R27

Cause No. 948591-A

EX PARTE	§	IN THE 180TH DISTRICT COURT
	§	OF
GERALD EDWARD MARSHALL, Applicant	§	HARRIS COUNTY, TEXAS

FILED
Chris Daniel
District Clerk
MAR 18 2014
Time: 4:19
Harris County, Texas
By
Deputy

STATE'S PROPOSED FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

The Court, having considered the applicant's application for writ of habeas corpus, the State's/Respondent's Original Answer, and official court documents and records in cause nos. 948591 and 948591-A, makes the following findings of fact and conclusions of law:

FINDINGS OF FACT

1. The applicant, Gerald Edward Marshall, was indicted and convicted of the felony offense of capital murder in cause no. 948591 in the 180TH District Court of Harris County, Texas.

2. The applicant was represented during trial by counsel Mack Arnold and Sid Crowley.

3. On November 12, 2004, after the jury affirmatively answered the first special issue and negatively answered the mitigation special issue, the trial court assessed punishment at death by lethal injection (XXIV R.R. at 4-7).

4. On December 20, 2006, the Court of Criminal Appeals affirmed the applicant's conviction in a published opinion. *Marshall v. State,* 210 S.W.3d 618 (Tex. Crim. App. 2006).

FACTS OF THE OFFENSE

5. On May 11, 2003, the applicant shot and killed the complainant, Christopher Dean, during a robbery at the Whataburger where the complainant worked; Kenny Calliham, Ronald Worthy, and Whataburger manager Greg Love were

27 PPD 3/2015

also involved in the offense in which the mentally challenged complainant was killed (XIV R.R. at 133, 164, 169)(XVI R.R. at 92-3).

6. A few days before the offense, the applicant told Tamara Woods, his girlfriend, that he was going to "make money" and do something at the Whataburger and he knew someone who knew a Whataburger employee (XIV R.R. at 202-4, 210).

7. On the Wednesday before the offense, Tamara Woods saw the applicant pick up a napkin with a telephone number and the name Greg written on it, make a phone call, and ask for Greg; the applicant referred to the napkin as his "money" (XIV R.R. at 211-4)(XV R.R. at 7-8).

8. Around 11:00 p.m. on May 10, 2003, the Whataburger manager Greg Love left Whataburger even though he was supposed to be working the night shift with employees Wilbert Marsh, Tony Ketchum, and the complainant; Love claimed that he had to go to the hospital because his brother had been shot (XIV R.R. at 131)(XV R.R. at 108-14)(XVI R.R. at 82).

9. In the early morning hours of May 11, 2003, Kenny Calliham, Ronald Worthy, and the applicant stopped in the Whataburger drive-thru where the applicant got out of the car and climbed through the drive-thru window; the applicant was armed with a gun and wore a bandanna over his face (XIV R.R. at 129-30, 164)(XV R.R. at 121-4)(XVI R.R. at 92-3).

10. Employee Tony Ketchum hid in the freezer and employee Wilbert Marsh hid in the storeroom; Marsh piled boxes in front of him but he could still see what was happening (XV R.R. at 128-30)(XVI R.R. at 96-9).

11. Marsh, who never saw a second robber in the store, heard the robber repeatedly threaten to kill the complainant unless the complainant gave him the key to the safe, even though the complainant said that he did not have a key to the safe (XVI R.R. at 105-6, 110).

12. The applicant shot the complainant in his forehead above his left eye from a distance of about eighteen inches after the complainant twice said he did not have a key to the safe (XVI R.R. at 105-6, 198-25).

13. After the offense, Kenny Calliham gave two statements to police in which he identified the applicant as the shooter in the offense (XIV R.R. a6 166, 200).

14. Kenny Calliham admitted that he was driving the car during the offense; that Ronald Worthy jumped out of the car after the applicant climbed through the drive-thru window; and, that Calliham then pulled the car into the next parking lot where Worthy and the applicant returned to the car (XIV R.R. at 164)(XVI R.R. at 163-6, 172-3).

15. Calliham told police that he heard the gunshot about a minute after the applicant climbed through the drive-thru window, and that, when the applicant got back in the car, he said, "I killed the bitch" and he had to kill the man because he was moving too slow (XIV R.R. at 165)(XVI R.R. at 174-8).

16. After the robbery, the applicant directed Calliham to Tamara Woods' apartment where the applicant became angry and kicked out a window after Woods would not let him in the apartment; the applicant pointed a gun at Woods when she came outside the apartment, and Woods saw Ronald Worthy standing outside the car and another man sitting in the driver's seat (XIV R.R. at 222-30)(XVI R.R. at 179-81).

17. The applicant gave a statement to police where he admitted participating in the Whataburger robbery along with Ronald Worthy and Kenny Calliham but denied being the shooter and claimed that his gun was not loaded; the applicant, who admitted that it was an inside job, said that Greg Love was supposed to be at the restaurant during the robbery (XVI R.R. at 21-2, 40)(XV R.R. at 76).

18. Greg Love's phone records showed that calls had been made from Love's phone to the apartment landline belonging to Julia Marshall, the applicant's sister;

the car used in the offense belonged to the mother of Julia Marshall's boyfriend (XV R.R. at 22-4)(XVI R.R. at 22-8).

