IN THE 272ND JUDICIAL DISTRICT COURT
BRAZOS COUNTY, TEXAS

EX PARTE, JOHN THUESEN, APPLICANT	)	**Cause No. 09-02136-CRF-272-A**

DC FILED
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BY ________ Deputy

ORDER

The Court hereby incorporates herein the Court's attached findings of fact and conclusions of law in this cause.

The Clerk is hereby ORDERED to prepare a transcript of all papers in Cause No. 09-02136-CRF-272-A and transmit same to the Court of Criminal Appeals as provided by Article 11.071 of the Texas Code of Criminal Procedure.

The Clerk is further ORDERED to send a copy of this Court's findings of fact and conclusions of law, including this Order, to Applicant's counsel and to counsel for the State.

ORDERED AND SIGNED on this 17 day of July, 2015.

~~The Honorable~~ Travis B. Bryan, III
Judge, 272nd District Court

IN THE 272ND JUDICIAL DISTRICT COURT
BRAZOS COUNTY, TEXAS

	)	**Cause No.**
	)	**09-02136-CRF-272-A**
EX PARTE,	)	
JOHN THUESEN,	)	
	)	
APPLICANT	)	
	)	

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO APPLICANT'S ARTICLE 11.071 WRIT APPLICATION; ATTACHMENT; ORDER

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IN THE 272ND JUDICIAL DISTRICT COURT
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EX PARTE, JOHN THUESEN, APPLICANT	)	**Cause No. 09-02136-CRF-272-A**

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BY ___ Deputy

FINDINGS OF FACT AND CONCLUSIONS OF LAW RELATING TO APPLICANT'S ARTICLE 11.071 WRIT APPLICATION

The Court, having considered John Thuesen's Initial Writ of Habeas Corpus Application ("Application"), filed on October 9, 2012, pursuant to Article 11.071 of the Texas Code of Criminal Procedure, as well as the State's Answer, filed on April 8, 2013, and supplemental briefing and exhibits from both parties, and having heard evidence and argument offered by the parties at a hearing on June 9 to June 13, 2014, makes the following Findings of Fact and Conclusions of Law, as directed by Article 11.071, Section 7.

I.

MATERIALS CONSIDERED AND CREDIBILITY DETERMINATIONS

1. This Court has considered all exhibits filed with Thuesen's Application, the State's Answer, and supplemental briefing, as well as all exhibits and arguments submitted by the parties at the June 2014 evidentiary hearing. This Court has accepted all exhibits as substantive evidence, whether presented in the pleadings or at the hearing.
2. At the June 2014 hearing, this Court heard testimony from the following witnesses presented by Thuesen: Dr. Elspeth Ritchie, Dr. Eric Elbogen, Dr. Mark Cunningham, Dr. Kenneth Kopel, William "Billy" Carter, Michele

Esparza, Frank Blazek, Patricia Thuesen, Dennis Thuesen, Michelle Thuesen, Craig Novak, Brian Smith, Karolyn Ottmer, Stephen Snell, Michael Novak, and John Stetter.

3. The Court finds that Dr. Ritchie, Dr. Elbogen, Dr. Cunningham, and Dr. Kopel, as expert witnesses, were each credible. Further, the Court finds that their testimony would have been admissible at Thuesen's trial and would have met sufficient reliability standards under *Daubert v. Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993).

4. The Court finds that Patricia Thuesen, Dennis Thuesen, and Michelle Thuesen each previously testified during Thuesen's capital trial. With the Court's recollection of that testimony, and having heard further testimony at the June 2014 hearing, this Court finds these witnesses' credible.

5. The Court finds that the testimony of Craig Novak, Brian Smith, Karolyn Ottmer, Stephen Snell, Michael Novak, and John Stetter was credible.

6. In addition, the Court heard testimony from trial counsel Billy Carter and Michele Esparza, and appellate counsel Frank Blazek. Overall the Court found these witnesses to be credible; however, specific determinations of the credibility of particular factual issues have been made below within the relevant Application claims.

7. In the absence of live testimony, the Court has weighed the credibility of Thuesen's other witnesses solely on the facts contained in their affidavits, including considerations of education and background for those witnesses presented as expert witnesses. The Court finds that the testimony of those witnesses presented as expert witnesses in Thuesen's Application would meet sufficient reliability standards under *Daubert*, and that their complete testimony would be admitted at a live hearing. The Court finds each of the

witnesses presented by Thuesen, both expert and lay, to be credible based on their affidavits.

II.

FACTS RELATING TO PROCEDURAL HISTORY

8. On May 14, 2009, a grand jury indictment was filed charging Thuesen with capital murder. (1 CR at 1.)[1] Voir dire commenced on March 29, 2010. (6 RR at 8.) The capital trial commenced on May 10, 2010. (38 RR at 28.) After the State and defense presentations, the case was submitted to the jury for guilt/innocence determination on May 20, 2010. (49 RR at 111.) The jury returned a guilty verdict as to the charge of the indictment. (49 RR at 112.)

9. The punishment phase began on May 21, 2010. (50 RR at 5.) Jury deliberations commenced on May 27, 2010. (54 RR at 90.) The following day, the jury returned the verdict answering "Yes" to special issue one and "No" to special issue two. (55 RR at 4.) John Thuesen was then sentenced to death. (55 RR at 7.)

10. On May 28, 2010, the Court appointed John Edward Wright to represent John Thuesen in his post-conviction habeas litigation. (6 CR at 1233-34; 1 Supp. CR at 23-26.) On December 21, 2010, the Court substituted the Office of Capital Writs ("OCW") to represent Thuesen in his post-conviction habeas litigation, permitting Mr. Wright to withdraw. The OCW filed Thuesen's Application on October 9, 2012. The State filed its Answer to the Application on April 8, 2013.

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[1] All references to "CR" are to the Clerk's Record in Thuesen's underlying capital trial. All references to "RR" are to the Reporter's Record. References to the transcript of the post-conviction hearing held on June 9 to June 13, 2014, will be designated as "HR." All exhibit references are to Applicant's exhibits admitted during the June 2014 evidentiary hearing, unless otherwise noted.

11. This Court signed an order on April 26, 2013, designating controverted, material issues to be resolved. The hearing on those issues was scheduled for December 10, 2013, but was postponed when this Court briefly recused himself from the case. Following the Court's resumption of the case, an evidentiary hearing was held on June 9 to June 13, 2014.

12. After hearing evidence and argument, this Court ordered the parties to submit proposed Findings of Fact and Conclusions of Law no later than December 23, 2014.

III.

CONCLUSIONS REGARDING THE STANDARD OF REVIEW OF TRIAL COUNSEL'S CONDUCT

13. To establish ineffective assistance of counsel, an applicant must show that counsel's performance was deficient and that the deficiency prejudiced the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *Porter v. McCollum*, 558 U.S. 30, 38-39 (2009); *Wiggins v. Smith*, 539 U.S. 510, 521 (2003); *Virgil v. Dretke*, 446 F.3d 598, 608 (5th Cir. 2006); *Ex parte Jimenez*, 364 S.W.3d 866, 883 (Tex. Crim. App. 2012); *Thompson v. State*, 9 S.W.3d 808, 812 (Tex. Crim. App. 1999) ("[A]ppellant must show a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.").

14. To show deficient performance of trial counsel, Thuesen must show his counsel's representation fell below an objective standard of reasonableness. *Porter*, 558 U.S. at 38-39 (quoting *Strickland*, 466 U.S. at 688). A defendant need only prove ineffective assistance of counsel by a preponderance of the evidence. *Thompson*, 9 S.W.3d at 813.

15. The Supreme Court has reiterated that it applies a "case-by-case approach to determining whether an attorney's performance was unconstitutionally

deficient under *Strickland*." *Rompilla v. Beard*, 545 U.S. 374, 393-94 (2005) (O'Connor, J., concurring) (citing *Strickland*, 466 U.S. 668).

16. Deficient performance is performance that is "inconsistent with the standard of professional competence in capital cases that prevailed [at the time of the trial]." *Cullen v. Pinholster*, 131 S. Ct. 1388, 1407 (2011). The Supreme Court has repeatedly assessed the reasonableness of counsel's performance by looking to "[p]revailing norms of practice as reflected in [the] American Bar Association standards." *Strickland*, 466 U.S. at 688; *see also Padilla v. Kentucky*, 559 U.S. 356, 367 (2010) (noting that the *ABA Standards* "may be valuable measures of the prevailing professional norms of effective representation"); *Rompilla*, 545 U.S. at 387 ("'[W]e long have referred [to the ABA *Standards for Criminal Justice*] as "guides to determining what is reasonable."'" (quoting *Wiggins*, 539 U.S. at 524)). Because adequacy is based upon "counsel's perspective at the time," *Strickland*, 466 U.S. at 689, this Court looks to the guidelines then in effect. *See Bobby v. Van Hook*, 558 U.S. 4 (2009).

17. At the time of Thuesen's trial, his attorneys' obligations were governed by the "prevailing professional norms," even if those norms did not align with a less rigorous defense based on "most common customs." *Harrington v. Richter*, 131 S. Ct. 770, 788 (2011). The Supreme Court instructs courts to look at the "norms of practice as reflected in the American Bar Association standards and the like" and to consider "all the circumstances" of a case. *Strickland*, 466 U.S. at 688. These sources of norms include the ABA *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913 (2003) ("*ABA Guidelines*"), the ABA *Standards for Criminal Justice* (3d ed. 1993) ("*ABA Standards*"), and state guidelines such as the State Bar of Texas *Guidelines and Standards*

for Texas Capital Counsel (2006) ("*Texas Guidelines*"). *See e.g., Ex parte Van Alstyne*, 239 S.W.3d 815, 822 n.22 (Tex. Crim. App. 2007) (citing the Texas Guidelines).

18. Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 690-91. Pursuant to the *ABA Guidelines*, counsel was required to conduct "thorough and independent investigations relating to the issues of both guilt and penalty." ABA Guidelines, Guideline 10.7; *see also Texas Guidelines*, Guideline 11.1(A). This Court considers not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 521; *Ex parte Martinez*, 195 S.W.3d 713, 721 (Tex. Crim. App. 2006).

19. When defense counsel is not aware of the relevant mitigating evidence, "the issue is not whether he was ineffective for failing to present [the] evidence . . . , but rather whether he failed to conduct a reasonable investigation to uncover mitigating evidence." *Ex parte Gonzales*, 204 S.W.3d 391, 396 (Tex. Crim. App. 2006). "Strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation." *Strickland*, 466 U.S. at 690-91.

20. The ABA Standards state that counsel "should conduct a prompt investigation of the circumstances of the case and explore all avenues leading to facts relevant to the merits of the case and the penalty." *ABA Standards*, Standard 4-4.1; *Texas Guidelines*, Guideline 11.1. Most significantly, "[t]he duty to investigate exists regardless of the accused's admissions or statements to defense counsel of facts constituting guilt or the

accused's stated desire to plead guilty." *Id.* Similarly, the duty to investigate may exist despite the accused's failure to mention potentially mitigating evidence or the accused's affirmative denial that such evidence exists. *Rompilla*, 545 U.S. at 377; *Gonzales*, 204 S.W.3d at 396.

21. Once capital trial counsel completes the necessary pretrial investigation, he or she must then formulate a defense theory "that will be effective in connection with both guilt and penalty, and should seek to minimize any inconsistencies." *ABA Guidelines*, Guideline 10.10.1. The Texas Court of Criminal Appeals ("CCA") states "[i]t is not sufficient to inquire generally and leave it up to the defendant to raise topics or respond to open-ended questions. Like a doctor, [capital] defense counsel must be armed with a comprehensive check-list of possibilities, and forcefully inquire about each topic." *Gonzales*, 204 S.W.3d at 400-01 (Cochran, J., concurring).

22. To establish prejudice, Thuesen "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. A reasonable probability is "a probability sufficient to undermine confidence in [the] outcome." *Porter*, 558 U.S. at 44 (quoting *Strickland*, 466 U.S. at 693-94). Thuesen need not show that counsel's deficient conduct "more likely than not altered the outcome" in his case, *Strickland*, 466 U.S. at 693, but he must demonstrate that "the likelihood of a different result [is] substantial, not just conceivable." *Richter*, 131 S. Ct. at 792. This Court "must decide whether the undiscovered and unoffered evidence would have created a reasonable probability that, had the jury heard it, the jury's verdict would have been different." *Martinez*, 195 S.W.3d 713, 731 (Tex. Crim. App. 2006).

23. This Court shall "reweigh the evidence in aggravation against the totality of available mitigating evidence." *Wiggins*, 539 U.S. at 534. It is not necessary for the petitioner to demonstrate that the newly presented mitigation evidence would necessarily overcome the aggravating circumstances. *Williams v. Taylor*, 529 U.S. 362, 394-98 (2000); *Gonzales*, 204 S.W.3d at 399 ("the mitigating evidence presented at the habeas hearing is substantially greater and more compelling than that actually presented by the applicant at his trial. We cannot say with confidence that the facts of the capital murder and the aggravating evidence originally presented by the State would clearly outweigh the totality of the applicant's mitigating evidence if a jury had the opportunity to evaluate it again. In short, we conclude that the applicant's available mitigating evidence, taken as a whole, 'might well have influenced the jury's appraisal' of the applicant's moral culpability.").

24. The Constitution requires that state post-conviction courts "engage with what [a defendant] actually went through," as expressed in mitigating evidence. *Porter*, 558 U.S. at 44. It is not only incorrect but "unreasonable to discount to irrelevance [mitigating] evidence . . . [or] to conclude that [certain mitigating evidence] would be reduced to inconsequential proportions simply because the jury would also have learned [of related aggravating evidence]." *Id.* The CCA has "adapted the Supreme Court's prejudice test to require that there is a reasonable probability that, absent the errors, the jury would have answered the mitigation issue differently." *Gonzales*, 204 S.W.3d at 394.

25. The fact that some mitigation evidence was presented at Thuesen's capital trial does not preclude a finding that any deficient performance by counsel prejudiced Thuesen's trial. *Sears v. Upton*, 130 S. Ct. 3259, 3266 (2010)

("We certainly have never held that counsel's effort to present some mitigation evidence should foreclose an inquiry into whether a facially deficient mitigation investigation might have prejudiced the defendant").

IV.

FINDINGS REGARDING TRIAL COUNSEL'S REPRESENTATION OF THUESEN

Appointment of Trial Counsel

26. William "Billy" Carter was appointed to represent Thuesen as lead counsel on March 9, 2009. (2 HR at 33.) At the time, Carter was still counsel on another capital murder case, Christian Olsen, which ended on March 11, 2009. (*Id.* at 108-09; Ex. 51 [Clerk's Record Index].) Additionally, Carter was counsel on the Jerry Martin capital case, which would go to trial in September 2009. (2 HR at 36.) Carter also maintained a caseload of over fifty non-capital criminal cases at that time. (*Id.* at 22-23.)

27. Michele Esparza was appointed to represent Thuesen as second chair counsel soon after Carter. At the time, Esparza had just finished her work on the Olsen case and was counsel on the pending John Falk capital murder case. Esparza also had between fifty and seventy-five pending non-capital criminal cases. (5 HR at 114-15.)

28. Carter and Esparza did not assign themselves a particular phase of the trial to prepare. Instead, they worked together on all aspects of the case and only divided up the witnesses on the eve of trial. (2 HR at 31-32.)

29. Esparza withdrew as Thuesen's counsel on June 2, 2009 because she "personally couldn't start another [capital case]" after having just finished the Olsen case. (5 HR at 145; Ex. 51 [Clerk's Record Index].) Esparza "didn't do that much work on the [Thuesen] case" prior to withdrawing. (5 HR at 144.) Attorney Clint Sare was appointed to replace Esparza on the

same day. (Ex. 51 [Clerk's Record Index].) Sare did "very little" on the case for the rest of 2009. (2 HR at 42.)

30. In December 2009, Carter asked Esparza to rejoin the Thuesen case. (5 HR at 142-43.) Esparza agreed to rejoin the case because "this was a kid who went to war and came back different, and [she] wanted to save his life." (*Id.* at 146.) She was substituted back onto the case for Sare in February 2010. (2 HR at 43; Ex. 51 [Clerk's Record Index].) Esparza and Carter represented Thuesen until the completion his capital trial. (2 HR at 40-44, 120-23.)

Motions filed by Trial Counsel

31. The only documents filed by Thuesen's defense team in 2009 were a Motion for Continuance filed on June 1, 2009, and a Motion for Substitution of Counsel filed on June 2, 2009. (2 HR at 40-44, 47-48; Ex. 51 [Clerk's Record Index].)

32. When Esparza returned to the case in February 2010, trial counsel filed numerous form motions. (2 HR at 44, 49; Ex. 51 [Clerk's Record Index].) Many of these same motions were filed in the Olsen case. (5 HR at 147-48.) Trial counsel did not have a strategic reason for waiting until February 2010 to file the form motions. (2 HR at 49.) A hearing was held on the form motions on February 22, 2010. Lead counsel Carter did not attend the hearing because he was in Leon County attending the motion for new trial hearing in the Jerry Martin case. (*Id.* at 50.) Esparza argued the motions instead. (5 HR at 148-49.)

33. In March 2010, trial counsel filed additional motions challenging the constitutionality of the death penalty. In April, a hearing was held on those motions, including live testimony from multiple defense witnesses. The

hearing was held while jury selection was being conducted in Thuesen's case. (2 HR at 50-53.)

Investigation and Records Collection in 2009

34. Shortly after being appointed, trial counsel hired Gerald Byington as the mitigation specialist on the case. Carter had worked with Byington before on multiple occasions, including the Jerry Martin and Christian Olsen cases. (2 HR at 37, 53-54.)

35. Byington's role was to collect and review records, create timelines based on the records, and summarize discovery. Trial counsel did not direct Byington on what records to collect. (2 HR at 53-55.) Trial counsel did not "police" Byington's work as the mitigation specialist. (*Id.* at 59.) Instead, counsel's approach was to "turn [Byington] loose and have him do the job he's supposed to do." (*Id.* at 54.)

36. In late June 2009, Byington sent out records requests to: Veterans Affairs Medical Center in Houston, Texas; College Station Medical Center; and Blinn College. (2 HR at 37, 60; Ex. 43 [Records Requests by Byington].) He also requested Thuesen's military records. (2 HR at 192.) Byington received responses to all record requests by August 2009. (*Id.* at 61-62; Ex. 44 [Response from Veterans Administration]; Ex. 45 [Response from Veterans Administration II]; Ex. 46 [Response from Blinn College]; Ex. 47 [Response from College Station Medical Center].) Trial counsel could not recall when they received the records from Byington. (2 HR at 62, 64.)

37. Trial counsel expected Byington to identify relevant witnesses from the records and interview them. (2 HR at 64, 74.) Trial counsel also received records from the State through discovery in January 2010. Counsel did not recall which records were collected by Byington and which were provided

by the State. Regardless, trial counsel did not personally review Thuesen's records until after January 1, 2010. (*Id.* at 192-94; 5 HR at 149-52, 201-02.)

Communication with Experts in 2009

38. In March 2009, trial counsel requested psychologist Dr. Roger Saunders be appointed to Thuesen's case. Carter had worked with Dr. Saunders on other cases, including the recently-completed Christian Olsen case and the ongoing Jerry Martin case. (2 HR at 38, 54.) Trial counsel did not understand Dr. Saunders to have a particular specialty within psychology other than "[j]ust the mental health issues for a client." (*Id.* at 38-39.)

39. Shortly after being appointed, Dr. Saunders met with Thuesen at the Brazos County Detention Center. Trial counsel did not ask Dr. Saunders to conduct a full assessment of Thuesen, but only to gain some "preliminary thoughts about [Thuesen]." (2 HR at 39, 74.) At that point, trial counsel considered Dr. Saunders to be a consulting expert but were open to the possibility that he might eventually testify at trial. Counsel stated of Dr. Saunders, "I like to use him as a witness, if I can. I just think he's a good witness." (*Id.*)

40. Following his initial meeting with Thuesen, Dr. Saunders did not take any specific action on the case again until February 2010, when attorney Esparza returned to the defense team. (2 HR at 75.)

Remainder of 2009

41. Other than what was described above, counsel appears to have done little to no other work on Thuesen's case during 2009. In September 2009, trial counsel Carter tried the Jerry Martin capital murder case, which concluded around December 1, 2009. (2 HR at 36, 192.) Dr. Saunders also worked on the Martin case and testified at Martin's trial. (*Id.* at 38-39.) On January 18, 2010, Carter filed a thirty-page Motion for New Trial in the Jerry Martin

case. (*Id.* at 192-93.) Carter attended a full hearing on the motion on February 22, 2010. (*Id.* at 193.)

42. Carter testified that it was only after the first of the new year in January 2010 that he turned his full attention to the Thuesen case.

