exposures during childhood that are psychologically damaging include precocious exposure to adult sexual exchange, perverse family atmosphere, perverse and/or promiscuous parental sexuality, inappropriately sexualized relationships, observed sexual abuse or assault of another, and premature sexualization.[380] At the very least, testimony as above regarding Betty's history of promiscuity would have assisted the jury in better understanding Mr. Raby's sexual involvement with Karianne Wright.

Additionally, the jury did not have the opportunity to consider the catastrophic long term effects of sexual abuse on boys, which include increased risk for depression, somatic disturbance, self-esteem deficits, difficulty maintaining intimate relationships, problems with sexual adjustment, alcohol and substance abuse, and sexual offending.[381]

14. Untreated Attention Deficit Hyperactivity Disorder

There are indications from Mr. Raby's history that he suffered from an untreated Attention Deficit Hyperactivity Disorder (ADHD).[382] ADHD is characterized by excessive motor activity, inattention/distractibility, and impulsivity.[383] In his early and middle childhood, Mr. Raby's behavior problems that he displayed in childhood had a strong impulsive quality.[384]

Untreated, ADHD is a broad risk factor for disturbed peer relationships, academic failure,

---

379 Wearstler ¶ 33.
380 Cunningham Mitig. ¶ 124.
381 Cunningham Mitig. ¶¶ 125, 128.
382 Cunningham Mitig. ¶ 129.
383 Cunningham Mitig. ¶ 129.
384 Cunningham Mitig. ¶ 129.

juvenile delinquency, alcohol and drug abuse, and adult criminal activity.[385] Mr. Raby received neither sustained counseling nor medication for his symptoms. Mr. Raby's likely ADHD was never raised at trial.

15. Academic failure and learning disabilities

There is ample evidence that Mr. Raby suffered from a learning disability, and experienced associated academic frustration and failure.[386] Mr. Raby had great difficulty learning to read.[387] Mr. Raby failed first grade, then second grade.[388] By the time Mr. Raby entered third grade, he was ten years old, and increasingly embarrassed and frustrated that he was not able to keep up with the other kids.[389] Teachers gave up asking him to read aloud or do classwork.[390] When Mr. Raby was in class, he was expected to do nothing but sit quietly at his desk.[391] Mr. Raby lost interest in school entirely.[392]

In the absence of an explanation of Mr. Raby's learning disabilities, the jury likely believed that Mr. Raby's irregular school attendance was due to no more than his *willful and motiveless choice*. In fact, Mr. Raby had little or no control over his ability to learn while at school, and every reason to wish to avoid the sting of inevitable academic failure he experienced there. Learning disabilities and/or academic failure are associated with reduced self-esteem, little sense of safety or refuge at school, increased risk of school drop-out, increased susceptibility to influence from marginal peers, and reduced employment opportunity.[393] Mr.

---

385 Cunningham Mitig. ¶ 130.
386 Cunningham Mitig. ¶ 139.
387 Raby ¶ 6.
388 Wearstler ¶ 21.
389 Raby at 5.
390 *Id.*
391 *Id.*
392 *Id.*
393 Cunningham Mitig. ¶ 141.

Raby experienced these negative consequences, the most serious of which was the truancy that first labeled him a criminal, and began his pattern of petty offenses and juvenile detention.

16. **Psychological disorders**

Mr. Raby displayed evidence of psychological disorder in his childhood and adolescence. Psychological assessments performed throughout his childhood described a quiet young man who did not easily trust others, who suffered from low self-esteem and depression, who wanted to form friendships but wasn't sure how, and who longed to be with his thoroughly dysfunctional family.[394] Similarly, a former girlfriend, Pam Langenbauhn, who was never asked to testify, remembers that Charles often visited a roller-skating rink that was a local hang-out, but never skated.[395] She described him as quiet: he was shy, and did not speak to people he did not know.[396] Once you were Mr. Raby's friend, however, he was very protective.[397] 57

These descriptions of Mr. Raby as a child and adolescent portray the emotional pain that he carried for many years, demonstrating that his condition is more complex than simply willfully choosing to be "bad."[398] More broadly, expert testimony could have explained that psychological symptoms and disorders impede normal development in a variety of ways, and are a risk factor for violence in the community.[399]

Detailed testimony regarding the emotional disorders and symptoms that Mr. Raby suffered were also important as several of these traits fly in the face of the highly pejorative sociopath/psychopath label elicited from Dr. Walter Quijano on cross-examination.[400] This label

---

394 Cunningham Mitig. ¶ 132-135.
395 Langenbauhn ¶ 4.
396 Langenbauhn ¶ 5.
397 *Id.*
398 Cunningham Mitig. ¶ 137.
399 Cunningham Mitig. ¶ 137.
400 S.F. 34:545.

describes individuals who do not seek or experience relationship attachments to others – hence their excessively self-driven reactions and behavior.[401] Descriptions of Mr. Raby's psychological processes as a teen, in contrast, pointed to his distress at the *loss* of such attachments, and his repeated attempts to *restore* that loss.[402]

17. **Corruptive surrogate family and peers; adolescent onset alcohol and drug abuse**

Junior introduced Mr. Raby to alcohol and marijuana at age ten.[403] Within a short time, Mr. Raby began to use both on a daily basis.[404] After Betty's separation from Bob Butler, when Mr. Raby and his sister found themselves without any effective parental supervision, they began to stay out all night, drinking with friends.[405] Throughout Mr. Raby's adolescence and young adulthood, he felt anxious most days while sober.[406] Much like his father, Mr. Raby sought daily relief from anxiety through the mellowing effect of marijuana and downers such as Valium.[407] Mr. Raby's counsel did not present evidence that the combined effect of the liquor and Valium resulted in a memory blackout during the late evening hours on the night of the offense. Yet such alcohol-related blackouts were not uncommon for Mr. Raby to experience, according to James Jordan, Paul Wayne Taylor, and others.[408] 58

The jury was deprived of critically important research and perspectives that could have resulted in consideration of Mr. Raby's substance dependence as a mitigating factor. There was *no* testimony at the sentencing phase regarding the redundant substance dependence risk factors

---

401 Cunningham Mitig. ¶ 138.
402 Cunningham Mitig. ¶ 138.
403 Raby ¶ 3; Wearstler ¶ 28; Hicks ¶ 18; Cunningham Mitig. ¶ 145.
404 Raby at 3; Cunningham Mitig. ¶ 145.
405 Mayes ¶ 12; Langenbauhn ¶ 4.
406 Raby ¶ 17.
407 *Id.*
408 Cunningham Mitig. ¶ 149; Hicks ¶ 18; Jordan ¶ 15; Taylor ¶¶ 12-13.

that impinged on Mr. Raby's development in early adolescence.[409] In addition, substance dependence and intoxication are also risk factors for violence in the community.[410] Moreover, trial counsel should have noted that Mr. Raby's "choice" to begin substance abuse occurred as an immature early adolescent, with the deficient reasoning and judgment that accompanies that developmental stage, and without the support of a stable family network.[411] Evidence of Mr. Raby's intoxication on the night of the offense also speaks to the quality and degree of planning, judgment, volition, and other facets of moral culpability that were important for the jury to weigh in their sentencing verdict.[412]

18. **Institutional neglect, inadequate interventions**

The interventions Charles received were delayed, inadequate, and not sustained.[413] As described above, CPS failed to intervene after discovering Bob Butler's abuse of Mr. Raby and his sister in 1978. When CPS finally did take custody of the children, at Betty's request, the agency made several placements that were profoundly negligent at best—for instance, placing Mr. Raby with Roy Robinson in 1982, despite Roy's past rape conviction and long history of sexually abusing his daughters and stepdaughters.

Beyond placement in special education classes from time to time, there is no indication that the school system involved Charles in counseling services, or medication consultation for his depressive or ADHD symptoms.[414] In addition, New Horizons failed to recognize that Mr. Raby was not ready to be released to his mother's custody, destroying the best chance Mr. Raby had known for achieving normal development.

---

409 Cunningham Mitig. ¶ 153.
410 Cunningham Mitig. ¶ 154.
411 Cunningham Mitig. ¶ 159.
412 Cunningham Mitig. ¶ 157.
413 Cunningham Mitig. ¶ 160.

Negligence in juvenile institutional placement may act to compound the psychological injury of disrupted attachments and removal from the mainstream developmental experiences, for instance, delaying the development of self-control.[415] In addition, apathetic or anemic institutions disrupt the adoption of constructive models, and the instilling of pro-social values is blocked.[416]

The presentation of compelling mitigation evidence was critical in Mr. Raby's case, as it is in every capital case that goes to sentencing in Texas. Yet trial counsel plainly had little notion of the ample evidence available to them that could have described the many adverse developmental factors present in Mr. Raby's childhood and adolescence. Furthermore, because Mr. Raby's trial counsel had *no* understanding of how these factors shed light on Mr. Raby's level of moral culpability for the offense, the jury in all likelihood considered the mitigation evidence that was presented as aggravating.

b. Positive Character Evidence That Could Have Been Presented

A number of those close to Mr. Raby never had the opportunity to testify on his behalf. Because trial counsel presented so little evidence of Mr. Raby's good character, it was probable that the jury accepted the State's portrayal of Mr. Raby as without friends or good qualities. Some witnesses that should have been called, and the testimony they could have offered, have been discussed above: Paul Wayne Taylor, Pam Langenbauhn, C.J. Hicks, John Sowell and ~~Pam~~ Donna Hamner. Furthermore, C.J., Robert Butler, and Mr. Raby's sister, Wanda, could have attested to Mr. Raby's attempts to stay away from alcohol and drugs after his release from prison in 1992.[417] 59 C.J. and Wanda each could have described peaceful nights he spent during that period with them

---

414 Cunningham Mitig. ¶ 160.
415 Cunningham Mitig. ¶ 165-156.
416 Cunningham Mitig. ¶ 167.
417 Hicks ¶ 21; Mayes ¶ 19; H.R. Butler ¶ 11.

and their children.[418] In addition, James Jordan could have described Mr. Raby's attempts to guide and protect James, who was like a little brother to him.[419] James states that for each of Mr. Raby's faults, there is an equal strength.[420]

Most importantly, while Merry Alice Gomez (now Merry Alice Wilkin) did testify at sentencing, very little of the positive character evidence she had to offer was elicited, because trial counsel did not learn of it. When Mr. Raby was released from prison in 1992, he had made the decision to try to avoid drugs and alcohol and turn his life around, in part so that he could be with Merry Alice, with whom he had been corresponding for over a year. He got a job at Westfield Sandblasting Company,[421] and was reporting as required to his parole officer.[422] Merry Alice and Mr. Raby were together for most of the two months during which he was on parole.[423] Merry Alice was in many ways the person most able to comment on Charles's struggle to stay straight after his release from prison. In fact, Merry Alice could have testified to the following if she had been properly interviewed and prepared for trial:

- the fact that after his release, Mr. Raby spoke enthusiastically about his goals of finding his daughter, Amber, and finding a job, a car, and a home. He confided in Merry Alice that earlier in his life, his mother was always working and his father was not around, and he got into trouble because he just didn't care;[424]

- the fact that Mr. Raby and Merry Alice were romantically involved, and would express their affection by holding hands and, once, by making love.[425] Because she was unprepared, Merry Alice was taken aback when Mr. Raby's trial counsel asked whether she and Mr. Raby had

---

418 Hicks ¶ 21; Mayes ¶ 19-20. A little over a week before his arrest, Charles took Wanda's son P.J. riding on the Metro bus route for fun, which P.J. seemed to enjoy. (Mayes ¶ 20.)

419 Jordan ¶¶ 1-3.

420 Jordan ¶ 19.

421 Aff. Ryan Rebe and accompanying job application, Ex. 18; Raby ¶ 25.

422 Raby ¶ 25; S.F. 34: 570.

423 Wilkin ¶ 13.

424 Wilkin ¶¶ 4, 17.

425 Wilkin ¶ 7.

slept together,and, flustered and embarrassed, denied it;[426]

- the fact that Mr. Raby spent much of his last paycheck from Westfield Sandblasting Company on gifts for Merry Alice's baby, soon to be born. Mr. Raby and his mother attended Merry Alice's baby shower in August of 1992, and he brought a bag filled with toys, spoons, a pacifier, socks, shoes, a thermometer, a medicine spoon, baby powder, a rattle, and a self-standing swing. Later he also gave Merry Alice a rocking chair that had been in his family;[427]

- the fact that Mr. Raby commented once that he got his drinking habit from his natural father, whom he called an alcoholic;[428]

- the fact that Mr. Raby never touched Merry Alice in violence or threatened her in any way;[429]

- the fact that Mr. Raby spent most of a week staying with Merry Alice in her hospital room after her C-section. Mr. Raby's trial counsel completely missed this testimony by asking Merry Alice whether Mr. Raby was there for her delivery. She answered no, but in fact no family or friends were present for the birth, which was a scheduled C-section performed in the morning under general anesthesia. Mr. Raby made sure he was present in the afternoon when Merry Alice woke up;[430]

- the fact that Mr. Raby was allowed to stay in Merry Alice's hospital room because a nurse assumed that he was her husband, and he encouraged her to think so. Mr. Raby's mother brought him fresh clothes to wear, and Merry Alice's mother brought them chicken to eat;[431]

- the fact that Mr. Raby was the only man to hold Merry Alice's son, Chris, for two months after his birth. Chris's father refused to do so;[432]

- the fact that after Merry Alice's delivery, Mr. Raby helped her around the house to do anything that she needed, and would wash her feet and put lotion on them. Mr. Raby used to tell her, "You take the mother, you accept the child." After Chris' birth, he would say, "Now I have a boy and a girl." Mr. Raby's family used to call him "C," and so Mr. Raby used to call Chris "Little C." He used to draw pictures for Chris

---

426 *Id.*; S.F. 28:247.
427 Wilkin ¶¶ 8-9, 14.
428 Wilkin ¶ 17.
429 Wilkin ¶ 19.
430 Wilkin ¶ 10.
431 *Id.*
432 Wilkin ¶ 12.

that said "Little Chris" in big letters;[433]

- the fact that after Chris was born, Mr. Raby spent most days with Merry Alice at her house, helping to care for him. During this time, Chris came down with colic and cried almost continuously. Mr. Raby was more patient with Chris than Merry Alice was at times, and would sit in the rocking chair he had brought and rock Chris in his arms "forever;"[434]

- the fact that although the weekend before Mr. Raby's arrest was mostly a tense time, there were a few hours on Sunday night during which Mr. Raby and Merry Alice sat on Mr. Reeves' porch swing and held hands while the wind blew softly. The two talked about getting married some day;[435]

- and the fact that Merry Alice never knew Mr. Raby to carry a knife.[436]

Obviously, the man Merry Alice would have described was a man capable of thoughtfulness, tenderness, patience, and even responsibility, and thus was radically different and more sympathetic than the man Karianne Wright described at trial. Mr. Raby's trial counsel completely failed to convey this side of Mr. Raby's character.

With mitigating evidence, half the story is worse than no story at all. Trial counsel's failure to perform a complete life history evaluation, and to explain to the jury how Mr. Raby's childhood surroundings had affected his development and personality—ultimately, his *moral culpability*—left the jury listening to a hollow-ringing plea for mercy. And it gave the State the opportunity to spin the very facts that should have been cause for sympathy and mercy as evidence of his bad character. Because the jury did not know of Bob Butler's vicious abuse, Bob's parenting became evidence of "discipline" that Mr. Raby rejected.[437] Because the jury did not know of the violence that surrounded Mr. Raby throughout his childhood, Mr. Raby's own

---

433 Wilkin ¶ 13.
434 Wilkin ¶ 14.
435 Wilkin ¶ 25.
436 Wilkin ¶ 19.

violent behavior became evidence that he has "no conscience."[438] Because the jury did not know of all the ways "the system" failed him, Mr. Raby's runaway attempts became evidence that he is an escape risk,[439] who rejected "the system's" help whenever given.[440] Worst of all, because the jury was not shown how the terrible circumstances of Mr. Raby's childhood led directly to his increasingly criminal behavior, and because the difference between criminal responsibility and moral culpability was never explained, his very plea for mercy became evidence of just another attempt to escape responsibility, to blame someone else.[441] By presenting only half the story, and failing to explain how Mr. Raby's life experiences affected his development and personality—his *moral* culpability, trial counsel presented a case that appeared far more aggravating than mitigating. Moreover, trial counsel missed every opportunity to put on substantial evidence of Mr. Raby's good character traits and attempts to straighten out his life.

C. Mr. Raby's Trial Counsel Failed to Impeach a Critical State Witness, Karianne Wright 60

In addition to failing to present compelling cases on the issues of future dangerousness and mitigation, trial counsel made a number of other prejudicial errors at the punishment phase of trial. Chief among these was trial counsel's failure to present evidence to impeach Karianne Wright's testimony. Karianne's accounts of her abusive relationship with Mr. Raby and other episodes did more than reveal Mr. Raby's violent tendencies during his teen years; they portrayed Mr. Raby as a sadist without a conscience. In fact, Karianne's opinion on Mr. Raby's character was especially important because Mr. Raby was indicted on a theory that he had attempted to sexually assault the victim. Jurors who were not initially convinced by the State's

---

437 S.F. 37:1043, 1062.
438 S.F. 37:1045-46.
439 S.F. 37:1048.
440 S.F. 37:1051-52.

weak evidence that Mr. Raby's attack on his victim was sexual in nature were likely looking for evidence of vicious character that would seem to warrant imposition of a death sentence. Evidence of vicious character of a sexual nature likely caused jurors to become more convinced of the State's rape theory in the bargain.

Given that Karianne described several violent episodes in detail, it would have been difficult or impossible for Mr. Raby's trial counsel to convince a jury that he had never touched Karianne in anger. But a competent attorney *could have* demonstrated through cross-examination and other evidence that Karianne's accounts were not always accurate, and were inflamed by her understandable pain and bitterness. For instance, witnesses could have reported that Karianne was verbally provocative, while Charles was generally passive, contrary to her accounts.[442] Impeaching Karianne's perception in this regard likely would have caused jurors to question Karianne's accounts in other respects as well, and to hesitate to accept her description of Mr. Raby as conscience-less and sadistic.

Karianne testified to a fight between Mr. Raby and his father, Elvis, on Mr. Raby's 18th birthday, which she described as the only fight she ever saw Mr. Raby lose.[443] Karianne described Elvis as a "wonderful man," who had merely refused to give Mr. Raby, who was very drunk, the keys to his truck.[444] In fact, Wanda Benefield Robinson could have testified that Karianne was *not present* for that fight, and that it was Elvis who provoked the fight, beating Mr. Raby with a two-by-four in the face until Mr. Raby was able to crawl away into his bedroom.[445] Furthermore, Karianne testified that after that fight, although she wanted to remain in New Ulm,

---

441 S.F. 37:1041-43, 1049.
442 Hicks ¶ 19.
443 S.F. 32:180; 32: 227.
444 S.F. 32:228.
445 Robinson ¶ 27.

Mr. Raby made sure they took the first bus back to Houston. Wanda Benefield Robinson could have testified that Karianne and Mr. Raby remained for months.[446]

In addition, Karianne testified that on one occasion James Jordan, Mr. Raby's friend, was beating up his girlfriend, Tyme Martin, in front of Karianne and Mr. Raby.[447] Karianne implored Mr. Raby to intervene, but he refused to do so until James let Tyme go and, angry with Karianne for interfering, called her a "bitch."[448] Tyme Martin was available at sentencing, however, and could have testified that Mr. Raby in fact intervened as soon as James began to beat her up, and that he always defended Tyme from James.[449]

Karianne also testified to an incident in which a man named Elliot had pushed down James Jordan's bike while high on paint fumes, and Mr. Raby set upon him with a two-by-four.[450] James Jordan could have testified that Mr. Raby set upon Elliot with his fists only, and after a few blows ran away.[451] 61

Had trial counsel opened the door to the possibility that Karianne Wright was not the best judge of Mr. Raby's character, other mitigation evidence, such as the evidence Merry Alice Wilkin could have presented, would likely have humanized Mr. Raby enough to spare his life.

D. Trial Counsel's Closing Argument At Sentencing Fell Below Constitutionally Permissible Standards And Prejudiced Mr. Raby In Assigning Responsibility For The Crime To The Elderly Victim

As has been discussed above, Mr. Raby's trial counsel's performance at closing arguments at sentencing fell below constitutional standards because counsel failed to explain to the jury the nature of the inquiry required in order to answer their question of future

---

446 Robinson ¶ 28.
447 S.F. 32:187.
448 S.F. 32:187.
449 Sworn statement of Tyme Martin Dunbardo ("Martin") ¶¶ 3-4, Ex. 13; *see also* Jordan ¶ 11.
450 S.F. 32:219-21.

dangerousness. Mr. Raby's trial counsel was ineffective in arguing for a life sentence for a second reason: *Mr. Raby's trial counsel in effect asked the jury to hold Mrs. Franklin, his adjudged victim, responsible for having been attacked and killed.* Trial counsel's argument went as follows:

> There are things about Charles that are good. There are things about Charles that are very bad. He's never lived up to the expectations, and people that he's been around have never lived up to his expectations, have they? Mom didn't live up to her expectations and responsibilities. *Karianne didn't live up to Charles's expectations of a sweetheart. . . . Mrs. Franklin didn't live up to the expectation of a mother figure.* All of that came to an explosion on that day when he attacked Mrs. Franklin. Expectations, what we expect of each other, what we expect of Charles, different things that occur in our lives to cause us to look at people and see what we expect of that person, our involvement, our love, our hate, our anger, our rages.[452]

Ms. Franklin was a frail 72-year old woman who was not related to Mr. Raby, and whom Mr. Raby had not seen for years. There is no evidence to suggest that Mr. Raby had any expectations of Ms. Franklin as a mother figure or that Ms. Franklin failed to meet those expectations, much less that such failure led to or justified her death. Making the argument was patently unjustified by any conceivable trial strategy. The State predictably attacked this argument with enthusiasm, noting, GQ

> And, heck, if [the facts and the law are] both against you, then you blame somebody. . . . And that's what [Mr. Raby] is trying to do, shift the anger to everybody, including the poor dead Edna Franklin -- it's her fault. She wasn't a good mother figure. Why should she be? I mean, she was trying to keep him out of her house.[453]

If Mr. Raby's trial counsel had used their closing argument to explain what the jury was asked to determine and to sum up evidence of Mr. Raby's good character and obstacles in

---

451 Jordan ¶ 13.
452 S.F. 37:1032 (emphasis added).
453 S.F. 37:1044.

development, rather than to forward bizarre and inflammatory theories that blame an elderly murder victim for her own death, there is a reasonable probability that Mr. Raby would have received a life sentence rather than death.

E. The Overall Performance of Mr. Raby's Trial Counsel Fell Below Constitutionally Permissible Standards

The adequacy of trial counsel's performance, and the prejudice flowing therefrom, is not to be judged on an error by error basis, but on the totality of the evidence.[454] In this case, trial counsel's failure to present compelling evidence on future dangerousness and mitigation, as well as to rebut events described by Ms. Wright, combined to create a picture of Mr. Raby as an incurable, sadistic monster. In fact, the real picture was much different. If the jury had seen the compelling evidence that Mr. Raby never had a chance when he was growing up to develop the discipline and responsibility that most of us take for granted, but that Mr. Raby had shown promise in certain environments, it is reasonably possible that the jury would have believed he could develop those traits in the right environment. If the jury had seen that Ms. Wright's account of events was not always accurate, it is likely that the jury would have at least considered that Mr. Raby had positive qualities, and was not simply a brutal monster. If the jury had seen the true scope of Mr. Raby's relationship with Merry Alice Gomez and her new son—how long he had known her, how much time he spent with her, and how he treated her—it is reasonably possible that the jury could have seen that Mr. Raby was a troubled young man struggling to get on the right track. If the jury had seen how alcohol and drugs controlled Mr. Raby, and prevented him from getting on the right track—just as they did on October 15, 1992—it is reasonably likely that the jury could have entertained the thought that Mr. Raby might be

---

454 *See Strickland*, 104 S. Ct. at 2066, 2069.

able to make it if he could just get away from substance abuse. Then if the jury had seen how to approach the issues of future dangerousness and moral culpability, there is a very reasonable probability that the outcome of Mr. Raby's sentencing proceeding would have been different.

III. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Mr. Raby's court-appointed counsel on direct appeal, Mr. Fosher, had also represented Mr. Raby at his trial. At both the trial and during direct appeal proceedings, Mr. Fosher's performance was impaired by debilitating pain caused by injuries sustained in a fall, and medication that Mr. Fosher was taking for the pain. In an affidavit submitted to the Court of Criminal Appeals during state habeas proceedings, Mr. Fosher stated that, during late May (just before trial began), his pain "increased steadily [and] required visits to the emergency room and pain medication."[455] Subsequently, Mr. Fosher admitted to an investigator for Mr. Raby that his performance was impaired by his injuries and the medication.[456]

Furthermore, the full extent of Mr. Fosher's injuries and impairments was apparent to the trial court, which appointed Mr. Fosher to represent Mr. Raby on direct appeal. Mr. Fosher's pain was so severe that it was discussed on the record several times at trial. On the very first day of trial, Mr. Fosher did not show up because he had to visit a doctor.[457] The prosecutor informed the Court that he had spoken to Mr. Fosher the day before, and that Mr. Fosher had said that "he had a ruptured disc and that he was in a lot of pain and had been given medication."[458] Mr. Fosher's co-counsel moved to delay commencement of the trial until Mr. Fosher arrived, but his

---

455 *See* Fosher at 1.

456 Aff. Patricia Jean Rovensky ("Rovensky") ¶ 4, Ex. 21 ("Mr. Fosher stated that he did not remember Mr. Raby's direct appeal clearly because, due to post-operative pain and pain medication, he was 'out of it.'").

457 S.F. 27:3.

458 *Id.*

request was denied.[459] The following day, the prosecutor noted on the record that Mr. Fosher had arrived the previous day during the middle of the medical examiner's testimony, and had left early, at 4:30 p.m.[460] The judge also stated that he had given Mr. Fosher permission to leave early on the second day of trial because "he's in a little bit of pain."[461]

During closing arguments at guilt-innocence, Mr. Fosher again discussed his injuries and pain, explaining to the jury: "I fell and hurt my ribs and ended up having medical problems, so this last weekend was real tough and so I ended up getting this collar, which is very uncomfortable, very hot and makes me sweat and everything."[462] Likewise, during closing arguments at the punishment phase, Mr. Fosher again apologized to the jury "for my appearance, my neck problems and shoulder pain that you probably noticed during the trial."[463] Most telling, Mr. Fosher then admitted, in front of the judge and jury, "The pain in my neck, radiating down into my arm, I have taken a lot of pain medication and muscle relaxants. *I've had my good moments and my bad moments.*"[464]

Despite knowing of Mr. Fosher's problems with pain, and extensive use of pain medications and muscle relaxants throughout the trial, the trial court nonetheless appointed Mr. Fosher, on June 17, 1994, to represent Mr. Raby on direct appeal.[465] Ten days later, on June 27, 1994, Mr. Fosher underwent surgery for a cervical laminectomy.[466] Just 11 days after his

---

459 S.F. 27:9-12.
460 S.F. 28: 177.
461 *Id.*
462 S.F. 30:432.
463 S.F. 37:1004.
464 *Id.* (emphasis added).
465 C.R. at 561.
466 *See* Fosher at 2. A cervical laminectomy, which involves the cutting of bone and nerve fibers in the neck, likely rendered Mr. Fosher unable to work for at least four days. The healing process takes a total of three to four weeks for the skin and tissue to heal completely. (Radelat ¶ 17).

surgery, on July 8, 1994, Mr. Fosher filed Mr. Raby's motion for new trial,[467] which, under Texas law, significantly limited the claims that Mr. Fosher could then bring on direct appeal.[468] In that motion for new trial and on appeal, Mr. Fosher unreasonably failed to raise numerous nonfrivolous issues, many of which would have required Mr. Fosher to attack the effectiveness of *his own performance* at trial. These appellate issues include:

- Mr. Raby was convicted on factually and legally insufficient evidence to sustain a conviction for capital murder (section VI, *infra*);
- Mr. Raby was convicted on a novel interpretation of murder in the course of a burglary in violation of the fair warning principles of due process and the narrowing requirement of the Eighth Amendment (section VII, *infra*);
- Mr. Raby was convicted in violation of due process because the jury was not required to agree unanimously about which predicate felony he committed (section VIII, *infra*);
- the State commented impermissibly on Mr. Raby's silence in violation of the Fifth Amendment (section IX, *infra*);
- trial counsel was ineffective for failing to raise these claims; and
- any other claim that this Court concludes was procedurally defaulted on direct appeal.

Indeed, in *Gravley v. Mills*, the Sixth Circuit held in a factually similar case that trial counsel's illness, which required her to undergo surgery between trial and the filing of the motion for new trial, and to take prescription pain killers during her representation of defendant, did not excuse her failure to object to the State's comments on the defendant's post-arrest silence and failure to testify at trial and to preserve the issue for appeal in the motion for new trial.[469] The court concluded:

---

467 C.R. at 566-76.

468 *See* T.R.A.P. 21.2 (motion for new trial necessary to preserve claim the factual predicate for which is not on the record).

469 *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996)

> In all fairness to [defendant's] counsel, many of her mistakes may have been attributed to her medication. At the very least her illness had to have been a major distraction to her during her representation of [defendant]. However, regardless of whether counsel's ineffectiveness was caused by illness, ignorance, or inadvertence - there can be no question that counsel was deficient.[470]

Mr. Raby is entitled to relief because his counsel was objectively unreasonable in failing to discover the nonfrivolous issues listed above and to raise them in his merits brief.[471] For the reasons stated in the sections discussing each claim, these claims were potentially meritorious, and should have been raised. In addition, Mr. Fosher submitted an affidavit during state habeas proceedings in which he patently demonstrated his own incompetence, and misunderstanding of his role as appellate counsel. For example, in response to the allegation that he failed to challenge Mr. Raby's conviction on fair warning grounds, Mr. Fosher stated, "I did not feel that we were denied fair warning and I don't believe Mr. Cantu made an objection to this."[472] The issue concerning fair warning, however, was not whether trial counsel had fair warning at the time of trial, but rather whether Mr. Raby had fair warning at the time of the crime.[473] Furthermore, the fact that trial counsel did not raise a meritorious issue below did not excuse Mr. Fosher's obligation to raise the issue on appeal, but rather required Mr. Fosher also to raise trial counsel's ineffectiveness for failing to raise the issue below.

Furthermore, Mr. Raby is entitled to a presumption of prejudice because Mr. Fosher was burdened by an *actual conflict of interest* about which the trial judge knew or reasonably should have known. More particularly, the trial judge knew or reasonably should have known that Mr. Fosher was impaired at trial by debilitating pain and extensive use of pain medication, and that

---

470 *Id.* at 786 (granting defendant's petition for writ of habeas corpus, on grounds of ineffective assistance of counsel, and ordering that defendant be released or given a new trial).

471 *Smith v. Robbins*, 120 S. Ct. 746, 764 (2000).

472 *See* Fosher at 2.

473 *See* section VII.A, *infra*.

since those facts appeared on the record, Mr. Fosher would be required on appeal to accuse *himself* of ineffective assistance of counsel. When a judge knows or reasonably should know about an apparent conflict of interest but fails to make an inquiry, then a defendant is excused of the obligation to show prejudice and is only required to show that there was an actual conflict of interest.[474]

Alternatively, even if Mr. Fosher's apparent conflict of interest was not apparent to the judge, Mr. Raby nonetheless is entitled to relief under the standard of *Cuyler v. Sullivan*.[475] Mr. Fosher was burdened by an actual conflict of interest as described in the preceding paragraph, and the conflict adversely affected Mr. Fosher's performance as evidenced by the fact that Mr. Fosher did not raise record-based claims of trial counsel's ineffectiveness.

Alternatively, even if Mr. Fosher was burdened by no actual conflict of interest that requires a presumption of prejudice, Mr. Raby is entitled to relief because the prejudice prong of *Strickland* is satisfied. In the context of ineffective appellate counsel, prejudice is satisfied if there is a reasonable probability that, but for Mr. Fosher's unreasonable failure to raise the identified claims on appeal, Mr. Raby would have prevailed on his appeal. Importantly, it is whether there is a reasonable probability that those claims would have been decided favorably by *the Court of Criminal Appeals or the United States Supreme Court on direct review* that matters,

---

474 *U.S. v. Rodriguez*, 2002 WL 13646 at *5 (5th Cir. Jan. 4, 2002), *citing Wood v. Georgia*, 101 S. Ct. 1097 (1981). Mr. Raby acknowledges that holdings of the Fifth Circuit suggest that a presumption of prejudice may not apply when the attorney's conflict of interest is between his *own* interests and those of his client. *See Beets v. Johnson*, 65 F.3d 1258, 1271 (5th Cir. 1995). Mr. Raby respectfully asserts that *Beets* conflicts with applicable Supreme Court precedent, as described in the dissenting opinion, 65 F.3d at 1279, and makes this argument for the purpose of preserving error for review.

475 *Cuyler v. Sullivan*, 100 S.Ct. 1708, 1718-19 (1980). Again, Mr. Raby recognizes the Fifth Circuit's decision in *Beets*, and raises this argument to preserve review.

not whether this Court views the claims as meritorious within the limited scope of habeas review.[476]

As discussed in the sections addressing each individual claim, *infra*, Mr. Raby probably would have prevailed on his appeal had Mr. Fosher raised all meritorious claims. Accordingly, Mr. Raby was deprived of the effective assistance of counsel on direct appeal, and is entitled to a new appeal or to be released from custody.

IV. MR. RABY WAS CONVICTED OF CAPITAL MURDER IN VIOLATION OF THE SIXTH AMENDMENT, EIGHTH AMENDMENT, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE HE WAS NOT PERMITTED TO INFORM THE JURY THAT EXTREME INTOXICATION COULD NEGATE THE CONSTITUTIONALLY REQUIRED ELEMENT OF SPECIFIC INTENT

It is a clearly established rule of constitutional law that, in order to be convicted of capital murder and sentenced to death, the Eighth Amendment requires proof beyond a reasonable doubt that the defendant had either a specific intent to kill, or showed a "reckless disregard for human life [by] *knowingly* engaging in criminal activities *known* to carry a grave risk of death."[477] Section 8.04(a) of the Texas Penal Code, however, provides that "[v]oluntary intoxication does not constitute a defense to the commission of crime." On the basis of section 8.04(a), the trial court did not permit Mr. Raby to introduce evidence to show, or argue to or instruct the jury that, his extreme state of intoxication at the time of the crime precluded him from forming the knowing mental state required to commit capital murder. Mr. Raby argued to both the trial court and the Court of Criminal Appeals that section 8.04(a) is unconstitutional, but the Texas courts disagreed.[478]

Section 8.04(a) is unconstitutional, as applied to a capital murder prosecution, because it

---

476 *See Strickland*, 104 S. Ct. at 2068-69.

redefines capital murder *not* to require proof of the highly culpable mental state that the Eighth Amendment requires. The Court of Criminal Appeals has recognized that the purpose of section 8.04(a) is to "eliminate mere intoxication as any defense in any criminal prosecution whatever, *regardless of the constituent elements of the crime.*"[479] This plainly violates the Eighth Amendment, because specific intent or a reckless indifference to human life is a *constitutionally required* element of capital murder, and thus the State of Texas ***cannot*** disregard that element of the crime. If intoxication prevents a defendant from forming one of those mental states, section 8.04(a) cannot constitutionally eliminate intoxication as a defense to the crime.

Section 8.04(a), as applied in this case, also violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment because it prevented Mr. Raby from offering a defense to a constitutionally required element of capital murder and arguing that defense to the jury. It is clearly established that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[480] It is also clearly established that the Sixth Amendment right to the effective assistance of counsel includes the right to make proper closing arguments to the jury.[481] Mr. Raby was not given a fair opportunity to defend against the State's accusation that he committed murder with specific intent (or reckless indifference to human life), because section 8.04(a) prevented him from offering evidence to show, or arguing to or instructing the jury that, his extreme state of intoxication rendered him unable to form the highly culpable mental state required to convict

---

477 *Tison v. Arizona*, 107 S. Ct. 1676, 1688 (1987) (emphasis added).

478 C.R. at 509-512; *Raby*, 970 S.W.2d at 4-5.

479 *Taylor v. State*, 885 S.W.2d 154, 156 (Tex. Cr. App. 1994) (emphasis added); *see also Smith v. State*, 968 S.W.2d 490, 495 (Tex. App.—Texarkana 1998, n.p.h.) (holding § 8.04(a) constitutional, in noncapital case, because legislature is free to define elements of crime any way it wants).

480 *Chambers v. Mississippi*, 93 S. Ct. 1038, 1045 (1973).

481 *See Herring v. New York*, 95 S. Ct. 2250, 2253-54 (1975).

him of capital murder.

Montana v. Egelhoff is not contrary.[482] Although four Justices in *Egelhoff* stated, in an opinion authored by Justice Scalia, that due process does not require that a criminal defendant be afforded an opportunity to negate intent with evidence of intoxication, those four Justices did not author the *holding* of the Court. Four other Justices stated, in an opinion authored by Justice O'Connor, that due process *does* require that a defendant be permitted to introduce such evidence.[483] The deciding vote was cast by Justice Ginsburg, who declined to reach the due process issue because she concluded that the Montana statute at issue had merely redefined murder to permit conviction when "the defendant killed 'under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication.'"[484] Because "[s]tates enjoy wide latitude in defining the elements of criminal offenses," Justice Ginsburg concluded that the Montana statute "encountered no constitutional shoal."[485] And because Justice Ginsburg's rationale was narrower than the rationale of the four-Justice plurality, Justice Ginsburg authored the *holding* of the Court in *Egelhoff*.[486]

Egelhoff is clearly distinguishable from the present case, because ***Egelhoff did not involve a capital crime.*** While the States do enjoy wide latitude to define the elements of noncapital crime, the Eighth Amendment limits the ability of states to define capital crime and impose a sentence of death. Simply put, a state cannot impose a sentence of death merely because the evidence *would otherwise* establish knowledge or purpose *but for* the defendant's

---

482 *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996).

483 *Egelhoff*, 116 S. Ct. at 2026.

484 *Egelhoff*, 116 S. Ct. at 2024 (quoting Brief of Amicus Curiae).

485 *Egelhoff*, 116 S. Ct. at 2024.

486 It is clearly established that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . . '" *Marks v. United States*, 97 S. Ct. 990,

voluntary intoxication.[487] If anything, *Egelhoff* thus supports Mr. Raby's claim. It certainly is not a holding overruling the Court's prior, clearly established holdings that due process requires that a defendant have an opportunity to present relevant, competent evidence bearing directly on an element of the offense charged.[488] Because section 8.04(a) denied Mr. Raby this opportunity, the Court of Criminal Appeals' decision affirming his conviction was contrary to, and an unreasonable application of, clearly established constitutional law.

V. MR. RABY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HE WAS NOT ALLOWED TO PRESENT RELEVANT MITIGATING EVIDENCE TO THE JURY AT SENTENCING

It is clearly established that a defendant's Sixth Amendment right to the effective assistance of counsel includes the right to make closing arguments to the jury.[489] At the punishment phase of his trial, Mr. Raby requested permission to argue to the jury that they "should consider and give mitigating effect" to evidence of Mr. Raby's voluntary intoxication at the time of the alleged offense.[490] The trial court denied Mr. Raby's motion.[491] The Court of Criminal Appeals affirmed, concluding that Mr. Raby "would have been misstating the law had he been allowed to argue or had the court instructed the jury as he proposed," because "the law does not require a juror to consider any particular piece of evidence as mitigating . . . ."[492]

It is absolutely apparent that the Court of Criminal Appeals misunderstood Mr. Raby's claim, and confused it with his claim—raised in a separate point of error—that the jury should have been *instructed* that they *must* consider Mr. Raby's intoxication in mitigation of

---

993 (1977), *citing Gregg v. Georgia*, 96 S. Ct. 2909, n.15 (1976).

487 *Tison*, 107 S. Ct. at 1688.

488 *See Chambers*, 93 S. Ct. at 1045.

489 *See Herring*, 95 S. Ct. at 2253-54.

490 C.R. at 544-45.

491 C.R. at 546.

punishment. Mr. Raby concedes that the law does not require the jury to consider any particular evidence as mitigating, but that does not bear on Mr. Raby's right to *argue* to the jury that they *should* consider his intoxicated state as mitigating.

Moreover, although the Court of Criminal Appeals did not reach this issue, the apparent basis for the trial court's denial of Mr. Raby's motion to permit jury argument on voluntary intoxication as mitigating evidence is section 8.04(b) of the Texas Penal Code, which provides that "[e]vidence of *temporary insanity* caused by intoxication may be introduced by the actor in mitigation . . . ."[493] It is clearly established, however, that a jury must be allowed to consider all constitutionally relevant mitigating factors, including the circumstances of the offense.[494] Evidence of a defendant's voluntary intoxication at the time of the offense clearly is constitutionally relevant mitigating evidence, regardless of whether it rises to the level of temporary insanity,[495] and thus application of section 8.04(b) to prevent a jury from considering evidence of "noninsane" intoxication is a clear violation of the Eighth and Fourteenth Amendments. Accordingly, evidence of Mr. Raby's "noninsane" voluntary intoxication was a proper subject of jury argument, and the denial of Mr. Raby's motion to permit jury argument on the issue requires that Mr. Raby's sentence of death be vacated.

VI. MR. RABY WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH EVERY ELEMENT OF THE OFFENSE OF CAPITAL MURDER

The Fourteenth Amendment "protects the accused against conviction except upon proof

---

492 *Raby*, 970 S.W.2d at 6.

493 Tex. Penal Code § 8.04(b) (emphasis added)

494 *See, e.g., Eddings v. Oklahoma*, 102 S. Ct. 869, 875 (1982).

495 *See Parker v. Dugger*, 111 S. Ct. 731, 736 (1991) (describing evidence that defendant was intoxicated at time of offense as mitigating); *Drinkard v. Johnson*, 97 F.3d 751, 758 n.10 (5th Cir. 1996) ("[e]vidence that Drinkard was intoxicated at the time of the murders is clearly 'constitutionally relevant'").

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[496] Habeas relief under section 2254 on a claim of insufficient evidence is appropriate "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[497] Moreover, because a claim of insufficient evidence was not presented to the Court of Criminal Appeals due to the ineffectiveness of appellate counsel, Mr. Raby is entitled to relief on his claim of ineffective assistance of counsel if there is a reasonable probability that, had this claim been raised, the Court of Criminal Appeals would have granted relief under its standards.[498]

A. The State Introduced Insufficient Evidence of Either Aggravated Sexual Assault or Attempted Aggravated Sexual Assault

Under section 22.021 of the Texas Penal Code, Mr. Raby committed the offense of aggravated sexual assault if he intentionally or knowingly, and without consent, (1) caused the penetration of Ms. Franklin's anus or sexual organ; (2) caused the penetration of Ms. Franklin's mouth by his sexual organ; or (3) caused Ms. Franklin's sexual organ to contact or penetrate his or another person's mouth, anus, or sexual organ.[499] Under section 15.01(a), Mr. Raby is guilty of attempted aggravated sexual assault if, with intent to commit aggravated sexual assault, he did "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."

The evidence the State presented at trial in support of the aggravated sexual assault and attempted aggravated sexual assault charges against Mr. Raby was insufficient to support his conviction. That evidence showed only that Ms. Franklin was wearing just a long shirt or

This is a problem.?

---

496 *In re Winship*, 90 S. Ct. 1068, 1072-73 (1970).

497 *Jackson v. Virginia*, 99 S. Ct. 2781, 2791-92 (1979).

498 *See* section III, *supra*.

499 Section 15.01(a)(2) also requires that the defendant utilized force, a threat of force, or a deadly weapon.

nightshirt when she was found dead, that a pair of inside-out pants and a pair of underwear with ripped elastic were found (among other laundry) in the same room, that the underwear bore traces of blood of indeterminate age, and that the position of her dead body was such that her legs were open about two feet at the ankles.[500] The medical examiner testified at trial that, after performing the necessary tests, he had found *no evidence* of sexual assault.[501] Importantly, Mr. Raby's custodial statement did not make any reference to undressing or sexually assaulting Ms. Franklin.[502]

Ultimately, the only significant evidence of attempted sexual assault was Ms. Franklin's state of dress. There are several equally, if not more, plausible explanations for that state of dress, however, than an attempted sexual assault. Ms. Franklin could have been using the bathroom when she was attacked, or she could have been in bed or getting ready for bed. She was attacked in the evening (after 6:45 p.m., at the earliest),[503] and her shoes were nowhere near the crime scene even though her grandson stated she could not walk without them.[504] The pants and underwear were found among other clothes in the living room.[505] In fact, when Ms. Franklin's grandson first encountered her body in the dark living room, he thought it was a pile of laundry that his cousin routinely left lying around.[506] There was no evidence presented at trial concerning whether the blood found on the underwear was fresh; even if it was, the evidence showed that there was blood splattered on the floor near where the panties were found.[507] Based

---

500 S.F. 27:110; 28:188, 195; State Ex. 10D.
501 S.F. 27:37-38, 59.
502 *See* Custodial Statement.
503 S.F. 28:280-83 (Ms. Franklin had a telephone conversation with her daughter until 6:45 p.m.).
504 S.F. 27:120.
505 Crime scene photos: State Exs. 10D (towel near victim's head and laundry basket nearby); 43 (clothes strewn on sofas); 51 (sock under victim's hand); 53 (clothes strewn on sofa), all at Ex. 48.
506 S.F. 27:72, 193.
507 Crime scene photo, State Ex. 53.

on such evidence, which at most gives rise to equally plausible inferences of guilt and innocence, no rational trier of fact could have found proof of attempted sexual assault beyond a reasonable doubt.

While sexual assault convictions have been upheld by Texas courts based on scanty evidence, there is no published decision in which a Texas court has gone so far as to say that a rational trier of fact could have found sufficient evidence of aggravated sexual assault or attempted aggravated sexual assault based solely on the victim's state of dress and the position of her body.[508] Significantly, in the two published decisions involving facts most similar to those at issue - indeed, slightly stronger evidence, in both cases - a sexual assault charge was either never brought against the defendant, or was dropped before trial.

In *Brimage v. State*, involving a capital murder conviction, the victim's body was found "unclothed from the waist down and bound at the wrists and elbows," with her feet "bound to the elbows behind the body, causing an arching exposure of [the victim's] genital area."[509] The defendant admitted that he "wanted [the victim] sexually real bad and that is why I lured her to my house," that during his attack on the victim he "was trying to feel up her shorts and touch her

---

508 In addition, research revealed only one unpublished Texas court decision affirming a sexual assault conviction on facts nearly as minimal as those at issue here. The court of appeals in *Quintero v. State*, 1998 Tex. App. LEXIS 272 (Tex. App. - Corpus Christi Jan. 15, 1998, n.p.h.), upheld a sexual assault conviction despite the lack of any direct evidence of such an assault, based on testimony that the victim's body "was found laying in a ditch with no clothes other than her bra or her blouse pulled up covering only the top part of her body"; the presence of blood on a pair of underwear found under the body; witness testimony that the attack on the victim lasted thirty minutes, during which time the witness heard "hollow, hitting noises, as well as [the victim's] screaming for her attacker to 'leave me alone,' and 'please leave me'"; and crime scene photographs which showed the position and condition the body as it appeared after the attack. *Id.* at *5-7. The decision in *Quintero*, which was not reviewed by the Texas Court of Criminal Appeals, is distinguishable from the case at issue because it was not a death penalty case, and because there was a witness to the attack whose testimony supported the sexual assault charge. *Id.* at *2 & n.3. The victim had been walking down a public road with a friend when she was attacked, and so the friend was able to establish that the victim was undressed by her attacker. *Id.* at *2. The friend was also a witness to the attack, having been left for dead herself, and so was able to give testimony as to the long duration of the attack and the sounds made by the victim and her attacker during the attack. *Id.* Even if the facts were not stronger in *Quintero* than they are here, *Quintero* has limited precedential value because it is an unpublished decision of an intermediary court of appeals.

between her legs," and that he stripped the victim from the waist down so that he could admire her body.[510] The medical examiner testified that he had found no evidence of sexual assault, but that the absence of such evidence did not rule out sexual assault and "the sexual nature of the crime [was] obvious because of the positioning of the body and the way the body [was] tied up with the legs spread and [the] feet tied back underneath the body with the body arched to expose the genital area."[511] Not only was the defendant in *Brimage* not convicted of sexual assault, that charge was dropped from the indictment on the first day of trial.[512]

In *Brasfield v. State*, also involving a capital murder conviction, the minor victim was found with his pants and underwear "pulled down below his knees."[513] The medical examiner testified that the decomposition of the victim's body made it impossible for him to determine whether the victim had been sexually molested.[514] In *Brasfield*, the indictment did not include a charge of sexual assault.[515]

B. The State Introduced Insufficient Evidence of Either Robbery or Attempted Robbery

The evidence presented at trial was insufficient to support a robbery or attempted robbery conviction because there was no evidence that any property was taken from Ms. Franklin or from her home, and insufficient other evidence to suggest an attempted robbery. Under section 29.01(a) of the Texas Penal Code, which defines the offense of robbery:

> A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2)

---

509 *Brimage v. State*, 918 S.W.2d 466, 472 (Tex. Cr. App. 1994).
510 *Id.* at 477, 497.
511 *Id.* at 473.
512 *Id.* at 498 n.4.
513 *Brasfield v. State*, 600 S.W.2d 288, 297 (Tex. Cr. App. 1980).
514 *Id.* at 292.
515 *Id.* at 291 & n.1.

intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Under section 31.01(a) of the Penal Code, to commit theft, a person must unlawfully appropriate property with the intent to deprive the owner of the property. A conviction of capital murder based on the predicate felony of robbery or attempted robbery requires a showing that the defendant formed the intent to commit robbery before or during the murder itself.[516]

While proof of a completed theft is not required to establish the underlying offense of attempted robbery, the State carried the burden of proving beyond a reasonable doubt that appellant had the specific intent to commit robbery and that appellant committed an act amounting to more than mere preparation for robbing the victim.[517] Thus, if the State introduced evidence from which the jury could rationally conclude that appellant possessed the specific intent to obtain or maintain control of the victim's property either before or during the commission of the murder, it has proven that the murder occurred in the course of robbery.[518] In resolving this question, the requisite intent may be inferred from circumstantial evidence and from the defendant's conduct.[519]

However, in the present case there was no evidence from which the jury could infer that Mr. Raby intended to obtain or maintain control of the victim's property either before or during the commission of Ms. Franklin's murder. In his custodial statement, Mr. Raby stated that he entered Ms. Franklin's residence through the unlocked front door and attacked her. He made no admission that he intended to take or did take anything from Ms. Franklin or the house, and no such evidence was presented at trial. In addition, the evidence showed that Mr. Raby was a

---

516 *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Cr. App. 1995).
517 *Maldonado v. State*, 998 S.W.2d 239, 243 (Tex. Cr. App. 1999).
518 *Id.*
519 *Id.*

friend of Ms. Franklin's grandsons and had been invited into the house on previous occasions.[520] Texas courts have consistently required more evidence than was presented in this case to support a robbery or attempted robbery conviction, especially where there is no evidence that anything was taken from the victim or scene of the crime. The additional evidence on which these courts have relied includes the following:

- evidence that defendant's fingers were bleeding, and that blood was found on the top of the victim's locked armoir, and in the victim's unlatched coin purse, and that coins from the coin purse were scattered on the ground;[521]
- the defendant's admission that he went into the retail establishment where the victim was attacked with the intent to commit theft;[522]
- evidence that the defendant had concealed items from the retail establishment where the victim was attacked on his person, even if he had not left the store with the items;[523]
- evidence that defendant demanded property from the victim;[524]
- evidence that defendant went through victim's pockets, accompanied by victim's testimony that defendant tried to steal his wallet;[525]
- evidence that defendant lay in wait outside a bank and attacked the victim just as she was unlocking the back door to the bank;[526]

---

520 S.F. 27:65-66 (Eric and Lee had sneaked Mr. Raby into the house to let Mr. Raby sleep on "[q]uite a few occasions"); S.F. 27:132 (Lee Rose had invited Mr. Raby to the house without Eric Benge's knowledge); S.F. 27:161-62 (Rose and Mr. Raby were friends up until the crime, and had allowed Mr. Raby in the house even though he had not been invited).

