INQUIRY CONCERNING JUDGE,
NO. 96

Date 8/14/09 In Re Judge No. 96

IN RE:	§	BEFORE THE
HONORABLE SHARON KELLER,	§	COMMISSION ON
PRESIDING JUDGE OF THE TEXAS	§	JUDICIAL CONDUCT
COURT OF CRIMINAL APPEALS,	§	
AUSTIN, TRAVIS COUNTY, TEXAS	§	

THE HONORABLE SHARON KELLER'S VERIFIED ANSWER TO THE FIRST AMENDED NOTICE OF FORMAL PROCEEDINGS OF THE TEXAS STATE COMMISSION ON JUDICIAL CONDUCT AND SPECIAL EXCEPTION

TO THE STATE COMMISSION ON JUDICIAL CONDUCT ("CJC"):

The Honorable Sharon Keller ("Respondent") submits this verified answer to the First Amended Notice of Formal Proceedings as follows:

I. GENERAL DENIAL

1. Respondent denies each and every, all and singular, the five Charges of the Notice of Formal Proceedings. With respect to the Factual Allegations she admits only the following and in all other respects the factual allegations are denied:

2. Judge Keller is now and was on September 25, 2007 the Presiding Judge of the Texas Court of Criminal Appeals ("CCA"). She was elected to the CCA in 1994 and, in 2000 was elected Presiding Judge and was reelected to that position in 2006. Her term expires in 2012 and she is currently serving on the CCA.

3. On September 25, 2007 there were no written Execution-Day Procedures. The Procedures that did exist at that time, with some revisions, were later reduced to writing in November 2007.

4. On September 25, 2007 Michael Wayne Richard ("Richard") was scheduled to be executed by the state of Texas, a date that had been set the previous June. Judge Keller

was aware on September 25, 2007 that there was an execution scheduled for 6:00 p.m. that night.

5. At approximately 8am (Central Time) on September 25, 2007 the United States Supreme Court ("USSC") entered an order in *Baze v. Rees* (Cause Number 07-5439) which granted petitioners' writ of certiorari. The writ was granted to determine whether Kentucky's lethal injection protocol satisfied the Eighth Amendment. Judge Keller was generally aware of the USSC's order.

6. Judge Keller was not the judge assigned to the Richard case ("Duty Judge") and, on September 25, 2007, she did not remember who was. The General Counsel Ed Marty was responsible for assigning the duty judge at that time. On September 25, 2007 Mr. Marty sent an email to the judges including Judge Keller at 11:29 AM which was titled "Execution Schedule" and cited an Associated Press report about "two Kentucky cases". The email speaks for itself but it does contain the following language: "I (Marty) do not know if Michael Wayne Richard will try to stay his execution for tonight over this issue and in what court."

7. Judge Tom Price drafted a dissenting opinion in anticipation that Richard might file something with the CCA and further anticipating that a majority of the judges would deny it but never sent it to Judge Keller for consideration.

8. Judge Keller arrived at the court at 6am on September 25, 2007 and left sometime during the afternoon to meet a repairman at her house. She did not return to court that day but was available by telephone.

9. Shortly before 5:00 p.m. on that day Mr. Marty called Judge Keller at home to ask a question about closing time, which she understood to refer to whether the clerk's office

stayed open past 5:00 p.m. Judge Keller said no in accordance with state law (Section 658.005 Tex. Govt. Code) and long standing custom. She asked why and Mr. Marty said something to the effect that they wanted to file something but they were not ready. Judge Keller knew that pleadings had been filed after hours on execution days but not with the clerk's office. She also knew that the general counsel, in this case Mr. Marty, stayed after hours on execution day. She also knew that after hours filings are specifically provided for in the Texas Rules of Appellate Procedure, Rule 9.2 (a). She also knew that the regular office hours for State employees were established by state law to be from 8:00 a.m. to 5:00 p.m.

10. Richard was executed sometime after 6:00 p.m. on September 25, 2007.

11. On September 26, 2007 Judge Keller did not tell the other judges about her conversation the previous night with Mr. Marty assuming that they already knew about it.

12. On September 27, 2007 the USSC granted a stay in the Turner case. He has since been executed.

13. On October 2, 2207 the CCA granted a stay in the Heriberto Chi execution. He has since been executed.

II. ADDITIONAL FACTS OMITTED BY THE COMMISSION

14. Respondent further states that the Notice of Formal Proceedings omits certain material facts including, but not limited to, the following:

A. On September 19, 2007, the Attorney General for the State of Texas, the Honorable Greg Abbott issued a press release ("Press Release") which advised the public and the media that Michael Wayne Richard ("Richard") was scheduled to be executed after 6:00 p.m. Tuesday, September 25, 2007. The Press Release noted that "on the afternoon of August 18, 1986 and just two months after he had been paroled from prison, (Richard) approached Marguerite Dixon's son, Albert, in front of the Dixon home in Hockley. When Albert and his sister, Paula, left a few minutes later, Richard returned and entered the house. He took two television sets ...,

sexually assaulted Mrs. Dixon and shot her in the head with a .25 caliber automatic pistol." See attached Exhibit "A."

B. The press release continued: "Mrs. Dixon's children returned home around 9:30 p.m. on the day of the killing to find the sliding-glass door open and all the lights in the house turned off. Frightened by the condition of the house, they got a neighbor, who entered the house with a flashlight and a gun. They discovered Mrs. Dixon dead in the bedroom." See attached Exhibit "A."

C. Richard was apprehended by the police and confessed to Mrs. Dixon's murder. He was indicted by a Harris County Grand Jury for capital murder on October 29, 1986. Approximately one year later (September 4, 1987) Richard was found guilty of capital murder and sentenced to death. Five years later the Texas Court of Criminal Appeals reversed Richard's conviction because of a flaw in the jury instructions. Richard's second trial began in May of 1995 and one month later the jury found him guilty of capital murder and he was sentenced to death. See attached Exhibit "A."

D. The Texas Court of Criminal Appeals affirmed the conviction and sentence on direct appeal on June 18, 1997, and the United States Supreme Court declined to review his case. See attached Exhibit "A."

E. On April 3, 1998, Richard filed an application for a writ of habeas corpus in Harris County District Court. The District Court recommended that the writ be denied. The District Court's recommendation was accepted by the Texas Court of Criminal Appeals. His state habeas corpus writ was denied by the Texas Court of Criminal Appeals on February 7, 2001.

F. Richard next filed a federal petition for writ of habeas corpus which was denied by United States District Judge David Hittner in Houston on December 31, 2002, in a written opinion. On June 27, 2003, the United States Court of Appeals for the Fifth Circuit affirmed Judge Hittner and refused Richard permission to further appeal. See attached Exhibits "B" and "C."

G. Richard then filed another state application for a writ of habeas corpus claiming ineligibility for execution based on mental retardation. The Texas Court of Criminal Appeals sent this claim to the trial court for resolution and the State District Judge recommended that the claim be denied. On March 21, 2007, the Texas Court of Criminal Appeals denied, by a vote of 8-1, Richard's second state habeas corpus application. See attached Exhibit "D."

H. Richard then attempted to file another habeas corpus petition in federal court claiming ineligibility for execution based on mental retardation but

the 5th Circuit denied that motion on May 15, 2007. See attached Exhibits "E" and "F."

I. On June 12, 2007, the Harris County District Court set Richard's execution date for September 25, 2007. See attached Exhibit "A."