19. Darrell Stein, Houston Police Department firearms examiner, examined the fired .380 cartridge casing recovered from the Whataburger kitchen, the fired bullet recovered from the complainant's body, and an unfired .380 auto cartridge recovered on March 11, 2003 from the parking lot of a nearby Diamond Shamrock and determined that both the fired .380 cartridge casing and the unfired .380 auto cartridge had been in the same gun at one time and that the fired bullet recovered from the complainant's body was consistent in size, style and weight with having been loaded in a .380 cartridge and with having been fired in a .380 auto firearm (XVI R.R. at 63-5).

20. The murder weapon was not recovered (XV R.R. at 91).

21. On August 23, 2003, the applicant told jail inmate Clarence Green that he had a murder case he could beat if his co-defendants kept quiet; that he had worked at another place with the Whataburger manager and they set up the robbery; that the Whataburger manager was not there during the robbery; and, that he shot the man because he would not give him the money (XVI R.R. at 143-8).

DEFENSE EVIDENCE AT GUILT-INNOCENCE[1]

22. David Thurgood testified that he owned a green Park Avenue car on May 11, 2003; that he did not loan the car to anyone; that the car was parked in front of Julia Marshall's apartment with the keys on the counter in the apartment when Thurgood went to bed; that the car and keys were in the same places the next

[1] The Court finds that the applicant, during the State's case-in-chief, reserved the right to recall Wilbert Marsh, Clarence Green, and Kenny Calliham for cross-examination; the applicant recalled the witnesses after the State rested but the testimony elicited by the applicant was cross-examination, not direct testimony (XVI R.R. at 117, 154)(XVI R.R. at 192)(XVII R.R. at 12, 1). During cross-examination, the applicant attempted to impeach Marsh, Green, and Calliham (XVII R.R. at 71-118, 124-8, 168-74)(XVIII R.R. at 8-11).

morning; and, that Kenny Calliham did not come to the apartment that day and say that the applicant killed a man at Whataburger (XVII R.R. at 45-9).

23. J.R. Hudson, Houston Police Department, testified that he was called to Tamara Woods' apartment around 7:35 a.m. on May 11, 2003, for a domestic disturbance; that Woods claimed that the applicant broke her window but the applicant claimed he was pushed into the window; and, that there is no reference to a weapon in Hudson's offense report (XVII R.R. at 130-4).

24. Harry Johnson, defense investigator, testified that he interviewed Whataburger employee Wilbert Marsh on August 19, 2004; that Marsh described the gunman as tall and skinny; and, that Marsh selected the wrong person from a photo array (XVII R.R. at 152-4).

25. Richard Moreno, Houston Police Department homicide division, testified that Wilbert Marsh selected Samuel Robinson's photo, not the applicant's, from a photo array, and that there is a resemblance between Robinson and Ronald Worthy (XVIII R.R. at 24-8).

26. Curtis Scales, Houston Police Department homicide division, testified that he took Wilbert Marsh's statement on May 11, 2003; that Marsh described the suspect as a black male in his twenties; that there is no information about the suspect's height, build, or complexion in the statement; and, that Scales asked Marsh to make sure his sworn statement was correct (XVIII R.R. at 33-43).

27. Dennis Meyer,[2] jail inmate, testified that he helped Kenny Calliham prepare an affidavit in jail; that Calliham and Ronald Worthy gave affidavits for each other to clear them in the case and to blame the shooting on the applicant; that Meyer doubted Calliham's claim that he did not know the robbery was going to occur, based on information that they stopped the car and got out the guns before the

[2] The Court finds that the applicant received permission to treat Dennis Meyer as a hostile witness (XVIII R.R. at 43).

robbery; and, that Meyer thought Calliham perjured himself in the affidavit so Meyer contacted his lawyer who then gave the information to the police (XVIII R.R. at 46-54, 60-1).

28. Shawna Reagin, criminal defense attorney, testified that she represented Kenny Calliham; that he gave her an affidavit signed by Ronald Worthy describing Calliham's role in the offense; that she did not recall Calliham ever giving her a similar affidavit signed by him; that she would have put such a document in her file and it was not there; and, that it was not true if Calliham said that he gave her an affidavit that he prepared and signed (XVIII R.R. at 72-6).

29. Estaban Perez, Jr., jail inmate, testified that he was in the same jail tank with the applicant in September, 2003, and the applicant never discussed the facts of his case with anyone (XVIII R.R. at 92-5).

STATE'S EVIDENCE AT PUNISHMENT

30. At approximately 5:30 or 5:45 a.m. on May 11, 2003, the same day as the instant capital murder, the applicant robbed Elizabeth Garcia, manager of Shipley's Donuts, at gunpoint (XX R.R. at 54-56, 59-61, 67, 80).

31. After Garcia gave the applicant money from the cash register, the applicant jumped over the counter, put the gun to Garcia's head, racked a bullet, and demanded more money and the safe key (XX R.R. at 59-66).

32. The applicant left the store after Garcia gave him money from the other register; the license number of the car in which the applicant arrived was traced to Ella Thurgood, the mother of the applicant's sister's boyfriend (XVII R.R. at 49, 52)(XX R.R. at 56, 66, 96, 110-1).