Investigation of Lay Witnesses in 2010

43. In February 2010, trial counsel hired Rick Starnes as an investigator. Trial counsel hired a second investigator, Pamela "Kay" Sanders, on March 27, 2010. Although mitigation specialist Byington had completed some initial interviews, trial counsel relied heavily on Starnes and Sanders to locate and interview lay witnesses in the months after jury selection had begun. Starnes and Sanders began interviewing witnesses around the time that jury selection started and continued investigating throughout Thuesen's trial. Starnes and Sanders relayed information to trial counsel as counsel was conducting the trial. (2 HR at 104-06.)

44. Thuesen's family members spoke with counsel on several occasions and were open and willing to give information about Thuesen's life history. Based on their interactions with counsel, it appeared to Thuesen's family that counsel only began focusing on Thuesen's case investigation in March 2010. Counsel did not focus their interviews with the family on Thuesen's post-traumatic stress disorder ("PTSD"). Counsel spoke to Thuesen's siblings, but only asked them to pick a favorite childhood memory of Thuesen to testify about on the stand, which was largely the whole of their testimony at trial. (52 RR at 73-74, 74-76; 3 HR at 17-18, 186-87; 4 HR at 79-80; Ex. 25 at ¶3 [Aff. of Michael Thuesen]; Ex. 26 at ¶¶2, 4 [Aff. of Michelle Thuesen].)

45. Many other family and friends spoke to the defense team about Thuesen in the weeks leading to trial. Several were told by counsel that they had

relevant and helpful information. However, counsel did not call them to testify, despite their willingness. (4 HR at 18-19, 38-39, 94; 5 HR at 19-20; Ex. 28 at ¶¶18, 19 [Aff. of Torres]; Ex. 17 at ¶¶9-10 [Aff. of Craig Novak]; Ex. 18 at ¶¶11-13 [Aff. of Michael Novak]; Ex. 19 at ¶12 [Aff. of Karolyn Ottmer]; Ex. 22 at ¶9 [Aff. of Stephen Snell]; Ex. 21 at ¶11 [Aff. of Brian Smith].) Others were never spoken to by the defense. (Ex. 16 at ¶8 [Aff. of Hood]; Ex. 20 at ¶11 [Aff. of Andy Rodesney].)

Communication with Experts in 2010

46. Counsel retained Dr. Roger Saunders for further general psychological evaluations of Thuesen in February 2010. [Ex. 39-H at 1 [Saunders Billing Records].) The first of those occurred on March 6, 2010. (*Id.*; 2 HR at 78-79.) The second occurred on May 13, 2010, after the trial had already commenced. (Ex. 39-H at 2 [Saunders Billing Records]; 2 HR at 191.)

47. On February 22, 2010, trial counsel hired Dr. Robert Yohman to conduct a neuropsychological evaluation. (2 HR at 77, 127-28, 177, 188-89; Ex. 51 [Clerk's Record Index].) Though the exam did not show neuropsychological damage, Dr. Yohman noted that Thuesen appeared to suffer from PTSD and suggested that trial counsel pursue that issue at trial. (2 HR at 188-89.)

48. In March 2010, trial counsel communicated with Texas Defender Service attorney John Niland, who recommended that trial counsel call an expert to educate the jury about PTSD. (2 HR at 85.)

49. On March 26, 2010, trial counsel contacted Dr. Michael Gottlieb, a family psychologist, who recommended that counsel provide the jury with information about PTSD. (2 HR at 85, 189; 5 HR at 246; Ex. 39-E [Billing for Dr. Michael Gottlieb].)

50. Trial counsel contacted Dr. Howard Detwiler, a psychologist in Alaska, in February 2010 in order to discuss potential PTSD testimony. (2 HR at 88.)

After reviewing records sent by the defense, Dr. Detwiler had two telephone calls with trial counsel, one in February and one in March. (Ex. 39-C [Detwiler Billing Records].) After further discussions throughout April, trial counsel decided Dr. Detwiler was not the appropriate defense expert. (*Id.*; 2 HR at 87-92.) Dr. Detwiler never met or evaluated Thuesen. (*Id.*)

51. Based on a recommendation from Dr. Saunders, trial counsel retained Dr. Kenneth Kopel, a Houston psychologist with experience treating veterans with PTSD, on April 27, 2010. (4 HR at 140.) After sending Dr. Kopel records to review, trial counsel drove to Houston on Saturday, May 22, 2010, to meet personally with Dr. Kopel for the first time. The punishment phase of Thuesen's trial was already underway. Carter planned to call Dr. Kopel as an expert in PTSD. (2 HR at 83-84, 92-93; 4 HR at 141-42.) Instead, on the night before Dr. Kopel's testimony, trial counsel informed Kopel that his testimony would not be needed. (4 HR at 143.)

52. Ultimately, trial counsel called Dr. Saunders to testify during the guilt/innocence phase of trial about his diagnosis of Dependent Personality Disorder, depression, and PTSD. (2 HR at 82-83; 47 RR at 5.) Dr. Saunders was the only defense expert to assess Thuesen in person. (2 HR at 191.) Counsel did not call an expert to testify about PTSD during the punishment phase of Thuesen's trial.

V.

FINDINGS AND CONCLUSION REGARDING CLAIMS RAISED BY APPLICANT

Claims One, Five, and Eight – Trial Counsel Performed Ineffectively in the Investigation and Presentation of Mitigation Evidence Related to PTSD at the Punishment Phase of Trial

Findings of Fact

53. **Trial counsel were alerted early in their representation of Thuesen that PTSD would be a significant issue in this case.**

54. Counsel began their representation of Thuesen in March 2009. By trial counsel's own statements, from early in their representation of Thuesen, they learned that Thuesen had served in the U.S. Marine Corps, concluded that Thuesen likely suffered from PTSD, and recognized PTSD would be an issue in his case. (2 HR at 79.) Counsel had psychologist Dr. Saunders meet with Thuesen in March 2009 for a brief interview to gauge Thuesen's mental state. (*Id.* at 36, 39.) Even though this meeting was not a formal evaluation and diagnosis, following the meeting counsel discussed the issue of PTSD with Dr. Saunders as being a "strong possibility" as a theme in Thuesen's case. (*Id.* at 39, 79.)

55. In July 2009, counsel received records from the Department of Veterans Affairs ("VA") regarding Thuesen's medical treatment, based on requests from their mitigation specialist Gerald Byington. (Ex. 44 [Response from Houston VA]; Ex. 45 [Response from Central Texas VA].) A review of these records would have shown counsel that Thuesen had been consistently reporting symptoms of PTSD for approximately two and half years prior to the crime. (Ex. 37 [Thuesen Military Records]; Ex. 38 [Thuesen Veteran Affairs Records].)

56. A year after returning from service in Iraq, Thuesen was given a post-deployment health assessment. (Ex. 37 at 118-21 [Thuesen Military Records].) In it, Thuesen endorsed "problems sleeping," "difficulty remembering," "weakness," and "numbness," in addition to back pain. (*Id.* at 119.) Thuesen also agreed that he had "a health concern or condition that . . . is related to [his] deployment" and that it was "[o]ther than wounds or injuries." (*Id.*)

57. As a result of this assessment, Thuesen was seen by a military health care provider for further evaluation. (Ex. 37 at 120-21 [Thuesen Military Records].) That provider noted that Thuesen complained of "feeling numb or detached from others, activities, or [his] surroundings," as well as having "little interest or pleasure in doing things" and "feeling down, depressed, or hopeless." (*Id.* at 121.) Thuesen indicated that these feelings were making it "very difficult" to do his work, to take care of things at home, and to get along with others. (*Id.*)

58. Thuesen was again seen by the VA system for an "Iraq/Afghanistan Mental Health Assessment" in March 2007. (Ex. 38 at 154 [Thuesen Veteran Affairs Records].) During that assessment, Thuesen reported that he was "constantly on guard, watchful, or easily startled." (*Id.*) He also reported feeling "numb or detached from others, activities, or [his] surroundings." (*Id.*) Through these answers, Thuesen endorsed two of the four symptoms of PTSD—hypervigilance and avoidance symptoms. American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders, at 467-68 (4th ed. text rev. 2000) (hereinafter "DSM IV-TR").

59. In July 2008, Thuesen returned to the VA with complaints of lower back pain. (Ex. 38 at 139-41 [Thuesen Veteran Affairs Records].) While being treated, Thuesen completed a PTSD screening that asked four questions

related to the common symptoms of PTSD. (*Id.* at 139.) Thuesen answered "Yes" to all four questions, indicating symptoms of re-experiencing the trauma, avoidant thoughts, hypervigilance, and emotional numbing. (*Id.*)

60. On August 29, 2008, Thuesen called a suicide hotline. (Ex. 38 at 136 [Thuesen Veteran Affairs Records].) He was intoxicated and having thoughts of shooting himself. (*Id.*) Thuesen was picked up by the police and taken to the Houston VA Medical Center. (*Id.* at 133-36.) During his initial evaluation on admission to the hospital, the admitting psychologist noted that Thuesen had experienced wartime trauma and was experiencing PTSD symptoms including nightmares, irritability, and an increased startle response. (*Id.* at 130.)

61. Finally, following his treatment at the Houston VA Medical Center, Thuesen was given a prescription of anti-depressants and referred to counseling sessions at a College Station VA clinic. (Ex. 38 at 62-64 [Thuesen Veteran Affairs Records].) Though Thuesen's referral related to his depression and suicide, his counselor Teresa Cannon reviewed PTSD symptoms with Thuesen and saw that Thuesen was endorsing all four types of PTSD symptoms, and therefore focused her counseling sessions on PTSD symptoms. (Ex. 38 at 41-43 [Thuesen Veteran Affairs Records]; Ex. 3 at ¶7 [Aff. of Cannon].) Thuesen was still participating in these counseling sessions just days before the crime.

62. **Counsel did not begin an investigation into the basis for Thuesen's PTSD, or consult potential avenues for developing PTSD evidence until the months leading up to trial. Yet, the information received by counsel from their investigation into Thuesen's life history and mental health consistently supported that PTSD was a significant mitigating factor in Thuesen's story.**

63. Based on counsel's testimony and a review of their billing records, the first step they took to investigate the issue of PTSD as a disorder was to meet with someone from the U.S. Marine Corps Wounded Warrior Regiment in late December 2010. The Wounded Warrior Regiment provides assistance to wounded, ill, or injured Marines to "maximize their recovery as they return to duty or transition to civilian life." (*See* www.woundedwarriorregiment.org, last visited December 22, 2014.) Trial counsel met a representative of the group, J. J. Wilson, for lunch and generally discussed the issue of PTSD. (2 HR at 175; 5 HR at 143.) Wilson informed trial counsel that there was not much that the Wounded Warriors Regiment could do to directly help Thuesen. He recommended that Thuesen file an application for PTSD benefits with a veterans service organization to establish a medical opinion of service connected disability. Wilson discussed symptoms of PTSD with trial counsel, but informed counsel that he was not an expert in PTSD and, therefore, could not speak in much detail or render an opinion in this case. He provided counsel with contact information for a forensic psychologist who was a naval officer, stationed somewhere on the east coast. Aside from that meeting with counsel, Wilson had no other involvement with Thuesen's case. (Attachment 1 at ¶¶4-6 [Aff. of J. J. Wilson].) Counsel confirmed the meeting with Wilson was a primary means for educating themselves about PTSD. (2 HR at 96.) Counsel maintains that Wilson recommended they contact Dr. Detwiler. (2 HR at 89.) Wilson states, "The name [Dr.] Detwiler is not familiar to me and is not the psychologist I recommended to [trial counsel]." (Attachment 1 at ¶6 [Aff. of Wilson].)

64. Counsel consulted several mental health professionals in the early months of 2010, though not with expertise in PTSD. In February 2010, trial counsel

again consulted with Dr. Roger Saunders. (Ex. 39-A at 22 [Carter Billing Records]; Ex. 10 at ¶3 [Aff. of Dr. Roger Saunders].) Based on his evaluations of Thuesen, Dr. Saunders identified PTSD as a "significant condition germane to the case." (Ex. 10 at ¶7 [Aff. of Dr. Saunders].) However, Dr. Saunders informed trial counsel that PTSD was not a diagnosis that he could develop for the case, as he was not a "specialist" in PTSD. (Ex. 10 at ¶¶7, 8 [Aff. of Dr. Saunders].) Dr. Saunders recommended that counsel consult a PTSD expert, suggesting Houston psychologist Dr. Kenneth Kopel. (*Id.* at ¶8.)

65. Also in February 2010, counsel contacted Dr. Richard Yohman, a clinical neuropsychologist from Houston to conduct a neuropsychological evaluation of Thuesen at the Brazos County Jail. (Ex. 11 at ¶¶6-8 [Aff. of Dr. Robert Yohman].) Dr. Yohman told counsel that there was a strong case that Thuesen suffered from PTSD and dysthymic disorder—a chronic condition characterized by depressive symptoms. (*Id.* at ¶¶11, 12.) During the interview with Dr. Yohman, Thuesen talked about his combat experience in Iraq as well as his suffering from daily nightmares in 2008 and 2009 about killing combatants and being attacked. Thuesen told Dr. Yohman that he felt threatened in public and would sit in a corner so he could always keep an eye on the door of the room. (*Id.* at ¶¶9, 10.)

66. Further, counsel consulted with Dr. Michael Gottlieb, a psychologist in Dallas, in March 2010 for advice regarding the themes that should be presented in Thuesen's defense case. (Ex. 35 at 1-2 [Dr. Michael Gottlieb Email and CV].) Dr. Gottlieb advised trial counsel to put on evidence of Thuesen's "military service and subsequent diagnosis" of PTSD and "how serious this disorder can be." (*Id.* at 1, 3.) Dr. Gottlieb also advised counsel to explore whether Thuesen's "drinking was exacerbated after his trauma."

(*Id.*) "This sadly, is a very common reaction," he noted, telling counsel that "[s]oldiers and vets have strong prejudices against mental health treatment, and when they develop symptoms, they self medicat[e]—with alcohol. Doing so often makes matters much worse for them." (*Id.*)

67. Regarding Thuesen's specific experiences during combat and evidence of his PTSD, counsel's mitigation specialist and investigators did not begin lay witness interviews in the case until late January-early February 2010. (Ex. 40-C at 3-4 [Byington Billing Records] (indicating first interviews and request for mileage reimbursements for non-case conference on January 25, 2010).) Most lay witness interviews appear to have been completed in March after jury selection had begun. Once interviewed, though, many witnesses informed trial counsel that Thuesen had been a well-liked, All-American kid, who had returned from his tour of duty in Iraq a changed person. (*See, e.g.*, Ex. 28 at ¶¶18, 19 [Aff. of Mark Torres]; Ex. 29 at ¶4 [Aff. of Rodney Townsend]; Ex. 18 at ¶¶4-5 [Aff. of Michael Novak]; Ex. 19 at ¶¶4-8 [Aff. of Karolyn Ottmer]; Ex. 22 at ¶¶4-5 [Aff. of Stephen Snell].)

68. Although counsel received records from Thuesen's treatment at the VA in July 2009, counsel admits to not reviewing them until 2010. (2 HR at 192.) Counsel did not attempt to contact Thuesen's treating physician or counselor from the VA until March and April 2010. (2 HR at 66-69; 5 HR at 152-60.) Once interviewed, however, both confirmed for counsel that Thuesen was suffering PTSD and that it was contributing to a downward spiral in his life in the months before the crime. (3 HR at 108-09, 112-13; 5 HR at 170-71, 183-84.)

69. **Despite the numerous indications that PTSD was a central component in Thuesen's case, and the suggestions by several mental health**

professionals that counsel present testimony from a PTSD expert, counsel did not secure the assistance of an expert witness or witnesses qualified to explain the mitigating impacts of PTSD.

70. Counsel had never previously presented PTSD as a mitigation defense at a capital case. (5 HR at 248.) Counsel did not conduct independent research regarding PTSD, despite realizing they knew only what a lay person knew about PTSD when starting the case. (2 HR at 95-96.) Even with this knowledge, however, counsel were aware of potential links between PTSD and alcohol abuse and violence. (2 HR at 95-98; 5 HR at 173-77.) In addition, counsel were aware based on their review of Thuesen's records, that he had not been properly diagnosed by the VA and may not have been receiving proper treatment. (2 HR at 102-03; 5 HR at 170-71.)

71. Counsel understood that expert witness testimony was a potentially important avenue to explain Thuesen's PTSD and its impact on his behavior after returning home from Iraq. (2 HR at 184-85.) Counsel were relying on expert witnesses to educate them about PTSD. *(Id.* at 96.) In addition, counsel was advised by numerous individuals during their investigation of this need. Dr. Saunders recommended they retain a PTSD expert. (Ex. 10 at ¶8 [Aff. of Dr. Saunders].) In their discussion with Dr. Gottlieb, he noted that evidence could be presented by someone who evaluated Thuesen or, at the very least, "a pure/education expert might help to explain [PTSD] as it is easily misunderstood—even today." (Ex. 35 at 1 [Dr. Michael Gottlieb Email and CV.) In discussions with John Niland of the Texas Defender Service, counsel was similarly advised to present evidence of Thuesen's PTSD and lack of proper treatment. (2 HR at 85; State Hearing Ex. 2 [Email from Niland].)

72. Counsel's first contact with a potential PTSD expert witness occurred in February 2010 when counsel approached Dr. Howard Detwiler, a psychiatrist in Alaska. (Ex. 39-C [Detwiler Billing Records].) A review of Dr. Detwiler's curriculum vitae indicates that, although he personally served time in the military as a medical officer, his practice focused on general psychiatry; it is unclear what experience he had in war-related PTSD diagnosis and treatment. (Ex. 12 [Detwiler CV].) After receiving records to review and speaking with counsel in late February, Dr. Detwiler was not contacted again until March 28, 2010. (Ex. 39-C [Detwiler Billing Records].) Over the next month, after numerous discussions and exchanges of further records to review, counsel became convinced that Dr. Detwiler was not the appropriate defense expert. (2 HR at 88-91.)

73. In March 2010, mitigation specialist Byington made initial contact with Teresa Cannon, the VA counselor who had been providing therapy sessions to Thuesen in the months leading up to the crime. It was through this first contact that counsel learned about federal statutory restrictions that protect VA employees from being subpoenaed as witnesses without prior approval of the VA and that prohibit VA employees from testifying as expert witnesses. (Ex. 56 [Email from Byington re: Cannon]; Ex. 57 [Letter from Esparza to VA attorney].) Because of these restrictions and the necessary approval process, Byington was unable to interview Cannon until mid-April 2010. (Ex. 58 [Email from Byington to VA attorney]; Ex. 59 [Fax from VA approving interview with Cannon].) Counsel also learned that although Cannon believed she was treating Thuesen for PTSD, the VA had not diagnosed Thuesen's PTSD and Cannon had not received any prior records of Thuesen's care from the VA. (2 HR at 72-73; 5 HR at 170-71.)

74. Despite learning of the VA restriction on employee subpoenas and testimony, counsel did not attempt to interview Dr. Ismael Carlo, Thuesen's treating physician at the VA Medical Center in Houston, until shortly before trial began. Byington interviewed Dr. Carlo on April 22, 2010, and, again despite knowing of the VA restrictions, counsel appears to have issued a subpoena for Dr. Carlo in early May 2010. (5 HR at 160; Ex. 60 [Letter from VA to Esparza re: Carlo].) In response, the VA notified counsel that it would likely seek to quash the subpoena and referred the matter to the United States Attorney's office. (Ex. 60 [Letter from VA to Esparza re: Carlo].) The VA subsequently agreed to allow Dr. Carlo to testify, though with restrictions on the subjects he would be allowed to speak about. Although counsel had options for challenging those restrictions, because of the late date in which these discussions took place, counsel felt they had no time to do anything other than agree to the conditions. (3 HR at 91-96.)

75. Counsel did not meet with or speak directly to either Dr. Carlo or Teresa Cannon prior to their appearance at Thuesen's trial. (2 HR at 70; 5 HR at 163.) Once counsel did speak directly with Dr. Carlo on the day before his testimony, Dr. Carlo informed them multiple times that he had not diagnosed Thuesen with PTSD. Regardless of whether he thought Thuesen was in fact suffereing from PTSD, Dr. Carlo informed counsel that the restrictions on his testimony meant he could only testify about his diagnosis of Thuesen's depression during his admission for the suicide call. (Ex. 4 at ¶¶11-12 [Aff. of Dr. Carlo].)

76. Counsel's only other attempt to secure the testimony of a witness qualified to present expert testimony regarding PTSD was to contact Dr. Kenneth Kopel, the Houston psychologist recommended by Dr. Saunders. Defense counsel contact Dr. Kopel on April 27, 2010, two weeks before trial began,

and asked him to evaluate Thuesen for PTSD, as well as to evaluate the medical and mental health care Thuesen received through the VA system. (4 HR at 140; Ex. 8 at ¶6 [Aff. of Dr. Kenneth Kopel].) Because of the time constraints, Dr. Kopel's review was limited to reading various records. (*Id.* at ¶7.) Dr. Kopel was not asked to do an in-person interview with Thuesen. (*Id.* at ¶9.) After a review of the records, Dr. Kopel informed counsel that he believed Thuesen suffered from PTSD and major depression. (*Id.* at ¶8.)