J. On September 17, 2007, the Texas Defender Service ("TDS"), on Richard's behalf, filed a motion for authorization to file successive petitions for writ of habeas corpus with the 5th Circuit on the same grounds (mental retardation) that the Court had previously denied on May 15, 2007. On the cover of the Motion filed in the Fifth Circuit, TDS wrote in bold letters: "**THIS IS A DEATH PENALTY CASE. MICHAEL WAYNE RICHARD IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 25, 2007.**" See Exhibit "G."

K. TDS's motion in the Fifth Circuit was 43 pages long. It attached a proposed petition for writ of habeas corpus which (with attachments) was 240 pages long. Nowhere in the motion or the attached "Proposed Petition" did Richard claim that Texas' method of lethal injection was unconstitutional. In fact, in over 20 years of litigation Richard never once made that claim until September 25, 2007.

L. Richard did not file any pleading in the Texas Court of Criminal Appeals between June 12, 2007, (the date his execution date was set) and September 25, 2007 (the date he was executed). See attached Exhibits "A" and "H."

M. By the time he was executed Richard had two trials, two direct appeals (including to the United States Supreme Court), two state habeas corpus proceedings and three federal habeas corpus hearings or motions. Accordingly, the suggestion in Charge IV that Richard was not accorded "access to open courts or the right to be heard according to law" is patently without merit. Indeed, Richard was not seeking on September 25, 2007 "to avoid execution." See Exhibit "I." He merely wanted Texas not to "include chemicals that are unnecessary to the effectuation of his death." *Id* at page 3.

N. Richard insisted on a trial but did not testify. Had he accepted the state's offer of life in prison in exchange for a guilty plea he would not have been executed. Richard told the Prosecutor in his first trial that he "wasn't pleading to anything," and, according to the Prosecutor, Richard said "the death penalty is the last, ultimate high." See Attached Exhibit "O."

O. In July or August, 2007, TDS took over representation of Richard.

P. The Court heard nothing from Richard's lawyers at TDS on September 25, 2007.

Q. A TDS runner, Rindy Fox, phoned the deputy clerk of the court between 4:40 p.m. and 4:48 p.m. She was in her car having been to a doctor's appointment and speaking from her cell phone. She asked if the clerk's office could stay open beyond 5:00 p.m.

R. For well over 100 years Texas has been administering the death penalty. As of September 25, 2007, to Respondent's knowledge, the Clerk's office had never stayed open beyond 5:00 p.m. on execution day which does not mean that after hour filings were not allowed. Indeed TDS, in another death penalty case, on the day of execution, filed a motion to stay with the Texas Court of Criminal Appeals after hours. See Exhibit "N" attached hereto. This procedure is expressly authorized by Rule 9.2 (a) (2) of the Texas Rules of Appellate Procedure which states:

> (a) *With Whom.* A document is filed in an appellate court by delivering it to:
>
> (1) the clerk of the court in which the document is to be filed; or
>
> (2) a justice or judge of that court who is willing to accept delivery. A justice or judge who accepts delivery must note on the document the date and time of delivery, which will be considered the time of filing, and must promptly send it to the clerk.

The Judges of the CCA's phone numbers at the Court are, and were on September 25, 2007, all listed in the blue pages of the Austin, Texas, phone book. Mr. Marty's phone number, as General Counsel, was also listed in the blue pages of the Austin, Texas, phone book.

S. Sometime shortly before 5:00 p.m. the deputy clerk relayed the request of the TDS runner about keeping the clerk's office open to the court's general counsel Ed Marty who then called Judge Keller at home to ask a question about closing time, which she understood to refer to whether the clerk's office stayed open past 5:00 p.m. Her answer was "No" which had been the practice of the court on other execution days all during Judge Keller's tenure with the court and in accordance with state law. Mr. Marty confirmed that he had already advised the deputy clerk that the Clerk's office would close at 5 p.m. but just wanted to check with her. Judge Keller did not, and could not have, if she had wanted to, close access to the court in light of TRAP Rule 9.2 (a), a fact well known to TDS.

T. Judge Keller was not told by Mr. Marty (the only person she spoke with about this matter on September 25, 2007) that TDS was having computer problems. It is still not clear whether TDS was, in fact, encountering computer problems on that day but in any event the motion to stay based on the *Baze* case was a simple document which could have said:

> Today, the Supreme Court agreed to review the issue of the constitutionality of lethal injection as practiced by States like Texas. See *Baze v. Rees*, No. 07-5439. The Court will now decide whether the administration of a lethal injection materially indistinguishable from Texas' violates the Eight and Fourteenth Amendments. Mr. Richard asserts his right to remain free from cruel and unusual punishment, and asks this Court to stay his execution pending the Supreme Court's resolution of this important question, which will definitively determine whether he is entitled to the relief herein sought.

It did not take a computer to prepare and timely file this document; it could have been hand written and the court would have accepted it as Judge Keller informed the Commission or he could have filed an application for a writ habeas corpus in the trial court pursuant to Article 11.071 Section 5 of the Code of Criminal Procedure.

U. Respondent questions whether newspaper articles, like the ones cited by the Commission, are ever appropriate to prove charges against a popularly elected judge like Respondent. However, Respondent notes that on March 22, 2009, the Houston Chronicle reported that attorneys for death penalty defendants failed to timely file pleadings in nine cases and in six of those cases the defendant was executed. See Exhibit "P." By the Commission's logic the ethics of the judges in those cases should have been questioned because they did not insure that the pleadings were filed in a timely manner, a position Respondent finds illogical.

V. On September 25, 2007 Richard's lawyers filed a 2 page motion to stay with the Harris County District Clerk's office at 5:57 p.m. and filed a motion for stay of execution in the USSC both based on the grant of cert in the *Baze* case that day. See Exhibit "I" and "J." The evening of September 25, 2007, the United States Supreme Court denied Richard's motion to stay and he was thereafter executed. See attached Exhibit "K."

W. The CCA's Execution Day Procedures were not reduced to writing on September 25, 2007. However, under those procedures the deputy clerk and, perhaps, Mr. Marty (who were both personally present at the court) should possibly have informed the duty judge about the request to keep the clerk's office open beyond 5:00 p.m. Regardless it is clear that Judge Keller did not have a duty to do anything other than what she did which was to answer a question about whether the clerk's office closes at 5:00 p.m.

X. Richard's lawyers, on the other hand, had a duty to follow the law, timely file pleadings and zealously represent their client. But on September 25, 2007 (i) no lawyer for Richard ever once contacted any CCA judge, its

general counsel, or staff member (ii) no attempt was made to file an after hour pleading in accordance with TRAP Rule 9.2(a); and (iii) Richard in twenty years of litigation never once challenged the Texas protocol of administering a lethal injection until September 25, 2007[1].

15. Respondent states that CJC be required to prove their charges against Respondent by clear and convincing evidence as is required by the Constitution and laws of the State of Texas and The United States. Any rule or statute which authorizes a lesser evidentiary standard is unconstitutional under the U.S. and/or Texas Constitutions both per se and as applied.

III. AFFIRMATIVE DEFENSES

Respondent asserts the to following affirmative defenses to the CJC charges:

16. The First Amended Notice of Formal Proceedings was filed without authority and without notice to or knowledge of The Commission in violation of Article 5 of The Texas Constitution, Chapter 33 of the Texas Government Code and The United States Constitution.