33. The State presented evidence of the applicant's following misconduct/offenses:

- On March 8, 2000, the juvenile applicant was ticketed for daytime curfew violation by the

Houston Police Department truancy detail (XX R.R. at 219-20);

- On March 13, 2001, Charles Odom, Houston Police Department, recovered seventeen rocks of cocaine and marijuana from the applicant's apartment after Odom received consent to search; the applicant was arrested (XX R.R. at 223-32);

- On July 31, 2001, the applicant evaded detention from Les McMullen, Houston Police Department, at an apartment complex where McMullen was investigating an offense (XX R.R. at 243-52);

- On January 1, 2002, the applicant stole beer from a Diamond Shamrock convenience store (XX R.R. at 233-7);

- On April 9, 2002, the applicant became angry at Shawanna Dixon, his ex-girlfriend, shoved her, grabbed a knife and went outside to her car where Dixon later found twelve stab marks on her car seat (XX R.R. at 176-80, 182-91)

- On April 9, 2002, the applicant gave William Powell, Houston Police Department, a false name after Powell stopped the applicant for speeding (XX R.R. at 259). Subsequently, the applicant alleged that Powell beat him and stole money from him (XX R.R. at 264-68);

- On September 12, 2002, Bradford Roland, Houston Police Department, observed the applicant conduct what appeared to be a drug sell and then retrieve a bag behind some bushed (XXI R.R. at 7-12). The applicant got in a car that was stopped and a bag containing enough marijuana to constitute a felony was found in the car found marijuana in the applicant's car (XXI R.R. at 13-7);

- On January 24, 2003, the applicant stole a Lone Star card used to buy food with food stamps and $100 cash from the purse of his girlfriend, Tamara Woods, and grabbed her by the throat when she confronted him about the theft confronted him (XX R.R. at 33-5, 202-07);

- On February 7, 2003, the applicant held a knife to Woods' throat after they argued over the volume of the radio (XX R.R. at 209-11)(XXI R.R. at 23-5);

- On May 11, 2003, the applicant kicked in the window at Tamara Woods' apartment and jumped on her car when she came outside and got in her car (XX R.R. at 213-4);

- On July 1, 2003, the applicant threw dice and gambled in the Harris County Jail, a violation of jail rules (XX R.R. at 275-6);

- On July 3, 2003, the applicant hit inmate Israel Gonzales in the face after Gonzales refused to let the applicant take his shoes (XX R.R. at 134). The applicant was written up for attempted extortion and Gonzales was moved to another jail pod for his safety (XXI R.R. at 45, 48);

- On July 19, 2003, the applicant was involved in a fight with inmate Leandrew Bradley; Bradley testified that the applicant had a following in the tank and he and the applicant made inmates pay them commissary and give them shoes (XXI R.R. at 59-61);[3]

- On August 5, 2003, the applicant was written up for the violation of refusing to obey an order in jail and creating loud noise in jail (XXI R.R. at 77-9);

- On November 12, 2003, the applicant was written up for refusing to obey an order in jail to refrain from loud talking (XXI R.R. at 82);

- On January 12, 2004, the applicant was cited for suspicion of being in possession of a cigarette in jail (XXI R.R. at 83-4);

- On April 15, 2004, the applicant was cited for extorting commissary items from another jail inmate (XXI R.R. at 91-8); and,

- In April, May, and June, 2004, the applicant "ran the tank" in the jail, had problems with Hispanic inmates, violated jail regulations by gambling, got into fights and threatened other inmates (XX R.R. at 14-22, 148-63).

[3] Leandrew Bradley also admitted that he previously had told prosecutor Vic Wisner that the applicant said he shot a guy in the head, but he was now testifying that it was not true (XXI R.R. at 67) Bradley claimed that the applicant told him he regretted the robbery but the applicant did not say he shot somebody in the head (XXI R.R. at 68-9).

34. Rose Dean Barton, the complainant's mother, testified that the complainant, who was slow in his development and had been in special education, competed in the Special Olympics; that he was a good guy who worked hard and loved his family, friends and church; that he was ecstatic about his job at Whataburger; that he wore his Whataburger shirt even when he was not working; that he was buried in his Whataburger uniform; and, that he insisted that Barton read her Mother's Day card and open her present the night before the offense; (XXI R.R. at 107-22, 132-143).

DEFENSE EVIDENCE AT PUNISHMENT

35. Johnnie Marshall, the applicant's mother, testified that she lost custody of her children when the applicant was five or six years old because of her drug and alcohol problems; that she took food and clothes that relatives provided for her children and sold them for crack cocaine; and, that the applicant was raised in foster care (XXI R.R. at 157, 166, 170).

36. Willie Marshall, the applicant's uncle, testified that the applicant's father had a nervous breakdown while married to the applicant's mother; that the applicant and his siblings lived in filthy conditions with their mother who sold their school clothes and food for drugs; that the applicant's father did not care about his children; and, that the applicant's father had been in the hallway during the applicant's trial but he left without testifying (XXI R.R. at 180-4).

37. Myrna Chambers, transportation officer for Children's' Protective Services (CPS) when the applicant was in foster care, testified that she tried to provide outings for the applicant while he was in foster care; that the applicant was like a son to Chambers; that the applicant was intelligent and made good grades; and, that he was in a safe environment in foster care (XXII R.R. at 21-38).

38. Carmen Petzhold, psychologist, diagnosed the applicant as having anxiety disorder not otherwise specified, but Petzhold could not rule out the

beginnings of paranoid schizophrenia, exacerbated by the applicant's heavy alcohol and marijuana use (XXII R.R. at 45-56).