521 *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Cr. App. 1996).

522 *Green v. State*, 840 S.W.2d 394, 401 (Tex. Cr. App. 1992); *Autry v. State*, 626 S.W.2d 758, 763 (Tex. Cr. App. 1982).

523 *Dansby v. State*, 2002 WESTLAW 44123, *2 (Tex. App. - Dallas Jan. 14, 2002, n.p.h.); *Tasby v. State*, 2000 WL 1598930, *3 (Tex. App. - Dallas Oct. 27, 2000, pet ref'd) (noting that defendant also said he tried to open cash register).

524 *Suell v. State*, 2002 WL 24443, *3 (Tex. App. - Dallas Jan. 10, 2002, n.p.h.); *Espada v. State*, 2001 WL 1525891, *4 (Tex. App. - Dallas Dec. 3, 2001, n.p.h.); *McPherson v. State*, 2001 WL 125967, *6 (Tex. App. - Dallas Feb. 15, 2001, no pet.); *Wiggins v. State*, 2000 WL 1125544, *2 (Tex. App. - Houston [14th Dist.] Aug. 10, 2000, pet. ref'd); *Patterson v. State*, 980 S.W.2d 529, 531 (Tex. App. - Beaumont 1998, no writ); *Medrano v. State*, 1997 WL 709457, *2 (Tex. App. - Houston [1st Dist.] Nov. 6, 1997, no writ); *Caldwell v. State*, 943 S.W.2d 551, 552 (Tex. App. - Waco 1997, no writ).

525 *Muiheid v. State*, 2001 Tex. App. LEXIS 7007, *4 (Tex. App. - Houston [14th Dist.] Oct. 18, 2001, n.p.h.).

526 *Slomba v. State*, 997 S.W.2d 781, 783 (Tex. App. - Texarkana 1999, pet. ref'd).

- evidence that defendant pointed a gun at the victim and told her to open the back door of her car;[527] and
- evidence that the defendant shot the victim right after seeing the victim put $900 into his pocket.[528]

The only evidence that even an attempted theft occurred in this case was evidence that Ms. Franklin's purse was found dumped over beside her bed, some things were on the floor next to the dresser, and that two dresser drawers in Ms. Franklin's room were found open.[529] In the most factually similar Texas case, however, the court held that there was insufficient evidence to support a robbery conviction.[530] In *Thomas v. State,* the defendant had admitted to going to the victim's apartment to acquire drugs, shooting the victim with her own pistol, and taking the defendant's jewelry, drugs, pistol, and money.[531] However, the physical evidence did not support this alleged admission, as there was no evidence that any jewelry or drugs were missing (despite being in plain sight), that the victim had owned a gun, or that the defendant had in his possession any of the items allegedly taken.[532] Moreover, even though the victim's purse was found near her body, upside down and open, and police found other items in the apartment disturbed and out of place, the court noted that such evidence was consistent with a presumed struggle preceding the murder, and thus was insufficient evidence of robbery.[533]

In discussing *Thomas*, a later court noted that the crime occurred in the victim's residence, where "motives other than theft are more probable than in a similar situation occurring

---

527 *Bombasi v. State*, 1996 WL 547200, *6-7 (Tex. App. - Houston [1st Dist.] Sept. 26, 1996, no writ).
528 *Barnes v. State*, 845 S.W.2d 364, 367 (Tex. App. - Houston [1st Dist.] 1992, no writ).
529 S.F. 27:78-79; 28:189.
530 *See Thomas v. State*, 807 S.W.2d 803 (Tex. App. - Houston [1st Dist.] 1991, writ ref'd).
531 *Id.* at 806.
532 *Id.* at 806-07. Notably, Ms. Franklin's rings were left on her fingers. *See* State Exhibit 7.
533 *Id.*

in a retail store or place of business."[534] Even though the State may not have an obligation to disprove alternate motives, the fact that Mr. Raby was convicted of killing Ms. Franklin in her residence, and that Mr. Raby knew Ms. Franklin and had been in her residence in the past, make the evidence offered by the State in support of the robbery charges even more inadequate.

The evidence offered in support of the robbery charges against Mr. Raby was especially deficient in that there was no evidence that Mr. Raby formed any intent to steal from Ms. Franklin or her residence *before or during* Ms. Franklin's murder, a necessary element of the capital murder charges in this case.[535] Such evidence has been found where the defendant admitted to police or told a witness that he had formed the intent to steal prior to or during the attack,[536] where the defendant made a demand for property prior to or during an attack on the victim,[537] where the defendant claimed that the victim owed him money,[538] where the defendant stole from the victim a car he needed as transportation to another town,[539] and where the attack occurred in a retail store after defendant lost a large amount of money gambling.[540] No similar evidence exists in this case upon which a rational juror could find beyond a reasonable doubt that Mr. Raby formed an intent to steal from Ms. Franklin or her residence *before or during* Ms. Franklin's murder.

---

534 *Garza v. State*, 937 S.W.2d 569, 571 (Tex. App. - San Antonio 1996, writ ref'd) (concluding that intent to steal could be inferred despite lack of evidence that anything was demanded or taken from victim because victim was at flea market, unloading large amounts of jewelry).

535 *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Cr. App. 1995).

536 *Foster v. State*, 25 S.W.3d 792, 798 (Tex. App. Waco 2000, pet. ref'd); *Rhone v. State*, 2000 WL 991559, *4 (Tex. App. - Houston [14th Dist.] July 20, 2000, pet. ref'd); *Whitaker v. State*, 977 S.W.2d 869, 873 (Tex. App. - Beaumont 1998, no writ).

537 *See Maldonado*, 998 S.W.2d at 243; *Patterson*, 980 S.W.2d at 532.

538 *Mireles v. State*, 2000 Tex. App. LEXIS 3647, *14 (Tex. App. - Corpus Christ May 25, 2000, no pet.).

539 *Eadeh v. State*, 2000 WL 5047, *3 (Tex. App. - Houston [1st Dist.] Jan. 6, 2000, no pet.).

540 *Tasby*, 2000 WL 1598930 at *3.

C. The State Introduced Insufficient Evidence of Either Burglary or Attempted Burglary

Under section 30.02 of the Texas Penal Code, which defines the offense of burglary:

> A person commits an offense if, without the effective consent of the owner, he: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or (2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony or theft.

The State never contended or presented evidence to show that Mr. Raby entered the house with an intent to commit a felony or theft, or "remained concealed" in the house where Ms. Franklin was murdered. Thus, in this case the State was required to prove that Mr. Raby entered the house without the effective consent of the owner and did commit a felony or theft.[541] Under section 15.01(a) of the Penal Code, Mr. Raby is guilty of attempted burglary if, with intent to commit burglary, he committed "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." The State offered insufficient evidence of the necessary elements of burglary or attempted burglary at trial.

1. The State introduced insufficient admissible evidence that Mr. Raby entered the house on the evening in question.

The only evidence that Mr. Raby, and not someone else, actually entered the house on the evening of the crime is Mr. Raby's statement to police. For reasons discussed in section I, *supra*, that statement should never have been admitted into trial. Without the statement, there is no evidence that Mr. Raby actually entered the house on the evening in question.

2. The State introduced insufficient evidence that Mr. Raby entered the house without effective consent.

Even if the record contains sufficient evidence that Mr. Raby actually entered the house

---

541 In section VII, *infra*, Mr. Raby contends that the State also had to prove that he committed a felony or theft other than the murder inside the house, which the State also failed to do.

13. **Sexually traumatic exposure, including possible sexual abuse by mother and placement in the care of a sex offender**

Bob Butler has reported that Betty had extra-marital encounters during her marriage to Bob.[371] Bob has also reported that after their separation, Betty routinely had men in and out of the house.[372] Robert, Mr. Raby's half brother, echoes Bob's reports.[373]

As described above, Roy Robinson, probably along with Junior, was sexually molesting Roy's daughters, Mr. Raby's aunts, Padoo and C.J.[374] Mr. Raby and his sister spent much of their childhood living in the same household with Roy Robinson and Junior, along with their aunts, who were close in age. In fact, at age 12, Harris County Child Welfare for a time placed Mr. Raby in the care of Roy Robinson, a convicted rapist.[375] Mr. Raby has therefore lived extensively with multiple child molesters, who exposed him to observing the abuse of others, and perhaps victimized him as well.

Most significantly, Betty once told her son, Robert, and his wife that she had sexually abused Mr. Raby.[376] She has never admitted this conduct since that time. Shirlene Guthrie, a faculty member at New Horizons, believes that during his placement there Mr. Raby showed several indications of having been sexually abused.[377] Mr. Raby himself has no memory of entire years during this period in his life.[378] Betty has similar memory loss, both of her own childhood and of this time during Mr. Raby's childhood, possibly because of the trauma of sexual abuse in

---

371 B. Butler ¶ 10.
372 B. Butler ¶ 11.
373 H.R. Butler ¶ 8.
374 *See also* Sowell ¶ 8 (Junior tried to rape C.J. once, and Padoo slept with Betty for protection from him).
375 Roy Robinson CA state crim record.
376 H.R. Butler ¶ 13.
377 Cunningham Mitig. ¶ 123.
378 Raby ¶ 4.

those associated with the direct experience of physical abuse.[361]

12. **Personal violent victimization**

Mr. Raby's Uncle Junior, who lived with Mr. Raby intermittently during his childhood, is a violent schizophrenic whose paranoia, unpredictable anger, and random violence terrorized family members daily.[362] He would hold his mother against the wall, using a machete to threaten her.[363] Constantly armed with Chinese Stars and knives,[364] Junior regularly threatened to kill family members.[365] Wanda always defended her son, saying he had "water on his brain."[366] C.J.'s husband at the time, John Sowell, who was not asked to testify, remembers witnessing several instances of Junior's bizarre and violent behavior.[367] John's sister, Donna Hamner, remembers receiving distressed telephone calls from Charles on several occasions asking for help.[368] When she would pick Charles up in her car, Donna could see visible injuries, such as claw marks that Junior had left on Charles's neck.[369] Neither John, nor C.J., nor Donna, was asked to testify, and the jury heard no evidence regarding Junior's victimization of Mr. Raby, and, indeed, Mr. Raby's entire family.

Like child abuse by a parent or caretaker, personal violent victimization by others can result in or exacerbate Post Traumatic Stress Disorder, interpersonal distrust, desensitization to violence, disruption of values and other risks.[370]

A: Right.

361 Cunningham Mitig. ¶ 116.
362 Hicks ¶ 16; *see also* Wearstler ¶ 19; Mayes ¶ 15; H.R. Butler ¶ 6.
363 Mayes ¶ 15.
364 *Id.*
365 *Id.*
366 *Id.*
367 Sowell ¶¶ 6-9.
368 Aff. Donna Hamner ("Hamner") ¶5, Ex. 8.
369 *Id.*
370 Cunningham Mitig. ¶ 119.

her childhood,[379] and Mr. Raby's lack of memory may also be attributable to sexual abuse.

There was no testimony at trial regarding sexually traumatic exposure. Sexually damaging or "traumatic" experience is broader than inappropriate genital contact. Other sexual exposures during childhood that are psychologically damaging include precocious exposure to adult sexual exchange, perverse family atmosphere, perverse and/or promiscuous parental sexuality, inappropriately sexualized relationships, observed sexual abuse or assault of another, and premature sexualization.[380] At the very least, testimony as above regarding Betty's history of promiscuity would have assisted the jury in better understanding Mr. Raby's sexual involvement with Karianne Wright.

Additionally, the jury did not have the opportunity to consider the catastrophic long term effects of sexual abuse on boys, which include increased risk for depression, somatic disturbance, self-esteem deficits, difficulty maintaining intimate relationships, problems with sexual adjustment, alcohol and substance abuse, and sexual offending.[381]

14. **Untreated Attention Deficit Hyperactivity Disorder**

There are indications from Mr. Raby's history that he suffered from an untreated Attention Deficit Hyperactivity Disorder (ADHD).[382] ADHD is characterized by excessive motor activity, inattention/distractibility, and impulsivity.[383] In his early and middle childhood, Mr. Raby's behavior problems that he displayed in childhood had a strong impulsive quality.[384]

Untreated, ADHD is a broad risk factor for disturbed peer relationships, academic failure,

---

379 Wearstler ¶ 33.
380 Cunningham Mitig. ¶ 124.
381 Cunningham Mitig. ¶¶ 125, 128.
382 Cunningham Mitig. ¶ 129.
383 Cunningham Mitig. ¶ 129.
384 Cunningham Mitig. ¶ 129.

juvenile delinquency, alcohol and drug abuse, and adult criminal activity.[385] Mr. Raby received neither sustained counseling nor medication for his symptoms. Mr. Raby's likely ADHD was never raised at trial.

15. **Academic failure and learning disabilities**

There is ample evidence that Mr. Raby suffered from a learning disability, and experienced associated academic frustration and failure.[386] Mr. Raby had great difficulty learning to read.[387] Mr. Raby failed first grade, then second grade.[388] By the time Mr. Raby entered third grade, he was ten years old, and increasingly embarrassed and frustrated that he was not able to keep up with the other kids.[389] Teachers gave up asking him to read aloud or do classwork.[390] When Mr. Raby was in class, he was expected to do nothing but sit quietly at his desk.[391] Mr. Raby lost interest in school entirely.[392]

In the absence of an explanation of Mr. Raby's learning disabilities, the jury likely believed that Mr. Raby's irregular school attendance was due to no more than his *willful and motiveless choice*. In fact, Mr. Raby had little or no control over his ability to learn while at school, and every reason to wish to avoid the sting of inevitable academic failure he experienced there. Learning disabilities and/or academic failure are associated with reduced self-esteem, little sense of safety or refuge at school, increased risk of school drop-out, increased susceptibility to influence from marginal peers, and reduced employment opportunity.[393] Mr.

---

385 Cunningham Mitig. ¶ 130.
386 Cunningham Mitig. ¶ 139.
387 Raby ¶ 6.
388 Wearstler ¶ 21.
389 Raby at 5.
390 *Id.*
391 *Id.*
392 *Id.*
393 Cunningham Mitig. ¶ 141.

describes individuals who do not seek or experience relationship attachments to others – hence their excessively self-driven reactions and behavior.[401] Descriptions of Mr. Raby's psychological processes as a teen, in contrast, pointed to his distress at the *loss* of such attachments, and his repeated attempts to *restore* that loss.[402]

17. **Corruptive surrogate family and peers; adolescent onset alcohol and drug abuse**

Junior introduced Mr. Raby to alcohol and marijuana at age ten.[403] Within a short time, Mr. Raby began to use both on a daily basis.[404] After Betty's separation from Bob Butler, when Mr. Raby and his sister found themselves without any effective parental supervision, they began to stay out all night, drinking with friends.[405] Throughout Mr. Raby's adolescence and young adulthood, he felt anxious most days while sober.[406] Much like his father, Mr. Raby sought daily relief from anxiety through the mellowing effect of marijuana and downers such as Valium.[407] Mr. Raby's counsel did not present evidence that the combined effect of the liquor and Valium resulted in a memory blackout during the late evening hours on the night of the offense. Yet such alcohol-related blackouts were not uncommon for Mr. Raby to experience, according to James Jordan, Paul Wayne Taylor, and others.[408]

The jury was deprived of critically important research and perspectives that could have resulted in consideration of Mr. Raby's substance dependence as a mitigating factor. There was *no* testimony at the sentencing phase regarding the redundant substance dependence risk factors

---

401 Cunningham Mitig. ¶ 138.
402 Cunningham Mitig. ¶ 138.
403 Raby ¶ 3; Wearstler ¶ 28; Hicks ¶ 18; Cunningham Mitig. ¶ 145.
404 Raby at 3; Cunningham Mitig. ¶ 145.
405 Mayes ¶ 12; Langenbauhn ¶ 4.
406 Raby ¶ 17.
407 *Id.*
408 Cunningham Mitig. ¶ 149; Hicks ¶ 18; Jordan ¶ 15; Taylor ¶¶ 12-13.

Raby experienced these negative consequences, the most serious of which was the truancy that first labeled him a criminal, and began his pattern of petty offenses and juvenile detention.

16. Psychological disorders

Mr. Raby displayed evidence of psychological disorder in his childhood and adolescence. Psychological assessments performed throughout his childhood described a quiet young man who did not easily trust others, who suffered from low self-esteem and depression, who wanted to form friendships but wasn't sure how, and who longed to be with his thoroughly dysfunctional family.[394] Similarly, a former girlfriend, Pam Langenbauhn, who was never asked to testify, remembers that Charles often visited a roller-skating rink that was a local hang-out, but never skated.[395] She described him as quiet: he was shy, and did not speak to people he did not know.[396] Once you were Mr. Raby's friend, however, he was very protective.[397]

These descriptions of Mr. Raby as a child and adolescent portray the emotional pain that he carried for many years, demonstrating that his condition is more complex than simply willfully choosing to be "bad."[398] More broadly, expert testimony could have explained that psychological symptoms and disorders impede normal development in a variety of ways, and are a risk factor for violence in the community.[399]

Detailed testimony regarding the emotional disorders and symptoms that Mr. Raby suffered were also important as several of these traits fly in the face of the highly pejorative sociopath/psychopath label elicited from Dr. Walter Quijano on cross-examination.[400] This label

---

394 Cunningham Mitig. ¶ 132-135.
395 Langenbauhn ¶ 4.
396 Langenbauhn ¶ 5.
397 *Id.*
398 Cunningham Mitig. ¶ 137.
399 Cunningham Mitig. ¶ 137.
400 S.F. 34:545.

Negligence in juvenile institutional placement may act to compound the psychological injury of disrupted attachments and removal from the mainstream developmental experiences, for instance, delaying the development of self-control.[415] In addition, apathetic or anemic institutions disrupt the adoption of constructive models, and the instilling of pro-social values is blocked.[416]

The presentation of compelling mitigation evidence was critical in Mr. Raby's case, as it is in every capital case that goes to sentencing in Texas. Yet trial counsel plainly had little notion of the ample evidence available to them that could have described the many adverse developmental factors present in Mr. Raby's childhood and adolescence. Furthermore, because Mr. Raby's trial counsel had *no* understanding of how these factors shed light on Mr. Raby's level of moral culpability for the offense, the jury in all likelihood considered the mitigation evidence that was presented as aggravating.

b. Positive Character Evidence That Could Have Been Presented

A number of those close to Mr. Raby never had the opportunity to testify on his behalf. Because trial counsel presented so little evidence of Mr. Raby's good character, it was probable that the jury accepted the State's portrayal of Mr. Raby as without friends or good qualities. Some witnesses that should have been called, and the testimony they could have offered, have been discussed above: Paul Wayne Taylor, Pam Langenbauhn, C.J. Hicks, John Sowell and Pam Hamner. Furthermore, C.J., Robert Butler, and Mr. Raby's sister, Wanda, could have attested to Mr. Raby's attempts to stay away from alcohol and drugs after his release from prison in 1992.[417] C.J. and Wanda each could have described peaceful nights he spent during that period with them

---

414 Cunningham Mitig. ¶ 160.
415 Cunningham Mitig. ¶ 165-156.
416 Cunningham Mitig. ¶ 167.
417 Hicks ¶ 21; Mayes ¶ 19; H.R. Butler ¶ 11.

that impinged on Mr. Raby's development in early adolescence.[409] In addition, substance dependence and intoxication are also risk factors for violence in the community.[410] Moreover, trial counsel should have noted that Mr. Raby's "choice" to begin substance abuse occurred as an immature early adolescent, with the deficient reasoning and judgment that accompanies that developmental stage, and without the support of a stable family network.[411] Evidence of Mr. Raby's intoxication on the night of the offense also speaks to the quality and degree of planning, judgment, volition, and other facets of moral culpability that were important for the jury to weigh in their sentencing verdict.[412]

18. **Institutional neglect, inadequate interventions**

The interventions Charles received were delayed, inadequate, and not sustained.[413] As described above, CPS failed to intervene after discovering Bob Butler's abuse of Mr. Raby and his sister in 1978. When CPS finally did take custody of the children, at Betty's request, the agency made several placements that were profoundly negligent at best—for instance, placing Mr. Raby with Roy Robinson in 1982, despite Roy's past rape conviction and long history of sexually abusing his daughters and stepdaughters.

Beyond placement in special education classes from time to time, there is no indication that the school system involved Charles in counseling services, or medication consultation for his depressive or ADHD symptoms.[414] In addition, New Horizons failed to recognize that Mr. Raby was not ready to be released to his mother's custody, destroying the best chance Mr. Raby had known for achieving normal development.

---

409 Cunningham Mitig. ¶ 153.
410 Cunningham Mitig. ¶ 154.
411 Cunningham Mitig. ¶ 159.
412 Cunningham Mitig. ¶ 157.
413 Cunningham Mitig. ¶ 160.

slept together,and, flustered and embarrassed, denied it;[426]

- the fact that Mr. Raby spent much of his last paycheck from Westfield Sandblasting Company on gifts for Merry Alice's baby, soon to be born. Mr. Raby and his mother attended Merry Alice's baby shower in August of 1992, and he brought a bag filled with toys, spoons, a pacifier, socks, shoes, a thermometer, a medicine spoon, baby powder, a rattle, and a self-standing swing. Later he also gave Merry Alice a rocking chair that had been in his family;[427]

- the fact that Mr. Raby commented once that he got his drinking habit from his natural father, whom he called an alcoholic;[428]

- the fact that Mr. Raby never touched Merry Alice in violence or threatened her in any way;[429]

- the fact that Mr. Raby spent most of a week staying with Merry Alice in her hospital room after her C-section. Mr. Raby's trial counsel completely missed this testimony by asking Merry Alice whether Mr. Raby was there for her delivery. She answered no, but in fact no family or friends were present for the birth, which was a scheduled C-section performed in the morning under general anesthesia. Mr. Raby made sure he was present in the afternoon when Merry Alice woke up;[430]

- the fact that Mr. Raby was allowed to stay in Merry Alice's hospital room because a nurse assumed that he was her husband, and he encouraged her to think so. Mr. Raby's mother brought him fresh clothes to wear, and Merry Alice's mother brought them chicken to eat;[431]

- the fact that Mr. Raby was the only man to hold Merry Alice's son, Chris, for two months after his birth. Chris's father refused to do so;[432]

- the fact that after Merry Alice's delivery, Mr. Raby helped her around the house to do anything that she needed, and would wash her feet and put lotion on them. Mr. Raby used to tell her, "You take the mother, you accept the child." After Chris' birth, he would say, "Now I have a boy and a girl." Mr. Raby's family used to call him "C," and so Mr. Raby used to call Chris "Little C." He used to draw pictures for Chris

---

426 *Id.*; S.F. 28:247.
427 Wilkin ¶¶ 8-9, 14.
428 Wilkin ¶ 17.
429 Wilkin ¶ 19.
430 Wilkin ¶ 10.
431 *Id.*
432 Wilkin ¶ 12.

and their children.[418] In addition, James Jordan could have described Mr. Raby's attempts to guide and protect James, who was like a little brother to him.[419] James states that for each of Mr. Raby's faults, there is an equal strength.[420]

Most importantly, while Merry Alice Gomez (now Merry Alice Wilkin) did testify at sentencing, very little of the positive character evidence she had to offer was elicited, because trial counsel did not learn of it. When Mr. Raby was released from prison in 1992, he had made the decision to try to avoid drugs and alcohol and turn his life around, in part so that he could be with Merry Alice, with whom he had been corresponding for over a year. He got a job at Westfield Sandblasting Company,[421] and was reporting as required to his parole officer.[422] Merry Alice and Mr. Raby were together for most of the two months during which he was on parole.[423] Merry Alice was in many ways the person most able to comment on Charles's struggle to stay straight after his release from prison. In fact, Merry Alice could have testified to the following if she had been properly interviewed and prepared for trial:

- the fact that after his release, Mr. Raby spoke enthusiastically about his goals of finding his daughter, Amber, and finding a job, a car, and a home. He confided in Merry Alice that earlier in his life, his mother was always working and his father was not around, and he got into trouble because he just didn't care;[424]

- the fact that Mr. Raby and Merry Alice were romantically involved, and would express their affection by holding hands and, once, by making love.[425] Because she was unprepared, Merry Alice was taken aback when Mr. Raby's trial counsel asked whether she and Mr. Raby had

---

418 Hicks ¶ 21; Mayes ¶ 19-20. A little over a week before his arrest, Charles took Wanda's son P.J. riding on the Metro bus route for fun, which P.J. seemed to enjoy. (Mayes ¶ 20.)

419 Jordan ¶¶ 1-3.

420 Jordan ¶ 19.

421 Aff. Ryan Rebe and accompanying job application, Ex. 18; Raby ¶ 25.

422 Raby ¶ 25; S.F. 34: 570.

423 Wilkin ¶ 13.

424 Wilkin ¶¶ 4, 17.

425 Wilkin ¶ 7.

violent behavior became evidence that he has "no conscience."[438] Because the jury did not know of all the ways "the system" failed him, Mr. Raby's runaway attempts became evidence that he is an escape risk,[439] who rejected "the system's" help whenever given.[440] Worst of all, because the jury was not shown how the terrible circumstances of Mr. Raby's childhood led directly to his increasingly criminal behavior, and because the difference between criminal responsibility and moral culpability was never explained, his very plea for mercy became evidence of just another attempt to escape responsibility, to blame someone else.[441] By presenting only half the story, and failing to explain how Mr. Raby's life experiences affected his development and personality—his *moral* culpability, trial counsel presented a case that appeared far more aggravating than mitigating. Moreover, trial counsel missed every opportunity to put on substantial evidence of Mr. Raby's good character traits and attempts to straighten out his life.

C. Mr. Raby's Trial Counsel Failed to Impeach a Critical State Witness, Karianne Wright

In addition to failing to present compelling cases on the issues of future dangerousness and mitigation, trial counsel made a number of other prejudicial errors at the punishment phase of trial. Chief among these was trial counsel's failure to present evidence to impeach Karianne Wright's testimony. Karianne's accounts of her abusive relationship with Mr. Raby and other episodes did more than reveal Mr. Raby's violent tendencies during his teen years; they portrayed Mr. Raby as a sadist without a conscience. In fact, Karianne's opinion on Mr. Raby's character was especially important because Mr. Raby was indicted on a theory that he had attempted to sexually assault the victim. Jurors who were not initially convinced by the State's

---

437 S.F. 37:1043, 1062.
438 S.F. 37:1045-46.
439 S.F. 37:1048.
440 S.F. 37:1051-52.

that said "Little Chris" in big letters;[433]

- the fact that after Chris was born, Mr. Raby spent most days with Merry Alice at her house, helping to care for him. During this time, Chris came down with colic and cried almost continuously. Mr. Raby was more patient with Chris than Merry Alice was at times, and would sit in the rocking chair he had brought and rock Chris in his arms "forever;"[434]

- the fact that although the weekend before Mr. Raby's arrest was mostly a tense time, there were a few hours on Sunday night during which Mr. Raby and Merry Alice sat on Mr. Reeves' porch swing and held hands while the wind blew softly. The two talked about getting married some day;[435]

- and the fact that Merry Alice never knew Mr. Raby to carry a knife.[436]

Obviously, the man Merry Alice would have described was a man capable of thoughtfulness, tenderness, patience, and even responsibility, and thus was radically different and more sympathetic than the man Karianne Wright described at trial. Mr. Raby's trial counsel completely failed to convey this side of Mr. Raby's character.

With mitigating evidence, half the story is worse than no story at all. Trial counsel's failure to perform a complete life history evaluation, and to explain to the jury how Mr. Raby's childhood surroundings had affected his development and personality—ultimately, his *moral culpability*—left the jury listening to a hollow-ringing plea for mercy. And it gave the State the opportunity to spin the very facts that should have been cause for sympathy and mercy as evidence of his bad character. Because the jury did not know of Bob Butler's vicious abuse, Bob's parenting became evidence of "discipline" that Mr. Raby rejected.[437] Because the jury did not know of the violence that surrounded Mr. Raby throughout his childhood, Mr. Raby's own

---

433 Wilkin ¶ 13.
434 Wilkin ¶ 14.
435 Wilkin ¶ 25.
436 Wilkin ¶ 19.

Mr. Raby made sure they took the first bus back to Houston. Wanda Benefield Robinson could have testified that Karianne and Mr. Raby remained for months.[446]

In addition, Karianne testified that on one occasion James Jordan, Mr. Raby's friend, was beating up his girlfriend, Tyme Martin, in front of Karianne and Mr. Raby.[447] Karianne implored Mr. Raby to intervene, but he refused to do so until James let Tyme go and, angry with Karianne for interfering, called her a "bitch."[448] Tyme Martin was available at sentencing, however, and could have testified that Mr. Raby in fact intervened as soon as James began to beat her up, and that he always defended Tyme from James.[449]

Karianne also testified to an incident in which a man named Elliot had pushed down James Jordan's bike while high on paint fumes, and Mr. Raby set upon him with a two-by-four.[450] James Jordan could have testified that Mr. Raby set upon Elliot with his fists only, and after a few blows ran away.[451]

Had trial counsel opened the door to the possibility that Karianne Wright was not the best judge of Mr. Raby's character, other mitigation evidence, such as the evidence Merry Alice Wilkin could have presented, would likely have humanized Mr. Raby enough to spare his life.

D. Trial Counsel's Closing Argument At Sentencing Fell Below Constitutionally Permissible Standards And Prejudiced Mr. Raby In Assigning Responsibility For The Crime To The Elderly Victim

As has been discussed above, Mr. Raby's trial counsel's performance at closing arguments at sentencing fell below constitutional standards because counsel failed to explain to the jury the nature of the inquiry required in order to answer their question of future

---

446 Robinson ¶ 28.
447 S.F. 32:187.
448 S.F. 32:187.
449 Sworn statement of Tyme Martin Dunbardo ("Martin") ¶¶ 3-4, Ex. 13; *see also* Jordan ¶ 11.
450 S.F. 32:219-21.

weak evidence that Mr. Raby's attack on his victim was sexual in nature were likely looking for evidence of vicious character that would seem to warrant imposition of a death sentence. Evidence of vicious character of a sexual nature likely caused jurors to become more convinced of the State's rape theory in the bargain.

Given that Karianne described several violent episodes in detail, it would have been difficult or impossible for Mr. Raby's trial counsel to convince a jury that he had never touched Karianne in anger. But a competent attorney *could have* demonstrated through cross-examination and other evidence that Karianne's accounts were not always accurate, and were inflamed by her understandable pain and bitterness. For instance, witnesses could have reported that Karianne was verbally provocative, while Charles was generally passive, contrary to her accounts.[442] Impeaching Karianne's perception in this regard likely would have caused jurors to question Karianne's accounts in other respects as well, and to hesitate to accept her description of Mr. Raby as conscience-less and sadistic.

Karianne testified to a fight between Mr. Raby and his father, Elvis, on Mr. Raby's 18th birthday, which she described as the only fight she ever saw Mr. Raby lose.[443] Karianne described Elvis as a "wonderful man," who had merely refused to give Mr. Raby, who was very drunk, the keys to his truck.[444] In fact, Wanda Benefield Robinson could have testified that Karianne was *not present* for that fight, and that it was Elvis who provoked the fight, beating Mr. Raby with a two-by-four in the face until Mr. Raby was able to crawl away into his bedroom.[445] Furthermore, Karianne testified that after that fight, although she wanted to remain in New Ulm,

---

441 S.F. 37:1041-43, 1049.
442 Hicks ¶ 19.
443 S.F. 32:180; 32: 227.
444 S.F. 32:228.
445 Robinson ¶ 27.

development, rather than to forward bizarre and inflammatory theories that blame an elderly murder victim for her own death, there is a reasonable probability that Mr. Raby would have received a life sentence rather than death.

E. The Overall Performance of Mr. Raby's Trial Counsel Fell Below Constitutionally Permissible Standards

The adequacy of trial counsel's performance, and the prejudice flowing therefrom, is not to be judged on an error by error basis, but on the totality of the evidence.[454] In this case, trial counsel's failure to present compelling evidence on future dangerousness and mitigation, as well as to rebut events described by Ms. Wright, combined to create a picture of Mr. Raby as an incurable, sadistic monster. In fact, the real picture was much different. If the jury had seen the compelling evidence that Mr. Raby never had a chance when he was growing up to develop the discipline and responsibility that most of us take for granted, but that Mr. Raby had shown promise in certain environments, it is reasonably possible that the jury would have believed he could develop those traits in the right environment. If the jury had seen that Ms. Wright's account of events was not always accurate, it is likely that the jury would have at least considered that Mr. Raby had positive qualities, and was not simply a brutal monster. If the jury had seen the true scope of Mr. Raby's relationship with Merry Alice Gomez and her new son—how long he had known her, how much time he spent with her, and how he treated her—it is reasonably possible that the jury could have seen that Mr. Raby was a troubled young man struggling to get on the right track. If the jury had seen how alcohol and drugs controlled Mr. Raby, and prevented him from getting on the right track—just as they did on October 15, 1992—it is reasonably likely that the jury could have entertained the thought that Mr. Raby might be

---

454 *See Strickland*, 104 S. Ct. at 2066, 2069.

dangerousness. Mr. Raby's trial counsel was ineffective in arguing for a life sentence for a second reason: *Mr. Raby's trial counsel in effect asked the jury to hold Mrs. Franklin, his adjudged victim, responsible for having been attacked and killed.* Trial counsel's argument went as follows:

> There are things about Charles that are good. There are things about Charles that are very bad. He's never lived up to the expectations, and people that he's been around have never lived up to his expectations, have they? Mom didn't live up to her expectations and responsibilities. *Karianne didn't live up to Charles's expectations of a sweetheart. . . . Mrs. Franklin didn't live up to the expectation of a mother figure.* All of that came to an explosion on that day when he attacked Mrs. Franklin. Expectations, what we expect of each other, what we expect of Charles, different things that occur in our lives to cause us to look at people and see what we expect of that person, our involvement, our love, our hate, our anger, our rages.[452]

Ms. Franklin was a frail 72-year old woman who was not related to Mr. Raby, and whom Mr. Raby had not seen for years. There is no evidence to suggest that Mr. Raby had any expectations of Ms. Franklin as a mother figure or that Ms. Franklin failed to meet those expectations, much less that such failure led to or justified her death. Making the argument was patently unjustified by any conceivable trial strategy. The State predictably attacked this argument with enthusiasm, noting,

> And, heck, if [the facts and the law are] both against you, then you blame somebody. . . . And that's what [Mr. Raby] is trying to do, shift the anger to everybody, including the poor dead Edna Franklin -- it's her fault. She wasn't a good mother figure. Why should she be? I mean, she was trying to keep him out of her house.[453]

If Mr. Raby's trial counsel had used their closing argument to explain what the jury was asked to determine and to sum up evidence of Mr. Raby's good character and obstacles in

---

451 Jordan ¶ 13.
452 S.F. 37:1032 (emphasis added).
453 S.F. 37:1044.

request was denied.[459] The following day, the prosecutor noted on the record that Mr. Fosher had arrived the previous day during the middle of the medical examiner's testimony, and had left early, at 4:30 p.m.[460] The judge also stated that he had given Mr. Fosher permission to leave early on the second day of trial because "he's in a little bit of pain."[461]

During closing arguments at guilt-innocence, Mr. Fosher again discussed his injuries and pain, explaining to the jury: "I fell and hurt my ribs and ended up having medical problems, so this last weekend was real tough and so I ended up getting this collar, which is very uncomfortable, very hot and makes me sweat and everything."[462] Likewise, during closing arguments at the punishment phase, Mr. Fosher again apologized to the jury "for my appearance, my neck problems and shoulder pain that you probably noticed during the trial."[463] Most telling, Mr. Fosher then admitted, in front of the judge and jury, "The pain in my neck, radiating down into my arm, I have taken a lot of pain medication and muscle relaxants. *I've had my good moments and my bad moments.*"[464]

Despite knowing of Mr. Fosher's problems with pain, and extensive use of pain medications and muscle relaxants throughout the trial, the trial court nonetheless appointed Mr. Fosher, on June 17, 1994, to represent Mr. Raby on direct appeal.[465] Ten days later, on June 27, 1994, Mr. Fosher underwent surgery for a cervical laminectomy.[466] Just 11 days after his

---

459 S.F. 27:9-12.
460 S.F. 28: 177.
461 *Id.*
462 S.F. 30:432.
463 S.F. 37:1004.
464 *Id.* (emphasis added).
465 C.R. at 561.
466 *See* Fosher at 2. A cervical laminectomy, which involves the cutting of bone and nerve fibers in the neck, likely rendered Mr. Fosher unable to work for at least four days. The healing process takes a total of three to four weeks for the skin and tissue to heal completely. (Radelat ¶ 17).

able to make it if he could just get away from substance abuse. Then if the jury had seen how to approach the issues of future dangerousness and moral culpability, there is a very reasonable probability that the outcome of Mr. Raby's sentencing proceeding would have been different.

III. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Mr. Raby's court-appointed counsel on direct appeal, Mr. Fosher, had also represented Mr. Raby at his trial. At both the trial and during direct appeal proceedings, Mr. Fosher's performance was impaired by debilitating pain caused by injuries sustained in a fall, and medication that Mr. Fosher was taking for the pain. In an affidavit submitted to the Court of Criminal Appeals during state habeas proceedings, Mr. Fosher stated that, during late May (just before trial began), his pain "increased steadily [and] required visits to the emergency room and pain medication."[455] Subsequently, Mr. Fosher admitted to an investigator for Mr. Raby that his performance was impaired by his injuries and the medication.[456]

Furthermore, the full extent of Mr. Fosher's injuries and impairments was apparent to the trial court, which appointed Mr. Fosher to represent Mr. Raby on direct appeal. Mr. Fosher's pain was so severe that it was discussed on the record several times at trial. On the very first day of trial, Mr. Fosher did not show up because he had to visit a doctor.[457] The prosecutor informed the Court that he had spoken to Mr. Fosher the day before, and that Mr. Fosher had said that "he had a ruptured disc and that he was in a lot of pain and had been given medication."[458] Mr. Fosher's co-counsel moved to delay commencement of the trial until Mr. Fosher arrived, but his

---

455 *See* Fosher at 1.

456 Aff. Patricia Jean Rovensky ("Rovensky") ¶ 4, Ex. 21 ("Mr. Fosher stated that he did not remember Mr. Raby's direct appeal clearly because, due to post-operative pain and pain medication, he was 'out of it.'").

457 S.F. 27:3.

458 *Id.*

> In all fairness to [defendant's] counsel, many of her mistakes may have been attributed to her medication. At the very least her illness had to have been a major distraction to her during her representation of [defendant]. However, regardless of whether counsel's ineffectiveness was caused by illness, ignorance, or inadvertence - there can be no question that counsel was deficient.[470]

Mr. Raby is entitled to relief because his counsel was objectively unreasonable in failing to discover the nonfrivolous issues listed above and to raise them in his merits brief.[471] For the reasons stated in the sections discussing each claim, these claims were potentially meritorious, and should have been raised. In addition, Mr. Fosher submitted an affidavit during state habeas proceedings in which he patently demonstrated his own incompetence, and misunderstanding of his role as appellate counsel. For example, in response to the allegation that he failed to challenge Mr. Raby's conviction on fair warning grounds, Mr. Fosher stated, "I did not feel that we were denied fair warning and I don't believe Mr. Cantu made an objection to this."[472] The issue concerning fair warning, however, was not whether trial counsel had fair warning at the time of trial, but rather whether Mr. Raby had fair warning at the time of the crime.[473] Furthermore, the fact that trial counsel did not raise a meritorious issue below did not excuse Mr. Fosher's obligation to raise the issue on appeal, but rather required Mr. Fosher also to raise trial counsel's ineffectiveness for failing to raise the issue below.

Furthermore, Mr. Raby is entitled to a presumption of prejudice because Mr. Fosher was burdened by an *actual conflict of interest* about which the trial judge knew or reasonably should have known. More particularly, the trial judge knew or reasonably should have known that Mr. Fosher was impaired at trial by debilitating pain and extensive use of pain medication, and that

---

470 *Id.* at 786 (granting defendant's petition for writ of habeas corpus, on grounds of ineffective assistance of counsel, and ordering that defendant be released or given a new trial).

471 *Smith v. Robbins*, 120 S. Ct. 746, 764 (2000).

472 *See* Fosher at 2.

473 *See* section VII.A, *infra*.

surgery, on July 8, 1994, Mr. Fosher filed Mr. Raby's motion for new trial,[467] which, under Texas law, significantly limited the claims that Mr. Fosher could then bring on direct appeal.[468] In that motion for new trial and on appeal, Mr. Fosher unreasonably failed to raise numerous nonfrivolous issues, many of which would have required Mr. Fosher to attack the effectiveness of *his own performance* at trial. These appellate issues include:

- Mr. Raby was convicted on factually and legally insufficient evidence to sustain a conviction for capital murder (section VI, *infra*);
- Mr. Raby was convicted on a novel interpretation of murder in the course of a burglary in violation of the fair warning principles of due process and the narrowing requirement of the Eighth Amendment (section VII, *infra*);
- Mr. Raby was convicted in violation of due process because the jury was not required to agree unanimously about which predicate felony he committed (section VIII, *infra*);
- the State commented impermissibly on Mr. Raby's silence in violation of the Fifth Amendment (section IX, *infra*);
- trial counsel was ineffective for failing to raise these claims; and
- any other claim that this Court concludes was procedurally defaulted on direct appeal.

Indeed, in *Gravley v. Mills*, the Sixth Circuit held in a factually similar case that trial counsel's illness, which required her to undergo surgery between trial and the filing of the motion for new trial, and to take prescription pain killers during her representation of defendant, did not excuse her failure to object to the State's comments on the defendant's post-arrest silence and failure to testify at trial and to preserve the issue for appeal in the motion for new trial.[469] The court concluded:

---

467 C.R. at 566-76.

468 *See* T.R.A.P. 21.2 (motion for new trial necessary to preserve claim the factual predicate for which is not on the record).

469 *Gravley v. Mills*, 87 F.3d 779 (6th Cir. 1996)

not whether this Court views the claims as meritorious within the limited scope of habeas review.[476]

As discussed in the sections addressing each individual claim, *infra*, Mr. Raby probably would have prevailed on his appeal had Mr. Fosher raised all meritorious claims. Accordingly, Mr. Raby was deprived of the effective assistance of counsel on direct appeal, and is entitled to a new appeal or to be released from custody.

IV. MR. RABY WAS CONVICTED OF CAPITAL MURDER IN VIOLATION OF THE SIXTH AMENDMENT, EIGHTH AMENDMENT, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE HE WAS NOT PERMITTED TO INFORM THE JURY THAT EXTREME INTOXICATION COULD NEGATE THE CONSTITUTIONALLY REQUIRED ELEMENT OF SPECIFIC INTENT

It is a clearly established rule of constitutional law that, in order to be convicted of capital murder and sentenced to death, the Eighth Amendment requires proof beyond a reasonable doubt that the defendant had either a specific intent to kill, or showed a "reckless disregard for human life [by] *knowingly* engaging in criminal activities *known* to carry a grave risk of death."[477] Section 8.04(a) of the Texas Penal Code, however, provides that "[v]oluntary intoxication does not constitute a defense to the commission of crime." On the basis of section 8.04(a), the trial court did not permit Mr. Raby to introduce evidence to show, or argue to or instruct the jury that, his extreme state of intoxication at the time of the crime precluded him from forming the knowing mental state required to commit capital murder. Mr. Raby argued to both the trial court and the Court of Criminal Appeals that section 8.04(a) is unconstitutional, but the Texas courts disagreed.[478]

Section 8.04(a) is unconstitutional, as applied to a capital murder prosecution, because it

---

476 *See Strickland*, 104 S. Ct. at 2068-69.

since those facts appeared on the record, Mr. Fosher would be required on appeal to accuse *himself* of ineffective assistance of counsel. When a judge knows or reasonably should know about an apparent conflict of interest but fails to make an inquiry, then a defendant is excused of the obligation to show prejudice and is only required to show that there was an actual conflict of interest.[474]

Alternatively, even if Mr. Fosher's apparent conflict of interest was not apparent to the judge, Mr. Raby nonetheless is entitled to relief under the standard of *Cuyler v. Sullivan*.[475] Mr. Fosher was burdened by an actual conflict of interest as described in the preceding paragraph, and the conflict adversely affected Mr. Fosher's performance as evidenced by the fact that Mr. Fosher did not raise record-based claims of trial counsel's ineffectiveness.

Alternatively, even if Mr. Fosher was burdened by no actual conflict of interest that requires a presumption of prejudice, Mr. Raby is entitled to relief because the prejudice prong of *Strickland* is satisfied. In the context of ineffective appellate counsel, prejudice is satisfied if there is a reasonable probability that, but for Mr. Fosher's unreasonable failure to raise the identified claims on appeal, Mr. Raby would have prevailed on his appeal. Importantly, it is whether there is a reasonable probability that those claims would have been decided favorably by *the Court of Criminal Appeals or the United States Supreme Court on direct review* that matters,

---

474 *U.S. v. Rodriguez*, 2002 WL 13646 at *5 (5th Cir. Jan. 4, 2002), *citing Wood v. Georgia*, 101 S. Ct. 1097 (1981). Mr. Raby acknowledges that holdings of the Fifth Circuit suggest that a presumption of prejudice may not apply when the attorney's conflict of interest is between his *own* interests and those of his client. *See Beets v. Johnson*, 65 F.3d 1258, 1271 (5th Cir. 1995). Mr. Raby respectfully asserts that *Beets* conflicts with applicable Supreme Court precedent, as described in the dissenting opinion, 65 F.3d at 1279, and makes this argument for the purpose of preserving error for review.

475 *Cuyler v. Sullivan*, 100 S.Ct. 1708, 1718-19 (1980). Again, Mr. Raby recognizes the Fifth Circuit's decision in *Beets*, and raises this argument to preserve review.

him of capital murder.

Montana v. Egelhoff is not contrary.[482] Although four Justices in *Egelhoff* stated, in an opinion authored by Justice Scalia, that due process does not require that a criminal defendant be afforded an opportunity to negate intent with evidence of intoxication, those four Justices did not author the *holding* of the Court. Four other Justices stated, in an opinion authored by Justice O'Connor, that due process *does* require that a defendant be permitted to introduce such evidence.[483] The deciding vote was cast by Justice Ginsburg, who declined to reach the due process issue because she concluded that the Montana statute at issue had merely redefined murder to permit conviction when "the defendant killed 'under circumstances that would otherwise establish knowledge or purpose 'but for' [the defendant's] voluntary intoxication.'"[484] Because "[s]tates enjoy wide latitude in defining the elements of criminal offenses," Justice Ginsburg concluded that the Montana statute "encountered no constitutional shoal."[485] And because Justice Ginsburg's rationale was narrower than the rationale of the four-Justice plurality, Justice Ginsburg authored the *holding* of the Court in *Egelhoff*.[486]

Egelhoff is clearly distinguishable from the present case, because ***Egelhoff did not involve a capital crime.*** While the States do enjoy wide latitude to define the elements of noncapital crime, the Eighth Amendment limits the ability of states to define capital crime and impose a sentence of death. Simply put, a state cannot impose a sentence of death merely because the evidence *would otherwise* establish knowledge or purpose *but for* the defendant's

---

482 *Montana v. Egelhoff*, 116 S. Ct. 2013 (1996).