17. The CJC fails to state a claim upon which relief could be granted.

18. The CJC lacks subject matter jurisdiction over this matter.

19. Canon 2A of the Code of Judicial Conduct ("Canon 2A") does not apply to these charges.

20. If applied to these charges Canon 2A is unconstitutional under the United States and Texas Constitutions.

21. Canon 3B(8) of the Code of Judicial Conduct ("Canon 3B(8)") does not apply to these charges.

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[1] Richard acknowledged this in the motion for stay that he filed in the USSC when he wrote: "although he himself did not previously present the issue, the issue, as presented in Baze, is identical to the issue he seeks to present." See Exhibit "I" at page 2.

22. If applied to these charges Canon 3B(8) is unconstitutional under the United States and Texas Constitutions.

23. Article 5, Section 1-a (6) A of the Texas Constitution ("Section 1-a (6) A") does not apply to these proceedings.

24. If applied to these charges Section 1-a (6) A is unconstitutional under the United States and Texas Constitutions.

25. Canons C3(1) and (2) do not apply to these charges.

26. If applied to these charges Canons C3(1) and (2) are unconstitutional under the United States and Texas Constitutions.

27. Section 33.001(b) of the Texas Government Code does not apply to these charges.

28. If applied to these charges Section 33.001(b) of the Texas Government Code is unconstitutional under the United States and Texas Constitutions.

29. Texas Constitution Article 5, §1-a(6) does not apply to these charges.

30. If applied to these charges Texas Constitution Article 5, §1-a(6) is unconstitutional under the United States Constitution and other provisions of the Texas Constitutions.

31. Texas Constitution Article 1, § 13 does not apply to these charges.

32. If applied to these charges Texas Constitution Article 1, § 13 is unconstitutional under the United States Constitution and other provisions of the Texas Constitutions.

33. Respondent's conduct is, and has been found to be, subject to absolute judicial immunity and the Examiner and/or Commission are estopped from contending otherwise.

SPECIAL EXCEPTION

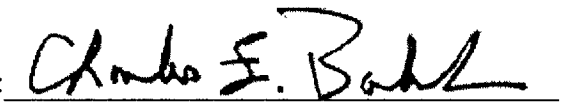
Respondent specially excepts to The First Amended Notice of Formal Proceeding Charges I, II and IV which allege that Respondent had a duty "to require or assume

compliance by the CCA General Counsel and clerk staff" because none of the Canons or provisions cited require such a duty.

Wherefore, Premises Considered, Respondent prays that the CJC charges be dismissed and that she be awarded her reasonable attorneys fees and costs and for such further relief as to which she may be entitled.

Respectfully submitted,

JACKSON WALKER L.L.P.

By: 

Charles L. Babcock
State Bar No. 01479500
Email: cbabcock@jw.com
1401 McKinney, Suite 1900
Houston, Texas 77010
(713) 752-4200
(713) 752-4221 – Fax

ATTORNEYS FOR RESPONDENT THE HONORABLE SHARON KELLER

VERIFICATION

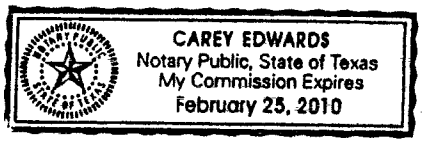
STATE OF TEXAS §
§
TRAVIS COUNTY §

BEFORE ME, the undersigned authority, on this day personally appeared the Honorable Sharon Keller who, after being duly sworn, stated under oath that she has read the foregoing Original Answer and that the factual statements contained therein are true and correct.

The Honorable Sharon Keller

SUBSCRIBED AND SWORN TO BEFORE ME on this 14TH day of August, 2009.

NOTARY PUBLIC, STATE OF TEXAS

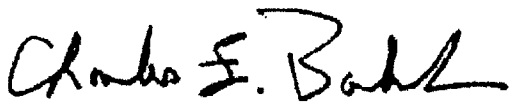


CERTIFICATE OF SERVICE

I hereby certify that a copy of this Verified Answer has been provided the State Commission on Judicial Conduct, on this the 14th day of August, via facsimile and/or electronic mail a copy of the Verified answer to the following:

John J. McKetta III
Graves Dougherty Hearon & Moody P.C.
401 Congress Avenue, Suite 2200
Austin, Texas 78701
(512) 536-991

Seana Willing — Via Hand Delivery
The State Commission on Judicial Conduct
P. O. Box 12265
Austin, Texas 78711-2265



Charles L Babcock

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EXHIBIT A

Wednesday, September 19, 2007 Printer Friendly

Media Advisory: Michael Richard Scheduled For Execution

AUSTIN – Texas Attorney General Greg Abbott offers the following information about Michael Wayne Richard, who is scheduled to be executed after 6 p.m Tuesday, September 25, 2007. Richard was convicted and sentenced to death for the capital murder of Marguerite Dixon during a burglary of her Houston-area home in 1986.

FACTS OF THE CRIME

On the afternoon of August 18, 1986 and just two months after he had been paroled from prison, Michael Richard approached Marguerite Dixon's son, Albert, in front of the Dixon home in Hockley and asked if a yellow van parked outside the home was for sale. Albert said the vehicle belonged to his brother who was out of town and suggested that Richard come back another time. Richard left.

When Albert and his sister, Paula, left a few minutes later, Richard returned and entered the house. He took two television sets and put them in the yellow van, sexually assaulted Mrs. Dixon and shot her in the head with a .25 caliber automatic pistol.

Richard told police he ran out of the house and hot-wired the van, then drove to Acres Homes. Richard attempted to sell the televisions there, but ended up just giving the gun to a friend. He drove the van to another home, where it stopped working. He told his friend there that he would return shortly for the van, but never did, the owner of the house called a wrecker the next morning to pick up the vehicle, which led to the police being called when it was discovered the van had been stripped of several valuable items and had obviously been hot-wired to get to its present location.

Mrs Dixon's children returned home around 9:30 p.m. on the day of the killing to find the sliding-glass door open and all the lights in the house turned off. Frightened by the condition of the house, they got a neighbor, who entered the house with a flashlight and a gun. They discovered Mrs. Dixon dead in her bedroom.

The next morning, the detective assigned to the case determined the missing van had been found and interviewed the owner of the home where Richard left the van and the man to whom Richard tried to sell the televisions Based on that information, the police obtained a warrant for Richard's arrest Police found Richard at his mother's home the next evening; Richard admitted he was involved in Mrs Dixon's murder and offered to help find the murder weapon Police found the weapon and testing revealed it to be the gun that fired the fatal shot

PRIOR CRIMINAL HISTORY

During the punishment phase of his trial, the state presented evidence of Richard's two prior convictions for burglary of a habitation. Evidence was also presented of an auto theft charge, committed shortly after the second burglary, but not prosecuted. Richard murdered Mrs. Dixon less than two months after he was released on mandatory supervision for his second burglary conviction.

PROCEDURAL HISTORY

October 29, 1986 -- A Harris County Grand Jury indicted Richard for the capital murder of Marguerite Dixon.
September 4, 1987 – A jury found Richard guilty of capital murder, and he was sentenced to death
September 16, 1992 – The Texas Court of Criminal Appeals reversed Richard's conviction because of a flaw in the jury instructions.
May 15, 1995 – Richard's second trial began.
June 15, 1995 – A second jury found Richard guilty of capital murder, he was sentenced to death.
June 18, 1997 – The Texas Court of Criminal Appeals affirmed Richard's conviction and sentence on direct appeal.
April 3, 1998 -- Richard filed his first application for writ of habeas corpus with the state trial court
June 26, 1998 – The U.S. Supreme Court denied Richard's petition for writ of certiorari.
February 7, 2001 – The Texas Court of Criminal Appeals denied Richard's state application for writ of habeas corpus.
February 7, 2002 – Richard filed a federal petition for writ of habeas corpus in a Houston federal district court.
December 31, 2002 – The Federal District Court denied Richard's petition.
June 20, 2003 – Richard filed a successive state application for the writ of habeas corpus, alleging he was ineligible to be executed based on Atkins claim of mental retardation.
June 27, 2003 – The 5th U.S. Circuit Court of Appeals denied Richard permission to appeal his first federal petition and affirmed the judgment of the federal district court.
March 21, 2007 – The Texas Court of Criminal Appeals denied Richard's second state habeas corpus application.
March 28, 2007 -- Richard filed a motion for authorization to file a successive federal habeas corpus petition in the 5th U.S. Circuit Court of Appeals.
May 15, 2007 – The 5th Circuit Court denied Richard's motion for authorization to file a successive habeas petition.
June 12, 2007 – The trial court set Richard's execution date for Tuesday, September 25, 2007.