First Ground for Relief: alleged illegality of arrest and admissibility of applicant's statements

39. During the pre-trial hearing on the motion to suppress the applicant's statements, Breck McDaniel, Houston Police Department, homicide division, testified that Tamara Woods showed police the apartment of the applicant's sister where Woods thought the applicant might be; that police had a valid Class C arrest warrant for the applicant; and, that they arrested the applicant at his sister's apartment on the morning of May 13, 2003 (XIII R.R. at 15-6, 20).

40. During the applicant's trial, Breck McDaniel testified that Tamara Woods directed police to the apartment of Julia Marshall, the applicant's sister; that police forced the door after police knocked and no one answered even though police could tell that people were inside the apartment; that the applicant was found on a mattress on the floor of one of the bedrooms; and, that police had a warrant to place the applicant in custody (XV R.R. at 46-7).

41. After his arrest, the applicant gave a videotaped statement to police on May 13, 2003, in which he denied being at the scene of the offense and the applicant gave a tape-recorded statement to police on May 14, 2003, in which the applicant admitted participating in the robbery but denied shooting the complainant (XIII R.R. at 6, 18-20, 24-5, 45)(XV R.R. at 77)(XVI R.R. at 22).

42. The Court finds that the applicant did not object during the pretrial suppression hearing or at trial to the admission of his statements based on police allegedly violating TEX. CODE CRIM. PROC. art. 15.26 by entering his sister's apartment to arrest the applicant pursuant to an outstanding Class C arrest warrant and based on police allegedly violating his constitutional rights by searching his sister's apartment to arrest him.

43. The Court finds that the applicant did not claim on direct appeal that the trial court erred in admitting his statements based on police allegedly violating TEX. CODE CRIM. PROC. art. 15.26 by entering his sister's apartment to arrest the applicant pursuant to an outstanding Class C arrest warrant and based on police allegedly violating his constitutional rights by searching his sister's apartment to arrest him.

44. The Court finds that, on direct appeal of the applicant's conviction, the Court of Criminal Appeals rejected the applicant's claim that his statement was inadmissible based on an alleged absence of a valid waiver of the applicant's right to remain silent and based on an alleged false promise to elicit the applicant's statement. *Marshall,* 210 S.W.3d at 625-8.

45. The Court finds that, in *Steagald v. United States,* 451 U.S. 204, 206-19 (1981)(emphasis added), the Supreme Court held that the warrantless search of Steagald's home violated his constitutional rights, but not the rights Lyons, when DEA agents entered Steagald's home to arrest Lyons pursuant to a warrant but arrested Steagald after finding cocaine in Steagald's home; the Supreme Court stated that, "[t]he only issue here, however, is not whether the subject of an arrest warrant can object to the absence of a search warrant when he is apprehended in another person's home, but rather whether the resident of that home can complain of the search."

46. The Court finds that the applicant, as did Lyons in *Steagald v. United States,* lacks standing to complain of the search of his sister's apartment, and the Court finds that the applicant's reliance on the holding in *Steagald* is misplaced.

47. The Court finds that, in *Jones v. State,* 568 S.W.2d 847, 857-8 (Tex. Crim. App. 1978), the Court of Criminal Appeals held that non-compliance with the requisites of TEX. CODE CRIM. PROC. art. 15.25, allowing forced entry to arrest for a felony if an officer is refused entry after giving notice of his "authority and purpose," and of art. 15.26 does not render an arrest illegal.

48. The Court finds that the applicant was given his *Miranda* warnings immediately after his arrest in the apartment, while in the patrol car and again at the police station prior to making his first statement on May 13, 2003; that the applicant read and initialed each of his rights on the warning form prior to giving his May 13, 2003 statement; that the applicant initiated his May 14, 2003 interview and subsequent tape-recorded statement; and, that the applicant was read his rights and indicated he understood them and voluntarily waived them prior to his May 14, 2003 statement (XIII R.R. at 16-20, 24-7)(XIV R.R. at 15-6)(XV R.R. at 54)(XVI R.R. at 14-7).

49. The Court finds that the applicant was arrested at 8:45 a.m. on May 13, 2003; that he was allowed to go to the restroom at the homicide station and given a breakfast from McDonald's prior to questioning; that the videotape of the applicant's May 13, 2003 statement indicates that it began at 9:22 a.m. and ended at 11:01; and, that the applicant first statement began approximately half an hour or forty-five minutes after his arrest (XIII R.R. at 16)(XV R.R. at 48-52). *State's Trial Exhibit 44A.*

50. The Court found that Kenny Calliham contacted homicide on May 13, 2003 and gave a statement implicating the applicant in the Whataburger robbery, and that capital murder charges were filed on the applicant about 4:00 p.m. on May 13, 2003 (XIV R.R. at 164)(XV R.R. at 82)(I Cl.R. at 2).

51. The Court finds that the applicant's interview and subsequent May 14, 2003 statement was initiated by the applicant contacting Tamara Woods and telling her to contact Detective Scales to let him know that the applicant wanted to talk with him; that Scales talked with the applicant on May 14TH; and, that the applicant's second statement began around 10:45 or 10:50 a.m. on May 14TH and ended at 11:10 (XVI R.R. at 15-8, 42-3).

