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

TRACY LANE BEATTY,	§	
	§	
PETITIONER	§	
	§	
V.	§	**CIVIL ACTION NO. 4:09CV225**
	§	
BRAD LIVINGSTON,	§	
Director, Texas Department	§	
of Criminal Justice,	§	***DEATH PENALTY CASE***
Institutional Division,	§	
	§	
RESPONDENT	§	

PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE

Jeff L. Haas
ATTORNEY AT LAW
908 First Place
Tyler, Texas 75702
903-593-8338
903-593-8330 (fax)

I. INTRODUCTION

This is Petitioner, Tracy Lane Beatty's, first federal petition for writ of habeas corpus challenging the Constitutionality of his conviction and death sentence. Mr. Beatty was convicted and sentenced to death for the murder of Carolyn Click during an alleged burglary of her home in Smith County, Texas. Carolyn Click is Mr. Beatty's biological mother. The offense took place on November 25, 2003. Petitioner was convicted of this offense and sentenced to death on August 10, 2004. At the punishment phase of the trial, evidence of Mr. Beatty's prior criminal history was introduced by the State of Texas along with prison records, and psychological evidence. Despite the existence of ample mitigating evidence, no mitigating evidence was introduced due to Counsels failure to investigate and the result was a sentence of death.

II. JURISDICTION

This Court has subject matter jurisdiction pursuant to 28 U.S.C. §2241(d). Mr. Beatty was indicted for the offense of capital murder in the 241st Judicial District Court of Smith County, Texas. Petitioner is in custody of the Texas Department of Criminal Justice pursuant to this judgment and death sentence. Under 28 U.S.C.§ 2241(d)(1), a petition filed on or before June 9, 2010 is timely.

III. PROCEDURAL HISTORY

On or about February 26, 2004, the grand jury in and for Smith County, Texas, indicted Petitioner for the offense of capital murder for the murder of Carolyn Click on November 25, 2003, by strangling Carolyn Click, striking Carolyn Click, smothering Carolyn Click, suffocating Carolyn Click during the course of attempting to commit or commit the offense of burglary of a

habitation of Carolyn Click, during the course of committing or attempting to commit the offense of robbery of Carolyn Click. On May 27, 2004, Mr. Beatty was re-indicted for the same offense of capital murder and given a new cause number. The second indictment alleged the same date, place and victim but was three pages in length and contained eleven paragraphs. The last three paragraph alleged that a deadly weapon was used and that Mr. Beatty had two prior felony convictions in 1986 and 1988. The first eight paragraph allege that either Mr. Beatty caused the death by strangling, striking, smothering or suffocating Carolyn Click by using his hands, a piece of cloth, pantyhose or an unknown object while in the course of committing or attempting to commit robbery or burglary. Mr. Robert Perkins and Ken Hawk of Smith County, Texas, were appointed to act respectively as first and second chair. Counsel to represent Mr. Beatty. In the summer of 2004, a jury was empaneled and after hearing testimony a verdict of guilty of capital murder was returned and on August 10, 2004, a day after hearing evidence during the penalty phase of the trial the jury answered the special issues of T.C.C.P. 37.071 regarding " future dangerousness" and "mitigating evidence," in such a way a death sentence was returned. Accordingly, under Texas Law, Mr. Beatty was sentenced to death. The conviction and death sentence were affirmed by the Texas Court of Criminal Appeals in AP-75,010 on March 11, 2009, in Beatty v. State 2009 WL (619191).[1] Mr. Beatty was represented on direct appeal by Mr. Donald Davidson of Smith County, Texas. Mr. Beatty's state habeas application pursuant to T.C.C.P. Art. 11.071 was filed January 4, 2007, and an Evidentiary Hearing was held and the Trial Court adopted the State's proposed findings of fact and conclusions of law, denying relief.

[1]The Texas Court of Criminal Appeals affirmed the conviction and sentence of death in a 5-3 opinion. The dissent was that the State failed to prove that the murder occurred during the case of burglary.

The Court of Criminal Appeals likewise partially adapted the Trial Court's findings and conclusion in an unpublished opinion March 11, 2009.

CLAIMS FOR RELIEF

1. Petitioner received Ineffective Assistance of Counsel in violation of the Sixth Amendment of the United States Constitution by Trial Counsel's failure to properly investigate, discover and present "mitigating evidence" in violation of **Strickland v. Washington** and **Wiggins v. Smith.**

   A. Petitioner avoids the 28 U.S. 2354 (D)(1) limitation on relief because the State proceeding resulted in unreasonable application of **Wiggins v. Smith, Strickland v. Washington**, and **Rompilla v. Beard**

   B. Petitioner avoids the 28 U.S.C. 2254 (D)(1) limitation on relief because the State decision was an unreasonable determination of the facts before the State Court.

   C. Issues that the State Court did not adjudicate do not enjoy deference under 28 U.S.C. 2254 (D).

2. Petitioner received Ineffective Assistance of Counsel in violation of the Sixth Amendment of the United States Constitution by Trial Counsel's failure to properly investigate facts which would have shown that this "killing" was murder rather than capital murder.

EVIDENCE AT TRIAL

a.)Evidence at the Guilt/Innocence Phase of the Trial

On December 16, 2003, a missing persons report was filed with the Smith County

Sheriff's Department concerning Carolyn Ruth Click. In the course of investigating Ms. Click's whereabouts Smith County Sheriff's detectives spoke with her son, Tracy Lane Beatty on Friday, December 19, 2003, after Henderson County detectives had spoken to him earlier that same day. Mr. Beatty also gave a statement to Henderson County detectives on Friday, December 26, 2003.

In the December 19, 2003, statement Mr. Beatty claimed that the last time he saw his mother, Ms. Click, was a "day before or two days before Thanksgiving." After having his Miranda rights explained to him Mr. Beatty told the detectives that he last saw Ms. Click when she drove away with "a guy named Junior" to Kansas. Mr. Beatty described Junior's physical features and identified his last name as "Reynolds". He volunteered that Ms. Click's car and some of her possessions were gone when he came back from work on Wednesday, December 17, 2003. Mr. Beatty described a series of three phone calls from Ms. Click, including a phone call he had received from his mother about a week before December 19, 2003. In that phone call she told Mr. Beatty that he had "until the 16th {of December} to find me (sic) another place to stay."

Mr. Beatty described how his mother was upset (i.e., "pissed off") at him in the phone call because he did not put her dogs in "little cages." During the interview one of the Smith County detectives told Mr. Beatty that he had talked to Junior and suggested that Junior may have done "something to her." Mr. Beatty admitted to using his mother's debit card that had recently come in the mail. Mr. Beatty also told detectives that he and his mother don't get along and that he "ain't nothing ever good enough for her."

Four days later on December 23, 2003, Mr. Beatty asked to speak with Henderson County detectives and told them that he wanted to show them where Junior Reynolds body could be located. He said that he stabbed Junior Reynolds and "dropped him in water" because Junior

Reynolds' "killed my mom." The detectives stopped the recording of the statement in order to take Mr. Beatty to the water where he has said that he dumped Junior Reynolds' body.

About four hours later on the same day, December 23, 2003, Smith County detectives interviewed Mr. Beatty at his residence, i.e., 18853 County Road 2323 Whitehouse, Texas, 75791, in a van after Mr. Beatty had pointed out where his mother's body was buried. Mr. Beatty told them that sometime after his mother left with Junior that Mr. Beatty had come back to the house and found his mother "laying in the living room floor dead." Mr. Beatty acknowledged giving his mother's car away and depleting her bank account and giving away personal belongings in order to buy and consume alcohol and drugs, including methamphetamine, because he "couldn't deal" with this mother's death. Mr. Beatty then described how he confronted Junior and stabbed and killed him and how Mr. Beatty put his mother's body in the bathtub for two days and took off her clothes and then buried her beside the house. Mr. Beatty told the detective that he was cooperating because "I want her out of that hole.... I want her buried properly."

On December 23, 2003, Smith County law enforcement officials dug up the body of Carolyn Click at the side of the house that she had shared with her son Tracy Beatty. Her body was recovered from the place where Mr. Beatty indicated he had buried her body. On top of the grave the officers found kitty litter. After uncovering moth balls and garlic, the officers found the nude body of Carolyn Click with her face covered with a nylon substance and folded-up into a contorted-type position in a small hole.

On December 26, 2003, Mr. Beatty gave another statement to Henderson County detectives describing many of the same details concerning his stabbing and killing of Junior Reynolds. Mr. Beatty indicated that he could show the detectives where he had dumped Junior

Reynolds' body.