MISCELLANEOUS

For additional information and statistics, please go to the Texas Department of Criminal Justice website, www.tdcj.state.tx.us.

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EXHIBIT B

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

MICHAEL WAYNE RICHARD,	§	
	§	
Petitioner,	§	
	§	
	§	H-02-469
	§	
JANIE COCKRELL, Director, Texas Department of Criminal Justice-Institutional Division,	§	
	§	
Respondent,	§	

MEMORANDUM AND ORDER GRANTING SUMMARY JUDGMENT AND DENYING WRIT OF HABEAS CORPUS

This case is before the Court on Petitioner Michael Wayne Richard's Petition for Writ of Habeas Corpus, and Respondent Janie Cockrell's Motion for Summary Judgment. Having carefully considered the Petition, the Summary Judgment Motion, and the arguments and authorities submitted by counsel, the Court is of the opinion that Respondent's Motion for Summary Judgment should be GRANTED, and Richard's Petition for Writ of Habeas Corpus should be DENIED.

I. Background

Petitioner Michael Wayne Richard, currently in the custody of the Texas Department of Criminal Justice, filed this federal habeas corpus application pursuant to 28 U.S.C. § 2254. Because this is Richard's first application for federal habeas relief, a brief history of the case is appropriate.

Richard was originally convicted of capital murder and sentenced to death in September 1987 for the murder of Marguerite Dixon. That conviction was reversed by the Texas Court of Criminal

Appeals. *Richard v. State*, 842 S.W.2d 279 (Tex.Crim.App. 1992). Petitioner was retried in 1995, and was again convicted and sentenced to death. This petition arises out of Petitioner's second trial.

On February 10, 1993, Judge Patricia R. Lykos of the 180th District Court of Harris County, Texas, appointed Stephen C. Taylor, Esq., to represent Petitioner in his trial for capital murder. SHTr. at 40.[1] Mr. Taylor worked in the 180th District Court as part of an appointment system. During the first six months of 1993, Mr. Taylor worked on, investigated, and prepared Petitioner's case. His work included filing a number of pretrial motions. In late June, 1993, the 180th District Court hired a new Court Coordinator, and the court terminated its existing attorney appointment system. In October 1993, the Court Coordinator informed Taylor that he had to quickly "work out" his assigned cases or "give them back." SHTr. at 46-48. Taylor made appearances on Petitioner's behalf into May of 1994. On May 16, 1994, the Court set a trial date of November 7, 1994. Petitioner's Brief at 8.[2]

In July 1994, the Court Coordinator advised Taylor that Judge Lykos removed him from his capital murder cases, including Petitioner's case. The Coordinator instructed Taylor to prepare a motion to withdraw from each of these cases, and obtain his clients' signatures on, and file, the motions. Taylor prepared a motion to withdraw as Petitioner's counsel, and visited Petitioner in July, 1994. SHTr. at 43-45. Taylor explained to Petitioner that he was ordered to withdraw, that it was not his idea to withdraw, and that Petitioner did not have to consent to his withdrawal as counsel.

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[1] "SHTr." refers to the transcript of Petitioner's State habeas corpus proceedings.

[2] Petitioner's brief contains several citations to a "Supplemental Transcript" in support of factual assertions. It is unclear, however, to which document in the record that citation refers. While this Court cannot ascertain where in the record these assertions find support, the Court will accept Petitioner's factual assertions as true for purposes of this analysis.

Petitioner refused to sign the motion, and Taylor so advised the court. The Court Coordinator told Taylor to file the motion without Petitioner's signature, and that Petitioner would be brought to court at a later date. Taylor filed the motion without Petitioner's signature on July 22, 1994. His last contact with Petitioner occurred two days later. SHTr. at 46-48.

Petitioner appeared before Judge Lykos on August 25, 1994. While waiting in a holding cell, Petitioner met his newly appointed counsel, Christopher Goldsmith. Petitioner told Mr. Goldsmith that he did not want Goldsmith to represent him, and that he wanted to speak to Taylor. Goldsmith responded that they were going into court so that he could be appointed to represent Petitioner. *Id.* at 51.

In the courtroom, Judge Lykos informed Petitioner that Mr. Goldsmith would represent him. Despite the fact that Petitioner had not signed Taylor's motion to withdraw, Goldsmith questioned Petitioner as to whether he was threatened or forced to sign the motion. *Id.* at 55-58. Petitioner questioned Taylor's withdrawal, but Judge Lykos told him it was her decision to remove Taylor. *Id.* at 58-60. She also stated that Taylor had been appointed as the "No. 2 attorney" for Petitioner. SHTr. at 57. Judge Lykos explained her policy of appointing a "Number 2" attorney to handle many pretrial matters, but subsequently appointing lead trial counsel. *Id.* at 55.[3] Judge Lykos also told Petitioner that he had to sign in order to have Goldsmith represent him. Though he did not want Goldsmith to represent him, Petitioner signed the document because he believed he would have no

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[3] Petitioner correctly notes that Judge Lykos stated that it was her policy to appoint lead counsel once the State announced its intention to seek the death penalty, but that the State so announced over a year before Judge Lykos appointed Goldsmith. *See* SHTr. at 47. Petitioner does not dispute, however, that Taylor was appointed to serve as his second chair trial counsel.

trial counsel unless he did so. SHTr. at 52. Goldsmith served as Petitioner's lead counsel at trial

Jury selection commenced on May 17, 1995. 6 Tr. at 2.[4] Petitioner filed a "Motion To Voir Dire On Parole Law 20 Year Minimum" in which he sought permission to inform prospective jurors that, if convicted and sentenced to life imprisonment, he would be ineligible for parole until he served 20 years in prison. SHTr. at 63-68. The motion was denied. *Id.* at 69. Petitioner also requested jury instructions on parole eligibility. *Id.* at 70-92. These requests were also denied.

Testimony began on June 8, 1995, 30 Tr. at 4. The evidence presented at trial showed the following:

At approximately 3:20 p.m. on August 18, 1986, Albert Dixon, the deceased's son, saw Petitioner walk past the Dixon home, come back, and walk up the driveway to the house. *Id.* at 150. Petitioner asked Albert if one of the cars in the driveway was for sale. They conversed briefly, and Petitioner left. *Id.* at 152-53. Albert had never seen Petitioner before that moment. *Id.* at 150. Petitioner returned a short while later and asked Albert for a glass of water. *Id.* at 156. Albert invited Petitioner into the house to get a drink. *Id.* at 156-57. Petitioner waited in the family room while Albert got him a glass of water from the kitchen. Marguerite Dixon was also in the family room, and Petitioner had a brief conversation with her. *Id.* at 158. Five or ten minutes later, Albert and his sister Paula left the house to run some errands and pick up their other sister, Marijo, from her job. *Id.* at 161, 192. As they were driving away from the house, they saw Petitioner walking along the street about a hundred yards from the house. *Id.* at 179-80, 192. Both Albert and Paula positively identified Petitioner as the person who came into their house for a drink of water on

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[4] "Tr " refers to the transcript of Petitioner's trial. The number preceding "Tr." refers to the volume number of the transcript. For example, "6 Tr. at 2" refers to volume 6 of the trial transcript at page 2.