77. Counsel met with Dr. Kopel on May 22, 2010, the day after the punishment phase began, to discuss his findings. (4 HR at 141-42.) Dr. Kopel agreed to testify at Thuesen's punishment phase regarding PTSD generally and how it specifically affected Thuesen, both overall and on the day of the crime. Dr. Kopel was also willing to testify about Thuesen's inadequate VA medical care. (Ex. 8 at ¶8 [Aff. of Dr. Kopel].) While the punishment phase was ongoing and the day before Dr. Kopel's testimony, Carter contacted the doctor and said he would not be needed as a witness. (*Id.* at ¶10.) The defense paid both for Dr. Kopel's time reviewing records and for a full eight-hour day to attend the trial and give testimony, but still chose not to present his testimony. (*Id.*)

78. **The ultimate presentation of information regarding PTSD during Thuesen's capital trial, including information specific to Thuesen's experience and information placing Thuesen's struggle with PTSD in a broader context, was significantly incomplete.**

79. Counsel did not present the testimony of an expert witness specifically qualified and focused on the issue of PTSD during either phase of trial. Counsel did not present the testimony of any expert witness at the punishment phase of trial.

80. During the guilt/innocence phase, the defense presented Dr. Saunders as an expert witness to opine that Thuesen did not have the intent to kill during the crime, largely due to a confluence of mental health issues that included Dependent Personality Disorder, depression, and PTSD. (47 RR at 15; Ex. 10 at ¶5 [Aff. of Dr. Saunders].) Regarding Thuesen's PTSD, Dr. Saunders testified that he diagnosed Thuesen with PTSD based on Thuesen's experience of trauma in Iraq and the reporting of distinct personality changes upon his return to the States. (47 RR at 18.) Dr. Saunders reviewed the symptoms of PTSD that Thuesen experienced including avoiding talking about his time in Iraq, estrangement from others, hypervigilance, exaggerated startle response, and outbursts of anger and irritability. (*Id.*) Dr. Saunders noted that the PTSD symptoms Thuesen experienced would interfere with interpersonal relationships. (*Id.* at 26.) He also stated that PTSD would make it difficult for Thuesen to negotiate his emotions, which could easily spill out onto others. (*Id.* at 27.)

81. As he had informed trial counsel in advance, though, the primary focus of Dr. Saunders's testimony was that Thuesen was suffering from Dependent Personality Disorder, a condition marked by fear of separation and an excessive need to be taken care of. (47 RR at 33-35.) Dr. Saunders believed that on the day of the crime, Thuesen's Dependent Personality Disorder prevented him from forming an intent to kill. (*Id.* at 37-44.) Though Thuesen's PTSD contributed to his mental condition at the time of the crime, Dr. Saunders believed it merely exacerbated the anxiety and depression already present because of the Dependent Personality Disorder. (*Id.* at 47.)

82. Dr. Saunders's testimony provided the jury with a very technical description of the PTSD symptoms Thuesen suffered and barely touched on how those symptoms directly impacted Thuesen's behavior and relationships with

others. In addition, Dr. Saunders's lack of expertise in PTSD led to several incorrect statements about Thuesen's particular experience with PTSD, including the incorrect statement that Thuesen had not suffered from flashbacks related to PTSD.[2] (*See* Ex. 28 at ¶¶11-13 [Aff. of Mark Torres]; Ex. 16 at ¶5 [Aff. of Jeff Hood]; Ex. 8 at ¶44 [Aff. of Dr. Kopel].)

83. Trial counsel also believed it had presented strong evidence of Thuesen's PTSD through the testimony of Dr. Ismael Carlo, the treating physician during at the Houston VA Medical Center. (45 RR at 21.) Dr. Carlo testified that Thuesen was severely depressed on admission to the hospital. (*Id.* at 22-23.) Based upon his observations and discussions with Thuesen, Dr. Carlo diagnosed him with Major Depressive Disorder. (*Id.* at 24.) Dr. Carlo testified that Thuesen was still a long way away from being well when he was discharged from the hospital. (*Id.* at 28.)

84. Dr. Carlo, though, had not diagnosed Thuesen with PTSD when treating him at the medical center. (Ex. 4 at ¶7 [Aff. of Dr. Ismael Carlo].) The defense unsuccessfully attempted to have Dr. Carlo diagnose Thuesen with PTSD on the witness stand. (45 RR at 37-58.) Based on the statutory restrictions on his testimony, of which counsel was previously aware, Dr. Carlo was permitted to testify only as a fact witness about his treatment of Thuesen. (*Id.* at 54-57; *see* 38 C.F.R. 1 §§14.803, .808.) Because he had not diagnosed Thuesen with PTSD when treating him at the VA Medical Center,

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[2] Further, because Dr. Saunders's testimony was presented during the guilt/innocence phase in the context of a defense theory arguing Thuesen was not guilty of capital murder, and the fact that the jury rejected that theory and (implicitly) Dr. Saunders's testimony, it is unlikely those same jurors both knew they could consider his testimony during the punishment deliberations and understood how it should be considered mitigating.

Dr. Carlo could not offer any expert opinions about whether Thuesen suffered from PTSD.

85. Next, counsel elicited testimony from the VA social worker Teresa Cannon regarding her treatment of Thuesen. Cannon talked about the various elements of PTSD that Thuesen self-reported during their sessions together. (45 RR at 81-94.) In addition, Cannon testified about the positive impact Thuesen's relationship with Rachel Joiner had on his mental state. (*Id.* at 93-101.)

86. However, Cannon mistakenly testified that Thuesen had been diagnosed with PTSD at the Houston VA Medical Center before starting sessions with her. (45 RR at 80.) Cannon had received only cursory information over the phone from the suicide prevention coordinator at the Houston VA regarding Thuesen's brief treatment related to his suicide threat. (Ex. 3 at ¶6 [Aff. of Teresa Cannon].) She never received any medical records from the VA system, including past diagnoses, treatment history, or mental health assessments. (*Id.*) Further, Cannon had herself never diagnosed Thuesen with PTSD, as she was unqualified to do so. As a social worker, Cannon cannot diagnose or prescribe treatment of patients. (*Id.* at ¶9.) Her testimony regarding the supportive counseling sessions she offered Thuesen was not the equivalent of an expert witness explaining the nature of the disorder to the jury.

87. Finally, the testimony of lay witnesses during Thuesen's trial only briefly touched on the ways in which Thuesen's behavior indicated he was suffering from PTSD. Much of the lay witness testimony presented by counsel, particularly during the punishment phase, focused on the stress and traumas Thuesen experienced while in Iraq, as opposed to the changes people saw in him as a result of that trauma once home. (*See* Application at 112-15.)

88. **Substantially more information was available at the time of Thuesen's trial that would have been relevant and compelling mitigation for a juror's consideration.**

89. **Military Experience:** Thuesen enlisted in the Marine Corps at the age of eighteen, while still in high school, soon after the attacks on September 11, 2001. He missed his high school graduation to attend boot camp. Thuesen was proud of wearing the uniform and serving his country. (3 HR at 10; 4 HR at 10-11.)

90. Thuesen was deployed to Iraq in the fall of 2004, fighting there until his return home in the spring of 2005. He experienced many combat missions, during a particularly difficult time in the war, in what was known as the Sunni Triangle. Although Thuesen enlisted and was trained as a field radio operator, he was primarily assigned as a machine gunner for security patrols in combat zones. He served honorably until his discharge. (6 HR at 22-23; Ex. 9 at ¶¶9-10 [Aff. of Dr. Elspeth Ritchie].)

91. **Training:** Thuesen's training while in the military had a marked impact on his psychological state and behaviors. War educates soldiers for war, not peace, and in doing so reverses the customary moral values of society. (Ex. 2 at ¶10 [Aff. of Dr. William Brown].) For example, in the civilian world, the act of killing is regarded as something to feel remorse over. In contrast, a "kill" in combat is rewarded and those who have not killed are looked down upon. (*Id.*)

92. A collection of rules, customs, values, habits, and beliefs are instilled into military recruits, otherwise known as the Military Total Institution (MTI). (Ex. 2 at ¶12 [Aff. of Dr. Brown].) The purpose behind the MTI is to transition individuals, through acculturation and training, from the civilian environment to the military context. (*Id.* at ¶6.) Military institutions have

adopted this manner of complete training of individual recruits in order to maximize its ability to complete its mission—defeat, destroy, or kill the enemy. (*Id.* at ¶12.)

93. Recruits are taught to obey orders without hesitation. In order to be prepared to fight, recruits must subdue any feelings of fear, sadness, or timidity to obey these orders with loyalty and enthusiasm. (Ex. 2 at ¶15 [Aff. of Dr. Brown].) In civilian society, people are expected to think before acting or responding to a situation. In contrast, military recruits are trained to react instantaneously to stimuli they perceive as a potential threat. (*Id.* at ¶17.) In combat, hesitation to act may result in serious injury or death. Thus, in the military context, making a bad decision is far less detrimental than making no decision and failing to act. (*Id.*)

94. Recruits are trained to respond instantaneously and aggressively to any and all perceived danger, without hesitation. Recruits are made to respond with a "fight" response, rather than "flight," when confronted with a stressful circumstance. (Ex. 2 at ¶20 [Aff. of Dr. Brown].) This instantaneous response extends to the use of deadly weapons. Recruits are conditioned to rely on weapons as a primary means of completing their mission. (*Id.* at ¶22.)

95. **Trauma:** Once deployed in Iraq, Thuesen's missions often stretched over many days, with little chance for rest. Even when on base, Thuesen described having spent much of the time in briefings and in preparing his equipment for the next mission. (Ex. 9 at ¶12 Aff. of Dr. Ritchie].) Family initially received letters home from Thuesen, but noted a change in Thuesen's writing, particularly in the last letter they received from him. (4 HR at 57-58, 75.)

96. Thuesen experienced multiple traumatic events and life threatening

situations in Iraq such as taking fire from rocket and mortar rounds, improvised explosive devices (IEDs), and land mines. Thuesen described being consistently in fear of death and of "hearing others over the radio experiencing enemy attacks, including the sounds of gunfire and screams." (Ex. 9 at ¶13 [Aff. of Dr. Ritchie].)

97. Thuesen witnessed and participated in killing what were perceived as enemy combatants, but were later determined to be innocent civilians, a situation commonly faced in the urban setting of the Iraq War. Thuesen also described a common mental conflict between eliminating any pause in his reflex to pull a trigger based on the need to protect the lives of his fellow troops, with the reality that his actions might later be revealed to have resulted in unnecessary deaths of civilians. (Ex. 9 at ¶¶14, 15 [Aff. of Dr. Ritchie].)

98. As a result of participating in this type of combat, Thuesen likely suffered a psychological trauma that has become known as Moral Injury. By doing what he had been trained to do as a Marine and take the life of a combatant, Thuesen was violating a more basic tenant he had grown up with in the civilian world that he should never kill. Not only could this create moral injury, but, along with the other life threatening experiences Thuesen faced in Iraq, could have served as a trauma causing PTSD. (6 HR at 24-26.)

99. **Lack of counseling/programs:** At that time, the military did not have many programs for identifying and treating servicemen who had experienced trauma. Thuesen did not receive any special debriefing or counseling to deal with the traumas he had witnessed. Thuesen would have greatly benefited from a program like the Marine's later developed Operational Stress Control and Readiness Program, which was aimed at helping soldiers deal with traumatic events. Instead, he returned from deployment to a civilian society

that could not comprehend what he had experienced. (6 HR at 29; Ex. 9 at ¶¶16-18 [Aff. of Dr. Ritchie].)

100. **Reintegration at Home:** In the early years of the Iraq War, there was little emphasis by the military on preparing service members for re-integration into civilian society. (Ex. 9 at ¶17 [Aff. of Dr. Ritchie].) This transition is often very difficult and should involve education of the service member and his family, as well assistance with health care, employment, and education for the service member. (*Id.*) Servicepersons need time to adjust back to civilian life and training to no longer react to triggers (like loud noises) and to no longer carry a weapon. Thuesen did not have these types of programs available during the period he served. (6 HR at 30-31.)

101. For members of a reserve component, as Thuesen was, the re-integration process is especially difficult. While active duty Marines return to a military base, surrounded by a community of other service members, a reservist often returns directly back to the civilian world. Family and friends do not comprehend their reservist's experience, and the society around them expects reservists to simply return to "normal" lives with little appreciation shown for the life-changing experiences they have undergone. There is little recognition of the significant support these reservists may need. (6 HR at 32-33; Ex. 9 at ¶18 [Aff. of Dr. Ritchie].)

102. Like many reservists, Thuesen struggled to relate to his family and friends. They, in turn, noticed that Thuesen seemed closed off, distant, and withdrawn. (Ex. 9 at ¶20 [Aff. of Dr. Ritchie].) Unfortunately, family members often do not know what to say and how to support the veteran. (Ex. 9 at ¶22 [Aff. of Dr. Ritchie].) Thuesen's family did not know how to engage him. (4 HR at 13.) Thuesen's friends distanced themselves as he began to call frequently, at odd hours of the day and night, wanting to talk

but not having anything to talk about. (Ex. 9 at ¶23 [Aff. of Dr. Ritchie]; 4 HR at 12; 5 HR at 16.) Over time, even the support Thuesen received from his fellow Marines faded as they were pulled back into their own lives. (Ex. 9 at ¶¶24, 25 [Aff. of Dr. Ritchie].)

103. **Post-Traumatic Stress Disorder:** Based on Thuesen's traumatic experiences during combat and on the statement of Thuesen, his family, and other people that knew him before and after Iraq, Thuesen suffered from PTSD from his return from Iraq until the time of the crime. PTSD is characterized by someone suffering a traumatic event, after which they experience three types of mental health symptoms. Those symptoms are: (1) re-experiencing the trauma (such as through flashbacks or nightmares); (2) numbing and avoidant behaviors (closing off from people or avoiding social places); and (3) physiological arousal (a "startle" response or hypervigilance). (Ex. 9 at ¶¶26-30 [Aff. of Dr. Ritchie]; 5 HR at 43-44; 6 HR at 15-16.)

104. PTSD is one of the only mental health disorders that requires an external event to occur—the traumatic experience. For this reason, PTSD is sometimes called post-traumatic stress injury, especially in the military context, as it is something that has happened to a serviceman because of war, rather than being solely an internal disorder. (5 HR at 43; 6 HR at 16, 21.)

105. **Signs of PTSD in Thuesen:** Thuesen's behavior after returning home from Iraq exhibited all the symptoms of PTSD. (6 HR at 41.) People described Thuesen as being in a daze and having a "mask" on. He struggled to speak with others about his experiences and generally no longer had a social, open personality. These are signs that Thuesen was experiencing emotional numbing and trying to avoid thoughts of his trauma. (Ex. 9 at ¶29 [Aff. of Dr. Ritchie]; 4 HR at 11-12, 35, 76; 6 HR at 17.)

106. In addition, people witnessed Thuesen show signs of hypervigilance or physiological arousal. Friends described Thuesen as being nervous in crowds or around new people, and that he would scan the room or refuse to sit with his back to the door. Thuesen's family described how Thuesen exhibited an exaggerated startle response, where he would jump and overreact when touched or surprised. (Ex. 9 at ¶30 [Aff of Dr. Ritchie]; 3 HR at 12; 4 HR at 37, 77; 5 HR at 11-12; 6 HR at 17.)

107. Thuesen also had what appeared to be flashbacks and intrusive thoughts about his experiences in Iraq. Two friends described an instance of a flashback where Thuesen began yelling military orders at a plant and later could not remember the episode. In addition, others witnessed Thuesen having nightmares and waking up in a cold sweat. (Ex. 9 at ¶28 [Aff. of Dr. Ritchie]; Ex. 16 at ¶¶4-6 [Aff. of Jeff Hood]; Ex. 28 at ¶¶11-14 [Aff. of Mark Torres].)

108. **Impact of PTSD:** Thuesen's symptoms of PTSD negatively impacted Thuesen's functioning in daily life, relationships, work, and school. PTSD impacts every veteran differently. But a commonality is that PTSD symptoms persist over time, intruding upon a veteran's normal interactions and interfering with his ability to function in the public sphere. (Ex. 9 at ¶¶31-34 [Aff. of Dr. Ritchie]; 5 HR at 45-46; 6 HR at 18.)

109. Prior to his deployment, friends and family viewed Thuesen as an energetic, outgoing, and confident All-American kid. Thuesen was a social, engaging person, even with strangers. He was seen as goal oriented and as someone in control of his emotions. (Ex. 9 at ¶34 [Aff. of Dr. Ritchie]; Ex. 27 at ¶4 [Aff. of Patricia Thuesen]; 3 HR at 8, 179-80; 4 HR at 71-73, 87-88; 5 HR at 7-10.)

110. In contrast, Thuesen returned from Iraq on edge, nervous around others, and

distant from those he cared about. He struggled to speak about his experiences in Iraq with others, often telling them they would not understand or did not want to know. (Ex. 9 at ¶35 [Aff. of Dr. Ritchie]; Ex. 27 at ¶8 [Aff. of Patricia Thuesen]; Ex. 26 at ¶¶9-11, 14 [Aff. of Michelle Thuesen]; 3 HR at 13, 15, 182; 4 HR at 35, 78-79, 90-91.)

111. At the same time, his experiences in Iraq intruded into his thoughts and came to the surface in sudden outbursts of anger or sadness. Friends stated that Thuesen seemed unable to control his emotions and appeared never to be relaxed. Friends and family witnessed him burst into irrational anger at something as trivial as an object being moved in his room, and saw him devolve into tears on other occasions. (Ex. 9 at ¶36 [Aff. of Dr. Ritchie]; 3 HR at 14, 184; 4 HR at 13; 5 HR at 14-15.)

112. Like many returning veterans, Thuesen complained about feeling "exposed" or "naked" without having protective military gear. He started carrying a firearm around with him, even when inappropriate, something he had never done before his time in Iraq. This behavior is not unusual for returning veterans, who feel the need to arm themselves for protection. (Ex. 9 at ¶37 [Aff. of Dr. Ritchie]; 3 HR at 12; 4 HR at 33, 36; 6 HR at 49.)

113. Thuesen also struggled to return to his daily routine. His grades at community college showed a rollercoaster of excelling and failing, and Thuesen's family noticed his new inability to remain focused. Friends thought that Thuesen no longer seemed to have structure to his life. (Ex. 9 at ¶38 [Aff. of Dr. Ritchie]; 3 HR at 13, 183-84.)

114. As Thuesen's PTSD persisted, he also suffered several other mental health issues that are frequently comorbid with PTSD, namely depression, suicidal ideation, and alcohol abuse. Friends noted the switch from his previous habit of drinking beer to drinking excessive amounts of hard liquor. (3 HR

at 14, 184.)

115. Unfortunately, these other issues further accentuated the problems Thuesen was facing in dealing with intrusive thoughts of his war trauma and in attempting to maintain normal relationships. PTSD not only carries negative symptoms with it, but will also exacerbate other negative issues like depression and the effects of alcohol abuse. (Ex. 9 at ¶39 [Aff. of Dr. Ritchie]; 5 HR at 91; 6 HR at 102.)

116. **Deterioration Leading to Crime:** Thuesen's struggle with PTSD particularly flared about a year after his return from Iraq. Delayed PTSD symptoms are common. A veteran may even initially appear to have returned home unaffected, especially during the immediate period of relief at having survived and the reconnection with family and friends, only to have PTSD arise as the veteran attempts to return to their civilian life. (6 HR at 19-20, 29, 81; Ex. 9 at ¶43 [Aff. of Dr. Ritchie].)

117. Thuesen began to abuse alcohol to the point of losing control and becoming violent with his girlfriend Leah Mathis. Mathis describes incidents where Thuesen would get a "glazed" look and would be violent with her until snapping out of it. Ultimately these episodes led to the end of their relationship. Unfortunately, the hyperarousal of PTSD often correlates with increased aggression and hostility. This leads to a vicious cycle where the veteran's partner begins to pull away from the relationship, which inspires the veteran to react with both elevated dependency and increased hostility. (Ex. 9 at ¶¶42, 44 [Aff. of Dr. Ritchie]; 4 HR at 15-16; 5 HR at 13-14.)

118. During late 2008 and early 2009, Thuesen continued to suffer from PTSD. (Ex. 9 at ¶59 [Aff. of Dr. Ritchie].) He reported ongoing feelings of hypervigilance, panic, anger, crowd avoidance, and intrusive thoughts and nightmares about his Iraq experiences. (*Id.* at ¶60.) Thuesen's condition

appeared on the surface to improve for a brief period. (*Id.* at ¶59.) Thuesen's struggle with PTSD seemed to put him on an emotional rollercoaster that was noticed by others. (4 HR at 12; 5 HR at 17; 6 HR at 51-52, 103)

119. Shortly before the crime, Thuesen began a romantic relationship with Rachel Joiner, seemed happier, and no longer had a flat affect. Thuesen himself attributed his improvement to the relationship with Rachel, noting that he was less angry and concentrating better. This improvement, though, was contingent upon Thuesen relying heavily on his relationship with Rachel. His interactions with others were primarily limited to Rachel and his immediate family. He also stated that Rachel was helping him deal with his issues. (Ex. 9 at ¶¶59-60 [Aff. of Dr. Ritchie].)