On December 30, 2003, Mr. Beatty was arrested on a warrant charging him with the capital murder of Carolyn Click and was transported by Smith County detectives from the Henderson County Jail to the Smith County Jail. While in the vehicle traveling between the two jails, Mr. Beatty volunteered the statement that "You know, I really didn't mean to kill her. I came in drunk. She started bitching at me, and I just started choking her. I didn't even know she was dead until the next morning when I found her still laying on the living room floor."

Tracy Beatty's first cousin, **John Clary,** a Marine Corps master sergeant, testified that he had not had any contact with Mr. Beatty for approximately ten years before November 2003. On the evening of the day after Thanksgiving 2003, November 28, 2003, Mr. Beatty came to Mr. Clary's house and stayed for an hour and a half. Mr. Beatty drove his mother's car to Mr. Clary's house and indicated that he was borrowing the car from his mother. Mr. Beatty was drinking alcohol and appeared to be "pretty inebriated." Two days later, November 30, 2003, in the evening, Mr. Beatty returned to Mr. Clary's house driving the same car and while appearing to be "intoxicated" told his cousin that he (Tracy Beatty) had "fucked up [and] that he had killed the bitch [and] that he had gone into the house, there had been an argument, and Carolyn [Click} had pulled a gun on him, so he went to choke her." Mr. Clary indicated that he knew that Mr. Beatty and his mother had loud arguments and scuffles in the past. He did not report Mr. Beatty's statement about killing his mother to the police because of the inconsistencies in Mr. Beatty's statements.

Betty McCarty lived next door to Carolyn "Callie" Click for about eleven years and spoke to her on a daily basis. Ms. McCarty recalled that Ms. Click was pleased that her son,

Tracy Beatty, had moved in with her in October 2003 even though he had assaulted her on two previous occasions. On November 25, 2003 at 4:00 in the afternoon Ms. Click came over to Ms. McCarty's residence and while crying and stressed out told here that she, Carolyn Click, had "put up with all I'm going to put up with, and I had asked him to leave", i.e., "I told Tracy to leave today." After that conversation, Ms. McCarty did not see or talk to Ms. Click again. After that conversation for the next five to six weeks, Ms. McCarty repeatedly observed Mr. Beatty at Ms. Click's house driving Ms. Click's car that she had never seen him drive before. She testified that the first time she saw him drive his mother's car was on the weekend after Thanksgiving and did not know if the drove it anytime between November 25, 2003, and November 29, 2003. Mr. Beatty told Ms.McCarty that his mother had left to go with Junior out of state and later told her that Ms. Click was in Jacksonville and would be home on December 17, 2003.

The jury heard that Mr. Beatty had told **Simone Norman** (they were not told she was his supervising parole officer) on November 13, 2003, that he responded "yes" to the question of whether he had ever thought seriously about killing others.

Another cousin of Tracy Beatty, **Stacey Killough**, testified that she saw Mr. Beatty on November 25, 2003, between 5:00 p.m. and 5:30 p.m. when he drove his mother's car to her house in Malakoff which is approximately a 45 minute drive from Ms. Click's residence in Whitehouse. Ms. Killough was surprised to see her cousin driving the car because she knew her aunt, Carolyn Click, to be very protective of the car and also because she had previously heard Ms. Click refuse Mr. Beatty's request to drive the car. Mr. Beatty stayed only for 10 minutes on November 25, 2003, but returned on November 28, 2003, and spent the night at Ms. Killough's residence because he was too intoxicated to drive.

Leanne Wilkerson had been a neighbor of Ms. Click for about eight to nine years and they were very closed even though there had been a falling out over Ms. Wilkerson allowing Mr. Beatty to house-sit for her. Ms. Wilkerson was also close to Mr. Beatty and often invited him over for dinner at her home during October and November 2003. Ms. Wilkerson recalled that Mr. Beatty and his mother had daily verbal arguments that were heated to the point where she would kick him out of the house but allow him to return. She recalled an incident that happened during October or November 2003 while Tracy Beatty was living with his mother where Mr. Beatty and Ms. Click had a "huge fight" and he told Ms. Wilkerson, "I can't believe she handed me that hammer....because all I could think about was hitting her in the head with it....[but] I couldn't do it....[because] if I shoved her under there [her house], she would have just started stinking." Ms. Click confided in Ms. Wilkerson that her son had previously "beaten her so severely he had left her for dead." After being incarcerated Mr. Beatty told Ms. Wilkerson that his mother had attacked him after he returned from Ms. Wilkerson's when she had served him some spaghetti. During the attack Ms. Click grabbed Mr. Beatty by the hair and then he grabbed her throat and she used her other hand to grab some more hair and he squeezed her neck in order to get her to let go. He did not know she was dead until the next morning when he found her in the hallway where the fight occurred.

Rene Loomis testified that she met Mr. Beatty for the first time on December 11, 2003, through an introduction made by her roommate. She shot up methamphetamine with Tracy Beatty on December 11, 2003. In violation of the motion in limine, Ms. Loomis testified that he was occupying a house that had become vacant while he was incarcerated. After a lengthy hearing, the Court denied the defenses's request for a mistrial and denied the defense's request to

recuse the Smith County District Attorney's Office. Mr. Beatty took Ms. Loomis to his mother's house on December 11, 2003, and gave her "two jewelry boxes, some clothing, knickknacks" that he told her belonged to an unnamed deceased aunt. Other items were removed from the home and given the next day to Melissa Southern.

Around December 17,2003, Tracy Beatty was seen "tearing up papers [including his driver's license], a checkbook, several personal papers of Ms. Click's [including her driver's license] and throwing them into [a] burn pile" near the house where he had recently been using illegal drugs with several other people. Also in the same time period Mr. Beatty made several efforts to sell his mother's car.

During the trial Mr. Beatty refused to give handwriting exemplars but did cooperate with law enforcement taking his fingerprints pursuant to a court order. The State called a handwriting expert, Denise Jarrett, who testified that she did not need Mr. Beatty's handwriting exemplars in order to form her opinion but that they would have been helpful. Ms. Jarrett was allowed to testify about Tracy Beatty's refusal to provide handwriting exemplars over the strenuous objections of the defense.

Dr. David Dolinak, a forensic pathologist, conducted an autopsy on Ms. Click on December 24, 2003. Based on the autopsy Dr. Dolinak determined that the cause of the death was one, or a combination, of the following: strangulation; blunt force injuries; and smothering and/or suffocation with an unknown object. The autopsy revealed that Ms. Click had sustained the following injuries while she was still alive and in close proximity to her death: "[a] fractured hyoid bone, [a] fractured voicebox [in two places],... bleeding in the chest,....bleeding in the head....[four] broken ribs, an injury of the chest, and ... bruises of the scalp and also the

hands...fracture of the breast bone or sternum."

After closing arguments were made by both sides and after deliberations had begun, the jury sent out a series of notes to the Court. The first substantive question was, "Betty McCarty's (sic) testimony on the day of the murder, November 25, 2003. We have a conflict to whether Mr. Beatty was at home that whole day." After reviewing copies of transcripts of Ms. McCarty's testimony, both the State and defense missed the portion where she had testified that she did not see Mr. Beatty at any time on November 25, 2003. Without objection from the State or defense, the court responded to the jury's request by stating, " The Court would be unable to resolve your conflict as to whether Mr. Beatty was at home the whole day by having any portion of the testimony of Betty McCarty read back to you in court" The jury next sent out a note requesting testimony from Lieanna Wilkerson regarding Tracy Beatty's whereabouts on November 23, 2003, Parole Officer Simone Norman's testimony regarding Mr. Beatty's statement that he had thoughts about killing someone and whether there was any testimony establishing that Tracy Beatty was home on November 25, 2003. Ms. Wilkerson's testimony regarding Mr. Beatty saying that he had thoughts of hitting his mother with a hammer and Ms. Norman's testimony that Mr. Beatty had said he had "previously thought of killing people" were read to the jury.

The jury then returned a unanimous verdict of "guilty" to capital murder that is, "intentional murder committed in the course of committing burglary of a habitation, as charged in the indictment."

The State offered judgments and penitentiary packets proving that Mr. Beatty had been convicted and incarcerated in Texas for; assault in 1992 (35 days jail, $25 fine); possession of marijuana in 1985 (30 days jail); injury to a child 14 years of age or younger in 1986 (6 years

TDC probated then revoked); theft of property in 1988 (15 years and 1 day in TDCJ-ID); aggravated assault on a correctional officer in 1991 (3 years TDCJ-ID ordered to be served consecutively to the 15 years and 1 day sentence for theft of property).

The state also offered a series of disciplinary reports from TAC that alleged Mr. Beatty had participated in multiple acts of threatening behavior, assaults, and numerous violations of TDC rules. A handcuff key that was in Mr. Beatty's possession when he was booked into the Smith County Jail was offered by the state.

