IN THE COURT OF CRIMINAL APPEALS
OF TEXAS

NO. WR-84,438-01

EX PARTE TERENCE TRAMAINE ANDRUS, Applicant

**ON APPLICATION FOR A WRIT OF HABEAS CORPUS
IN CAUSE NO. 09-DCR-051034 IN THE 240TH DISTRICT COURT
FORT BEND COUNTY**

RICHARDSON, J., filed a concurring opinion in which KELLER, P.J., and HERVEY and SLAUGHTER, JJ., joined.

CONCURRING OPINION

Applicant filed an application for a writ of habeas corpus pursuant to Texas Code of Criminal Procedure 11.071 and presented seven challenges to the validity of his conviction and sentence. The habeas judge held an evidentiary hearing and subsequently entered findings of fact and conclusions of law recommending that we deny relief on Applicant's Claims 2-7. The habeas judge, however, recommended that we grant relief on Applicant's Claim 1. In Claim 1, Applicant alleges that "trial counsel provided ineffective assistance in failing to conduct a reasonable investigation and in their presentation of available mitigating

evidence."[1] In our written order, the Court declines to adopt the habeas judge's findings and conclusions regarding this claim and, based on our own review of the record, we deny relief on Claim 1.[2]

I agree with the Court's recitation of the facts and its decision to deny Applicant relief on all grounds. I write separately only to elaborate on why I conclude that Applicant is not entitled to relief on Claim 1.

BACKGROUND

In determining whether trial counsel failed to reasonably investigate and present mitigating evidence in Applicant's trial, it is necessary to review the evidence that the parties actually presented during the punishment phase. The State presented the following evidence:

- Applicant had two juvenile adjudications for crimes committed when he was about 15 or 16: (1) a May 2004 felony possession of a controlled substance in a drug-free zone; and (2) a January 2005 criminal solicitation to commit felony aggravated robbery (involving a firearm). The juvenile court put Applicant on probation for the 2004 possession offense, sent him to an alternative school, and required him to complete community service hours. But, about two weeks after the juvenile court adjudicated the possession case, police arrested Applicant for the solicitation-aggravated robbery offense.

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[1] Applicant seems to claim that lead counsel performed deficiently because he unreasonably failed to: (1) immediately hire a mitigation specialist, and then, after the first mitigation specialist withdrew, to hire a replacement specialist; (2) discover and present certain lay witness testimony to corroborate Applicant's punishment phase testimony about his upbringing; (3) present testimony from two expert witnesses whom counsel consulted before Applicant's trial—S.O. Woods (a prison classification expert) and Dr. Jerome Brown (a clinical psychologist); (4) consult and present testimony from experts in: (a) child and adolescent development, (b) Houston's Third Ward, and (c) scandals, conditions, and the mental health treatment Applicant received at TYC; and (5) provide their testifying expert, Dr. John Roache, with more information about Applicant and Applicant's family.

[2] As stated in the Court's order, we also decline to adopt any of the habeas judge's findings of fact and conclusions of law, and we deny relief on all of Applicant's habeas claims.

- While confined in the Texas Youth Commission (TYC) for the solicitation-aggravated robbery case, Applicant exhibited "significant assaultive behavior" toward other youths and staff. TYC's efforts to rehabilitate Applicant were unsuccessful and thus, he was transferred to the Texas Department of Criminal Justice (TDCJ) to complete his sentence.

- After being transferred from TYC, Applicant served a few months in TDCJ before being released to parole. In 2007, shortly after being released, Applicant violated parole by being convicted of misdemeanor theft. He served a few more months in TDCJ before being released again.

- On August 21, 2008, Applicant committed aggravated robbery when he entered a dry cleaning business and demanded money from an employee. When the employee ran to the back of the business, Applicant cornered, beat, and kicked the employee before pulling a knife on him. Applicant committed the capital murder underlying this application less than two months after this aggravated robbery.