483 *Egelhoff*, 116 S. Ct. at 2026.

484 *Egelhoff*, 116 S. Ct. at 2024 (quoting Brief of Amicus Curiae).

485 *Egelhoff*, 116 S. Ct. at 2024.

486 It is clearly established that "[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .'" *Marks v. United States*, 97 S. Ct. 990,

redefines capital murder *not* to require proof of the highly culpable mental state that the Eighth Amendment requires. The Court of Criminal Appeals has recognized that the purpose of section 8.04(a) is to "eliminate mere intoxication as any defense in any criminal prosecution whatever, *regardless of the constituent elements of the crime.*"[479] This plainly violates the Eighth Amendment, because specific intent or a reckless indifference to human life is a *constitutionally required* element of capital murder, and thus the State of Texas ***cannot*** disregard that element of the crime. If intoxication prevents a defendant from forming one of those mental states, section 8.04(a) cannot constitutionally eliminate intoxication as a defense to the crime.

Section 8.04(a), as applied in this case, also violates the Sixth Amendment and the Due Process Clause of the Fourteenth Amendment because it prevented Mr. Raby from offering a defense to a constitutionally required element of capital murder and arguing that defense to the jury. It is clearly established that "[t]he right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations."[480] It is also clearly established that the Sixth Amendment right to the effective assistance of counsel includes the right to make proper closing arguments to the jury.[481] Mr. Raby was not given a fair opportunity to defend against the State's accusation that he committed murder with specific intent (or reckless indifference to human life), because section 8.04(a) prevented him from offering evidence to show, or arguing to or instructing the jury that, his extreme state of intoxication rendered him unable to form the highly culpable mental state required to convict

---

477 *Tison v. Arizona*, 107 S. Ct. 1676, 1688 (1987) (emphasis added).

478 C.R. at 509-512; *Raby*, 970 S.W.2d at 4-5.

479 *Taylor v. State*, 885 S.W.2d 154, 156 (Tex. Cr. App. 1994) (emphasis added); *see also Smith v. State*, 968 S.W.2d 490, 495 (Tex. App.—Texarkana 1998, n.p.h.) (holding § 8.04(a) constitutional, in noncapital case, because legislature is free to define elements of crime any way it wants).

480 *Chambers v. Mississippi*, 93 S. Ct. 1038, 1045 (1973).

481 *See Herring v. New York*, 95 S. Ct. 2250, 2253-54 (1975).

punishment. Mr. Raby concedes that the law does not require the jury to consider any particular evidence as mitigating, but that does not bear on Mr. Raby's right to *argue* to the jury that they *should* consider his intoxicated state as mitigating.

Moreover, although the Court of Criminal Appeals did not reach this issue, the apparent basis for the trial court's denial of Mr. Raby's motion to permit jury argument on voluntary intoxication as mitigating evidence is section 8.04(b) of the Texas Penal Code, which provides that "[e]vidence of *temporary insanity* caused by intoxication may be introduced by the actor in mitigation . . . ."[493] It is clearly established, however, that a jury must be allowed to consider all constitutionally relevant mitigating factors, including the circumstances of the offense.[494] Evidence of a defendant's voluntary intoxication at the time of the offense clearly is constitutionally relevant mitigating evidence, regardless of whether it rises to the level of temporary insanity,[495] and thus application of section 8.04(b) to prevent a jury from considering evidence of "noninsane" intoxication is a clear violation of the Eighth and Fourteenth Amendments. Accordingly, evidence of Mr. Raby's "noninsane" voluntary intoxication was a proper subject of jury argument, and the denial of Mr. Raby's motion to permit jury argument on the issue requires that Mr. Raby's sentence of death be vacated.

VI. MR. RABY WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH EVERY ELEMENT OF THE OFFENSE OF CAPITAL MURDER

The Fourteenth Amendment "protects the accused against conviction except upon proof

---

492 *Raby*, 970 S.W.2d at 6.

493 Tex. Penal Code § 8.04(b) (emphasis added)

494 *See, e.g., Eddings v. Oklahoma*, 102 S. Ct. 869, 875 (1982).

495 *See Parker v. Dugger*, 111 S. Ct. 731, 736 (1991) (describing evidence that defendant was intoxicated at time of offense as mitigating); *Drinkard v. Johnson*, 97 F.3d 751, 758 n.10 (5th Cir. 1996) ("[e]vidence that Drinkard was intoxicated at the time of the murders is clearly 'constitutionally relevant'").

voluntary intoxication.[487] If anything, *Egelhoff* thus supports Mr. Raby's claim. It certainly is not a holding overruling the Court's prior, clearly established holdings that due process requires that a defendant have an opportunity to present relevant, competent evidence bearing directly on an element of the offense charged.[488] Because section 8.04(a) denied Mr. Raby this opportunity, the Court of Criminal Appeals' decision affirming his conviction was contrary to, and an unreasonable application of, clearly established constitutional law.

V. MR. RABY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HE WAS NOT ALLOWED TO PRESENT RELEVANT MITIGATING EVIDENCE TO THE JURY AT SENTENCING

It is clearly established that a defendant's Sixth Amendment right to the effective assistance of counsel includes the right to make closing arguments to the jury.[489] At the punishment phase of his trial, Mr. Raby requested permission to argue to the jury that they "should consider and give mitigating effect" to evidence of Mr. Raby's voluntary intoxication at the time of the alleged offense.[490] The trial court denied Mr. Raby's motion.[491] The Court of Criminal Appeals affirmed, concluding that Mr. Raby "would have been misstating the law had he been allowed to argue or had the court instructed the jury as he proposed," because "the law does not require a juror to consider any particular piece of evidence as mitigating . . . ."[492]

It is absolutely apparent that the Court of Criminal Appeals misunderstood Mr. Raby's claim, and confused it with his claim—raised in a separate point of error—that the jury should have been *instructed* that they *must* consider Mr. Raby's intoxication in mitigation of

---

993 (1977), *citing Gregg v. Georgia*, 96 S. Ct. 2909, n.15 (1976).

487 *Tison*, 107 S. Ct. at 1688.

488 *See Chambers*, 93 S. Ct. at 1045.

489 *See Herring*, 95 S. Ct. at 2253-54.

490 C.R. at 544-45.

491 C.R. at 546.

nightshirt when she was found dead, that a pair of inside-out pants and a pair of underwear with ripped elastic were found (among other laundry) in the same room, that the underwear bore traces of blood of indeterminate age, and that the position of her dead body was such that her legs were open about two feet at the ankles.[500] The medical examiner testified at trial that, after performing the necessary tests, he had found *no evidence* of sexual assault.[501] Importantly, Mr. Raby's custodial statement did not make any reference to undressing or sexually assaulting Ms. Franklin.[502]

Ultimately, the only significant evidence of attempted sexual assault was Ms. Franklin's state of dress. There are several equally, if not more, plausible explanations for that state of dress, however, than an attempted sexual assault. Ms. Franklin could have been using the bathroom when she was attacked, or she could have been in bed or getting ready for bed. She was attacked in the evening (after 6:45 p.m., at the earliest),[503] and her shoes were nowhere near the crime scene even though her grandson stated she could not walk without them.[504] The pants and underwear were found among other clothes in the living room.[505] In fact, when Ms. Franklin's grandson first encountered her body in the dark living room, he thought it was a pile of laundry that his cousin routinely left lying around.[506] There was no evidence presented at trial concerning whether the blood found on the underwear was fresh; even if it was, the evidence showed that there was blood splattered on the floor near where the panties were found.[507] Based

---

500 S.F. 27:110; 28:188, 195; State Ex. 10D.
501 S.F. 27:37-38, 59.
502 *See* Custodial Statement.
503 S.F. 28:280-83 (Ms. Franklin had a telephone conversation with her daughter until 6:45 p.m.).
504 S.F. 27:120.
505 Crime scene photos: State Exs. 10D (towel near victim's head and laundry basket nearby); 43 (clothes strewn on sofas); 51 (sock under victim's hand); 53 (clothes strewn on sofa), all at Ex. 48.
506 S.F. 27:72, 193.
507 Crime scene photo, State Ex. 53.

beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[496] Habeas relief under section 2254 on a claim of insufficient evidence is appropriate "if it is found that upon the record evidence adduced at the trial no rational trier of fact could have found proof of guilt beyond a reasonable doubt."[497] Moreover, because a claim of insufficient evidence was not presented to the Court of Criminal Appeals due to the ineffectiveness of appellate counsel, Mr. Raby is entitled to relief on his claim of ineffective assistance of counsel if there is a reasonable probability that, had this claim been raised, the Court of Criminal Appeals would have granted relief under its standards.[498]

A. The State Introduced Insufficient Evidence of Either Aggravated Sexual Assault or Attempted Aggravated Sexual Assault

Under section 22.021 of the Texas Penal Code, Mr. Raby committed the offense of aggravated sexual assault if he intentionally or knowingly, and without consent, (1) caused the penetration of Ms. Franklin's anus or sexual organ; (2) caused the penetration of Ms. Franklin's mouth by his sexual organ; or (3) caused Ms. Franklin's sexual organ to contact or penetrate his or another person's mouth, anus, or sexual organ.[499] Under section 15.01(a), Mr. Raby is guilty of attempted aggravated sexual assault if, with intent to commit aggravated sexual assault, he did "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended."

The evidence the State presented at trial in support of the aggravated sexual assault and attempted aggravated sexual assault charges against Mr. Raby was insufficient to support his conviction. That evidence showed only that Ms. Franklin was wearing just a long shirt or

This is a problem.

496 *In re Winship*, 90 S. Ct. 1068, 1072-73 (1970).
497 *Jackson v. Virginia*, 99 S. Ct. 2781, 2791-92 (1979).
498 *See* section III, *supra*.
499 Section 15.01(a)(2) also requires that the defendant utilized force, a threat of force, or a deadly weapon.

between her legs," and that he stripped the victim from the waist down so that he could admire her body.[510] The medical examiner testified that he had found no evidence of sexual assault, but that the absence of such evidence did not rule out sexual assault and "the sexual nature of the crime [was] obvious because of the positioning of the body and the way the body [was] tied up with the legs spread and [the] feet tied back underneath the body with the body arched to expose the genital area."[511] Not only was the defendant in *Brimage* not convicted of sexual assault, that charge was dropped from the indictment on the first day of trial.[512]

In *Brasfield v. State*, also involving a capital murder conviction, the minor victim was found with his pants and underwear "pulled down below his knees."[513] The medical examiner testified that the decomposition of the victim's body made it impossible for him to determine whether the victim had been sexually molested.[514] In *Brasfield*, the indictment did not include a charge of sexual assault.[515]

B. The State Introduced Insufficient Evidence of Either Robbery or Attempted Robbery

The evidence presented at trial was insufficient to support a robbery or attempted robbery conviction because there was no evidence that any property was taken from Ms. Franklin or from her home, and insufficient other evidence to suggest an attempted robbery. Under section 29.01(a) of the Texas Penal Code, which defines the offense of robbery:

> A person commits an offense if, in the course of committing theft as defined in Chapter 31 and with intent to obtain or maintain control of the property, he: (1) intentionally, knowingly, or recklessly causes bodily injury to another; or (2)

---

509 *Brimage v. State*, 918 S.W.2d 466, 472 (Tex. Cr. App. 1994).
510 *Id.* at 477, 497.
511 *Id.* at 473.
512 *Id.* at 498 n.4.
513 *Brasfield v. State*, 600 S.W.2d 288, 297 (Tex. Cr. App. 1980).
514 *Id.* at 292.
515 *Id.* at 291 & n.1.

on such evidence, which at most gives rise to equally plausible inferences of guilt and innocence, no rational trier of fact could have found proof of attempted sexual assault beyond a reasonable doubt.

While sexual assault convictions have been upheld by Texas courts based on scanty evidence, there is no published decision in which a Texas court has gone so far as to say that a rational trier of fact could have found sufficient evidence of aggravated sexual assault or attempted aggravated sexual assault based solely on the victim's state of dress and the position of her body.[508] Significantly, in the two published decisions involving facts most similar to those at issue - indeed, slightly stronger evidence, in both cases - a sexual assault charge was either never brought against the defendant, or was dropped before trial.

In *Brimage v. State*, involving a capital murder conviction, the victim's body was found "unclothed from the waist down and bound at the wrists and elbows," with her feet "bound to the elbows behind the body, causing an arching exposure of [the victim's] genital area."[509] The defendant admitted that he "wanted [the victim] sexually real bad and that is why I lured her to my house," that during his attack on the victim he "was trying to feel up her shorts and touch her

---

508 In addition, research revealed only one unpublished Texas court decision affirming a sexual assault conviction on facts nearly as minimal as those at issue here. The court of appeals in *Quintero v. State*, 1998 Tex. App. LEXIS 272 (Tex. App. - Corpus Christi Jan. 15, 1998, n.p.h.), upheld a sexual assault conviction despite the lack of any direct evidence of such an assault, based on testimony that the victim's body "was found laying in a ditch with no clothes other than her bra or her blouse pulled up covering only the top part of her body"; the presence of blood on a pair of underwear found under the body; witness testimony that the attack on the victim lasted thirty minutes, during which time the witness heard "hollow, hitting noises, as well as [the victim's] screaming for her attacker to 'leave me alone,' and 'please leave me'"; and crime scene photographs which showed the position and condition the body as it appeared after the attack. *Id.* at *5-7. The decision in *Quintero*, which was not reviewed by the Texas Court of Criminal Appeals, is distinguishable from the case at issue because it was not a death penalty case, and because there was a witness to the attack whose testimony supported the sexual assault charge. *Id.* at *2 & n.3. The victim had been walking down a public road with a friend when she was attacked, and so the friend was able to establish that the victim was undressed by her attacker. *Id.* at *2. The friend was also a witness to the attack, having been left for dead herself, and so was able to give testimony as to the long duration of the attack and the sounds made by the victim and her attacker during the attack. *Id.* Even if the facts were not stronger in *Quintero* than they are here, *Quintero* has limited precedential value because it is an unpublished decision of an intermediary court of appeals.

friend of Ms. Franklin's grandsons and had been invited into the house on previous occasions.[520] Texas courts have consistently required more evidence than was presented in this case to support a robbery or attempted robbery conviction, especially where there is no evidence that anything was taken from the victim or scene of the crime. The additional evidence on which these courts have relied includes the following:

- evidence that defendant's fingers were bleeding, and that blood was found on the top of the victim's locked armoir, and in the victim's unlatched coin purse, and that coins from the coin purse were scattered on the ground;[521]
- the defendant's admission that he went into the retail establishment where the victim was attacked with the intent to commit theft;[522]
- evidence that the defendant had concealed items from the retail establishment where the victim was attacked on his person, even if he had not left the store with the items;[523]
- evidence that defendant demanded property from the victim;[524]
- evidence that defendant went through victim's pockets, accompanied by victim's testimony that defendant tried to steal his wallet;[525]
- evidence that defendant lay in wait outside a bank and attacked the victim just as she was unlocking the back door to the bank;[526]

---

520 S.F. 27:65-66 (Eric and Lee had sneaked Mr. Raby into the house to let Mr. Raby sleep on "[q]uite a few occasions"); S.F. 27:132 (Lee Rose had invited Mr. Raby to the house without Eric Benge's knowledge); S.F. 27:161-62 (Rose and Mr. Raby were friends up until the crime, and had allowed Mr. Raby in the house even though he had not been invited).

521 *Wolfe v. State*, 917 S.W.2d 270, 275 (Tex. Cr. App. 1996).

522 *Green v. State*, 840 S.W.2d 394, 401 (Tex. Cr. App. 1992); *Autry v. State*, 626 S.W.2d 758, 763 (Tex. Cr. App. 1982).

523 *Dansby v. State*, 2002 WESTLAW 44123, *2 (Tex. App. - Dallas Jan. 14, 2002, n.p.h.); *Tasby v. State*, 2000 WL 1598930, *3 (Tex. App. - Dallas Oct. 27, 2000, pet ref'd) (noting that defendant also said he tried to open cash register).

524 *Suell v. State*, 2002 WL 24443, *3 (Tex. App. - Dallas Jan. 10, 2002, n.p.h.); *Espada v. State*, 2001 WL 1525891, *4 (Tex. App. - Dallas Dec. 3, 2001, n.p.h.); *McPherson v. State*, 2001 WL 125967, *6 (Tex. App. - Dallas Feb. 15, 2001, no pet.); *Wiggins v. State*, 2000 WL 1125544, *2 (Tex. App. - Houston [14th Dist.] Aug. 10, 2000, pet. ref'd); *Patterson v. State*, 980 S.W.2d 529, 531 (Tex. App. - Beaumont 1998, no writ); *Medrano v. State*, 1997 WL 709457, *2 (Tex. App. - Houston [1st Dist.] Nov. 6, 1997, no writ); *Caldwell v. State*, 943 S.W.2d 551, 552 (Tex. App. - Waco 1997, no writ).

525 *Muiheid v. State*, 2001 Tex. App. LEXIS 7007, *4 (Tex. App. - Houston [14th Dist.] Oct. 18, 2001, n.p.h.).

526 *Slomba v. State*, 997 S.W.2d 781, 783 (Tex. App. - Texarkana 1999, pet. ref'd).

intentionally or knowingly threatens or places another in fear of imminent bodily injury or death.

Under section 31.01(a) of the Penal Code, to commit theft, a person must unlawfully appropriate property with the intent to deprive the owner of the property. A conviction of capital murder based on the predicate felony of robbery or attempted robbery requires a showing that the defendant formed the intent to commit robbery before or during the murder itself.[516]

While proof of a completed theft is not required to establish the underlying offense of attempted robbery, the State carried the burden of proving beyond a reasonable doubt that appellant had the specific intent to commit robbery and that appellant committed an act amounting to more than mere preparation for robbing the victim.[517] Thus, if the State introduced evidence from which the jury could rationally conclude that appellant possessed the specific intent to obtain or maintain control of the victim's property either before or during the commission of the murder, it has proven that the murder occurred in the course of robbery.[518] In resolving this question, the requisite intent may be inferred from circumstantial evidence and from the defendant's conduct.[519]

However, in the present case there was no evidence from which the jury could infer that Mr. Raby intended to obtain or maintain control of the victim's property either before or during the commission of Ms. Franklin's murder. In his custodial statement, Mr. Raby stated that he entered Ms. Franklin's residence through the unlocked front door and attacked her. He made no admission that he intended to take or did take anything from Ms. Franklin or the house, and no such evidence was presented at trial. In addition, the evidence showed that Mr. Raby was a

---

516 *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Cr. App. 1995).
517 *Maldonado v. State*, 998 S.W.2d 239, 243 (Tex. Cr. App. 1999).
518 *Id.*
519 *Id.*

in a retail store or place of business."[534] Even though the State may not have an obligation to disprove alternate motives, the fact that Mr. Raby was convicted of killing Ms. Franklin in her residence, and that Mr. Raby knew Ms. Franklin and had been in her residence in the past, make the evidence offered by the State in support of the robbery charges even more inadequate.

The evidence offered in support of the robbery charges against Mr. Raby was especially deficient in that there was no evidence that Mr. Raby formed any intent to steal from Ms. Franklin or her residence *before or during* Ms. Franklin's murder, a necessary element of the capital murder charges in this case.[535] Such evidence has been found where the defendant admitted to police or told a witness that he had formed the intent to steal prior to or during the attack,[536] where the defendant made a demand for property prior to or during an attack on the victim,[537] where the defendant claimed that the victim owed him money,[538] where the defendant stole from the victim a car he needed as transportation to another town,[539] and where the attack occurred in a retail store after defendant lost a large amount of money gambling.[540] No similar evidence exists in this case upon which a rational juror could find beyond a reasonable doubt that Mr. Raby formed an intent to steal from Ms. Franklin or her residence *before or during* Ms. Franklin's murder.

---

534 *Garza v. State*, 937 S.W.2d 569, 571 (Tex. App. - San Antonio 1996, writ ref'd) (concluding that intent to steal could be inferred despite lack of evidence that anything was demanded or taken from victim because victim was at flea market, unloading large amounts of jewelry).

535 *Alvarado v. State*, 912 S.W.2d 199, 207 (Tex. Cr. App. 1995).

536 *Foster v. State*, 25 S.W.3d 792, 798 (Tex. App. Waco 2000, pet. ref'd); *Rhone v. State*, 2000 WL 991559, *4 (Tex. App. - Houston [14th Dist.] July 20, 2000, pet. ref'd); *Whitaker v. State*, 977 S.W.2d 869, 873 (Tex. App. - Beaumont 1998, no writ).

537 *See Maldonado*, 998 S.W.2d at 243; *Patterson*, 980 S.W.2d at 532.

538 *Mireles v. State*, 2000 Tex. App. LEXIS 3647, *14 (Tex. App. - Corpus Christ May 25, 2000, no pet.).

539 *Eadeh v. State*, 2000 WL 5047, *3 (Tex. App. - Houston [1st Dist.] Jan. 6, 2000, no pet.).

540 *Tasby*, 2000 WL 1598930 at *3.

- evidence that defendant pointed a gun at the victim and told her to open the back door of her car;[527] and
- evidence that the defendant shot the victim right after seeing the victim put $900 into his pocket.[528]

The only evidence that even an attempted theft occurred in this case was evidence that Ms. Franklin's purse was found dumped over beside her bed, some things were on the floor next to the dresser, and that two dresser drawers in Ms. Franklin's room were found open.[529] In the most factually similar Texas case, however, the court held that there was insufficient evidence to support a robbery conviction.[530] In *Thomas v. State,* the defendant had admitted to going to the victim's apartment to acquire drugs, shooting the victim with her own pistol, and taking the defendant's jewelry, drugs, pistol, and money.[531] However, the physical evidence did not support this alleged admission, as there was no evidence that any jewelry or drugs were missing (despite being in plain sight), that the victim had owned a gun, or that the defendant had in his possession any of the items allegedly taken.[532] Moreover, even though the victim's purse was found near her body, upside down and open, and police found other items in the apartment disturbed and out of place, the court noted that such evidence was consistent with a presumed struggle preceding the murder, and thus was insufficient evidence of robbery.[533]

In discussing *Thomas*, a later court noted that the crime occurred in the victim's residence, where "motives other than theft are more probable than in a similar situation occurring

---

527 *Bombasi v. State*, 1996 WL 547200, *6-7 (Tex. App. - Houston [1st Dist.] Sept. 26, 1996, no writ).
528 *Barnes v. State*, 845 S.W.2d 364, 367 (Tex. App. - Houston [1st Dist.] 1992, no writ).
529 S.F. 27:78-79; 28:189.
530 *See Thomas v. State*, 807 S.W.2d 803 (Tex. App. - Houston [1st Dist.] 1991, writ ref'd).
531 *Id.* at 806.
532 *Id.* at 806-07. Notably, Ms. Franklin's rings were left on her fingers. *See* State Exhibit 7.
533 *Id.*

C. The State Introduced Insufficient Evidence of Either Burglary or Attempted Burglary

Under section 30.02 of the Texas Penal Code, which defines the offense of burglary:

> A person commits an offense if, without the effective consent of the owner, he: (1) enters a habitation, or a building (or any portion of a building) not then open to the public, with intent to commit a felony or theft; or (2) remains concealed, with intent to commit a felony or theft, in a building or habitation; or (3) enters a building or habitation and commits or attempts to commit a felony or theft.

The State never contended or presented evidence to show that Mr. Raby entered the house with an intent to commit a felony or theft, or "remained concealed" in the house where Ms. Franklin was murdered. Thus, in this case the State was required to prove that Mr. Raby entered the house without the effective consent of the owner and did commit a felony or theft.[541] Under section 15.01(a) of the Penal Code, Mr. Raby is guilty of attempted burglary if, with intent to commit burglary, he committed "an act amounting to more than mere preparation that tends but fails to effect the commission of the offense intended." The State offered insufficient evidence of the necessary elements of burglary or attempted burglary at trial.

1. The State introduced insufficient admissible evidence that Mr. Raby entered the house on the evening in question.

The only evidence that Mr. Raby, and not someone else, actually entered the house on the evening of the crime is Mr. Raby's statement to police. For reasons discussed in section I, *supra*, that statement should never have been admitted into trial. Without the statement, there is no evidence that Mr. Raby actually entered the house on the evening in question.

2. The State introduced insufficient evidence that Mr. Raby entered the house without effective consent.

Even if the record contains sufficient evidence that Mr. Raby actually entered the house

---

541 In section VII, *infra*, Mr. Raby contends that the State also had to prove that he committed a felony or theft other than the murder inside the house, which the State also failed to do.

on the evening in question, the only evidence presented by the State that Mr. Raby did so without effective consent was trial testimony that Ms. Franklin had previously told Mr. Raby that he was not welcome at the house.[542] Even assuming the accuracy of that testimony, however, that testimony is not sufficient to support a finding that Mr. Raby did not have effective consent to enter the house, because Mr. Raby may have had the consent of Ms. Franklin's grandsons to enter the house. Indeed, both grandsons admitted at trial that they had allowed Mr. Raby to "sneak" into the house through the windows on other occasions.[543] The grandsons' consent was "effective consent" for the purposes of section 30.02 for several reasons. First, the grandsons are owners of the house because the Texas Penal Code's definition of "owner" includes anyone who has "a greater right to possession of the property than the actor,"[544] and the grandsons admitted they lived in the house.[545] Second, the grandsons are owners of the house because ownership "is not restricted to those having title interest in property, but can also include those in possession."[546] Third, "effective consent" includes "consent by a person legally authorized to act for the owner,"[547] and the grandsons had such authority.

There is no evidence in the record that Mr. Raby did not have permission from Eric

---

542 S.F. 27:161-62.

543 S.F. 27:65-66 (Eric and Lee had sneaked Mr. Raby into the house to let Mr. Raby sleep on "[q]uite a few occasions"); S.F. 27:132 (Lee Rose had invited Mr. Raby to the house without Eric Benge's knowledge); S.F. 27:161-62 (Rose and Mr. Raby were friends up until the crime, and had allowed Mr. Raby in the house even though he had not been invited).

544 Tex. Penal Code § 1.07(a)(35)(A). "Possession" means "actual care, custody, control, or management." Tex. Penal Code § 1.07(a)(39). "Thus, under the Penal Code, any person who has a greater right to the actual care, custody, control, or management of the property than the defendant can be alleged as the 'owner.'" *Alexander v. State*, 753 S.W.2d 390, 392 (Tex. Cr. App. 1988); *see also Johnson v. State*, 1999 Tex. App. LEXIS 26 (Tex. App - Texarkana Jan. 5, 1999, no writ) (holding that woman who had on four or five occasions checked on house owned by elderly woman, who was in nursing home and had asked woman's mother to look after the house, could be considered owner of house).

545 S.F. 27:62, 159.

546 Tex. Penal Code § 1.07(a)(35)(A); *Villanueva v. Texas*, 711 S.W.2d 739, 740 (Tex. App. - San Antonio 1986, writ denied) (holding that rational juror could not have found absence of effective consent to enter, for purposes of section 30.02, if owner's son, while in possession of house, allowed defendant to enter house).

547 Tex. Penal Code § 1.07(a)(19).

Benge or Lee Rose to enter their house. Although Texas courts have taken the position that the State need not prove that a defendant lacked every resident's consent to establish burglary,[548] that interpretation impermissibly shifts an element of the offense onto Mr. Raby in violation of due process.[549] At the very least, in a case such as this in which the evidence justifies an inference that the defendant *did* have consent, due process requires that the State produce some evidence to prove the consent element beyond a reasonable doubt. Both Eric Benge and Lee Rose testified at trial, yet the State *never* asked the obvious question: "did you give Mr. Raby permission to come into your house?" The State presented no evidence from which the jury could conclude that Mr. Raby lacked the grandsons' effective consent, and thus Mr. Raby's conviction must be reversed.

VII. MR. RABY WAS CONVICTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS PERMITTED TO CONVICT HIM OF CAPITAL MURDER BASED ON A BURGLARY FINDING PREDICATED ON THE MURDER ITSELF

The jury that convicted Mr. Raby of capital murder was allowed to base its capital murder conviction on a burglary finding for which the same murder served as the predicate felony. Under this construction of section 19.03(a)(2) of the Texas Penal Code, any murder committed inside a building or habitation that the accused was not authorized to enter is capital murder.[550] So construed, section 19.03(a)(2) is unconstitutional, and Mr. Raby's conviction under that statute is unconstitutional, for two reasons.

---

548 *See Davis v. State*, 782 S.W.2d 211, 220-21 (Tex. Cr. App. 1989).

549 *See, e.g., Mullaney v. Wilbur*, 95 S. Ct. 1851, 1891-92 (1975).

550 *See* Tex. Pen. Code § 19.03(a)(2) (elevating murder committed in connection with a burglary to capital murder if "the person intentionally commits the murder in the course of committing or attempting to commit . . . burglary"); Tex. Pen. Code § 30.02(a)(3) ("A person commits an offense if, without the effective consent of the owner, the person . . . (3) enters a building or habitation and commits or attempts to commit a felony, theft, or an assault.").

A. Texas Penal Code § 19.03(a)(2) Did Not Give Fair Warning at the Time of the Offense, as Required by the Due Process Clause of the Fourteenth Amendment, That an Intentional Murder Occurs "In the Course of" Burglary When the Murder Itself Is the Conduct That Creates the Burglary

Mr. Raby's capital murder conviction under section 19.03(a)(2) of the Texas Penal Code is unconstitutional because, in violation of the Fourteenth Amendment's Due Process Clause, section 19.03(a)(2) failed to give Mr. Raby fair notice that an intentional murder is in the course of committing burglary when the murder itself is the conduct that creates the burglary. The trial court's 1994 interpretation of this statute to include within the definition of capital murder any murder committed inside a building or habitation that the accused was not authorized to enter was so unexpected and unreasonable as to deprive Mr. Raby of fair notice of the crime with which he was charged.[551]

The plain language of section 19.03(a)(2) elevates a murder committed in connection with a burglary to capital murder only if "the person intentionally commits the murder ***in the course of*** committing or attempting to commit . . . burglary."[552] The ambiguity of the language "in the course of" leaves serious doubt in the minds of people of ordinary intelligence about whether a complete burglary must occur separate and apart from the murder itself. The interpretation that the burglary must occur independently of the murder, relying on a predicate felony other than the murder itself, is bolstered by the Court of Criminal Appeals' repeated decisions that "in the course of" means "in an attempt to commit, during the commission, or in

---

551 *See, e.g., Rabe v. Washington*, 92 S. Ct. 993, 994 (1972) (per curiam) (reversing, under Fourteenth Amendment's due process clause, conviction under state obscenity law that rested on an unforeseeable construction of the statute); *see also Coleman v. McCormick*, 874 F.2d 1280, 1300 (9th Cir. 1989) (listing other cases "hold[ing] that the due process clause guarantees the right to fair warning of what conduct or actions are subject to criminal liability").

552 § 19.03(a)(2) (emphasis added).

immediate flight after the attempt or commission of the offense."[553] Because a "burglary by murder" does not exist until the murder occurs, the murder is not committed before the burglary, while the burglary is ongoing, or after the burglary; rather, the murder is *part of the burglary*. Furthermore, if the Texas Legislature had intended murder in the course of committing trespass of a habitation to constitute capital murder, it easily could have included trespass of a habitation among the predicate crimes enumerated in section 19.03(a)(2).

Indeed, the Court of Criminal Appeals has admitted that section 19.03(a)(2) is ambiguous in this regard. In *Muniz v. State*, the Court of Criminal Appeals considered an identical argument that murder in the course of committing aggravated sexual assault, under section 19.03(a)(2), requires some conduct independent of the murder itself to make the sexual assault aggravated.[554] The court concluded that section 19.03(a)(2) "is susceptible to two reasonable interpretations"—and described the identical interpretation argued herein as both "reasonable" and "facially attractive."[555] Although the Court of Criminal Appeals ultimately rejected that reasonable interpretation in *Muniz*, that case was not decided until 1993, *after* Mr. Raby's alleged crime. Thus, while the Court of Criminal Appeals was free to put such "judicial gloss" on section 19.03(a)(2), due process bars the court from applying its judicial gloss retroactively to prior conduct.[556]

Moreover, *Muniz* addressed this interpretation of section 19.03(a)(2) with respect to aggravated sexual assault, not burglary. The Texas Court of Criminal Appeals did not clearly establish this interpretation of section 19.03(a)(2) with respect to burglary until 2000, when it

---

553 *See Riles v. State*, 595 S.W.2d 858, 862 (Tex. Cr. App. 1980).
554 *Muniz v. State*, 851 S.W.2d 238, 244 (Tex. Cr. App. 1993).
555 *Id.*
556 *See, e.g., Marks*, 97 S. Ct. at 992-93.

decided *Homan v. State*.[557] In *Homan*, the Court of Criminal Appeals reversed a lower court's decision interpreting section 19.03(a)(2) to mean that "the State cannot prove murder in the course of burglary by showing appellant unlawfully entered the property and thereafter committed murder."[558] Of course, the decision in *Homan* was too recent to have provided fair notice to Mr. Raby of its rejection of the admittedly reasonable interpretation of section 19.03(a)(2) to require independent burglary and murder. Moreover, as a dissenting judge noted in *Homan*, "the majority's decision relies upon case law which has no basis in logic and which misinterprets earlier precedent."[559] As shown by the plain language of the statute, the lower court's decision in *Homan*, and the dissenting judge's opinion in *Homan*, Mr. Raby could not have had fair notice prior to the Court of Criminal Appeals' decision in *Homan* that the trial court would interpret section 19.03(a)(2) to include within the definition of capital murder any murder committed inside a building or habitation that the accused was not authorized to enter.

In the trial court's conclusions of law on this issue in State habeas proceedings, which the Court of Criminal Appeals adopted as its own, the court cited *Alba v. State* for the proposition that charging Mr. Raby with capital murder in the course of burglary did not deny Mr. Raby fair notice.[560] This citation demonstrates that the trial court and the Court of Criminal Appeals completely misunderstood the fair notice claim. *Alba* was decided ***in 1995***, far too late to give

---

557 *Homan v. State*, 19 S.W.3d 847, 848 (Tex. Cr. App. 2000).

558 *Id.*, *citing Homan v. State*, No. 12-97-00046-CR (Tex. App. - Tyler Feb. 5, 1999) (not designated for publication).

559 *See Homan*, 19 S.W.3d at 849-51 (Johnson, J., dissenting). The majority in *Homan* concluded that the court had decided this issue in *Fearance v. State*, 771 S.W.2d 486 (Tex. Cr. App. 1988). But as the *Homan* dissent noted, *Fearance* was decided on the grounds that the State in fact ***had*** shown that the defendant engaged "in felonious criminal conduct other than the assault which caused the death . . . ." *Id.* at 493. Moreover, the claim presented in *Fearance* did not challenge the interpretation of the statute, but rather challenged the indictment on completely inapplicable "merger doctrine" grounds. *Id.* at 492-93. The *Fearance* court did not decide the statutory construction issue presented herein.

560 *See Ex Parte Raby*, No. 9407130-A (Nov. 14, 2000), p. 7, *citing Alba v. State*, 905 S.W.2d 581 (Tex. Cr. App. 1995).

Mr. Raby notice of this novel interpretation of section 19.03(a)(2).[561] Furthermore, the appellant in *Alba* only challenged the "bootstrapping" of burglary-murder into capital murder on Eighth Amendment narrowing grounds, not on fair notice grounds.[562] Finally, the *Alba* court did not even reach the appellant's Eighth Amendment claim, because the appellant in *Alba* had committed "two completely separate felonies" after forcing his way into an apartment, so that "there was no need for the State to use the murder of appellant's wife as both the primary offense and an element of burglary."[563]

It is apparent that the Court of Criminal Appeals has never considered this claim on the merits, and accordingly, this Court should review *de novo* whether section 19.03(a)(2), as interpreted by precedent existing at the time of the alleged crime, gave fair notice that murder in the course of a burglary includes every murder following the unauthorized entry of a habitation.

B. Texas Penal Code § 19.03(a)(2), as Applied to Mr. Raby, Does Not Sufficiently Narrow the Class of Persons Eligible for the Death Penalty, as Required by the Eighth and Fourteenth Amendments

Mr. Raby's capital murder conviction under section 19.03(a)(2) of the Texas Penal Code is also unconstitutional because, in violation of the Eighth and Fourteenth Amendments, section 19.03(a)(2) does not sufficiently narrow the class of persons eligible for the death penalty. To satisfy the Eighth and Fourteenth Amendments, "an aggravating circumstance must ***genuinely narrow*** the class of persons eligible for the death penalty and must ***reasonably justify*** the imposition of a more severe sentence on the defendant compared to others found guilty of

---

561 Mr. Raby's appellate counsel apparently shared this misconception of the fair warning claim. In responding to the allegation that he was ineffective for failing to raise the fair warning claim, Mr. Fosher stated in an affidavit submitted during state habeas proceedings that, "I did not feel that we were denied fair warning . . . (Fosher at 2). Of course the issue was not whether Mr. Raby's counsel had fair warning at the time of trial, but whether Mr. Raby had fair warning at the time of the offense.

562 *Alba*, 905 S.W.2d at 584.

563 *Id.* at 585.

murder."[564]

Under the trial court's construction of section 19.03(a)(2), the class of persons eligible for the death penalty includes anyone found guilty of murder as long as the murder was committed inside a building or habitation that the accused was not authorized to enter. Under this interpretation, section 19.03(a)(2) does not "genuinely narrow" the class of persons eligible for the death penalty and "reasonably justify" the imposition of a more severe sentence on the defendant compared to others found guilty of murder. There is no rational basis for punishing a person who commits murder inside a building or habitation that the person was not authorized to enter more severely than a person who commits murder outdoors or inside a building the person was authorized to enter.

VIII. MR. RABY WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE JURY WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON WHICH UNDERLYING FELONY ALLEGED IN THE INDICTMENT ELEVATED THE OFFENSE OF MURDER TO CAPITAL MURDER

The indictment charging Mr. Raby with capital murder alleged, in three separate paragraphs, that Mr. Raby committed intentional murder in the course of committing or attempting to commit robbery, aggravated sexual assault, or burglary. The jury was not instructed that they had to agree unanimously on which of these three predicate felonies Mr. Raby actually committed. Indeed, the State expressly told two eventual jurors during voir dire that the jury did not have to agree unanimously that Mr. Raby committed a particular predicate felony in order to return a verdict of guilty.[565] During their deliberations, the jury expressed their inability to agree that Mr. Raby committed a particular predicate felony by asking the trial court:

---

564 *Zant v. Stephens*, 103 S. Ct. 2733, 2742 (1983) (emphasis added).

565 S.F. 5:286; 13:1089.

> Does the entire jury have to "unanimously" agree on the charges other than murder[?] Or can we be convinced, separately, that one of the charges occurred . . . .[566]

The trial court refused to give the jury further instructions, and referred the jury to the charge.[567] The jury's note illustrates the substantial probability that the jurors did not all agree on which predicate felony Mr. Raby committed, and Mr. Raby's conviction without a requirement that the jury agree on a particular predicate felony creates the possibility that *no more than four* jurors believed that Mr. Raby committed any particular felony. Under these circumstances, there is a substantial likelihood that Mr. Raby was convicted without a verdict on every element of the crime, in violation of the Due Process Clause of the Fourteenth Amendment.

A. The Trial Court's Refusal to Instruct the Jury That They Had to Agree Unanimously on Which Underlying Felony Was Committed Violated the Due Process Clause of the Fourteenth Amendment

The jury's ability to convict Mr. Raby of capital murder without agreeing on which of three predicate felonies Mr. Raby committed violates the principle, set forth in *Schad v. Arizona,* that a jury must be unanimous as to the means of committing the crime when there is "a material difference" between the various means set forth in the jury charge.[568] The Court of Criminal Appeals has interpreted section 19.03 to define a "single crime" that may be committed through a variety of alternative means, so that the jury need not be unanimous about the particular means through which an accused committed the crime.[569] This interpretation violates the Due Process Clause of the Fourteenth Amendment, however, because the crimes of aggravated sexual assault, robbery, and burglary entail materially different acts and mental states.

---

566 C.R. at 541.
567 *Id.*
568 *Schad v. Arizona*, 111 S. Ct. 2491, 2500 (1991).
569 *See Kitchens v. State*, 823 S.W.2d 256, 258 (Tex. Cr. App. 1991).

Moreover, because the Court of Criminal Appeals has interpreted section 19.03(a)(2) to encompass any murder following the unauthorized entry into a habitation, *see* section V, *supra*, Mr. Raby's jury actually was permitted to convict him of capital murder based on murder in the course of committing or attempting to commit *trespass*. The acts and mental state associated with trespass are substantially different from the acts and mental state associated with aggravated sexual assault and robbery. Because the jury was permitted to convict Mr. Raby upon such a vague definition of capital murder, without agreeing unanimously about which particular predicate offense he committed, Mr. Raby's conviction violates the Due Process Clause of the Fourteenth Amendment.

B. The Texas Court of Criminal Appeals' Failure to Provide a Remedy for the Trial Court's Refusal to Instruct the Jury That They Had to Agree Unanimously on Which Underlying Felony Was Committed, as Required by Texas Law, Violated the Due Process Clause of the Fourteenth Amendment

Both the Texas Constitution and Texas Code of Criminal Procedure guarantee a right to a unanimous verdict in felony trials.[570] It is clearly established that when a state guarantees a structural protection, the state must implement that guarantee in accordance with due process.[571] A state court's application of state law will violate the Due Process Clause of the Fourteenth Amendment when it is arbitrary and capricious.[572] The Court of Criminal Appeals' decision that capital murder is a "single crime" that can be committed by means as various as murder in the course of trespass or murder in the course of aggravated sexual assault—without juror unanimity on the predicate crime—is arbitrary and capricious. This arbitrariness is illustrated by the Court of Criminal Appeals' recent decision in *Francis v. State*, in which the court held that a defendant could not be convicted of a single count of indecency with a child by touching a child's genitals

---

570 *See* Tex. Const. Art. V, §13; Tex. Code Crim. Proc. Ann. art. 36.29.

or breasts, without requiring the jury to be unanimous as to which act the defendant had done.[573] There is no meaningful distinction between the conduct alleged in this case, and the conduct for which the Court of Criminal Appeals required unanimity in *Francis*. Accordingly, the State's arbitrary and capricious implementation of its guarantee of a unanimous verdict violates the Due Process Clause of the Fourteenth Amendment. As illustrated by the jury's note inquiring about unanimity, there is a substantial likelihood that the outcome of Mr. Raby's trial would have been different if the trial court had properly instructed the jury that they must all agree on which predicate felony Mr. Raby committed.

IX. MR. RABY WAS CONVICTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THE STATE COMMENTED IMPERMISSIBLY ON HIS SILENCE DURING ORAL ARGUMENT AT THE GUILT-INNOCENCE PHASE OF TRIAL

At the guilt-innocence phase of Mr. Raby's trial, a critical issue was whether there was any evidence that Mr. Raby had committed any of the predicate felonies which could elevate the crime of murder to capital murder. In its effort to establish these elements, the State argued that Mr. Raby had broken into Ms. Franklin's house and attempted to sexually assault and rob her. The State's version of the events was entirely inconsistent with Mr. Raby's statement to police, however, leaving a substantial hole in the State's case. Attempting to mend this hole in closing argument, the State's very first point was:

> [I]s it any wonder that a person who would attack a helpless, fragile, arthritic little old lady and stab her as many times as he did, brutalize her, slit her throat, ripped her clothes off, ripped her panties, anyone who would do something so cowardly, *is it any wonder that when he runs, that* ***he is silent after he runs***? He doesn't go to the police. He isn't filled with remorse. When he gets the call that the police are coming, when he gets that call from his mother, he flees, indicating guilty knowledge. *Is it any wonder that that type of coward* ***would not fess up to all the***

---

571 *See Evitts v. Lucey*, 105 S. Ct. 830, 838-39 (1985).
572 *See Lewis v. Jeffers*, 110 S. Ct. 3092, 3102 (1990).
573 *Francis v. State*, 36 S.W.3d 121, 124-25 (Tex. Cr. App. 2000).

details of his statement to the police? Of course not.[574]

As discussed above (*see* section I.C, supra), the prosecutor's repeated emphasis on Mr. Raby's silence (after his arrest, at trial, or both) unequivocally equated his silence with guilt.

The Supreme Court and the Fifth Circuit have repeatedly held that the government violates a defendant's due process rights by commenting on his post-arrest silence or failure to testify at trial.[575] Indeed, the Fifth Circuit held in *Edwards* that the circumstances in which a prosecutor's comment on the defendant's silence does not require reversal are "few and discrete."[576] As in this case, the improper comment in *Edwards* occurred in closing argument, and could have been interpreted as either a comment on the defendant's post-arrest silence on certain aspects of the crime, his failure to testify at trial, or both. The court summarized the applicable law as follows:

> With limited exceptions not applicable here, it is the rule that a prosecutor may not comment on a defendant's silence at arrest. *Doyle v. Ohio*, 426 U.S. 610, 96 S. Ct. 2240, 49 L. Ed. 2d 91 (1976), prohibits the use of such evidence even to impeach a defendant's testimony at trial.[577] Such comments may constitute plain error, and a judge's cautionary instruction will not suffice to cure the error. Thus, defendant's failure to object on these grounds does not preclude review.[578]

Holding that the comment on the defendant's silence was "undoubtedly prejudicial," the court concluded that the question of whether the error was harmless depended on the strength of the

---

574 S.F. 30:462-63 (emphasis added).

575 *See, e.g.*, *Wainwright v. Greenfield*, 474 U.S. 284 (1986); *Doyle v. Ohio*, 426 U.S. 610 (1976); *United States v. Rodriguez*, 260 F.3d 416 (5th Cir. 2001); *United States v. Edwards*, 576 F.2d 1152 (5th Cir. 1978).

576 *Edwards*, 576 F.2d at 1155.

577 Much of the case law concerning prosecutors' comments to the jury on the defendant's silence involve so-called "*Doyle* violations," in which the State uses the defendant's silence to impeach his exculpatory testimony at trial. The United States Supreme Court has stated that, in cases where the defendant's silence is not used to impeach the defendant, but to affirmatively suggest the defendant's guilt to the jury, the constitutional violation might be especially egregious. *Wainwright v. Greenfield*, 474 U.S. 284, 292 n.8 (1986) (noting that defendant's silence was used by prosecutor as affirmative proof of defendant's guilt and not to impeach the defendant, and that "the constitutional violation might thus be especially egregious because, unlike in *Doyle*, there was no risk that 'the exclusion of the evidence [would] merely provide a shield for perjury.'" (quoting Doyle v. Ohio, 426 U.S. 610, 626 (1976) (Stevens, J., dissenting))).

evidence against the defendant. The court concluded that the error could not be considered harmless, even though the evidence was otherwise sufficient to support the conviction, stating:

> [A]lthough the evidence is somewhat thin, it is sufficient to support the conviction. However, the weakness of the evidence makes it impossible to view the prosecutor's comments on [the defendant's] silence as harmless error, as we might do were the evidence stronger. The prosecutor by his comments brought the defendant's silence upon arrest and at trial to the attention of the jury, apparently intending to shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence. We must therefore reverse. In so doing we note that the comment upon silence of the accused is a crooked knife and one likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete. We suggest that it be abandoned as a prosecutorial technique.

Id. at 1155.

There is no logical basis on which to distinguish *Edwards* from the present case, and no reasonable argument why this case should be one of the "few and discrete" cases involving comments on the defendant's silence that do not require reversal. Even if this Court were to conclude that the evidence against Mr. Raby is sufficient to support his capital murder conviction, the evidence presented at trial was plainly weak in that there was not physical evidence tying Mr. Raby to the murder, and the State's case relied almost completely on a statement Mr. Raby gave to police (under coercive circumstances) that did not encompass the predicate felonies. For these reasons, the State's repeated comments on Mr. Raby's silence are grounds not only for reversal on the grounds of ineffective assistance of counsel, both at trial and on appeal, but also for independent due process claims.

---

578 *Edwards*, 576 F.2d at 1154.