52. The Court finds that the applicant's first statement, in which he denied being present or involved in the offense, was given after he was arrested on Class C charges and prior to him being charged with capital murder; the Court further finds that the applicant's second statement, in which he admitted participating in the robbery but denied being the shooter, was given more than a day after his arrest and only when the applicant re-initiated contact with the police. *See Findings Nos. 41, 48-51, supra.*

53. The Court finds that the officers' forced entry into the applicant's sister's apartment, after knocking and receiving no answer even though it was evident that people were in the apartment, does not rise to the level of flagrant official misconduct, if at all, so that the applicant's statements were inadmissible.

54. The Court finds that the applicant's statements were attenuated from his arrest by the numerous giving of *Miranda* warnings, the temporal proximity of the arrest and statements – particularly the second statement in which the applicant inculpates himself by admitting his participation in the robbery, the presence of intervening circumstances, and the lack and/or insufficiency, of purpose and flagrancy of official misconduct.

Second Ground for Relief: alleged ineffective assistance of trial counsel/alleged illegal arrest and alleged inadmissible statements

55. The Court, based on the appellate record, finds that trial counsel filed approximately forty-nine pre-trial motions, including a motion to suppress the applicant's statements; that a hearing on the motion to suppress was conducted; that trial counsel were familiar with the facts of the offense and relevant law; that trial counsel cross-examined State's witnesses; that trial counsel made appropriate objections throughout trial; that trial counsel presented ten witnesses on the applicant's behalf; and, that trial counsel presented cogent jury argument.

56. The Court finds that the applicant's first statement was entirely exculpatory – he denied being present during the offense; that the applicant's second statement admitted only his participation in the robbery but denied shooting the complainant; and, that, notwithstanding the applicant's statements, sufficient evidence was admitted to show that the applicant shot and killed the complainant. *See Marshall,* 210 S.W.3d at 625 (holding evidence factually sufficient to show applicant show and killed complainant; noting that witnesses Callihan and Green provided testimony to support this finding).

57. The Court finds that trial counsel are not ineffective for not objecting to the legality of the applicant's arrest and admissibility of the applicant's statements based on police forcing entry to the applicant's sister's apartment to arrest the applicant on a Class C warrant. *See Findings Nos. 39-54, supra.*

58. The Court finds that the results of the proceedings would not have been different if trial counsel had objected to the legality of the applicant's arrest and the admissibility of the applicant's statements based on police forcing entry to the applicant's sister's apartment to arrest the applicant on a Class C warrant.

Third Ground for Relief: admission of autopsy photos

59. During the applicant's trial, Roger Milton, Harris County Assistant Medical Examiner, testified that he selected State's Trial Exhibits 70 through 81, photographs, to aid him in explaining the complainant's injuries to the jury (XVI R.R. at 200).

60. The State offered State's Trial Exhibits 70 through 81 into evidence and trial counsel, on request, conducted a brief *voir dire* of Milton and then approached the bench, stating that Milton did not need "these four photographs" and there was nothing in "these four photographs" that could not be explained through other photographs (XVI R.R. at 201-2).

61. In a hearing outside the presence of the jury, trial counsel showed Milton the photographs labeled State's Trial Exhibit 74, 75, 76, 77, and 78; Milton testified that they were helpful to visually depict injuries, i.e., the words in the autopsy report, and they were necessary to insure that they jury had an accurate understanding of his testimony (XVI R.R. at 203-5).

62. In the hearing outside the presence of the jury, Milton testified that State's Trial Exhibit 78 depicts the complainant's brain showing a grazing defect across the inferior aspect of the left and right sides of the brain, the direction the bullet traveled, and the appearance of the lethal injury; that State's Trial Exhibit 77 is a close-up photo of the bone of the skull beneath the forehead and the bullet entrance; that State's Trial Exhibit 75 is a photo of the inside of the base of the skull depicting the direction of travel of the bullet and its disruption; that State's Trial Exhibits 74 and 75 show the same injury but a better explanation could be provided by using both photos with one depicting a more overall view and focusing in more on the actual injury; that State's Trial Exhibits 71 and 72 depict different magnifications of the injury; and, that State's Trial Exhibit shows an x-ray of the complainant's head and the position of the projectile in the head (XVI R.R. at 205-8).

63. Trial counsel objected to the admission of State's Trial Exhibits 72 and 74 as being redundant and merely intended to inflame the jury and objected to State's Trial Exhibits 75, 76, 77, and 78 as being merely intended to inflame the minds of the jury; trial counsel stated he had no objection to the admission of State's Trial Exhibits 70, 71, 73, 79, 80, and 81 (XVI R.R. at 208-9).

64. The trial court sustained trial counsel's objection to State's Trial Exhibit 74, but admitted over objection State's Trial Exhibits 72, 75, 76, 77, and 78, finding that the probative value outweighs the prejudicial effect; State's Trial Exhibits 70, 71, 73, 79, 80, and 81 were admitted without objection (XVI R.R. at 209, 213).

65. Inside the presence of the jury, Milton testified concerning the objected-to photographs as follows: State's Trial Exhibit 72 depicts the gunshot entrance wound with multiple pinpoint markings of gunpowder stippling and the complainant's black eye (XVI R.R. at 224); State's Trial Exhibit 76 depicts the front of the forehead with the scalp folded down showing the frontal bone of the skull and the actual defect through the skull above the eyebrow; State's Trial Exhibit 77 shows a closer view of the gunshot entrance wound through the skull and the area where the skull has been hit by the bullet; State's Trial Exhibit 78 depicts the path of the bullet by looking at the brain from the underside (XVI R.R. at 235-7).