- Numerous photographs of Applicant's gang-related tattoos. When Applicant later took the stand in his own defense, he admitted that those tattoos included "murder weapons" tattooed on his hands, and that he had been a member of the "59 Bounty Hunter Bloods" street gang.

- Applicant's conduct while he was in the Harris and Fort Bend County jails awaiting trial in this case:

  - On April 18, 2009, Applicant assaulted another inmate. When a detention officer intervened, Applicant told him, "I don't give a fuck," and "I'm going to get the needle anyway."

  - On May 9, 2009, Applicant, who was housed on the "super-max" floor of the jail, claimed to be having chest pains. According to jail protocol, detention officers took Applicant to the medical clinic to be checked out. Applicant asked the nurse at the clinic for decongestants, but she told him that she could not provide those due to his other medications. Applicant told her, "Fuck you," and then screamed and yelled obscenities as detention officers tried to calm him down. The officers then escorted Applicant, who was handcuffed and shackled, back to his cell. Applicant refused to walk on his own, so the officers had to physically push him into the elevator to the super-max floor. When they arrived at Applicant's cell, the officers unshackled him. As soon as one officer unlocked the handcuffs, Applicant turned and punched the officer twice in the face before the officers regained control. That same day, officers also discovered in Applicant's cell a broken razor blade and a sharpened, bent key

ring. Applicant had apparently cut himself and used his blood to draw a picture of the world on his cell wall and to write "Fuck the world. I want to die."

- On May 11, 2009, Applicant jammed open his cell door's "panhole," the opening where food, papers, and medicines can be passed to an inmate without the cell door being opened. When an officer went to investigate and looked into the panhole, [Applicant] threw urine in the officer's face. Applicant then danced around his cell in celebration saying, "I got him, bitch ass, mother fucker. I got his ass." Applicant then taunted the officer, "Come on in and get me. There is nothing you can do to me."

- On July 5, 2009, Applicant attempted to pass contraband pills to another inmate. When a detention officer intercepted the pills, Applicant angrily demanded the pills back. Applicant then threatened to throw urine on the officer. Afterwards, Applicant broke a sprinkler head and flooded his cell. Officers handcuffed Applicant. Applicant threatened one of the officers on duty, saying, "[I'm] going to get him, you just wait and see," and, "Once you take these handcuffs [off of] me, you are going to see how hard I hit." Applicant also told the rest of the staff that he was "going to get all of you." The mental-health unit was called to calm Applicant down.

- Two hours after the initial July 5, 2009 contraband incident, Applicant began complaining of chest pains. Applicant was taken to the medical clinic where he attempted to convince the attending officer to remove his handcuffs. When the officer refused due to Applicant's earlier threats, Applicant told him, "I haven't threatened you though." When the officer again refused, Applicant asked him, "Are you scared?" Two officers put Applicant back in his cell. They had Applicant lie down on his bed while they removed his cuffs. Once the cuffs were removed, Applicant jumped up and began kicking and punching the officers, injuring them. Applicant yelled, "I'm going to kill y'all. I told you I'm going to kill y'all." The Special Response Team (SRT) was called. It took five officers to subdue Applicant.

- On January 4, 2010, Applicant threw an unknown liquid on an officer as he walked past Applicant's cell. When asked to back up to the cell bars to be handcuffed, Applicant wrapped himself in a blanket so that his arms were inaccessible and the officers had to enter his cell to handcuff him. The SRT was called to handcuff Applicant and move him to a more secure cell. Applicant once again displayed obscenity-laced defiance.

- On July 20, 2010, Applicant covered the window of his cell so that officers could not see inside. He refused to remove the cover or to place his hands in

the panhole so that he could be handcuffed. The SRT was called. Upon entering Applicant's cell, the officers discovered that Applicant had stopped up the toilet and the shower drain, and used the shower to flood the cell. The cell walls were covered in feces and 2½ inches of water and feces covered the floor. Applicant was naked, standing by the toilet. Applicant threw liquid on the officers and then resisted their attempts to handcuff him by striking at them.