August 18, 1986. *Id.* at 165, 188-89.

Paula and Marijo left Albert at a friend's house. *Id.* at 163. At about 9:30 p.m., Marijo and Paula arrived back at the family home. Marijo found a sliding glass door open. *Id.* at 103-10. Albert closed that door before leaving the house earlier in the day. *Id* at 160-61. A TV was missing from the house. *Id.* at 111. Marijo returned to the car and told Paula about the condition of the house. Paula and Marijo called two neighbors. The four of them walked through the house, and discovered Marguerite's body on her bed. *Id.* at 111-22, 195-97. In addition to the TV that Marijo originally noticed was missing, another TV was also missing from the house, and a blue van was missing from the driveway. *Id.* at 203, 31 Tr. at 12.

An autopsy revealed that Marguerite Dixon died from a gunshot wound to the right temple. The gun was touching her head when it was fired. *Id.* at 170-72, 178-79.

Petitioner's younger sister, Pat Williams, testified that she was living with Petitioner and their mother in Hockley, Texas on August 18, 1986. *Id.* at 44-45, 47. At some point after August 18, 1986, Ms. Williams noticed, and reported to the police, that a .25 caliber automatic pistol was missing from her home. *Id.* at 45. A .25 caliber bullet was recovered from Ms. Dixon's body. *Id.* at 66.

Petitioner's fingerprint was lifted from the crime scene, 30 Tr. at 62-63, and he was arrested for the Dixon murder two days later, *id.* at 10-11. He led police to the place where he left the murder weapon,[5] and admitted his involvement in the murder. 31 Tr. at 77-81, 121. Petitioner gave a written statement in which he confessed to stealing the television sets and van and killing Ms. Dixon,

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[5] Petitioner left the gun in the home of Lottie Cole. Ms. Cole did not want the gun in her house, and had her son remove it from the house. Petitioner brought the police to Ms. Cole's house, and Ms. Cole brought the police to the gun. 31 Tr. at 155-59

though he claimed that the gun fired accidentally when she surprised him during the burglary. 32 Tr. at 109-17 and SX 36.[6] On August 22, 1986, two days after Petitioner's arrest, Albert and Paula Dixon both identified him in a police lineup. 30 Tr. at 166-72, 204-09, 32 Tr. at 17-18.

Subsequent tests of the recovered gun revealed that the gun's safety devices functioned properly, and the amount of pressure required to pull the trigger was normal for that type of weapon. *Id.* at 33-34. Tests also revealed that the bullet that killed Ms. Dixon was fired by the recovered gun. *Id.* at 35-40.

The jury found Petitioner guilty of capital murder for murder committed during the commission of a burglary. 37 Tr. at 3-4, 33 Tr. at 66. At the punishment phase of Petitioner's trial, the State reintroduced the evidence presented during the guilt/innocence phase, 34 Tr. at 4, and presented evidence of several prior burglaries committed by the Petitioner, *id.* at 14-24, 35 Tr. at 15-42, and his bad reputation for being peaceful and law abiding, *id.* at 44. The State also presented victim impact testimony by Ms. Dixon's son, Phillip. *Id.* at 75-86.

Dr. Fred Fason testified as an expert psychiatric witness for Petitioner, and opined that Petitioner had an antisocial personality disorder at the time of the offense, 36 Tr. at 8, but that this condition mitigated during Petitioner's incarceration, *id.* at 18-19. A colleague of Dr. Fason's diagnosed Petitioner as having passive aggressive or emotionally explosive disorder. *Id.* Dr. Fason still believed Petitioner to have antisocial personality disorder, though he found Petitioner less likely to act out than he was at the time of the murder. *Id.* at 37. Another defense expert, Dr. Jerome Banks Brown, opined that Petitioner became more stable and motivated following his incarceration and that he also began to express greater concern for other people. *Id.* at 73-75. Petitioner's mother

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[6] "SX" refers to the State's trial exhibits.

testified to the physically and emotionally abusive treatment Petitioner suffered at the hands of his father throughout his childhood. *Id.* at 156-70.

The trial court instructed the jury that it had to answer three special issues: (1) Whether Petitioner's conduct that caused the death of Ms. Dixon was committed deliberately and with the reasonable expectation that the death of Ms. Dixon or another would result, 37 Tr. at 16-17; (2) whether there is a probability that Petitioner would commit criminal acts of violence that would constitute a continuing threat to society, *id.* at 17-18; and (3) Whether there were sufficient mitigating circumstances to warrant a sentence of life imprisonment rather than death, *id.* at 19. The court also instructed the jury that "[t]he mandatory punishment for capital murder is death or confinement in the penitentiary for life." *Id.* at 6. The jury answered the first two special issues in the affirmative, and the third special issue in the negative. *Id.* at 84-86. Accordingly, the court sentenced Petitioner to death. *Id.* at 88-89.

The Texas Court of Criminal Appeals affirmed Petitioner's conviction and sentence on June 18, 1997, *Richard v. State*, No. 72,193 (Tex.Crim.App. June 18, 1997) (en banc), and the United States Supreme Court denied certiorari on July 3, 1998, *Richard v. Texas*, 524 U.S. 956 (1998). Petitioner subsequently filed a State application for post conviction relief, which was denied by the Texas Court of Criminal Appeals on February 7, 2001. Petitioner filed this federal habeas corpus petition on February 7, 2002. It appears, and Respondent does not dispute, that both claims raised in this petition were properly exhausted in the state courts and this petition is timely.

II. Discussion

A. The Anti-Terrorism and Effective Death Penalty Act

This federal petition for habeas relief is governed by the applicable provisions of the Anti-

Terrorism and Effective Death Penalty Act ("AEDPA"), which became effective April 24, 1996. *See Lindh v. Murphy*, 521 U.S. 320, 335-36 (1997). Under the AEDPA, federal habeas relief based upon claims that were adjudicated on the merits by the state courts cannot be granted unless the state court's decision (1) "was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d); *Kitchens v. Johnson*, 190 F.3d 698, 700 (5th Cir. 1999).