120. In the weeks before the crime, Rachel began to pull away from their relationship. The relationship became strained, at the same time Thuesen was experiencing financial and school stress. He and Rachel had trouble communicating. Friends describe Thuesen as seeming depressed, different, and that he was having a difficult time. Ultimately, Rachel indicated she wanted a break in the relationship. Despite being advised to give Rachel space, Thuesen reacted by becoming more intense and smothering, culminating in the tragic killings for which he was convicted. (4 HR at 92; Ex. 9 at ¶¶61, 64 [Aff. of Dr. Ritchie].)

121. **Lack of proper treatment by VA:** Thuesen did not receive proper diagnosis and treatment of his PTSD from the VA. On at least three occasions from 2006 to 2008, Thuesen reported symptoms of PTSD to the VA in his post-deployment health assessments. Yet Thuesen was never given a diagnosis of PTSD nor was his file flagged for possible follow-up or intervention. (Ex. 37 at 119-21 [Thuesen Military Records]; Ex. 38 at 139-

41, 154-60 [Thuesen Veteran Affairs Records].)

122. Over Labor Day weekend 2008, Thuesen called the VA suicide hotline threatening to kill himself. (Ex. 9 at ¶46 [Aff. of Dr. Ritchie].) Thuesen was admitted to the VA Medical Center in Houston, where he reported feelings of stress and guilt related to financial and school stressors, as well as problems with alcohol abuse. (*Id.* at ¶47.) In addition, the admitting physician noted that Thuesen showed signs of PTSD, namely exposure to trauma, nightmares, and an increased startle response. (*Id.*)

123. However, Thuesen was not diagnosed or treated for PTSD during this short hospital stay. (Ex. 9 at ¶49 [Aff. of Dr. Ritchie].) This was surprising given his symptoms and the prevalence of PTSD in military veterans. (*Id.* at ¶48.) Because there was no diagnosis of PTSD, the VA's treatment of Thuesen in an inpatient psychiatry setting and the decision to release him after three days was understandable. It was not, though, beneficial for the evaluation and treatment of PTSD. (*Id.*)

124. Had Thuesen been admitted to the hospital for longer, it is likely that a more comprehensive assessment would have resulted in Thuesen's diagnosis of PTSD. Just before his discharge, Thuesen underwent an abbreviated mental health psychosocial assessment, during which he discussed his traumatic war experiences and his struggles with anger and alcohol. From these statements, it should have been clear that Thuesen was suffering from PTSD at time of his hospitalization. A diagnosis and longer hospital stay would have provided the opportunity for more treatment of Thuesen's PTSD symptoms. (Ex. 9 at ¶49 [Aff. of Dr. Ritchie].)

125. The only treatment Thuesen received was supportive counseling sessions from the VA social worker Teresa Cannon and a prescription for antidepressants. (Ex. 9 at ¶50 [Aff. of Dr. Ritchie].) This treatment was not

adequate to address Thuesen's PTSD. (*Id.* at ¶51.) Supportive therapy is not the optimal treatment for PTSD, which needs more intensive outpatient treatment. (*Id.* at ¶¶52, 53.) There are many other evidence-based treatment options such as cognitive behavioral therapy and exposure therapy. (*Id.* at ¶53.) Further, Cannon never received Thuesen's medical records or even a diagnosis of PTSD, treating Thuesen apparently based on the assumption that he had PTSD. This shows a lack of communication and continuity of care. (*Id.* at ¶51.) Thus, Thuesen had not been given a treatment plan designed to effectively deal with his illness and instead was receiving a treatment that did not address the specific triggers associated with PTSD. (*Id.* at ¶¶53, 54.)

126. In addition, the medication Thuesen was prescribed for his depression was not prescribed long enough to have had much effect. After a short time, Thuesen felt less depressed and was no longer interested in taking the medication (which is not unusual for service members). At a video conference appointment, a VA psychiatrist agreed to discontinue the medication and removed any diagnosis of mental illness from Thuesen's chart. This was the only time Thuesen saw a physician following his stay at the VA hospital. (Ex. 9 at ¶¶56-57 [Aff. of Dr. Ritchie].)

127. It is unsurprising that Thuesen was not interested in taking medications. Lots of young male veterans resist treatment. In addition, there are significant social and logistical barriers to care. (6 HR at 36-38, 89-90.) Yet, Thuesen showed a willingness to respond to treatment options, unlike some veterans. (Ex. 9 at ¶58 [Aff. of Dr. Ritchie].) While like many veterans Thuesen resisted being labeled as having PTSD, he attended every supportive therapy session scheduled by Cannon. (*Id.*)

128. **National Problem:** Thuesen's de-compensation based on his PTSD is not unique to his story. Somewhere around twenty percent of military service members suffer from PTSD. Most of these people live seemingly normal lives, keeping their apartments clean, living alone, and functioning at work. However, they struggle with this illness, which, if left untreated, can lead to issues like joblessness, substance abuse, and depression. (6 HR at 52-53; Ex. 9 at ¶67 [Aff. of Dr. Ritchie].)

129. The impact of PTSD on the military and civilian communities is significant. Suicide rates in the military having been going up since 2004, with some statistics finding that eighteen military veterans kill themselves every day. (Ex. 9 at ¶68 [Aff. of Dr. Ritchie].) In addition, data shows that there is an upward trend of violence committed by veterans, such as domestic violence and sex crimes. Although not all veterans (or even most) kill themselves or someone else, murders and suicides by veterans—especially of spouses or loved ones—unfortunately happen too frequently. (*Id.* at ¶70.)

130. The connection between PTSD and violence has been studied since the 1980s. At the time of Thuesen's trial, over seventy studies were available that show PTSD is a significant problem in America's returning veterans. (5 HR at 42-43; Ex. 6 at ¶8 [Aff. of Dr. Eric Elbogen].)

131. Estimates are that around fifteen to twenty percent of U.S. veterans suffer from PTSD. (5 HR at 49; Ex. 6 at ¶8 [Aff. of Dr. Elbogen].) Veterans who have experienced combat exposure are significantly more likely to suffer PTSD. (5 HR at 50; Ex. 6 at ¶10 [Aff. of Dr. Elbogen.) Veterans with PTSD are also at risk of struggling with depression and alcohol abuse. (Ex. 6 at ¶9 [Aff. of Dr. Elbogen].)

132. Veterans with PTSD are at a statistically significant risk of committing violent acts. (Ex. 6 at ¶11 [Aff. of Dr. Elbogen].) Of the over 70 studies,

the most consistent findings is that PTSD correlates to a higher risk of violence. (5 HR at 50.) Veterans with PTSD are overwhelmingly more likely to commit acts of violence than veterans without PTSD. (5 HR at 52-53, 61; Ex. 6 at ¶12 [Aff. of Dr. Elbogen.) This is true even when looking only at veterans from the conflict in Iraq and Afghanistan. (*Id.* at ¶13.)

133. PTSD has the most consistent empirical relationship with violence committed by veterans, and is linked to a spectrum of violent acts, violent thoughts, anger, and hostility, as well as ownership of a deadly weapon. (Ex. 6 at ¶12 [Aff. of Dr. Elbogen].) Veterans with PTSD are more likely to destroy property, threaten others with and without weapons, and become involved in physical fights. (*Id.* at ¶14.) They are also more likely to own handguns, aim guns at family members, load their weapons with the intent of suicide, and patrol their property with loaded weapons. (*Id.*)

134. Research has shown that the PTSD symptoms of hyperarousal and physiological arousal are the most likely symptoms connected to increased aggression. These symptoms include anger, poor sleep, and being constantly "on-guard." Thus, the particular symptoms exhibited by Thuesen in the months prior to the crime are the type most indicative of risk of violence. In contrast, the re-experiencing symptoms such as flashbacks and nightmares have not shown any consistent relationship between PTSD and violence. (5 HR at 53-54; Ex. 6 at ¶16 [Aff. of Dr. Elbogen].)

135. Research shows that the combination of PTSD and alcohol abuse is particularly notable. In a study that asked veterans whether they suffered from PTSD or abused alcohol, one in three of veterans who reported both conditions committed an act of severe violence sometime in the next year. Over sixty percent of those veterans committed some type of aggressive or violent act within the year. (5 HR at 58-63; Ex. 6 at ¶18 [Aff. of Dr.

Elbogen].)

136. Veterans with PTSD are at an increased risk of committing violence specifically within a relationship. One study has found that veterans with PTSD committed acts of family violence at a rate four times higher than veterans without PTSD. (Ex. 6 at ¶19 [Aff. of Dr. Elbogen].)

137. This increased rate of violence attributed to PTSD is not explained away by other factors that might cause these veterans to commit violence. Studies have controlled for other factors that suggest risk of violence, like participating in combat or co-existing mental illness, and have confirmed that PTSD independently increases the risk of violence, and specifically domestic violence. (5 HR at 56, 65-66, 88; Ex. 6 at ¶20 [Aff. of Dr. Elbogen].)

138. Criminal justice involvement is one of the most significant problems for Iraq and Afghanistan veterans, and that PTSD specifically is linked to incarceration in veterans. The reality of the impact of PTSD is that over 200,000 veterans are in U.S. jails or prisons, most incarcerated for violent offenses. And even this number may be underestimated. (5 HR at 64; Ex. 6 at ¶21 [Aff. of Dr. Eric Elbogen].)

Conclusions of Law

139. Counsel's investigation into potential mitigation evidence, particularly evidence regarding Thuesen's PTSD, was "inconsistent with the standard of professional competence in capital cases." *See Pinholster*, 131 S. Ct. at 1407. In determining that counsels' performance was deficient, this Court has considered both the evidence already known to counsel, as well as whether the known evidence would lead a reasonable attorney to investigate further. *Wiggins*, 539 U.S. at 521; *Miller*, 420 F.3d at 361.

140. It is apparent that from early in their representation of Thuesen, counsel knew both that Thuesen likely suffered from PTSD and that this issue, along with Thuesen's experiences serving in Iraq, would be a central component of the defense case at trial. As experienced capital counsel, Billy Carter and Michele Esparza were aware of their duty to thoroughly investigate avenues of mitigation evidence, from both lay and expert witnesses. Indeed, it is clear counsel started down that path with the hiring of Dr. Roger Saunders for an initial psychological evaluation of Thuesen and with the tasking of Gerald Byington to begin investigating life history records for Thuesen in the fall of 2009.

141. However, whether because of obligations to another capital case (in the case of Mr. Carter), or because of being overtaxed from previous cases (in the case of Ms. Esparza), or for any other reason, counsel's investigation was decidedly put on hold for the majority of counsel's representation of Thuesen. Most lay witness interviews did not take place until three or four months prior to trial, many closer or even during trial. Initial evaluations by mental health experts did not occur until February of 2010. This despite the fact that counsel was initially appointed almost a year prior.

142. Defense counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. *Wiggins*, 539 U.S. at 521; *Strickland*, 466 U.S. at 690-91. Thuesen's case is not one where counsel failed to identify significant mitigating factors. Instead, counsel was squarely focused on presenting Thuesen's military service and resulting PTSD. ~~However, counsel appears to have simply taken for granted that evidence regarding Thuesen's PTSD and combat trauma would ultimately materialize~~.

143. Having identified the predominant issue in their defense case, counsel had a duty to sufficiently investigate the potential building blocks of that case, well in advance of trial. Counsel failed to thoroughly review VA medical records or speak to VA staff who treated Thuesen until the eve of trial. It was through the agreement of the US Attorney's Office, and not counsels' preparation, that Dr. Carlo and Teresa Cannon were even allowed to testify. Further, counsel failed to reasonably investigate potential expert witness testimony regarding Thuesen's PTSD.

144. Counsel's statements that they relied on their experts to educate them about PTSD, and the fact that many of the retained experts in this case had been retained by counsel in prior cases, suggests that counsel anticipated one of their usual experts would either be able to testify regarding PTSD or could point them toward the correct expert. While not in itself an unreasonable expectation, it does not replace counsels' duty to educate themselves about the issue they are investigating and to seek out the experts qualified in the specific field for which testimony is needed. *See ABA Guidelines*, Guideline 10.11 cmt. ("Counsel should choose experts who are tailored specifically to the needs of the case, rather than relying on an 'all-purpose' expert who may have insufficient knowledge or experience to testify persuasively.").

145. Ultimately, it appears counsel only spoke to two potential PTSD experts. Assuming that Dr. Detwiler in Alaska had relevant PTSD experience (a fact unclear from his CV), counsel was ultimately unconvinced the doctor would be the appropriate expert to present. Regarding the second, Dr. Kopel, counsel retained his assistance a mere two weeks before trial. Regardless of whether counsel would have chosen to present Dr. Kopel under different circumstances, at the time counsel were making the decisions about Dr. Kopel's potential testimony, the punishment phase was already underway.

Such last minute decisions were not based on careful and thorough investigation and were therefore not based on strategic grounds. *Wiggins*, 539 U.S. at 521 ("[S]trategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations on investigation.").

146. Given the experience level of both attorneys, and the fact that counsel readily identified Thuesen's military experience and PTSD as mitigation when beginning representation in the case, this Court concludes that the steps counsel undertook to investigate these issues failed to meet professional norms when considered in the overall context of Thuesen's capital case. *See Wiggins*, 539 U.S. at 526-27 ("When viewed in this light, the 'strategic decision' the state courts and respondents all invoke to justify counsel's limited pursuit of mitigating evidence resembles more a *post hoc* rationalization of counsel's conduct than an accurate description of their deliberations prior to sentencing.").

147. As a result of counsels' deficient investigation of Thuesen's PTSD, the punishment phase of trial was prejudiced. The central theory of the State's punishment case was that Thuesen's behavior at the time of the crime was an escalating pattern of violence towards women that began prior to his service in Iraq. The prosecution argued that Thuesen's PTSD, if existent, did not contribute to his crime and did not separate him from the many veterans who returned home without committing acts of violence.

148. The following are some, though not all, of the key points regarding PTSD that, based on this Court's personal recollection, were not presented during Thuesen's trial.

    a. PTSD is one of the only mental illnesses that require an external event to cause the illness in an individual.

b. For this reason, many consider PTSD to be an injury instead of a disorder.
c. Following the trauma of his experiences in Iraq, including killing a perceived enemy combatant who Thuesen learned was a civilian, Thuesen was not provided with any counseling or other trauma-management programs like the military has put in place since Thuesen's service.
d. Like many returning service members who are part of reserve units, Thuesen did not return to a base with other fellow Marines to gradually adjust back to civilian life, but was instead returned directly back into the community with civilians, like his family, who did not understand what he had been through.
e. Despite initially appearing to be reintegrating to civilian life without trouble, Thuesen began to exhibit signs of PTSD to those around him. It is common for returning service members to initially appear fine, sometimes for a long time, before showing signs of PTSD.
f. It is common for veterans suffering PTSD to struggle with depression, nightmares, social isolation, alcohol abuse, and sudden outbursts of anger or sadness.
g. It is common for returning service members to feel the absence of their battle gear and to carry a weapon with them, even where inappropriate.
h. Thuesen reported signs of PTSD to the VA multiple times over several years prior to the crime.
i. Thuesen's report of PTSD symptoms to the VA coincide with reports of abuse during his relationship with Leah Mathis.
j. Veterans with PTSD are at higher risk of committing acts of violence, including to romantic partners.

k. Over seventy studies have shown there is a link between PTSD and violence in veterans.

149. Had counsel presented the sort of evidence offered in Thuesen's Application and at the evidentiary hearing, the jury would have heard substantially more and different information to argue in favor of a life sentence. *See Sears*, 130 S. Ct. at 3266. A thorough description of PTSD would have explained Thuesen's behaviors around the time of the crime, as well as his prior relationship with Leah Mathis. This evidence would have shown the jury a different pattern in Thuesen's life story, arguing that the effects of Thuesen's war trauma (while mitigating in themselves) continued to impact his life once back home. In addition, this evidence would have put Thuesen's experience into a national context of understanding the impact of PTSD. Instead of the prosecutions suggestion that no other veterans were committing violence, this evidence would have shown the one in three veterans suffering from PTSD and alcohol abuse commit serious acts of violence.

150. Finally, development of expert testimony regarding PTSD would have allowed counsel to explain to the jury why a diagnosis that explains Thuesen's struggles and behaviors does not at the same time warrant a finding that he would commit acts of criminal violence in the future. Rather, expert witnesses could have explained the ability to treat PTSD symptoms and significant reduce any likelihood of aggression or violence by Thuesen going forward.

151. In post-conviction, the state argues that defense counsel presented a compelling case during Thuesen's trial that he suffered PTSD as the result of his war experiences and that the state did not contest that presentation. (6 HR at 132-34.) However, it is evident the state's argument now is an after-

the-fact rationalization of what occurred at trial, rather than a genuine belief in defense counsel's performance. At trial, the state repeatedly told jurors the defense had not shown that Thuesen's military service and PTSD contributed to his crime, that "That is not PTSD. That is not the war." and "this isn't about his service in the Marine Corps." (54 RR at 30, 82.)

152. Weighed against the aggravating evidence presented by the State, this Court is not confident that the evidence in aggravation clearly outweighs the totality of Thuesen's mitigating evidence. *See Gonzales*, 204 S.W.3d at 399 ("We cannot say with confidence that the facts of the capital murder and the aggravating evidence originally presented by the State would clearly outweigh the totality of the applicant's mitigating evidence if a jury had the opportunity to evaluate it again.").

153. This Court recommends granting Thuesen's first, fifth, and eighth claims for relief and remanding the case for a new trial on punishment.

Claim Seven – Trial Counsel Performed Ineffectively by Failing to Investigate and Present Evidence at the Punishment Phase of Trial that Thuesen Was Not Properly Treated for PTSD by the VA

Findings of Fact

154. As a focal point of their presentation, trial counsel intended to show the jury that Thuesen suffered from PTSD as the result of traumatic experiences he faced during his time in Iraq. (44 RR at 52-55; 51 RR at 37; 54 RR at 37-41.) This evidence was meant to prove Thuesen did not intend to kill Rachel and Travis (and was therefore not guilty of capital murder) and/or that mitigating factors warranted sparing Thuesen's life.

155. As part of the presentation of Thuesen's PTSD, trial counsel relied on the testimony of two employees of the VA, Dr. Ismael Carlo and social worker Teresa Cannon. Indeed, counsel testified that Dr. Carlo and Cannon were

two of the strongest witnesses they presented regarding Thuesen's PTSD. (2 HR at 66-73.)

156. By presenting the testimony of Dr. Carlo and Cannon, trial counsel obscured evidence that Thuesen was never properly diagnosed or treated by the VA for his PTSD. Had counsel fully reviewed the records in their possession, they would have noted (and could have presented evidence) that despite Thuesen's consistent report of PTSD symptoms, neither Dr. Carlo nor any other VA medical professional had ever actually diagnosed Thuesen with PTSD or provided proper treatment.

157. From the conclusion of his deployment in Iraq to the day of the crime, Thuesen did not receive adequate identification, intervention, or treatment from the VA regarding his PTSD. Thuesen completed a post-deployment health assessment survey in March 2005, just before being sent home. (Ex. 37 at 136-37 [Thuesen Military Records].) However, the assessment did not ask any questions regarding PTSD symptoms.

158. The following year, Thuesen completed another health assessment in which he noted several PTSD related symptoms, including numbness and depression. (Ex. 37 at 119-21 [Thuesen Military Records].) Thuesen indicated that these symptoms were making it "very difficult" to live a regular daily life. (*Id.*) Thuesen also indicated that he would like to schedule a visit with a health care provider to discuss these issues. (*Id.*) The referral he received, though, was for an appointment with his primary care or family practitioner, not a VA practitioner. (*Id.* at 120.)

159. Other than this referral, there is no indication that the VA made any diagnosis of PTSD or even flagged Thuesen's records for that issue. Thuesen was not seen again by the VA system until another assessment occurred in March 2007. (Ex. 38 at 154 [Thuesen Veteran Affairs

Records].) During that assessment, Thuesen again endorsed symptoms of PTSD. (*Id.* at 154, 158-59.) Yet in the results of the assessment, the only problems identified by VA staff were "anger/irritability" and "some mild depressed mood." (*Id.* at 160.) There is no indication that the survey conductors diagnosed Thuesen with PTSD, made any special note of his positive endorsement of PTSD symptoms in his file, or informed Thuesen of the possibility that he suffered from PTSD. It is unsurprisingly that as a result Thuesen declined the offer of mental health treatment at the Houston VA for his "irritability" and "mild depressed mood," especially as he lived an hour away from the VA clinic. (*Id.*)

160. Thuesen's next encounter with the VA was four months later, following his arrest for the incident at Leah Mathis's house in July 2007, when Thuesen's mother brought him to see a VA psychiatrist. (Ex. 38 at 148 [Thuesen Veteran Affairs Records].) Thuesen told the psychiatrist about troubles he had been having with his relationship with Mathis, including the fact that in March he had gotten into a violent confrontation with her. (*Id.*) In her evaluation, the psychiatrist noted that she had the results of the prior assessment Thuesen had completed, which occurred during the same period as the confrontation between Thuesen and Mathis. (*Id.* at 149.) However, the VA psychiatrist simply recommended "counseling at the Vet Center or through church to improve quality of life and deal with psychosocial stressors." (*Id.* at 153.)