Tamara Beatty, one of Mr. Beatty's two daughters, testified that her biological father (Tracy Beatty) had a long history of having hard feelings toward his mother, Carolyn Click. She also remembered that her grandmother would take her as a young girl to visit Tracy Beatty in TDC but that she did not have a relationship with him. She did receive letters from Mr. Beatty including some that belittled and condemned her for interracial dating.

The mother of Mr. Beatty's niece, i.e., his wife's sister, testified concerning the injuries that her daughter had sustained at the hand of Tracy Beatty when the child was eighteen months old. The testimony graphically related injuries to the child's head and stomach on two occasions while Mr. Beatty was babysitting the child. These injuries were factual basis for the charge of injury to a child 14 years of age or younger for which Mr. Beatty had been sentenced to TDC in 1986. Tracy Beatty had acknowledged committing these injuries after his wife left the child with him. He admitted that the child's grandmother went to the house to pick the child up and could not located the child. Mr. Beatty admitted that the child was found hiding in a closet. He also admitted that she had bruises on her face and nose, cigarette burns on her right leg, a lot of hair pulled out, and adult bite mark on her back. However, he denied any knowledge of how the

injuries came about. Mr. Beatty admitted that he was high on codeine, methamphetamine, marijuana, and alcohol at the time of the offense.

Sergeant Wanda Hunter of the Smith County Sheriff's Office testified that Tracy Beatty submitted an inmate request form on June 8, 2004. The jury was told that the request forms was signed by Mr. Beatty and it read, in part: "A shank was confiscated during a cell search of my cell, and everything is being blown out of proportion.... It was made by me from a brace that I took off of a table that had a hole in each end and was bent on one end..." I am a member of A.C.[Arayna Circle] and have been since '88. There are also members of M.M. [Mexican Mafia] in this jail. That's the only reason I have this shank.

Royce Smithey, the chief investigator for the Special Prosecution Unit in the Governor's office that prosecutes crimes occurring on State property, testified that he was familiar with a variety of serious injuries and deaths that have occurred in TDCJ-ID between inmates and other inmates and between guards and inmates. Based on this knowledge he opined that an inmate in TDCJ-ID would always be in a position to hurt someone.

Stephen Lee Rogers, a member of the TDCJ-ID committee that initially assign inmates to the "correct" unit within TDCJ-ID testified regarding the process of placing an inmate in the administrative segregation and that such placement would not guarantee the safety of the inmate or prevent the inmate placed in admin segregation from hurting others. Mr. Rogers also described the metal rod confiscated from Mr. Beatty's cell in the Smith County Jail as a 'scary-looking device."

Tynus McNeel, M.D. and **Edward Gripon, M.D.** were both qualified as expert witnesses in regards to special issue number 1 (future dangerousness). They did not examine

Mr. Beatty personally, however, they did examine documents and pictures about the case submitted to them by the prosecution. Based on these materials, they both expressed opinions that Mr. Beatty represented a 'high degree of risk for future dangerousness" and would pose a "continuing threat for a violent act."

Dr. McNeel testified that the documentation he reviewed indicated that Mr. Beatty met the criteria for having an antisocial personality disorder. When testifying about Mr. Beatty's lack of impulse control, Dr. McNeel repeatedly said that he based his opinion on his review of documents that included reports from TDCJ-ID describing how Mr. Beatty had "attacked prison correction officers or guards on two occasions.... in eight separate years...in prison... he has...16 incidences where he was either threatened correctional officers or attacked them...these are all highly predictive- in my opinion, highly predictive of the potential possibility of dangerousness in the future. He has a series of, like I say, 16 events where he has threatened - over a period of eight different years he was in prison." Dr. McNeel told the jury that because Mr. Beatty had generated multiple reports in multiple TDCJ-ID units that "it's almost like everywhere he went he caused these kind of problems."

Dr. Gripon testified that Mr. Beatty was documented as having an IQ of 100 and that would place him in the middle of the population for intelligence. Dr. Gripon also testified that Mr. Beatty had a "propensity for inherent violence."

At the request of the defense the trial court held an ex parte hearing after the state rested. In the hearing outside of the presence of the jury and the prosecution the defense noted for the record that there would be no witnesses called on Mr. Beatty's behalf during the punishment phase of the trial. The potential harm from the possible testimony of the two psychological

experts, the mitigation specialist and the investigator retained by the defense were noted.

The jury did not send out any questions before returning a verdict wherein they answered the first and second special issues questions of T.C.C.P. Art. 37.071 "yes" and "no," respectively. Accordingly, the trial court sentenced Mr. Beatty to death.

CLAIM FOR RELIEF NO.1

Petitioner received Ineffective Assistance of Counsel in violation of the Sixth Amendment of the United States Constitution by Trial Counsel's failure to properly investigate, discover and present "mitigating evidence" in violation of **Strickland v. Washington** and **Wiggins v. Smith.**

CLAIM FOR RELIEF NO. 2

Petitioner received Ineffective Assistance of Counsel in violation of the Sixth Amendment of the United States Constitution by Trial Counsel's failure to properly investigate facts which would have shown that this "killing" was murder rather than capital murder.

STATEMENT OF FACTS[2]

Pursuant to the preparation of Applicant's Petition for Writ of Habeas Corpus that was filed pursuant to T.C.C.P. Art. 11.071. Writ Counsel obtained the services of Sheri Stillwell a Mitigation investigator. She and Mr. Sonny Monteagudeo a fact investigator contacted numerous witnesses. These witnesses were subpoenaed and testified at the Writ Hearing.

[2]The Statement of Facts apply equally to Claims #1 and Claim # 2.

Tim Day married Carolyn Click in 1978.(V2 P116 L15) [3]During their marriage Mr. Day determined that Ms. Click had mental issues.(V2 P119L2) She overdosed on prescription medication numerous times. (V2 P119 L9) On one occasion he saw Ms. Click and her son Tracy Beatty in a fight where Ms. Click was on Mr. Beatty's back.(V2 P119 L22) Later on CPS contacted Mr. Day and as a result of this contact he and Ms. Click divorced. (V2 P121 L6) Mr. Day had children by a prior marriage by the names of Tim, Chad and Kammie. While he worked Ms. Click took care of the kids. Ms. Click had some paranoia where she actually thought that people were living in the attic.(V2 P128 L12) Mr. Day had never been contacted by Holly Randall or anyone from the defense team.(V2 P138 L17-25) Although that there were some problems with Mr. Beatty while he resided in the house he thought that Tracy Beatty was a pretty good kid around him. (V2 P146 L13) Chad Day also testified that Carolyn Click was physically and emotionally abused the kids.(V2 P152 L8) He was beat with a frying pan on one occasion with a knife on another occasion. (V2 P152 L16) On one occasion the school noticed bruises on him that had been caused by Carolyn Click and when he got home (V2 P153 L6) Carolyn Click gave him one of the worst whippings he ever had. (V2 P153 L12) According to Mr. Day he sure didn't deserve it.(V2 P153 L14) He was present when he saw Ms. Click pull his sister Kammie's hair out. (V2 P154) Ms. Click would engage in bizarre behavior; where she would make the kids walk around in circles in the heat in the back yard in and if they stopped that they would be beaten.(V2 P155 L10-16) Most if not all of these beatings occurred while Ms. Click was in the nude and the kids were in the nude. (V2 P156 L1) He wasn't allowed to have any friends over (

[3] These references are to the Statement of Facts from the 11.071 Evidentiary Hearing conducted on March 4-9, 2007.

V2 P 157 L1) and he couldn't tell his father about the abuse because fear of what Ms. Click would do. (V2 P158 L7)

Kamie Bentley also testified at the Writ Hearing about the mental and physical abuse by Ms. Click.(V2 P172 L3) She was sadistically beat with a belt. (V2 P172 L20)She bolstered her brother's testimony where the children were made to walk in circles outside in the back yard and they weren't given anything to drink.(V2 P173 L2) She likewise talked about the nude beatings,(V2 P173 L23) the hair pulling and in addition the kids weren't given enough food to eat. She also was told not to tell their father, (V2 P175 L15) which she didn't do because of fear. Ms. Click also told the kids that they were fat, ugly and stupid. She was picked on because she was the smallest, weakest one.(V2 P176 L21)On at least one occasion Tracy Beatty stopped his mother from beating her. (V2 P177 L24)Likewise no one ever spoke to her from the defense team when this case initially went to trial.