For questions of law or mixed questions of law and fact adjudicated on the merits in state court, this Court may grant federal habeas relief under 28 U.S.C. § 2254(d)(1) only if the state court decision "was contrary to, or involved an unreasonable application of, clearly established [Supreme Court precedent]." *See Martin v. Cain*, 246 F.3d 471, 475 (5th Cir.), *cert. denied*, 122 S.Ct. 194 (2001). Under the "contrary to" clause, this Court may afford habeas relief only if "'the state court arrives at a conclusion opposite to that reached by . . . [the Supreme Court] on a question of law or if the state court decides a case differently than . . . [the Supreme Court] has on a set of materially indistinguishable facts.'" *Dowthitt v. Johnson*, 230 F.3d 733, 740-41 (5th Cir. 2000) (quoting *Terry Williams v. Taylor*, 529 U.S. 362, 406 (2000)), *cert. denied*, 532 U.S. 915 (2001).[7]

The "unreasonable application" standard permits federal habeas relief only if a state court decision "identifies the correct governing legal rule from [the Supreme Court] cases but

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[7] On April 18, 2000, the Supreme Court issued two separate opinions, both originating in Virginia, involving the AEDPA, and in which the petitioners had the same surname. *Terry Williams v. Taylor*, 529 U.S. 362 (2000), involves § 2254(d)(1), and *Michael Williams v. Taylor*, 529 U.S. 420 (2000), involves § 2254(e)(2). To avoid confusion, this Court will include the full name of the petitioner when citing to these two cases.

unreasonably applies it to the facts of the particular state prisoner's case" or "if the state court either unreasonably extends a legal principle from [Supreme Court] precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Terry Williams*, 529 U.S. at 406. "In applying this standard, we must decide (1) what was the decision of the state courts with regard to the questions before us and (2) whether there is any established federal law, as explicated by the Supreme Court, with which the state court decision conflicts." *Hoover v. Johnson*, 193 F.3d 366, 368 (5th Cir. 1999). A federal court's "focus on the 'unreasonable application' test under Section 2254(d) should be on the ultimate legal conclusion that the state court reached and not on whether the state court considered and discussed every angle of the evidence." *Neal v. Puckett*, 239 F.3d 683, 696 (5th Cir. 2001), *aff'd*, 286 F.3d 230 (5th Cir. 2002) (en banc), *pet. for cert. filed* (June 13, 2002). The solitary inquiry for a federal court under the 'unreasonable application' prong becomes "whether the state court's determination is 'at least minimally consistent with the facts and circumstances of the case.'" *Id.* (quoting *Hennon v. Cooper*, 109 F.3d 330, 335 (7th Cir. 1997)); *see also Gardner v. Johnson*, 247 F.3d 551, 560 (5th Cir. 2001) ("Even though we cannot reverse a decision merely because we would reach a different outcome, we must reverse when we conclude that the state court decision applies the correct legal rule to a given set of facts in a manner that is so patently incorrect as to be 'unreasonable.'").

The AEDPA precludes federal habeas relief on factual issues unless the state court's adjudication of the merits was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding. *See* 28 U.S.C. § 2254 (d)(2); *Hill v. Johnson*, 210 F.3d 481, 485 (5th Cir. 2000), *cert. denied*, 532 U.S. 1039 (2001). The state court's factual determinations are presumed correct unless rebutted by "clear and convincing evidence." 28 U.S.C.

§ 2254(e)(1); *see also Jackson v. Anderson*, 112 F.3d 823, 824-25 (5th Cir. 1997), *cert. denied*, 522 U.S. 1119 (1998).

B. Procedural Default

The procedural default doctrine may bar federal review of a claim. "When a state court declines to hear a prisoner's federal claims because the prisoner failed to fulfill a state procedural requirement, federal habeas is generally barred if the state procedural rule is independent and adequate to support the judgment." *Sayre v. Anderson*, 238 F.3d 631, 634 (5th Cir. 2001). The Supreme Court has noted that

> [i]n all cases in which a state prisoner had defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice.

Coleman v. Thompson, 501 U.S. 722, 750 (1991). "This doctrine ensures that federal courts give proper respect to state procedural rules." *Glover v. Cain*, 128 F.3d 900, 902 (5th Cir. 1997) (citing *Coleman*, 501 U.S. at 750-51), *cert. denied*, 523 U.S. 1125 (1998); *see also Edwards v. Carpenter*, 529 U.S. 446, 451 (2000) (finding the cause and prejudice standard to be "grounded in concerns of comity and federalism").

C. The Standard for Summary Judgment in Habeas Corpus Cases

"As a general principle, Rule 56 of the Federal Rules of Civil Procedure, relating to summary judgment, applies with equal force in the context of habeas corpus cases." *Clark v. Johnson*, 202 F.3d 760, 764 (5th Cir.), *cert. denied*, 531 U.S. 831 (2000). Insofar as they are consistent with established habeas practice and procedure, the Federal Rules of Civil Procedure apply to habeas cases. *See* Rule 11 of the Rules Governing Section 2254 Cases. In ordinary civil cases, a district

court considering a motion for summary judgment is required to construe the facts in the case in the light most favorable to the non-moving party. *See Anderson v. Liberty Lobby*, 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor"). Where a state prisoner's factual allegations have been adversely resolved by express or implicit findings of the state courts, and the prisoner fails to demonstrate by clear and convincing evidence that the presumption of correctness established by 28 U.S.C. § 2254(e)(1) should not apply, it is inappropriate for the facts of a case to be resolved in the petitioner's favor. *See Marshall v. Lonberger*, 459 U.S. 422, 432 (1983); *Sumner v. Mata*, 449 U.S. 539, 547 (1981); *May v. Collins*, 955 F.2d 299, 310 (5th Cir. 1991), *cert. denied*, 504 U.S. 901 (1992); *Emery v. Johnson*, 940 F.Supp. 1046, 1051 (S.D. Tex. 1996), *aff'd*, 139 F.3d 191 (5th Cir. 1997), *cert. denied*, 525 U.S. 969 (1998). Consequently, where facts have been determined by the Texas state courts, this Court is bound by such findings unless an exception to 28 U.S.C. § 2254 is shown.

D. Summary Judgment in the Instant Case

Richard asserts that the trial judge's actions is removing his original counsel denied him his Sixth Amendment right to counsel, and that the trial court's denial of his requests to inform the jury on his parole eligibility if sentenced to life imprisonment denied him due process of law. These contentions are discussed below.

1. Removal of Counsel

Petitioner contends that the trial court's removal of Mr. Taylor as his counsel denied him due process of law and violated his Sixth Amendment right to counsel because he did not knowingly and voluntarily consent to the change in counsel. The petition cites several cases addressing a presumption in favor of a criminal defendant's right to *retained* counsel of his choosing, but admits

that this principal has never been applied by a federal court in the context of court-appointed counsel. *See* Petitioner's Brief at 6 ("Petitioner's first ground of relief raises a question of first impression in federal jurisprudence . . ."), *id.* at 7 ("in federal jurisprudence that presumption [in favor of a defendant's right to counsel of his choosing] has not been tested and ruled upon in the situation where an accused has been denied not his retained counsel of choice but had his counsel removed from him").

a. Retroactivity

In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court held that, except in very limited circumstances, a federal habeas court cannot retroactively apply a new rule of criminal procedure.[8] The Court explained that

> a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government. To put it differently, a case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final.

Id. at 301 (emphasis in original). The AEDPA effectively codified the *Teague* non-retroactivity rule "such that federal habeas courts must deny relief that is contingent upon a rule of law not clearly established at the time the conviction becomes final." *Peterson v. Cain*, 302 F.3d 508, 511 (5th Cir. 2002) (citing *Terry Williams v. Taylor*, 529 U.S. 362, 380-81 (2000)).

The Supreme Court has held that the Sixth Amendment secures a criminal defendant's right

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[8] Respondent contends that this claim is procedurally defaulted. Because, however, analysis of the procedural default requires a detailed inquiry into possible cause for, and prejudice from, the default, and relief on Petitioner's claim is so clearly barred by the non-retroactivity rule of *Teague v. Lane*, it is unnecessary to address Respondent's procedural default argument. *See Lambrix v. Singletary*, 520 U.S. 518, 523 (1997) ("[j]udicial economy might counsel giving the *Teague* question priority, for example, if it were easily resolvable against the habeas petitioner, whereas the procedural-bar issue involved complicated issues of state law").

to the assistance of counsel in a trial for a serious crime. *See, e.g., Gideon v. Wainwright*, 372 U.S. 335 (1963); *Powell v. Alabama*, 287 U.S. 45 (1932). The Court has also noted, however, that the purpose underlying this constitutional requirement "is simply to ensure that criminal defendants receive a fair trial," *Strickland v. Washington*, 466 U.S. 668, 689 (1984), and that "the appropriate inquiry focuses on the adversarial process, not on the accused's relationship with his lawyer, as such." *United States v. Cronic*, 466 U.S. 648, 657 n.21 (1984). Thus, "the essential aim of the Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers." *Wheat v. United States*, 486 U.S. 153, 159 (1988).