161. The fact that Thuesen's altercations with Mathis signaled PTSD, however, was readily apparent from even a limited assessment of Thuesen's mental health. Following his visit to the VA in July, Thuesen followed the recommendation of the psychiatrist and sought counseling from a private counselor, social worker Dianne Appolito. (Ex. 1 at ¶4 [Aff. of Dianne

Appolito].) From only a few sessions, Appolito recognized that Thuesen was suffering from PTSD and that it was impacting his relationships, including with Mathis. (*Id.* at ¶¶6, 7.) She noted his description of several of the same symptoms noted in the March VA assessment—depression, hypervigilance, and angry outbursts. (*Id.* at ¶7.) As a social worker, though, Appolito was unable to formally diagnose Thuesen with PTSD and her therapy with Thuesen ended after only six sessions when Thuesen relocated. (*Id.* at ¶¶4, 6.)

162. In July 2008, Thuesen again completed a PTSD screening at the VA, this time endorsing all four questions relating to PTSD symptoms. (Ex. 38 at 139-41 [Thuesen Veteran Affairs Records].) In response to Thuesen's answers, a VA nurse practitioner noted that the results "have been reviewed and the patient assessed including assessment of suicidal risk." (*Id.* at 138.) However, again no specific diagnosis of PTSD was made or mentioned. Regarding treatment options, the nurse noted there was "[n]o mental health condition requiring further intervention" and instructed that "[i]n case of crisis" Thuesen was to the call the National Suicide Prevention Lifeline. (*Id.*) Forty-five days later Thuesen did call the hotline threatening suicide, for which he was hospitalized at the Houston VA Medical Center. (*Id.* at 136.)

163. Thuesen's initial diagnosis and treatment focus was limited to Major Depression related to his suicidal ideation. (Ex. 38 at 131 [Thuesen Veteran Affairs Records.) It was at this stage that Thuesen was seen by Dr. Carlo, the VA psychiatrist. (*Id.* at 113-20.) As standard medical practice dictated, Dr. Carlo focused his diagnosis and treatment on the major problem Thuesen presented, which was his risk of suicide. (Ex. 4 at ¶¶6, 7 [Aff. of Dr. Ismael Carlo].) Dr. Carlo neither confirmed nor ruled out PTSD as a diagnosis, but

instead prescribed Thuesen a regimen of antidepressants and a period of detox for his alcohol abuse. (*Id.* at ¶6.) Because Thuesen came to the VA Medical Center on a Friday before a holiday weekend, he was given the medication for the next three days and observed by the VA's nursing staff. (*Id.* at ¶8.) No further diagnosis or mental health assessment for PTSD was done of Thuesen's condition, and there is no further mention of PTSD or PTSD symptoms in the records of his stay at the VA Medical Center that weekend. (Ex. 38 at 70-112 [Thuesen Veteran Affairs Records].)

164. On the following Tuesday, Thuesen expressed that he was feeling better and wanted to return home so that he could resume classes and work. (Ex. 38 at 71 [Thuesen Veteran Affairs Records].) Dr. Carlo again evaluated Thuesen's condition with regard to his suicide risk and depression, and found that Thuesen had logical reasons for returning home and was no longer at an immediate risk of suicide. (*Id.* at 62-64.) Dr. Carlo made no inquiry or findings regarding a potential diagnosis of PTSD, nor recommended to Thuesen that he seek treatment for PTSD.

165. On the day of his release, one more assessment was done of Thuesen's mental health by a VA social worker. (Ex. 38 at 58 [Thuesen Veteran Affairs Records].) Again Thuesen indicated he was struggling with his wartime experiences. Thuesen told the social worker that he had trouble talking to other people about his war trauma and that he felt his excessive use of alcohol was his way of "trying to deal with what happened and not fitting in in the civilian world." (*Id.*) In this assessment, Thuesen went into further detail about the trauma he had experienced, describing the incident at the checkpoint as well as a time his unit had encountered a woman with a bomb strapped to herself. (*Id.*) Thuesen admitted that he was having trouble with drinking and that his anger was difficult to manage. (*Id.*) The VA

social worker did not make any notations in Thuesen's file regarding possible PTSD, noting only that her assessment was unable to be completed—unsurprising given it was undertaken less than an hour before Thuesen was discharged. (*Id.*)

166. Upon his release, Thuesen was given a prescription for antidepressants and the recommendation to seek counseling through the VA to manage his depression. (Ex. 38 at 62-64 [Thuesen Veteran Affairs Records].) Far from being a resistant patient, as suggested by the prosecution (45 RR at 111-13), Thuesen confirmed multiple times that he was very interested in individual psychotherapy sessions in the College Station area. (Ex. 38 at 57-58 [Thuesen Veteran Affairs Records].)

167. Unfortunately, most of Thuesen's history with the VA and his reports of PTSD symptoms were never transferred to Teresa Cannon at the College Station VA clinic. Cannon received only cursory information over the phone from the suicide prevention coordinator at the Houston VA Medical Center regarding Thuesen's brief treatment related to his suicide threat. (Ex. 3 at ¶6 [Aff. of Teresa Cannon].) She never received any medical records from the VA system, including past diagnoses, treatment history, or mental health assessments. (*Id.*) In addition, the staff at the Houston VA Medical Center followed up with Thuesen only a few times to ensure that he was in contact with Cannon and that he was no longer at risk of suicide. (Ex. 38 at 51-54 [Thuesen Veteran Affairs Records].)

168. As a social worker Cannon was neither qualified to diagnose medical disorders nor prescribe treatment. (Ex. 3 at ¶9 [Aff. of Cannon].) As a result, Cannon only provided Thuesen with supportive counseling sessions once a month, during which they discussed his symptoms or other issues he wanted to discuss. (*Id.* at ¶¶8, 9, 12.) Cannon found Thuesen to be

unguarded and a willing participant in these sessions. (*Id.* at ¶8.) While supportive counseling is beneficial, proper treatment of PTSD requires much more intensive outpatient treatment, such as a combination of cognitive-based therapy, exposure therapy, medication, and counseling with a psychologist or physician. (Ex. 9 at ¶¶52-53 [Aff. of Dr. Ritchie]; Ex.8 at ¶25 [Aff. of Dr. Kopel].)

169. Although her standard process was to report symptoms to VA physicians or psychiatrists so that a diagnosis could be made, Cannon did not refer Thuesen to see a VA physician about his PTSD. The only time Cannon did refer Thuesen to a treating physician was after he ran out of his antidepressant medication. (Ex. 38 at 33 [Thuesen Veteran Affairs Records].) At that time, Thuesen indicated to Cannon that his depression was better and he was interested in discontinuing his medication. (*Id.*) Cannon set up an appointment for Thuesen to see a VA psychiatrist in Temple, Texas, remotely via a video conference. (Ex. 3 at ¶11 [Aff. of Cannon].) During that video appointment in November 2008, Thuesen reported that his depression was lessening and that he was feeling "pretty upbeat." (Ex. 38 at 32 [Thuesen Veteran Affairs Records].) As a result, based only on this one short video session, a VA psychiatry nurse practitioner canceled Thuesen's prescription for antidepressants and removed all psychiatric diagnoses from Thuesen's chart. (*Id.*)

170. For the rest of the sessions with Thuesen leading up to the crime, Cannon did not refer Thuesen to any other physicians or treatment programs, except to suggest he join a weekly PTSD support group she facilitated. (Ex. 3 at ¶14 [Aff. of Cannon].) She did not receive any further medical records or assessments done of Thuesen, nor did she receive information from family and friends regarding Thuesen's condition. (*Id.* at ¶13.)

171. Ultimately, after decreasing the frequency of her counseling sessions, Cannon saw Thuesen just two days before the crime occurred. (Ex. 38 at 16 [Thuesen Veteran Affairs Records].) During that session, Thuesen again noted issues of anger, panic, hypervigilance, and avoidance. (*Id.*) In response, Cannon provided supportive counsel, offering "symptom management techniques," so that Thuesen could recognize and deal with these symptoms on his own. (*Id.*)

Conclusions of Law

172. Counsel's failure to investigate and present evidence that the VA failed to properly diagnose and treat Thuesen's PTSD fell below the norms of professional standards for capital counsel. Counsel were clearly aware of the discrepancy between what the VA records showed about Thuesen's treatment and what Dr. Carlo and Teresa Cannon could testify to at trial. (2 HR at 102-03; 5 HR at 170-71.) It is unreasonable to suggest that such evidence would not have been compelling and highly mitigating to Thuesen's jury.

173. Counsel suggests that they decided not to present evidence that Thuesen was not properly diagnosed and treated by the VA, based on the testimony of Teresa Cannon. Counsel state they believed Cannon was a powerful witness and did not want to offer evidence countering her testimony that she was treating Thuesen for PTSD. This rationale is not a reasonable strategic ground for several reasons. First, counsel's opinion that Cannon's testimony was persuasive arose after that testimony at trial, well after counsel should have undertaken an investigation of the care provided to Thuesen by the VA. Counsel failed to sufficiently review Thuesen's medical records and investigate potential testimony about the failure of the VA to diagnose Thuesen. Any decisions not to present such testimony were not based on

reasonable investigation and complete information. Further, had counsel sufficiently investigated and developed other evidence regarding Thuesen's PTSD, the concerns of potential conflicting with Cannon or Dr. Carlo's testimony would have been significantly reduced.

174. There is a significant probability that evidence the VA failed to properly diagnose and treat Thuesen would have impacted the jury's deliberations. Such evidence could have placed Thuesen's lack of diagnosis in the broader context of a VA system that had recently come under fire for the failure (potentially intentional) to diagnose returning veterans with PTSD. *See* Pai Malbran, *VA Staff Discourages PTSD Diagnoses*, CBS News (February 11, 2009); Michael de Yoanna and Mark Benjamin, *Army pushing its medical staff not to diagnose PTSD*, Salon (April 8, 2009) ("I am under a lot of pressure to not diagnose PTSD."). Further, a history of Thuesen's reports to the VA of PTSD symptoms would have countered the suggestion by the prosecution that PTSD was simply a made up excuse by Thuesen post-crime. It would have made clear that Thuesen consistently reported struggling with PTSD over a long period of time. It would also have made clear that Thuesen was not receiving proper medical care for that PTSD. (Ex. 8 at ¶¶23-25 [Aff. of Dr. Kopel]; Ex. 4 at ¶13 [Aff. of Dr. Carlo] ("The treatment [Thuesen] received . . . were designed to impact his suicidal thoughts and depression, and is not how I would treat PTSD.").)

175. This Court recommends granting Thuesen's seventh claim for relief and remanding the case for a new trial on punishment.

Claim Six – Trial Counsel Performed Ineffectively in the Investigation and Presentation of Evidence at the Punishment Phase of Trial That There was Not a Probability That Thuesen Would Commit Acts of Future Violence Constituting a Danger to Society

Findings of Fact

176. At the punishment phase of Thuesen's trial, the defense presented two witnesses to testify regarding the risk that Thuesen would commit future acts of criminal violence. The first witness, Kathryn Wright who worked for the medical division of the Brazos County Sheriff's Office, testified that she oversaw the sheriff's staff who undertook inmate care, and intake, evaluation and treatment of jail inmates. Wright stated that she knew Thuesen and that he had always been respectful and calm, he always took his medication, and that she had no issues with him. She further testified that Thuesen had done well in the structured jail environment and that he had no issues with the female guards or nursing staff. (52 RR at 6-7.)

177. The second defense witness was Daniel Zavala, a jailer for the Brazos County Sheriff's Department. Zavala testified that he escorted inmates to and from jail visits, church, court dates, and recreation, and that Thuesen was never a problem during the escorts and always complied with orders. Zavala also testified that Thuesen was a model prisoner. (52 RR at 125-26.)

Dr. Mark Cunningham

178. Trial counsel did not present an expert to testify to whether there was a probability that Thuesen would commit acts of future violence constituting a danger to society.

179. Substantially more evidence was available to show that there was a low likelihood that Thuesen would commit serious acts of violence while serving life without the possibility of parole in TDCJ. (3 HR at 33-39.) An expert in the field, such as Dr. Mark Cunningham, could explain to the jury that

Thuesen exhibited at least nine factors that reduced his risk of future violence and zero factors that increased the risk. An expert also could have addressed the arguments made by the State regarding Thuesen's risk of future violence. (*Id.* at 49-50, 76-70.)

180. Without expert assistance, jurors tend to inaccurately predict a defendant's risk of future violence because the scientifically-validated factors that impact the risk can be counter-intuitive. One study found that jurors over-predicted future violence by anywhere between fifty and two hundred and fifty fold. (3 HR at 39-42.)

181. Future violence is best predicted by using an actuarial approach, wherein the characteristics of the defendant are compared to a larger dataset of people who share those characteristics. In addition, an expert considers the defendant's past pattern of behavior in a similar context; i.e., time spent in jail or prison. (3 HR at 45-49.)

182. Thuesen exhibits nine factors that indicate he would make a positive adjustment to life in prison. (3 HR at 49-50.)

183. Thuesen would have been twenty-six years old when he entered prison following his trial. Studies indicate that, regardless of the severity of the infraction, inmates are increasingly less likely to commit infractions as they get older. This is one of the most well-established findings in the field of penology. (3 HR at 50-53.)

184. The fact that Thuesen had no infractions at the Brazos County Detention Center while awaiting trial is also indicative of his low risk of future violence. It is more difficult to do time in a jail as opposed to a prison because the jail tends not to be equipped for long-term stays and there is a high turnover rate. Thuesen's good behavior in a jail setting is similar

enough to the prison to be predictive of his risk of future violence. (3 HR at 53-56.)

185. The low level of security that correctional officers used with Thuesen is also indicative of his low risk of future violence. For fourteen months, Thuesen was housed in a "tank" holding eight to ten inmates. He was not shackled and had full access to other inmates. The correctional officers' treatment of Thuesen shows that they did not believe him to be a risk of violence. (3 HR at 56-57.)

186. Studies show that educational achievement is directly related to the likelihood of assaultive conduct, with higher educated individuals being less likely to be assaultive. Thuesen earned his high school diploma and nearly sixty hours of college credits prior to the incident. Inmates with at least twelve years of education are half as likely to be assaultive, even when controlling for other factors. (3 HR at 57-59.)

187. Inmates with a history of employment tend to be "more industrious" inmates who are more likely to occupy themselves constructively while in prison. Thuesen has a significant work history for his age, including his time with the U.S. Marines. (3 HR at 59-60.)

188. Inmates who maintain contact with family and friends while incarcerated tend to adjust better to prison life. This could be a form of incentive to the inmates or serve as an anchor to community values. Thuesen has maintained contact with family and friends while in jail and likely would in prison as well. (3 HR at 60-61.)

189. Studies show that capital inmates sentenced to life terms have very low rates of serious violence. This is an example of a counterintuitive factor of which the jury would not be aware without expert assistance. (3 HR at 61-65.)

190. Inmates serving life without the possibility of parole were half as likely to be assaultive compared to parole-eligible inmates when studied side by side in the same prison. Dr. Cunningham testified to such before the Texas Legislature when it was considering whether to introduce life without parole as a sentencing option. The Legislature credited Dr. Cunningham's findings by instituting life without parole in Texas. (3 HR at 65-73.)

191. Finally, the fact that Thuesen would be an inmate in TDCJ puts him at a lower risk of violence. Statistics show that 99.9% of TDCJ inmates do not commit a serious assault in any given year. The homicide rate in TDCJ is far lower than the rates in places such as Houston, New Orleans, Washington D.C., and the United States overall. (3 HR at 73-76.)

192. Thuesen does not exhibit any factors that indicate he would be at a higher risk of violence than other inmates. In one study conducted by Dr. Cunningham, those that share Thuesen's particular characteristics were in the lowest risk group of capital inmates. None of the inmates in that study committed an assault requiring more than first aid treatment. Based on all of these factors, Thuesen's risk of committing future acts of violence is "very low." (3 HR at 76-78.)

193. The State's intuitive argument that a defendant's character is predictive of future violence is not born out in the statistics. (*See* 54 RR at 23; 3 HR at 39-42.) Because "bad character" is so common in prison, it cannot accurately predict the relatively rare event of violence. (3 HR at 80-81.)

Correctional Officer John Stetter

194. Trial counsel also did not interview correctional officer John Stetter or call him to testify at the punishment phase of Thuesen's trial. (2 HR at 213; 5 HR at 220; Ex. 23 at ¶19 [Aff. of John Stetter].) Stetter was a correctional

officer at the Brazos County Detention Center and he knew Thuesen better than any other jail personnel.

195. Prior to becoming a correctional officer, Stetter worked for nearly thirty years in administrative positions at various universities, including Texas A&M. He was the Director of Scholarly Book Publishing at three different universities. (2 HR at 202.) In 2005, Stetter left the field due to a longstanding problem with alcohol that he developed while in Vietnam fighting in an Army helicopter combat assault troop. (*Id.*; Ex. 23 at ¶2 [Aff. of Stetter].)

196. After leaving the publishing industry, Stetter entered a six-week intensive outpatient rehabilitation program. He then worked as a correctional officer at various TDCJ Units before eventually settling at the Brazos County Detention Center. (2 HR at 201-04; Ex. 23 at ¶¶1-5 [Aff. of Stetter].)

197. Stetter interacted with Thuesen about fourteen days a month over the course of the twelve to fifteen months that Thuesen spent at Brazos County Detention Center. (2 HR at 200-01.) Stetter and Thuesen would talk to each other during count and then off and on throughout the shift. (2 HR at 207-08.) They were both aware each had served in the military. (*Id.* at 208; Ex. 23 at ¶8 [Aff. of Stetter].)

198. While in Brazos County, Thuesen was housed in a pod that held about eight to ten inmates. "It was a very closed-in space, and one that could erupt in violence at any time." (Ex. 23 at ¶9 [Aff. of Stetter].) Stetter observed that Thuesen was "very, very reserved, almost isolated." There were fights and other altercations in the pod while Thuesen was housed there, but Thuesen was never involved in them. He was never a threat to anyone in the pod or to any of the guards. (2 HR at 206-07.)

199. Inmates who are believed to be a threat to themselves or others are placed on razor restrictions, but Thuesen was never placed on such restrictions. (2 HR at 206-07.) Thuesen's mood and behavior were always very consistent. *Id.* at 211-12.) There was never any indication that Thuesen would be a threat to other inmates or the staff. (*Id.* at 213; Ex. 23 at ¶18 [Aff. of Stetter].)

200. At the hearing, trial counsel conceded that they "wish[ed] [they] would have gone back and talked to [Stetter]." (5 HR at 219.)

Correctional Officer Daniel Zavala

201. Trial counsel also did not elicit testimony from Daniel Zavala that he and Thuesen saw "eye to eye" on things because they had both served in the military; that Thuesen was a positive influence on his fellow inmates; that Thuesen was an "unselfish" inmate; that Zavala did not fear Thuesen; and that Zavala believes he could have turned his back on Thuesen without consequence. (Ex. 31 at ¶¶5-10 [Aff. of Zavala].) Zavala would have testified to such had he been asked. (*Id.* at ¶4.)

Expert in PTSD

202. Trial counsel did not present an expert in PTSD to testify at the punishment phase of Thuesen's trial. Had counsel done so, a PTSD expert could have testified that the effects of PTSD impact those veterans most who are not receiving adequate treatment and are subject to the stressors of re-entry into civilian life. (Ex. 2 at ¶¶11-15, 43 [Aff. of Dr. Brown]; Ex. 9 at ¶71 [Aff. of Dr. Ritchie].) However, prison is a structured setting, which can provide consistency and treatment for Thuesen's PTSD. Accordingly, "it is very unlikely Thuesen will commit any violent acts while incarcerated in the future." (Ex. 9 at ¶71 [Aff. of Dr. Ritchie].)

Conclusions of Law

203. Trial counsel has a duty to present evidence that Thuesen would not pose a threat of future violence. *ABA Guidelines*, Guideline 10.11 cmt. ("Studies show that future dangerousness is on the minds of most capital jurors, and is thus at issue in virtually all capital trials, whether or not it is argued by the prosecution or is a statutorily mandated sentencing consideration."). Counsel should "make every effort to present information on this subject." *Id.* Expert witness testimony is one of the most powerful tools at a defense attorney's disposal. *Coble v. State*, 330 S.W.3d 253, 281 (Tex. Crim. App. 2010).