66. Inside the presence of the jury, Milton testified concerning the unobjected-to photographs as follows: State's Trial Exhibit 70 is a facial photograph showing a cluster of injuries - the gunshot entrance wound, stippling, laceration of the bridge of the nose, and swelling around both eyes (XVI R.R. at 229); State's Trial Exhibit 71 is a closer view of the gunshot wound depicting a circular defect and a closer view of the gunpowder stippling (XVI R.R. at 230); State's Trial Exhibit 73 depicts a cluster of superficial lacerations and abrasions to the right side of the forehead and what looks like an interrupted linear wound (XVI R.R. at 230); State's Trial Exhibit 79 is a frontal x-ray depicting the position of the bullet in the left side of the head (XVI R.R. at 238); State's Trial Exhibit 80 is a photo of the actual bullet collected from the complainant's brain (XVI R.R. at 238); State's Trial Exhibit 81 is a photo of the complainant's personal property (XVI R.R. at 238).

67. The Court finds that, of the ten photographs admitted into evidence, three photos showed no actual injuries, instead depicting a bullet, an x-ray, and personal property; that none of the photos depicts a naked body; and, that the photographs explained and illustrated Milton's extensive testimony concerning the autopsy report, the applicant's external and internal wounds, and wound charts (XVI R.R. at 220-38).

68. The Court finds that testimony and photographic evidence showing the applicant's external injuries, the stippling indicating the distance of the gun from the complainant's head, and the internal injuries indicating the path of the bullet were probative to the cause and circumstances of the complainant's death.

Fourth Ground for Relief: lethal injection

69. The Court finds that the applicant's claim concerning the constitutionality of Texas' lethal injection procedure is not ripe for review; the applicant has no scheduled execution date during the pendency of his initial state habeas proceedings. *See Gonzales v. State,* 353 S.W.3d 826, 837 (Tex. Crim. App. 2011)(citing *Gallo v. State,* 239 S.W.3d 757, 780 (Tex. Crim. App. 2007)(holding that challenge to constitutionality of Texas' lethal injection procedure not ripe for review when execution not imminent)).

70. The Court finds that the applicant's claim concerning the alleged cruel and unusual punishment aspect of lethal injection, i.e., the constitutionality of Texas' lethal injection procedure, is not cognizable in a habeas proceeding; instead, pursuant to the United States Supreme Court holding in *Hill v. McDonough,* 547 U.S. 573 (2006), a method-of-execution claim may be brought by a death row inmate as an action for relief under 42. U.S.C. § 1983, as a civil rights suit, rather than in a habeas proceeding. *See Ex parte Chi,* 256 S.W.3d 702, 703 (Tex. Crim. App. 2008)(citing *Ex parte Alba,* 256 S.W.3d 682 (Tex. Crim. App. 2008)(holding death row inmate's challenge to Texas' lethal injection protocol not cognizable in art. 11.071 habeas proceeding)).

71. The Court finds that, pursuant to TEX. CODE CRIM. PROC. art. 43.14, the execution procedure is to be determined and supervised by the director of the correctional institutions division of the Texas Department of Criminal Justice.

72. The Court finds that the United States Supreme Court, in *Baze v. Rees,* 553 U.S. 35 (2008), rejected a Kentucky death row inmate's argument that Kentucky's three-drug protocol violated his rights under U.S. CONST. amend. VIII.

73. The Court finds that, at the time of the filing of the applicant's initial application for writ of habeas corpus, Texas was employing a three-drug protocol, materially indistinguishable to that reviewed and found constitutional by the Supreme Court in *Baze v. Rees.*

74. The Court finds that Texas no longer uses the three-drug protocol of the administration of sodium pentothal, pancuronium bromide and potassium chloride, so the Court finds moot and speculative the applicant's habeas argument that improper administration of sodium pentothal would fail to render him unconscious so that the subsequent dosage of pancuronium bromide would paralyze him and he would be unable to express alleged pain from the administration of potassium chloride.

75. The Court finds, as noted in *Granviel v. State,* 561 S.W.2d, 503, 513 (Tex. Crim. App. 1978), that it is presumed that the director of the correctional institutions division of the Texas Department of Criminal Justice will not act in an arbitrary manner so as to choose a substance that would cause an agonizing death and result in cruel and unusual punishment.

CONCLUSIONS OF LAW

First Ground for Relief: alleged illegal arrest and admissibility of statements

1. The applicant is procedurally barred from presenting his habeas claim that the trial court erred in admitting into evidence his statements based on alleged illegality of his arrest, because the applicant did not object to the admission of his statements on such basis. *See* Tex. R. App. P. 33.1(a); *Hodge v. State*, 631 S.W.2d 754, 757 (Tex. Crim. App. 1978); *see also Hughes v. Johnson*, 191 F.3d 607, 614 (5th Cir. 1999)(holding that defendant's failure to comply with Texas

contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

2. In the alternative, the applicant's habeas allegation concerning the legality of the search of his sister's apartment to effect his arrest and, thus, the admissibility of his statements is not cognizable in the instant habeas proceeding or any subsequent proceeding; the applicant did not present such claim on direct appeal. *Ex parte Grigsby,* 137 S.W.3d 673 (Tex. Crim. App. 2004)(quoting *Ex parte Kirby,* 492 S.W.2d 579, 581 (Tex. Crim. App. 1973)(denying habeas relief where defendant challenged legality of search and seizure because "the failure to raise the question of the sufficiency of the affidavit on direct appeal is tantamount to an abandonment of the complaint.").