Courts have also recognized a defendant's right, subject to certain limitations, to retain counsel of his choosing, but note that such right is not "inexorable". *See, e.g., United States v. Hughey*, 147 F.3d 423, 428 (5th Cir.) (citing *Wheat*), *cert. denied*, 525 U.S. 1030 (1998). As the Fifth Circuit explained in *Hughey*, "[t]he Sixth Amendment right to counsel of choice is limited, and protects *only a paying defendant's* fair or reasonable opportunity to obtain counsel of the defendant's choice." *Hughey*, 147 F.3d at 428 (emphasis added). Indeed, both the Supreme Court and the Fifth Circuit have expressly held that indigent defendants only have the right to be represented by competent counsel, not by counsel of their choice. "[T]hose who do not have the means to hire their own lawyers have no cognizable complaint so long as they are adequately represented by attorneys appointed by the courts. '[A] defendant may not insist on representation he cannot afford.'" *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617, 624 (1989) (quoting *Wheat*, 486 U.S. at 159) (second bracket in original); *see also Neal v. Texas*, 870 F.2d 312, 315 (5th Cir. 1989) ("there is no constitutional right to representation by a particular attorney").

It is true that the Fifth Circuit has also noted, in this context, that "arbitrary or unreasonable action that impairs the effective use of counsel of choice may violate a defendant's constitutional right to due process of law." *Hughey*, 147 F.3d at 429. However, in light of both the language in *Caplin & Drysdale* and *Hughey* limiting the right to counsel of choice to *paying* defendants, and the express holding in *Neal* that there is no constitutional right to particular counsel, it is clear that an indigent defendant only has a right to effective representation; he has no right to choose his counsel. Even if this Court construed the "arbitrary and unreasonable action" language in *Hughey* as creating ambiguity on the subject, it is simply not the case that such ambiguous existing precedent *dictates* the rule Petitioner seeks. Thus, any such rule would constitute a new rule of criminal procedure. Under *Teague*, it can provide no basis for relief on a petition for a writ of habeas corpus.

b. Due Process And The Right To Counsel

Even if, however, the rule Petitioner seeks did not constitute a "new rule," this claim would provide no basis for relief. The trial court made clear, and the State habeas court found, that Taylor was originally appointed to serve as second chair counsel for Petitioner. SHTr. at 130 ¶ 8. Under the AEDPA, this finding is entitled to deference. Taylor handled many pretrial matters, but was never appointed to serve as lead counsel. When Goldsmith was eventually appointed lead counsel, the trial court gave him the opportunity to select his own second chair. SHTr. at 132 ¶ 16. Thus, under any circumstances, Taylor would not have served as Petitioner's principal counsel.

Moreover, even if the trial court erred in removing Taylor, any such error was harmless. On federal habeas corpus review, an error is harmless unless it

> had substantial and injurious effect or influence in determining the jury's verdict. Under this standard, habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can

establish that it resulted in actual prejudice.

Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (internal quotation marks and citations omitted).[9]

While Petitioner complains that he wanted Taylor to represent him, he notably does not complain that Goldsmith's performance was in any way deficient. Having received competent representation, albeit not by the attorney of his choice, Petitioner cannot plausibly contend that either his Sixth Amendment right to counsel or his Fourteenth Amendment right to a fair trial was in any way abridged. *See, e.g., United States v. Izydore*, 167 F.3d 213, 221 (5th Cir. 1999) (rejecting a claim that forced recusal of counsel denied defendant's rights where, *inter alia*, "[t]here is no indication in the record that [counsel]'s representation was inadequate or in any way unsatisfactory . . ."). Accordingly, this claim provides no basis for relief.

2. Failure to Instruct the Jury on Parole Eligibility

Richard claims that his Fourteenth Amendment right to due process of law was violated by the trial court's failure to instruct the jury on parole eligibility if he received a sentence of life imprisonment. Respondent argues that this claim lacks merit, and that the ruling Richard seeks is barred by the non-retroactivity rule of *Teague v. Lane*, 489 U.S. 288 (1989).

In support of his argument, Richard principally relies on the United States Supreme Court's

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[9] Petitioner contends that the trial court's actions constituted "structural error," *i.e.*, a "defect[] in the constitution of the trial mechanism, which def[ies] analysis by 'harmless-error' standards." *Brecht*, 507 U.S. at 629. *Brecht* explains, however, that "structural error" includes errors such as *deprivation* of the right to counsel. *Id.* They are "those [errors] that make a trial fundamentally unfair. . ." *Id.* at 640 (Stevens, J., concurring). Here, Petitioner does not contend that he was deprived of his right to counsel, or even that his counsel was ineffective. He simply complains that he was not permitted to proceed with his counsel of choice. As the performance of his counsel is certainly reviewable for its effectiveness, *i.e.*, whether counsel "function[ed] as the 'counsel' guaranteed by the Sixth Amendment," *Strickland v Washington*, 466 U.S. 668, 687 (1984), this is not "structural error," and is clearly amenable to harmless error analysis.

decision in *Simmons v. South Carolina*, 512 U.S. 154 (1994). At the time of Simmons' conviction, South Carolina allowed for a sentence of life in prison without the possibility of parole upon conviction of a capital offense. In *Simmons*, the defense sought an instruction informing the jury that life imprisonment would carry no possibility of parole, but the trial court refused. The Supreme Court held that this refusal violated the defendant's right to due process of law. *Simmons*, 512 U.S. at 169 (citing *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

The *Simmons* court reasoned that when a state imposes the death penalty on the premise that the convicted individual poses a danger to society, the fact that the defendant may receive life without possibility of parole "will necessarily undercut the State's argument regarding the threat the defendant poses to society." *Simmons*, 512 U.S. at 169. To hold otherwise would create a "false dilemma by advancing generalized argument regarding the defendant's future dangerousness while, at the same time, preventing the jury from learning that the defendant will never be released on parole." Id. at 171.

Simmons addresses very specific circumstances: (1) When the State seeks the death penalty at least in part on the grounds that the defendant will be a future danger to society; and (2) when the alternative to a sentence of death is a sentence of life imprisonment without the possibility of parole.

> [I]f the State rests its case for imposing the death penalty at least in part on the premise that the defendant will be dangerous in the future, the fact that the alternative sentence to death is life without parole will necessarily undercut the State's argument regarding the threat the defendant poses to society. Because truthful information of parole ineligibility allows the defendant to deny or explain the showing of future dangerousness, due process plainly requires that he be allowed to bring it to the jury's attention by way of argument by defense counsel or an instruction from the court.

Simmons, 512 U.S. at 168-69 (internal quotation marks and citation omitted); *see also*, *Wheat v. Johnson*, 238 F.3d 357, 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001). While the State did seek a death sentence in this case partially on the basis that Richard would pose a continuing threat to

society, the jury's alternative was a parole-eligible life sentence, not, as in *Simmons*, life without parole. *Simmons*, 512 U.S. at 168 n.8.

a. Fifth Circuit Application of *Simmons*

The Fifth Circuit has repeatedly rejected precisely the claim raised by Richard.