204. Trial counsel's failure to present affirmative evidence that Thuesen would not pose a future threat of violence constituted deficient performance. Had the defense presented expert testimony from Dr. Cunningham regarding the data behind future danger predictions, the jury would have been made aware of the lack of basis for the State's assertions about Thuesen's future risk. Instead, however, the jury was left with the unrebutted, and simply unsupported, argument of the prosecution. Moreover, had the jury heard additional lay testimony from Stetter and Zavala to supplement the expert testimony described above, it is probable that at least one juror would have voted for a sentence of life. *Wiggins*, 539 U.S. at 536; *see also ABA Guidelines*, Guideline 10.11 cmt. ("Evidence that the client has adapted well to prison and has had few disciplinary problems can allay jurors' fears and reinforce other positive mitigating evidence.")

205. This Court recommends granting Thuesen's sixth claim for relief and remanding the case for a new trial on punishment.

Claim Ten – Trial Counsel Failed to Impeach Mandy Ward's Testimony

Findings of Fact

206. During the punishment case, the State presented the testimony of Mandy Ward, a young woman who testified regarding an incident with Thuesen when they were both in high school. According to Ward, one night she went to a party with Thuesen and Ward's friend, Hailey McDowell. While at the party, Ward started talking to another male, which made Thuesen angry. Thuesen, who was drinking, got into a verbal altercation with the male. Thuesen, Ward, and McDowell left the party. Mandy testified that on the way home to McDowell's home, Thuesen drove erratically which scared Ward and McDowell. When Thuesen got to McDowell's home, McDowell went inside. Thuesen meanwhile pleaded with Ward to talk with him. Ward told Thuesen that she did not want to date him and for him to leave. Thuesen left and Ward drove herself home. (50 RR at 36-41.)

207. Once at her own home, according to Ward, she telephoned McDowell to talk about what had happened. While she was on the telephone, Thuesen began tapping on Ward's window. When Ward cracked the window to tell Thuesen to go home, she believed Thuesen had something in his hand that he tried to put under the window to open it. Ward became scared and closed the window. She heard Thuesen get into his truck and leave. Sometime later she heard Thuesen return and she called her friend, Jimmy Kleimann, for help. Kleimann went over to Ward's home and confronted Thuesen. Thusen told Kleimann that he wanted to talk to Ward. According to Ward, Kleimann punched Thuesen and Ward's mother came outside and told both Kleimann and Thuesen to leave. (50 RR at 42, 45-48.)

208. Following her direct testimony, defense counsel deferred their cross-examination of Ward. Defense counsel explained to the court that their

investigator had spoken to Ward and McDowell, that their two stories were not consistent, and that the defense wanted the jury to hear both Ward and McDowell back to back. (50 RR at 50-51.) However, the defense never cross-examined Ward or called McDowell as a witness.

209. During closing argument, the State argued that Ward's testimony was unimpeached.

> And Mandy Ward was a scared young lady on that stand remembering what the defendant did to her. Her testimony was not impeached by cross-examination. Not impeached at all, and the reason is because it didn't fit because the Defense witnesses all say that the defendant changed when he came back from Iraq.

(54 RR at 20.)

210. Had counsel subpoenaed Haley McDowell and secured her testimony, she would have impeached Ward's version of what happened the night of the party. McDowell would have testified that the evening was simply a "date gone wrong" between Thuesen and Ward. During the car ride home, Thuesen was quietly irritated with Ward, not driving erratically or crying. Otherwise, the rest of the events that night to McDowell were unmemorable. Further, while she recalls talking to Ward later about Thuesen coming to Ward's house that night, Ward stated only that Thuesen tried to come in her window, she freaked out and slammed the window shut, and told McDowell something to the effect of "See, I told you he was weird." (Ex. 33-A ¶¶2-6 [Aff. of Haley Lebeuf].)

211. In addition to McDowell, the defense could have interviewed and called Jimmy Kleimann to refute Ward's testimony. Kleimann would have testified that he had only a faint recollection of who Ward was and that he had no recollection of a John Thuesen. Further, Kleimann had no

recollection of having been called to Ward's home or fighting with Thuesen. Defense counsel never interviewed Kleimann prior to Thuesen's trial, nor did they subpoena him to testify. (Ex. 32-A at ¶¶4-6, 8 [Aff. of Jimmy Kleimann].)

212. Finally, defense counsel could have interviewed and called Mandy Ward's mother, Sandra, to testify. Sandra would have testified that she did not know who Thuesen was until her daughter was called to testify at his capital trial and she did not have any specific memory involving Thuesen. She also would have testified that while she had asked friends of her daughter to leave the house before, she had no memory of an incident involving Thuesen and Kleimann, nor did she even know who Kleimann was. (Ex. 30 at ¶¶3-6 [Aff. of Sandra Ward].)

Conclusions of Law

213. Counsel's failure to investigate and present testimony to specifically rebut the testimony of Mandy Ward fell below professional norms for capital counsel. Counsel was aware of Ward's potential testimony and the need to rebut the aggravating impact. *See Porter*, 130 S. Ct. at 454; *Rompilla*, 545 U.S. at 385 ("With every effort to view the facts as a defense lawyer would have done at the time, it is difficult to see how counsel could have failed to realize that without examining the readily available file they were seriously compromising their opportunity to respond to a case for aggravation.").

214. The State relied heavily on the testimony of Mandy Ward throughout their cross-examination of defense witnesses and in their closing arguments to the jury in order to argue to the jury that Thuesen had exhibited a pattern of violence toward women and that it had started prior to his service in the military. The State argued that any evidence of Thuesen's PTSD was irrelevant because of the Mandy Ward incident and that Thuesen was simply

a jealous, violent individual. The State also highlighted that this testimony had not been impeached. (54 RR at 20.)

215. Had counsel presented the testimony of Haley McDowell, Jimmy Kleimann, and Sandra Ward, their testimony would have significantly impeached the salacious nature of the version of events described by Ward. It also would have rebutted the suggestion by the prosecution that Thuesen had a pattern of scary behavior toward women that existed prior to his military service. Instead, with the testimony of people Mandy Ward claimed to be involved in the incident refuting her story, there is a reasonable probability the jury would have concluded the incident was an isolated event that was the product of two teenagers getting drunk and breaking up. Because counsels' theme throughout trial was the Thuesen's military service was the significant mitigating event in his life, there was no possible strategic reason for allowing Ward's testimony to go unchallenged.

216. This Court recommends granting Thuesen's tenth claim for relief and remanding the case for a new trial on punishment.

Claims Two and Three – Trial Counsel Performed Ineffectively in the Investigation and Presentation of Evidence Related to PTSD at the Guilt Phase of Trial

Findings of Fact

217. Counsels' chosen theme during the guilt/innocence phase of trial was that Thuesen did not commit capital murder because he lacked the intent to kill either Rachel or Travis Joiner. (49 RR at 55, 61.)

218. In support of this theory, the defense presented the testimony of Dr. Roger Saunders. Dr. Saunders was originally hired to provide a general evaluation of Thuesen for mental-health-related punishment phase mitigation evidence. (Ex. 10 at ¶10 [Aff. of Dr. Saunders].) However, in the midst of the

guilt/innocence presentation, Dr. Saunders suggested to trial counsel that he testify in the guilt/innocence phase. Upon hearing the testimony of the State's medical examiner, Dr. Saunders concluded Thuesen did not intend to kill Rachel Joiner. He based his theory in part on reviewing the autopsy reports and on "the trajectory of the three bullet wounds [Rachel] had suffered at close range that did not immediately cause her death." (*Id.*) Dr. Saunders believed Thuesen was simply trying to prevent Rachel from leaving the house. (*Id.*)

219. Based on Dr. Saunders's new theory, trial counsel decided to move his testimony to the guilt phase of trial. (Ex. 10 at ¶10 [Aff. of Dr. Saunders].) In discussing the bullet wounds, Dr. Saunders told the jury that he had diagnosed Thuesen with Dependent Personality Disorder, depression, and PTSD. (47 RR at 15-18, 33.) Dr. Saunders believed that on the day of the crime, Thuesen's anxiety and dependency issues came to bear on him at the moment of the shooting. (*Id.* at 35.) The doctor further explained that Thuesen's identity was tied with Rachel in a way that would prohibit him from wanting her dead. (*Id.* at 38, 43.)

220. Dr. Saunders is a forensic psychologist. (Ex. 10 at ¶2 [Aff. of Dr. Saunders].) He is not trained in the area of medical pathology—the area of study that would relate to trajectory of bullets and bullet wounds. (*Id.* at ¶9.) Without this training, he lacked the qualification to testify whether Rachel's bullet wounds demonstrated anything about Thuesen's intentions to kill. This became apparent on cross-examination. The prosecution asked Dr. Saunders about his theory that the bullet wounds showed Thuesen did not intend to kill. (47 RR at 164.) Dr. Saunders was forced to admit that he had looked at the evidence of the gunshots and "abandoned looking" because the evidence was inconclusive. (*Id.* at 165.) Eventually, Dr. Saunders even

admitted that his theory had been based on "speculating" about the wounds and that he was not an expert in that field. (*Id.* at 167.)

221. Counsel had consulted with a forensic pathologist, Dr. Charles Harvey, who would have been the correct expert to testify about evidence of Rachel's bullet wounds and Thuesen's intent. (Ex. 7 at ¶¶4-6 [Aff. of Dr. Charles Harvey].) Counsel asked Dr. Harvey to look at the autopsy reports in Thuesen's case and opine as to whether there was evidence that showed Thuesen did not intend to kill either victim. (*Id.* at ¶6.) After reviewing the evidence, Dr. Harvey concluded that an argument could be made that the trajectory of the bullets indicated that Thuesen did not intend to kill Rachel Joiner. (*Id.* at ¶8.) However, counsel did not present Dr. Harvey as an expert witness at trial.

222. Instead of repurposing punishment phase expert Dr. Saunders, trial counsel could have retained an expert to specifically focus on the issue of Thuesen's intent at the guilt/innocence phase of trial. For example, Dr. Kopel could have been available to testify about Thuesen's PTSD and how it related to his intent. Had Dr. Kopel testified at the guilt/innocence phase, he could have told the jury that Thuesen was suffering from PTSD as a result of his service in Iraq. (Ex. 8 at ¶¶13-22 [Aff. of Dr. Kopel].) In addition, Dr. Kopel would have testified that Thuesen's PTSD impacted his ability to form an intent to kill on the day of the crime. (*Id.* at ¶31.)

223. Dr. Kopel could have testified that a normal person experiences a startle response, or "Flight or Fight," when the person encounters a danger or experiences fear. (Ex. 8 at ¶32 [Aff. of Dr. Kopel].) People suffering from PTSD have what is called an exaggerated startle response. (Ex. 8 at ¶32 [Aff. of Dr. Kopel].) Often, their "Flight or Fight" response will be triggered by non-dangerous events such as loud noises or sudden

movements. (*Id.*) Veterans suffering PTSD are also likely to have "Flight or Fight" responses that are more intense and last longer than a normal startle response. (*Id.* at ¶36.)

224. Based on the evidence both at his capital trial and presented in the Application, it appears Thuesen experienced an exaggerated "Flight or Fight" response on the day of the crime. Evidence showed that Thuesen likely entered an exaggerated startle response during the shooting of Rachel and Travis Joiner, supported by statements immediately after the crime that he felt "in a mode . . . like training" and that he "came to" after the shooting was over. (Ex. 8 at ¶37 [Aff. of Dr. Kopel].)

Conclusions of Law

225. A defendant has the right to counsel that will perform an adversarial function in the courtroom. *United States v. Cronic*, 466 U.S. 648, 656 (1984) ("The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing."). The client "is entitled to have counsel insist that the state prove guilt beyond a reasonable doubt." *ABA Guidelines*, Guideline 10.10.1 cmt.

226. Counsel made the decision to pursue a defense theory at the guilt/innocence phase of trial that Thuesen lacked the required mental intent to commit capital murder. In making that decision, counsel was required to perform sufficiently in the investigation and presentation of such a theory.

227. Counsel's last minute repurposing of Dr. Saunders to present the defense theory at the guilt/innocence phase of trial did not meet professional standards for the development of evidence in a capital case. Had counsel began investigation into Thuesen case at an earlier date, particular regarding the issue of PTSD, it is probable that they would not have found themselves

in the position of making last minute selection of their theory and witnesses. Instead, there is every reason to believe counsel would have been able to develop significant evidence regarding Thuesen's PTSD, including its impact on his mental state at the time of the crime. *See Strickland*, 466 U.S. at 688 ("[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

228. ~~Particularly~~ However, this evidence would not have directly impacted the jury's decision about whether Thuesen was guilty of capital murder. Under Texas law, the State must prove that a defendant acted intentionally or knowingly before securing a conviction of capital murder. Tex. Penal Code § 19.03. Evidence of Thuesen's PTSD and "Flight or Fight" response would not have undermined the prosecution's arguments that Thuesen's had a "conscious objective or desire" to commit murder or that he was "aware that his conduct is reasonably certain to cause the result." *See* Tex. Penal Code § 6.03(a), (b) (definitions of "intentionally" and "knowingly").

229. Had counsel presented such testimony during the guilt/innocence phase of trial, including from both expert and lay witnesses, there is ~~a~~ no reasonable probability that the results of Thuesen's trial would have been different. *Strickland*, 466 U.S. at 694 (defendant must show a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different").

230. This Court recommends ~~granting~~ denying Thuesen's second and third claims for relief and deny ~~remanding the case for a new trial~~ based on this ground.

Claim Four – Trial Counsel Failed to Sufficiently Prepare Their Expert Witness at Guilt/Innocence

Findings of Fact

231. Trial counsel retained Dr. Roger Saunders in the initial months of investigating Thuesen's case based on their history of using Dr. Saunders as an expert witness in prior cases. (2 HR at 37-38; Ex. 10 at ¶3 Aff. of Dr. Saunders].)

232. It appears that because of this prior history with Dr. Saunders, counsel to a large degree left the development of Dr. Saunder's investigation and testimony to his discretion. Shortly prior to (and potentially during) trial, counsel shifted the focus of Dr. Saunders planned testimony, deciding to present him at the guilt/innocence phase to describe Thuesen's mental state rather than present him at the punishment phase focused on mitigation evidence. (2 HR at 82; Ex. 10 at ¶10 [Aff. of Dr. Saunders].) Counsel states they were relying on Dr. Saunders to understand and articulate for the jury a defense case regarding Thuesen's mental state at the time of the crime. (5 HR at 171-72.) Counsel went so far as to allow Dr. Saunders to prepare his own direct examination. (5 HR at 211.)

233. A review of Dr. Saunders's testimony shows that, likely due to their delegation of responsibility to Dr. Saunders, counsel had not adequately prepared themselves or Dr. Saunders to present their guilt/innocence case theory. Dr. Saunders struggled throughout cross-examination to define when Thuesen did or did not have the capacity to form intent. He first suggested that Thuesen was aware of his actions and intended them up to the moment he pulled the trigger, but that he lacked the intent to kill after that moment. (47 RR at 102.) Next, he explained that Thuesen had the intent to shoot Rachel in order to stop her, forming "an intent" but just not the

specific intent to kill. *(Id.* at 107.) Finally, Dr. Saunders offered that Thuesen could have formed the intent to kill Rachel and Travis in the days leading up to the crime, but just not at the moment of the crime itself. (*Id.* at 169.) The prosecution even pointed out that Dr. Saunders had never actually asked Thuesen what his intent was at the time of the crime. *(Id.* at 107-08.)

234. As the sole expert witness provided by the defense during either phase of Thuesen's capital trial, Dr. Saunders's testimony was critical to support the defense theory that Thuesen's lacked intent to commit the crime.

Conclusions of Law

235. Capital trial counsel have a well-established duty to investigate, prepare, and present evidence of innocence and of mitigation at a defendant's trial. *See Wiggins*, 539 U.S. at 522. This evidence may often include expert witness testimony, especially when mental health issues are relevant to the defense. *See Ake v. Oklahoma*, 470 U.S. 68, 83 (1985). To sufficiently present this testimony, though, counsel must adequately prepare the expert witness.

236. Counsels' actions in delegating the investigation and development of Dr. Saunders's testimony failed to meet the professional norms established for capital counsel. The lack of oversight and preparation was particularly deficient given that the focus of Dr. Saunders's testimony had shifted just before his testimony. *Strickland,* 466 U.S. at 688 ("[T]he performance inquiry must be whether counsel's assistance was reasonable considering all the circumstances.").

237. Counsel's deficient performance prejudiced Thuesen's trial. Had counsel spent sufficient time directing Dr. Saunders, his testimony might have been seen as credible, ultimately leading to a different verdict. Therefore trial counsel's deficient conduct created "a probability sufficient to undermine

confidence in" the outcome at trial. *Porter*, 130 S. Ct. at 455-56 (quoting *Strickland*, 466 U.S. at 693-94).

238. This Court recommends denying ~~granting~~ Thuesen's fourth claim for relief and deny remanding the case for a new trial on this ground.

Claim Nine – Trial Counsel Failed to Request a Change of Venue

Findings of Fact

239. Although Bryan-College Station is a university town, it still retains the feel of a small town. In 2010, the population of Brazos County was less than 195,000, with close to half of the individuals living in College Station, home of Texas A&M.

240. Rachel and Travis Joiner were both students at Texas A&M and thus they were both Aggies. While Thuesen lived in the area, he was not an Aggie, but was a student at Blinn Community College. The distinction of two Aggies being killed by a non-Aggie was a common theme in news stories starting after the crime and continuing throughout the trial.

241. Six of the jurors chosen for Thuesen's trial had very close ties to the university. C. Miller was an employee of Texas A&M. (4th Supp. 3 CR at 1186.) F. Hartfiel was a graduate of Texas A&M and her granddaughter attended the University. (4th Supp. 1 CR at 141.) G. Brynildsen's wife was an employee of Texas A&M. (4th Supp. 1 CR at 637.) L. Barber was a Texas A&M employee. (4th Supp. 2 CR at 480.) M. Howell was a graduate of Texas A&M. (4th Supp. 5 CR at 1372.)

242. The Aggie Muster, one of the oldest traditions at Texas A&M University, is a special ceremony to recognize Aggies who have died the previous year. Texas A&M University, Aggie Muster History, http://muster.tamu.edu/history (last visited December 22, 2014). Individual voir dire in Thuesen's case occurred between April 8, 2010 and April 30,

2010. However, no voir dire activity occurred on April 21, 2010, the day reserved for Aggie Muster. Further, the trial started less than a month after the 2010 Muster, leaving the thought of fallen Aggies fresh in the minds of everyone throughout the jury selection and trial process.

243. Media coverage documenting the murder of Aggie siblings by a non-Aggie started soon after the incident and continued through the end of the trial, which was some fifteen months later. In addition, stories mentioned that Thuesen admitted to shooting the Aggie siblings, that before dying Rachel identified Thuesen as her shooter, and that he had previously stalked another female.

244. In Thuesen's case, the Batallion (an Aggie newspaper), The Eagle (a Bryan-College Station newspaper), KTBX and KRHD (Bryan-College Station television stations), and WTAW (a Bryan-College Station radio news network), all covered the story in detail. In a county with less than 195,000 residents, circulation is fairly wide spread. In addition, there were live blogs throughout the trial from reporters inside the courtroom, a fact that even concerned attorneys in the case. (38 RR at 5, 22, 41.)

Conclusions of Law

245. The Sixth Amendment guarantees criminal defendants a fair trial by an impartial jury. Courts consider several factors in determining whether pretrial publicity and community prejudice prevent a fair trial, including the size and characteristics of the community in which the crime occurred, whether the news stories covering the crime contained blatantly prejudicial information, and the amount of time that had elapsed between the crime and the beginning of trial. *Skilling v. United States*, 130 S. Ct. 2896, 2902 (2010).

246. The nature of the ~~small, close-knit~~ Aggie community in College Station, in the context of a crime involving the killing of two Aggies, did not create~~d~~ a venue ~~(or at least an appearance of one)~~ in which Thuesen was unlikely to receive a fair trial. ~~The publicity surrounding the case expressed this community bias and contained the type of pre-determinate information—details of the defendant's background, previous crimes committed, an announcement of a confession to the crimes—that the Supreme Court has found to be prejudicial. *Irvin v. Dowd*, 366 U.S. 717, 725-26 (1961).~~

247. Counsels' failure to request a change in venue was not ~~constitutes~~ deficient performance. Counsels' explanation that they were concerned another county might be worse for the defense did ~~does not~~ amount to a reasonable strategic ground. ~~Concerns about a hypothetical unfriendly county do not change the fact that counsel was facing a known potential bias from a Brazos County jury.~~

248. This Court recommends denial of ~~granting~~ Thuesen's ninth claim for relief ~~and remanding the case for a new trial on punishment~~ on this ground.