3. In the alternative, the applicant lacks standing to complain of the search of his sister's apartment made to effect his arrest. *Cf. Steagald v. United States,* 451 U.S. 204, 206-19 (1981)(holding that warrantless search of Steagald's home violated his constitutional rights, but not Lyons' rights, when DEA agents entered Steagald's home to arrest Lyons pursuant to a warrant but arrested Steagald after finding cocaine in Steagald's home).

4. In the alternative, the applicant's arrest on a Class C warrant after police forced entry into the applicant's sister's apartment did not render his arrest illegal and, thus, did not affect the admissibility of his statements. *See Jones v. State,* 568 S.W.2d 847, 857-8 (Tex. Crim. App. 1978)(holding that non-compliance with TEX. CODE CRIM. PROC. art. 15.25, allowing forced entry to arrest for felony if officer is refused entry after giving notice of his "authority and purpose," and of art. 15.26 does not render arrest illegal).

5. In the alternative, the applicant's statements, the first of which was a denial of being present at the offense and the second of which was an admission of participation in the robbery but a denial of the shooting, were sufficiently attenuated

from his arrest so that his arrest did not affect the admissibility of his statements. *See Bell v. State,* 724 S.W.2d 780 (Tex. Crim. App. 1986)(noting following factors should be considered in admission of confession after illegal arrest: whether *Miranda* warnings given; temporal proximity of arrest and confession; intervening circumstances; and purpose and flagrancy of official misconduct).

6. The applicant fails to show that his statements were inadmissible based on the circumstances of his arrest.

Second Ground for Relief: alleged ineffective assistance of trial counsel/alleged illegal arrest and alleged inadmissible statements

7. The applicant fails to show ineffective assistance of counsel because of counsel not objecting to the legality of the applicant's arrest and admissibility of the applicant's statements based on police forcing entry to the applicant's sister's apartment to arrest the applicant on a Class C warrant and finding the applicant in the bedroom of his sister's apartment. *See Tong v. State,* 25 S.W.3d 707, 712-3 (Tex. Crim. App. 2000)(holding counsel not ineffective for lack of objection to jury argument that was reiteration of law on which jury charged); *Kinnamon v. State,* 791 S.W.2d 84, 97 (Tex. Crim. App. 1990)(holding counsel not ineffective for failing to request jury charge on lesser-included of murder when evidence did not support such charge).

8. The applicant fails to show that the results of the proceedings would have been different if counsel had advanced objections to the admissibility of his statements based on the alleged illegality of his arrest. *See Strickland v. Washington,* 466 U.S. 668 (1984)(holding that to prove ineffective claim, defendant must show that, but for counsel's error, results of proceeding would have been different); *Roberson v. State,* 852 S.W.2d 509, 510-12 (Tex. Crim. App. 1993)(holding trial counsel not ineffective for failing to assert pretrial motion without showing that meritorious ruling would have changed outcome of case).

Third Ground for Relief: admission of photographs

9. Based on the trial court sustaining the applicant's objection to the admission of State's Trial Exhibit 74, autopsy photo, the applicant cannot complain on habeas about the alleged admission of such photo (XVI R.R. at 213). *See DeRusse v. State,* 529 S.W.2d 224 (Tex. Crim. App. 1979)(having received the relief requested, error, if any, is cured).

10. Based on lack of objection, the applicant is procedurally barred from advancing his habeas complaint concerning the admission of State's Trial Exhibits 70, 71, 73, 79, 80, and 81 (XVI R.R. at 209). *See* Tex. R. App. P. 33.1(a); *Hodge,* 631 S.W.2d at 757; *see also Hughes,* 191 F.3d at 614 (holding that defendant's failure to comply with Texas contemporaneous objection rule constituted adequate and independent state-law procedural ground sufficient to bar federal habeas).

11. In the alternative, the trial court properly admitted into evidence State's Trial Exhibits 70, 71, 73, 79, 80, and 81, as well as the objected-to photographs – State's Trial Exhibits 72, 75, 76, 77, and 78. *See Shuffield v. State,* 189 S.W.3d 782, 786-8 (Tex. Crim. App. 2006)(holding that admissibility of photo is within trial court's sound discretion).

12. The applicant fails to show that the trial court abused its discretion in admitting the ten photos, three of which depicted an x-ray, the recovered projectile, and the complainant's personal property; the photos were probative and relevant to the medical examiner's testimony concerning the complainant's wounds, cause of death, and the circumstances of his death, i.e., the distance the gun was from his head when fired. *Id.* (citing *Narvaiz v. State,* 840 S.W.2d 415, 419 (Tex. Crim. App. 1992)(noting that reviewing court should consider number of photographs, size of photograph, whether in black and white or color, whether body is naked, whether photo is gruesome, and whether body had been altered since crime in way that might enhance gruesomeness of photograph to defendant's detriment).

Fourth Ground for Relief: lethal injection

13. The applicant's method-of-execution claim that Texas' lethal injection procedure violates his rights, under U.S. CONST. amend. VIII, is not cognizable in the instant habeas proceeding. *See Ex parte Chi,* 256 S.W.3d 702, 703 (Tex. Crim. App. 2008)(citing *Ex parte Alba,* 256 S.W.3d 682 (Tex. Crim. App. 2008)(holding death row inmate's challenge to Texas' lethal injection protocol not cognizable in art. 11.071 habeas proceeding)).