X. MR. RABY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HE WAS NOT PERMITTED TO QUESTION OR INFORM THE JURY THAT A LIFE SENTENCE WOULD RENDER MR. RABY PAROLE INELIGIBLE FOR AT LEAST 35 YEARS

At the punishment phase of Mr. Raby's capital murder trial, the State attempted to prove that Mr. Raby posed a future danger to society, in order to satisfy the first special issue in Texas' capital sentencing scheme.[579] On several occasions throughout the trial, the State emphasized to the jury that parole could substantially shorten sentences imposed by juries. Most importantly, in questioning the defendant's future dangerousness expert, the State attempted to show that Mr. Raby would continue to pose a threat because he could be released on parole, as he had previously for his conviction for aggravated robbery:

> And would you agree with me that the way our system is geared, is that, say, for example, someone commits a crime like aggravated robbery, like Mr. Raby did the first time. He got ten years, *got out after two-and-a-half years*.[580]

Similarly, in responding to a question from a witness whose son was in prison about whether her son's cooperation with police could lighten his sentence, the State asked whether her son already had been sentenced, and then volunteered that a prosecutor could "write the Board of Pardons and Paroles and let them know he had cooperated in some case."[581]

In the face of this evidence to show that Mr. Raby posed a future danger to society, and that any sentence imposed by the jury could be shortened by parole, Mr. Raby sought to inform the jury that, under Texas law, a defendant sentenced to life would not be eligible for parole for

---

579 *See* Tex. Code Crim. Proc. § 37.071(b)(1).
580 S.F. 34:548 (emphasis added).
581 S.F. 32:109-10.

at least 35 calendar years.[582] Mr. Raby filed a motion with extensive briefing, asking permission to voir dire the jury about parole law, and to give the jury accurate information about parole law in final argument and the court's instructions.[583] The trial court denied Mr. Raby's motion without an opinion,[584] and the Court of Criminal Appeals affirmed.[585] Notably, three judges dissented from the Court of Criminal Appeals' decision on this issue, with one writing the following chilling observation:

> At least four members of the Supreme Court think Texas law "perversely ... prohibits the judge from letting the jury know when the defendant will become eligible for parole if he is not sentenced to death." ... [C]learly a message has been sent and we ignore it at our own peril. Therefore, before myriads of our capital cases are either reversed in the federal habeas system or remanded to this Court in light of future Supreme Court precedent, we should require that all capital veniremembers be informed of the actual length of incarceration a capital defendant must serve before being eligible for parole.[586]

A. Mr. Raby Was Sentenced to Death in Violation of the Fourteenth Amendment Because He Was Not Permitted to Inform the Jury That a Life Sentence Would Render Him Parole Ineligible for at Least 35 Years

The Court of Criminal Appeals' decision that denying jurors accurate information about Mr. Raby's parole ineligibility does not violate due process was contrary to, and an unreasonable application of, clearly established constitutional law. In *Simmons v. South Carolina*, the Supreme Court established that a defendant has a right to give the jury accurate information about parole ineligibility when future dangerousness is an issue at sentencing.[587] Because there is no reasonable distinction between *Simmons* and the present case, Mr. Raby's death sentence must be reversed. The Supreme Court's decision in *Simmons* is based on the "elemental due

---

582 Tex. Code Crim. Proc. art 42.18 § 8(b)(2) (Vernon Supp. 1993).
583 C.R. at 153-233.
584 C.R. at 156.
585 *Raby*, 970 S.W.2d at 6.
586 *Raby*, 970 S.W.2d at 16 (Baird, J., dissenting), *citing Brown v. Texas*, 118 S. Ct. 354 (1997).
587 *Simmons v. South Carolina*, 114 S. Ct. 2187, 2200-01 (1994).

process requirement that a defendant not be sentenced to death 'on the basis of information which he had no opportunity to deny or explain.'"[588] In this case, providing the jury with accurate information about parole ineligibility was the only way to rebut the State's inaccurate insinuation that, "the way our system is geared," Mr. Raby might be paroled after a very short time. Furthermore, when the State seeks to show the defendant's future dangerousness, the fact that the defendant "never will be released from prison will often be the only way that a violent criminal can successfully rebut the State's case."[589] In this case, the fact that Mr. Raby would not be released from prison for at least 35 years if sentenced to life, combined with evidence that Mr. Raby would pose very little threat to society when released at age 57, was Mr. Raby's only way to successfully rebut the State's case of future dangerousness.[590] This case thus falls squarely within the holding of *Simmons*.

Mr. Raby acknowledges that the Fifth Circuit has declined to hold that *Simmons* applies to Texas' capital sentencing scheme because a defendant sentenced to life in Texas is ineligible for parole for only 35 years, not for life.[591] Mr. Raby respectfully suggests that the Fifth Circuit's decisions construing *Simmons* this narrowly are in error, especially in light of very recent Supreme Court precedent. In *Kelly v. South Carolina*, the Supreme Court rejected a narrow interpretation of *Simmons* (for the second time in a year), and reiterated that *Simmons* requires that a defendant be able to "convey a clear understanding of [the defendant's] parole ineligibility" to the jury.[592] As the Chief Justice observed in his dissent in *Kelly*, the Court's most

---

588 *Simmons*, 114 S. Ct. at 2200, *quoting Skipper v. South Carolina*, 106 S. Ct. 1669, 1671 n.1 (1986).

589 *Simmons*. 114 S. Ct. at 2200.

590 *See* Cunningham Risk Assess. ¶¶ 69-71 (statistical evidence demonstrates that old-age parole recidivism rates of capital offenders is very low).

591 *See, e.g., Tigner v. Cockrell*, 264 F.3d 521, 524-26 (5th Cir. 2001).

592 *Kelly v. South Carolina*, ___ S. Ct. ___, 2002 WL 21284, *7 (Jan. 9, 2002); *see also Shafer v. South Carolina*, 121 S. Ct. 1263, 1273-74 (2001).

recent application of *Simmons* shows that *Simmons* established a "truth in sentencing" doctrine rather than a narrow rule that would apply only to the narrow facts of *Simmons* or cases just like it.[593] The essence of *Simmons'* "truth in sentencing" doctrine—that a State may not "'mislead the jury by concealing accurate information about the defendant's parole ineligibility"—clearly was violated when Mr. Raby was prevented from giving his jury accurate information about parole ineligibility in Texas.[594]

Furthermore, the facts in this case are distinguishable—and far more egregious—than the typical post-*Simmons* cases in which the Fifth Circuit has denied relief, because in this case the court went beyond simply prohibiting Mr. Raby from offering accurate information about his parole ineligibility. In this case, the State affirmatively gave the jury *inaccurate* information about Mr. Raby's parole eligibility, when it improperly referred to Mr. Raby's previous release on parole, after serving only two-and-a-half years of a ten year sentence. Because the jury's sentencing decision very possibly was based on this inaccurate information supplied by the State, Mr. Raby's death sentence not only violates the requirements of *Simmons*, but also is contrary to, and an unreasonable application of, the Supreme Court's clearly established authority prohibiting death sentences based on inaccurate sentencing information.[595]

---

593 *Kelly* at *7 (Rehnquist, C.J., dissenting).

594 *Kelly* at *5, n. 3, *quoting Simmons*, 114 S. Ct. at 2195 n.5.

595 *Compare Caldwell v. Mississippi*, 105 S. Ct. 2633, 2642 (1985) (reversing death sentence because jury was given inaccurate information about post-sentencing procedure) and *Gardner v. Florida*, 97 S.Ct. 1197, 1205 (1977) (reversing death sentence imposed on the basis of potentially inaccurate information contained in presentence report that defendant had no ability to deny or explain) with *Ramos v. California*, 103 S. Ct. 3446, 3448-49 (1983) (affirming death sentence because information provided to jury about post-sentencing procedure was not inaccurate).

B. Mr. Raby Was Sentenced to Death in Violation of the Eighth and Fourteenth Amendments Because He Was Not Permitted to Offer Constitutionally Relevant Mitigating Evidence Regarding Age and Recidivism at the Punishment Phase of His Trial

Age is one of the very best predictive factors in assessing whether a defendant is likely to commit acts of violence in the future.[596] For the same reasons that men's car insurance rates go down as they grow older and get married, men become substantially less likely to commit acts of violence as they age. Reliable statistical evidence shows that, beginning in their mid-twenties, young men with violent tendencies become steadily less likely to commit acts of violence as they grow older.[597] Accordingly, the fact that Mr. Raby would not be eligible for parole until he is 57 if he were sentenced to life is constitutionally relevant mitigating evidence bearing on the issue of future dangerousness.[598] The Court of Criminal Appeals' decision affirming the trial court's refusal to permit Mr. Raby to offer this evidence to the jury thus is contrary to, and an unreasonable application of, the clearly established constitutional rule that a jury must be permitted to consider and give effect to constitutionally relevant mitigating evidence.[599]

C. Texas Law Giving the Trial Judge *Discretion* Whether to Inform the Jury About the Parole Ineligibility of a Life Sentence Violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment

Under Texas sentencing law, whether a capital defendant may present truthful information regarding parole eligibility to the jury is *within the discretion of the trial judge.*[600] As a result, Mr. Raby's jury was not given accurate information about the parole ineligibility of

---

596 Cunningham Risk Assess. ¶ 71.

597 *Id.*

598 *See Johnson v. Texas*, 113 S. Ct. 2658, 2668-69 (1993) (holding that "sentencer in a capital case must be allowed to consider the mitigating qualities of youth" because "lack of maturity and an underdeveloped sense of responsibility are found in youth more often than in adults . . . .").

599 *See, e.g., Eddings*, 102 S. Ct. at 875.

600 *See Raby*, 970 S.W.2d at 15 (Baird, J., dissenting), *citing Santellan v. State*, 939 S.W.2d 155, 171 (Tex. Cr. App. 1997); *Ford v. State*, 919 S.W.2d 107, 116 (Tex. Cr. App. 1996); *Walbey v. State*, 926 S.W.2d 307, 313, n.8 (Tex. Cr. App. 1996).

defendants sentenced to life, while the juries of some other capital defendants in Texas are. As four Justices of the Supreme Court have observed, accurate information about parole ineligibility is a very important factor in juries' decisions about whether to impose a death sentence.[601] Accordingly, there is a substantial likelihood that similarly situated defendants in Texas are sentenced differently based solely on whether their juries are given accurate information about parole ineligibility. This disparate treatment results in the "wanton and freakish" imposition of the death penalty, in violation of clearly established principles of the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment.[602]

XI. MR. RABY WAS CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF THE FOURTEENTH AMENDMENT BECAUSE HE WAS NOT PERMITTED TO CONDUCT MEANINGFUL VOIR DIRE OF PROSPECTIVE JURORS

It is well-established that the Fourteenth Amendment right to an impartial jury at the sentencing phase—which is coextensive with the Sixth Amendment right to an impartial jury at the guilt-innocence phase—requires every juror to consider the mitigating evidence offered by the defendant in good faith.[603] Furthermore, to implement this constitutional protection, a defendant must be permitted to conduct adequate voir dire to identify those jurors who will not consider the defendant's mitigating evidence, so that they can be excused for cause.[604] Adequate voir dire requires more than general questions about whether a prospective juror can "follow the law"; voir dire must be sufficiently specific that it can expose when a prospective juror cannot

---

601 *See Brown v. Texas*, 118 S. Ct. 355, n. 2 (1997) (Stevens, J.) (opinion respecting the denial of certiorari).

602 *See Lewis*, 110 S. Ct. at 3099 ("[o]ur capital punishment doctrine is rooted in the principle that '[t]he Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be . . . wantonly and . . . freakishly imposed'"), *quoting Gregg*, 96 S. Ct. at 2932.

603 *See Morgan v. Illinois*, 112 S. Ct. 2222, 2229-30 (1992).

604 *Id.* at 2230-31.

follow the law because he or she already has formed an opinion to the exclusion of the evidence.[605]

Mr. Raby was not permitted to conduct adequate voir dire to determine which prospective jurors would be unable to consider his mitigating evidence. Throughout voir dire, Mr. Raby sought to question prospective jurors about general categories of mitigating evidence—such as age, intoxication, and learning disability—without giving details of the instant case or seeking to commit prospective jurors during voir dire. For example, trial counsel asked prospective (and eventual) juror Georgia Winward:

> Q. Now, what if a person had a low IQ or was involved or had a learning disability?
>
> A. No, I don't think that would cause a person to commit a crime.
>
> Q. Well, but can you look at that when you would impose either a death sentence or life imprisonment
>
> A. No.
>
> Q. So it wouldn't be a factor?

At that point, the State objected to the question on the grounds that trial counsel was trying to commit the juror as to whether the juror considered a learning disability aggravating or mitigating, and the trial court sustained the objection.[606] The Court of Criminal Appeals affirmed, holding that "the law does not require a juror to consider any particular evidence as mitigating; all the law requires is that a defendant be allowed to present relevant mitigating evidence and that the jury be provided a vehicle to give mitigating effect to that evidence . . . ."[607]

---

605 *Id.* at 2233.
606 S.F. 5:312-13.
607 *Raby*, 970 S.W.2d at 3.

Although the Court of Criminal Appeals is correct that it is the sentencer's prerogative to determine what weight to give mitigating evidence, as the Fifth Circuit recently stated in regard to the identical argument of the Court of Criminal Appeals, "a sentencer 'may not give [mitigating evidence] no weight by excluding such evidence from [his] consideration.'"[608] In this case, Mr. Raby's questioning on voir dire did not attempt to commit prospective jurors to give Mr. Raby's evidence some (or any) mitigating weight, but rather attempted to identify whether prospective jurors already had fixed opinions about certain categories of mitigating evidence and thus would be unable or unwilling to consider that evidence at trial. Ms. Winward, for example, may have been unable to consider a learning disability as potential mitigating evidence, and if so, should have been excused for cause.[609] Because Mr. Raby was not permitted to conduct adequate voir dire of Ms. Winward (as well as other prospective jurors), Mr. Raby could not build a record to excuse her for cause. Accordingly, because the inadequacy of voir dire creates "doubt that [Mr. Raby] was sentenced to death by a jury empanelled in compliance with the Fourteenth Amendment, his sentence cannot stand."[610]

XII. MR. RABY WAS CONVICTED ON THE BASIS OF A FALSE AND INVOLUNTARY STATEMENT THAT WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS

As is set out fully in section I.A, *supra*, Mr. Raby was convicted on the basis of a false statement that police obtained under coercive circumstances, after Mr. Raby requested counsel, and without a knowing and intelligent waiver of Mr. Raby's Fifth Amendment rights. Mr.

608 *Soria v. Johnson*, 207 F.3d 232, 245 (5th Cir. 2000).
609 *Id.*
610 *See Morgan*, 112 S. Ct. at 2235.

Raby's conviction on the basis of this illegally obtained statement violates clearly established constitutional law, and must be reversed.[611]

XIII. THE CUMULATIVE IMPACT OF THE FLAWS IN MR. RABY'S TRIAL ROBBED MR. RABY'S STATE TRIAL OF FUNDAMENTAL DUE PROCESS

The accumulation of constitutional errors that occur in a state proceeding may be found to be an independent violation of due process.[612] Cumulative error is found "where (1) individual errors involved matters of constitutional dimension rather than mere violations of state law; (2) the errors were not procedurally defaulted for habeas purposes; and (3) the errors "so infected the entire trial that the resulting conviction violates due process."[613] Although the standard applied in the case was modified after rehearing, Judge Garza's descriptive explanation of cumulative error is instructive:

> At the beginning of the trial, we had an entire sheet of cloth. As trial progressed and the conduct from the judge and the prosecutor worsened, a tear developed down the middle of the sheet. With each improper remark the tear lengthened until at the end of trial what was one sheet is now two . . . . The two sheets are symbolic of a due process violation.[614]

Viewing due process in Mr. Raby's case as Judge Garza's hypothetical sheet, police officers' violation of Mr. Raby's Fifth and Sixth Amendment rights, the trial court's prohibition against effective voir dire, the violation of Mr. Raby's right to the effective assistance of counsel, the trial court's obstruction of Mr. Raby's right to mount a defense, the State's improper comment on Mr. Raby's invocation of his Fifth Amendment rights, and the trial court's refusal to require

---

611 *See, e.g., Moran*, 106 S. Ct. at 1140-41; *Edwards v. Arizona*, 101 S. Ct. 1880, 1883-86 (1981).

612 *Derden v. McNeel*, 978 F.2d 1453, 1454 (5th Cir. 1992).

613 *Id., citing Cupp v. Naughten*, 94 S. Ct. 396, 400-01 (1973).

614 *Derden v. McNeel*, 938 F.2d 605, 618 (5th Cir. 1991), *rev'd en banc* 978 F.2d 1453 (holding that only cognizable error can create cumulative error); *see also Nicholes v. Collins*, 802 F. Supp. 66, 78 (S.D. Tex 1992) (J. Hittner), *rev'd* 69 F.3d 1255 (5th Cir. 1995).

unanimity acted as forces pulling at each side of this sheet, ripping it in shreds.[615]

In every stage of this capital murder case, including investigation, trial, and appeal, Mr. Raby has been deprived of his constitutional rights. The tearing of the fabric of due process is almost audible in this case. Taken together, the cumulative constitutional errors violate due process, and mandate a granting of Mr. Raby's writ.[616]

---

615 Although the force of the ineffective assistance of counsel and *Brady/ Giglio* claims alone represent sufficient error, the absence of due process at his state habeas proceeding state habeas acted as shears.

616 *See Derden*, 978 F.2d at 1454 (5th Cir. 1992) (en banc).

REQUEST FOR EXPANSION OF THE RECORD AND EVIDENTIARY HEARING

During state habeas corpus proceedings, Mr. Raby requested an evidentiary hearing at which to prove his entitlement to relief. The trial court entered findings of fact and conclusions of law *without* holding an evidentiary hearing, however, and the Court of Criminal Appeals entered judgment on the trial court's recommendation.[617] Accordingly, Mr. Raby's failure to develop the factual basis for his claims is not due to any lack of diligence attributable to Mr. Raby, and thus section 2254(e)(2)'s limitations on the availability of an evidentiary hearing in this Court are inapplicable.[618] Mr. Raby therefore requests that this Court expand the record under Rule 7 of the Rules Following 28 U.S.C. § 2254 to include the materials filed contemporaneously herewith, and exercise its discretion to grant an evidentiary hearing under Rule 8(a) of the Rules Following 28 U.S.C. § 2254, at which time Mr. Raby will present further evidence supporting the claims presented herein, and demonstrating his entitlement to the relief requested.

---

617 *See* Order, Tex. Ct. Crim. App., 1/31/2001 at 2, Ex. 41.

618 *See Williams v. Taylor*, 120 S. Ct. 1479, 1488 (2000).

PRAYER

WHEREFORE, Mr. Raby prays that this Court:

1. Issue a writ of habeas corpus that he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death;

2. Expand the record pursuant to Rule 7 of the Rules Following 28 U.S.C. § 2254 to include the materials filed contemporaneously herewith

3. Grant him further discovery and an evidentiary hearing at which he may present evidence in support of these claims, and allow him a reasonable period of time subsequent to any hearing this Court determines to conduct, in which to brief the issues of fact and of law raised by this petition or such hearing; and

4. Grant such other relief as law and justice require.

Respectfully submitted,

Michael W. Perrin
State Bar No. 15795700
Southern District I.D. No. 1473
Tracey M. Robertson (Attorney-in-Charge)
State Bar No. 00792805
Southern District I.D. No. 26094
Kevin D. Mohr
Southern District I.D. No. 28140
State Bar No. 24002623
Sarah M. Frazier
State Bar No. 24027320
Southern District I.D. No. 27980
KING & SPALDING
1100 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 751-3200
(713) 751-3290 - Fax

ATTORNEYS FOR CHARLES D. RABY

CERTIFICATE OF SERVICE

I certify that on this 8th day of May, 2002, a true and correct copy of the foregoing was served upon the following counsel by certified mail, return receipt requested:

State of Texas
Assistant Attorney General
Capital Litigation Division
P.O. Box 12548
Austin, Texas 78711
(512) 936-1600

ATTORNEY FOR CHARLES D. RABY

CAUSE NO. 9407130

THE STATE OF TEXAS	§	**IN THE 248TH DISTRICT COURT**
	§	
	§	
VS.	§	**IN AND FOR**
	§	
CHARLES DOUGLAS RABY	§	**HARRIS COUNTY, TEXAS**

AFFIDAVIT OF CHARLES D. RABY

County of Polk §

State of Texas §

My name is Charles D. Raby. I am a resident of Polk County, Texas. I am over the age of eighteen and I am competent to make this affidavit. All the facts stated here are within my personal knowledge.

1. This affidavit is attached is a true and correct copy of the First Amended Petition for a Writ of Habeas Corpus that was filed in my case in the United States District Court in the Southern District of Texas. The statements of fact in that petition, to the extent that they are not within the public domain, and to the extent that they have not been attested to by other individuals, are within my personal knowledge.

Under the pain and penalty of perjury, I swear that the above is true and correct to the best of my knowledge. I give this statement of my own free will.

Charles D. Raby

SWORN TO and SUBSCRIBED before me on this the 14th day of October, 2002, to certify which witness hereof my hand and seal of office.

NOTARY PUBLIC IN AND FOR
THE STATE OF TEXAS

RONALD M. BUSH
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires 05-14-2006

My Commission Expires: 5-14-2006

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

United States Courts
Southern District of Texas
FILED
MAY 08 2002
Michael N. Milby, Clerk

CHARLES D. RABY, §
§
Petitioner, §
§
v. § NO. H-02-0349
§
JANIE COCKRELL, §
§
Director, Texas Department of Criminal §
Justice, Institutional Division §

FIRST AMENDED PETITION FOR WRIT OF HABEAS CORPUS

CHARLES D. RABY, through his undersigned appointed counsel, hereby files this petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254. For the reasons stated below, Mr. Raby is being held under a sentence of death by the Texas Department of Criminal Justice in violation of the United States Constitution. Mr. Raby respectfully asks this Court to grant an evidentiary hearing, at which Mr. Raby will offer proof of the facts alleged herein, demonstrating his entitlement to a writ of habeas corpus ordering the State of Texas (the "State") to afford him, in the alternative, a new trial, a new capital sentencing proceeding, or a new direct appeal.

TABLE OF CONTENTS

INTRODUCTION 4

PROCEDURAL HISTORY 8

STANDARD OF REVIEW 9

CLAIMS FOR RELIEF 10

I. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SUPPRESSION HEARING AND GUILT-INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS 10

A. Mr. Raby's Trial Counsel Failed to Develop and Present an Available, Compelling Case for Suppression of the Statement to Police 11

B. Mr. Raby's Trial Counsel Abandoned Their Advocacy Role at the Guilt-Innocence Phase of Trial, Resulting in the Constructive Denial of Counsel 21

C. Mr. Raby's Trial Counsel Made Numerous, Nonstrategic Errors at the Guilt-Innocence Phase of Trial 26

D. The Overall Performance of Mr. Raby's Trial Counsel at the Guilt-Innocence Phase Fell Below Constitutionally Permissible Standards and Prejudiced Mr. Raby 33

II. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 33

A. Mr. Raby's Trial Counsel Failed to Develop and Present Available Evidence to Contest the Probability That Mr. Raby Would Commit Acts of Criminal Violence, and Instead Presented an Unreliable Expert Who *Exaggerated* the Risk That Mr. Raby Would Commit Acts of Criminal Violence if Sentenced to Life in Prison 34

B. Mr. Raby's Trial Counsel Failed to Develop and Present Available Mitigating Evidence 44

C. Mr. Raby's Trial Counsel Failed to Impeach a Critical State Witness, Karianne Wright 78

D. Trial Counsel's Closing Argument At Sentencing Fell Below Constitutionally Permissible Standards And Prejudiced Mr. Raby In Assigning Responsibility For The Crime To The Elderly Victim 80

E. The Overall Performance of Mr. Raby's Trial Counsel Fell Below Constitutionally Permissible Standards 82

III. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL ON DIRECT APPEAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION 83

IV. MR. RABY WAS CONVICTED OF CAPITAL MURDER IN VIOLATION OF THE SIXTH AMENDMENT, EIGHTH AMENDMENT, AND THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE HE WAS NOT PERMITTED TO INFORM THE JURY THAT EXTREME INTOXICATION COULD NEGATE THE CONSTITUTIONALLY REQUIRED ELEMENT OF SPECIFIC INTENT 88

V. MR. RABY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HE WAS NOT ALLOWED TO PRESENT RELEVANT MITIGATING EVIDENCE TO THE JURY AT SENTENCING 91

VI. MR. RABY WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THERE WAS INSUFFICIENT EVIDENCE TO ESTABLISH EVERY ELEMENT OF THE OFFENSE OF CAPITAL MURDER 92

A. The State Introduced Insufficient Evidence of Either Aggravated Sexual Assault or Attempted

Aggravated Sexual Assault 93
B. The State Introduced Insufficient Evidence of Either Robbery or Attempted Robbery 96
C. The State Introduced Insufficient Evidence of Either Burglary or Attempted Burglary 101

VII. MR. RABY WAS CONVICTED IN VIOLATION OF THE EIGHTH AND FOURTEENTH AMENDMENTS BECAUSE THE JURY WAS PERMITTED TO CONVICT HIM OF CAPITAL MURDER BASED ON A BURGLARY FINDING PREDICATED ON THE MURDER ITSELF 103

A. Texas Penal Code § 19.03(a)(2) Did Not Give Fair Warning at the Time of the Offense, as Required by the Due Process Clause of the Fourteenth Amendment, That an Intentional Murder Occurs "In the Course of" Burglary When the Murder Itself Is the Conduct That Creates the Burglary 104
B. Texas Penal Code § 19.03(a)(2), as Applied to Mr. Raby, Does Not Sufficiently Narrow the Class of Persons Eligible for the Death Penalty, as Required by the Eighth and Fourteenth Amendments 107

VIII. MR. RABY WAS CONVICTED IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT BECAUSE THE JURY WAS NOT REQUIRED TO AGREE UNANIMOUSLY ON WHICH UNDERLYING FELONY ALLEGED IN THE INDICTMENT ELEVATED THE OFFENSE OF MURDER TO CAPITAL MURDER 108

A. The Trial Court's Refusal to Instruct the Jury That They Had to Agree Unanimously on Which Underlying Felony Was Committed Violated the Due Process Clause of the Fourteenth Amendment 109
B. The Texas Court of Criminal Appeals' Failure to Provide a Remedy for the Trial Court's Refusal to Instruct the Jury That They Had to Agree Unanimously on Which Underlying Felony Was Committed, as Required by Texas Law, Violated the Due Process Clause of the Fourteenth Amendment 110

IX. MR. RABY WAS CONVICTED IN VIOLATION OF THE FIFTH AND FOURTEENTH AMENDMENTS BECAUSE THE STATE COMMENTED IMPERMISSIBLY ON HIS SILENCE DURING ORAL ARGUMENT AT THE GUILT-INNOCENCE PHASE OF TRIAL 111

X. MR. RABY WAS SENTENCED TO DEATH IN VIOLATION OF THE SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS BECAUSE HE WAS NOT PERMITTED TO QUESTION OR INFORM THE JURY THAT A LIFE SENTENCE WOULD RENDER MR. RABY PAROLE INELIGIBLE FOR AT LEAST 35 YEARS 114

A. Mr. Raby Was Sentenced to Death in Violation of the Fourteenth Amendment Because He Was Not Permitted to Inform the Jury That a Life Sentence Would Render Him Parole Ineligible for at Least 35 Years 115
B. Mr. Raby Was Sentenced to Death in Violation of the Eighth and Fourteenth Amendments Because He Was Not Permitted to Offer Constitutionally Relevant Mitigating Evidence Regarding Age and Recidivism at the Punishment Phase of His Trial 118
C. Texas Law Giving the Trial Judge *Discretion* Whether to Inform the Jury About the Parole Ineligibility of a Life Sentence Violates the Eighth Amendment and the Equal Protection Clause of the Fourteenth Amendment 118

XI. MR. RABY WAS CONVICTED AND SENTENCED TO DEATH IN VIOLATION OF THE FOURTEENTH AMENDMENT BECAUSE HE WAS NOT PERMITTED TO CONDUCT MEANINGFUL VOIR DIRE OF PROSPECTIVE JURORS 119

XII. MR. RABY WAS CONVICTED ON THE BASIS OF A FALSE AND INVOLUNTARY STATEMENT THAT WAS OBTAINED IN VIOLATION OF THE FIFTH, SIXTH, AND FOURTEENTH AMENDMENTS 121

XIII. THE CUMULATIVE IMPACT OF THE FLAWS IN MR. RABY'S TRIAL ROBBED MR. RABY'S STATE TRIAL OF FUNDAMENTAL DUE PROCESS 122

REQUEST FOR EVIDENTIARY HEARING 116

PRAYER 117

INTRODUCTION

Mr. Raby was convicted of capital murder and sentenced to death for the October 15, 1992, homicide of Edna Franklin. Ms. Franklin was found dead in her home by her two adult grandsons, Eric Benge and Lee Rose, both of whom lived in Ms. Franklin's house. Ms. Franklin had been stabbed with a knife that was never found. Mr. Raby was a friend of Ms. Franklin's two grandsons and was seen in the same neighborhood on the day of the crime, but *no physical evidence* tied Mr. Raby to the crime.

Mr. Raby was convicted solely on the basis of a statement that he gave while in police custody four days after the crime occurred. The series of constitutional violations that led ultimately to Mr. Raby's wrongful conviction began with that custodial interrogation. Police obtained Mr. Raby's statement after he requested counsel, while he was intoxicated on narcotics, and under the coercive pressure of threats to arrest his girlfriend and to put her infant child into the custody of Child Protective Services (police were holding the two at the station during Mr. Raby's interrogation). Mr. Raby's waiver of his Fifth Amendment rights was not voluntary, both because of these coercive circumstances, and because he did not (and still does not) understand that his right to remain silent includes the right not to have his silence used against him. In addition, the story Mr. Raby recounted in his statement to police differs markedly from the evidence police officers found at the crime scene, most significantly in that Mr. Raby stated that he entered the victim's house through the unlocked front door, whereas the State presented substantial evidence that the attacker entered through a window.

Virtually none of these facts came out at the hearing on the motion to suppress the statement, because Mr. Raby's court-appointed attorneys did almost nothing to prepare for that hearing (or any other part of the case). With respect to these and many other key issues at trial,

Mr. Raby's attorneys did not interview and call important witnesses (such as Mr. Raby's girlfriend), and did not follow up on important information supplied by Mr. Raby (such as his unanswered request for counsel). The product of trial counsel's failure to prepare, and Mr. Raby's resulting misunderstanding of his rights, was a formalistic suppression hearing at which only a sliver of the entire picture of the interrogation was revealed, and at which Mr. Raby appeared to confirm his custodial statement.

Mr. Raby's trial lawyers then compounded their errors at the suppression hearing by failing to challenge the voluntariness of the statement at trial. Remarkably, although Mr. Raby's statement to police (obtained under highly coercive circumstances) was the only evidence linking Mr. Raby to this crime, Mr. Raby's attorneys: (1) put on *no evidence* of any kind at the guilt-innocence phase of the trial; (2) *conceded* the validity of the custodial statement and that Mr. Raby committed the murder; and (3) attempted—through argument and rhetoric alone—to challenge *only* whether he committed the predicate felonies (sexual assault, robbery, burglary, or attempt thereof) that would elevate the crime to capital murder. But even then, trial counsel's fundamental misunderstanding of the law rendered their challenge meaningless. Trial counsel focused on whether Mr. Raby had entered the house through a window, apparently believing that a *breaking and entering* was required to establish a burglary. Of course, it is not. Whether Mr. Raby entered the house through a window (as the State alleged) or through the unlocked front door (as Mr. Raby stated in his statement to police) was irrelevant to whether a burglary occurred; the only relevant facts were whether he entered at all and whether he had consent to do so. By completely failing either to challenge the voluntariness of the statement, or to develop evidence that Mr. Raby had his friends' consent to enter the Franklin home (the only issue that remained open after trial counsel conceded the statement), trial counsel conceded essentially all

elements of capital murder, and failed to provide Mr. Raby with even a semblance of a defense at the guilt-innocence phase of his trial.

Trial counsel committed numerous other errors during the guilt-innocence phase of the trial. Tellingly, trial counsel's cross-examination of witnesses and closing argument mostly reiterated the State's case, in complete abandonment of any effort to advocate on Mr. Raby's behalf. And perhaps worst of all, trial counsel failed to object to the State's highly improper and prejudicial suggestions in closing arguments that Mr. Raby's post-arrest silence on the predicate felonies and failure to testify at trial was evidence of his guilt. Given that the State presented extremely weak—indeed, legally insufficient—evidence on all of the predicate felonies, trial counsel's failure to object to these comments was inexcusable.

At the punishment phase, trial counsel's errors of unpreparedness, fundamental misunderstanding of the law and facts, and simple incompetence continued unabated. On the issue of future dangerousness, trial counsel presented an expert witness who became involved in the case only a week before he testified, who prepared no report to give trial counsel a preview of his opinion, and who made numerous fundamental errors in his methodology. This expert's methods have since been discredited by, among others, the Texas Attorney General's office. On the issue of mitigation, trial counsel conducted almost no investigation of Mr. Raby's social history. Trial counsel uniformly called mitigation witnesses with whom they had never met or spoken, ignorant of what knowledge or insight those witnesses might possess. As a result, Mr. Raby's mitigation witnesses were often confused and mistrustful on the stand, and counsel was unable to discover, much less elicit, crucial mitigating evidence.

The adequacy of Mr. Raby's counsel did not improve on direct appeal. Remarkably, one of Mr. Raby's trial lawyers was appointed to represent him on direct review, even though he

suffered from an obvious conflict of interest: during trial he was wearing a neck brace and taking prescription painkillers for a neck injury he admitted was extremely painful. Indeed, appellate counsel underwent major neck surgery shortly after the trial concluded, and less than two weeks before he filed the motion for new trial that defined the scope of the direct appeal. Whether because of his obvious conflict of interest, his surgery during the preparation of the motion for new trial, or because of general ineffectiveness, appellate counsel failed to raise a number of valid claims that should have been raised on direct appeal, including ineffective assistance claims, and failed to brief claims that he did raise properly.

The state trial court, and the Court of Criminal Appeals also made a number of serious, prejudicial constitutional errors, including:

- *First*, the state courts prohibited Mr. Raby from meeting the evidence against him on the constitutionally required element of specific intent or reckless indifference to human life, by barring him from introducing evidence to show that his extreme intoxication prevented him from forming the necessary mental state;
- *Second*, the courts did not permit Mr. Raby to make proper jury argument during the punishment phase of the trial regarding voluntary intoxication as mitigation;
- *Third*, these courts allowed Mr. Raby to be convicted of capital murder despite insufficient evidence to establish every element of the offense beyond a reasonable doubt;
- *Fourth*, these courts allowed Mr. Raby to be convicted on a novel interpretation of the Texas capital murder statute, which the Court of Criminal Appeals has admitted is ambiguous, thus denying Mr. Raby fair notice of the crime with which he was charged;
- *Fifth*, the state courts allowed Mr. Raby to be convicted without a verdict on every element of capital murder because his jury was not required to agree about which predicate felony Mr. Raby committed;
- *Sixth*, the State commented improperly on Mr. Raby's silence during oral argument at the guilt-innocence phase of the trial;

- *Seventh*, the Texas courts did not permit Mr. Raby to give the jury accurate information about Texas parole law to rebut the State's case of future dangerousness;

- *Eighth*, the Texas courts convicted Mr. Raby on the basis of a false and involuntary statement that police obtained in violation of the Fifth, Sixth, and Fourteenth Amendments;

- *Ninth*, the Texas courts did not permit Mr. Raby to conduct adequate voir dire so that unqualified jurors could be excused for cause; and

- *Tenth*, the cumulative impact of the flaws in Mr. Raby's trial robbed Mr. Raby's state trial of fundamental due process.

For these reasons, as stated more fully in the claims below, and as the evidence submitted herewith and to be presented at the evidentiary hearing will show, this petition for habeas corpus should be granted, and Mr. Raby's conviction and death sentence should be reversed.

PROCEDURAL HISTORY

Mr. Raby was tried by a jury in June of 1994. At trial, Felix Cantu and Michael Fosher were appointed to represent Mr. Raby. He was found guilty of capital murder on June 9, 1994, and sentenced to death on June 17, 1994. On appeal, Mr. Fosher was appointed as Mr. Raby's appellate counsel.[1] Nearly four years later, on March 4, 1998, the Court of Criminal Appeals affirmed the conviction and death sentence, over the dissent of three Judges.[2] A Motion for Rehearing was denied on April 22, 1998.[3] A Petition for Writ of Certiorari to the United States Supreme Court was filed on July 3, 1998, and was denied on November 16, 1998.[4]

---

1 *See* C.R. at 561. In this petition, citations to "Ex." refer to the evidentiary exhibits and other materials being filed by Mr. Raby contemporaneously with this petition, followed by the exhibit number. Citations to "S.F." refer to the Statement of Facts (i.e., the trial transcript), followed by the volume: page number. Citations to "C.R." refer to the Clerk's Record, followed by the page number.

2 *Raby v. State*, 970 S.W.2d 1 (Tex. Cr. App.), *cert. denied*, 119 S. Ct. 515 (1998), a true and correct copy of which is attached hereto as Exhibit 39.

3 *Id.*

4 *Raby v. Texas*, 119 S. Ct. 515 (1998).

While Mr. Raby's direct appeal was pending before the United States Supreme Court, Mr. Raby proceeded with state habeas corpus proceedings. On July 16, 1998, Mr. Raby filed a state application for writ of habeas corpus.[5] Although Mr. Raby requested an evidentiary hearing, the trial court adopted the State's proposed findings of fact and conclusions of law, without holding an evidentiary hearing, on November 14, 2000.[6] The Court of Criminal Appeals adopted the trial court's findings and conclusions, and denied relief on January 31, 2001.[7]

On March 20, 2001, this Court appointed King & Spalding to represent Mr. Raby in proceedings under 28 U.S.C. § 2254. Pursuant to 28 U.S.C. § 2244(d)(1)(A), as tolled by 28 U.S.C. § 2244(d)(2), Mr. Raby filed his habeas petition on January 30, 2002, within one year from the date on which his conviction became final by the conclusion of direct review. Pursuant to Fed. R. Civ. P. 15(a) and *U.S. v. Saenz*,[8] Mr. Raby timely files this First Amended Petition for Writ of Habeas Corpus.

STANDARD OF REVIEW

A federal court reviewing a habeas petition from a person in State custody reviews claims that were presented to the State courts, but not decided on their merits, *de novo*.[9] With respect to any claim that was adjudicated on the merits in State court proceedings, a federal court reviewing a habeas petition may grant relief if the State court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

---

5 *See* Application for Writ of Habeas Corpus, in the 248th Dist. Ct. of Harris Cty., Tex., Ex. 43.

6 A true and correct copy of the trial court's findings of fact and conclusions of law is attached hereto as Exhibit 40.

7 *Ex Parte Raby*, No. 48131-01 (Tex. Cr. App. Jan. 31, 2001), a true and correct copy of which is attached hereto as Exhibit 42.

8 *U.S. v. Saenz*, 282 F.3d 354, 356 (5th Cir. 2002).

9 *Johnson v. Cain*, 215 F.3d 489, 494 (5th Cir. 2000).

(2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in State court proceedings.[10]

Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision," as determined by this Court upon an independent review.[11] A decision is contrary to clearly established federal law "if the state court arrives at a conclusion opposite to that reached by [the Supreme Court] on a question of law or if the state court decides a case differently than [the] Court has on a set of materially indistinguishable facts."[12] A decision is an unreasonable application of federal law "if the state court identifies the correct governing legal principle . . . but unreasonably applies that principle to the facts of the prisoner's case."[13] Factual findings of the State court are presumed to be correct, "unless they were 'based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.'"[14]

CLAIMS FOR RELIEF

I. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE SUPPRESSION HEARING AND GUILT-INNOCENCE PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS

It is clearly established that a felony defendant has the right to the effective assistance of counsel at all critical stages of criminal proceedings.[15] This right is violated if counsel's performance falls below an objective standard of reasonable competence, and if the deficient performance prejudices the defendant.[16] The defendant is prejudiced if, considering the attorney's performance as a whole, there is a reasonable probability that the outcome would have

---

10 28 U.S.C. § 2254(d).
11 *Williams v. Taylor*, 120 S. Ct. 1495, 1518, 1523 (2000).
12 *Id.* at 1523; *see also Gardner v. Johnson*, 247 F.3d 551, 557 (5th Cir. 2001).
13 *Williams*, 120 S. Ct. at 1518, 1523.
14 *Gardner*, 247 F.3d at 557.
15 *See Strickland v. Washington*, 104 S. Ct. 2052, 2063-64 (1984).

been different but for the attorney's unreasonable errors.[17] This "reasonable probability" standard requires something less than a showing that it is more likely than not that counsel's deficient conduct altered the outcome of the case.[18] Moreover, if an attorney's conduct so deviates from the standards of reasonable competence as to amount to a constructive denial of counsel, prejudice is presumed.[19]

In this case, Mr. Raby was denied the effective assistance of counsel both at his suppression hearing, and at the guilt-innocence phase of trial. Prejudice should be presumed, because counsel's complete abandonment of any advocacy role at the guilt-innocence phase of trial amounted to a constructive denial of counsel. Moreover, but for counsel's unprofessional errors, there is a reasonable probability that Mr. Raby would not have been convicted.

A. Mr. Raby's Trial Counsel Failed to Develop and Present an Available, Compelling Case for Suppression of the Statement to Police

The State had no physical evidence tying Mr. Raby to this crime, and no eyewitness testimony placing him inside the house. Other than Mr. Raby's statement to police, the State's evidence showed at most that Mr. Raby was in Ms. Franklin's neighborhood on the evening of the crime. It is beyond serious dispute that, in the absence of Mr. Raby's statement to police, Mr. Raby would not have been convicted, and likely would not have been prosecuted.

Despite the overwhelming significance of the custodial statement to this case, however, Mr. Raby's trial counsel failed to develop what would have been his best chance at acquittal—the case for suppression. Trial counsel's failure stems from their blind acceptance of Mr. Raby's custodial statement and guilt. Presuming that Mr. Raby's statement to police was substantially

---

16 *Id.*
17 *Id.* at 2067-68.
18 *Id.* at 2068; *see also Haynes v. Cain*, 272 F.3d 757, 759 (5th Cir. 2001).
19 *Strickland*, 104 S. Ct. at 2067.

true, trial counsel failed to conduct a sufficient interview of their client to learn *what really happened* on the night of the crime, or how the statement was obtained.[20]

Trial counsel never learned that Mr. Raby has no memory of going into the house or committing this crime. Yet by all accounts, including the account in Mr. Raby's statement to police, Mr. Raby was extremely intoxicated on the night of the crime.[21] Mr. Raby smoked marijuana and took several Valium pills that day, in addition to drinking malt liquor and Mad Dog wine.[22] Had trial counsel interviewed Mr. Raby on the subject, they would have learned not only of his memory loss that night, but that Mr. Raby had been abusing alcohol from at least the age of eleven, and had a history of similar alcohol-related memory loss.[23]

If trial counsel had understood Mr. Raby's lack of memory, the potential meaninglessness of his "statement" would have become apparent: Mr. Raby could have admitted killing Mrs. Franklin not because he remembered having done so, but because he supposed that he must have, as everyone seemed to agree that he had. With just a little probing—of both Mr. Raby and the people to whom he "confessed"—it becomes apparent that Mr. Raby has consistently said that he does not remember what happened, other than being near the house on the night of the crime. This is entirely consistent with the story of the interrogation told by Sergeant Waymon Allen, the interrogator, who described the critical moment at which he contends Mr. Raby began to tell him the truth:

---

20 Trial counsel never interviewed Mr. Raby in detail about either the day of the crime, or the day of the interrogation. (Aff. Charles D. Raby ("Raby") ¶ 43, Ex. 17.) Although trial counsel did visit Mr. Raby several times before trial, trial counsel never spent more than twenty minutes with Mr. Raby at a time. (*Id.*) Furthermore, during many of trial counsel's visits, trial counsel simply "visited," reading a newspaper or chatting about matters unrelated to the case. (*Id.*)

21 *See* Charles D. Raby Custodial Statement ("Custodial Statement"), Ex. 45 at 1-2.

22 Raby ¶ 28.

23 Raby ¶ 3; Aff. Paul Wayne Taylor ("Taylor") ¶¶ 12-13, Ex. 23; Aff. James Daniel Jordan ("Jordan") ¶ 15, Ex. 10.

> [Mr. Raby denied] that he had actually gone to the victim's house. I told him that I knew he wasn't being truthful, that he had been identified as going over a fence from the victim's backyard, and at that time Raby looked down at the floor and his eyes teared up and he stated that *he was there* . . . . I asked him if he would be willing to give a written statement, and he said that he would.[24]

Tellingly, Mr. Raby said, "I was *there*," not "I *did it*." Allen then began to draft Mr. Raby's statement, although Mr. Raby had not admitted the crime. For Mr. Raby, admitting being at the house was significant, because knowing that he had the opportunity to commit the crime made him *fear* that he was the killer; but he did not speak out of knowledge.[25]

Similarly, after Mr. Raby was charged with the murder, his girlfriend, Merry Alice Gomez, visited him in jail and asked him whether it was true that he had signed a statement. He answered, "yeah," with a tone of finality.[26] But when Ms. Gomez asked why, he replied, "Because they told me that they were going to lock you up and put Chris [her newborn child] in foster care."[27]

If Mr. Raby's trial counsel had not uncritically accepted the truth of the statement, they would have learned from Mr. Raby that the statement was a narrative constructed of two parts: (1) Mr. Raby's own description of his whereabouts during the day and early evening of October 15; and (2) Sergeant Allen's own word-for-word description of the crime itself, posed to Mr. Raby in the form of yes-or-no questions.[28] The statement does not directly describe the killing itself, but instead contains only a vague description that Mr. Raby and Ms. Franklin "went to the

---

24 S.F. 25:40-41 (emphasis added).

25 Again, soon after Mr. Raby was incarcerated in Harris County Jail awaiting trial, his friend, James Jordan visited him and asked Mr. Raby whether he had killed Mrs. Franklin. (Jordan ¶ 18.) Mr. Raby assented, but then explained that he did not actually remember what happened that night, as he had been drinking and had blacked out. (*Id.*)

26 Aff. Merry Alice Wilkin ("Wilkin") ¶ 33, Ex. 25.

27 *Id.*

28 Raby ¶ 41.

floor" and that Mr. Raby saw blood on his hands.[29] In the last paragraph of the statement, Mr. Raby is purported to state, "The next day I knew I had killed Edna."[30] Sergeant Allen suggested this wording to Mr. Raby, however, after Mr. Raby repeatedly refused to describe, *because he had no recollection of,* the actual killing he purportedly committed.[31]

Trial counsel also could have discovered that the statement was not recorded on audiotape or on video, even though recording statements was a common police practice at the time.[32] Recording the statement would have been an easy way to show that the statement was voluntary, and the failure to record is evidence that Sergeant Allen had something to hide.

Furthermore, a video recording would have revealed that throughout much of the interrogation, presumably a stressful time, Mr. Raby was nodding off to sleep.[33] Trial counsel failed to develop evidence that at the time of his interrogation, Mr. Raby had ingested between five and eight tablets of Tylenol with codeine, an opiate known to cause drowsiness.[34] He took these prescription painkillers from his girlfriend's purse, just before turning himself over to

---

29 Custodial Statement, p. 2.

30 Custodial Statement, p. 3.

31 Raby ¶¶ 28, 29.

32 A cursory review of reported decisions from the early 1990's reveals many cases in which confessions were recorded. *See, e.g., Fuller v. State*, 829 S.W.2d 191 (Tex. Crim. App. 1992, *cert. denied,* 113 S. Ct. 2418) (videotape); *Gibbs v. State*, 819 S.W.2d 821, 825 (Tex. Crim. App. 1991, *cert. denied*, 112 S. Ct. 1205) (videotape); *Hardie v. State*, 807 S.W.2d 319, 320 (Tex. Crim. App. 1991, no pet.) (videotape); *Higginbotham v. State*, 807 S.W.2d 732, 735 (Tex. Crim. App. 1991, no pet.) (audiotape); *Gordon v. State*, 801 S.W.2d 899, 902 (Tex. Crim. App. 1990, no pet.) (videotape); *Fuentes v. State*, 846 S.W.2d 527, 529 (Tex. App.—Corpus Christi 1993, pet. ref'd) (videotape); *Nguyen v. State*, 1992 WL 258910 at *1 (Tex. App.—Hous. [14th Dist.] Oct. 8, 1992, no pet.) (videotape); *Hiser v. State*, 830 S.W.2d 338, 340 (Tex. App.—Hous. [14th Dist.] 1992, no pet.) (audiotape and videotape); *Dumas v. State*, 812 S.W.2d 611, 614 (Tex. App.—Dallas 1991, pet. ref'd) (videotape); *Alford v. State*, 788 S.W.2d 436, 441 (Tex. App.—Hous. [14th Dist.] 1990, no pet.) (videotape).