Mr. Perkins lead trial counsel also testified at the Writ Hearing. He testified about the defense team that was assembled which included a fact investigator, a mitigation investigator, and forensic investigator, and psychological and psychiatric experts. (V2) Roy Linn was the fact investigator. Dr. Allen and Dr. Self were psychological psychiatric experts. Dr. Frost was a forensic expert, Holly Randall was the mitigation investigator and Ken Hawk second chair trial counsel. Mr. Perkins was primarily in charge of the guilt or innocence stage of the trial while Mr. Hawk was more in charge of the experts and the punishment phase of the trial.(V2 P19 L7) Mr. Perkins through Mr. Linn and Ms. Randall's efforts became aware of some suicide attempts by the deceased. During the trial of this case, the defense attempted to admit into evidence, evidence of these suicide attempts however, such attempts were unsuccessful based on a ruling

by the Trial Court. Mr. Perkins articulated reasons of attempting to get these suicide attempts into evidence was "just to dirty up the deceased when we get to the special issues. (V2 P31 L13) Mr. Perkins also testified at the Writ Hearing that had he known of the bizarre behavior of Ms. Click i.e. the beatings, and abuse of the Day kids, i.e. the walking around in the nude, the paranoia, and the mental illness of the deceased he would have proffered that evidence. (V2 P47 L7-16) Holly Randall also testified at the Writ Hearing. Ms. Randall was the mitigation investigator and she was aware of the existence of Tim Day. His name appeared on a life line she prepared in regard to Mr. Beatty's case. She received the information of Tim Day from Tracy Beatty. She was aware that Mr. Beatty had step-siblings however, (V5 P15 L24) no one ever contacted Mr. Beatty's extended family and no decision was ever made not to contact them. (V5 P23L4) In articulating a reason why this information was not explored she stated that she had only two months to do what she had to do and they didn't have time.(V5 P 23 L12) She also testified that these medical records regarding Ms. Click's visits to the hospital were mitigating however, based on a meeting by the defense team there was a legal strategy not to attempt to offer these medical records. (V5 P34 L14) She elaborated on the time situation by saying that she didn't have enough time to do what she had to do that she felt frustrated by the lack of time. (V5 P47L24) The two month window between the time she was appointed until the trial time was very unusual (V5 P48 L7)and she would never take a case when she had that little time again. (V5 P48L13) She did feel as if there was nothing really that the defense team could have done however, she did agree that what is mitigating is left up to the jury and if evidence isn't proffered by the defense then a jury never has the opportunity to determine if something is mitigating or not. (V5 P53 L7) When advised of the previously testimony from Mr. Day, and

the Day kids she thought that this bizarre behavior by Ms.Click was extremely important and should have been presented. (V5 P54L17) She actually stated that if this evidence existed " I would have driven there and picked it up myself, that's how important it would have been. (V5P56L9)

Dr. Gripon a Psychiatrist who testified at punishment stage of petitioners trial in regard to 37.071 i.e. the future dangerousness issue; Dr. Gripon also testified at the writ hearing. Dr. Gripon is a forensic psychiatrist who has testified numerous times in capital murder cases. He is familiar with capital murder legal procedure. He is aware of the importance of mitigation evidence in conjunction with Article T.C.C.P. Art. 37.071. He is also aware that a jury has unbridled discretion to determine whether something is mitigating or not. Dr. Gripon testified that Tim Day's testimony regarding Carolyn Click's mental illness, hospital visits, and overdose could be considered to be mitigating. Dr. Gripon as psychiatrist also stated that Carolyn Click's eccentric behavior as testified to by Chad and Kamie Day regarding the beatings, being made to walk around in circles outside, an administration of beatings in the nude was absolutely abnormal behavior. (V4 P247L17) He also could conceded that the testimony from Leanne Wilkerson and Twyla Johnson regarding Carolyn Click's nature as being controlling, eccentric, and knowing how to push buttons also could be considered to be mitigating evidence (V4P251L19). He also theorized that since beatings often time are administered behind closed doors, that its conceivable that Carolyn Click treated her own son Tracy Beatty the same way she had treated the Day children. (V4 P262L18)

This evidence along with evidence presented at the Writ Hearing from Twyla Johnson and Lana Wilkerson regarding the circumstances between Mr. Beatty and his mother's

relationship and the actual character of Ms. Click as cold, arrogant, demanding was never presented to the jury for their consideration in regard for their consideration pursuant to T.C.C.P. Art. 37.071 i.e. the mitigation issue.

At the guilt/innocence stage of the trial, during opening statements, Trial Counsel conceded that the Defendant/Petitioner was guilt of the offense of murder. The strategy of Trial Counsel was due to the relationship between Petitioner and his mother, Ms. Click. That Petitioner just snapped and killed his mother, Ms. Click. It was only after Ms. Click death that Petitioner formed the intent to take and use her property. It is well settled under Texas Law that the intent to commit the underlying felony which elevates murder to capital murder must be prior to or simultaneously with the formation of the intent to commit the murder. The State was allowed to offer un-rebutted evidence as to the loving nature of the decedent. Nothing was offered by the Defendant to rebutt this damaging testimony. Consequently, the only belief the jury could have had is that this ex-con killed his mother to obtain her property, what else could the jury think giving the state of the record in this matter? Evidence presented at T.C.C.P. 11.071 Writ, included testimony from witnesses who Trial Counsel were aware of and should have been named in discovery or included in the State witnesses list. Twyla Johnson, an acquaintance of the Decedent had previously given a statement whereby she had witnessed an altercation between Carolyn Click, the decedent,(V4P9L8) and Petitioner. According to Ms. Johnson Ms. Click was being very abusive and hateful to Petitioner calling him “stupid”, “retarded” and “dumb”.(V4P11L9-19) Ms. Johnson had never been contacted by anyone from the defense team. (V4P12L3)This evidence as well as evidence that followed from Leanne Wilkerson would have been admissible pursuant to T.C.C.P. Art. 38.36 which states as follows:

> In all prosecutions for murder, the state or the defendant shall be permitted to offer testimony as to all relevant facts and circumstances surrounding the killing and the previous relationship existing between the accused and the deceased, together with all relevant facts and circumstances going to show the condition of the mind of the accused at the time of the offense.

On cross examination, Mr. Bingham, the District Attorney for Smith County, Texas, asked the following question:

"And in your mind....can you think of .... I don't know everything you know... can you think of anything about these statements that would justify Tracy Beatty's killing his mother?"

"After an objection, the court allowed the witness to answer the question, the Court allowed the witness to answer the question."

Its obvious from the question itself that Mr. Bingham misses the import of Petitioners contention, its not that these words justify Mr. Beatty's actions, they do not. But what it does show is that the murder was committed not in pursuit of financial gain, but rather in a moment of anger. Additionally the defense also called Leanne Wilkerson, a neighbor of Ms. Click, who also testified at the Writ Hearing in State Court. (V4 P23 L7)Ms. Wilkerson also testified at the Trial of this case and had been contacted by investigator for the defense team. (V4 P30L17) However, the investigator never questioned Ms. Wilkerson prior to Trial as to prior incidents that she had observed between Petitioner and his mother. According to Ms. Wilkerson she had known the decedent for approximately 10 years. She met Tracy Beatty after he moved in with his mother. Mr. Beatty did a lot of work for Ms. Wilkerson. Ms. Wilkerson previously suffered a heart attack and was unable to do any physical labor. As a result Mr. Beatty helped her by mowing grass, moving dirt, picking up rocks things that he didn't need to do but did just to help her out for very small in financial gain.(V4) Ms. Wilkerson was never afraid of Mr. Beatty and

considered Mr. Beatty to be a friend.(V4 P26L8) While Mr. Beatty was living with his mother, Ms. Wilkerson heard numerous arguments almost on a daily basis between Petitioner and his mother. During these arguments she heard Ms. Click's voice raised in anger. Ms. Wilkerson was bothered by the way Ms. Click was depicted at trial as a poor, little weak disabled lady. She was the farthest thing from that that would possibly be (V4P46 L3-7) And indeed Ms. Click became angry with Ms. Wilkerson for no obvious reason. According to Ms. Wilkerson at times Ms. Click could be a very nice lady but at other times she could be a "mean cold hearted bitch." Ms. Click was eccentric, controlling, strange. On one occasion Mr. Beatty was excited about having a job interview he had been looking forward to it for days. At the time of the job interview he got ready, dressed, and Ms. Click advised him that she just didn't feel like taking him to the job interview today. Mr. Beatty was very disappointed and upset.(V4 P52L3-5) None of this evidence was ever discovered, and proffered to the jury at the trial of this case.

CLAIM NO. 1

Petitioner received Ineffective Assistance of Counsel in violation of the Sixth Amendment of the United States Constitution by Trial Counsel's failure to properly investigate, discover and present "mitigating evidence" in violation of **Strickland v. Washington** and **Wiggins v. Smith.**

A. Petitioner avoids the 28 U.S. 2354 (D)(1) limitation on relief because the State proceeding resulted in unreasonable application of **Wiggins v. Smith, Strickland v. Washington**, and **Rompilla v. Beard**

B. Petitioner avoids the 28 U.S.C. 2254 (D)(1) limitation on relief because the State decision was an unreasonable determination of the facts before the State Court.