Claim Eleven – Trial Counsel Failed to Object to the State's Jury Strikes Based on Gender

Findings of Fact

249. During the selection of Thuesen's jury, both the State and the defense were allowed up to fifteen peremptory strikes. (6 RR at 86.) Of these fifteen available strikes, the State used ten. (10 RR at 55; 14 RR at 164; 15 RR at 57; 18 RR at 75; 20 RR at 99; 23 RR at 78; 28 RR at 48; 30 RR at 126; 31 RR at 132; 33 RR at 33.) Of the State's ten peremptory strikes, eight were used against women. (14 RR at 164; 15 RR at 57; 18 RR at 75; 20 RR at 99; 23 RR at 78; 30 RR at 126; 31 RR at 132; 33 RR at 33.)

250. L. Brownlee was the thirty-fifth potential juror on the venire panel. (20 RR at 31.) After acknowledging her oath to answer all voir dire questions truthfully, Brownlee, an African-American hospital medication aide, expressed her belief that she could be open-minded and consider all the evidence presented to her; that she could take her evidence solely from the witness stand; and that she would be willing to fairly deliberate with her fellow jurors. In short, Brownlee believed she could take the oath to be a fair, honest, and obedient juror. *(Id.* at 31-33.)

251. After the defense had an opportunity to cross-examine Brownlee, the State moved to exercise one of its peremptory challenges against her. (20 RR at 99.) Because Brownlee was the first Black venireperson struck by the State, Thuesen's defense raised a *Batson* objection to the State's use of a peremptory against her on racial grounds. *(Id.* at 99, 102.) When the State finished its proffer of reasons for Brownlee's strike, the court held that the defense had failed to prove purposeful racial discrimination. *(Id.* at 106.) Though they had the opportunity to, defense counsel did not raise an objection to the State's gender discrimination.

252. Comparison of the State's explanation for Brownlee's strike with the responses of similar male veniremembers reveals that that explanation was merely a pretext for purposeful gender discrimination. The State gave four supposedly race-neutral reasons for why it wanted Brownlee stricken: (i) Brownlee had various family-members and acquaintances either in jail or soon to be on trial; (ii) Brownlee expressed a view that LWOP is a "severe" punishment; (iii) Brownlee seemed compassionate, as evidenced in part by her nurse-like occupation; and (iv) Brownlee "teared up" at various points in the voir dire process. (20 RR at 104-06.) ~~However, the State accepted male veniremen Miller, S. Smith, Kilgore, Anderson, C. Smith, and Sprouse, each~~

The Court finds that had trial counsel ~~of whom provided answers similar to those given by Brownlee. (See~~ made an objection based on gender, this ~~Application at 161-169.)~~ Court would have found no gender discrimination and therefore denied it. The State's reasons were gender neutral.

Conclusions of Law

253. The Fourteenth Amendment of the United States Constitution and the Texas Code of Criminal Procedure bar the use of peremptory challenges to exclude potential jurors on account of the juror's race. *Batson v. Kentucky*, 476 U.S. 79, 89 (1986); *Johnson v. California*, 545 U.S. 162, 168 (2005); *Rice v. Collins*, 546 U.S. 333, 338 (2006); Tex. Code Crim. Proc. Art. 35.261(a). The United States Supreme Court explained that excluding jurors because of their race is particularly egregious because it "undermines public confidence in the fairness of our justice system." *Batson*, 476 U.S. at 87. Excluding even one juror on the basis of race violates these core provisions of the law and entitles a defendant to a new trial. *See Linscomb v. State*, 829 S.W.2d 164, 166 (Tex. Crim. App. 1992).

254. This prohibition on the exercise of discriminatory peremptory strikes extends to strikes grounded in racial stereotypes *as well as gender stereotypes*. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 129 (1994); *Fritz v. State*, 946 S.W.2d 844, 847 (Tex. Crim. App. 1997). The *J.E.B.* Court emphasized the fact that oftentimes State-sponsored discrimination occurs when the State adheres to "'archaic and overbroad' generalizations about gender." *J.E.B.*, 511 U.S. at 135 (quoting *Schlessinger v. Ballard*, 419 U.S. 498, 506-07 (1975)). The Court furthermore warned that "[s]triking individual jurors on the assumption that they hold particular views simply because of their gender is 'practically a brand upon them, affixed by the law, an assertion of their inferiority.'" *Id.* at 142 (quoting *Strauder v. West Virginia*, 100 U.S. 303, 308 (1880)).

255. Finally, the State's discriminatory use of a peremptory strike with respect to even a *single* potential juror invalidates the entire jury selection process, and in turn necessitates that the aggrieved defendant receive a new trial. *See Linscomb*, 829 S.W.2d at 166; *Whitsey v. State*, 796 S.W.2d 707, 716 (Tex. Crim. App. 1989).

256. Thuesen's counsel did not perform ~~performed~~ deficiently in failing to object to the State's gender discrimination in jury selection. ~~That deficiency prejudiced the jury selection process in Thuesen's capital trial.~~

257. This Court recommends denying ~~granting~~ Thuesen's eleventh claim for relief and deny remanding the case for a new trial on punishment based on this ground.

Claim Twelve – Appellate Counsel Failed to Appeal the State's Jury Strikes Based on *Batson* Violations

Findings of Fact

258. Of the one hundred and two potential jurors on the venire, six were African American. (4th Supp. 1 CR at 273 [Quesionnaire—Allison]; 4th Supp. 3 CR at 821 [Questionnaire—Brownlee], 925 [Questionnaire—Mitchell]; 4th Supp. 4 CR at 1058 [Questionnaire—Betties]; 4th Supp. 6 CR at 1608 [Questionnaire—Davis]; 4th Supp. 10 RR at 2522 [Questionnaire—Parish].) The State exercised two of its peremptory strikes against African Americans, thereby removing a third of the African Americans on the venire. (20 RR at 99; 23 RR at 78.)

259. After the examination of potential juror L. Brownlee, the State moved to exercise one of its peremptory challenges against her. (20 RR at 99.) Because Brownlee was the first black venireperson struck by the State, Thuesen's defense raised a *Batson* objection to the State's use of a peremptory against her. (*Id.* at 99, 102.) The State gave four supposedly race-neutral reasons for why it wanted Brownlee stricken. (*Id.* at 104-06.)

When the State finished its proffer for Brownlee's strike, the court held that the defense had failed to prove purposeful racial discrimination. (*Id.* at 106.)

260. Comparison of the State's explanation for Brownlee's strike with the responses of similar white veniremembers—specifically venirepersons Hartfiel, White, Black, Detrick, and Camp—reveals that the explanation was merely a pretext for purposeful racial discrimination. (*See* Application at 173-180.)

261. While Thuesen's appellate counsel raised many points of error, counsel did not raise a single *Batson* claim challenging the erroneous ruling of the court on trial counsel's objection.

Conclusions of Law

262. When the State strikes a minority juror, but accepts a similarly-situated white juror, that is substantial evidence of purposeful racial discrimination. *Miller-El v. Dretke*, 545 U.S. 231, 241 (2005). Because the State struck a African American juror but accepted numerous similar white jurors, Thuesen suffered a violation of his rights under the Fourteenth Amendment as well as the constitution and criminal laws of Texas. *Miller-El*, 545 U.S. at 241; Tex. Code Crim. Proc. Art. 35.261(a).

263. Appellate counsel has an obligation to research relevant facts and law and to raise "solid, meritorious arguments" based on controlling precedent in an appellate brief. *United States v. Williamson*, 183 F.3d 458, 463 (5th Cir. 1999); *accord Ries v. Quarterman*, 522 F.3d 517, 531-32 (5th Cir. 2008); *see also Ex parte Santana*, 227 S.W.3d 700, 704-05 (Tex. Crim. App. 2007) (*Strickland* standard controls ineffective assistance of appellate counsel claims).

264. If Thuesen's appellate counsel had appealed the trial court's ruling that the State had not engaged in racial discrimination, there is a reasonable

probability that the appeal would have succeeded, and that Thuesen would be entitled to a new jury-selection process. Thuesen's appellate counsel performed deficiently in failing to appeal this error, and this failure prejudiced Thuesen's right to a fair trial.

265. This Court recommends granting Thuesen's twelfth claim for relief and remanding the case for a new trial on punishment.

Claim Thirteen – Trial Counsel Performed Ineffectively in Jury Selection

Findings of Fact

266. During voir dire, at the conclusion of the State's questioning, the State moved to excuse potential juror Burroughs for cause. As a former Marine who experienced problems returning from war, Burroughs would likely have benefited the defense as a juror in Thuesen's case. (22 RR at 17-32.) The defense never questioned Burroughs and did not object to his removal. (*Id.* at 35.) Counsel also failed to require the State to express the basis for a challenge for cause.

267. During her voir dire, juror Bryant, a divorced mother of two, wrote in her questionnaire that she had "dated a violent tempered man. He was violent towards police when called to have him removed from my house." (4th Supp. 5 CR at 1481.) Bryant also stated on voir dire that she believed her former boyfriend suffered from mental illness, but also stated that his illness did not excuse his behavior. (27 RR at 65-66.) Counsel did not raise a challenge for cause or exercise a peremptory challenge. (*Id.* at 70.)

268. During juror Brynildsen's voir dire, he described his daughter's divorce. According to Brynildsen, his daughter's former husband, who he referred to as a "psychopath," tried to take out a contract against the life of the daughter and Brynildsen's wife. (17 RR at 80; 4th Supp. 3 CR at 645.) Brynildsen went on to describe the problems that his daughter continued to have with

the former husband, including the fact he was a controlling person and extremely mentally ill. That same daughter was also stalked by a man who went into her apartment, unauthorized, and stole her underwear. (17 RR at 81-84.) In addition, regarding his own military service, Brynildsen stated that while he had seen combat while serving in Vietnam, he never experienced any negative influences on himself or his family. *(Id.* at 76.) Brynildsen also stated that he had never known anyone returning from combat who had been violent towards his family or loved ones. (*Id.*) Counsel did not raise a challenge for cause or exercise a peremptory challenge.

Conclusions of Law

269. "[T]he right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." *Irvin*, 366 U.S. at 722; *see also Franklin v. State*, 138 S.W.3d 351, 354 (Tex. Crim. App. 2004) ("The Sixth Amendment guarantees the right to a trial before an impartial jury"). To be considered an impartial jury in a capital case, jurors must not only meet typical standards regarding biases and prejudices; they must also be able to consider whether evidence presented by the defense is mitigating. *Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("A juror who will automatically vote for the death penalty in every case will fail in good faith to consider the evidence of aggravating and mitigating circumstances as the instructions require him to do.").

270. Counsels' performance during the selection of Thuesen's jury was deficient. There was no strategic reason for failing to demand the State provide a reason for challenging prospective juror Burroughs for cause. Rather, given Burroughs answers during voir dire that appeared to favor the defense's trial strategy, reasonable counsel would have made efforts to keep Burroughs on

the jury. ~~In contrast,~~ But counsel was not deficient in failing to exercise peremptory challenges on ~~both~~ either juror Bryant and juror Brynildsen. Based on their answers during voir dire, counsel ~~knew or should~~ would not have known that these two jurors would be predisposed find the State's theory of the case particularly aggravating based on their personal histories with domestic violence. Counsel's ~~deficient~~ performance did not prejudice~~d~~ the selection and ultimate makeup of Thuesen's jury on Jurors Bryant and Brynildsen but did on Juror Burroughs.

271. This Court recommends granting Thuesen's thirteenth claim for relief and remanding the case for a new trial on punishment based on Juror Burroughs only.

Claim Fourteen – Trial Counsel Failed to Effectively Investigate and Present Lay Witness Testimony

Findings of Fact

272. In their opening guilt phase argument, defense counsel told the jury that Thuesen suffered from mental illness—PTSD, depression, and Dependent Personality Disorder—and therefore did not have the requisite intent to be convicted of capital murder. (44 RR at 50-55.)

273. The defense's first guilt phase witness, Patrolman Tom Jagielski of the City of College Station Police Department, testified about being the first on the scene after the shooting and about transporting Thuesen to the police station. (44 RR at 55-58.) On cross-examination, however, Jagielski testified that in his opinion as a certified health crisis officer Thuesen was not in mental health crisis, and that Thuesen appeared mentally competent, seemed to understand the consequences of his actions, and was not experiencing delusions or seeing things. *(Id.* at 75-78.)

274. Next, during the State's cross-examination, Dr. Saunders testified that there was nothing to suggest that Thuesen had gone over to Rachel's house with the intent to kill her. After further questioning from the State, Dr. Saunders

testified that there was a police report which indicated that Thuesen told Janet Walker that he thought of shooting Rachel. (47 RR at 114-15.) During the punishment phase, defense counsel presented the testimony of Janet Walker, who denied Thuesen ever made such a statement. (51 RR at 61-62.)

275. Lastly, during the punishment phase, defense counsel called Amanda Wagner, a former school mate of Thuesen's, to testify that Thuesen was a good guy who helped her keep her faith after losing her husband. (52 RR at 45-47.) During cross-examination, though, the prosecution asked about the impact the loss had had on Wagner's mother-in-law, who Wagner agreed had been "destroyed" by the loss of her children. (*Id.* at 48-49.)

Conclusions of Law

276. Counsel's decisions regarding the presentation of these witnesses were ~~not~~ based on reasoned, strategic grounds. The presentation of Officer Jagielski and the failure to present Janet Walker during the guilt/innocence phase of trial each undermined the defense's own theory that Thuesen had not intended to kill. During the punishment phase, the presentation of Amanda Wagner buttressed the State's argument ~~that the deaths of Rachel and Travis were especially devastating and aggravating~~. Counsels' actions in this regard were deficient and prejudiced Thuesen's trial.

277. This Court recommends ~~granting~~ Thuesen's fourteenth claim for relief and remanding the case for a new trial.

Claim Fifteen – Trial Counsel Failed to Present Evidence Regarding the Thuesen Family's History of Mental Illness

Findings of Fact

278. Before Patricia Thuesen's guilt-phase testimony, the State objected on relevance grounds to her testifying about the Thuesen family history of

mental illness. (46 RR at 92-93.) In response, defense counsel argued that Thuesen's family had an "incredible, severe history of mental illness," and the evidence was relevant as Dr. Saunders relied upon it when coming to his conclusions about Thuesen's own mental health. (*Id.* at 93-94.)

279. After hearing further argument (46 RR at 107), the trial court sustained the State's objection "until Dr. Saunders testifies, and I may let it in through him or through other witnesses after he testifies." (*Id.* at 107-08, 112.)

280. Following the ruling, the defense proffered what Ms. Thuesen would testify to with regard to family history of mental illness. In relevant part, Ms. Thuesen would have testified to the following: Ms. Thuesen's mother was an alcoholic; Ms. Thuesen's father did not live with the family and her visits with him were monitored by her grandmother; Ms. Thuesen's father showed signs of depression; Ms. Thuesen's brother, George, attended a state school, showed signs of depression throughout his life, and was then homeless living somewhere in the Corpus Christi area; Ms. Thuesen's half-sister, Lisa, also showed signs of depression and had been admitted to a psychiatric hospital; Ms. Thuesen's daughter, Michelle, also spent time in a psychiatric hospital; and Ms. Thuesen's mother-in-law showed signs of depression and alcoholism. (46 RR at 108-12.)

281. The defense called Patricia Thuesen as a witness a short time later but, per the court ruling, she did not testify about her family's history of mental illness. (46 RR at 130-49.)

282. During his own testimony, Dr. Saunders explained that there was a genetic component to mental illness and that people with first or second-degree relatives with mental illness had a higher degree of suffering themselves from such illnesses—and then linked that to Thuesen's own family history of mental illness (which he had read about). (47 RR at 50-53.)

283. At a break a short time later, the trial court ruled that "since Dr. Saunders has testified to the mental illness of the members of Thuesen's family . . . the testimony of Mrs. Thuesen, the mother, regarding mental illness of her family members is now relevant and admissible." (47 RR at 120.) Defense counsel, however, never presented Ms. Thuesen's testimony about her family's history of mental illness, either in guilt or in punishment.

Conclusions of Law

284. Evidence of Thuesen's family history of mental illness was relevant as it formed the basis, at least in part, for Dr. Saunders's testimony that Thuesen suffered from Dependent Personality Disorder and depression, both of which could have been the result of multi-generational history of similar mental illnesses.

285. It is reasonably probable that had the jury heard this evidence directly from Patricia Thuesen, the jury would have given more credibility to Dr. Saunders's intent testimony. As it was presented, the jury was left without a valuable piece of information, that Thuesen indeed suffered from mental illness and that its cause was at least partially due to his own family's history of mental illness.

286. Evidence of Thuesen's family history of mental illness was also relevant to the punishment phase of trial. Mitigation evidence is not developed to provide a defense to the crime or to challenge evidence of guilt. Nor is it an excuse or explanation for a crime. Instead, it provides a context for the crime by describing a set of life experiences that inspire compassion, empathy, mercy and understanding. Indeed, mitigation is *anything* that "*might* serve 'as a basis for a sentence less than death.'" *Tennard v. Dretke*, 542 U.S. 274, 287 (2004) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)) (emphasis added).

287. Here, evidence, presented by Patricia Thuesen, that her family suffered a multi-generational history of mental illness is the type of evidence that the Supreme Court has declared relevant to assessing a defendant's moral culpability. *See Wiggins*, 539 U.S. at 534-35; *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) (overruled on other grounds by *Atkins v. Virginia*, 536 U.S. 304 (2002)); *Eddings v. Oklahoma*, 455 U.S. 104, 109 (1982). To that end, the fact that Thuesen's family had a history of mental illness, and that Thuesen was more prone to mental illness because of it, was relevant evidence the jury should have heard before making a sentencing determination. Counsel's failure to present it cannot be considered tactical and this deficient performance prejudiced Thuesen's case. *Wiggins*, 539 U.S. at 536 (finding a reasonable probability that a jury would have reached a different verdict after counsel promised mitigating evidence but never followed through with its presentation).

288. Appellate counsel was also ineffective for failing to raise this record-based claim on direct appeal. *See Smith v. Robbins*, 528 U.S. 259, 285 (2000) ("the proper standard for evaluating [a petitioner's] claim that appellate counsel was ineffective . . . is that enunciated in *Strickland v. Washington*"); *Evitts v. Lucey*, 469 U.S. 387, 396-97 (1985) (the Fourteenth Amendment requires the assistance of counsel to appellants for their first appeal as of right); *accord Ries*, 522 F.3d at 531-32; *Ex parte Santana*, 227 S.W.3d at 704-05.

289. This Court recommends granting Thuesen's fifteenth claim for relief and remanding the case for a new trial on punishment.

Claim Sixteen – Trial Counsel Failed to Raise the Theme of Mental Illness in Opening Punishment Phase Argument

Findings of Fact

290. Trial counsel did not mention mental illness in their opening punishment phase argument.

Conclusions of Law

291. At the heart of the punishment phase of a capital trial is the presentation of mitigation evidence and the concept of moral culpability. A jury's understanding of the evidence impacting the moral culpability of a defendant is critical to a jury's consideration of the appropriate punishment for a capital offense. (Ex. 5 at ¶10 [Aff. of Dr. Cunningham].)

292. Evidence that a defendant is mentally ill can be powerful mitigation when jurors are charged with assessing individualized culpability. To that end, evidence of mental illness may explain the succession of facts and circumstances that led to the crime and how that distorted the defendant's judgment and reactions.

293. Here, as discussed, the defense theme was that Thuesen was mentally ill with three illness—PTSD, depression, and Dependent Personality Disorder. However, the defense never mentioned anything to the jurors about taking into account mental illness as mitigating evidence during their opening argument. Thus, the jurors were left with little or no guidance from the defense as to what they were looking for in determining that Thuesen should not be sentenced to death. This resulting lack of direction led the jurors to instead misunderstand their role in the punishment phase, and caused them to sentence Thuesen to death.

294. Counsel's failure to raise the theme of mental illness constituted deficient performance. Had defense counsel properly informed the jurors of the role

of mental illness in the upcoming punishment phase of trial, it is likely that at least one juror would have voted for a sentence of life. *Wiggins*, 539 U.S. at 536.

295. This Court recommends granting Thuesen's sixteenth claim for relief and remanding the case for a new trial on punishment.

Claim Seventeen – Trial Counsel Failed to Object to the Prosecution's Improper Closing Argument

Findings of Fact

296. During closing punishment phase argument in Thuesen's case, the prosecutor made the following comment about PTSD:

> [L]et me tell you a story. My stepfather fought in the Battle of the Bulge. His friends and comrades were dying left and right of him as they were there. And years later as we're sitting on the porch after dinner, a gunshot goes off. We all think it is nothing. He knows, he yells for all of us to get down, get inside. That's PTSD.

(54 RR at 82.)

297. The prosecutor contrasted Thuesen's experience after leaving the Marines with that of his stepfather's, concluding that "[Thuesen's] is not PTSD." (54 RR at 84.)