33 Raby ¶ 36; Aff. I. Bruce Frumkin, Ph.D., ABFP ("Frumkin") ¶ 12, Ex. 3.

34 Raby ¶ 30; Frumkin ¶ 12; *see also* Tylenol with codeine entry, printed from Physician's Desk Reference website, Ex. 46.

police.[35] (Ms. Gomez had been prescribed opiates for pain associated with the C-section birth of her son.[36]) Mr. Raby informed Mr. Cantu of this fact before the suppression hearing.[37]

Trial counsel also failed to learn that Mr. Raby believed he would face about a ten-year prison sentence if he confessed to the crime, and had no idea he was "confessing" to something punishable by death.[38] Trial counsel further failed to discover that Mr. Raby did not (and still does not) understand that his silence could not be used against him in any way.[39] Finally, trial counsel failed to follow up when Mr. Raby told them he had requested counsel prior to his interrogation. While Mr. Raby was sitting in a car waiting to be transported to the police station, one of the arresting officers (probably Sergeant Stephens) began to question Mr. Raby.[40] In response to Mr. Raby's denials that he had been involved in the crime, the officer responded, "Don't lie. We know you did it."[41] Mr. Raby replied, "if that's how you're going to be, I want a lawyer."[42] The officer replied, "We will talk about all that later. We are fixing to go downtown right now."[43] Although Mr. Raby did not fully understand the significance of this fact at the time, because he believed that his subsequent waiver of his right to counsel was effective, he told his trial counsel about the request, but trial counsel failed to investigate this claim and to raise it at the suppression hearing.[44]

Trial counsel's next error was their failure to develop evidence to show how Mr. Raby's personality and background, combined with the circumstances of interrogation, resulted in a false

---

35 Raby ¶ 30.
36 *Id.*
37 Raby ¶ 31.
38 Raby ¶ 42; Frumkin ¶ 18.
39 Frumkin ¶ 9.
40 Raby ¶ 33.
41 *Id.*
42 *Id.*
43 *Id.*
44 Raby ¶ 34

statement. Mr. Raby has traits associated with borderline personality disorder, which is characterized by intense (but stormy) emotional attachments, and consistent feelings of guilt and low self-worth.[45] It was natural for Mr. Raby to fill in the holes in his "guilty knowledge" that he was near the crime scene with the assumption from his generally guilty conscience that because he remembered being near the house, he must have committed the crime.[46] Whether he intended to or not, Sergeant Allen took advantage of Mr. Raby's natural suggestibility by feeding him the facts Allen wanted to hear Mr. Raby say. If trial counsel had consulted and presented an expert psychologist at the suppression hearing, it would have been apparent how Mr. Raby could have confessed to a crime he did not remember committing.

Instead, trial counsel focused only on the coercive circumstances of the interrogation caused by the police officers' taking Mr. Raby's girlfriend, Merry Alice Gomez, and her infant son Chris into custody. But even with respect to that limited issue, trial counsel failed to develop the significant evidence. Mr. Raby had formed a very close relationship with Merry Alice and her son, spending nearly every day with her during the previous two months, spending several nights with her at the hospital when she delivered her son by C-section, and helping to take care of her baby.[47] Mr. Raby was with Ms. Gomez and her baby on the morning of his arrest.[48] En route to the station, Mr. Raby was anxious to know what would happen to Ms. Gomez and Chris.[49] Sergeant Shirley, who was driving the car, answered that while it was possible that Ms.

---

45 *See* Frumkin ¶ 4.
46 *See* Frumkin ¶ 17.
47 Wilkin ¶¶ 7, 10, 13.
48 Homicide Report, Ex. 43, at 2.045.
49 Raby ¶ 35.

Gomez could be booked with aiding and abetting for failure to give Mr. Raby's location to police, he believed that she was being taken home.[50]

At the station, Sergeant Allen became frustrated with the interrogation after Mr. Raby repeatedly denied having murdered Ms. Franklin.[51] Mr. Raby was escorted to the restroom and, while he was in the hallway of the homicide office, he heard Chris crying and Ms. Gomez soothing the baby in an adjoining room.[52] Ms. Gomez' and her child's presence at the station filled Mr. Raby with fear that Ms. Gomez was to be charged with aiding and abetting, as Officer Shirley had suggested.[53] He demanded to know why Ms. Gomez and her son were being held, but Sergeant Allen said, "We will talk about that later, in a little while."[54] Back in the interrogation room, Mr. Raby asked again why Ms. Gomez was in custody, and Sergeant Allen said, "You want to tell me what I want to know?"[55] Mr. Raby asked, "What do you want to know?" and Sergeant Allen resumed asking yes-or-no questions.[56] Mr. Raby began to answer yes, and demanded at regular intervals to see Ms. Gomez.[57] Each time, Sergeant Allen answered, "We'll talk about that some more later," or "you can see her later."[58] Mr. Raby's deep emotional attachment to Ms. Gomez and her infant son, and his fear that Ms. Gomez would get into trouble if he did not satisfy the police, put intense pressure on Mr. Raby to go along with whatever Sergeant Allen wanted. The codeine pills Mr. Raby had taken were wearing off, leaving him

---

50 *Id.*

51 Raby ¶ 37; *see also* Homicide Report at 2.047.

52 Raby ¶ 37.

53 Raby ¶ 39. In fact, Sergeant Wendell interviewed Ms. Gomez while she was detained at the station, asking, among other questions, whether Mr. Raby had said anything to Ms. Gomez about having committed the crime. (Wilkin ¶¶ 27-28). She told him no, and Sergeant Wendell told Ms. Gomez in unequivocal terms that she could be arrested and her baby placed in foster care. (*Id.*)

54 Raby ¶ 37.

55 Raby ¶ 38.

56 *Id.*; Homicide Report at 2.048 ("The statement is taken in a narrative, question/answer format and reduced to a typed statement by Sergeant Allen.")

57 Raby ¶ 41.

feeling increasingly agitated, as Sergeant Allen could observe by his restless body movements.[59] At one point, in answer to Mr. Raby's question about what police would do with Ms. Gomez, Sergeant Allen stated that she had broken the law by failing to tell the police where Mr. Raby was, and "could get in some trouble."[60]

The interrogation continued, and Sergeant Allen pieced together a statement for Mr. Raby to sign.[61] This purported confession does not include any statement that Mr. Raby was of sound mind or free from the influence of mind-altering substances, which he was not.[62] Only afterwards was Mr. Raby allowed to see Ms. Gomez and her child, for three minutes, before he was taken to be booked.[63] Police records show that Mr. Raby was allowed to telephone Ms. Gomez after booking, in order to confirm that she really had been taken home.[64]

Because Sergeant Allen would not let Mr. Raby see Merry Alice before he finished giving his statement, Mr. Raby had a strong incentive to tell Sergeant Allen whatever he wanted to hear. Ms. Gomez had never been in trouble with the law, and Mr. Raby thought that if she were booked she would be strip-searched and subjected to other humiliations.[65] He did not want to be the cause for her experiencing that, and could not bear to think of what she would think of him in that case.[66] Furthermore, Mr. Raby believed that Chris would be put in State custody; having been a Ward of the State as a child himself, Mr. Raby could not stand the thought of causing Chris the same fate.[67] Mr. Raby was encouraged to believe that Ms. Gomez was in

---

58 *Id.*
59 Raby ¶ 38.
60 *Id.*
61 *See* Custodial Statement.
62 *See id.*
63 Raby ¶ 41; Wilkin ¶ 31.
64 Homicide Report at 2.049.
65 Raby ¶ 39.
66 *Id.*
67 *See* Raby ¶ 40.

danger of being charged, and reacted by being highly protective of her and her child. Because trial counsel did not interview Merry Alice, much less call her at the suppression hearing, trial counsel failed to develop this important available evidence about Mr. Raby's susceptibility to coercion.

Notably, while Allen testified at the suppression hearing that he allowed Mr. Raby to see Merry Alice *before* he took down the statement,[68] Allen's credibility has since been called into question by a Texas appellate court, which found that Allen had improperly obtained a statement from a juvenile suspect after denying her access to her family.[69] In *Jeffley v. State*, the court described Allen's interrogation method, which closely resembles Allen's tactics in this case:

> [Allen] never made arrangements for [the suspect] to return home, *as promised.* Instead, the officer, who believed she had lied in her first statement, confronted appellant for three hours about discrepancies in her statements until she gave a statement inculpating herself in the murder.[70]

Moreover, while the coercive circumstances of the interrogation are certainly important, they paint only a part of the entire picture. On the flip side of coercion is *susceptibility* to coercion. Without establishing the entire context of the interrogation, the mere fact that Mr. Raby's girlfriend was in the police station is likely to leave any court thinking, "yes, but is that sufficient to overcome a suspect's will and cause him to confess a capital murder he didn't commit?" But viewed in light of the entire context—Mr. Raby's intoxicated blackout on the evening of the crime, Mr. Raby's natural tendency to view himself as guilty, the strength of Mr. Raby's emotional attachment to Merry Alice and her son, the fact that Mr. Raby was high on codeine during the interrogation, the fact that Mr. Raby thought he would serve ten years in prison if he confessed, the fact that he thought he'd get in just as much trouble if he remained

---

[68] S.F. 25:41.

silent, not to mention the fact that he had requested a lawyer—the case for suppression becomes far more compelling. The fact is that people sometimes *do* confess to crimes they did not commit, even capital crimes, and trial counsel's failure to explain why this case fits the profile of a false confession was unreasonably incompetent.

Finally, a statement should be suppressed if it was given involuntarily, which can occur *either* when the police obtain the statement through coercive means, *or* when a suspect's waiver of his rights is not knowing and intelligent.[71] In this case, regardless of the coercive tactics used by police, Mr. Raby's waiver of his Fifth and Sixth Amendment rights was not knowing and intelligent. If trial counsel had not focused solely on coercion, but instead had developed and presented the compelling case of unintelligent waiver, there is a reasonable probability that the statement would have been suppressed. In this case, in the absence of Mr. Raby's statement, the State had absolutely no evidence to prove that Mr. Raby even entered the Franklin house, much less that he killed Ms. Franklin. Mr. Raby could not have been convicted on the State's evidence that Mr. Raby was in the neighborhood on the evening of the crime,[72] and that a witness saw a man who compared favorably in build to Mr. Raby—but that the witness could not identify as Mr. Raby—jumping the fence from the direction of Ms. Franklin's home later that night.[73] Accordingly, Mr. Raby was prejudiced by his trial counsel's unreasonable failure to present the compelling case for suppression of Mr. Raby's coerced and involuntary statement.

---

69 *See Jeffley v. State*, 38 S.W.3d 847, 857 (Tex. App.—Hous. [14th Dist.] 2001, pet. ref'd).
70 *Id* (emphasis added).
71 *Moran v. Burbine*, 106 S. Ct. 1135, 1140-41 (1986); *see also* Frumkin ¶ 10.
72 S.F. 28:304-05.
73 S.F. 28:314-19.

B. Mr. Raby's Trial Counsel Abandoned Their Advocacy Role at the Guilt-Innocence Phase of Trial, Resulting in the Constructive Denial of Counsel

Trial counsel made no opening statement and presented no evidence at the guilt-innocence phase of trial.[74] Despite the fact that Mr. Raby's statement was the only piece of evidence tying Mr. Raby to the crime, and that there was a compelling story to explain why Mr. Raby gave that statement and why it wasn't true, trial counsel made no attempt to show that the statement was involuntarily given or that Mr. Raby did not remember committing the crime. Even when the State called Merry Alice Gomez to the stand to establish that Mr. Raby had fled the police early in their investigation, trial counsel did not ask Ms. Gomez any questions to establish the depth of her emotional attachment to Mr. Raby, or what happened at the police station, or, in fact, any questions at all.[75] Trial counsel did not call an expert psychologist to explain to the jury why suspects sometimes give false statements, and why a defendant with a borderline personality disorder might believe he committed a crime that he couldn't remember, or confess to a crime to protect a girlfriend.[76] Trial counsel did not even question Sergeant Allen to raise any doubt about the circumstances of the interrogation. Quite the opposite, trial counsel simply invited Sergeant Allen to reiterate the State's case:

> Q. Mr. Raby spoke to you about the incident? He spoke to you ***freely*** about the incident after speaking to him and indicating his desire to speak to you about it?
>
> A. Yes, sir, he did.[77]

In short, trial counsel did nothing to challenge the validity of the statement. Instead, they *conceded* that Mr. Raby had committed murder. Indeed, at closing arguments, trial counsel

---

74 S.F. 27:12; 29:416.

75 S.F. 28:328.

76 Without an expert, there was no one to explain how false confessions can occur. *See* Frumkin ¶ 20.

77 S.F. 28:255 (emphasis added).

never once even invited the jury to question whether the statement was given voluntarily, but instead *expressly conceded* no less than seven times that Mr. Raby committed the murder. Specifically, trial counsel told the jury:

> We know that Ms. Franklin was killed and Mr. Raby admitted killing her. We know that.[78]
>
> * * *
>
> [T]he state has proved there was a killing, they have proved that Mr. Raby committed this killing . . . .[79]
>
> * * *
>
> Well, we have had what is it, four days of testimony? Some of it interesting, some of it not. Some of it revealing, some not so. But what we do have, of course, is a confession.[80]
>
> * * *
>
> [Mr. Raby] signs a document that indicates that he's going to make a confession. He and Officer Allen get along and Charles wants to get this off his chest, and then he makes a confession.[81]
>
> * * *
>
> [Y]ou can conclude only one thing, that . . . Charles Raby made a confession. He made a confession about a very horrible thing he had done. He made a confession about doing something to a lady he had known almost all his life.[82]
>
> * * *
>
> And if you do that, you look at all the evidence that's been given to you and make those reasonable conclusions that you have, because all of you are real people of common sense, and you can conclude only one thing, that Charles made a confession, confessed to a horrible thing he did on the 16th of October.[83]
>
> * * *

---

78 S.F. 30:442.
79 S.F. 30:444.
80 S.F. 30:445.
81 S.F. 30:458.
82 S.F. 30:460.
83 S.F. 30:461. Actually, the crime occurred on October 15, 1992.

> We have the evidence, and I know you will make a conclusion and I think you will conclude with us is that the truth is that ***Charles Raby killed Mrs. Franklin and nothing more.***[84]

In *Haynes v. Cain*, the Fifth Circuit recently granted a writ of habeas corpus for a defendant whose lawyers told the jury, "the evidence will show that Brandon Haynes ***is guilty of second degree murder. Nothing more.***"[85] The court held that because Haynes' trial lawyers expressly conceded that Haynes committed the underlying offense of second degree murder, and did not contest the State's evidence, they failed to subject the prosecution's evidence to meaningful adversarial testing, and worked a constructive denial of counsel.[86] *Haynes* is indistinguishable from this case. As in *Haynes*, trial counsel conceded that Mr. Raby murdered Ms. Franklin, despite his plea of not guilty and his desire to maintain his innocence. Trial counsel's abandonment of their role as advocates for Mr. Raby constructively denied him the assistance of counsel.

As is demonstrated by *Haynes*, trial counsel's total abandonment of advocacy cannot be dismissed as strategy. To be sure, trial counsel's decision to concede Mr. Raby's guilt of the murder may have been a conscious one, in order to focus on whether Mr. Raby had committed the predicate felony necessary for capital murder. Any such "strategy" was patently unreasonable, however, because it was based on a misunderstanding of the law, which resulted in conceding the predicate felony as well as the murder.[87] This supposed "strategy" was based on a misunderstanding of the law because, judging from trial counsel's obsession with showing that Mr. Raby entered through the door rather than through a window, trial counsel obviously

---

84 S.F. 30:461-62 (emphasis added).

85 *Haynes v. Cain*, 272 F.3d 757, 759 (5th Cir. 2001).

86 *Id.* at 761-65.

87 It is well-established that an attorney's decision is not entitled to deference as a "strategy" when it is based on an unreasonable misunderstanding of the law. *See, e.g., Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999).

believed that the State had to prove that Mr. Raby *broke into* the house in order to prove burglary.[88] A breaking-and-entering is not required to establish burglary,[89] however, and thus Mr. Raby's statement to police that he walked in the front door and then murdered Ms. Franklin established every element of burglary except consent. Because trial counsel also did not contest consent—the one element of burglary that was not established by the statement itself—trial counsel effectively conceded the entire charge of capital murder by conceding the validity of the statement.[90] This case thus is indistinguishable from *Haynes*, in which trial counsel conceded second-degree felony murder, but in so doing conceded the very felonies from which the state asked the jury to infer the intent element of first degree murder.[91] As in *Haynes*, a patently unreasonable choice to concede virtually the entire case is not insulated from review on the grounds that it may have been a conscious "strategy."[92]

The only way that trial counsel's decision not to contest the statement possibly could have been reasonable trial strategy is if counsel reasonably believed that capital murder in the course of a burglary required some substantial element that the statement did not provide.[93] This arguably was a reasonable belief because the statement did not prove that Mr. Raby committed an *independent* burglary, e.g., that he entered the house with intent to commit a felony, or

---

88 S.F. 27:148-56 (questioning Eric Benge extensively about the alleged entry window); 30:438 (stating in closing argument that there was no evidence of forced entry to prove burglary); 28:232-240 (questioning Sergeant Allen extensively about the alleged entry window); 30:440 (stating in closing, "[o]n the burglary, if he would have broke in, there would have been some type of forced entry . . . .The door was probably open and he just went in. There was no forced entry"); 30:452 (stating in closing, "[t]here is no entry through the window. There's no such testimony about entry through the window. So what do we have? We go back to the 19th of October, 1992, when Charles made a confession: entry through the door").

89 *See, e.g., Clark v. State*, 667 S.W.2d 906, 908 (Tex. App.—Dallas, 1984, writ ref'd).

90 Although Mr. Raby contends that the State nonetheless failed to prove that he did ***not*** have consent, *see* section V.C.2, *infra*, trial counsel's decision to concede all the elements of capital murder except consent could not be reasonable strategy when they did not even argue consent to the jury.

91 *Haynes*, 272 F.3d at 764.

92 *Id.* at 763.

93 *See, e.g., Moore v. Johnson*, 194 F.3d 586, 616 (5th Cir. 1999).

committed a felony other than the murder while in the house. As discussed more fully in section VII, *infra*, it would have been entirely proper to object to the charge permitting Mr. Raby to be convicted of capital murder without proof of an independent felony because the Texas Court of Criminal Appeals did not hold until 1993, ***after*** the crime in this case, that capital murder predicated on a felony does not require proof of an *independent* felony. (As discussed in section VII, *infra*, the court's retroactive application of this novel interpretation of the ambiguous capital murder statute quite clearly violates due process fair warning principles.) Neither trial counsel nor appellate counsel *did* object to this interpretation of the capital murder statute, however—just as they did not argue that Mr. Raby had consent to enter the house—and thus their failure to challenge the validity of the statement cannot be viewed as a reasonable trial strategy. (In addition, both trial counsel and appellate counsel were ineffective for their failure to raise the fair warning claim.)

Trial counsel abdicated their role as advocates for Mr. Raby, by conceding nearly every element of capital murder (at least, as retroactively interpreted by the Court of Criminal Appeals), and by failing to challenge the remaining element of consent. Under *Haynes*, trial counsel's complete failure to subject the State's case to the "crucible of meaningful adversarial testing" is a constructive denial of counsel.[94] Prejudice must be presumed, and Mr. Raby's capital murder conviction must be reversed.

Even if prejudice is not presumed, Mr. Raby's conviction still must be reversed because he was prejudiced by trial counsel's unreasonable failure to challenge the validity of the statement and contest consent before the jury. The statement was obtained under highly coercive circumstances, in which Mr. Raby did not understand the consequences of his decision. Given

the vagueness of the statement, and the fact that it deviates materially from the evidence of the crime scene introduced at trial, the circumstances of the statement likely would have caused the jury to question not just the voluntariness of the statement, but its truthfulness. Given that there was no other significant evidence of Mr. Raby's guilt, *see* section I.A, *supra*, there is a reasonable probability that but for this deficient conduct by trial counsel, at least one juror would have entertained a reasonable doubt.

C. Mr. Raby's Trial Counsel Made Numerous, Nonstrategic Errors at the Guilt-Innocence Phase of Trial

In addition to choosing an unreasonable strategy not to challenge the statement, thus conceding nearly every element of capital murder, trial counsel made numerous nonstrategic errors at trial. These nonstrategic errors fall into the following categories: (1) failure to cross-examine State witnesses effectively on important issues; (2) failure to obtain experts to contradict State witnesses on important issues; (3) questioning of witnesses that served no purpose other than to reinforce the State's case or inflame the jury; (4) failure to develop and present evidence of alternative suspects; (5) failure to object to mischaracterizations of testimony; (6) focusing on irrelevant issues; (7) failure to make relevant points at closing argument; and (8) most strikingly, failure to object to the State's highly improper and prejudicial comment during closing argument on Mr. Raby's post-arrest silence and failure to testify.

First, trial counsel failed to cross-examine State witnesses effectively on important issues, including:

- trial counsel's failure to cross-examine the medical examiner to clarify ambiguities in his testimony regarding whether the two-inch pocketknife that was seen in Mr. Raby's possession could have caused the four-inch wounds to Ms. Franklin. The medical examiner testified

---

94 *Haynes*, 272 F.3d at 761-65.

that a two-inch blade can cause four-inch wounds by depressing the body, but noted that he found no hiltmarks and that a hiltmark "is a clue in the autopsy table to tell us that that blade came all the way down...."[95] The medical examiner's testimony was ambiguous, however, about whether a two-inch blade likely could have caused a four-inch wound without leaving hiltmarks, yet trial counsel asked no questions about this critical issue;

- trial counsel's failure to cross-examine the medical examiner to establish and emphasize the absence of any bruises on Ms. Franklin's body that would be consistent with attempted sexual assault, as well as to demonstrate that Ms. Franklin suffered from *senile purpura*, meaning that she bruised easily;[96]

- trial counsel's failure to cross-examine witnesses who testified that Ms. Franklin was found "nude from the waist down"[97] wearing only a "shirt," or "blouse,"[98] with the medical examiner's report which stated that she was wearing a *gown*.[99] Because the only evidence even arguably suggesting a sexual assault was the fact that Ms. Franklin was found "nude from the waist down,"[100] evidence that Ms. Franklin was apparently dressed for bed, in a gown that could have ridden up during the attack, was highly probative on a critical issue[101];

- trial counsel's failure to call or cross-examine police officers who worked the crime scene about other garments of clothing that were strewn about the room where Ms. Franklin was found,[102] in addition to the pants and panties that the State contended were removed from Ms. Franklin in the attack;

- trial counsel's failure to cross-examine the "elastic expert" who testified that panties that police officers found near the crime scene appeared to be "torn and not cut,"[103] to establish that it was possible that the elastic in the panties had simply worn out or had been severed at another time;

---

95 S.F. 27:35-36.

96 Aff. Paul B. Radelat, M.D. ("Radelat") ¶ 11, Ex. 5.

97 *See* S.F. 28:188 (Sergeant Allen)

98 *See* S.F. 27:131 (Eric Benge)

99 Office of the Medical Examiner of Harris County Autopsy Report of Edna Mae Franklin, Investigator's Report appendix, Ex. 49.

100 *See* section VIA, infra.

101 In fact, sexual assault could not be scientifically inferred from the state of Mrs. Franklin's dress. (Radelat ¶ 13.)

102 *See* section VIA, infra.

103 S.F. 29:391-93.

- trial counsel's failure to cross-examine Sergeant Allen to challenge whether a stain on panties found at the scene was fresh, and actually blood; and

- trial counsel's failure to cross-examine Sergeant Allen to establish that Mr. Raby had no cuts or scratches on his arms when he was arrested;[104] and

- trial counsel's failure to cross-examine Sergeant Allen to establish the absence of blood on Mr. Raby's jeans when he was arrested, even though Mr. Raby stated in his statement that he was wearing the same jeans on the day of the crime.[105]

Second, trial counsel failed to present expert witnesses to contradict State witnesses on important issues, including:

- expert pathological evidence to show that a two-inch to three-inch knife is not likely to have made four-inch wounds, especially not without leaving hiltmarks;[106] and

- expert criminalistics evidence to show that an attacker in a stabbing such as this one: (a) likely would have gotten scratches or cuts on his hands, either from struggling with the victim or after the knife became slippery with blood;[107] and (b) likely would have gotten blood on his clothes.[108]

- expert criminalistics evidence to show that the stain on the panties collected from the crime scene, if indeed it was blood, was not fresh at the time of collection.[109]

Third, the bulk of trial counsel's examination of State witnesses served no purpose other than to lead the witnesses into reiterating the State's case. Although it is not possible to include every instance of this practice in this pleading, good examples include:

---

104 Mrs. Franklin's attacker probably received bruises or scratches on his or her arms during the attack. (Radelat ¶ 16.)

105 *See* Custodial Statement at 3.

106 In fact, the knife used to attack Mrs. Franklin was probably three to four inches in length. (Radelat ¶ 16.)

107 Aff. Elizabeth Johnson, Ph.D. ("Johnson") ¶ 7; Radelat ¶ 16.

108 Johnson ¶ 7.

109 It is the observation of undersigned counsel that the stain was an old one, but this cannot be confirmed until access to the evidence is provided to Dr. Johnson, Mr. Raby's criminalistics expert. The "blood stain" was not challenged on cross-examination of Sergeant Allen, who testified to it. (S.F. 28:195.)

- the vast majority of trial counsel's cross-examination of the medical examiner simply walked the witness through all the gruesome and inflammatory injuries to Ms. Franklin, without even attempting to make a point relevant to the defense;[110] and

- in questioning Eric Benge, trial counsel emphasized—indeed, he even got on the floor and demonstrated—that Benge allegedly found Ms. Franklin in a "spread eagle" position. [111] This questioning had no conceivable purpose other than to inflame the jury on the sexual assault allegation.

Fourth, trial counsel failed to develop and present evidence to implicate alternative suspects in the crime, and thus to generate reasonable doubts in the minds of the jurors. For example, Donna Perras, Eric Benge's girlfriend, would have testified that she observed that drugs were likely sold out of the Franklin house, and that Benge had told her on the night of the murder that he suspected the killer was someone to whom he owed money.[112] In addition, trial counsel should have investigated Edward Bangs' potential involvement in the crime. Benge named Bangs as a possible suspect on the night of the crime.[113] Bangs was living at the house at the time,[114] and was painting Mrs. Franklin's house at the time,[115] in exchange for which he expected money which he may or not have been paid by the evening of the crime. Significantly, Bangs was arrested for assaulting another elderly woman less than a year after Ms. Franklin's murder.[116]

---

110 S.F. 27:44-56.

111 S.F. 27:141-42.

112 Aff. Donna Lynn Perras ("Perras") ¶¶ 3, 8, Ex. 15.

113 Homicide Report at 2.021. Benge told police that Bangs was a drug addict and in the past had stolen Benge's shotgun and paycheck. Benge pointed out that Bangs, like Raby, knew about a broken pane in the southeast bedroom window. (*Id.*)

114 Benge and Rose both reported that Bangs had recently been in the house. Homicide Report at 2.017. Someone was likely sleeping on the couch, as crime scene photographs and descriptions show. (See Homicide Report at 2.025; Crime scene photo, State Ex. 42A, Ex. 48.)

115 Homicide Report at 2.017.

116 Edward Bangs criminal record, Ex. 47. In fact, police officers for a time put a hold on Bangs' case when he was arrested for another crime soon after the murder. (*Id.*).

Fifth, trial counsel failed repeatedly to object to mischaracterizations of important evidence, unqualified expert opinions, and conclusions of law. Instances include:

- failure to object to Sergeant Allen's testimony that Ms. Franklin's "pants had been turned inside out and pulled off the body and discarded a couple of feet from the body. Her panties had been ripped off and discarded . . . . [W]hen someone has been disrobed in this manner, the pants turned inside out, that would be indicative of an attempted sexual assault;"[117]

- failure to object to Sergeant Allen opining on (and misstating) what constitutes a burglary and robbery;[118] and

- failure to object to Sergeant Allen opining that he "knew [Ms. Franklin's injuries] occurred with a small pocketknife" and could have been inflicted with a two-inch blade.[119]

Sixth, trial counsel focused on irrelevant issues. Specifically, trial counsel focused obsessively on whether Mr. Raby had entered through a window, suggesting instead that he entered through the door.[120] It is irrelevant whether Mr. Raby entered the house through the window (as the State alleged) or through the front door (as Mr. Raby stated in his statement to police). Nonconsensual entry is all that is required for burglary; *forced entry* is not required.[121] Furthermore, the evidence at trial demonstrated that Mr. Raby had been permitted to enter the house through a window on a number of occasions,[122] thus entry through the window was at least as consistent with consent, if not more so, than entry through the door.

Seventh, trial counsel failed utterly to emphasize critical, relevant facts to the jury in closing arguments, including:

---

117 S.F. 28:188-89.
118 S.F. 28:189.
119 S.F. 28:264.
120 *See* notes 87-88 and accompanying text, *supra*.
121 *See, e.g., Clark*, 667 S.W.2d at 908.
122 S.F. 27:65-66 (Benge and Rose allowed Mr. Raby to enter through the window on "quite a few occasions").

- the fact that Mr. Raby was a friend of the grandsons and had been allowed to sneak into the house on numerous occasions,[123] and thus may have had consent to enter the house;

- the fact that Ms. Franklin's grandsons, and their friends, used and sold drugs in the Franklin house, and thus there were many unsavory characters around the house;[124]

- the fact that a small restaurant waiter's tray and paring knife (probable drug paraphernalia) were found where they did not belong in Eric Benge's room;[125]

- the fact that the housepainter, Edward Bangs, knew where Eric Benge kept his tools (such as Benge's screwdriver, found in the alleged entry window);[126]

- the fact that Bangs had a reputation for violence, and unpredictable violent behavior;[127]

- the fact that the eyewitness who observed a man hopping a fence from the direction of the Franklin house testified that the man was around 6' tall, whereas Mr. Raby is only 5'6" tall.[128] Only under extensive leading by the State did the witness change his testimony to say the man he saw "compared favorably" in build to Mr. Raby;[129] and

- the fact that Edward Bangs was over six feet tall,[130] more closely matching the original description in the testimony of a neighbor who saw a man hopping the fence from the direction of the Franklin house on the night of the crime.

Eighth, and perhaps most significantly, trial counsel themselves stood silent while counsel for the State, in his closing argument, made highly improper and prejudicial comments on Mr. Raby's post-arrest silence as to the predicate felonies and his failure to testify at trial. As discussed above, Mr. Raby's statement to the police, on which the State's case relied heavily, did

---

123 *Id.*
124 Perras ¶ 3.
125 S.F. 28:247.
126 S.F. 27:152-53.
127 *See* notes 113-16 and accompanying text, *supra.*
128 S.F. 28:316-18; Homicide Report at p. 2.033.
129 S.F. 28:316-18.
130 Homicide Report at p. 2.033.

not support the State's argument that Mr. Raby had broken into Ms. Franklin's house and attempted to sexually assault and rob her. In closing argument, counsel for the State attempted to neutralize and possibly "flip" this fatal flaw in his capital murder case, saying to the jury early in his argument:

> [I]s it any wonder that a person who would attack a helpless, fragile, arthritic little old lady and stab her as many times as he did, brutalize her, slit her throat, ripped her clothes off, ripped her panties, anyone who would do something so cowardly, *is it any wonder that when he runs, that* ***he is silent after he runs***? He doesn't go to the police. He isn't filled with remorse. When he gets the call that the police are coming, when he gets that call from his mother, he flees, indicating guilty knowledge. *Is it any wonder that that type of coward* ***would not fess up to all the details of his statement to the police***? Of course not.[131]

The State's repeated emphasis on Mr. Raby's silence, whether the comments are interpreted as comments on Mr. Raby's silence on the predicate felonies during his statement to police, Mr. Raby's failure to testify at trial, or both (the only reasonable interpretations), are plainly meant to equate Mr. Raby's silence and his guilt. There can be no question that defense counsel and the jury heard the State argue that someone who would kill Ms. Franklin is the kind of person that would stay silent afterwards, and that the kind of person that would run from police ("indicating guilty knowledge") is someone who would not confess to "all the details" of his crime. Yet trial counsel failed to object, much less request a mistrial, in response to any of the repeated references to Mr. Raby's silence, each one of which constitutes such serious prosecutorial misconduct that it would independently support a mistrial.[132] (*See* section IX, infra.) These repeated failures cannot be dismissed as strategic choices.[133]

---

131 S.F. 30:462-63 (emphasis added).

132 *See United States v. Edwards*, 576 F.2d 1152, 1155 (5th Cir. 1978) ("The prosecutor by his comments brought the defendant's silence upon arrest and at trial to the attention of the jury, apparently intending to shore up his less-than-overwhelming evidence by leading the jury to make inferences of guilt from defendant's silence. We must therefore reverse. In so doing we note that the comment upon silence of the accused is a crooked knife and one

D. The Overall Performance of Mr. Raby's Trial Counsel at the Guilt-Innocence Phase Fell Below Constitutionally Permissible Standards and Prejudiced Mr. Raby

The adequacy of trial counsel's performance, and the prejudice flowing therefrom, is not to be judged on an error by error basis, but on the totality of the evidence.[134] In this case, the complete failure of trial counsel to contest the voluntariness of the statement, combined with trial counsel's numerous, nonstrategic errors, including their failure to object to the State's comments on Mr. Raby's silence, resulted in representation that fell below constitutionally reasonable standards of adequacy. In essence, trial counsel presented no defense at all, which cannot be reasonable. Because Mr. Raby's custodial statement was the only evidence linking Mr. Raby to the crime, there was a compelling case why the statement was both involuntary and inaccurate, and there was evidence to suggest other possible suspects, there was at least a reasonable probability that but for trial counsel's deficiencies the jury would have entertained a reasonable doubt about Mr. Raby's guilt.

II. MR. RABY WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AT THE PUNISHMENT PHASE OF HIS TRIAL IN VIOLATION OF THE SIXTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION

Mr. Raby's trial counsel put up no opposition to the State's evidence at the guilt-innocence phase, and presented no evidence themselves, in the apparent belief that resisting conviction was futile and that their energies should be concentrated towards Mr. Raby's presumably inevitable sentencing hearing. Yet, at the punishment phase, trial counsel simply

---

likely to turn in the prosecutor's hand. The circumstances under which it will not occasion a reversal are few and discrete."); *see also Gravley v. Mills*, 87 F.3d 779, 785 (6th Cir. 1996) (reversing conviction based on ineffective assistance of counsel where "[t]he most compelling evidence of counsel's incompetence was her failure to object to very serious instances of prosecutorial misconduct," including prosecutor's comments to jury on defendant's silence); *Freeman v. Class*, 95 F.3d 639, 644 (8th Cir. 1996) ("[D]efense counsel's inaction allowed the jury to equate [defendant's] silence with guilt. There was no reasonable tactical basis not to object to these comments. On the contrary, a motion for a mistrial would have been appropriate and should have been made." (citations omitted)).

went through the motions, and failed to put on available, compelling cases on both special issues. On the "future dangerousness" special issue, trial counsel failed to rebut the State's evidence of Mr. Raby's prior bad acts with compelling evidence that Mr. Raby likely could adjust well to the prison context, and instead put on an alleged expert psychologist who exaggerated the risk that Mr. Raby would commit future violent acts. On the mitigation special issue, although trial counsel did call several witnesses who described aspects of Mr. Raby's life, trial counsel failed to develop substantial mitigating testimony, and terribly mishandled the little evidence they did produce. Combined with trial counsel's failure to generate any doubt about Mr. Raby's guilt at the guilt-innocence phase, there is a reasonable probability that, but for trial counsel's deficient conduct, the outcome of the punishment phase would have been different.

A. Mr. Raby's Trial Counsel Failed to Develop and Present Available Evidence to Contest the Probability That Mr. Raby Would Commit Acts of Criminal Violence, and Instead Presented an Unreliable Expert Who *Exaggerated* the Risk That Mr. Raby Would Commit Acts of Criminal Violence if Sentenced to Life in Prison

In order to return a sentence of death, the jury was required to find beyond a reasonable doubt that there was a probability that Mr. Raby would commit criminal acts of violence in the future that would constitute a continuing threat to society.[135] The State presented evidence that Mr. Raby had engaged in violent behavior in his past, and asked the jury to conclude that he would continue to commit criminal acts of violence in the future. Trial counsel did almost nothing to rebut the State's case, except to present testimony from a supposed expert, Walter Y. Quijano, Ph.D. The "future dangerousness" case that trial counsel presented was unreasonably inadequate, however, for two related reasons. *First*, trial counsel did not present the available,

---

133 *See, e.g., Freeman*, 95 F.3d at 644.
134 *See Strickland*, 104 S. Ct. at 2066, 2069.
135 Tex. Code Crim. Proc. § 37.071(2)(b)(1).

powerful evidence that the probability that Mr. Raby would commit criminal acts of violence if sentenced to life in prison was negligible. *Second*, the testimony of Dr. Quijano was methodologically unreliable, and as a result tended to *exaggerate* the risk that Mr. Raby would commit criminal acts of violence if sentenced to life in prison.

1. Trial Counsel Failed to Present Critical Expert Testimony to Assist the Jury in Making a Reliable Prediction of Mr. Raby's Risk of Future Acts of Criminal Violence

To make a reliable assessment of the risk that a defendant will commit criminally violent acts in the future, a jury needs accurate statistical information and guidance in assessing that risk.[136] It is well-established that uninformed jurors, in the absence of such information and guidance, frequently base their decisions on a number of faulty concepts that result in substantially over-estimating the likelihood of future violence.[137] In short, uninformed jurors are much more likely simply to guess that a defendant will commit violent acts in the future simply because he has in the past, and to be inflamed by passion and prejudice.[138]

The first important piece of information that should have been presented to the jury by an expert is the importance of base rates to risk assessment.[139] Group statistical information provides one of the most reliable bases for long-range violence risk assessment.[140] Statistical evidence shows that prisons in general, and capital murderers in particular, are far less violent than most people assume, and can be managed effectively in administrative segregation.[141]

---

136 *See* Aff. Mark D. Cunningham, Risk Assessment ("Cunningham Risk Assess.") ¶ 12, Ex. 1.

137 *Id.*

138 *Id.*

139 *Id.* at ¶ 13.

140 *Id.*

141 For example, base rate data regarding capital offenders and their disciplinary outcome in the general prison population reveals that fewer than 10% commit chronic violent rule infractions, and that those inmates can be managed in administrative segregation. Multiple studies in varying jurisdictions and across varying decades indicate that over two-thirds of commuted capital inmates never have a disciplinary write-up for assaultive conduct. Base rate data thus demonstrates probabilities that are well below the "more likely than not" probability standard. Group

Moreover, trial counsel should have challenged the State's assertion, and Dr. Quijano's agreement, that there is "a great deal of violence in prison," and that "folks are sometimes killed."[142] That testimony would almost certainly lead the jury to a conclusion that homicide in the Texas Department of Criminal Justice ("TDCJ") is a routine event and, by implication, a significant aspect of any violence risk presented by Mr. Raby. In fact, homicide and assault are relatively rare in prison—less common than outside prison.[143] Had the jury been advised of the actual rates of homicide in TDCJ, their perceptions of the likelihood that Mr. Raby would commit violent acts in prison probably would have been quite different.

Second, the jury should have been informed about the central importance of context in making a reliable assessment of the likelihood of future violence. Quite simply, the likelihood of violence is always a function of context.[144] Because prison is a different context than the free society, the defendant may not repeat past violent acts in prison.[145] Most of the factors identified by Dr. Quijano as predictive of violence (personality characteristics, drug and alcohol abuse, gender, family instability, work instability, weapons use history, recidivism) apply only to the open community, and are not predictive of violence in prison.[146] Trial counsel presented no testimony regarding the primacy of context in making a violence risk assessment or to

---

statistical information also would have countered the State's assertion that Mr. Raby's history of prior violence or re-offending put him at a disproportionate risk of prison violence; such histories are common in TDCJ, yet rates of prison violence and parole recidivism among capital offenders are low. *Id.* at ¶¶ 47-67.

142 *Id.* at ¶¶ 14, 82.

143 *Id.* At the time of Mr. Raby's capital sentencing trial in June of 1994, it had been *12 years* since an inmate-on-staff homicide occurred in TDCJ. During the five years prior to Mr. Raby's 1994 punishment phase trial, the inmate-on-inmate homicide rate in TDCJ was 3.72 homicides per 100,000 inmates annually. For comparison purposes, the murder rate *in the community* in Texas was 11.9 per 100,000 persons annually in 1993, and 37 per 100,000 persons annually in Dallas in 1992. While assault in prison is more common than homicide, this offense still is relatively rare. Fewer than 1.3% of inmates were written up for assault on staff or other inmates in 1993. *Id.* at ¶¶ 83-90.

144 *Id.* at ¶¶ 15, 72-91.

145 *Id.*

146 *Id.*

differentiate Mr. Raby's likelihood of violence in prison from the capital offense or other violent acts that he may have committed in the community.

Third, trial counsel should have educated the jury about misconceptions and "illusory correlations," so that the jury would not base its risk assessment on faulty premises. One faulty premise, which the State argued and with which Dr. Quijano inexplicably agreed, is that the severity of the offense is a good predictor of criminal violence in prison.[147] To the contrary, prison violence simply does not predictably follow from pre-confinement violence or the capital offense of conviction.[148] Also, Mr. Raby's supposed "attitude problem" toward correctional staff, as it was described by the State at closing argument,[149] does not correlate with risk of violence in prison.[150] Although hostility to staff, manipulation, exploitation, irresponsibility, denial, and the like may be unlikable personality traits, they are nearly ubiquitous among prison inmates, and are not predictive of serious violence in prison.[151] Finally, the State's assertion that an inmate facing a capital life sentence likely would be violent because he has "nothing to lose" is an illusory correlation. Again, while having an air of plausibility, the reality is that the increasing length of sentence appears actually to *reduce* the risk of violence in prison.[152]

Fourth, and perhaps most importantly, trial counsel should have educated the jury that a pattern of violence in the community is not predictive of violence in prison. The best predictive factor in predicting risk of criminal violence in prison is prior patterns of behavior in TDCJ

---

147 *Id.* at ¶¶ 16, 92-93.

148 *Id.* This fact is not surprising when the makeup of a state prison population is considered. First, over 45% of prison inmates have been convicted of a serious violent felony, and 70% have had a prior adult prison term – implicating histories of community violence, violent offenses of conviction, and offense deliberation. When the rate of these characteristics is sufficiently high, they cease to differentiate which particular inmates will be violent. *Id.* at ¶¶ 16, 92-03, 95.

149 S.F. 37:1050-51.

150 Cunningham Risk Assess. ¶¶ 16, 97.

151 *Id.*

152 *Id.* at ¶¶ 16, 98. This may be explained by the fact that long-term inmates adopt a perspective regarding

incarceration.[153] Trial counsel essentially ignored significant evidence that Mr. Raby's prior record in TDCJ custody reflected only minor infractions, was characterized by extensive compliance, and did not demonstrate a pattern of serious prison violence.[154] Until his confinement in the Harris County Jail prior to his capital murder trial, Mr. Raby had not displayed a pattern of serious violence or staff assault in juvenile custody, prior county jail confinement, or TDCJ custody.[155] Mr. Raby's history of custodial adjustment therefore was particularly important to present to the jury, because it shed light on the controversy regarding whether Mr. Raby's violent acts in the Harris County jail resulted from harassment or provocation related to the capital murder trial itself.

Finally, trial counsel should have presented a risk assessment from a competent expert that started with applicable base rates, and then incorporated the particular characteristics of Mr. Raby in light of differences in context.[156] Capital offenders have a relatively low base rate of serious violence when confined in the general prison population.[157] Several factors particular to Mr. Raby would be expected to reduce his risk of serious violence across a capital life prison term in TDCJ below applicable base rates, including his history of no serious violence in multiple, extended confinements in juvenile facilities and prior TDCJ incarceration, and the

---

doing time that promotes adaptation, and have more time to adapt. *Id.*

153 *Id.* at ¶¶ 17, 123.

154 *Id.* at ¶¶ 17, 124-126.

155 *Id.*

156 *Id.* at ¶¶ 18, 135-138.

157 *Id.* 70%-80% of capital inmates have no institutional violence after 15 years. This is consistent with research regarding the lower rates of institutional misconduct of other long-term prisoners. Approximately 90% of non-death row capital offenders in TDCJ ultimately function as trustees, which is evidence that correctional staff do not regard them as an eminent or disproportionate risk of violence to inmates or staff. The lifetime actuarial likelihood of a capital inmate killing another inmate is estimated to be 1% or less. In 1994, the base likelihood that Mr. Raby would kill a correctional officer was approximately 1 chance in a million during any given year, with that likelihood subsequently falling with age. *Id.*

substance dependence/intoxication context of Mr. Raby's capital offense.[158] On the other hand, several factors would tend to increase Mr. Raby's risk in relation to applicable base rates, including his relative youthfulness (although he is nearing a neutral age-point), and his altercations with staff in the Harris County Jail (although these are complicated by testimony asserting harassment, provocation, and falsification).[159] On balance, Mr. Raby's risk of serious violence across a capital life term is estimated as modestly above the base group risk rate, but this risk rate is nonetheless far below the standard of "more likely than not."[160] Furthermore, because Mr. Raby would have been at least 57 years old if released on parole, it is highly unlikely that he would commit acts of criminal violence in the parole context.[161]

Trial counsel called Dr. Quijano to testify at the punishment phase, but did not ask him to offer any opinion on the relevant issue of how likely it was that Mr. Raby would commit acts of criminal violence if sentenced to life in prison. Instead, trial counsel only asked Dr. Quijano to opine about prison conditions and classification levels, without even attempting to relate that information to Mr. Raby's risk of future violent acts. In exchange for Dr. Quijano's testimony on the obvious fact that prisons have security, however, the defense also got Dr. Quijano's numerous, unreliable, and prejudicial opinions that, as described in the next section, exaggerated Mr. Raby's risk of future violence.

---

158 *Id.*

159 *Id.*

160 *Id.*

161 *Id.* at ¶ 138. There is a large body of evidence showing that men become substantially less likely to commit acts of criminal violence as they age. Because the jury is not supposed to consider the possibility of parole at all in assessing punishment under the Texas capital punishment scheme, it technically should not be necessary to present evidence about future dangerousness on parole because the jury should assume that parole is impossible. As is discussed in section X, *infra*, however, the fact that juries in fact do not assume that a life sentence means life without parole requires that the jury be informed that a life sentence renders a defendant parole ineligible for 35 years in Texas.

2. *Trial Counsel Presented an Unreliable Expert Who Exaggerated Mr. Raby's Risk of Future Acts of Criminal Violence*

Instead of presenting a competent expert who could explain to the jury why Mr. Raby posed a negligible risk of committing future acts of criminal violence if sentenced to life in prison, trial counsel presented an incompetent expert who used unreliable methodologies, improperly labeled Mr. Raby a "psychopath" with no conscience, and acceded to the State's improper reframing of the issue from whether Mr. Raby likely would commit acts of criminal violence to whether Mr. Raby was a "threat."[162] In short, Dr. Quijano became an excellent—albeit, scientifically unqualified—expert ***for the State***. The reason that trial counsel did not anticipate the deficiencies in Dr. Quijano's testimony may have been that Dr. Quijano did not evaluate Mr. Raby until four days before he testified, and did not produce a written report of his evaluation until months after the trial ended.[163] In any event, Dr. Quijano did not present reliable expert testimony for the following reasons, and should not have been called as a witness.

First, Dr. Quijano's testimony that Mr. Raby is a psychopath, a sociopath, or an individual with an antisocial personality disorder ("APD")—which he identified as synonyms[164]—reflects fundamental misunderstandings of these disorders.[165] APD is ***not*** synonymous with "sociopath" or "psychopath."[166] These disorders reflect ranges on a continuum of disorders involving difficulty forming intimate attachments, but they have different levels of severity and different diagnostic criteria.[167] Most specifically, psychopathology has a very

---

162 *Id.* at ¶ 20.

163 *Id.*; *see* Dr. Walter Y. Quijano's psychological forensic evaluation ("Quijano"), Ex. 39. Interestingly, Dr. Quijano's written report contains information suggesting that Dr. Quijano confused Mr. Raby with another defendant, and failed to understand that Mr. Raby was charged with capital murder. (Quijano, *passim*).

164 S.F. 34:545.

165 Cunningham Risk Assess. at ¶¶ 21, 110-119.

166 *Id.* at ¶¶ 21, 114.

167 *Id.* at ¶¶ 21, 115.

specific meaning, different from APD, and is measured by a separate instrument, the Psychopathology Checklist-Revised.[168] Finally, APD was in 1994, and continues to be, a diagnostic construct of significant scholarly controversy and questionable reliability.[169]

Second, Dr. Quijano's diagnosis that Mr. Raby is a psychopath/sociopath/APD-individual is fraught with errors. To begin with, Dr. Quijano's testimony that the MCMI personality test "showed" that Mr. Raby is a sociopath and psychopath[170] reflects a fundamental misunderstanding of the basic tools of psychological assessment.[171] The MCMI, like the MMPI and most other personality tests, does not "show" that an individual has any particular personality disorder, but rather generates hypotheses that must be investigated and integrated with client interviews, records review, third party interviews, and other testing data.[172] In Mr. Raby's case, the diagnosis of APD is inconsistent with other findings in Dr. Quijano's report, including that Mr. Raby is socially withdrawn, passive-aggressive, and shows symptoms of a borderline personality disorder.[173] Moreover, there is no basis for Dr. Quijano's inflammatory conclusions that an APD-individual has "no conscience," and that a sociopath/psychopath/APD-individual "would despise the most . . . that very person that showed him the greatest act of kindness."[174]

Third, psychopath, sociopath, and APD disorders are not predictive of future violent

---

168 *Id.* at ¶¶ 21, 114.
169 *Id.* at ¶¶ 21, 118.
170 S.F. 34:545.
171 Cunningham Risk Assess. at ¶¶ 22, 106.
172 *Id.* There also is no basis for Dr. Quijano's assertion that the MCMI is "much better" than the Minnesota Multiphasic Personality Inventory ("MMPI") in the assessment of psychological disorders. *See* S.F. 34:533; Cunningham Risk Assess. at ¶¶ 22, 105.
173 Cunningham Risk Assess. at ¶¶ at 22, 107.
174 S.F. 34:546. The essence of this continuum of disorders is that the individual does not experience enduring emotional reactions that would give rise to loving *or* despising. *Id.*

behavior in prison.[175] Even inmates classified as psychopaths by the PCL-R have not been reliably demonstrated to be more likely to commit acts of serious violence in prison than non-psychopaths.[176] Furthermore, there is no reliable correlation between APD and violence in prison.[177] A generally accepted estimate is that seventy-five percent of state prison inmates can be diagnosed as exhibiting an antisocial personality disorder.[178] Because of the pervasiveness of these personality disorders among prison inmates, their presence in an individual inmate predicts little about his prison behavior and prison violence potential.[179] It predicts only that the individual is similar to most prison inmates, including the many inmates who adjust well to the prison setting.[180]

Dr. Quijano's concurrence and agreement with the State's assertion that Mr. Raby was a sociopath/psychopath/APD-individual, combined with his subsequent descriptions of those personality descriptions, had ominous implications for the jury's sentencing determinations.[181] To begin with, these labels carry very negative connotations among lay people that are different from their distinct meanings in the psychological community, so that these labels are problematic even if they are properly applicable.[182] Second, when improper, these diagnoses tend to have a profoundly aggravating effect on a jury's sentencing considerations, because they suggest that no rehabilitation is possible and that future criminal violence is inevitable.[183] Dr. Quijano's misinformed testimony regarding sociopath/psychopath/APD formed a significant basis for the

---

175 Cunningham Risk Assess. at ¶¶ 23, 111.
176 *Id.* at ¶¶ 23, 117.
177 *Id.* at ¶¶ 23, 111.
178 *Id.*
179 *Id.*
180 *Id.* at ¶ 23.
181 S.F. 34:545-47.
182 Cunningham Risk Assess. at ¶¶ 24, 110.
183 *Id.*

State's final argument,[184] creating a grave risk that the jury was misled regarding the violence risk assessment and mitigation determinations they had to make.