C. Issues that the State Court did not adjudicate do not enjoy deference under 28

U.S.C. 2254 (D).

RULING ON 11.071 WRIT OF HABEAS CORPUS

At the conclusion of the Evidentiary Hearing held on the Application for Writ of Habeas Corpus brought by Petitioner pursuant to Article 11.071 Texas Code of Criminal Procedure the Trial Court adopted the following Findings of Fact and Conclusions of Law which were submitted by the State including the following:

58. Mr. Perkins testified that he was not aware of the names of Tim Day, Chad Day, Kamie Bently, Kim Patterson, Melanie Carmichael or David and Danny Wyatt.

60. Importantly, Applicant was "consistent" in expressing his desire that "he did not want to spend 40 years in prison before he became eligible for parole" as would be the case if he was convicted of capital murder and assessed a life sentence. Applicant felt that way even though the alternative was the death penalty. Applicant further "seemed disinterested" in a lot of the details and unenthusiastic about "bringing forth evidence ....that could potentially help him."

61. In spite of the requests for the names of helpful witnesses by Mr. Perkins and Mr. Hawk, Holly Randall and Roy Linn, Applicant remained of the opinion that if he was convicted for capital murder, he "would rather have the death penalty" and was not

particularly helpful in developing punishment evidence.

75. Mr. Perkins was not aware that Applicant had one time stepped in and stopped his mother from a beating she was inflicting on a step-sibling. Mr. Perkins was of the opinion that he would not have presented that evidence because it also shows that all the other times he stood by and watched his mother beat the step-sibling and did nothing.

76. At the evidentiary hearing, Applicant also presented Mr. Tim Day who testified that he was married to the victim from 1978 until 1984. He brought three children into that marriage, Kimberly Patterson, Chad Day and Kamie Bently. He was not contacted by Applicant's defense team.

77. According to Mr. Day, the victim was in counseling for mental problems the entire time they were married and she did overdose on her medications from time to time during that period.

78. Mr. Day saw Applicant and the victim being violent towards each other one time in six years. He heard her hollering and saw her hanging on Applicant's back.

84. The Court find Mr. Tim Day to be a credible witness whose testimony would have presented significantly more aggravating than potentially mitigating evidence to the jury.

85. Applicant called Mr. Chad Day who testified that when his father, Tim, was married to the victim she would be physically abusive to him and beat him and his sisters quite frequently. She would make them stay outside all day and they had to keep within here eyesight and never stop moving in a circle. During the beatings the victim was often nude and the children were told to take their clothes off as well.

91. Applicant presented Ms. Kamie Bently who testified that she was 6 or 7 years old

when her father, Mr. Tim Day, got married to Applicant's mother. She claims that she too was physically and mentally abused by the victim. According to Ms. Bently, the victim would beat her and pull her hair. She did not tell her father because the victim warned her not too.

92. Ms. Bently remembers only one time that Applicant interceded while she was being beat by the victim, although he was present for other beatings, she never saw the victim beat Applicant.

95. The Court finds Ms. Kamie Bently to be a credible witness whose testimony would have presented significantly more aggravating than potentially mitigating evidence to the jury.

99. Mr. Perkins testified that he considers the good and the bad of each potential punishment witness and if the bad outweighs the good he will not risk opening the door to overwhelming aggravating evidence in order to establish a single mitigating factor.

100. Mr. Perkins would not have presented the testimony of Mr. Tim Day, Mr. Chad Day, or Kamie Bently, because each had more aggravating evidence to present regarding Applicant than mitigating. Although Mr. Perkins could not recall talking to these witnesses, he would have contacted them if Applicant had given him their names.

105. Mr. Hawk would not attach much mitigating value to testimony that the victim was abusive to her former step-children when weighed against the evidence that she was not similarly abusive to Applicant, or in fact doted on him.

106. Mr. Hawk would not have presented the testimony of Mr. Tim Day, Mr. Chad Day, or Kamie Bently, because each had more aggravating evidence to present regarding

Applicant than mitigating facts.

109. Ms. Twyla Johnson was presented by Applicant and testified that she lived near the victim at the time of the offense and saw Applicant and the victim arguing on e time in the front yard. She heard the victim calling Applicant names in a very hateful tone of voice. She never observed any other confrontations between them. She had never heard the victim talk to anybody like that before. In her opinion, the argument she saw did not justify Applicant's killing his mother.

121. Mr. Linn did not have a copy of his reports to refresh his memory and thus testified as best he could recall regarding the events of this trial which occurred in 2004.

130. Applicant told Mr. Linn that the victim was mentally and physically abusive him. However, Mr. Linn spoke with witnesses that reported that the victim was not abusive towards Applicant. The potential abusive aspect of the victim was a "large part" of his investigation because "the guilt or innocence part it wasn't looking too good for {Applicant}."

132. The Court finds that Applicant failed to present any evidence at the evidentiary hearing to establish exactly which names he had provided his defense team for them to contact.

170. The Court concludes that Applicant has not met this burden in establishing that his trial attorneys were ineffective for making the reasonable strategic decisions to proceed in the manner they did in this case. Applicant was represented by counsel who provided effective assistance of counsel. There is no credible evidence before the Court that his trial attorneys and defense team provided ineffective assistance.

LEGAL BASIS FOR THE CLAIM NO. 1[4]

Petitioner was deprived of the Effective Assistance of Counsel in the sentencing phase of this capital murder trial.

There is controlling clearly established supreme court precedent, in determining where defense counsel was ineffective in failing to adequately investigate and present available mitigating evidence during sentencing. This Court must apply the standards set forth in **Strickland v. Washington** 466 U.S. 668 (1984) Under **Strickland** the Defendant first " most show that Counsel's representation fail below an objective standard of reasonableness which must be judged under prevailing professional norms Id at 688. In evaluating a claim that Counsel failed to adequately investigate, **Strickland** states that Counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary.

Secondly the Defendant must satisfy the prejudice requirement by showing that there is a reasonable probability that but for Counsels unprofessional errors the result of the preceding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. However, this test is not outcome determinative. The **Strickland** Court itself expressly rejected an "outcome determining" standard requiring the Defendant to show that Counsel deficient conduct more likely than not alter the outcome of the case. Instead Strickland relies on whether the result of a proceeding is unreliable and hence the proceeding itself unfair even if Counsel cannot be shown by a preponderance oft he evidence to determine

[4]Counsel credits Maurie Levin for her assistance in preparing the legal argument

the outcome. Thus the "reasonable probability" standard i.e. a probability sufficient to undermine confidence in the outcome is a less burdensome test than even the preponderance of the evidence standard. In **Williams v. Taylor** 529 U.S. 362 (2000) the Supreme Court reiterated this point. The prejudice inquiry is therefore case specific in that it is an attempt to assess the effect of a Trial Counsels deficient performance had on the reliability of the outcome of the particular proceeding.

The Texas Court of Criminal Appeals is also affirmed this analytical framework for reviewing the prejudice prong of an Ineffective Assistance of Counsel Claim in the punishment phase of a Texas Capital Trial in **Ex Parte Gonzales** 204 S.W. 3d 391 (Tex. Crim. App. 2006). In making the prejudice inquiry, the Court should consider the totality of the evidence both adduced at Trial and the evidence adduced at the habeas proceeding. In **Gonzales** the Court determined that Petitioner had suffered prejudice from his counsels failure to locate and present mitigating evidence because Applicant's mitigating evidence taken as a whole might well have influenced the juries appraisal of Applicant's moral culpability. In the early 2000's the Supreme Court accepted three cases to determine and to address Effective Assistance of Counsel at the sentencing phase of a capital trial. **Rompilla v. Beard** 545 U.S. 374 (2005), **Wiggins v. Smith** 539 U.S. 510(2003) and **Williams v. Taylor** 529 U.S. 362 (2000)in each of these cases the Supreme Court held that the clearly established law of **Strickland** mandated the finding of Ineffective Assistance of Counsel. The AEDPA posed no barrier relief to these cases, all set out a detailed set of instructions to the lower courts on the proper applications of **Strickland** in a capital sentence proceedings. In **Williams v. Taylor** 529 U.S. 362 (2000) the United States Supreme Court determined that Mr. Williams did not received effective assistance of Counsel at