298. Trial counsel admitted that they should have objected to this comment by the prosecution. (2 HR at 168-70.)

Conclusions of Law

299. Trial counsel has a duty to object to inadmissible evidence or improper argument and establish a record reflecting adverse rulings by the court. *See ABA Guidelines*, Guideline 10.8, cmt.; ABA Standards for Criminal Justice, *Defense Function*, 4-7.1(d). In order to establish that counsel was ineffective for failure to object, Thuesen must show that this Court would

have committed error had the objection been made and overruled. *Ex parte Martinez*, 330 S.W.3d at 901.

300. Proper jury argument is limited to four permissible categories: (1) summation of the evidence; (2) reasonable deduction from the evidence; (3) answer to argument of opposing counsel; and (4) plea for law enforcement. *Alejandro v. State*, 493 S.W.2d 230, 231-32 (Tex. Crim. App. 1973). Arguments that go beyond these four categories "too often place before the jury unsworn, and most times believable, testimony of the attorney." *Id.* at 232; *see also Borjan v. State*, 787 S.W.2d 53, 57 (Tex. Crim. App. 1990).

301. Closing arguments in which the prosecutor holds himself out as having a special expertise in an area are improper. *See Maupin v. State*, 930 S.W.2d 267, 270 (Tex. Crim. App. 1996) ("[I]t is clear that it is improper for a prosecutor to give a personal opinion that is also, impliedly or overtly, based on his expertise as a prosecutor or based on some other special knowledge possessed by the prosecutor."); *Johnson v. State*, 698 S.W.2d 154, 167 (Tex. Crim. App. 1985) ("The implication of special expertise coupled with an implied appeal to the jury to rely on that expertise in deciding the contested issues before it is improper."). An improper, prejudicial comment by counsel during jury arguments is reversible error. *Jackson v. State*, 529 S.W.2d 544, 546 (Tex. Crim. App. 1975).

302. The prosecutor's opinion of whether Thuesen suffered from PTSD falls outside of the acceptable range of subjects during closing argument because it was his personal opinion and unsupported in the record. The State proffered no evidence that suggested Thuesen was not suffering from PTSD. No expert witnesses testified that the type of experience described by the prosecution was the true nature of PTSD, and no lay witness offered any stories that were similar to the one described by the prosecutor of his

stepfather. In fact, all the evidence on the record regarding PTSD symptoms was offered in support of finding that Thuesen indeed suffered from PTSD.

303. By using his stepfather's experience as an example in closing argument, the prosecutor crossed the line between acting as the State's counsel and acting as a State witness. The comments were particularly harmful to Thuesen because the prosecutor, in effect, held himself out as having special knowledge regarding PTSD. The prosecutor's comments were framed as a medical diagnosis based upon his stepfather's experience—a subject that the prosecutor was clearly not qualified to comment about. *See Davis v. State*, 114 S.W. 366, 372 (Tex. Crim. App. 1908) (reversing the conviction due the State's improper closing argument that testimony by the defense's medical expert was not reliable).

304. Trial counsel performed deficiently by failing to object to the improper arguments made by the State because had trial counsel done so, this Court would have committed error by overruling the objections.

305. Trial counsel's failure to object to the prosecutor's improper comments can in no way be considered strategic. The defense's primary theme focused on Thuesen's experiences in Iraq "outside the wire" and the resulting impacts of PTSD on Thuesen when he returned home. By failing to object, counsel allowed the prosecution to offer "evidence" about PTSD during the closing argument—evidence that counsel had neither the opportunity to cross-examine nor to impeach.

306. Further, trial counsel's failure to object prevented him from being able to challenge the improper comments on direct appeal. *See Cockrell v. State*, 933 S.W.2d 73, 89 (Tex. Crim. App. 1996) ("Before a defendant will be permitted to complain on appeal about an erroneous jury argument or that an instruction to disregard could not have cured an erroneous jury argument, he

will have to show he objected and pursued his objection to an adverse ruling."). No reasonable strategy entails allowing the prosecutor to make unsupported, prejudicial comments and then waive the ability to appeal the harm they cause. *See Andrews v. State*, 159 S.W.3d 98, 102 (Tex. Crim. App. 2005) (noting that under some circumstances a decision by trial counsel cannot be considered strategic).

307. Thuesen's rights were further prejudiced by the failure of his direct appeal counsel to raise the issue of ineffective assistance of trial counsel in not objecting to this closing argument. As shown above, this error is clear on the face of the record. Appellate counsel has a duty to review the record and present any potentially meritorious claims. *Meza v. State*, 206 S.W.3d 684, 689 (Tex. Crim. App. 2006) (noting appellate counsel's "constitutional duty to review the record for any arguable error"). By failing to raise this issue as part of Thuesen's direct appeal, appellate counsel's performance fell below the reasonable standards of professional conduct. *Evitts*, 469 U.S. at 394 n.6 ("In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all."). For all the reasons expressed above, this failure prejudiced Thuesen's constitutional and statutory rights under federal and state law and under common law precedent.

308. This Court recommends granting Thuesen's seventeenth claim for relief and remanding the case for a new trial on punishment.

Claim Eighteen – Trial Counsel Failed to Object to the Introduction of Inadmissible Evidence; Appellate Counsel Failed to Appeal

Findings of Fact

309. At the guilt/innocence phase of trial, counsel did not object to evidence that Thuesen was subject to a protective order at the time of the alleged offense. (50 RR at 174.)

310. Also during the guilt/innocence phase of the trial, trial counsel did not object to testimony from Tabitha Foreman that Thuesen appeared to have "no remorse" following the shooting. (38 RR at 106.)

311. Trial counsel objected only after certain evidence was offered, including testimony from Dr. Saunders on cross-examination that one offense report stated "Thuesen's behavior was consistent with a deranged person" and that he had "propensities for one that could harm another," (47 RR at 151), as well as testimony regarding background information about the victims. (*Id.* at 7, 21; 39 RR at 26-31.)

312. Trial counsel objected to the admission of Thuesen's cellular phone records only one of the three times that they were offered by the State. (38 RR at 132-34; 39 RR at 18, 81; 41 RR at 90-91.)

313. During the punishment phase, trial counsel objected to the "anti-sympathy" section of the jury charge. (53 RR at 82.) As a result of this objection, the trial court completely omitted the "anti-sympathy" charged after originally being poised to give it. (*Id.* at 84-96.)

Conclusions of Law

314. Trial counsel has a duty to object to inadmissible evidence or improper argument and establish a record reflecting adverse rulings by the court. *See ABA Guidelines*, Guideline 10.8, cmt.; ABA Standards for Criminal Justice, *Defense Function*, 4-7.1(d). In order to establish that counsel was

ineffective for failure to object, Thuesen must show that this Court would have committed error had the objection been made and overruled. *Ex parte Martinez*, 330 S.W.3d at 901.

315. Counsel must make an objection as soon as the ground for objection becomes apparent. *Lagrone v. State*, 942 S.W.2d 602, 618 (Tex. Crim. App. 1997). "If a defendant fails to object until after an objectionable question has been asked and answered, and he can show no legitimate reason to justify the delay, his objection is untimely and the error is waived." *Id.* The law in Texas requires counsel to continuously object to the inadmissible evidence each time it is offered. *Ethington v. State*, 819 S.W.2d 854, 858 (Tex. Crim. App. 1991). If the inadmissible evidence is admitted elsewhere in the trial without objection, the error is cured. *Id.*

316. Trial counsel performed deficiently by failing to properly object to, and preserve error regarding, admission of the protective order, Tabitha Foreman's testimony about Thuesen's apparent lack of remorse, Dr. Saunders's testimony on cross-examination, background information about the victims, and Thuesen's cellular phone records. To the extent appellate counsel did not argue trial counsel's ineffectiveness in this regard, his representation was ineffective.

317. Regarding the "anti-sympathy" instruction, trial ~~was~~ ineffective for objecting the instruction in the jury charge. ~~It is proper to instruct the jury that sympathy and emotional response are irrelevant to the jury's consideration of the deathworthiness of the defendant. *Tong v. State*, 25 S.W.3d. 707, 710 (Tex. Crim. App. 2000).~~ ~~Trial counsel's objection to the "anti-sympathy" charge led to its omission and could have left the jury with the impression that sympathy for the victims was sufficient to impose death, thereby~~

~~prejudicing Thuesen~~. Appellate counsel, for his part, was ineffective for failing to argue this on direct appeal.

318. ~~For the reasons stated above~~, trial counsel's failure to raise proper, timely objections at trial ~~failed~~ to preserve ~~these~~ errors for appeal. To the extent any of the errors alone did not prejudice Thuesen's sentence of death, their cumulative effect did prejudice Thuesen. Appellate counsel's failure to raise this issue on direct appeal was ineffective and Thuesen's sentence of death should be reversed.

319. This Court recommends ~~granting~~ Thuesen's eighteenth claim for relief and remanding the case for a new trial on punishment.

Claim Nineteen – Appellate Counsel Failed to Appeal the Denial of Thuesen's Pre-Trial Motions

Findings of Fact

320. On March 12, 2010, trial counsel filed pre-trial motions attacking the constitutionality of the death penalty in Thuesen's case that were titled as follows: Motion to Declare Chapter 19 of the Texas Penal Code Unconstitutional and to Set Aside the Indictment; Motion to Find Article 37.071 Unconstitutional Because It Fails to Provide Meaningful Appellate Review of the Jury's Answers to the Special Issues at Punishment; Motion to Preclude the Death Penalty Due to the Grand Jury's Failure to Allege in the Indictment All Elements Necessary to Make Thuesen Death-Eligible; Article 37.071 is Unconstitutional (Burden of Proof on Defendant to Prove Mitigation is Sufficient to Warrant Life); Motion to Preclude the Death Penalty as a Sentencing Option: Probability; Code of Criminal Procedure Article 37.071 Is Unconstitutional Due to Unreliability; Motion to Find Article 37.071, Section 2(F)(4) Unconstitutional; Motion to Preclude the State from Seeking Death Related to Requiring Mitigation to Be Considered;

Motion to Prohibit the State from Seeking the Death Penalty Relating to Predictions of Future Dangerousness Not Reliable; Motion to Permit the Introduction of Evidence of Other Sentences Imposed in Capital Cases in Brazos County; Motion to Preclude the Death Penalty as a Sentecning Option or, in the Alternative, to Quash the Indictment Under *Apprendi v. New Jersey/Ring v. Arizona/Blakely v. Washington & Bush v. Gore*, or, in the Alternative, Request to Voir Dire/Requested Instructions/Motions in Limine Related to Issues Raised by This Motion. (*See* 1 CR at 189; 2 CR at 218, 225, 230, 243, 306, 310, 337, 342, 350, 355, 364, 377; 3 CR at 401.)

321. The trial court denied each of the aforementioned motions. Appellate counsel did not challenge the denial of these motions.

Conclusions of Law

322. The denials of these motions was ~~in~~ not error in the opinion of the trial court.

323. Appellate counsel has a duty to review the record and present any potentially meritorious claims. *Meza*, 206 S.W.3d at 689 (noting appellate counsel's "constitutional duty to review the record for any arguable error"). By failing to present this issue on Thuesen's direct appeal, appellate counsel's performance did not fall ~~fell~~ below the reasonable standards of professional conduct. *Evitts*, 469 U.S. at 394 ("In a situation like that here, counsel's failure was particularly egregious in that it essentially waived respondent's opportunity to make a case on the merits; in this sense, it is difficult to distinguish respondent's situation from that of someone who had no counsel at all.").

324. Appellate counsel's failure to challenge the denial of these motions did not constitute~~d~~ deficient performance and Thuesen's rights were not prejudiced by the alleged failure.

325. This Court recommends denial of ~~granting~~ Thuesen's nineteenth claim for relief. ~~and reforming the sentence to life without pa~~role.

Claim Twenty – Texas's 10-12 Instruction is Unconstitutional; Trial Counsel Was Ineffective For Reminding the Jury of it During Closing Argument

Findings of Fact

326. In accordance with the requirements of Texas Code of Criminal Procedure, Article 37.071, Section 2, Thuesen's jury was instructed that it could not answer "Yes" to either of the first two special issues (future danger and law of parties) without unanimous agreement and that it could not answer "No" to those questions unless at least ten jurors agree. Tex. Code Crim. Proc. art. 37.071, § 2(d)(2). Similarly, the jury was instructed that it may not answer "No" to the third special issue (mitigation) without unanimous agreement and that it may only answer "Yes" if at least ten jurors agree. Tex. Code Crim. Proc. art. 37.071, § 2(f)(2). The jury was not instructed about, and was prohibited from being informed of, the effect of failure to agree on any of the questions submitted to it, which is a life without parole sentence. Tex. Code Crim. Proc. art. 37.071, § 2(a)(1).
327. Trial counsel objected to the misleading instructions before the jury received its charge in the punishment phase of the case. (53 RR at 127-29, 141-42.)
328. Counsel argued that jurors have a right to know that there need not be unanimity in sentencing and that one juror can cause a life without parole prison sentence to be imposed. The court overruled the objection and the jurors were charged accordingly. (53 RR at 142-43; CR at 1219 ["You may not answer Special Issue Number 1 "No" unless ten (10) or more jurors agree"]; 1220 ["You may not answer Special Issue Number 2 "Yes" unless ten (10) or more jurors agree"].)
329. During the defense closing argument, counsel himself reminded the jurors of the very instruction he objected to, not once, but twice:

> The only way you can answer Special Issue No. 1 yes is if all twelve of you agree that it is yes. [¶] The only way you can answer it no is if ten you believe it is no. If you answer it yes it has to be unanimous. To answer it no, it has to be ten. That is what the law says. That is the only way you can answer it. Either yes when it's twelve, no if it's 10.

(54 RR at 64-65.) With regard to Special Issue No. 2: "Again, to answer that question no it [has] to be unanimous. A unanimous vote of every juror. To answer it, yes, would be ten." (54 RR at 66.)

Conclusions of Law

330. The statutory jury instructions impair a juror's ability to give effect to his or her determination that a defendant is not deserving of the death penalty. This impairment violates a defendant's constitutional rights to due process and a fair trial. The misleading instructions impermissibly direct the jury to a unanimous verdict against the individual moral judgments of the jurors. There is a reasonable probability Thuesen's trial would have resulted differently but for the misleading statutory instructions.

331. Trial counsel's actions in objecting to the instructions and then reminding the jury of those instructions in closing argument did not constitute~~d~~ deficient performance. There ~~can be no~~ is a reasonable strategy for counsel's actions. Counsel properly objected to the charge before it was given. Counsel knew the charge was constitutionally defective and if given would almost ensure Thuesen was sentenced to death. At best, counsel should have steered clear of the charge. But what counsel did instead was remind the jurors of the flawed rule, two times. Counsel's actions were not unreasonable and did not ~~unduly~~ prejudice~~d~~ Thuesen.

332. This Court recommends ~~granting~~ denial of Thuesen's twentieth claim for relief. ~~and reforming the sentence to life without parole.~~

Claim Twenty-One – Texas's Death Penalty Scheme is Unconstitutional Because It Restricts the Evidence a Jury May Determine is Mitigating

Findings of Fact

333. Thuesen's jurors were instructed in accordance with the requirements of Texas Code of Criminal Procedure, Article 37.071, Section 2. (2 CR at 563.)

334. This statute defines mitigation evidence and instructs jurors that they should "consider mitigating evidence to be evidence that a juror might regard *as reducing the defendant's moral blameworthiness*." Tex. Code Crim. Proc. art. 37.071, § 2(f)(4) (emphasis added).

Conclusions of Law

335. The Eighth and Fourteenth Amendments require that a jury be permitted to consider any aspect of the defendant's life that is offered as a mitigating circumstance. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (plurality opinion), *aff'd*, *Eddings v. Oklahoma*, 455 U.S. 104, 113-14 (1982).

336. As explained in the Application (*see* pages 220-26), the Article 37.071 limits what evidence a jury may consider~~ed~~ mitigating and ~~denied~~ did not deny Thuesen his rights under the Eighth and Fourteenth Amendments to the United States Constitution.

337. This Court recommends ~~granting~~ denying Thuesen's twenty-first claim for relief. ~~and reforming the sentence to life without parole.~~

Claim Twenty-Two – The Texas Death Penalty is Administered Arbitrarily

Findings of Fact

338. Thuesen was convicted of capital murder in Texas.

Conclusions of Law

339. As explained in the Application (*see* pages 226-34), Thuesen received his capital sentence by operation of the arbitrary Texas system of capital

punishment and thus has not been denied his rights under the Sixth, Eighth, and Fourteenth Amendments to the United States Constitution.

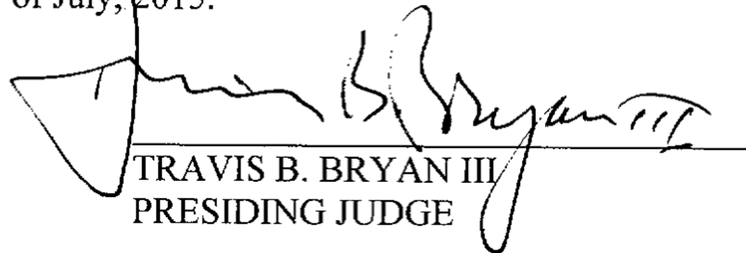
340. This Court recommends denying ~~granting~~ Thuesen's twenty-second claim for relief. ~~and reforming the sentence to life without parole.~~

VI.

CONCLUSION

341. Having found sufficient facts and conclusions to merit the granting of Thuesen's claims of error raised in his Application, this Court determines that Thuesen's constitutional rights were violated and that his punishment should be reversed and remanded for a new punishment trial. The Court recommends that Thuesen is entitled to said relief consistent with the Federal and State Constitutions, and Supreme Court and state case law.

Signed this 17th day of July, 2015.



TRAVIS B. BRYAN III
PRESIDING JUDGE

Attachment 1

AFFIDAVIT OF J. J. WILSON

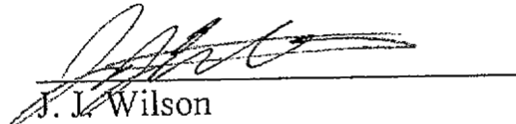
I, J. J. Wilson, state and declare as follows:

1. My name is J. J. Wilson. I am currently the Director of Clinical Integration for TPC Select, a health care supply and purchasing supply chain that works to help supply small hospitals and health care offices. My office is located in Plano, Texas.
2. Since May of 1998, I have been a member of the United States Marine Corps. I am currently in the Marine Reserves. From around 2008 to 2010, I was on active duty and was assigned to the Wounded Warriors Regiment, a program within the United States Marine Corps that provides assistance and support to wounded Marines. I held the rank of Major and was an infantry officer. I was assigned as a District Injured Support Coordinator to an area that included Brazos County.
3. As a District Injured Support Coordinator, my job entailed non-medical case management of returning veterans and connection to care points provided by the Department of Veterans Affairs.
4. Around December 2010, I was contacted by trial attorney Billy Carter regarding John Thuesen's capital case. At that stage of Mr. Thuesen's case, I informed Mr. Carter there was not much that the Wounded Warriors Regiment could do to directly help. I recommended Mr. Thuesen or his family file an application for Post-Traumatic Stress Disorder (PTSD) benefits with a county service officer or veteran service organization such as Texas Veterans Commission to establish a medical opinion of service connected disability.
5. Mr. Carter asked me several questions about PTSD and brain injury within the context of military service. From his questions, I understood he was

looking for a subject matter expert regarding PTSD. I informed Mr. Carter that I was not a medical doctor, and had never met Mr. Thuesen, and therefore could not speak with much detail or render an opinion about his case. We spoke about symptoms of PTSD, but I made sure Mr. Carter understood that I was speaking purely in layman's terms and that I was not an expert in PTSD.

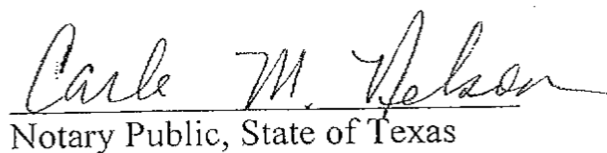
6. I recommended that Mr. Carter contact someone who specialized in PTSD. I gave him the name and contact for a forensic psychologist who was a naval officer, stationed somewhere on the east coast. I do not currently recall the doctor's name or more details. The name Howard Detwiler is not familiar to me and is not the psychologist I recommended to Mr. Carter.
7. Mr. Carter asked me whether I would be willing to testify. Although I was willing to testify if needed, I told Mr. Carter I did not think I would be able to say much because I had never met or evaluated Mr. Thuesen and I was not an expert on PTSD.
8. Aside from this meeting with Mr. Carter, I had no other substantive contact or involvement in Mr. Thuesen's case.
9. I have read and reviewed this two page affidavit.

I declare under penalty of perjury under the laws of the State of Texas that the foregoing is true and correct to the best of my knowledge and that this affidavit was executed on December 17, 2014 in Frisco, Texas.



J. J. Wilson

Subscribed and sworn to before me on December 17, 2014.



Notary Public, State of Texas