Finally, Dr. Quijano acceded to the State's subtle but critical (and improper) shifts in what was being measured. Although the special issue asked the jury to determine whether there was a ***probability*** that Mr. Raby would commit acts of criminal violence, the State subtly refocused the issue in terms of whether Mr. Raby is a "threat" who posed any possibility of committing future acts of violence.[185] The issue is not simply one of "threat." All violent felons are considered to be a threat. That is an important aspect of securely segregating them in prison away from the rest of society, and for maintaining a high degree of supervision over them in prison. Thus, if the issue were one of "threat" alone, this special issue would have no particularizing effect – as every capital offender would be deemed a threat. Instead, the issue as defined in this case is whether it is more likely than not that that Mr. Raby would *commit* acts of criminal violence [of sufficient severity and magnitude] to constitute a continuing threat to society. In other words, it is the probability of "acts" and not simply the potential of "threats" that is at issue.

3. *Mr. Raby Was Prejudiced By Trial Counsel's Unreasonable Failure to Put On Competent and Appropriate Expert Testimony on the Probability of Future Acts of Criminal Violence*

Like any other issue that a jury must decide, the first special issue in the Texas capital sentencing scheme presents a fact question that the jury must decide based on the evidence: is it probable that the defendant will commit acts of criminal violence in the future if sentenced to life in prison? It is natural for juries to believe that the answer to this question must nearly always be

---

184 S.F. 37:1044-1046.

185 S.F. 34:558; Cunningham Risk Assess. at ¶¶ 25, 128-134.

yes because, after all, the defendant is a convicted capital murderer. The truth is, however, that a substantial majority of capital murderers, even those with histories of violence worse than Mr. Raby's, never commit acts of criminal violence in prison or on parole.[186] Severity of offense and patterns of behavior outside prison are not highly predictive of behavior inside prison, for reasons that are easy to understand but not necessarily obvious.[187] A better predictor is past behavior during incarceration, and while there was some evidence of violence by Mr. Raby in the Harris County Jail awaiting trial, the majority of his incarceration record was clean.[188] Furthermore, if trial counsel had properly focused the jury on this issue, the differences between TDCJ and county jail—primarily the fact that a defendant in a capital murder trial is a prime target for provocation in county jail—might reasonably have caused the jury to conclude that Mr. Raby would adapt (as he had before) to TDCJ custody.

Mr. Raby's jury was not asked to focus on the fact question before them, and instead was permitted to make this decision on the basis of passion, prejudice, and faulty premises. If the jury had been shown how to think about this issue logically and scientifically, there was a reasonable probability that the jury would have concluded that Mr. Raby's risk of future violence in prison was small.

B. Mr. Raby's Trial Counsel Failed to Develop and Present Available Mitigating Evidence

Mr. Raby's trial counsel failed to present and develop compelling mitigating evidence at the punishment phase of trial that probably would have resulted in a life sentence. There was substantial available evidence to show that a number of adverse developmental factors, such as child abuse and neglect, family mental illness, possible sexual abuse, and early and pervasive

---

186 Cunningham Risk Assess. at ¶¶ 47-67.

substance abuse, shaped and affected Mr. Raby's development during childhood and young adulthood. There also was substantial available evidence that, for all of Mr. Raby's negative qualities, he had positive qualities of compassion and loyalty, and was working—indeed, struggling—to put his life on the right track. Much of that evidence, the jury simply never got to hear. Trial counsel lacked the understanding of Mr. Raby's background and character necessary to elicit the significant testimony from the witnesses that were called. Worse still, trial counsel's ignorance caused them to mishandle most of the evidence that was elicited, resulting in testimony that appeared aggravating when it could have been mitigating. Perhaps trial counsel's most damaging error was their failure to explain to the jury why the jury should consider Mr. Raby's extraordinarily disadvantaged childhood as mitigating in favor of sparing his life, while at the same time holding him criminally responsible. Mr. Raby is entitled to a new sentencing hearing, because it is reasonably probable that the outcome of Mr. Raby's sentencing hearing would have been different had competent counsel presented and explained the significance of all the available mitigation evidence.[189]

1. Trial Counsel Should Have Called a Mitigation Expert or Otherwise Explained the Concept of Mitigation

While trial counsel presented some evidence to show that Mr. Raby had an underprivileged childhood, trial counsel did not argue, or call an expert to explain, why Mr. Raby's childhood was important for the jury to consider at sentencing. Texas' capital sentencing scheme requires a jury to consider all evidence of a defendant's background or character that "mitigates" against the imposition of the death penalty.[190] It was therefore critical that the jury understand the nature of

---

187 *Id.* at ¶¶ 92-99.
188 *Id.* at ¶¶ 17, 123-126.
189 *Williams*, 120 S. Ct. at 1513, 1515.
190 *See* Tex. Code Crim. Proc. 37.071(d)(1).

mitigation evidence.

In particular, the jury needed to know that they were not being asked to excuse Mr. Raby from responsibility. In finding him guilty, the jury had already assigned criminal responsibility and determined that Mr. Raby had made the choice to commit a murder. Instead, at the heart of the concept of mitigation is the concept of *moral culpability*, which considers the experience of being adversely shaped or limited by forces not personally chosen.[191] In other words, while Mr. Raby's unfortunate background, which was largely beyond his control, did not render his alleged crime involuntary, it placed more obstacles in the way of Mr. Raby's development into a mature adult who could readily conform his conduct to the expectations and mores of society. An expert could have explained that what is easy for many of us might have been harder for Mr. Raby, and therefore it was appropriate to take this reduced moral culpability into account in assessing his punishment.

Trial counsel at no point explained or defined either "mitigation" or "moral culpability." In all likelihood, this lack of guidance may well have caused the jury to absorb mitigating evidence instead as evidence simply of *bad character*. In the absence of an explicit discussion of both the damaging developmental factors present in Mr. Raby's life and their formative impact, the jury likely confused or failed to differentiate moral culpability from criminal responsibility.[192]

---

191 Aff. Mark D. Cunningham, Ph.D., Mitigation ("Cunningham Mitig.") ¶11, Ex. 2.

192 Explanation of the difference between moral culpability and criminal responsibility was particularly important given the State's emphasis on choice:

Q: You [Betty] said Charles had a home but he did not stay there.
A: Yes, sir.
Q: That was his choice?
A: Yes, sir.
Q: Him running away from those places, that was his choice, too?
A: Yes, sir. (S.F. 34: 521, ll. 13-20)
...
Q: The bottom line with Charles, Ms. Perteet, is people would give advice, there were programs. The bottom line is, no one could make him do what he didn't want to do.
A: Right. (S.F. 34: 523, l. 13)

2. *The Mitigation Story That Could Have Been Presented*

Charles Raby's true life history reveals both the overwhelming obstacles blocking his development into a fully mature and well-adjusted man, and his largely unsuccessful, sometimes misguided, but real struggle to cope with and conquer these obstacles. Though his life depended upon it, this story has never been told.

Charles Raby was born in Houston, Texas in 1970 to Betty Perteet and Charles Elvis Raby.[193] Elvis, a violent alcoholic,[194] abandoned Mr. Raby's mother when Mr. Raby was one-and-a-half years old, never to return.[195] The family went to live with Betty's mother, Wanda,[196] a paranoid schizophrenic who was committed to mental hospitals several times throughout Mr. Raby's youth.[197] Also in the house were Wanda's husband, Roy Robinson, a convicted rapist who molested both his stepdaughters and his daughters,[198] and Betty's brother, Junior, a violent schizophrenic with a penchant for impulsively holding knives to family member's throats and threatening to kill them.[199]

Betty married again, and Mr. Raby and his younger sister, also named Wanda, spent about seven years living with a stepfather who beat them so regularly and savagely that neighbors called Child Protective Services after seeing the children's legs covered in bruises and hearing their screams.[200]

When Mr. Raby was 12 years old, Betty checked herself into a mental hospital and asked

---

193 Charles D. Raby Birth Certificate, Ex. 27.
194 Aff. Wanda (Benefield) Robinson ("Robinson") ¶ 23, Ex. 20; Aff. Betty Perteet Wearstler ("Wearstler") ¶ 12, Ex. 24.
195 Wearstler ¶ 12; Aff. Mary Lanclos ("Lanclos") ¶ 14, Ex. 11.
196 Lanclos ¶ 15.
197 Lanclos ¶ 10; Cunningham Mitig. ¶ 44.
198 Aff. Louise Richards ("Richards") ¶¶ 8, 9, 11, Ex. 19.
199 Aff. John Sowell ("Sowell") ¶¶ 5-7, Ex. 22.
200 Child Protective Services ("CPS") Case Record, 6/4/1978, Ex. 29.

Child Protective Services to take him and Wanda into its care.[201] Mr. Raby then lived in a succession of foster home residences,[202] only one of which met his minimal needs.[203] That placement was ended after a year.[204] When Mr. Raby was allowed to return to live with his mother as a young teenager, he began to get in trouble for truancy, and eventually was sent to a juvenile detention center, where he spent the rest of his childhood.[205]

a. Adverse Developmental Factors

Mr. Raby has faced a number of obstacles that psychologists consider "adverse developmental factors," because they tend to delay an individual's development of maturity. The following adverse development factors were present in Charles' childhood and adolescence:

1. Multi-generational family distress, including pervasive incest, domestic abuse, and family violence
2. Genetic predisposition to substance abuse and dependence
3. Genetic predisposition to mental illness
4. Teenage mother
5. Parental alcohol and drug abuse
6. Abandonment by father
7. Mother's mental illness and personality inadequacy
8. Chaotic household and serial placement outside the home
9. Physical and emotional abuse
10. Child neglect
11. Observed family violence
12. Personal violent victimization
13. Sexually traumatic exposure, including possible sexual abuse by mother and placement in the care of a sex offender
14. Untreated Attention Deficit Hyperactivity Disorder
15. Psychological disorders
16. Academic failure and learning disabilities
17. Corruptive surrogate family and peers and adolescent onset alcohol and drug abuse
18. Neglect and inadequate interventions[206]

---

201 Wearstler ¶ 23; Bob at 14; CPS Foster Care Intake Study, 9/18/1982, Ex. 31.
202 Wearstler ¶ 27.
203 Raby ¶¶ 6-10.
204 *See* S.F. 35: 680.
205 *See* S.F. 35: 682-83, 692.
206 Cunningham Mitig. ¶ 20.

Each of these factors increased the likelihood that Mr. Raby's development would be delayed or thwarted. The existence of each of these factors in Mr. Raby's life is described below, including an explanation of how each factor posed an obstacle to Mr. Raby's development.

1. **Multi-generational family distress, including pervasive incest, domestic abuse, and family violence**

The phrase "multi-generational family distress" refers to the influence of events taking place over several generations within Mr. Raby's family, even events that did not affect him directly.[207] These events are influential because they point to genetic predispositions (treated separately below); they also reveal pathological "family scripts," or patterns of behavior over several generations that become "normal" within a family.[208] In addition, a child may model himself after a family member's dysfunctional or harmful behavior - this is known as "corruptive modeling."[209] Finally, such events may point to "sequential damage": one family member's damaging behavior to another may in turn cause the damaged individual to cause damage to a child, intentionally or not.[210] Mr. Raby's extended family history is characterized by extensive dysfunction from one generation to the next, including extensive sexual abuse and incest.

Betty Perteet is the eldest of four children born to Wanda Jean and Clarence Perteet, Sr.[211] Beginning when Betty was eight years old, her father began to sexually abuse her while her mother was out working the night shift.[212] The abuse continued for the next six or so years.[213]

---

207 Cunningham Mitig. ¶ 21.
208 Cunningham Mitig. ¶ 35.
209 Cunningham Mitig. ¶ 36.
210 Cunningham Mitig. ¶ 37.
211 Wearstler ¶ 6.
212 Wearstler ¶ 8.
213 Wearstler ¶ 8.

Betty told her mother about the abuse when she was about 14 years old.[214] Wanda ultimately divorced Clarence, Sr., who then had little or no contact with his children.[215] As a teen, Betty would cry over and over to her mother that she was sorry she had broken up the family.[216]

Wanda married a second child molester less than a year after her separation from Clarence, Sr.[217] Roy Robinson had already served fifteen years in a California prison for rape when they were married.[218] Betty's half-sister Charlotte Jean, or "C.J.," was born two years later, and Charlotte Marie, known as "Padoo," followed ten years later.[219] Roy Robinson was violent and abusive toward Wanda throughout their marriage.[220] Louise frequently called the police on Roy, who was jailed for domestic violence several times.[221]

Roy began sexually preying on Louise, Betty's sister, almost immediately after he married her mother, when she was seven or eight years old.[222] A few years later, after Roy began to rape Betty's other sister, Mary, and to show increasing violence towards Louise and their mother, Louise reported the abuse to the police.[223] Roy was arrested and jailed for raping Mary.[224]

Betty lived with her mother and Roy for at least two years after they married, but moved out and got married at about the time her half-sister, C.J., was born.[225] Even though Wanda had divorced Roy after he was arrested for raping Mary, he returned to live with the family after his

---

214 Wearstler ¶ 9; Lanclos ¶ 4.
215 Wearstler ¶ 9.
216 Wearstler ¶ 10; Richards ¶ 5
217 Wearstler ¶ 11; Lanclos ¶ 6.
218 CPS Memo from Odessa Sayles, 10/31/1983, Ex. 35; Roy Robinson CA state criminal records, Ex. 26.
219 Wearstler ¶ 6.
220 Richards ¶ 7.
221 Richards ¶ 7.
222 Richards ¶ 8.
223 Richards ¶ 9.
224 Lanclos ¶ 6; Richards ¶ 9
225 Wearstler ¶ 6, 12.

release from custody,[226] and Padoo was born during this period.[227] After Roy's return, Mary and Louise followed Betty's lead and escaped their mother's house at their first opportunity through early marriage.[228] His stepdaughters gone, Roy began to molest his own daughter, C.J., and it was again Betty who spoke out.[229] Betty suspected that Junior, who by this time was a teenager, was also involved in this abuse.[230] Children's Protective Services ("CPS") intervened, and C.J. and Padoo were sent to live with relatives.[231] The CPS worker who investigated the reports of abuse commented in her report, "*This family appears to be thoroughly ingrained in incest.*"[232] Indeed, Betty's immediate family appears to have been comprised of three groups: male abusers of children, females they victimized, and a mother in denial regarding this abuse.

Mr. Raby's father's history is less known, but is also typified by family violence. Charles Elvis Raby, known as Elvis, was the fourth of five children born to Cleta Mae and Roy Elvis Raby.[233] Elvis' brother, Alec, spent most of his life in prison for a series of robberies and assaults.[234] One of Shirley's husbands sexually abused her daughter.[235] Elvis grew increasingly violent as he reached his teenage years.[236] Elvis's mother and siblings were afraid of him and did whatever he asked of them for fear of retaliation.[237] Elvis has been in jail several times, mostly related to his fighting or his pattern of abducting his children without the permission of his

---

226 Lanclos ¶ 7; Richards ¶ 10.
227 Richards ¶ 11; Lanclos ¶ 8.
228 Richards ¶ 10.
229 Richards ¶ 11; Lanclos ¶ 9; CPS Memo from Odessa Sayles, 10/31/1983.
230 CPS Memo from Odessa Sayles, 10/31/1983.
231 Lanclos ¶ 9.
232 CPS Memo from Odessa Sayles, 10/31/1983 (emphasis added).
233 Robinson ¶ 5.
234 Robinson ¶ 7.
235 Robinson ¶ 8.
236 Robinson ¶ 11.
237 *Id.*

former wives.[238]

In Mr. Raby's multigenerational family system, available "role models" led lives characterized by chaotic relationships, precipitous violence, volatile reactions and relationships, irresponsibility, exploitation, perverse sexual boundaries, alcoholism, and other deviant behavior.[239] The damaging effects of sexual abuse in the family – combined with the genetic predispositions and faulty modeling in the family – were ultimately demonstrated in Betty's own disastrous relationship choices, psychological disturbance, and limited coping capacity. Thus, she carried the emotionally scarring legacy of this trauma, and its resulting predispositions, into her adulthood and parenting. Her damaged emotional status resulted in Mr. Raby having little semblance of a functional parent.[240]

Almost none of this family history of profound dysfunction was described at trial. Betty Perteet's description of her family history was limited to acknowledging: "my daddy molested me and they [her parents] got divorced".[241] Testimony regarding the impact on her of this molestation or the broader context of pathological family experience was not elicited. Wanda Robinson, Mr. Raby's maternal grandmother, testified to the sexual abuse,[242] but defense counsel failed to elicit any testimony from Betty or Wanda regarding the broader dysfunction of this family system or its impact on Betty's psychological well-being or subsequent parenting capabilities.[243]

2. <u>Genetic predisposition to substance abuse and dependence</u>

Several members of Mr. Raby's father's family have had severe problems with alcohol. Elvis' brother, Donald Ray, was a violent alcoholic who, like their father, focused much of his

---

238 *Id.*
239 Cunningham Mitig. ¶ 36.
240 Cunningham Mitig. ¶ 37.
241 S.F. 34: 463, l. 24.
242 S.F. 34: 580-581.

violence on his wife.[244] Donald died in an auto accident caused by his drunk driving.[245] An alcoholic and chronic drug abuser, Elvis has been physically and sexually violent towards his wives.[246] One former wife, Wanda Robinson (no relation to Mr. Raby's maternal grandmother), claims Elvis smoked marijuana during their marriage, which seemed to "mellow him out."[247] Elvis was reportedly jealous, demanding, and violent with Betty.[248] He drank heavily, sometimes staying out all night.[249] On Mr. Raby's maternal side, Betty has at times drunk heavily, Mr. Raby's uncle Junior has a long history of alcohol and drug abuse, his younger half-brother, Robert, has abused drugs heavily since adolescence, and his sister, Wanda, abuses cocaine.[250]

An established body of research confirms that there is a genetically transmitted predisposition to alcohol and drug abuse/dependence, independent of environmental factors.[251] That Mr. Raby was involved in extensive drug as well as alcohol abuse is also consistent with research regarding genetic predisposition - alcohol abuse by a family member is significantly correlated to drug abuse.[252] Evidence of family substance abuse was not elicited at trial. In the absence of discussion of the genetic predispositions realized in Mr. Raby's substance abuse and dependence, the jury had no scientific foundation to consider that this dependence was not simply a free and unencumbered exercise of free will – and thus had little basis to consider it as a mitigating factor. Because Mr. Raby was intoxicated on the night of the offense, this factor was critically important.

---

243 Cunningham Mitig. ¶ 38.
244 Robinson ¶ 9.
245 *Id.*
246 Robinson ¶¶ 17-20.
247 Robinson ¶ 23
248 Wearstler ¶ 12.
249 Wearstler ¶ 12; Louise at 15.
250 Wearstler ¶ 10; Raby ¶ 3; *see* Cunningham Mitig. ¶ 39.
251 Cunningham Mitig. ¶ 40.
252 Cunningham Mitig. ¶ 41.

3. **Genetic predisposition to mental illness**

Mental illness is rampant in Mr. Raby's maternal family, and appears to be present in his paternal family as well, as family members believe that Elvis was placed in a psychiatric hospital as a juvenile.[253]

On the maternal side, Betty's father, Clarence, Sr., is described by his wife of 35 years, Jane Perteet, as exhibiting bizarre behavior characterized by paranoia and barricading their residence.[254] Mr. Raby's grandmother, Wanda, had a long history of hospitalizations for depression and paranoid schizophrenia.[255] Wanda began showing serious signs of mental illness during her pregnancy with Padoo, when she was forty-two.[256] After Padoo's birth, Wanda's mental illness worsened, eventually causing her second husband, Roy, to throw her out of her own house.[257] Later in life, she left her home and retreated to live in the woods in a makeshift tent.[258]

Family members report that both of Betty's full sisters have had bouts of mental illness.[259] Betty's brother, Junior, suffers from paranoid schizophrenia and epilepsy, and for much of his life has had a penchant for sudden outbursts of rage in which he searches out a family member at random to terrorize with a knife, machete, or Chinese throwing star.[260]

Many psychological disorders, including schizophrenia, depression, personality disorder,

---

253 Robinson ¶ 11.

254 Aff. Jane Perteet ("Perteet") ¶ 12, Ex. 16.

255 Lanclos ¶ 10; Wearstler ¶ 28; Perteet ¶ 7; Cunningham Mitig. ¶ 44; *see also* Aff. Harry Robert Butler ("H.R. Butler") ¶ 5, Ex. 7.

256 Lanclos ¶ 8.

257 Lanclos ¶ 8.

258 Aff. Wanda Mayes ("Mayes") ¶ 8, Ex. 14; Aff. Robert Butler ("B. Butler") ¶ 12, Ex. 6.

259 Perteet ¶ 9 (Mary Lanclos); Wearstler ¶ 7; Betty's half sister, Padoo, tried to commit suicide as a teenager following a miscarriage. (Lanclos ¶ 9).

260 Wearstler ¶ 7, 17, 21; Lanclos ¶ 11; Richards ¶ 13; C.J. at 15; Mayes ¶ 15; H.R. Butler ¶ 6.

and learning disabilities, have a genetically transmitted predisposition.[261] This predisposition may be reflected in either full penetration of the disorder, *or "partial penetration,"* meaning that some characteristics occur but not the full syndrome.[262] The presence of serious mental disorders in Mr. Raby's family system placed him at higher risk for these psychiatric disorders, for substance dependence (in order to "self-medicate"), *and for partial penetration of these disorders.*[263] Trial counsel did not explain partial penetration or raise the issue of self-medication. Consequently, it is extremely likely that the jury *dismissed* the little evidence of familial mental illness that was presented, based on the misconception that if Mr. Raby was not himself "insane," this genetic evidence was irrelevant.

In fact, as discussed in the section on Mr. Raby's psychological disorders, below, Mr. Raby's genetic background of mental illness likely played a part in the behavioral problems he has displayed since early childhood, particularly temper control problems and impulsivity.[264]

4. Teenage mother

Mr. Raby's mother was 18 years old at his birth.[265] A number of developmental risks are associated with having a teenage mother, including birth and development complications, abuse, neglect, academic difficulty, and delinquency.[266] Virtually all of these adverse outcomes were realized across Mr. Raby's development. There was no testimony elicited regarding Betty's limited parenting capability at the time of Mr. Raby's birth, or the increased developmental risk stemming from having a teenage mother.

---

261 Cunningham Mitig. ¶ 50
262 Cunningham Mitig. ¶ 50
263 Cunningham Mitig. ¶ 50
264 Cunningham Mitig. ¶ 51.
265 Charles D. Raby Birth Certificate.
266 Cunningham Mitig. ¶ 63

5. Parental alcohol and drug abuse

As described above, Betty has dealt with depression by drinking heavily, and Elvis is a sometimes heavy drinker and substance abuser. Alcoholism has a number of adverse impacts on parental functioning, in addition to being an important genetic factor. First, parents who abuse alcohol display "corruptive modeling" of how to cope with life's demands and stresses.[267] Second, a parent who is substance dependent is more likely to be emotionally detached – a product of both being under the influence and being preoccupied with drug seeking behavior.[268] Third, the children of a substance abusing parent are more likely to be neglected and inadequately supervised, more likely to be abused, and more likely to live in a chaotic, unstable household.[269] Fourth, in the face of the impairment of a substance abusing parent, the children of an alcoholic parent are frequently compelled to assume roles of *premature responsibility*.[270] This role reversal of the child assuming responsibility for the parent, in an adaptation of precocious "maturity," is ultimately damaging to the child – who experiences feelings of incompetence in not being able to prevent the parent from drinking, and rejection at being abandoned to this role by the non-alcoholic parent.[271] Mr. Raby's CPS. caseworker's testimony at trial,[272] as well as a report from a girlfriend, Pam Langenbauhn,[273] show that he felt compelled to assume the role of head of household because his mother's inability to take care of even herself, often causing him to run away from foster placement in order to help the family. No evidence, however, of the *effects* of Mr. Raby's premature responsibility, or other effects of his mother's substance dependence, was elicited

---

267 Cunningham Mitig. ¶ 55.
268 Cunningham Mitig. ¶ 56.
269 Cunningham Mitig. ¶ 57.
270 Cunningham Mitig. ¶ 58.
271 Cunningham Mitig. ¶ 58.
272 S.F. 35: 678. *See also* CPS records in trial transcript, *passim.*
273 Aff. Pam Langenbauhn ("Langenbauhn") ¶ 6, Ex. 12.

at trial.

6. **Abandonment by father**

Elvis abandoned Betty for another woman when Mr. Raby was one-and-a-half years old. Father absence is associated with an increased likelihood of inadequate parental supervision and associated delinquency, as well as criminal violence.[274] No evidence of the effect of the absence of Mr. Raby's father on Mr. Raby's development was presented at trial.

7. **Mother's mental illness and personality inadequacy**

Betty has never gotten over her feelings of guilt for breaking up her parents' marriage and depriving her sisters of their father.[275] She attributes her often-disabling bouts of depression and her tendency to self-medicate with alcohol to this guilt.[276] Despite her bravery in reporting family abuse more than once, during Mr. Raby's childhood Betty most often felt helpless and overwhelmed by the difficulties of caring for herself and her family.[277]

Mental illness in a parent is a risk factor for disrupted attachment, neglect, abuse, and mental illness in the child.[278] Betty acknowledged at trial that she once had a "nervous breakdown" and committed herself to a psychiatric facility, following her separation/divorce from Bob Butler.[279] There was no testimony at trial, however, regarding the implications of parental mental illness on the emotional welfare and psychological development of the children in such a home.

---

274 Cunningham Mitig. ¶ 61.
275 Wearstler ¶ 10.
276 *Id.*; *see also* Lanclos ¶ 12; Richards ¶ 14. Betty has a poor memory, which she believes may stem from her childhood trauma, and can remember only pieces of her own childhood or that of Charles and his younger sister, (*Id.* at ¶ 33. Trial counsel's reliance on Betty's memory limited the information they received considerably.
277 Wearstler ¶¶ 16, 18, 20, 23-25; *see also* Cunningham Mitig. ¶ 64.
278 Cunningham Mitig. ¶ 65.
279 Cunningham Mitig. ¶ 66; S.F. 34: 471-472.

8. Chaotic household and serial placement outside the home

Within a few months of Mr. Raby's birth, his parents lost their apartment, beginning the pattern of instability and frequent relocations that characterized Mr. Raby's youth.[280] Making matters worse, there was often little to eat,[281] and Betty's family would secretly bring her groceries.[282] After Elvis left, Betty was forced to move back in with her mother.[283] There were up to nine people living in Wanda Jean's modest house at a time, including Wanda, Roy Robinson, Junior, C.J., Betty, Mr. Raby, and little Wanda.[284]

After Betty married Bob Butler, Wanda would sometimes come to live with them[285] with C.J., Padoo, and Junior often in tow[286]—after Roy would evict her from her house.[287] Wanda's symptoms during those periods included staring emptily into space, paranoia, and violence.[288] One of her grandsons remembers once finding her stabbing one of his teddy bears.[289] Wanda Jean's and Junior's disruptive presence in Bob's house caused much conflict between Betty and Bob.[290]

After Betty gave up care of her children when Mr. Raby was 12, he spent 18 of the next 24 months in seven different CPS shelters, residential placements, and the juvenile jail.[291] The weeks and months Mr. Raby was not at these facilities were times he had run away from them.[292] When Mr. Raby was at home, as a run-away from the foster placements, he received neither care

---

280 Wearstler ¶ 13.
281 *Id.*; *see also* Richards ¶ 15.
282 Wearstler ¶ 13.
283 Wearstler ¶ 15.
284 Lanclos ¶ 15; Richards ¶ 17; Sowell ¶ 4.
285 Wearstler ¶¶ 17, 18.
286 Wearstler ¶¶ 17, 19-20.
287 Richards ¶ 12; Wearstler ¶ 17.
288 H.R. Butler ¶ 5.
289 *Id.*
290 B. Butler ¶ 8; Wearstler ¶ 17-18.
291 *See* CPS records, *passim*; Cunningham Mitig. ¶ 81-83.

nor supervision.[293] Betty led Mr. Raby to believe she needed him to help provide for her and his newborn brother, Timmy, and told him she wished he could stay home with her. But whenever Mr. Raby came home, Betty would call the authorities and report him as a runaway.[294]

After several years of struggling at various placements, torn by his compulsion to return to his mother, Mr. Raby was placed at New Horizons Ranch.[295] There, at age 13, Mr. Raby at last received one-on-one help with reading, and soon learned to read and to write competently.[296] Mr. Raby and another boy, Jack, started reading Mr. Raby's first real book together - Jack London's *Call of the Wild*.[297] That first book opened a new world to Mr. Raby, and he has since become an avid reader.[298] New Horizons also provided Mr. Raby with his first meaningful exposure to the outdoors.[299] Not always confident in social settings, Mr. Raby benefited greatly from interacting with horses for the first time, and quietly enjoying the ranch's natural surroundings.[300] It was also at New Horizons that Mr. Raby first had the opportunity to work with paints, initiating a lifelong interest in drawing.[301]

Mr. Raby spent almost a year at New Horizons, during which time he flourished. Caseworkers noted that Mr. Raby was making great academic progress.[302] He had also begun to think more maturely, and to develop self-esteem and leadership abilities—for instance, he served as group leader in his cottage.[303] Against the advice of his social worker, however, staff

---

292 Cunningham Mitig. ¶ 81-83; Wearstler ¶ 27.
293 Wearstler ¶ 27; CPS Child Dictation, 6/22/1983; 4/11/84; 9/18/84, Ex. 32.
294 CPS *passim*.
295 CPS Child Dictation, 4/11/84
296 *Id.*; CPS Child Dictation, 7/19/1984; Raby ¶ 6.
297 Raby ¶ 6.
298 *Id.*
299 CPS Child Dictation, 4/16/1984; Raby ¶ 7.
300 CPS Child Dictation, 4/16/1984; Raby ¶ 7.
301 Raby ¶ 9.
302 CPS. Child Dictation, 4/16/1984; Child Dictation, 7/19/1984.
303 CPS Child Dictation, 4/16/1984; Child Dictation, 7/10/1984.

determined that Mr. Raby was ready to return home, and Mr. Raby was forced to leave the one environment where he had ever seemed to move forward.[304] Mr. Raby did not want to leave New Horizons, and his family was in no better position to care for him than ever before.[305]

Mr. Raby was transferred to Clarewood, another residential placement.[306] He promptly ran away to his family.[307] Betty sent him to live with her father, Clarence, Sr., and his wife, so that he could escape Junior's violent behavior.[308] Mr. and Mrs. Perteet requested that CPS perform a home study to determine whether Charles would be allowed to live with them on a more permanent basis, but later retracted the request.[309] After that, Mr. Raby moved in with his mother, who was again staying with Bob Butler.[310] Hostilities between Mr. Raby and Bob quickly reemerged, and Bob forced Mr. Raby to leave the house.[311] Mr. Raby was soon arrested for attempted burglary after he attempted to enter an acquaintance's house through the window, looking for a place to sleep.[312] Mr. Raby was eventually placed in juvenile detention.[313]

In the absence of external structure and guidance, such as in the chaos of Mr. Raby's childhood household and periodic homelessness of his adolescence, self-control does not develop and aggression can unfold.[314] In Mr. Raby's life, this is borne out by his benefiting from the increased structure of institutional placements – particularly at New Horizons.

Mr. Raby's serial placement disrupted his attachment to any particular parent figure - a

---

304 CPS Child Dictation, 9/7/1984.
305 *Id.*; Child and Family Dictation, 9/20/1984.
306 Child Dictation, 9/18/1984.
307 *Id.*
308 Wearstler ¶ 28.
309 CPS Letter from Carrie L. Lenzy to Jeffrey Page, 8/24/1983, Ex. 30.
310 Child and Family Dictation, 9/20/1984.
311 Child Dictation, 10/11/1984.
312 *Id.*
313 S.F. 35: 682-83, 692.
314 Cunningham Mitig. ¶ 85.

crucial factor in healthy psychological development.[315] In addition, as described above, there are multiple indications that Mr. Raby's mother did not establish a strong, secure attachment or emotional bond to Mr. Raby. Disrupted attachment is a broad risk factor for psychological disorder, delinquency, criminal activity, and violent criminal activity.[316] Unfortunately, there was no testimony at sentencing that described this attachment damage from maternal abuse, neglect, and rejection - or its effects.

9. **Physical and emotional abuse**

There was only limited testimony at trial regarding abuse that Mr. Raby suffered in childhood: Betty acknowledged in her testimony that Bob Butler had made Mr. Raby "eat a pencil" as punishment for chewing on his pencils, and stated that Bob Butler had made Mr. Raby wear a brick around his neck.[317] Wanda Robinson, maternal grandmother of Mr. Raby, testified that Bob Butler called Mr. Raby "ugly, dirty names" and that Bob made Mr. Raby stay in bed all day.[318] Mr. Raby's sister, Wanda, testified that Bob Butler "punished us pretty hard," and detailed that he made them kneel for periods of time, kicked Mr. Raby, confined Mr. Raby to his room for a day or two at a time, and spanked them.[319] This testimony did little, though, to capture the chronic and extreme nature of the abuse experienced by Mr. Raby.[320]

Charlotte Jean Hicks ("C.J."), Mr. Raby's maternal aunt, lived off and on in the household of Bob Butler and Betty between 1973 and 1978.[321] C.J. has reported that for minor misbehavior, Bob would beat Mr. Raby on the buttocks with a belt – striking him several times,

---

315 Cunningham Mitig. ¶ 86.
316 Cunningham Mitig. ¶ 87.
317 S.F. 34: 506, ll. 8-10.
318 S.F. 34: 587-88, l. 22.
319 S.F. 34: 598-600.
320 Cunningham Mitig. ¶ 88.
321 Aff. Charlotte Jean Hicks ("Hicks") ¶¶ 3, 6, Ex. 9.

usually while in a rage.[322] She reported that Bob beat Mr. Raby when notes came home from school describing Mr. Raby's fidgeting.[323] Bob would kick Mr. Raby in the buttocks every time he walked past him.[324] Mr. Raby wet the bed as late as the age of nine, and Bob beat him for that.[325] Mr. Raby was continually grounded for days or weeks at a time – and was never "ungrounded" for more than a day.[326] C.J. has vivid memories of Mr. Raby looking out his bedroom window, watching all the other children play.[327] Mr. Raby was grounded so pervasively that C.J. could recall only a few instances of playing with Charles during the years she was in the household.[328] C.J. was never called to testify at trial.

In May or June of 1978, when Mr. Raby was eight years old, two neighbors reported Bob to CPS after watching him kick Mr. Raby in the stomach and beat Mr. Raby all over his body with a belt.[329] A CPS social worker who investigated the complaint learned that Bob often hired a neighbor, Elvira Robles, to babysit his own son, but told her not to bother to watch or feed Mr. Raby and Wanda.[330] Witnesses who resided in the house recall Bob beating Mr. Raby with a belt

---

322 Hicks ¶ 8.

323 Hicks ¶ 11.

324 Hicks ¶ 9.

325 Hicks ¶ 10.

326 Hicks ¶ 12.

327 *Id.*

328 *Id.*

329 CPS Caseworker Liz Mast's handwritten notes, 1978 ("CPS Mast notes"), Ex. 30: "Bob Butler beats Charles [age 8] and Wanda [age 7] all the time. Today Bob Butler beat Charles all over his body with a belt and kicked Charles in his stomach and back. Wanda was beaten about two weeks ago but worker was unable to get any details of this. Bob Butler allegedly doesn't care about Charles and Wanda as he supposedly tells babysitter not to bother feeding or watching them, but to watch Robert Butler, Jr. [age 3] ... [redacted] seen bruises on Charles and Wanda for the 6-7 months [redacted]. The focus seem to be more on Charles. [redacted] never seen bruises on Robert. [redacted] he wished that [redacted] did not have the children that they were a 'pain.' Charles has bruises on him no less than 3X a week. [redacted] is a 'good' child who is 'reaching out for love.' He acts afraid of Bob Butler. He is always hungry. Last Sunday Charles was playing with a neighbor's boy at the Bayou at the back of their house. Bob Butler came after him and the neighbor went after the boys. Bob Butler caught Charles in front of Ms. Alvarado's house and beat Charles. He took Charles to their house and continued. Charles screams could be heard over Mr. Alvarado's TV and air conditioner. The whole neighborhood was watching and 'no rescue was offered.'"

330 *Id.*; CPS Case Record, June 4-13, 1978, at 3; see also CPS Intake Study, 11/11/1978, Ex. 31.

every day,[331] while neighbors could hear Mr. Raby screaming "up and down the street."[332] The social worker assigned to the case commented in her report that Wanda and Mr. Raby were living in a constant state of fear.[333] She determined that Bob's beatings were "arbitrary, unclear and severe."[334] Yet that social worker concluded that Betty could protect her children from their stepfather, and closed the case.[335] Betty's reactions to Bob's abuse of the children varied from anger to passivity.[336] At times, Betty would react to slight misbehavior with comments such as, "If I had a gun, I'd shoot you all."[337]

Betty was unfortunately in no position to protect the children from Bob's abuse, despite the assessment of Child Protective Services. When Mr. Raby was 11 years old, Betty and Bob separated, according to Betty, because she was afraid that Mr. Raby was getting big enough to eventually fight back.[338]

Experienced and/or observed physical abuse is associated with Posttraumatic Stress Disorder (PTSD), depression, relationship disturbances, personality disorder, and/or antisocial behavior. Chronic victimization can also result in survival responses in which the victim emulates the toughness of the victimizer.[339] Abuse can also interfere with development of the ability to regulate one's emotions,[340] evident in Mr. Raby's erratic emotions and behavior in training school settings.[341] In late adolescence, there may be either an inappropriately rapid thrust toward self-sufficiency or, out of concern for other family members' safety and security, postponement of plans

---

331 CPS Case Record, June 4-13, 1978, at 3.
332 *Id.*
333 *Id.*
334 *Id.*
335 CPS Case Record, June 4-13, 1978.
336 *See id.*
337 Mayes ¶ 5.
338 Wearstler ¶ 22.
339 Cunningham Mitig. ¶ 95.
340 Cunningham Mitig. ¶ 97.

to leave home, both of which are evident in Mr. Raby's behavior when not in institutional care.[342] Traumatic experience in childhood can result in lasting damage to beliefs in fundamental reason and justice, the shattering of one's basic trust and feeling of control over one's existence.[343] Child abuse can also cause pervasive low self-esteem, a chronic and inescapable sense of shame and worthlessness, and behavioral misconduct and criminal conduct.[344]

The full extent of the emotional and physical abuse Mr. Raby suffered, and the likely effects of that abuse, were never explained at trial. In fact, evidence of abuse was undermined when Mr. Raby's trial counsel called Bob Butler as a friendly witness and allowed him to portray himself as a strict father who insisted that Mr. Raby attend school, but who loved to take the children to the zoo.[345] Trial counsel did not impeach Bob with an early CPS report of abuse, or draw from him evidence of abuse described in that report. On cross-examination, the State elicited testimony that Bob punished Mr. Raby because he refused to go to school, and that he "kept telling [the children] that there ain't nothing in the world like an education, you know."[346] As a result, the jury was at grave risk to believe that Bob Butler provided the kind of structure and discipline that Mr. Raby needed, when in fact his arbitrary and severe punishment, neglect, and indifference to Mr. Raby's welfare *exacerbated* Mr. Raby's developmental problems.

10. <u>Child neglect</u>

When Mr. Raby was three, his family was living in an apartment and Betty was working two jobs.[347] Betty's mother and sisters often watched Mr. Raby and Wanda while she was at

---

341 Cunningham Mitig. ¶ 99.
342 Cunningham Mitig. ¶ 100.
343 Cunningham Mitig. ¶ 104.
344 Cunningham Mitig. ¶ 105.
345 S.F. 34: 601-12.
346 S.F. 34:617.
347 Wearstler ¶ 16.

work, but even while not at work, Betty was often too exhausted to stay awake, and the children were left to their own devices.[348] Family members would find Betty asleep while Mr. Raby and Wanda tore the apartment apart.[349]

During the period after Betty left Bob Butler, she again worked two jobs to support her children.[350] Again, while she was at work, Betty left Mr. Raby, Wanda, and Robert in the care of her mother, and when she was not working, she was too tired to do anything but sleep.[351] Wanda was increasingly mentally ill during this period, and increasingly unable to watch the children.[352] Mr. Raby and Wanda were left to get themselves to school, and seldom went.[353]

C.J. has described that Betty seldom interacted with her children or showed them affection.[354] C.J. cannot recall Mr. Raby ever having a birthday party or ever receiving any gifts for Christmas or his birthday.[355]

John Sowell, former maternal uncle by marriage, recalled that as a teen, Mr. Raby was thrown out of the house, and was forced to live off friends, neighbors, and even under a bridge.[356] A friend of Mr. Raby's, Paul Wayne Taylor, has also described the extent of Betty's neglect, and notes that he always called Mr. Raby "the throwaway child."[357]

Neglect has been identified as even more psychologically and developmentally damaging than physical abuse.[358] The long-term impact of child neglect includes distorted perception of the world, anxiety, insufficient capacity for emotional self-regulation and behavioral control, and

---

348 *Id.*; Lanclos ¶ 15; Richards ¶ 17.
349 Lanclos ¶ 15.
350 Wearstler ¶ 23.
351 *Id.*
352 *Id.*
353 Wearstler ¶ 26.
354 Hicks ¶ 13.
355 Hicks ¶ 17.
356 Sowell ¶ 10.
357 Taylor ¶ 3.

violent and criminal conduct.[359] Testimony detailing Betty's psychological vulnerabilities, parenting deficiencies, and maternal neglect was important to counter the suggestions from the State that her parenting had been adequate and well-intentioned, while Mr. Raby's behavior was willful and disobedient.[360]

11. **Observed family violence**

Mr. Raby has witnessed Bob Butler's abuse of his sister, as described above. He likely has also witnessed Roy Robinson's violence towards his grandmother. Finally, Mr. Raby has observed his uncle Junior's almost daily violence towards family members, which is described below.

The observation of violence directed towards others in the family is associated with emotional distress, psychological disorder, and adverse developmental outcomes equivalent with

---

358 Cunningham Mitig. ¶ 109.

359 Cunningham Mitig. ¶ 109.

360 *See, e.g.*, S.F. 34:515-518. See also S.F. 34:516:22 – 517:18 and S.F. 34:523, l. 13.
Q: And you [Betty] did your best to discipline Charles with what you had: is that correct?
A: I tried, but...
Q: But at the time you did your best?
A: Yes, sir.
Q: You also taught Charles the difference between right and wrong?
A: Yes, sir.
Q: You taught him it was wrong to steal?
A: Yes, sir.
Q: You taught him it was wrong to drink?
A: Yes, sir.
Q: That it was wrong to use drugs?
A: Yes, sir.
Q: That it was wrong to hurt other people?
A: Yes, sir.
Q: And you told him that he shouldn't stay out in the streets, walk the streets day and night. You told him that, didn't you?
A: Yes, sir.
Q: Did Charles listen?
A: No.

Q: The bottom line with Charles, Ms. Perteet, is people would give advice, there were programs. The bottom line is, no one could make him do what he didn't want to do.

those associated with the direct experience of physical abuse.[361]

12. Personal violent victimization

Mr. Raby's Uncle Junior, who lived with Mr. Raby intermittently during his childhood, is a violent schizophrenic whose paranoia, unpredictable anger, and random violence terrorized family members daily.[362] He would hold his mother against the wall, using a machete to threaten her.[363] Constantly armed with Chinese Stars and knives,[364] Junior regularly threatened to kill family members.[365] Wanda always defended her son, saying he had "water on his brain."[366] C.J.'s husband at the time, John Sowell, who was not asked to testify, remembers witnessing several instances of Junior's bizarre and violent behavior.[367] John's sister, Donna Hamner, remembers receiving distressed telephone calls from Charles on several occasions asking for help.[368] When she would pick Charles up in her car, Donna could see visible injuries, such as claw marks that Junior had left on Charles's neck.[369] Neither John, nor C.J., nor Donna, was asked to testify, and the jury heard no evidence regarding Junior's victimization of Mr. Raby, and, indeed, Mr. Raby's entire family.

Like child abuse by a parent or caretaker, personal violent victimization by others can result in or exacerbate Post Traumatic Stress Disorder, interpersonal distrust, desensitization to violence, disruption of values and other risks.[370]

A: Right.

361 Cunningham Mitig. ¶ 116.
362 Hicks ¶ 16; *see also* Wearstler ¶ 19; Mayes ¶ 15; H.R. Butler ¶ 6.
363 Mayes ¶ 15.
364 *Id.*
365 *Id.*
366 *Id.*
367 Sowell ¶¶ 6-9.
368 Aff. Donna Hamner ("Hamner") ¶5, Ex. 8.
369 *Id.*
370 Cunningham Mitig. ¶ 119.

13. **Sexually traumatic exposure, including possible sexual abuse by mother and placement in the care of a sex offender**

Bob Butler has reported that Betty had extra-marital encounters during her marriage to Bob.[371] Bob has also reported that after their separation, Betty routinely had men in and out of the house.[372] Robert, Mr. Raby's half brother, echoes Bob's reports.[373]

As described above, Roy Robinson, probably along with Junior, was sexually molesting Roy's daughters, Mr. Raby's aunts, Padoo and C.J.[374] Mr. Raby and his sister spent much of their childhood living in the same household with Roy Robinson and Junior, along with their aunts, who were close in age. In fact, at age 12, Harris County Child Welfare for a time placed Mr. Raby in the care of Roy Robinson, a convicted rapist.[375] Mr. Raby has therefore lived extensively with multiple child molesters, who exposed him to observing the abuse of others, and perhaps victimized him as well.

Most significantly, Betty once told her son, Robert, and his wife that she had sexually abused Mr. Raby.[376] She has never admitted this conduct since that time. Shirlene Guthrie, a faculty member at New Horizons, believes that during his placement there Mr. Raby showed several indications of having been sexually abused.[377] Mr. Raby himself has no memory of entire years during this period in his life.[378] Betty has similar memory loss, both of her own childhood and of this time during Mr. Raby's childhood, possibly because of the trauma of sexual abuse in

---

371 B. Butler ¶ 10.
372 B. Butler ¶ 11.
373 H.R. Butler ¶ 8.
374 *See also* Sowell ¶ 8 (Junior tried to rape C.J. once, and Padoo slept with Betty for protection from him).
375 Roy Robinson CA state crim record.
376 H.R. Butler ¶ 13.
377 Cunningham Mitig. ¶ 123.
378 Raby ¶ 4.

her childhood,[379] and Mr. Raby's lack of memory may also be attributable to sexual abuse.

There was no testimony at trial regarding sexually traumatic exposure. Sexually damaging or "traumatic" experience is broader than inappropriate genital contact. Other sexual exposures during childhood that are psychologically damaging include precocious exposure to adult sexual exchange, perverse family atmosphere, perverse and/or promiscuous parental sexuality, inappropriately sexualized relationships, observed sexual abuse or assault of another, and premature sexualization.[380] At the very least, testimony as above regarding Betty's history of promiscuity would have assisted the jury in better understanding Mr. Raby's sexual involvement with Karianne Wright.

Additionally, the jury did not have the opportunity to consider the catastrophic long term effects of sexual abuse on boys, which include increased risk for depression, somatic disturbance, self-esteem deficits, difficulty maintaining intimate relationships, problems with sexual adjustment, alcohol and substance abuse, and sexual offending.[381]

14. **Untreated Attention Deficit Hyperactivity Disorder**

There are indications from Mr. Raby's history that he suffered from an untreated Attention Deficit Hyperactivity Disorder (ADHD).[382] ADHD is characterized by excessive motor activity, inattention/distractibility, and impulsivity.[383] In his early and middle childhood, Mr. Raby's behavior problems that he displayed in childhood had a strong impulsive quality.[384]

Untreated, ADHD is a broad risk factor for disturbed peer relationships, academic failure,

---

379 Wearstler ¶ 33.
380 Cunningham Mitig. ¶ 124.
381 Cunningham Mitig. ¶¶ 125, 128.
382 Cunningham Mitig. ¶ 129.
383 Cunningham Mitig. ¶ 129.
384 Cunningham Mitig. ¶ 129.

juvenile delinquency, alcohol and drug abuse, and adult criminal activity.[385] Mr. Raby received neither sustained counseling nor medication for his symptoms. Mr. Raby's likely ADHD was never raised at trial.