the sentencing phase of his capital trial. According to the opinion there wasn't much question as to the guilt of Mr. Williams. The State also presented evidence in support of the aggravation. The Defendant had just been convicted of a cold blooded beating death of a defenseless man for three dollars and he had a history of prior felony convictions. Mr. Williams had been involved in numerous assaults and while incarcerated and pending trial he had set his cell on fire. Two psychological experts testified that there was a high probability that Mr. Williams could constitute a continuing threat to society. Mr. Williams defense counsel at the sentencing phase of the trial presented some family member and neighbor testimony and neighbor testimony. The Supreme Court however, concluded that the Trial Counsel performance was deficient because they failed to investigate and discover extensive records describing Mr. Williams childhood. What is important about **Williams** is that the Court expressly noted that its frequently true about a capital defendants's history that not all the additional evidence was favorable. However the Court held that failure to introduce records that were never located and reviewed by Trial Counsel could not have been based on strategic considerations related to the negative information in the records. The Court held that the failure to conduct a proper investigation was deficient performance. The Court then determined that based upon what this investigation would have shown that had a proper investigation been conducted, prejudice was shown. The holding in **Williams** is also important because the Court emphasized that whether the mitigating evidence might have resulted in a different outcome is an entirely separate question from whether it negates future dangerousness. Mitigating evidence unrelated to dangerousness may alter the jury selection of the penalty, even if it does not undermine or rebutt the prosecutions death eligibility case. The questions is not whether there is sufficient evidence to justify a death sentence but

whether the totality of the mitigating evidence might well have influenced the juries apprising the defendant's moral culpability. In **Wiggins v. Smith** 539 U.S. 510 (2003) the Supreme Court revisited the issue of capital defense investigation and representation. Mr. Wiggins was assessed the death penalty in the **State of Virginia**. Afer a verdict and during post conviction proceedings Wiggins challenged the adequacy of his representation at sentencing arguing that attorney's had rendered constitutionally Ineffective Assistance of Counsel by failing to investigate and present mitigating evidence. In **Wiggins** Trial Counsel acknowledged that he did not retain a forensic social worker i.e. a mitigation investigator to prepare a social history. In **Wiggins** Trial Counsel was aware of Mr. Wiggins childhood including incidents of physical and sexual abuse an alcoholic mother placements in foster care and borderline retardation. The State Courts according to **Wiggins** held that Trial Counsel had made a reasonable choice to proceed with what they thought was there best defense. The Federal District Court granted habeas corpus relief in **Wiggins** but the 4th Circuit reversed, holding that counsel "made a reasonable strategic decision to focus on Petitioner's direct responsibility." The 4th Circuit held that Counsels knowledge of at least some details of **Wiggins** childhood was sufficient to make an informed strategic decision. The Supreme Court held however that **Wiggins** counsel was ineffective during his trial because there investigation failed to satisfy **Strickland** performance standard and the State Courts conclusion to the contrary was objectively unreasonable. After identifying the two part **Strickland** test is controlling, the Court emphasized:

" our opinion in **Williams v. Taylor** is illustrative of the proper application of these standards. In finding Williams' ineffectiveness claim meritorious, we applied **Strickland,** and concluded that counsel's failure to uncover and present voluminous mitigating evidence at sentencing could not be justified as a tactical decision to focus on **Williams**' voluntary confessions, because counsel had not "fulfilled their obligation to conduct a thorough

investigation of the defendant's background." 529 U.S. 396, 120 S.Ct. 1495 (citing 1 ABA Standards for Criminal Justice 4-4-1, commentary, p. 4-55 (2d ed. 1980))... in highlighting counsel's duty to investigate, and in referring to the ABA Standards for Criminal Justice as guides, we applied the same "clearly established" precedent of **Strickland** we apply today. **Wiggins** at 522.

In **Wiggins** the Court focused whether the investigation supported counsels decision not to introduce mitigating evidence of **Wiggins** background was itself reasonable. The Court then cataloged the investigative efforts of **Wiggins** counsel and indeed **Wiggins** counsel had conducted an investigative examination. However, the Trial Court's decision not to expand their investigation fell short of the professional standards that prevail. The Court held that the standard practice in Maryland in capital cases at time of **Wiggins** trial include the preparation of a social history report. Counsels conduct similarly fell short of the standards for capital defense work articulated by the American Bar Association- standards which we have long referred to as "guides to determining what is reasonable." The ABA Guidelines provide that investigations into mitigating evidence "should comprise efforts to discover all reasonably available mitigating evidence and evidence to rebut any aggravating evidence that may be introduced by the prosecutor."

The Supreme Court scrutinized counsels failure to conduct an investigation in **Wiggins** and concluded that the record of the actual sentence proceedings unscores the unreasonableness of counsels conduct by suggesting that their failure to investigate thoroughly resulted from attention, not reasoned strategic judgment. In reviewing Counsels actions before and during the trial, the court conducted " the strategic decision the state courts and respondents all invoke to justify counsels 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."

Wiggins at 526

Having found deficient performance pursuant to **Strickland,** in **Wiggins** and because the state courts never reached the prejudice inquiry, in **Strickland** , the Supreme Court reviewed the question of prejudice de novo.

Rompilla v. Beard 545 U.S. 374 (2005) Two years later, in Rompilla, the Court held that "even when a capital defendant's family members and the defendant himself have suggested that no mitigating evidence is available, his lawyer is bound to make reasonable efforts to obtain and review material that counsel knows the prosecution will probably rely on as evidence of aggravation at the sentencing phase of trial." In **Rompilla** evidence was sufficient to show Mr. **Rompilla** not only killed his victim, but tortured him. Mr. Rompilla had a significant criminal history of felony convictions including a burglary and a rape at gun point. In **Rompilla** the defense case at punishment consisted of five family members who asked the jury for mercy.

The Federal District court held that the state court had unreasonably applied **Strickland** and granted habeas corpus relief due to defense failure to present significant mitigation evidence. The Third Circuit however, reversed. Therefore the panel determined that trial counsel failed to discover mitigating evidence located in records, but that based on the information that Trial Counsel actually had, Trial Counsel was justified in failing to look. In **Wiggins** Trial Counsel ignored obvious leads, in **Romplilla** the Third Circuit held that Trial Counsel did enough to reasonably concluded that further investigation would be a waste of resources. The Supreme Court reversed the Third Circuit and granted relief holding that trial counsels investigation deficient even though **Rompilla** himself was not helpful and his contribution to any mitigation case was minimal. In **Rompilla** the Court again relied on the ABA Guidelines for the standard

of care. After finding deficient performance under **Strickland** the Supreme Court that next turned to the prejudice inquiry which again was addressed de novo because the state court never addressed that issue.

These cases have clarified "clearly establish law" applicable to capital cases adjudicated in state court after **Strickland** . The following principals are inherit in Strickland and its progeny:

Performance:

- Capital defense is sufficiently specialized and regulated to have a national standard, reflected both in the 8th Amendment and the ABA Guidelines. **Rompilla,** 545 U.S. at 387; **Wiggins**, 539 U.S. at 524; **William**s, 529 U.S. at 397.
- While there is not set of per se rules or checklist for capital representation, defense counsel must- in every case- engage in a thorough social history investigation. The ABA Guidelines reflect the "well-defined norms" of the national standard for mitigation investigation, and thus the floor below which local practices may not descend. **Wiggins** 539 U.S. at 524-25 and **Rompilila** 545 U.S. at 380.
- Termination of mitigation investigation is only appropriate in the context of an informed decision, after a thorough investigation. **Rompilla** 545 U.S. 395; **Wiggins** 539 U.S. 527-28.
- The fact that counsel performed some, or even extensive investigation, does not preclude a finding of deficient performance with respect to further investigation they reasonably should have done under the circumstances. **Rompilla** 545 U.S. at

388-89; **Wiggins** 539 U.S. at 527, 534.

- Federal courts, even under the deferential scheme of the AEDPA, should scrutinize claims of strategy in light of a close reading of the record and a state court finding of strategic purpose for an omission should be disregarded if it cannot withstand such scrutiny. **Wiggins** 539 U.S. 526-27.
- The duty to investigate and prepare for the punishment phase also includes rebutting the prosecution's case in aggravation. Counsel must, at a minimum secure the information in possession of law enforcement. **Rompilla** 545 U.S. 385-87.

Prejudice:

- Prejudice ensues whenever the totality of the mitigating evidence "might well have influenced the jury's appraisal" of the defendant's moral culpability. **Rompilla** 545 U.S.. 393; **Wiggins** 539 U.S. 538; **Williams** 529 U.S. 398.
- The operative question is whether there's a reasonable probability that one juror would have voted differently. **Wiggins** 539 U.S. 537
- When assessing prejudice from counsel's error or omissions, reviewing courts must look at all of the evidence in the aggregate, including the evidence adduced at trial and the evidence adduced in post-conviction proceedings. **Wiggins** 539 U.S. 536; **Williams** 529 U. S. 397-98
- Courts should not focus on trial counsel's post-trial statements regarding whether they would have used the mitigating evidence adduced in post-conviction proceedings, the relevant inquiry is whether a competent attorney would have

introduced it. **Wiggins** 539 U.S. at 535.