- On July 27, 2011, Applicant stuck his arms through his cell door's panhole and refused to remove them. He claimed that he was upset that he was denied recreation even though he had refused his recreation opportunity when it was offered to him. Applicant yelled at the detention officer, "You don't know me, bitch. I'm not some peon inmate. You won't find out. You'd better ask around." He continued to refuse the officer's order to put his arms back inside his cell. The SRT was called and Applicant kicked and struck at the team members who tried to subdue him. He yelled that they did not know him and that he was "going to fuck somebody up." The team moved him to a padded cell where Applicant covered his new cell window with feces.

- On July 28, 2011, Applicant told a guard at meal time, "Don't bring that tray over here, bitch. I'm going to throw it and hit somebody with it." As a result of his statements, Applicant was again moved to a padded cell. While being moved, Applicant told the officers, "I have three caps. I have nothing to lose. This will be everyday." Once in the cell, he commented that he "will kill an officer" if given the chance.

The defense then presented its punishment case. Applicant, his mother, and his father testified regarding Applicant's background and upbringing. To summarize, Applicant was raised by a single mother who sold drugs. Applicant was exposed to drugs as early as six years of age, and started using drugs regularly at age fifteen. Throughout his childhood and early teenage years, Applicant and his siblings were often left unattended for extended periods of time and Applicant "practically raised his little brothers and sisters." Applicant's father was incarcerated for drug-related offenses for most of Applicant's life, although Applicant did live with his father during his freshman year of high school until his father was

arrested on new drug charges. Applicant did fairly well in school, but he dropped out of school in tenth grade and started getting in trouble with the law.

Defense counsel also called Dr. John Roache, a pharmacologist and psychiatry professor specializing in the effect of alcohol and drug addiction on the human brain and behavior, to testify about Applicant's drug use and mental development. Dr. Roache testified that by age eleven, Applicant had begun using marijuana, and that his drug use increased during his teenage years. Applicant also periodically used Xanax and alcohol. By nineteen, Applicant was regularly using PCP and ecstasy and was sporadically using cocaine. Dr. Roache testified that drugs impair adolescent brain development in the areas of judgment and impulse control, and that these effects are long lasting. Dr. Roache also testified that an unstable family environment and a lack of role models can adversely affect the development of good judgment and the ability to self-regulate one's emotions.

In addition, defense counsel presented evidence of Applicant's remorse through the testimony of James Martin, a licensed professional counselor with the Fort Bend County Jail. Martin testified that he assisted Applicant with his behavioral issues at the jail and noted that Applicant had hallucinations and a poor history of complying with his medication schedule. Martin testified that, although Applicant "[met] every criteria of [antisocial personality] disorder," he had been making progress and was beginning to show remorse for the murders.

Based on this evidence, the jury answered "yes" to the "future dangerousness" question,[3] and "no" to the "mitigating circumstances" question.[4] The judge accordingly set Applicant's punishment at death.[5]

LEGAL STANDARD

In Claim 1, Applicant alleges that "trial counsel provided ineffective assistance in failing to conduct a reasonable investigation and in their presentation of available mitigating evidence." To prevail on an ineffective assistance of counsel allegation, an applicant must establish by a preponderance of the evidence that (1) counsel's performance fell below an objective standard of reasonableness, and (2) there is a reasonable probability that the result of the proceedings would have been different but for counsel's deficient performance.[6]

In *Wiggins v. Smith*,[7] the United States Supreme Court specifically discussed and applied *Strickland's* two-part test to a claim of ineffective assistance of counsel for failure

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[3] Issue No. 1 in the Court's Charge on Punishment asked: "Do you find from the evidence beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society?" *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1).

[4] Issue No. 2 in the Court's Charge on Punishment asked: "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, that there is a sufficient mitigating circumstance or circumstances to warrant that a sentence of life imprisonment rather than a death sentence be imposed?" *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(e)(1).

[5] *See* TEX. CODE CRIM. PROC. art. 37.071, § 2(g).