15. Academic failure and learning disabilities

There is ample evidence that Mr. Raby suffered from a learning disability, and experienced associated academic frustration and failure.[386] Mr. Raby had great difficulty learning to read.[387] Mr. Raby failed first grade, then second grade.[388] By the time Mr. Raby entered third grade, he was ten years old, and increasingly embarrassed and frustrated that he was not able to keep up with the other kids.[389] Teachers gave up asking him to read aloud or do classwork.[390] When Mr. Raby was in class, he was expected to do nothing but sit quietly at his desk.[391] Mr. Raby lost interest in school entirely.[392]

In the absence of an explanation of Mr. Raby's learning disabilities, the jury likely believed that Mr. Raby's irregular school attendance was due to no more than his *willful and motiveless choice*. In fact, Mr. Raby had little or no control over his ability to learn while at school, and every reason to wish to avoid the sting of inevitable academic failure he experienced there. Learning disabilities and/or academic failure are associated with reduced self-esteem, little sense of safety or refuge at school, increased risk of school drop-out, increased susceptibility to influence from marginal peers, and reduced employment opportunity.[393] Mr.

---

385 Cunningham Mitig. ¶ 130.
386 Cunningham Mitig. ¶ 139.
387 Raby ¶ 6.
388 Wearstler ¶ 21.
389 Raby at 5.
390 *Id.*
391 *Id.*
392 *Id.*
393 Cunningham Mitig. ¶ 141.

Raby experienced these negative consequences, the most serious of which was the truancy that first labeled him a criminal, and began his pattern of petty offenses and juvenile detention.

16. Psychological disorders

Mr. Raby displayed evidence of psychological disorder in his childhood and adolescence. Psychological assessments performed throughout his childhood described a quiet young man who did not easily trust others, who suffered from low self-esteem and depression, who wanted to form friendships but wasn't sure how, and who longed to be with his thoroughly dysfunctional family.[394] Similarly, a former girlfriend, Pam Langenbauhn, who was never asked to testify, remembers that Charles often visited a roller-skating rink that was a local hang-out, but never skated.[395] She described him as quiet: he was shy, and did not speak to people he did not know.[396] Once you were Mr. Raby's friend, however, he was very protective.[397]

These descriptions of Mr. Raby as a child and adolescent portray the emotional pain that he carried for many years, demonstrating that his condition is more complex than simply willfully choosing to be "bad."[398] More broadly, expert testimony could have explained that psychological symptoms and disorders impede normal development in a variety of ways, and are a risk factor for violence in the community.[399]

Detailed testimony regarding the emotional disorders and symptoms that Mr. Raby suffered were also important as several of these traits fly in the face of the highly pejorative sociopath/psychopath label elicited from Dr. Walter Quijano on cross-examination.[400] This label

---

394 Cunningham Mitig. ¶ 132-135.
395 Langenbauhn ¶ 4.
396 Langenbauhn ¶ 5.
397 *Id.*
398 Cunningham Mitig. ¶ 137.
399 Cunningham Mitig. ¶ 137.
400 S.F. 34:545.

describes individuals who do not seek or experience relationship attachments to others – hence their excessively self-driven reactions and behavior.[401] Descriptions of Mr. Raby's psychological processes as a teen, in contrast, pointed to his distress at the *loss* of such attachments, and his repeated attempts to *restore* that loss.[402]

17. **Corruptive surrogate family and peers; adolescent onset alcohol and drug abuse**

Junior introduced Mr. Raby to alcohol and marijuana at age ten.[403] Within a short time, Mr. Raby began to use both on a daily basis.[404] After Betty's separation from Bob Butler, when Mr. Raby and his sister found themselves without any effective parental supervision, they began to stay out all night, drinking with friends.[405] Throughout Mr. Raby's adolescence and young adulthood, he felt anxious most days while sober.[406] Much like his father, Mr. Raby sought daily relief from anxiety through the mellowing effect of marijuana and downers such as Valium.[407] Mr. Raby's counsel did not present evidence that the combined effect of the liquor and Valium resulted in a memory blackout during the late evening hours on the night of the offense. Yet such alcohol-related blackouts were not uncommon for Mr. Raby to experience, according to James Jordan, Paul Wayne Taylor, and others.[408]

The jury was deprived of critically important research and perspectives that could have resulted in consideration of Mr. Raby's substance dependence as a mitigating factor. There was *no* testimony at the sentencing phase regarding the redundant substance dependence risk factors

---

401 Cunningham Mitig. ¶ 138.
402 Cunningham Mitig. ¶ 138.
403 Raby ¶ 3; Wearstler ¶ 28; Hicks ¶ 18; Cunningham Mitig. ¶ 145.
404 Raby at 3; Cunningham Mitig. ¶ 145.
405 Mayes ¶ 12; Langenbauhn ¶ 4.
406 Raby ¶ 17.
407 *Id.*
408 Cunningham Mitig. ¶ 149; Hicks ¶ 18; Jordan ¶ 15; Taylor ¶¶ 12-13.

that impinged on Mr. Raby's development in early adolescence.[409] In addition, substance dependence and intoxication are also risk factors for violence in the community.[410] Moreover, trial counsel should have noted that Mr. Raby's "choice" to begin substance abuse occurred as an immature early adolescent, with the deficient reasoning and judgment that accompanies that developmental stage, and without the support of a stable family network.[411] Evidence of Mr. Raby's intoxication on the night of the offense also speaks to the quality and degree of planning, judgment, volition, and other facets of moral culpability that were important for the jury to weigh in their sentencing verdict.[412]

18. **Institutional neglect, inadequate interventions**

The interventions Charles received were delayed, inadequate, and not sustained.[413] As described above, CPS failed to intervene after discovering Bob Butler's abuse of Mr. Raby and his sister in 1978. When CPS finally did take custody of the children, at Betty's request, the agency made several placements that were profoundly negligent at best—for instance, placing Mr. Raby with Roy Robinson in 1982, despite Roy's past rape conviction and long history of sexually abusing his daughters and stepdaughters.

Beyond placement in special education classes from time to time, there is no indication that the school system involved Charles in counseling services, or medication consultation for his depressive or ADHD symptoms.[414] In addition, New Horizons failed to recognize that Mr. Raby was not ready to be released to his mother's custody, destroying the best chance Mr. Raby had known for achieving normal development.

---

409 Cunningham Mitig. ¶ 153.
410 Cunningham Mitig. ¶ 154.
411 Cunningham Mitig. ¶ 159.
412 Cunningham Mitig. ¶ 157.
413 Cunningham Mitig. ¶ 160.

Negligence in juvenile institutional placement may act to compound the psychological injury of disrupted attachments and removal from the mainstream developmental experiences, for instance, delaying the development of self-control.[415] In addition, apathetic or anemic institutions disrupt the adoption of constructive models, and the instilling of pro-social values is blocked.[416]

The presentation of compelling mitigation evidence was critical in Mr. Raby's case, as it is in every capital case that goes to sentencing in Texas. Yet trial counsel plainly had little notion of the ample evidence available to them that could have described the many adverse developmental factors present in Mr. Raby's childhood and adolescence. Furthermore, because Mr. Raby's trial counsel had *no* understanding of how these factors shed light on Mr. Raby's level of moral culpability for the offense, the jury in all likelihood considered the mitigation evidence that was presented as aggravating.

b. Positive Character Evidence That Could Have Been Presented

A number of those close to Mr. Raby never had the opportunity to testify on his behalf. Because trial counsel presented so little evidence of Mr. Raby's good character, it was probable that the jury accepted the State's portrayal of Mr. Raby as without friends or good qualities. Some witnesses that should have been called, and the testimony they could have offered, have been discussed above: Paul Wayne Taylor, Pam Langenbauhn, C.J. Hicks, John Sowell and Pam Hamner. Furthermore, C.J., Robert Butler, and Mr. Raby's sister, Wanda, could have attested to Mr. Raby's attempts to stay away from alcohol and drugs after his release from prison in 1992.[417] C.J. and Wanda each could have described peaceful nights he spent during that period with them

---

414 Cunningham Mitig. ¶ 160.
415 Cunningham Mitig. ¶ 165-156.
416 Cunningham Mitig. ¶ 167.
417 Hicks ¶ 21; Mayes ¶ 19; H.R. Butler ¶ 11.

and their children.[418] In addition, James Jordan could have described Mr. Raby's attempts to guide and protect James, who was like a little brother to him.[419] James states that for each of Mr. Raby's faults, there is an equal strength.[420]

Most importantly, while Merry Alice Gomez (now Merry Alice Wilkin) did testify at sentencing, very little of the positive character evidence she had to offer was elicited, because trial counsel did not learn of it. When Mr. Raby was released from prison in 1992, he had made the decision to try to avoid drugs and alcohol and turn his life around, in part so that he could be with Merry Alice, with whom he had been corresponding for over a year. He got a job at Westfield Sandblasting Company,[421] and was reporting as required to his parole officer.[422] Merry Alice and Mr. Raby were together for most of the two months during which he was on parole.[423] Merry Alice was in many ways the person most able to comment on Charles's struggle to stay straight after his release from prison. In fact, Merry Alice could have testified to the following if she had been properly interviewed and prepared for trial:

- the fact that after his release, Mr. Raby spoke enthusiastically about his goals of finding his daughter, Amber, and finding a job, a car, and a home. He confided in Merry Alice that earlier in his life, his mother was always working and his father was not around, and he got into trouble because he just didn't care;[424]

- the fact that Mr. Raby and Merry Alice were romantically involved, and would express their affection by holding hands and, once, by making love.[425] Because she was unprepared, Merry Alice was taken aback when Mr. Raby's trial counsel asked whether she and Mr. Raby had

---

418 Hicks ¶ 21; Mayes ¶ 19-20. A little over a week before his arrest, Charles took Wanda's son P.J. riding on the Metro bus route for fun, which P.J. seemed to enjoy. (Mayes ¶ 20.)

419 Jordan ¶¶ 1-3.

420 Jordan ¶ 19.

421 Aff. Ryan Rebe and accompanying job application, Ex. 18; Raby ¶ 25.

422 Raby ¶ 25; S.F. 34: 570.

423 Wilkin ¶ 13.

424 Wilkin ¶¶ 4, 17.

425 Wilkin ¶ 7.

slept together,and, flustered and embarrassed, denied it;[426]

- the fact that Mr. Raby spent much of his last paycheck from Westfield Sandblasting Company on gifts for Merry Alice's baby, soon to be born. Mr. Raby and his mother attended Merry Alice's baby shower in August of 1992, and he brought a bag filled with toys, spoons, a pacifier, socks, shoes, a thermometer, a medicine spoon, baby powder, a rattle, and a self-standing swing. Later he also gave Merry Alice a rocking chair that had been in his family;[427]

- the fact that Mr. Raby commented once that he got his drinking habit from his natural father, whom he called an alcoholic;[428]

- the fact that Mr. Raby never touched Merry Alice in violence or threatened her in any way;[429]

- the fact that Mr. Raby spent most of a week staying with Merry Alice in her hospital room after her C-section. Mr. Raby's trial counsel completely missed this testimony by asking Merry Alice whether Mr. Raby was there for her delivery. She answered no, but in fact no family or friends were present for the birth, which was a scheduled C-section performed in the morning under general anesthesia. Mr. Raby made sure he was present in the afternoon when Merry Alice woke up;[430]

- the fact that Mr. Raby was allowed to stay in Merry Alice's hospital room because a nurse assumed that he was her husband, and he encouraged her to think so. Mr. Raby's mother brought him fresh clothes to wear, and Merry Alice's mother brought them chicken to eat;[431]

- the fact that Mr. Raby was the only man to hold Merry Alice's son, Chris, for two months after his birth. Chris's father refused to do so;[432]

- the fact that after Merry Alice's delivery, Mr. Raby helped her around the house to do anything that she needed, and would wash her feet and put lotion on them. Mr. Raby used to tell her, "You take the mother, you accept the child." After Chris' birth, he would say, "Now I have a boy and a girl." Mr. Raby's family used to call him "C," and so Mr. Raby used to call Chris "Little C." He used to draw pictures for Chris

---

426 *Id.*; S.F. 28:247.
427 Wilkin ¶¶ 8-9, 14.
428 Wilkin ¶ 17.
429 Wilkin ¶ 19.
430 Wilkin ¶ 10.
431 *Id.*
432 Wilkin ¶ 12.

that said "Little Chris" in big letters;[433]

- the fact that after Chris was born, Mr. Raby spent most days with Merry Alice at her house, helping to care for him. During this time, Chris came down with colic and cried almost continuously. Mr. Raby was more patient with Chris than Merry Alice was at times, and would sit in the rocking chair he had brought and rock Chris in his arms "forever;"[434]

- the fact that although the weekend before Mr. Raby's arrest was mostly a tense time, there were a few hours on Sunday night during which Mr. Raby and Merry Alice sat on Mr. Reeves' porch swing and held hands while the wind blew softly. The two talked about getting married some day;[435]

- and the fact that Merry Alice never knew Mr. Raby to carry a knife.[436]

Obviously, the man Merry Alice would have described was a man capable of thoughtfulness, tenderness, patience, and even responsibility, and thus was radically different and more sympathetic than the man Karianne Wright described at trial. Mr. Raby's trial counsel completely failed to convey this side of Mr. Raby's character.

With mitigating evidence, half the story is worse than no story at all. Trial counsel's failure to perform a complete life history evaluation, and to explain to the jury how Mr. Raby's childhood surroundings had affected his development and personality—ultimately, his *moral culpability*—left the jury listening to a hollow-ringing plea for mercy. And it gave the State the opportunity to spin the very facts that should have been cause for sympathy and mercy as evidence of his bad character. Because the jury did not know of Bob Butler's vicious abuse, Bob's parenting became evidence of "discipline" that Mr. Raby rejected.[437] Because the jury did not know of the violence that surrounded Mr. Raby throughout his childhood, Mr. Raby's own

---

433 Wilkin ¶ 13.
434 Wilkin ¶ 14.
435 Wilkin ¶ 25.
436 Wilkin ¶ 19.

violent behavior became evidence that he has "no conscience."[438] Because the jury did not know of all the ways "the system" failed him, Mr. Raby's runaway attempts became evidence that he is an escape risk,[439] who rejected "the system's" help whenever given.[440] Worst of all, because the jury was not shown how the terrible circumstances of Mr. Raby's childhood led directly to his increasingly criminal behavior, and because the difference between criminal responsibility and moral culpability was never explained, his very plea for mercy became evidence of just another attempt to escape responsibility, to blame someone else.[441] By presenting only half the story, and failing to explain how Mr. Raby's life experiences affected his development and personality—his *moral* culpability, trial counsel presented a case that appeared far more aggravating than mitigating. Moreover, trial counsel missed every opportunity to put on substantial evidence of Mr. Raby's good character traits and attempts to straighten out his life.

C. Mr. Raby's Trial Counsel Failed to Impeach a Critical State Witness, Karianne Wright

In addition to failing to present compelling cases on the issues of future dangerousness and mitigation, trial counsel made a number of other prejudicial errors at the punishment phase of trial. Chief among these was trial counsel's failure to present evidence to impeach Karianne Wright's testimony. Karianne's accounts of her abusive relationship with Mr. Raby and other episodes did more than reveal Mr. Raby's violent tendencies during his teen years; they portrayed Mr. Raby as a sadist without a conscience. In fact, Karianne's opinion on Mr. Raby's character was especially important because Mr. Raby was indicted on a theory that he had attempted to sexually assault the victim. Jurors who were not initially convinced by the State's

---

437 S.F. 37:1043, 1062.
438 S.F. 37:1045-46.
439 S.F. 37:1048.
440 S.F. 37:1051-52.

It just stops

Cause No. 940730 Charge Capital Murder

THE STATE OF TEXAS § 248 DISTRICT COURT
§
§
v. § HARRIS COUNTY, TEXAS
Charles Douglas Raby §
§

MOTION FOR APPOINTMENT OF COUNSEL
POST-CONVICTION DNA TESTING

TO THE HONORABLE JUDGE OF SAID COURT:

Charles D. Raby (name), the **DEFENDANT** in the above styled and numbered cause respectfully petitions the court to appoint counsel to represent him / her for the purpose of post-conviction DNA testing in this cause and would show the Court that he / she is too poor to employ counsel.

x not present (TDC)
Defendant

Sworn to and subscribed before me on 1-29-03 **(date)**

Deputy District Clerk, Harris County, Texas

FILED
CHARLES BACARISSE
District Clerk
JAN 29 2003
Time: 11 AM
Harris County, Texas
By _____ Deputy

ORDER APPOINTING COUNSEL

On Jan 29, 2003 **(date), the Court determined that the above named defendant has executed an affidavit stating that he / she is without counsel and is too poor to employ counsel. The Court ORDERS that the attorney listed below is appointed to represent the defendant named above for the purpose of post-conviction DNA testing in this cause.**

Hattie Sewell Mason — 13155700
Attorney — **Bar Card Number**
5959 West Loop South, Suite 110
Address
Bellaire — Texas — 77401
City — **State** — **Zip Code**
(713) 664-0332 — (713) 664-0377
Telephone Number — **Fax number**

The court further ORDERS the cause set for 3-28 **(date)**
9:00 am **(time)** _____ **Houston, Harris County, Texas (place)**

Signed 1-29-03 **(today's date)**

Judge Presiding

000366

73981P:473

19/pt/439

Cause No. 9407130

STATE OF TEXAS	§	IN THE 248TH DISTRICT COURT
V.	§	OF
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

STATE'S MOTION REQUESTING COURT TO DENY DNA TESTING

COMES NOW the State of Texas, by and through its Assistant District Attorney, and respectfully requests that the Court deny DNA testing of evidence in the above-styled case and for good cause shows the following:

FILED
CHARLES BACARISSE
DEC 17 2003
Time:
Harris County, Texas
By
Deputy

I.

PROCEDURAL HISTORY

The defendant, Charles Douglas Raby, was indicted for the 1992 capital murder, cause number 9407130, of seventy-two year old complainant Edna Mae Franklin (Tr. I – 5). The indictment alleged that the defendant intentionally caused the death of the complainant in the course of committing and attempting to commit the offenses of robbery, aggravated sexual assault, or burglary of the complainant's home (Tr. I – 5).[1]

On June 9, 1994, the defendant was found guilty of capital murder (Tr. IB - 557). The trial court charged the jury on the three methods of committing the instant offense as set forth in the indictment, and the jury returned a general verdict of guilt (Tr. IB – 525-37). Punishment was assessed at death by lethal injection in accordance with the jury's responses to the special issues (Tr. IB – 557-8).

On March 4, 1998, the Court of Criminal Appeals affirmed the defendant's capital murder conviction. *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 1998).

[1] The indictment references Houston Police Department offense report number 111371392.

On November 16, 1998, the United States Supreme Court denied the defendant's petition for certiorari. *Raby v. Texas*, 525 U.S. 1003, 119 S.Ct. 515, 142 L.Ed.2d 427 (1998).

On January 31, 2001, the Court of Criminal Appeals denied relief on the defendant's first state habeas petition, cause number 9407130-A, adopting the trial court's findings of fact and conclusions of law. *Ex parte Raby*, No. 58,131-01 (Tex. Crim. App. Jan. 31, 2001).

On November 27, 2002, the United States District Court for the Southern District of Texas – Houston Division, granted Respondent Cockrell's motion for summary judgment and dismissed all claims in the defendant's first federal habeas petition. The federal district court also denied the defendant certificate of appealability (COA). *Raby v. Cockrell*, No. H-02-0349 (D.C. Tex. Nov. 27, 2002)(not designated for publication).

On October 15, 2003, the Fifth Circuit Court of Appeals denied the defendant's application for COA. *Raby v. Cockrell*, No. 03-20129, 2003 WL 22348919 (5th Cir. Oct. 15, 2003). The Fifth Circuit also denied the defendant's motion for rehearing en banc.

The defendant now requests forensic DNA testing of evidence containing biological material in the instant case. *See* Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05 (Vernon Supp. 2004).[2]

[2] Chapter 64 of the Texas Code of Criminal Procedure, governing the procedure whereby a convicted person may obtain forensic DNA testing of evidence, was amended effective September 1, 2003. However, a convicted person who submits a motion under Article 64.01 is covered by the law in effect when the motion was submitted. TEX. CODE CRIM. PROC. ANN. art. 64.03 historical note (Vernon Supp. 2004). Defendant's motion was filed in 2002.

II.

STATEMENT OF THE CASE

STATE'S GUILT-INNOCENCE EVIDENCE

The complainant, seventy-two year old Edna Mae Franklin, lived with her two grandsons, Eric Benge and Lee Rose (S.F. XXVII – 62-5, 159-160). On October 15, 1992, Benge left the complainant's house shortly before 4:00 p.m. with Rose (S.F. XXVII – 68-9). At around 10:00 p.m. that same evening, Benge returned home to find the front door of the complainant's house unlocked and open and all the lights in the house extinguished (S.F. XXVII – 70, 138-9). The back door of the house was open, and Benge's three dogs were loose in the front yard (S.F. XXVII – 70, 77). The complainant's house was ransacked, and the contents of the complainant's purse emptied on the complainant's bedroom floor (S.F. XXVII – 78-80, 121; XXVIII - 189). Other personal items were scattered around the complainant's bedroom and the dresser drawers were open (S.F. XXVII – 79-80).

Benge found the complainant dead on the living room floor (S.F. XXVII – 76, 80). She was lying on her side with her legs in a spread eagle position (S. F. XXVII – 140-2). The complainant was nude from the waist down, her pants inside out, some ripped panties near her body, and the complainant's knee brace around her ankle (S.F. XXVII – 84, 110-1; XXVIII - 188). The complainant clutched hair in her right hand (R. XXVIII – 191; XXIX – 372-3). Also, some loose hairs were in the complainant's left hand and on her body (S.F. XXVIII – 191-2). There was a towel adjacent to the complainant's body with blood smears on it (S.F. XXVIII – 190).

000369

The complainant's death was attributed to two large cutting wounds to her neck and five stab wounds to her chest (S.F. XXVII – 16). Also, the complainant was severely beaten (S.F. XXVII – 17-8). There was no injury to the complainant's genitalia, anus, rectal, or parietal areas, and no semen in the complainant's oral, rectal, or vaginal cavities (S.F. XXVII – 37, 58). The complainant may have been sexually assaulted (S.F. XXVII – 59).

Benge and Rose were friends with the defendant for several years before the complainant's murder (S.F. XXVII – 62-5). The complainant did not like the defendant and barred him from her home a week before her murder (S.F. XXVII – 66, 115, 161-3). Her grandsons, however, often snuck the defendant into the complainant's home through bedroom windows (S.F. XXVII – 65-6, 132).

On the day of the instant offense, Benge nailed a screen to one of his bedroom windows, a window that the defendant previously used to enter the complainant's house (S.F. XXVII – 90-1, 105-6). The screen was torn from the window and the window blinds were in disarray when Benge discovered the complainant's body (S.F. XXVII – 90-1, 113-4, 116). Also, there were two footprints in the middle of the bed located in front of the bedroom window (S.F. XXVII – 113-4, 116). Police believed that the defendant entered the complainant's house through that window because a screwdriver was lying on the window ledge, and there was a fresh wood chip (S.F. XXVII – 90; XXVIII - 189).

Shirley Gunn testified at the defendant's capital murder trial that she lived within walking distance of the complainant, and the defendant came by her house at 5:00 p.m. on the evening of the instant offense looking for Gunn's son and another man (S.F.

XXVIII – 290-2). The defendant was wearing a jacket (S.F. XXVIII – 293). The defendant smelled of alcohol and used a pocketknife to clean his nails before leaving Gunn's house at 6:00 p.m. (S.F. XXVIII – 293-4). Before the defendant left Gunn's house, he asked her whether her son and the other man might be at "grandma's" (S.F. XXVIII – 296-7). Gunn testified that the complainant was known as "grandma" (S.F. XXVIII – 290).

Mary Alice Scott, who lived approximately 200 feet from the complainant's house, saw the defendant walking from her driveway into the street between 7:00 p.m. and 7:45 p.m. on the evening of the instant offense (S.F. XXVIII – 300-5). The defendant wore jeans and a dark jacket (S.F. XXVIII – 309).

Leo Truitt lived directly behind the complainant's house (S.F. XXVIII – 300). Truitt testified at trial that at approximately 8:00 p.m. on the evening of the instant offense, a white male of similar build and height to the defendant walked from the rear to the front of Truitt's house and jumped Truitt's fence (S.F. XXVIII – 314-7).

Mary Gomez, the defendant's girlfriend, was with the defendant at her house when the defendant's mother telephoned to tell the defendant that the police wanted to talk to him in connection with the complainant's murder (S.F. XXVIII – 325). The defendant looked out the window, told Gomez that the police had arrived, and fled from the house through the back door (S.F. XXVIII – 326-7).

On October 19, 1992, police arrested the defendant (S.F. XXVIII – 198-9). The defendant confessed to the instant offense, stating that he was carrying a pocketknife that he used to clean his fingernails on the day of the complainant's murder. In his

confession, the defendant recounted, *inter alia*, how he had been drinking beer, whiskey, and Mad Dog 20/20 and stated the following:

> I told Sergeant Allen that I had not been at Lee's house on Westford Street Thursday night. I was not telling the truth at first, because I was scared. I decided to tell the truth and get this over with.
>
> ***
>
> I drank the bottle of wine and then I walked over to Lee's house on Westford Street. Lee lives with his grandmother, Edna, and his cousin Eric. There is an old Volkswagen in the driveway at their house. I walked up to the front door. The front door has a screen type door in front of a wooden door. I knocked on the door. I did not hear anyone answer. I just went inside. I sat down for a little bit on the couch. I called out when I got inside but I did not hear anyone say anything. I heard Edna in the kitchen. I walked into the kitchen and grabbed Edna. Edna's back was to me and I just had my knife but I do not remember taking it out. We were in the living room when we went to the floor. I saw Edna covered in blood and underneath her. I went to the back of the house and went out the back door that leads to the back yard.
> Shortly after I had left Lee's house on Westford I was approached by a man and this man told me something like "I had better not catch you in my yard," "jumping his fences". Or something like that. I woke up later on the ground near the Hardy Toll Road and Crosstimbers. I walked home, on Cedar Hill from there. I remember feeling sticky and I had blood on my hands. I washed my hands off in a water puddle that is near the pipeline by the Hardy Toll Road. I do not remember what I did with my knife. The next day I knew I had killed Edna. I remembered being at her house and struggling with her and Edna was covered in blood when I left. I think I was wearing a black concert shirt, the blue jeans I'm wearing and my Puma tennis shoes. I also had on a black jacket.

State's Exhibit 98. Police recovered a black jacket that the defendant was wearing on the day of the instant offense from Mary Gomez's house (S.F. XXIX – 371, 384). 72

Deetrice Wallace, Houston Police Department Crime Lab, testified that the elastic on the complainant's panties was torn and not cut (R. XXIX – 391-2). 73 Joseph Chu, Houston Police Department Crime Lab, collected hair samples from the defendant. Reidun Hilleman, Houston Police Department Crime Lab, testified that she examined several articles of clothing, a piece of carpet, hairs collected from the complainant's

hands, hairs from articles of clothing and carpet, and compared those hairs to known samples from the defendant, the complainant, Eric Benge, and Lee Rose (R. XXIX – 404-5). Hilleman testified that she found no hairs from the crime scene that were consistent with the defendant's hair (R. XXIX – 405-6). The hair found in the complainant's right hand was consistent with the complainant's hair (R. XXIX – 406). Also, there was some animal hair and a head hair that was consistent with the hair of Eric Benge (R. XXIX – 406). 74

STATE'S PUNISHMENT EVIDENCE

The State elicited evidence that the defendant was previously convicted for assault and robbery (S.F. XXXII – 70-1). Additionally, one of the defendant's friends testified that the defendant was a very violent person with a bad reputation for being peaceful and law abiding. The defendant liked to fight when he did not get his way or was bored (S.F. XXXI – 29, 41-2, 49).

Also, the State presented testimony concerning the defendant's bad acts. When the defendant was a teenager, he and some of his friends stole beer and other items from a convenience store (S.F. XXXI – 33). During the robbery, the defendant struck the store clerk with a stick resembling a closet pole several times (S.F. XXXI – 33). 75 When the defendant and his friends tried to hide at a girlfriend's house after the robbery and were told to leave, the defendant fought the girlfriend's brother-in-law (S.F. XXXI – 34-6). 76 On one occasion, the defendant got into a fight with his sister's husband and beat the man with a fence board (S.F. XXXI – 37-8). 77

78 Karianne Wright, the defendant's former girlfriend, testified regarding her experiences with the defendant and his violent nature during the mid 1980s. When

Wright was seven months pregnant, the defendant chased her down a public road, knocked her to the ground, and threatened to jump on her stomach while stating that he wished Wright's baby would die (S.F. XXXI – 7-8; XXXII – 233-4). Approximately one month later, the defendant threw a knife and fork at Wright while she was holding her newborn child, hitting Wright in the head and causing her to bleed (S.F. XXXI – 8-9, 16; XXXII – 202-3).

Wright also testified that the defendant beat her three to five times a week during their relationship (S.F. XXXI – 36-7; XXXII – 189). Usually, the defendant also demanded that Wright strip and perform oral sex on him after he beat her (S.F. XXXII – 189-90). The defendant also struck Wright with his fists and called her insulting names (S.F. XXXII – 190-1). After Wright performed oral sex on the defendant, the defendant had sexual intercourse with Wright (S.F. XXXII – 191). The defendant beat Wright into compliance if she resisted his sexual demands (S.F. XXXII – 191-2). 79

Finally, Wright testified regarding the defendant's mannerisms when he talked about beating people. According to Wright, the defendant "would get a spark in his eye, a glow in his eye, as if violence to him was better than sex. There was nothing better. It was a power rush for him" (R. XXXII – 221). 80

In the late 1980s, the defendant accosted and beat a ten-year-old boy who was riding his bicycle on the sidewalk (S.F. XXXII – 74-7). The defendant told the child that the sidewalk belonged to him, and the child could not travel on it (S.F. XXXII – 74-7). 81 When the defendant's mother and stepfather tried to intervene, the defendant stabbed his stepfather in the neck with a long kitchen knife and knocked out his stepfather's front teeth (S.F. XXXII – 88, 92). 82

In 1986, Alicia Jordan discovered the defendant in her home with her son and ordered the defendant to leave (S.F. XXXII – 106-8). When Jordan tried to call the police after the defendant refused to leave her house, the defendant pulled the telephone out of the wall, punched Jordan, threw Jordan on the ground, and kicked Jordan (S.F. XXXII – 108). 83

In 1990, Paul Autry, a convenience store clerk got into a fight with a young man who entered his store and stole some beer (S.F. XXXIII – 302, 305). While Autry and the man scuffled in the store parking lot, the defendant got out of a car and approached Autry with a knife (R. XXXIII – 305). When Autry backed off, the defendant and the young man left (S.F. XXXIII – 308). 84

The defendant was involved in some incidents while in custody at the Harris County Jail. On January 9, 1993, the defendant tried to cut a jailer with a shank constructed from a piece of steel tied to a broom handle (S.F. XXXIII – 328, 330-1). The defendant also told several jailers that he wanted to knife them and that he wanted to go to the hospital in order to attempt to escape (R. XXXIII – 331-2). 85

Defense's Punishment Evidence

The defense presented testimony that the defendant's father spanked the defendant for crying when he was two and three months old (S.F. XXXIV – 651-2). When the defendant was two years old, his mother and father divorced, and the defendant's mother married a man who was strict and verbally abusive to the defendant (S.F. XXXIV – 465-8). The defendant's mother divorced her second husband when the defendant was twelve years old (S.F. XXXIV – 469-70). At that time, the defendant started drinking beer, wine, and whisky (S.F. XXXIV – 502). In 1982, the defendant's

mother committed herself to a mental institution, and Children's Protective Services (CPS) took custody of the defendant (S.F. XXXIV – 471-7). The defendant was in CPS custody at various times thereafter when he refused to attend school (S.F. XXXIV – 479-484). The defendant ran away when he was sixteen and seventeen years old and had little contact with his mother (S.F. XXXIV – 488).

Michael Downs, the defendant's parole officer, testified that the defendant looked for a job and never tested positive for drugs while under Downs' supervision (S.F. XXXIV – 567-9). A convicted murderer and arsonist, who befriended the defendant while they were both Harris County Jail inmates in January, 1993, testified that the defendant tolerated the abuse of the Harris County jailers (S.F. XXXV – 763-4, 770-7).

Psychologist Walter Quijano testified that the defendant had a borderline personality disorder and was possibly depressed (S.F. XXXIV – 535-545). Also, the defendant could be controlled in a prison setting (S.F. XXXIV – 535-7).

III.

CHAPTER 64 MOTION

The defendant requests DNA testing of the following evidence pursuant to Chapter 64 of the Texas Code of Criminal Procedure:

- the complainant's fingernail clippings;
- hair found in the complainant's hand;
- a pair of blue, bloody panties found near the complainant's body; and
- the complainant's nightshirt.

In support of the defendant's motion for DNA testing, the defendant includes the affidavit of Elizabeth Johnson, Ph.D., Senior Forensic Scientist with Technical Associates, Inc., in Ventura, California. *See Defendant's Exhibit 4.*

The attached affidavits reflect the current location of evidence relating to the instant cause. *See attached affidavits of Elena Siurna, Reidun Hilleman, K.L. McGinnis, Jerry Werner, Melchora Vasquez, John R. Thornton, and Roberto Gutierrez.* The Harris County District Clerk's Office has the following evidence:

- carpet from scene;
- hair from scene;
- blue pants from scene;
- underwear from scene;
- oral, vaginal, and rectal swabs taken from complainant;
- pulled head and pubic hair from complainant;
- complainant's fingernails;
- defendant's pulled and loose pubic and head hair; and
- hair samples from Eric Benge and Lee Rose.

See attached affidavit of Melchora Vasquez. The Houston Police Department Crime Lab has the following items:

- defendant's blood sample;
- vaginal, oral, and rectal swabs and extracts from complainant;
- hairs from scene;
- hairs from defendant's clothing;
- pulled head and pubic hair from complainant;
- defendant's pulled and loose pubic hair and pulled head hair; and
- pulled head hair of Eric Benge and Lee Rose.

See attached affidavit of Reidun Hilleman. Respondent has not been able to locate the shirt referred to in the defendant's motion. The HPD Property Room records attached to the affidavit of K.L. McGinnis reflect that a white blouse was checked into the property room on April 13, 1993 and released, along with many other items of evidence, on June 6, 1994. *See attached affidavit of K.L. McGinnis.* The blouse was not admitted into evidence during the defendant's capital murder trial and is not in the possession of the Harris County District Attorney's Office. *See attached affidavits of Melchora Vasquez, Johnny Thornton, and Roberto Gutierrez.*

IV.

DEFENDANT NOT ENTITLED TO HEARING ON CHAPTER 64 MOTION

The defendant requests that the trial court either grant his motion for DNA testing and/or conduct a hearing on the defendant's Chapter 64 motion. However, the Texas Court of Criminal Appeals has held that "nothing in Article 64.03 requires a hearing of any sort concerning the trial court's determination of whether a defendant is entitled to DNA testing." *Rivera v. State*, 89 S.W.3d 55, 58-9 (Tex. Crim. App. 2002). Rather, evidentiary matters arising under Article 64.03 can be resolved through affidavits. *Rivera*, 89 S.W.3d at 59. Chapter 64 provides for a hearing only after DNA testing is completed under Article 64.03. Then "the convicting court shall hold a hearing and make a finding as to whether the results are favorable to the convicted person." *See* Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05 (Vernon Supp. 2004).

V.

DEFENDANT NOT ENTITLED TO CHAPTER 64 DNA TESTING

The defendant is not entitled to Chapter 64 DNA testing. According to the applicable version of TEX. CODE CRIM. PROC. art. 64.03, the Court may order DNA testing of evidence in the case of a convicted person ONLY IF

(1) the Court finds the following:

(A) that the evidence

(i) still exists and is in a condition making DNA testing possible;

and

(ii) has been subjected to a chain of custody sufficient to establish that is has not been substituted, tampered with, replaced, or altered in any material aspect;

and

(B) that identity was or is an issue in the case;

and

(2) the convicted person establishes by a preponderance of the evidence

(A) that a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing;

and

(B) that the request for the proposed DNA testing is not made to unreasonably delay the execution of sentence or the administration of justice.

See Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05 (Vernon Supp. 2004).

IDENTITY NOT AN ISSUE

In the instant case, the defendant confessed to the commission of the instant offense; therefore, the defendant fails to demonstrate that identity is or was an issue as required by Chapter 64. Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05 (Vernon Supp. 2004); *see also Bell v. State*, 90 S.W.2d 301, 308 (Tex. Crim. App. 2002)(identity not an issue for purposes of capital murder defendant's Chapter 64 motion because defendant confessed to murder). Further, several details of the defendant's confession were corroborated by independent evidence. For instance, witnesses saw the defendant carrying a knife in the vicinity of the complainant's house on the night of

offense, and the complainant sustained cutting and stab wounds (S.F. XXVII – 16; XXVIII – 290-7, 300-5, 314-7). Also, witnesses saw the defendant wearing clothing on the night of the instant offense consistent with that described in the defendant's statement to police (S.F. XXVIII – 293, 309).

During closing argument in the defendant's capital murder trial, defense counsel Michael Fosher argued that there was a murder and the defendant admitted killing the complainant, but the offense did not rise to the level of capital murder because the State failed to prove that the offense was committed in the course of robbery, aggravated sexual assault, or burglary of the complainant's home (S.F. XXX – 434-8, 442). Defense counsel asked that the jury return a verdict of the lesser-included offense of murder (S.F. XXX – 444). In his closing, defense counsel Felix Cantu asked the jury to conclude that the defendant killed the complainant and nothing more (S.F. XXX – 462).

Nevertheless, the defendant contends that identity is or was an issue in the instant case, alleging that defense counsel were ineffective for failing to demonstrate that the defendant's confession was involuntary for the following reasons:

(1) defendant unequivocally requested a lawyer when he was arrested;
(2) defendant was intoxicated on codeine when he gave his confession;
(3) defendant's girlfriend was threatened with arrest during the defendant's interrogation; and
(4) defendant did not understand that his Fifth Amendment right to remain silent included the right not to have his silence used against him at trial.

Defendant's motion at 18. However, a Chapter 64 motion for post-conviction DNA testing is not the proper forum for challenging the voluntariness of a defendant's

confession or defense counsel's alleged ineffectiveness at trial.[3] Such claims are more properly raised on direct appeal or via an Article 11.071 petition for writ of habeas corpus. Significantly, the defendant did not challenge the voluntariness of his confession on direct appeal or state habeas appeal of his capital murder conviction.

Further, the defendant's claim that his confession was involuntary is not supported by the record. During the hearing on the defendant's motion to suppress his confession, the defendant testified that Houston Police Department Sergeant Waymon Allen read the defendant his warnings three times; that the defendant understood what his rights were each time Allen read them to him; and, that the defendant voluntarily and intelligently waived those rights and talked to Officer Allen (S.F. XXV – 74). The defendant asserted that he was going to turn himself in because he was tired of running, but his plan was to lie and try to convince the police that he did not commit the instant offense (S.F. XXV – 76, 82). The defendant acknowledged that his confession was true, and that he was not forced to give a confession (S.F. XXV – 82-3). During his testimony, the defendant never asserted that he had invoked his right to counsel or that he was intoxicated when he gave his confession. The trial court denied the defendant's motion to suppress his confession (S.F. XXVI – 103).

On federal habeas appeal, the defendant alleged that counsel at trial were ineffective for failing to "develop and present a compelling case for the suppression of [the defendant's] confession...," alleging that his confession was coerced, involuntary

[3] Defendant also claims that defense counsel were ineffective for failing to present evidence from an expert pathologist that defendant's knife could not have caused the complainant's wounds and develop evidence that an allegedly violent friend of the complainant's grandsons lived at the complainant's house at the time of the offense. The federal district court considered the defendant's claims on habeas appeal and found that the defendant failed to show that he was denied the effective assistance of counsel at the guilt-innocence phase of trial. *Raby*, No. H-02-0349, slip op. at 11-14.

and false, because the defendant was intoxicated when he confessed and he feared that his girlfriend, Mary Gomez, would be charged with aiding and abetting his crime. *Raby*, No. H-02-0349, slip op. at 7. The federal district court held that the defendant's claim of a coerced and false confession failed given the defendant's testimony during the suppression hearing. *Raby*, No. H-02-0349, slip op. at 11. Further, the defendant's claim that he received ineffective assistance of counsel at the suppression hearing was defaulted. *Raby*, No. H-02-0349, slip op. at 11. The federal district court stated that the defendant testified during the suppression hearing that the police read the defendant his *Miranda* rights several times; that the defendant understood his rights; that the police never threatened to mistreat the defendant's girlfriend, but the police wanted her at the police station in case they needed to talk to her; that the police made no threats about the defendant's girlfriend or threatened to mistreat her in any way; that the defendant voluntarily and intelligently waived his rights; that no one ever told the defendant that his girlfriend would be charged unless the defendant confessed; and, that the defendant confessed, in part, because his confession was true. *Raby*, No. H-02-0349, slip op. at 10-11. The federal district court also cited the defendant's testimony admitting that his confession was "true" and that he was not forced to give a confession. *Raby*, No. H-02-0349, slip op. at 11.

NO REASONABLE PROBABILITY THAT DEFENDANT WOULD NOT HAVE BEEN PROSECUTED OR CONVICTED IF DNA TESTING RESULTS EXCULPATORY

Further, the defendant fails to establish that a reasonable probability exists that he would not have been prosecuted or convicted if exculpatory results were obtained through DNA testing. *See* Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05

(Vernon Supp. 2004). The Texas Court of Criminal Appeals has interpreted this to mean that a defendant must show "a reasonable probability exists that exculpatory DNA tests will prove [his] innocence." *Kutzner v. State*, 75 S.W.3d 427, 438-9 (Tex. Crim. App. 2002). That showing has not been made if exculpatory DNA testing results "merely muddy the waters." *Id.*

The instant indictment alleged that the defendant intentionally caused the death of the complainant in the course of committing and attempting to commit the offenses of robbery, aggravated sexual assault, or burglary of the complainant's home (Tr. I – 5). The trial court charged the jury on the three methods of committing the offense as set forth in the indictment, and the jury returned a general verdict of guilt (Tr. IB – 525-37). The only result from DNA testing that would have any bearing on the instant case would be a positive finding of the defendant's DNA, obviously not an exculpatory result.

The absence of the defendant's DNA or the presence of another individual's DNA would not prove the defendant's innocence. *Rivera*, 89 S.W.3d at 60 (capital murder defendant not entitled to Chapter 64 DNA testing because, even if negative DNA test results supplied a weak exculpatory inference, such inference would not come close to outweighing defendant's confession). Exclusion of the defendant's DNA from the rape kit evidence would only bear on the issue of whether the defendant sexually assaulted the complainant and would not establish that the defendant was innocent of intentionally causing the death of the complainant in the course of committing and attempting to commit robbery or burglary. In denying the defendant's habeas claim for relief alleging insufficient evidence, the federal district court stated that the evidence "was nearly compelling in showing that [the complainant] was killed during the commission of a

robbery or sexual assault." *Raby*, No. H-02-0349, slip op. at 21. Similarly, a finding of exclusion of the defendant's DNA from other biological evidence would not indicate that the defendant was innocent of the charged offense. Further, the presence of another individual's DNA would not, without more, constitute affirmative evidence of the defendant's innocence. The jury had before it evidence that no hair consistent with that of the defendant was found at the crime scene (S.F. XXIX – 405-6). Also, no semen was detected in the complainant's anal, rectal, or vaginal areas (S.F. XXVII – 37).

Based on the foregoing, Charles Douglas Raby, the convicted person in the above-styled case, fails to meet the requirements of Chapter 64 of the Texas Code of Criminal Procedure. THEREFORE, the State respectfully requests that the Court deny DNA testing in cause number 9407130.

VI.

CERTIFICATE OF SERVICE

Service has been accomplished by hand delivering a true and correct copy of the foregoing instrument to:

Hattie Sewell Mason
Attorney of Law
5959 West Loop South, Suite 110
Bellaire, Texas 77401

SIGNED this 17th day of December, 2003.

Sincerely

LYNN HARDAWAY
Assistant District Attorney
1201 Franklin, Ste. 600
Houston, Texas 77002
(713) 755-6657
(713) 755-5809
TBC No. 08948520

"EVIDENCE RECORDS AFFIDAVIT"
Cause #: 9407130 – Charles Raby

STATE OF TEXAS)(

COUNTY OF HARRIS)(

My name is Elena Silva.

I am employed as the property and/or evidence records custodian for the: Harris County Medical Examiner's Office (HME).

My address and telephone number are: 1885 O. S. T. – 77054 // 713-796-92921.

In my capacity as property and/or evidence records custodian I have care and custody of those records for : HCME.

and I certify that the following reflects the status of property and/or evidence related to: HPD offense report #: 111371392 and/or Lab #: 92-6802 (autopsy #) dated: 10-15-92

(please select and complete the proper category)

(A) _____ According to the records of (list your agency) _____

the evidence in offense report # _____ was destroyed on

_____.

(B) X The records of the (list your agency) HCME

do not reflect that property and/or evidence from offense report # 111371392

is in the Possession of the (list your agency) * HCME.

* See attached sheets. Evidence Released To HPD

(continued on page 2)

(C) _____ According to the records of the (list your agency) _____

the following property and/or evidence from offense report #_____

is in the custody of the (list your agency) _____

(continued on page 3)

(D) _____ The records of the (list your agency) _____

indicate the following items were checked out of the Property Room / Lab on the following dates by the following entities and have not been returned:

_____

_____

_____

_____

_____

_____

_____

_____

_____

_____

"I have completed and read the above affidavit and have found it to be true and correct to the best of m knowledge."

SIGNED: Elena Linares
NAME

SWORN TO AND SUBSCRIBED before me the undersigned authority on this the 2 day of December, 20 02

MONICA JOSEPH
NOTARY PUBLIC, STATE OF TEXAS
MY COMMISSION EXPIRES
MAY 23, 2006

Monica Joseph
NOTARY PUBLIC FOR HARRIS COUNTY, TEXAS

JOSEPH A. JACHIMCZYK FORENSIC CENTER
OF HARRIS COUNTY
AUTOPSY EVIDENCE SUBMISSION/REQUEST FORM

ML/PA # 92-6802

Law Enforcement Agency HPD

Agency # 111371392 R

Evidence Del. by: Dr. Edward Beeler MD (Signature)

Police Investigator Assigned to Case:

Rec'd. in Laboratory by: [signature]

Name ALLEN / NORRIS

Date: 10-20-92 Time: _____ am/pm

Address 61 RIESNER

Direct Telephone # ( ) 247-5418

EVIDENCE LISTING

Item(s) Requested:	Item (s) Received in Laboratory:
FINGERNAILS	RT & LT FINGERNAILS
LOOSE HAIRS FROM HANDS	LOOSE HAIR & FIBERS
LOOSE + PULLED HEAD + VAGINAL HAIRS	HEAD HAIR STD.
VAGINAL SWAB	PUBIC HAIR STD.
MOUTH + RECTAL SWABS	ORAL, ANAL, VAGINAL SWAB
SHIRT	
FOREIGN MATERIALS	

Nature of Death SLASHED THROAT

Date of Death 10/15/92

Decedent EDNA MAE FRANKLIN

Race/Sex/Age W/F/72

Suspect _____

Race/Sex/Age _____

Received by: [signature] on 10-30-92 from H.C.M.E.

000388

ML92-6802
Agency Name: hpd
Agency #: 111371392-R
Submission Date: 10/15/92
Submitting Officer(s): Allen/Norris
PE: YES
BULLET: N
CLOTHING: YES
RELEASED: YES
Release Date:: 10/30/92
Releasing Officer: Fred Hale

"EVIDENCE RECORDS AFFIDAVIT"
Cause #9407130 // Charles Raby

STATE OF TEXAS) (

COUNTY OF HARRIS) (

My name is Reidun Hilleman. I am employed as the property and /or evidence records custodian for the Houston Police Department (HPD) Crime Laboratory.

My address and telephone number is: 1200 Travis, Room 2621
Houston TX 77002
(713) 308-2600.

In my capacity as property and/or evidence records custodian I have care and custody of those records for the H. P. D. Crime Laboratory and I certify that the following reflects the status of property and/or evidence related to offense report # 111371392, Lab #L92-10848 dated 10-15-92:

A review of laboratory records related to offense report #111371392 found the following evidence to be in the custody of the Houston Police Department Crime Laboratory: known blood sample from Charles Raby, vaginal swab and extract from swab from complainant, oral swab and extract from complainant, rectal swab and extract from complainant, hairs from complainant's right and left hands, hairs from blue panties, hairs from blue pants, hairs from carpet, hairs from jacket and jeans, hairs from black t-shirt, pulled head and pubic hair of E. Franklin, pulled and loose pubic hair of Charles Raby, pulled head hair of Charles Raby, pulled head hair of Eric Benge, pulled head hair of Lee Rose. NOTE: hairs described above are stored on microscope slides.