- The failure to discover mitigation undermines the outcome even in highly aggravated cases. The failure to provided any context or explanation for an aggravated case may render the proceeding unreliable. The idea that considerable aggravation is per se bar to finding prejudice is no longer viable after **Williams** and **Rompilla,** both of which were highly aggravated cases.
- Prejudice inures even if the omitted evidence does not rebutt the State's case for death eligibility. **Williams** 529 U.S. 398
- Courts must look at all consequences that would have flowed from competent performance, including the impact on the work of expert witnesses. **Rompilla** 545 U.S. 592-93.
- When assessing prejudice federal courts need not make the state-law evidentiary findings that would have been at issue at sentencing, courts merely evaluate the totality of the evidence adduced at trial and in the habeas proceedings. Thus, a petitioner can use reliable hearsay to prove prejudice.

Relief is warranted. In the States Court the decision is contrary and is an unreasonable application of clearly established law. Upon the above principles to Mr. Beatty's case it is plain that clearly established federal law requires relief and the state court decision to the contrary was unreasonable.

1. DEFICIENT PERFORMANCE: Defense Counsel's failure to conduct a reasonable mitigation investigation and to discover relevant mitigating evidence fell below an objective standard of reasonableness pursuant to prevailing professional norms.

The Eighth Amendment of the United States Constitution and the Fourteenth Amendment require sentencing procedures in a capital case to "focus the juries attention on the particular nature of the particular crime." Because " an individual decision is essential, " see **Lockett v. Ohio** 438 U.S. 586,605 (1978) the Eight Amendment mandates that the sentence not be precluded from considering as a mitigating factor, any aspect of a defendant's character or record and any circumstances of the offense that the defendant proffers as a basis for a sentence less than death. Relevant mitigating evidence is not limited only to evidence that would relate. Specifically to petitioners culpability for the crime he committed see **Skipper v. South Carolina** 476 U.S. 1,4 (1986) and there is no requirement that mitigating evidence even have a "nexus" to the offense or that the defendant make any showing that the criminal act was attributable in any way to the mitigating factor see **Tennard v. Dretke** 542 U.S. 274 (2004). Relevant mitigating evidence is basically defined as any evidence that might serve as a basis for a sentence less than death. Because the scope of mitigating evidence which may be considered by the jury in sentencing is much broader than the range of relevant information which may be considered in determining guilt or innocence, counsel is under a greater obligation to discover and evaluate potential evidence of mitigation see **United States ex rel Emerson v. Gramley** 883 F3d 898 (7th Cir. 1996) "its imperative to case a wide net for all relevant mitigating evidence is heightened at a capital sentencing hearing."

In short the prevailing professional norms when a petitioner is tried for capital murder requires at a minium that counsel attempt through mitigation investigation presentation of evidence to provided some "explanation for petitioner's criminal propensities and some basis for the exercise of mercy." As stated in **Caro v. Woodford** 280 F3d 1247 (9th Cir. 2002) a little

explanation can go a long way and might make a difference between life and death.

In addition, the ABA Guidelines which had been refereed to in Supreme Court precedent require that investigation for the penalty phase of a capital phase should begin immediately upon counsels entry into the case. The ABA Guidelines 11.4.1A; 11.8.3A. In fulfilling counsels duties the ABA Guidelines specifies that counsel should investigate the defendant's full history, including medial history, alcohol and drug use, birth trauma, family and social history. ABA Guideline 11.4.1.D.2 mandates that counsel must interview witness family with aspects of the client's history that might affect the... possible mitigating reasons for the offense and/or other mitigating evidence to show why the client should not be sentenced to death. Counsels duty is not discharged merely by conducting a limited investigation. Counsel must "seek records, interview family members, and friends, and obtain appropriate mental evaluations well in advance for trial."

In 2006 the State Bar of Texas published its guidelines and standard for Texas Capital Counsel "SBOT" Guidelines. According to the Texas Guidelines Counsel should :[5]

A. Make application to the court for financial assistance to the defense team

In addition the SBOT Guidelines echo the 2003 ABA Guidelines in the holding in **Rompilla,** with respect to trial counsels duty to investigate mitigating evidence.

> The investigation regarding penalty should be conducted regardless of any statement by the client that evidence bearing upon penalty is not to be collected or presented.

Finally the Texas Guidelines required counsels investigation to have produced sufficient

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[5]This Trial was conducted in 2004, prior to the enactment of the Texas Guidelines however the standards set forth in **Strickland, Rompilla, Wiggins**, and the ABA Guidelines all predicate the trial of this cause.

information to allow counsel to consider presentation of th following kinds of evidence: (1) witnesses familiar with and evidence relating to the client's life and development, that would explanatory of the offense for which the client is being sentenced would rebutt or explain evidence presented by the prosecutors, would present positive characters in the clients life or would otherwise support a sentence less than death.

Applying these principals to the case at hand, the Petitioner recognizes that Trial Counsel did not totally abrogate their duties as Trial Counsel in a capital murder case. In deed, Trial Counsel incorporated a defense team which involved psychological/psychiatric experts, a mitigation investigator, a fact investigator, and a forensic expert. However Petitioner contends that merely by assembling this team does not constitute effective assistance of counsel per se. As is evident from the statement of facts from the state writ of habeas corpus hearing, much was left undone that should have been done. As stated in case law and the ABA Guidelines, Trial Counsel in order to render effective assistance of counsel must immediately start preparing for the punishment stage of a capital murder case. Although purportedly several witness were contacted by the trial team, other witnesses were not. Witnesses that could describe the tumultuous relationship between Petitioner and his mother, and witnesses who could describe the eccentricity and bizarreness of Ms. Click's personality were never contacted. There were available. As Mr. Perkins stated during the writ hearing, they were looking for anything that could possibly be mitigating. Again, as stated in the writ hearing on direct examination had he known of the testimony of the Day children, Leanne Wilkerson, Twyla Johnson, he would have introduced said testimony. However, upon being questioned by the State of Texas, " he crawfished" on this contention and stated that he would not have offered this testimony due

to the fact that in his opinion he would consider the testimony to be more aggravating than mitigating. The problem with this contention is that any aggravating evidence that would have been admitted through the testimony of these witnesses, the vast majority had already been heard by the jury. There really wasn't anything new that would potentially harm Petitioner had the testimony of these witnesses been introduced, that the jury wasn't already aware of. As stated in **Wiggins,** this post trial explanation of a strategical decision appears to be more of ad hoc rationalization as to why an investigation wasn't conducted. Ms. Randall, the mitigation investigator, testified that she just didn't have enough time to do what she felt needed to be done and consequently decisions had to be made where they could "get the biggest bang for their buck." This activity again, runs a foul of the holdings in **Strickland, Wiggins, Williams, Rompilla** and the ABA Guidelines. Ms. Randall recognized the import of the testimony from the state writ witnesses and as she stated " had I know of this, I would have driven there and picked them up myself." Its important to note that in **Wiggins**, **Strickland,** and **Rompilla** there were actually witnesses who testified on the behalf of the defense in the actual trial of their cause. Such was not the case here. There were no witnesses presented by the defense and the attempt to save Petitioner's life consisted solely that Petitioner "was a child of God." Petitioner contends he has satisfied the first prong i.e. deficient performance of **Strickland.**

2. PREJUDICE: Petitioner has demonstrated that but for Trial Counsel's deficient performance calls into question the reliability of jury's verdict.

Prejudice; the totality of the mitigating evidence might have a influenced the juries appraisal of the defendant moral culpable for successful claim of ineffective assistance of counsel, a reasonable probability must exists that the result of the proceeding would have been

different but for trial counsels error. **Strickland v. Washington** 466 U.S. 687 a reasonable probability is a probability sufficient to undermine this courts confidence in the outcome of the proceeding. Is there a reasonable probability of available mitigating evidence would have caused at least one juror to have struck a different balance. In this Writ of Habeas Corpus Mr. Beatty presents evidence that had not ever was presented to the trial jury. Based on the tumultuous relationship between Mr. Beatty and the victim, his mother, and the uncontrovered evidence of Ms. Click's personality and the bizarre behavior, Petitioner contends that there is a reasonable probability that the available mitigating evidence would have forced at least one juror to have struck a different cord. Again, as stated in the discussion regarding performance there were not witnesses called at Petitioner's trial. There was no evidence presented which would have given a juror a vehicle to determine that there was at least one sufficient mitigating circumstance to warrant that a life sentence be imposed rather than a death sentence. The fact that there was no evidence presented, when the evidence adduced at the state writ hearing reflects that evidence could have been presented, and should have been presented, to at least explain, not excuse, but explain the relationship between Petitioner and his mother and the nature and character of Ms. Click. Petitioner contends that based on the lack of an investigation to obtain this readily available information, and providing it to the jury, this constitutes deficient performance. By failing to present this evidence calls into question the reliability and fundamental fairness of this proceeding. Consequently, Petitioner contends that prejudice has been shown. For instance, Kamie Bentley testifying that 30 years ago Ms. Click called her "stupid", "lazy", "no good,"her personality did not change. According to Ms. Johnson some 26 years later she was angrily calling her grown son, "lazy and retarded." A juror could rationally believe that Mr. Beatty, as a

youngster, was treated as the Day children were treated. Consequently, Ms. Click made Petitioner into what he eventually became.