14. The applicant's method-of-execution claim that Texas' lethal injection procedure violates his rights, under U.S. CONST. amend. VIII, is not ripe for review based on the applicant's execution not being imminent. *See Gonzales v. State,* 353 S.W.3d 826, 837 (Tex. Crim. App. 2011)(citing *Gallo v. State,* 239 S.W.3d 757, 780 (Tex. Crim. App. 2007)(holding that challenge to constitutionality of Texas' lethal injection procedure not ripe for review when execution not imminent)).

15. The applicant's method-of-execution claim concerning the constitutionality of Texas' lethal injection procedure – a protocol previously composed of the three-drug protocol of sodium pentothal, pancuronium bromide, and potassium chloride - is moot, based on such protocol no longer being employed in Texas' lethal injection procedure. *But see Baze v. Rees,* 553 U.S. 35 (2008)(rejecting Kentucky death row inmate's argument that Kentucky's materially indistinguishable three-drug protocol violated his rights under U.S. Const. amend. VIII).

16. In the alternative, the applicant fails to show that the lethal injection procedure employed at the time of his execution will constitute cruel and unusual punishment, in violation of U.S. CONST. amend. VIII. *See Gonzales,* 353 S.W.3d at 837 (noting that method of lethal injection currently administered is not determinative of way it will be administered at time of defendant's execution); *see also Woolls v. McCotter,* 798 F.2d 695, 697-8 (5TH Cir. 1986)(rejecting Texas death

row inmate's claim that use of sodium thiopental violated right against cruel and unusual punishment); *O'Bryan v. McKaskle,* 729 F.2d. 991 (5TH Cir. 1984)(rejecting claim that lethal injection constitutes cruel and unusual punishment because drugs used allegedly not proven safe, effective, or humane in producing death and not approved by FDA for that purpose); *Granviel v. State,* 561 S.W.2d, 503, 509, 513 (Tex. Crim. App. 1978(noting it is presumed director of the correctional institutions division of TDCJ will not act in arbitrary manner so as to choose substance for lethal injection that would cause agonizing death and result in cruel and unusual punishment; constitutional prohibition against cruel and unusual punishment protects against "cruelty inherent in the method of punishment, not the necessary suffering involved in any method employed to extinguish life humanely").

17. The applicant fails to demonstrate that his conviction was unlawfully obtained. Accordingly, it is recommended to the Texas Court of Criminal Appeals that relief be denied.

Cause No. 948591-A

EX PARTE	§	IN THE 180TH DISTRICT COURT
	§	OF
GERALD EDWARD MARSHALL, Applicant	§	HARRIS COUNTY, TEXAS

ORDER

THE CLERK IS HEREBY **ORDERED** to prepare a transcript of all papers in cause no. 948591-A and transmit same to the Court of Criminal Appeals, as provided by Article 11.071 of the Texas Code of Criminal Procedure. The transcript shall include certified copies of the following documents:

1. all of the applicant's pleadings filed in cause number 948591-A, including his application for writ of habeas corpus;

2. all of the State's/Respondent's pleadings filed in cause number 948591-A, including the State's/Respondent's Original Answer;

3. this court's findings of fact, conclusions of law and order denying relief in cause no. 948591-A;

4. any Proposed Findings of Fact and Conclusions of Law submitted by either the applicant or State/Respondent in cause no. 948591-A;

5. any affidavits and exhibits filed in cause no. 948591-A; and,

6. the indictment, judgment, sentence, docket sheet, and appellate record in cause no. 948591, unless they have been previously forwarded to the Court of Criminal Appeals.

THE CLERK IS FURTHER **ORDERED** to send a copy of the court's findings of fact and conclusions of law, including its order, to the applicant's counsel: Jerome

Godinich; 929 Preston; Houston, Texas 77002 and to State/Respondent: Roe Wilson; Harris County District Attorney's Office; 1201 Franklin, Suite 600; Houston, Texas 77002-1901.

BY THE FOLLOWING SIGNATURE, THE COURT ADOPTS THE STATE'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW IN CAUSE NO. 948591-A.

SIGNED this 18 day of July, 2014.

DISTRICT COURT OF HARRIS COUNTY TEXAS

CATHERINE EVANS
Presiding Judge
180TH District Court
Harris County, Texas

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

July 22, 2014

DEVON ANDERSON
DISTRICT ATTORNEY
HARRIS COUNTY, TEXAS

To Whom It May Concern:

Pursuant to Article 11.07 of the Texas Code of Criminal Procedure, please find enclosed copies of the documents indicated below concerning the Post Conviction Writ filed in cause number 0948591A in the 180th District Court.

☐ State's Original Answer Filed ,

☐ Affidavit ,

☐ Court Order Dated ,

☐ Respondent's Proposed Order Designating Issues and Order For Filing Affidavit.

☒ Respondent's Proposed Findings of Fact and Order July 18, 2014

☐ Other

Sincerely,

Brenda McNeil, Deputy
Criminal Post Trial

bm

Enclosure(s) -

CHRIS DANIEL
HARRIS COUNTY DISTRICT CLERK

July 22, 2014

JEROME GODINICH
ATTORNEY FOR APPLICANT
929 PRESTON SUITE 200
HOUSTON, TEXAS 77002

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