"I have completed and read the above affidavit and have found it to be true and correct to the best of my knowledge."

SIGNED: Reidun Hilleman
NAME

SWORN TO AND SUBSCRIBED before me the undersigned authority on this the 3rd day of December, 2002

NOTARY PUBLIC FOR HARRIS COUNTY, TEXAS

R. E. BOBZEAN
Notary Public, State of Texas
My Commission Expires
APRIL 06, 2005

000390

CAUSE NUMBER 9407130

AFFIDAVIT OF K. L. MCGINNIS

STATE OF TEXAS)(

COUNTY OF HARRIS)(

Before me, the undersigned authority, a Notary Public in and for Harris County, Texas, on this day personally appeared K. L. McGinnis, who being by me duly sworn, upon his oath deposes and says:

"My name is K. L. McGinnis. I am employed as the property and evidence records custodian for the Houston Police Department. In my capacity as property and evidence records custodian, I have care and custody of those records for the Houston Police Department, and certify that the following reflects the status of property and evidence related to Houston Police Department offense report #111371392:

The records of the Houston Police Department Property Room do not reflect that property/or evidence from offense report #111371392 is in the possession of the HPD property Room.

I have read the above statement and find it to be true and correct to the best of my knowledge."

K. L. McGinnis

SWORN AND SUBSCRIBED before me, under oath, on this the 12TH day of December, 2002.

Aaron Leon Christopher
NOTARY PUBLIC
State of Texas
Comm. Exp. 03/24/04

NOTARY PUBLIC in and for the State of Texas

My commission expires: 3/24/04

Case Report

12/11/02 10:57:05 AM

Case

Case Number 1113713-92
Date Created 10/16/92
Responsible Officer 81421
Notes

Agency Code 6 - HOMICIDE
Incident Code 1 - EVIDENCE

Evidence

Report Label 0UW5 **Location** CLOSED OUT **Evidence** 0UW6 **In Date** 4/13/93
Category 1 - MISCELLANEOUS **Collected By** **Control**
Serial Number **Suspect** UNKNOWN **Owner** FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV **Tx Date** 4/19/94 **Last Count** 12/30/97
Last Dispose 1 - Unknown **Dispose Date**
Description 1–WHITE PRINT BLOUSE LE236

Transactions

Date/Time 4/19/94 9:17 am	**Issuer** 51105	**Receiver** 98590	**Tx** 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:40 pm	**Issuer** 99414	**Receiver** 51105	**Tx** 21 - PERMANENT OUT TO D

Evidence

Report Label 1285 **Location** CLOSED OUT **Evidence** 1286 **In Date** 5/18/93
Category 11 - CONTAINER ONLY **Collected By** **Control**
Serial Number N/A **Suspect** UNKNOWN **Owner** FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV **Tx Date** 5/25/94 **Last Count** 12/30/97
Last Dispose 1 - Unknown **Dispose Date**
Description CARDBOARD BOX CONTAINING BELOW LISTED ITEMS 027

Transactions

Date/Time 9/1/93 2:22 pm	**Issuer** 51105	**Receiver** 101274	**Tx** 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	**Issuer** 41494	**Receiver** 94374	**Tx** 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:40 pm	**Issuer** 99414	**Receiver** 51105	**Tx** 21 - PERMANENT OUT TO D

Evidence

Report Label 1287 **Location** CLOSED OUT **Evidence** 1288 **In Date** 5/18/93
Category 9 - KNIVES **Collected By** **Control**
Serial Number N/A **Suspect** UNKNOWN **Owner** FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV **Tx Date** 5/25/94 **Last Count** 12/30/97
Last Dispose 1 - Unknown **Dispose Date**
Description KNIFE 027

Transactions

Date/Time 9/1/93 2:22 pm	**Issuer** 51105	**Receiver** 101274	**Tx** 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	**Issuer** 41494	**Receiver** 94374	**Tx** 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:41 pm	**Issuer** 99414	**Receiver** 51105	**Tx** 21 - PERMANENT OUT TO D

Evidence

Report Label 1289 **Location** CLOSED OUT **Evidence** 128A **In Date** 5/18/93
Category 1 - MISCELLANEOUS **Collected By** **Control**
Serial Number N/A **Suspect** UNKNOWN **Owner** FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV **Tx Date** 5/25/94 **Last Count** 12/30/97
Last Dispose 1 - Unknown **Dispose Date**
Description SCREWDRIVER 027

Transactions

Date/Time 9/1/93 2:22 pm	**Issuer** 51105	**Receiver** 101274	**Tx** 5 - HOLD BY DIVISION
Date/Time 5/25/94 10:47 am	**Issuer** 41494	**Receiver** 94374	**Tx** 5 - HOLD BY DIVISION
Date/Time 6/6/94 1:41 pm	**Issuer** 99414	**Receiver** 51105	**Tx** 21 - PERMANENT OUT TO D

Case Report

12/11/02 10:57:05 AM

Evidence

Report Label 128B Location CLOSED OUT Evidence 128C In Date 5/18/93
Category 1 - MISCELLANEOUS Collected By Control
Serial Number N/A Suspect UNKNOWN Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 5/25/94 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description PLASTIC TRAY 027

Transactions

Date/Time	9/1/93 2:22 pm	Issuer 51105	Receiver 101274	Tx 5 - HOLD BY DIVISION
Date/Time	5/25/94 10:47 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 1:41 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label 128D Location CLOSED OUT Evidence 128E In Date 5/18/93
Category 1 - MISCELLANEOUS Collected By Control
Serial Number N/A Suspect UNKNOWN Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 5/25/94 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description PURSE CONT ASST CREDIT CARDS & PAPERS 027

Transactions

Date/Time	9/1/93 2:22 pm	Issuer 51105	Receiver 101274	Tx 5 - HOLD BY DIVISION
Date/Time	5/25/94 10:47 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 1:41 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label 1SM5 Location CLOSED OUT Evidence 1SM6 In Date 9/8/93
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect RABY,CHARLES Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 12/13/93 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description ME CONT HAIRS/HEAD HAIRS/PUBIC HAIR/HAIR * (ME108)

Transactions

Date/Time	12/13/93 4:01 pm	Issuer 41494	Receiver 94035	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 1:40 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label SWVL Location CLOSED OUT Evidence SWVM In Date 10/30/92
Category 11 - CONTAINER ONLY Collected By Control
Serial Number Suspect N/A Owner FRANKLIN,EDNA MATTON
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description ME (FZ180) CONT. BELOW LISTED ITEMS

Transactions

Date/Time	11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time	12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time	12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time	1/20/93 1:50 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time	2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 12:24 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Case Report

12/11/02 10:57:05 AM

Evidence

Report Label SWVN Location CLOSED OUT Evidence SWVO In Date 10/30/92
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect N/A Owner FRANKLIN,EDNA MATTON
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description (2) PLASTIC CUPS CONTAINING FINGER NAILS

Transactions

Date/Time	11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time	12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time	12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time	1/20/93 1:50 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time	2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 12:24 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label SWVP Location CLOSED OUT Evidence SWVQ In Date 10/30/92
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect N/A Owner FRANKLIN,EDNA MATTON
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description (3) SWABS ,VAGINAL-ORAL-RECTAL

Transactions

Date/Time	11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time	12/2/92 8:42 am	Issuer 93158	Receiver 94035	Tx 1 - RETURN PROPERTY
Date/Time	12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time	1/20/93 1:48 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time	2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 12:24 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D
Date/Time	6/6/94 12:25 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Evidence

Report Label SWVR Location CLOSED OUT Evidence SWVS In Date 10/30/92
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect N/A Owner FRANKLIN,EDNA MATTON
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 11/4/93 Last Count 12/30/97
Last Dispose 1 - Unknown Dispose Date
Description (3) PLASTIC BAG COTAINING HAIR

Transactions

Date/Time	11/4/92 11:04 am	Issuer 97646	Receiver 81265	Tx 4 - OUT TO LABS
Date/Time	12/2/92 10:46 am	Issuer 93158	Receiver 94035	Tx 99 -
Date/Time	12/16/92 9:03 am	Issuer 98133	Receiver 34082	Tx 4 - OUT TO LABS
Date/Time	1/20/93 1:49 pm	Issuer 34082	Receiver 97646	Tx 99 -
Date/Time	2/2/93 8:14 am	Issuer 41494	Receiver 94374	Tx 5 - HOLD BY DIVISION
Date/Time	11/4/93 1:53 pm	Issuer 51105	Receiver 98360	Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 12:25 pm	Issuer 99414	Receiver 51105	Tx 21 - PERMANENT OUT TO D

Case Report

12/11/02 10:57:05 AM

Evidence

Report Label TJYN Location CLOSED OUT Evidence TJYO In Date 10/16/92
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect Owner FRANKLIN,EDNA
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 12/2/92 Last Count 12/2/92
Last Dispose 1 - Unknown Dispose Date
Description 1-PIECE OF CARPET;CLOTHING;LOOSE HAIRS (028)

Transactions

Date/Time	10/21/92 10:30 am	Issuer 97124	Receiver 94715		Tx 4 - OUT TO LABS
Date/Time	12/2/92 8:42 am	Issuer 93158	Receiver 94035		Tx 1 - RETURN PROPERTY
Date/Time	3/30/94 3:03 pm	Issuer 97646	Receiver 102193		Tx 4 - OUT TO LABS
Date/Time	5/4/94 1:40 pm	Issuer 102193	Receiver 92842		Tx 1 - RETURN PROPERTY
Date/Time	6/6/94 12:22 pm	Issuer 99414	Receiver 51105		Tx 21 - PERMANENT OUT TO D

Evidence

Report Label TKQN Location CLOSED OUT Evidence TKQO In Date 10/20/92
Category 1 - MISCELLANEOUS Collected By Control
Serial Number Suspect RABY,CHARLES D. W/M (22) Owner FRANKLIN,EDNA M
Last Tx 21 - PERMANENT OUT TO DIV Tx Date 10/28/93 Last Count 12/2/92
Last Dispose 1 - Unknown Dispose Date
Description SUSPECTS ASSORTED CLOTHING

Transactions

Date/Time	10/21/92 10:30 am	Issuer 97124	Receiver 94715		Tx 4 - OUT TO LABS
Date/Time	12/2/92 8:42 am	Issuer 93158	Receiver 94035		Tx 1 - RETURN PROPERTY
Date/Time	1/25/93 1:13 pm	Issuer 51105	Receiver 94035		Tx 5 - HOLD BY DIVISION
Date/Time	10/28/93 12:52 pm	Issuer 51105	Receiver 94035		Tx 5 - HOLD BY DIVISION
Date/Time	6/6/94 1:38 pm	Issuer 99414	Receiver 51105		Tx 21 - PERMANENT OUT TO D

Evidence

Report Label TNQD Location FZ023 Evidence TNQE In Date 11/30/92
Category 5 - FREEZER Collected By Control
Serial Number Suspect RABY,CHARLES Owner FRANKLIN,ENDA
Last Tx 15 - INFORMAL DESTRUCT Tx Date 12/27/99 Last Count 11/30/92
Last Dispose 13 - Thrown Away Dispose Date 12/27/99
Description SALIVA,BLOOD (FZ023)

Transactions

Date/Time	1/19/93 1:30 pm	Issuer 41494	Receiver 94035		Tx 5 - HOLD BY DIVISION
Date/Time	12/7/93 4:45 pm	Issuer 51105	Receiver 98360		Tx 5 - HOLD BY DIVISION
Date/Time	6/28/96 8:58 am	Issuer 51105	Receiver 94094		Tx 5 - HOLD BY DIVISION
Date/Time	1/7/99 7:41 am	Issuer 51105	Receiver 107254		Tx 5 - HOLD BY DIVISION
Date/Time	12/9/99 7:07 am	Issuer 41494	Receiver 105752		Tx 7 - DISPOSE CITY ORD.
Date/Time	12/27/99 5:38 am	Issuer 41494-HOMICIDE	Receiver 92370	KP	Tx 15 - INFORMAL DESTRUCT

Total Cases: 1 **Total Evidence:** 14 **Total Transactions:** 64

"EVIDENCE RECORDS AFFIDAVIT"
Def. Name & Cause #: 9407130 – Charles Raby

STATE OF TEXAS)(

COUNTY OF HARRIS)(

My name is JERRY D. WERNER.

I am employed as the property and/or evidence records custodian for the: Houston Police Department Latent Print Lab.

My address and telephone number are: 1200 Travis – 77002 // 713-308-3050.

In my capacity as property and/or evidence records custodian I have care and custody of those records for : HPD Latent Lab and I certify that the following reflects the status of property and/or evidence related to: HPD offense report #: 111371392 and/or Lab #: LL7605-92 dated: 10-15-92

(please select and complete the proper category)

(A) _____ According to the records of (list your agency) _____

on _____ the following evidence in offense report # _____

was destroyed (list date also)_____

_____

_____

(B) ✓ **The records of the (list your agency)** Houston Police Dept. (HPD)

do not reflect that property and/or evidence from offense report # 111371392

is in the Possession of the (list your agency) HPD Latent Print Lab.

(continued on page 2)

(C) _____ According to the records of the (list your agency) _____

the following property and/or evidence from offense report #_____

is in the custody of the (list your agency) _____

"I have completed and read the above affidavit and have found it to be true and correct to the best of my knowledge."

SIGNED: Jerry D. Wenn

SUBSCRIBED AND SWORN TO before me the undersigned authority on this 7th day of March, 2003

HARRY L. HOPE
Notary Public, State of Texas
My Commission Expires
APRIL 15, 2006

Harry L. Hope
NOTARY PUBLIC FOR HARRIS COUNTY

000397

Cause Number 9407130

AFFIDAVIT

THE STATE OF TEXAS

COUNTY OF HARRIS

Before me, the undersigned authority, a peace officer, on this day personally appeared Melchora Vasquez, who being by me duly sworn, upon her oath deposes and says:

"My name is Melchora Vasquez. I am presently employed as the Exhibits Clerk with the Harris County District Clerk's Office.

According to the attached computer printout, the following evidence relating to the case of *State of Texas v. Charles Douglas Raby,* cause number 9407130, is in the possession of the Harris County District Clerk's Office. *See attached.*

I have read the above statement and find it to be true and correct to the best of my knowledge."

MELCHORA VASQUEZ
Affiant

SWORN AND SUBSCRIBED before me pursuant to Texas Government Code Section 602.002(7) on this the 13 day of MARCH, 2003.

INVESTIGATOR
Harris County District Attorney's Office

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 1 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__

DESIGNATOR		DESCRIPTION	WAREHOUSE LOCATION
_ D 1_____	_	PHOTO	11-H_____
_ D 2_____	_	BLACK TRAY	11-H_____
_ S 109A__	_	T.V.GUIDE	11-H_____
_ S 110A__	_	LOOSE HEAD HAIR	11-H_____
_ S 77AA__	_	PIECE OF CARPET	11-H_____
_ S 1_____	_	DIAGRAM	11-H_____
_ S 2_____	_	AUTOPSY REPORT	11-H_____
_ S 3_____	_	PHOTO	11-H_____
_ S 4_____	_	PHOTO	11-H_____
_ S 5_____	_	PHOTO	11-H_____
_ S 6_____	_	PHOTO	11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY 2= 3= 4= 5= ___
6=PRINT 7=BACKWARD 8=FORWARD 9= 10=REFRESH 11=HELP

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 2 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__

DESIGNATOR		DESCRIPTION	WAREHOUSE LOCATION
_ S 7_____	_	PHOTO	11-H_____
_ S 8_____	_	PHOTO	11-H_____
_ S 9_____	_	PHOTO	11-H_____
_ S 10____	A	PHOTO	11-H_____
_ S 10____	B	PHOTO	11-H_____
_ S 10____	C	PHOTO	11-H_____
_ S 10____	D	PHOTO	11-H_____
_ S 11____	_	PHOTO	11-H_____
_ S 12____	_	PHOTO	11-H_____
_ S 13____	_	PHOTO	11-H_____
_ S 14____	_	PHOTO	11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY 2= 3= 4= 5= ___
6=PRINT 7=BACKWARD 8=FORWARD 9= 10=REFRESH 11=HELP

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 3 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__

DESIGNATOR		DESCRIPTION	WAREHOUSE LOCATION
_ S 15____	_	PHOTO	11-H_____
_ S 16____	_	PHOTO	11-H_____
_ S 17____	_	PHOTO	11-H_____
_ S 18____	_	PHOTO	11-H_____

_ S 19____ _ PHOTO_____ 11-H_____
_ S 20____ _ PHOTO_____ 11-H_____
_ S 21____ _ PHOTO_____ 11-H_____
_ S 22____ _ PHOTO_____ 11-H_____
_ S 23____ _ PHOTO_____ 11-H_____
_ S 24____ _ PHOTO_____ 11-H_____
_ S 25____ _ PHOTO_____ 11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY 2= 3= 4= 5=
6=PRINT 7=BACKWARD 8=FORWARD 9= 10=REFRESH 11=HELP

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 4 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__
DESIGNATOR DESCRIPTION WAREHOUSE LOCATION
_ S 26____ _ PHOTO_____ 11-H_____
_ S 27____ _ PHOTO_____ 11-H_____
_ S 28____ _ PHOTO_____ 11-H_____
_ S 29____ _ PHOTO_____ 11-H_____
_ S 30____ _ PHOTO_____ 11-H_____
_ S 31____ _ PHOTO_____ 11-H_____
_ S 32____ _ PHOTO_____ 11-H_____
_ S 33____ _ PHOTO_____ 11-H_____
_ S 34____ _ PHOTO_____ 11-H_____
_ S 35____ _ PHOTO_____ 11-H_____
_ S 36____ _ PHOTO_____ 11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY 2= 3= 4= 5=
6=PRINT 7=BACKWARD 8=FORWARD 9= 10=REFRESH 11=HELP

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 5 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__
DESIGNATOR DESCRIPTION WAREHOUSE LOCATION
_ S 37____ _ PHOTO_____ 11-H_____
_ S 38____ _ PHOTO_____ 11-H_____
_ S 39____ _ PHOTO_____ 11-H_____
_ S 40____ _ PHOTO_____ 11-H_____
_ S 41____ _ PHOTO_____ 11-H_____
_ S 42____ _ PHOTO_____ 11-H_____
_ S 42____ A PHOTO_____ 11-H_____
_ S 43____ _ PHOTO_____ 11-H_____
_ S 43____ A PHOTO_____ 11-H_____
_ S 44____ _ PHOTO_____ 11-H_____
_ S 45____ _ PHOTO_____ 11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY 2= 3= 4= 5=
6=PRINT 7=BACKWARD 8=FORWARD 9= 10=REFRESH 11=HELP

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 6 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__

DESIGNATOR	DESCRIPTION	WAREHOUSE LOCATION
_ S 46____ _	PHOTO_____	11-H_____
_ S 47____ _	PHOTO_____	11-H_____
_ S 48____ _	PHOTO_____	11-H_____
_ S 49____ _	PHOTO_____	11-H_____
_ S 50____ _	PHOTO_____	11-H_____
_ S 51____ _	PHOTO_____	11-H_____
_ S 52____ _	PHOTO_____	11-H_____
_ S 53____ _	PHOTO_____	11-H_____
_ S 54____ _	PHOTO_____	11-H_____
_ S 55____ _	PHOTO_____	11-H_____
_ S 56____ _	PHOTO_____	11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY 2= 3= 4= 5= ____
6=PRINT 7=BACKWARD 8=FORWARD 9= 10=REFRESH 11=HELP

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 7 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__

DESIGNATOR	DESCRIPTION	WAREHOUSE LOCATION
_ S 57____ _	PHOTO_____	11-H_____
_ S 58____ _	PHOTO_____	11-H_____
_ S 59____ _	PHOTO_____	11-H_____
_ S 59____ A	PHOTOO_____	11-H_____
_ S 60____ _	PHOTO_____	11-H_____
_ S 61____ _	PHOTO_____	11-H_____
_ S 62____ _	PHOTO_____	11-H_____
_ S 63____ _	PHOTO_____	11-H_____
_ S 64____ _	PHOTO_____	11-H_____
_ S 65____ _	PHOTO_____	11-H_____
_ S 66____ _	PHOTO_____	11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY 2= 3= 4= 5= ____
6=PRINT 7=BACKWARD 8=FORWARD 9= 10=REFRESH 11=HELP

JULPH (49A2) JUSTICE INFORMATION MANAGEMENT SYSTEM NOV 25, 2002(C2)
CEX4020 CRIMINAL EXHIBIT SUBSYSTEM OPT _____ - CEX
WAREHOUSE LOCATION UPDATE PAGE: 8 - 12

CDI: 3__ CASE: 9407130 01 01 0 WAREHOUSE LOCATION: _____ COURT: 248
SPN: 1032396__ NAME: RABY, CHARLES DOUGLAS_____ CST: C__ DST: D__
NEW WAREHOUSE LOCATION: _____ PRINTER ID> RM2355__

DESIGNATOR	DESCRIPTION	WAREHOUSE LOCATION
_ S 67____ _	PHOTO_____	11-H_____
_ S 68____ _	PHOTO_____	11-H_____
_ S 69____ _	PHOTO_____	11-H_____
_ S 70____ _	PHOTO_____	11-H_____

```
_ S 71____ _ PHOTO_____                                          11-H_____
_ S 72____ _ PHOTO_____                                          11-H_____
_ S 73____ _ PHOTO_____                                          11-H_____
_ S 75____ _ PURSE AND CONTENTS_____                             11-H_____
_ S 77____ _ PLASTIC BAG_____                                    11-H_____
_ S 78____ _ BLUE PANTS_____                                     11-H_____
_ S 79____ _ UNDERWEAR_____                                      11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY   2=            3=            4=            5=
6=PRINT       7=BACKWARD    8=FORWARD     9=            10=REFRESH    11=HELP

JULPH (49A2)      JUSTICE INFORMATION MANAGEMENT SYSTEM      NOV 25, 2002(C2)
CEX4020                CRIMINAL EXHIBIT SUBSYSTEM            OPT _____ - CEX
                        WAREHOUSE LOCATION UPDATE            PAGE:   9 -   12

CDI: 3__  CASE: 9407130 01 01 0   WAREHOUSE LOCATION: _____      COURT: 248
SPN: 1032396__  NAME: RABY, CHARLES DOUGLAS_____  CST: C__  DST: D__
NEW WAREHOUSE LOCATION: _____  PRINTER ID> RM2355__
DESIGNATOR          DESCRIPTION                                  WAREHOUSE
                                                                  LOCATION
_ S 80____ _ PLASTIC BAG_____                                    11-H_____
_ S 81____ _ HAIRS FROM PANTS_____                               11-H_____
_ S 83____ _ HAIRS FORM CARPET_____                              11-H_____
_ S 84____ _ LOOSE HAIRS TAKEN FROM HAND_____                    11-H_____
_ S 85____ _ EVIDENCE ENVELOPE_____                              11-H_____
_ S 87____ _ ORAL SWAB_____                                      11-H_____
_ S 88____ _ VAGINAL SWAB_____                                   11-H_____
_ S 89____ _ RECTAL SWAB_____                                    11-H_____
_ S 90____ _ PLASTIC BAG_____                                    11-H_____
_ S 91____ _ PULLED HED HAIR_____                                11-H_____
_ S 92____ _ PULLED PUBIC HAIR_____                              11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY   2=            3=            4=            5=
6=PRINT       7=BACKWARD    8=FORWARD     9=            10=REFRESH    11=HELP

JULPH (49A2)      JUSTICE INFORMATION MANAGEMENT SYSTEM      NOV 25, 2002(C2)
CEX4020                CRIMINAL EXHIBIT SUBSYSTEM            OPT _____ - CEX
                        WAREHOUSE LOCATION UPDATE            PAGE:  10 -   12

CDI: 3__  CASE: 9407130 01 01 0   WAREHOUSE LOCATION: _____      COURT: 248
SPN: 1032396__  NAME: RABY, CHARLES DOUGLAS_____  CST: C__  DST: D__
NEW WAREHOUSE LOCATION: _____  PRINTER ID> RM2355__
DESIGNATOR          DESCRIPTION                                  WAREHOUSE
                                                                  LOCATION
_ S 93____ _ LOOSE HAIR/FIBER_____                               11-H_____
_ S 94____ _ FINGERNAILS_____                                    11-H_____
_ S 95____ _ VOL.CONSENT_____                                    11-H_____
_ S 96____ _ STATEMENT_____                                      11-H_____
_ S 97____ _ VOL.CONSENT_____                                    11-H_____
_ S 98____ _ STATEMENT_____                                      11-H_____
_ S 99____ _ VOL.CONSENT_____                                    11-H_____
_ S 101___ _ PULLED PUBIC HAIR_____                              11-H_____
_ S 102___ _ PULLED HEAD HAIR_____                               11-H_____
_ S 103___ _ LOOSE HEAD HAIR_____                                11-H_____
_ S 104___ _ LOOSE PUBIC HAIR_____                               11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY   2=            3=            4=            5=
6=PRINT       7=BACKWARD    8=FORWARD     9=            10=REFRESH    11=HELP
```

```
JULPH (49A2)      JUSTICE INFORMATION MANAGEMENT SYSTEM      NOV 25, 2002(C2)
CEX4020                CRIMINAL EXHIBIT SUBSYSTEM            OPT _____ - CEX
                        WAREHOUSE LOCATION UPDATE            PAGE:  11 -  12

CDI: 3__  CASE: 9407130 01 01 0   WAREHOUSE LOCATION: _____        COURT: 248
SPN: 1032396__  NAME: RABY, CHARLES DOUGLAS_____  CST: C__  DST: D__
NEW WAREHOUSE LOCATION: _____  PRINTER ID> RM2355__
DESIGNATOR          DESCRIPTION                                  WAREHOUSE
                                                                  LOCATION
_ S 106___ _ PIECE OF PAPER_____________________________________ 11-H_____
_ S 107___ _ LOOSE HEAD HAIRS___________________________________ 11-H_____
_ S 108___ _ PULLED HEAD HAIR___________________________________ 11-H_____
_ S 109___ _ PULLED HEAD HAIR___________________________________ 11-H_____
_ S 110___ _ BLACK LEATHER JACKET_______________________________ 11-H_____
_ S 111___ _ 3 PHOTOS___________________________________________ 11-H_____
_ S 112___ _ PLASTIC BAG W/CONTENTS_____________________________ 11-H_____
_ S 113___ _ BUSINESS RECORDS___________________________________ 11-H_____
_ S 114___ _ DOCUMENT___________________________________________ 11-H_____
_ S 115___ _ JUDGMENT___________________________________________ 11-H_____
_ S 116___ _ RECORD_____________________________________________ 11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY   2=          3=          4=          5=              ___
6=PRINT       7=BACKWARD  8=FORWARD   9=          10=REFRESH   11=HELP

JULPH (49A2)      JUSTICE INFORMATION MANAGEMENT SYSTEM      NOV 25, 2002(C2)
CEX4020                CRIMINAL EXHIBIT SUBSYSTEM            OPT _____ - CEX
                        WAREHOUSE LOCATION UPDATE            PAGE:  12 -  12

CDI: 3__  CASE: 9407130 01 01 0   WAREHOUSE LOCATION: _____        COURT: 248
SPN: 1032396__  NAME: RABY, CHARLES DOUGLAS_____  CST: C__  DST: D__
NEW WAREHOUSE LOCATION: _____  PRINTER ID> RM2355__
DESIGNATOR          DESCRIPTION                                  WAREHOUSE
                                                                  LOCATION
_ S 117___ _ PEN PACKET_________________________________________ 11-H_____
_ S 118___ _ PEN PACKET_________________________________________ 11-H_____
_ S 119___ _ JAIL CARD__________________________________________ 11-H_____
_ S 120___ _ FINGERPRINT CARD___________________________________ 11-H_____
_ S 123___ _ INDICTMENT_________________________________________ 11-H_____
_ S 125___ _ PHOTO______________________________________________ 11-H_____
_ S 126___ _ PHOTO______________________________________________ 11-H_____
_ S 127___ _ PHOTO______________________________________________ 11-H_____
_ S 128___ _ PHOTO______________________________________________ 11-H_____
_ S 129___ _ PHOTO______________________________________________ 11-H_____
_ S 130___ _ STIPULATION________________________________________ 11-H_____

==> *** (132) EXHIBIT(S) FOUND ***
1=LOC ENTRY   2=          3=          4=          5=              ___
6=PRINT       7=BACKWARD  8=FORWARD   9=          10=REFRESH   11=HELP
```

AFFIDAVIT

Cause #9407130 – Charles Douglas Raby

STATE OF TEXAS)(

COUNTY OF HARRIS)(

Before me, the undersigned Texas Peace Officer, did personally appear John R. Thornton, who, being duly sworn, deposes and says:

"My name is John R. Thornton. I am a criminal investigator for the Appellate Division of the Harris County District Attorney's Office in Houston, Texas."

"On Tuesday, August 13, 2002, at the request of by Assistant District Attorney Lynn Hardaway I conducted a search of the District Attorney's sixth floor evidence storage room for any evidence associated with this cause. I did so but no evidence related to cause #9407130 was found."

"I have read the above affidavit and find it to be true and correct to the best of knowledge."

SIGNED: _____
AFFIANT

SWORN AND SUBSCRIBED TO before me pursuant to Texas Government Code Section 602.002(7) on the 13 **day of** AUGUST **, 2002.**

_____
Investigator
Harris County District Attorney's Office

Cause No. 9407130

CHARLES DOUGLAS RABY	§	IN THE 248TH DISTRICT COURT
V.	§	OF
STATE OF TEXAS	§	HARRIS COUNTY, TEXAS

AFFIDAVIT OF ROBERTO GUTIERREZ

BEFORE ME, the undersigned authority, on this day, personally appeared Roberto Gutierrez, who being duly sworn upon his oath did depose and say:

"My name is Roberto Gutierrez. I have been licensed in the State of Texas since 1978. My Texas bar number is 08642500. I am currently employed as an Assistant District Attorney with the Harris County District Attorney's Office where I have been a prosecutor for twenty-five years.

I prosecuted Charles Douglas Raby for the capital murder of Edna Franklin in the 248th District Court of Harris County, Texas. I do not have any evidence from the trial in *State of Texas v. Charles Douglas Raby*, cause number 9407130."

I, Roberto Gutierrez, state that the matters above are true and correct to the best of my knowledge.

ROBERTO GUTIERREZ

Sworn to and Subscribed before me on this 16 day of June 2003.

JILL RACHELLE DAVIS
NOTARY PUBLIC
STATE OF TEXAS
My Commission Expires
MAY 04, 2005

NOTARY PUBLIC
STATE OF TEXAS

My commission expires: 5-4-05

14P07940

Cause No. 9407130

STATE OF TEXAS	§	IN THE 248TH DISTRICT COURT
V.	§	OF
CHARLES DOUGLAS RABY	§	HARRIS COUNTY, TEXAS

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER ON DEFENDANT'S MOTION FOR DNA TESTING

Having considered the defendant's postconviction motion requesting DNA testing of evidence, pursuant to Chapter 64 of the Texas Code of Criminal Procedure; the State's motion requesting that DNA testing be denied; and, the affidavits of Elena Siurna, Reidun Hilleman, K.L. McGinnis, Jerry Werner, Melchora Vasquez, John R. Thornton, and Roberto Gutierrez, the Court makes the following findings of fact:

FILED
CHARLES BACARISSE
DEC 17 2003
Time:
Harris County, Texas
Deputy

FINDINGS OF FACT

1. On March 24, 1994, the defendant, Charles Douglas Raby, was indicted for the 1992 capital murder, cause number 9407130, of seventy-two year old complainant Edna Mae Franklin (Tr. I – 5). The indictment alleged that the defendant intentionally caused the death of the complainant in the course of committing and attempting to commit the offenses of robbery, aggravated sexual assault, or burglary of the complainant's home (Tr. I – 5).[1]

2. During the hearing on the defendant's motion to suppress his confession in the instant case, the defendant testified that Houston Police Department Sergeant Waymon Allen read the defendant his warnings three times; that the defendant understood his rights; that the defendant voluntarily and intelligently waived those rights and talked to Officer Allen; that the

[1] The indictment references Houston Police Department offense report number 111371392.

defendant acknowledged that his confession was true; and, that the defendant was not forced to give a confession (S.F. XXV – 74, 82-3).

3. The trial court denied the defendant's motion to suppress his confession (S.F. XXVI – 103).

4. On June 9, 1994, the defendant was found guilty of capital murder (Tr. IB - 557). The trial court charged the jury on the three methods of committing the offense set forth in the indictment, and the jury returned a general verdict of guilt (Tr. IB – 525-37). Punishment was assessed at death by lethal injection in accordance with the jury's responses to the special issues (Tr. IB – 557-8).

5. On March 4, 1998, the Court of Criminal Appeals affirmed the defendant's capital murder conviction. *Raby v. State*, 970 S.W.2d 1 (Tex. Crim. App. 1998).

6. On November 16, 1998, the United States Supreme Court denied the defendant's petition for certiorari. *Raby v. Texas*, 525 U.S. 1003, 119 S.Ct. 515, 142 L.Ed.2d 427 (1998).

7. On January 31, 2001, the Court of Criminal Appeals denied relief on the defendant's first state habeas petition, cause number 9407130-A, and adopted the trial court's findings of fact and conclusions of law. *Ex parte Raby*, No. 58,131-01 (Tex. Crim. App. Jan. 31, 2001).

8. On November 27, 2002, the United States District Court for the Southern District of Texas – Houston Division, granted Respondent Cockrell's motion for summary judgment and dismissed all claims in the defendant's first federal habeas petition. The federal district court also denied the defendant certificate of appealability (COA). *Raby v. Cockrell*, No. H-02-0349 (S.D. Tex. Nov. 27, 2002)(not designated for publication). The federal district court held that the

defendant's claim of a coerced and false confession failed given the defendant's testimony during the suppression hearing. *Raby*, No. H-02-0349, slip op. at 11

9. On October 15, 2003, the Fifth Circuit Court of Appeals denied the defendant's application for COA. *Raby v. Cockrell*, No. 03-20129, 2003 WL 22348919 (5th Cir. Oct. 15, 2003). The Fifth Circuit also denied the defendant's motion for rehearing en banc.

10. The Court finds that the defendant's Chapter 64 motion for DNA testing is governed by the 2001 version of the statute found at Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(current version at TEX. CODE CRIM. PROC. ANN. art. 64.01 – 64.05 (Vernon Supp. 2004). *See* TEX. CODE CRIM. PROC. ANN. art. 64.03 historical note (Vernon Supp. 2004).

11. The Court finds, based on the affidavits of Melchora Vasquez and Reidun Hilleman, that the Houston Police Department Crime Lab and the Harris County District Clerk's Office have evidence relating to the instant cause. *See State's Motion Requesting Court to Deny DNA Testing, affidavits of Melchora Vasquez, Harris County District Clerk's Office, and Reidun Hilleman, Houston Police Department Crime Lab.*

12. The Court finds that the Court of Criminal Appeals in *Rivera v. State*, 89 S.W.3d 55, 58-9 (Tex. Crim. App. 2002), held that the trial court is not required to conduct a hearing concerning the court's determination of whether a defendant is entitled to postconviction DNA testing. *See also* TEX. CODE CRIM. PROC. ANN. art. 64.04.

13. The Court finds, based on the evidence elicited during the hearing on the defendant's motion to suppress his confession and the evidence elicited during the defendant's capital murder trial, that the defendant voluntarily confessed to committing the instant offense.

14. The Court further finds, based on the evidence elicited during the defendant's capital murder trial, that details of the defendant's confession were corroborated by other independent evidence.

15. The Court finds, based on the trial record, that defense counsel conceded during their closing arguments at the guilt-innocence phase of trial that the defendant killed the complainant (S.F. XXX – 434-8, 442, 462).

16. The Court finds, based on the evidence elicited during the defendant's capital murder trial, including the defendant's confession to the commission of the instant offense, that identity was not and is not an issue in the instant cause. *See* TEX. CODE CRIM. PROC. ANN. art. 64.03(a)(1)(B)(requires convicting court to find that identity was or is an issue in the case before ordering forensic DNA testing under Chapter 64); *see also Bell v. State*, 90 S.W.3d 301, 308 (Tex. Crim. App. 2002)(identity was not an issue for purposes of capital murder defendant's Chapter 64 motion because defendant confessed to murder).

17. The Court finds that the Court of Criminal Appeals in *Kutzner v. State*, 75 S.W.3d 427, 438-9 (Tex. Crim. App. 2002), held that a defendant seeking postconviction forensic DNA testing pursuant to Chapter 64 must show a reasonable probability that exculpatory DNA tests will prove the defendant's innocence and not "merely muddy the waters." The Court further finds that the Court of Criminal Appeals has reaffirmed the use of the *Kutzner* standard in other cases. *See Skinner v. State,* 2003 WL 22902830 (Tex. Crim. App. 2003)*; Bell v. State,* 90 S.W.3d 301 (Tex. Crim. App. 2002)*; Rivera v. State,* 89 S.W.3d 55, Tex. Crim. App. 2002).

18. The Court finds, based on the evidence elicited at trial, including the defendant's confession to the commission of the instant offense, that the defendant cannot demonstrate that he would not have been prosecuted or convicted for the offense of capital murder in the instant

cause if exculpatory results were obtained through DNA testing. Acts 2001, 77th Leg., R.S., ch. 2, 2001 Tex. Gen. Laws 2 (amended 2003)(Article 64.03(a)(2)(A) required convicted person to establish by a preponderance of the evidence that a reasonable probability exists that the person would not have been prosecuted or convicted if exculpatory results had been obtained through DNA testing).

19. The Court finds in the negative the issues listed in Article 64.03 of the Texas Code of Criminal Procedure.

CONCLUSION OF LAW

1. The Court, based on its finding that the defendant fails to meet the requirements for forensic DNA testing set forth in Article 64.03 of the Texas Code of Criminal Procedure, **DENIES** the defendant's request for DNA testing in cause number 9407130.

ORDER

THE CLERK IS **ORDERED** to send a copy of the Court's findings of fact denying DNA testing in cause number 9407130 and the instant order to the defendant's counsel: Hattie Sewell Mason; 5959 West Loop South, Suite 110; Bellaire, Texas 77401 and to the State: Lynn Hardaway; 1201 Franklin, Suite 600; Houston, Texas 77002.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS IN CAUSE NUMBER 9407130.

SIGNED the ___ day of JAN 29 2004, 2003.

Presiding Judge
248th District Court

DISTRICT COURT OF HARRIS COUNTY TEXAS

74521 P0077

000410

Court Coordinator No. 2-A

CAUSE NO. 940130-01-010A CHARGE Capital Murder

THE STATE OF TEXAS

VS.

Charles Ruby
Defendant

248th DISTRICT COURT

OF HARRIS COUNTY, TEXAS.

AGREED SETTING

The undersigned Counsel hereby agrees this case is reset for

DNA Hearing (Type of Setting) to 01/29/04 (Date)

Attorney for the State

Defendant

Hattie Sewell Mason
(Print) Attorney for Defendant

Hattie Sewell Mason
(Signature) Attorney for Defendant

5909 W. Loop South Suite 120
(Street Address)

Bellaire TX 77401
(City) (State) (Zip)

(713) 664-0332
(Phone Number)

13155701
(Bar Card/SPN Number)

APPROVED BY THE COURT:

Judge Presiding

12/17/03
Date

FILED
CHARLES BACARISSE
District Clerk
DEC 17 2003
Time:
Harris County, Texas
By: Deputy

000411

DISTRICT CLERK

B|PT|927

CAUSE NO. 9407130

THE STATE OF TEXAS	§	**IN THE 248TH DISTRICT**
	§	**COURT**
	§	
VS.	§	**IN AND FOR**
	§	
CHARLES DOUGLAS RABY	§	**HARRIS COUNTY, TEXAS**

NOTICE OF APPEAL

DNA Testing

Movant Charles D. Raby hereby gives notice of his desire to appeal from the final judgment denying his motion for DNA testing pursuant to Chapter 64 of the Texas Code of Criminal Procedure, which was signed on January 29, 2004 by the 248th District Court for Harris County, Texas in Cause No. 9407130, styled *The State of Texas vs. Charles Douglas Raby*.

This appeal is taken to the Court of Criminal Appeals, pursuant to article 64.05 of the Texas Code of Criminal Procedure, because this is a capital case.

This notice of appeal is being filed within 30 days of the signing of the final judgment in this case, as allowed by Texas Rule of Appellate Procedure 26.2(a)(1). *See Kutzner v. State*, 75 S.W.3d 427, 431 (Tex. Crim. App. 2002) (Chapter 64.01 proceeding is a "criminal case.").

Movant further gives notice of his desire to appeal from all adverse rulings by the district court in the above case, including without limitation all rulings relating to requests for hearing, evidence, findings of fact, and all other rulings that can form the bases of appellate complaints.

This notice is being served on all parties to the trial court's final judgment.

Respectfully submitted,

Michael W. Perrin
Texas Bar No. 15795700
Tracey M. Robertson
Texas Bar No. 00792805
Kevin D. Mohr
Texas Bar No. 24002623
Sarah M. Frazier
Texas Bar No. 24027320
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 751-3200
(713) 751-3290 - Fax

ATTORNEYS FOR CHARLES D. RABY

FILED
CHARLES BACARISSE
District Clerk
MAR - 1 2004
Harris County, Texas
By _____ Deputy

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing to be served on counsel for all parties to this action by U. S. certified mail, return receipt requested to:

Lynn Hardaway
Harris County District Attorney
1201 Franklin Avenue, Suite 600
Houston, TX 77002

Dated: March 1, 2004
Houston, Texas

Sarah M. Frazier

FILED
CHARLES BACARISSE
District Clerk
MAR 01 2004
Time:
Harris County, Texas
By
Deputy

CAUSE NO. 9407130

THE STATE OF TEXAS	§	**IN THE 248TH DISTRICT COURT**
	§	
VS.	§	**IN AND FOR**
	§	
CHARLES DOUGLAS RABY	§	**HARRIS COUNTY, TEXAS**

APPELLANT'S DESIGNATION OF RECORD ON APPEAL

COMES NOW, Charles D. Raby, Appellant in the above- entitled and numbered cause, by and through his attorney on appeal, and pursuant to Tex.R.App.P.34.5 files this his Designation of Record on Appeal, and requests that the following be included in the record on appeal of the denial of DNA testing in this action under Chapter 64 of the Texas Code of Criminal Procedure:

1. All pleadings filed by the Defendant, whether pro se or through an attorney, and by the State of Texas, and all rulings of the Court thereon;
2. All docket entries made in the trial court;
3. All hearing transcripts and court reporter's record;
4. All communications between the trial court and counsel for either side;
5. The judgment of the trial court;
6. The defendant's written notice of appeal;
7. All written motions, pleas and orders of the Court;
8. All exhibits introduced into evidence;
9. All exhibits introduced on an offer of proof or bill of exceptions;
10. The designation of record;
11. Any order appointing counsel on appeal;

000926
000014

12. Copies of any communications between the office of the District Clerk and counsel for any party.

Appellant requests that all the above items, excluding those to be provided by the Court Reporter, be assembled under one cover to constitute the Clerk's Record on Appeal pursuant to Tex.R.App.P. 34.5., and that once assembled, they be consecutively numbered and indexed and forwarded to the appropriate Court of Appeals.

Respectfully submitted,

Michael W. Perrin
Texas Bar No. 15795700
Tracey M. Robertson
Texas Bar No. 00792805
Kevin D. Mohr
Texas Bar No. 24002623
Sarah M. Frazier
Texas Bar No. 24027320
KING & SPALDING LLP
1100 Louisiana Street, Suite 4000
Houston, TX 77002
(713) 751-3200
(713) 751-3290 - Fax

ATTORNEYS FOR CHARLES D. RABY

CERTIFICATE OF SERVICE

I hereby certify that I have this day caused the foregoing to be served on counsel for all parties to this action by U. S. certified mail, return receipt requested to:

Lynn Hardaway
Harris County District Attorney
1201 Franklin Avenue, Suite 600
Houston, TX 77002

Dated: March 1, 2004
Houston, Texas

Sarah M. Frazier

KING & SPALDING LLP

1100 Louisiana Street, Suite 4000
Houston, Texas 77002-5213
Fax: 713/751-3290
www.kslaw.com

Sarah M. Frazier
Direct Dial: 713/276-7362

sfrazier@kslaw.com

March 1, 2004

HAND DELIVERY

Charles Bacarisse
Harris County District Clerk
1201 Franklin St.
Houston, Texas 77002

Re: Cause No. 9407130; *The State of Texas v. Charles Douglas Raby*; In the 248th District Court in and for Harris County, Texas

Dear Mr. Bacarisse:

Enclosed for filing in connection with the above-referenced cause are the following:

1. An original and two copies of a Notice of Appeal; and

2. An original and two copies of Appellant's Designation of Record on Appeal.

Also please be advised that by some oversight, the undersigned have not received pleadings or other notice in proceedings in this Court following our initial filing of Mr. Raby's motion for DNA testing. We have in fact been his attorneys throughout these proceedings, however, and will continue to represent him in the future.

I thank you for your cooperation in this matter.

Very truly yours,

Sarah M. Frazier

SMF:cmb
Encls.

000417

GENERAL ORDERS OF THE COURT JUN 15 1995 Mandate Affirmed received from CCA Court of Appeals

3-1-04 notice of Appeal filed DNA only

000418

DNA – No box to be checked

Cause No. 9407130

THE STATE OF TEXAS

V.

Charles Douglas Raby A/K/A/ _____

248 District Court / County Criminal Court at Law No. _____
Harris County, Texas

TRIAL COURT'S CERTIFICATION OF DEFENDANT'S RIGHT OF APPEAL

I, judge of the trial court, certify this criminal case:

- ☐ is not a plea-bargain case, and the defendant has the right of appeal. [*or*]
- ☐ is a plea-bargain case, but matters were raised by written motion filed and ruled on before trial, and not withdrawn or waived, and the defendant has the right of appeal, [*or*]
- ☐ is a plea-bargain case, but the trial court has given permission to appeal, and the defendant has the right of appeal. [*or*]
- ☐ is a plea-bargain case, and the defendant has NO right of appeal. [*or*]
- ☑ the defendant has waived the right of appeal.

MAR 2 2 2004

Judge

Date Signed

I have received a copy of this certification:

Defendant (if not represented by counsel)

Defendant's Counsel

Mailing Address

Bar Card No.

City State

FILED
CHARLES BACARISSE
District Clerk
MAR 2 2 2004
Harris County, Texas
By _____ Deputy

Mailing Address

City State

Telephone (Voice)

Telephone (Fax)

Telephone (Voice)

Telephone (Fax)

"A defendant in a criminal case has the right of appeal under these rules. The trial court shall enter a certification of the defendant's right to appeal in every case in which it enters a judgment of guilt or other appealable order. In a plea bargain case – that is, a case in which a defendant's plea was guilty or *nolo contendere* and the punishment did not exceed the punishment recommended by the prosecutor and agreed to by the defendant – a defendant may appeal only: (A) those matters that were raised by a written motion filed and ruled on before trial, or (B) after getting the trial court's permission to appeal." TEXAS RULES OF APPELLATE PROCEDURE 25.2(a)(2).

000419

CLERK

CHARLES BACARISSE
HARRIS COUNTY DISTRICT CLERK

Direct Dial Line:
(713) 755-5738

March 22, 2004

MICHAEL W. PERRIN
ATTORNEY OF RECORD
1100 LOUISIANA STE. # 4000
HOUSTON, TX 77002

Defendant's Name: CHARLES DOUGLAS RABY

Cause No: 9407130

Court: 248TH DISTRICT COURT

Please note the following appeal updates on the above mentioned cause:

Notice of Appeal Filed Date:
Sentence Imposed Date:
Court of Appeals Assignment: Court of Criminal Appeals
Appeal Attorney of Record: MICHAEL W. PERRIN
Motion for New Trial Filed:
State's Notice of Appeal (Judgment & Sentence) filed:
State's Notice of Appeal (Motion) filed date: **Ruling made:**
Defendant's Notice of Appeal on Motion filed date: 3/1/04 **Ruling Made:** DENIED 1/29/04
Notice of Appeal on Writ of Habeas Corpus filed: **Ruling Made:**

Sincerely,

Paula Gibson

Paula Gibson, Deputy
Criminal Post Trial

CC: Mr. Charles Rosenthal, Jr.
District Attorney
Appellate Division
Harris County, Texas

LOUISE STECKLER

This is your notice to inform any and all substitute reporters in this cause.

22/925

CERTIFICATE OF THE CLERK

THE STATE OF TEXAS — IN THE 248TH JUDICIAL DISTRICT COURT

COUNTY OF HARRIS — OF HARRIS COUNTY, TEXAS

I, **CHARLES BACARISSE**, District Clerk of Harris County, Texas, do hereby certify that the above and foregoing proceedings, instruments and other papers contained in Volume II Pages 1-421 inclusive, to which this certification is attached and made a part thereof, are true and correct copies of all proceedings, instruments and other papers specified by Rule 51 (a) and matter designated by the parties pursuant to Rule 51 (b) in Cause No. 9407130, styled CHARLES DOUGLAS RABY vs.The State of Texas in said court.

GIVEN UNDER MY HAND AND SEAL of said Court, at office in Harris County, Texas on

March 24, 2004.

CHARLES BACARISSE, District Clerk
Harris County, Texas

By: Paula Gibson
Paula Gibson, Deputy