3. Issues at the state court did not adjudicate do not enjoy deference under 28 U.S.C. 2254 (D).

The State may not setup a procedural bar in 28 U.S.C. 2254 (D)'s requirement that a state court decision must be unreasonable before a federal court will re-visit the issues underlying it. The Supreme Court made clear in **Wiggins** in **Rompilla** when they refused to extend 2254 (D) deference to those issues that a state court did not resolve or address see **Rompilla** Id. At 224, 67 which held " because a state court found that representation adequate they never reached the issue of prejudice... and so we examine this element of **Strickland** claim de novo citing **Wiggins** Id. at 534. **Wiggins** and **Strickland** stand for specific legal proposition. If a state court denial of a claim requires adverse adjudication of only one of two issues and if the state court does not reach one of the issue because it resolved the other against the Petitioner then a federal court applying the AEDPA does not defer "to a hypothetical ruling on the unadjudicated issue." under Section 2254 (D) it reviews that second issue de novo. Ineffective assistance of claims state courts often times erroneously determine that assistance was not ineffective, as the state courts did in this case and the state courts did not analyze the second prong of ineffective assistance claims under **Strickland** i.e. whether counsels constitutional ineffective representation was prejudicial. In cases such as this, where a federal courts finds that the state determination on the deficient performance prong of **Strickland** unreasonable then it conducts a de nova inquiry into the second prong on which the state court did not rule. The logical conditions present in **Wiggins** and **Rompilla** are identical to the case at bar. The state courts made the determination

only on whether or not Petitioner received effective representation. If this Honorable Court determines that the state court adjudication of the determination of the deficient performance was adjudicated and unreasonably then it knows no deference to a hypothetical state "finding on the prejudice prong of **Strickland** under 28 U.S.C. 2254.

CLAIM NO. 2

Petitioner received Ineffective Assistance of Counsel in violation of the Sixth Amendment of the United States Constitution by Trial Counsel's failure to properly investigate facts which would have shown that this "killing" was murder rather than capital murder.

RULING ON 11.071 WRIT OF HABEAS CORPUS

At the conclusion of the Evidentiary Hearing held on the Application for the Writ of Habeas Corpus brought by petitioner brought pursuant to T.C.C.P. Art. 11.071. Applicant filed the following proposed findings of fact and conclusions of law:

146. No one from the defense team ever spoke to Twyla Johnson, a potential witness.

147. Twyla Johnson met Applicant when he was paroled to Carolyn Click's residence.

148. Twyla Johnson was a neighbor of Carolyn Click

149. Twyla Johnson gave a statement to the police where on one occasion Carolyn Click was being aggressive toward Applicant calling him stupid and retarded.

150. Carolyn Click was the aggressor in this situation.

153. The relevancy would be to reflect the conduct of the parties

155. Leanne Wilkerson testified at the trial of this case

170. Ms. Click was not a kind old lady as she was portrayed in the trial of this cause, but

rather could be mean, controlling, and manipulative.

171. Ms. Wilkerson was aware of Carolyn Click's meanness as she had been mean to her in the past. Ms. Wilkerson was aware of odd eccentric behavior and meanness that she had exhibited toward Applicant.

172. This evidence of Carolyn Click's character would have been relevant in the defense of this case.

173. This evidence would have been relevant pursuant to T.C.C.P. Art. 38.36 to show that the murder was not capital murder.

178. On one occasion Applicant was excited about getting a job, and on the day of the job interview, Carolyn Click told him that she was too tired to take him. Applicant was devastated by his mothers failure to take him to this job interview.

181. This evidence would have been relevant pursuant to T.C.C. P. Art. 38.36 to show this murder was not a capital murder.

182. On at least one occasion Ms. Wilkerson called Tamara Beatty and told her that it was a bad situation that Petitioner and Carolyn Click were gonna "rip each other's heads off" and somebody needed to do something about it.

184. This evidence would have been relevant again in showing that this was not a capital murder but rather a mere murder.

204. Tiffany Beatty, Applicant's daughter, and Carolyn Click's granddaughter was aware of a conversation where Leanne Wilkerson had called her and told her that someone needs to come down because Petitioner and Ms. Click were going to rip off each others heads.

208. This evidence was relevant in regard to the issue of rather this murder was a capital

murder or a murder.

LEGAL BASIS FOR CLAIM NO. 2

Petitioner contends that the Sixth Amendment of the United States Constitution holding in **Strickland v. Washington** also incorporate the duty for Trial Counsel to adequately investigate and prepare a defense in this case. It is evident from testimony from the writ hearing there was evidence that would have described the tumultuous relationship between Petitioner and the deceased, his mother. This evidence would have been admissible at the trial of this cause pursuant to T.C.C.P. 38.36. Texas law itself recognizes the importance for a jury to understand the dynamics between the parties in a homicide case. Petitioner also incorporates as a legal basis for this claim the legal statements made in conjunction with his Claim #1.

DEFICIENT PERFORMANCE

At the opening statement of Petitioners trial Mr. Perkins, first chair trial counsel told the jury that this was murder case. The states contention that it was a murder case in the course of a burglary or a robbery which elevated the murder case to a capital case. Although, there was some evidence admitted at the trial of this case that showed the relationship between the parties; it was the unrequited contention of the State of Texas that the decedent was a kind, weak, disabled, loving woman and consequently, Petitioner must have killed her for the purpose of obtaining property or burglarizing her home. Such is not the case; as evidence amply demonstrated at the writ hearing although the decedent could be a kind, good natured woman, she had another side. The other side as described by Ms. Wilkerson was "mean cold hearted bitch," who aggravated fights with her son the Petitioner, and knew how to push buttons. The witnesses who testified to

this; Ms. Johnson and Ms. Wilkerson were known to trial counsel. They were Ms. Click's neighbors, their names, addresses were included in discovery and state witness list. Indeed Mr. Roy Linn an investigator for the Defense actually spoke to Ms. Wilkerson but did not ask any questions regarding the decedents character and nature. Again Mr. Perkins recognized the strategy of " dirty up the decedent," so any post trial rationalization that had he even known of this testimony he would not have offered it is an ad hoc rationalization at best. Petitioner contends that the failure to investigate and discover this crucial information constitutes deficient performance and the first prong of **Strickland** has been met.

PREJUDICE

Incorporating legal arguments made in conjunction with Claim No. 1 Petitioner also contends that he has demonstrated prejudice pursuant to the second prong of **Strickland.** Had this evidence from Ms. Johnson and Ms. Wilkerson been proffered to a jury there is a likelihood that at least one juror would have concluded that this offense was not a capital murder case but was the build up to a long simmering tumultuous relationship between Petitioner and his mother and Consequently a sentence of first degree murder would have been returned rather than capital murder. Even the Texas Court of Criminal Appeals had a hard time in determining whether this offense was actually a capital murder, although the Court of Criminal Appeals as previously stated, ultimately affirmed Petitioner's conviction and sentence of death but only did so by 5-3, majority with 1 Judge not participating. The dissent finding that the evidence was insufficient and two to prove the existence of the underlying felony.

PRAYER FOR RELIEF

Wherefore, Tracy Lane Beatty, prays that this Court:

A. Order the Petitioner to provide this court with the record of all state court proceedings:

B. Issue a writ of habeas corpus to have him brought before it, so that he may be discharged from his unconstitutional confinement and restraint and/or relieved of his unconstitutional sentence of death.

C. Grant an evidentiary hearing so that he may present evidence in support of these claims: and

D. Grant such other relief as law and justice require.

Respectfully submitted,

/s/

JEFF L. HAAS
State Bar No. 08659600
908 First Place
Tyler, Texas 75702
903-593-8338
903-593-8330 (fax)

VERIFICATION

Under penalty of perjury, I hereby declare that all the factual allegations made herein are true and accurate except for those allegations made upon information and belief. This the 9th day of June, 2010.

/s/
JEFF L. HAAS

CERTIFICATE OF SERVICE

On this the 9th day of June, 2010, I, Jeff Haas, Attorney for Petitioner do certify that a true and correct copy of the foregoing instrument was filed with the Clerk of the District Court using the CM/ECF system which sent notification of such filing to the following:

1. Georgette Oden
   Assistant Attorney General
   300 West 15th Street
   Austin, Texas 78701
   Georgette.Oden@oag.state.tx.us

/S/
JEFF L. HAAS