[6] *See Ex parte Overton*, 444 S.W.3d 632, 640 (Tex. Crim. App. 2014) (citing *Strickland v. Washington*, 466 U.S. 668, 688 (1984)).

[7] 593 U.S. 510 (2003).

to conduct a reasonable mitigation investigation. The Supreme Court held that counsel's investigation into Wiggins's background did not reflect reasonable professional judgment and that counsel's failures prejudiced Wiggins's defense.[8] To assess prejudice, the Court evaluated the "totality of the evidence- 'both that adduced at trial, and the evidence adduced in the habeas proceedings.'"[9] The Supreme Court specifically explained how counsel's deficient performance prejudiced Wiggins's defense. First, the mitigating evidence that counsel failed to discover and present was powerful and not double-edged.[10] Second, Wiggins's jury only heard one significant mitigating factor—that Wiggins had no prior convictions.[11] Third, Wiggins did not have a record of violent conduct that the State could have introduced to offset the undiscovered mitigating evidence.[12]

After evaluating the totality of the evidence, the Supreme Court concluded that, had the jury been confronted with the considerable undiscovered mitigating evidence, there was a reasonable probability that the jury would have returned a different sentence.[13] When analyzing whether Applicant has satisfied *Strickland's* prejudice requirement, it is appropriate to use *Wiggins* as a guide.

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[8] *Id*. at 534, 536.

[9] *Id*. at 536 (citing *Williams v. Taylor*, 529 U.S. 362, 397-98 (2000)).

[10] *Id*. at 534-35.

[11] *Id*. at 537.

[12] *Id*.

[13] *See id*. at 536.

ANALYSIS

In this case, We need not consider the constitutional adequacy of defense counsel's performance because Applicant fails to show prejudice.[14] Assuming without deciding that aspects of defense counsel's performance were deficient, Applicant fails to establish that, had counsel reasonably investigated and presented a stronger mitigation defense, there is a reasonable probability that the jury would have returned a different sentence.

Proposed Additional Mitigating Evidence

From my independent review of the record, it appears that Applicant's strongest proposed mitigating evidence would have been (1) testimony from certain lay witnesses to corroborate Applicant's punishment phase testimony about his upbringing, and (2) testimony from Dr. Jerome Brown, the clinical psychologist who performed a forensic evaluation of Applicant before trial. Applicant alleges that his mother and father gave a "sanitized version" of his life history and that additional lay witness testimony would have provided the jury with a more complete, and therefore a more compelling, narrative of Applicant's life. In regard to Dr. Brown, the report that he created contained potentially mitigating information, including that Applicant had self-reported a history of psychological/psychiatric problems which may have begun as early as childhood, that Applicant's jail records showed that he

[14] *Ex parte Lane*, 303 S.W.3d 702, 707 (Tex. Crim. App. 2009) (holding that applicant's failure to satisfy both prongs of *Strickland's* two-pronged test defeats a claim of ineffective assistance).

was diagnosed with schizophrenia,[15] and that he had a high probability of substance dependence disorder. However, even if the jury heard this mitigating evidence, I cannot say that there is a reasonable probability that the jury would have returned a different sentence.

First, Applicant's proposed additional mitigating evidence is not as powerful as the evidence in *Wiggins*. In *Wiggins*, the petitioner "experienced severe privation and abuse in the first six years of his life while in the custody of his alcoholic absentee mother" and "[h]e suffered physical torment, sexual molestation and repeated rape during his subsequent years in foster care."[16] Wiggins was also homeless at times and had diminished mental capacities.[17] This evidence, the Supreme Court concluded, demonstrated that Wiggins had the kind of troubled history that was relevant to assessing his moral culpability.[18]

Here, while not insignificant, Applicant's proposed mitigating evidence does not rise to the level of that discussed in *Wiggins*. Applicant alleges that, through additional lay witness testimony, the jury would have heard the "reality of [Applicant's] childhood"— that Applicant grew up primarily among street hustlers and drug dealers, that Applicant raised his siblings while his mother was dealing drugs out of the house or on the street, and that

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[15] Although this diagnosis appears in Applicant's jail records, the professionals who had a longer opportunity to observe Applicant generally concluded that Applicant suffered instead from antisocial personality disorder.

[16] *Wiggins*, 539 U.S. at 535.

[17] *See id*.

[18] *See id*.

Applicant lacked a stable, supportive parental figure.[19] This is not the same caliber of potentially mitigating evidence that was available, but not presented, in *Wiggins*. In addition, much of this information had already been introduced through the testimony of Applicant, his mother, and his father, a fact which further dilutes the potential effect this evidence would likely have had on the jury. Lastly, unlike in *Wiggins*, much of Applicant's proposed mitigating evidence was extremely double-edged.[20] For example, Dr. Brown's report, which contained some potentially mitigating evidence, also contained evidence that was potentially extremely aggravating, such as Applicant's history of abusing and killing animals.

Mitigating Evidence Presented

Second, unlike in *Wiggins*, Applicant's jury actually heard multiple mitigating factors, but still did not spare Applicant from the death penalty. Wiggins's jury heard just one significant mitigating factor—that Wiggins had no prior convictions.[21] Because the jury heard only one aspect of mitigation, the Supreme Court reasoned that, had the jury "been able to place [Wiggins's] excruciating life history on the mitigating side of the scale," there was a "reasonable probability that at least one juror would have struck a different balance" on the mitigation issue.[22] Applicant's jury, however, heard the following: testimony regarding

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[19] *See* Applicant's Initial Application for Writ of Habeas Corpus at 44.

[20] *See Wiggins*, 539 U.S. at 535.

[21] *Id.* at 537.

[22] *Id*.

Applicant's background and dysfunctional upbringing; testimony from an expert witness who opined about the effects that drugs, alcohol, and an unstable family environment can have on adolescent brain development; and testimony from a professional counselor that Applicant was beginning to show remorse for the murders. The jury was given the opportunity to consider this evidence, to place it on the "mitigating side of the scale,"[23] but still did not resolve the mitigation issue in Applicant's favor.

Violent History

Third, unlike in *Wiggins*, Applicant had an extensive record of violent conduct that the State could have used to offset the proposed additional mitigating evidence.[24] The jury heard evidence about Applicant's multiple prior convictions, including a conviction for solicitation of aggravated robbery. In addition, the jury heard evidence that, just two months before the capital offense underlying this application, Applicant committed aggravated robbery when he beat, kicked, and robbed a victim while brandishing a knife. The jury also heard evidence of Applicant's assaultive behavior while in TYC. Further, the jury heard evidence that Applicant engaged in numerous instances of significant violent and disruptive behavior while he was in jail awaiting trial. In short, Applicant did not have the "powerful mitigating narrative"[25] that was available in *Wiggins*, and the State presented plenty of

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[23] *Id*.

[24] *Id*. at 537.

[25] *Id*.

potentially aggravating evidence to offset the potentially mitigating evidence adduced in the habeas proceedings.

CONCLUSION

Even assuming Applicant's lead counsel was deficient,[26] Applicant fails to show how his defense was prejudiced. The State presented a vast amount of aggravating evidence, and the evidence Applicant now alleges counsel should have discovered and presented was largely duplicative, double-edged, and not particularly helpful. In these circumstances, even assuming that counsel could have discovered and presented Applicant's proposed additional mitigating evidence in an admissible form, I cannot say that there is a reasonable probability that the result of the proceedings would have been different. Applicant fails to show prejudice, and that failure defeats his claim of ineffective assistance.[27]

With these comments, I concur and join the majority.

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[26] It is worth noting that, even if lead counsel was deficient, Applicant had other counsel who arguably performed sufficiently. Normally, an applicant cannot obtain relief in this situation. *See McFarland v. State*, 928 S.W.2d 482, 505-06 (Tex. Crim. App. 1996) (concluding that the defendant had not show prejudice because, even if one of his attorneys was asleep at trial, his other attorney was alert and effective).

[27] *Lane*, 303 S.W.3d at 707.