> [T]he Supreme Court took great pains in its opinion in *Simmons* to distinguish states such as Texas, which does not provide capital sentencing juries with an option of life without parole, from the scheme in South Carolina which required an instruction on parole eligibility . . . [T]he Fifth Circuit has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole.

Green v. Johnson, 160 F.3d 1029, 1045 (5th Cir. 1998), *cert. denied*, 525 U.S. 1174 (1999); *see also*, *Wheat*, 238 F.3d at 361-62 (5th Cir.), *cert. denied*, 532 U.S. 1070 (2001)(finding *Simmons* inapplicable to the Texas sentencing scheme); *Soria v. Johnson*, 207 F.3d 232 (5th Cir.), *cert. denied*, 530 U.S. 1286 (2000)(finding that "reliance on *Simmons* to demonstrate that the Texas capital sentencing scheme denied [petitioner] a fair trial is unavailing"); *Miller v. Johnson*, 200 F.3d 274, 290 (5th Cir.) ("because Miller would have been eligible for parole under Texas law if sentenced to life, we find his reliance on *Simmons* unavailing")(internal quotation marks and citation omitted), *cert. denied*, 531 U.S. 849 (2000); *Hughes v. Johnson*, 191 F.3d 607, 617 (5th Cir. 1999), *cert. denied*, 528 U.S. 1145 (2000); *Muniz v. Johnson*, 132 F.3d 214, 224 (5th Cir.)(stating that a claim based on *Simmons* "has no merit under the law in our circuit"), *cert. denied*, 523 U.S. 1113 (1998); *Montoya v. Scott*, 65 F.3d 405, 416 (5th Cir. 1995) (holding that *Simmons* claims are foreclosed by recent circuit authority rejecting an extension of *Simmons* beyond situations in which a defendant is statutorily ineligible for parole"), *cert. denied sub nom. Montoya v Johnson*, 517 U S. 1133 (1996); *Allridge v. Scott*, 41 F.3d 213, 222 (5th Cir. 1994)(stating that "*Simmons* is inapplicable to this case"), *cert. denied*, 514 U.S. 1108 (1995);

Kinnamon v. Scott, 40 F.3d 731, 733 (5th Cir.) (refusing to "extend *Simmons* beyond cases in which the sentencing alternative to death is life without parole"), *cert. denied*, 513 U.S. 1054 (1994). If these decisions left any doubt that *Simmons* provides no basis for the relief Petitioner seeks, the Supreme Court removed all such doubt in *Ramdass v. Angelone*, 530 U.S. 156 (2000). "*Simmons* applies only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison." *Id.* at 169.

In this case, life without parole was not a possibility. Richard faced one of two sentences: Death, or life imprisonment with the possibility of parole at a future date. Therefore, as *Ramdass* and Fifth Circuit precedent make unmistakably clear, his case does not fall within the scope of *Simmons*.

b. The Rule Sought by Richard Would Constitute Retroactive Application of a New Rule of Criminal Procedure.

Insofar as Richard seeks an extension of *Simmons* to the Texas scheme, this Court is barred from granting habeas relief on that basis by the non-retroactivity principle of *Teague v. Lane*, 489 U.S. 288 (1989). *See Wheat*, 238 F.3d at 361 (finding any extension of *Simmons* to violate *Teague*); *Clark v. Johnson*, 227 F.3d 273, 282 (5th Cir. 2000)(same), *cert. denied*, 531 U.S. 1167 (2001); *Boyd v. Johnson*, 167 F.3d 907, 912 (5th Cir.) ("[r]elief based on *Simmons* is foreclosed by *Teague*"), *cert. denied*, 527 U.S. 1055 (1999). Thus, even if controlling precedent did not expressly hold that the *Simmons* rule does not apply to the Texas capital sentencing scheme, relief would be barred by *Teague*.

III. Evidentiary Hearing

This Court has discretion whether to conduct an evidentiary hearing. *Michael Williams v. Taylor*, 529 U.S. 420, 436 (2000) (stating that it was "Congress' intent to avoid unneeded hearings in federal habeas corpus"); *Robison v. Johnson*, 151 F.3d 256, 268 (5th Cir. 1998), *cert. denied*, 526 U.S.

1100 (1999). An evidentiary hearing is not required if there are "no relevant factual disputes that would require development in order to assess the claims." *Id.* "If it appears that an evidentiary hearing is not required, the judge shall make such disposition of the petition as justice shall require." Rule 8 of the Rules Governing Section 2254 Cases.

Richard has not demonstrated any factual dispute that would entitle him to relief. Both of Richard's claims can be resolved by reference to the state court record, the submissions of the parties, and relevant legal authority. Accordingly, there is no basis upon which to hold an evidentiary hearing on these claims.

IV. Certificate of Appealability

Richard has not requested a certificate of appealability ("COA"), but this Court may determine whether he is entitled to this relief in light of the foregoing rulings. *See Alexander v. Johnson*, 211 F.3d 895, 898 (5th Cir. 2000) ("It is perfectly lawful for district court's [sic] to deny a COA *sua sponte*. The statute does not require that a petitioner move for a COA; it merely states that an appeal may not be taken without a certificate of appealability having been issued.") A petitioner may obtain a COA either from the district court or an appellate court, but an appellate court will not consider a petitioner's request for COA until the district court has denied such a request. *See Whitehead v. Johnson*, 157 F.3d 384, 388 (5th Cir. 1988); *see also Hill v. Johnson*, 114 F.3d 78, 82 (5th Cir. 1997) ("[T]he district court should continue to review COA requests before the court of appeals does."). "A plain reading of the AEDPA compels the conclusion that COAs are granted on an issue-by-issue basis, thereby limiting appellate review to those issues alone." *Lackey v. Johnson*, 116 F.3d 149, 151 (5th Cir. 1997).

A COA may issue only if the petitioner has made a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *see also United States v. Kimler*, 150 F.3d 429, 431 (5th Cir. 1998). A petitioner "makes a substantial showing when he demonstrates that his application involves issues that are debatable among jurists of reason, that another court could resolve the issues differently, or that the issues are suitable enough to deserve encouragement to proceed further." *Hernandez v Johnson*, 213 F.3d 243, 248 (5th Cir.), *cert. denied*, 531 U.S. 966 (2000). The Supreme Court has stated that

> Where a district court has rejected the constitutional claims on the merits, the showing required to satisfy § 2253(c) is straightforward: The petitioner must demonstrate that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong.

Slack v. McDaniel, 529 U.S. 473, 484 (2000). "The nature of the penalty in a capital case is a 'proper consideration in determining whether to issue a [COA], but the severity of the penalty does not in itself suffice to warrant the automatic issuing of a certificate.'" *Washington v. Johnson*, 90 F.3d 945, 949 (5th Cir. 1996) (quoting *Barefoot v. Estelle*, 463 U.S. 880, 893 (1983)), *cert. denied*, 520 U.S. 1122 (1997). However, "the determination of whether a COA should issue must be made by viewing the petitioner's arguments through the lens of the deferential scheme laid out in 28 U.S.C. § 2254(d)." *Barrientes v. Johnson*, 221 F.3d 741, 772 (5th Cir. 2000), *cert. dismissed*, 531 U.S. 1134 (2001).

This Court has carefully considered both of Richard's claims. While the issues Richard raises are clearly important and deserving of the closest scrutiny, the Court finds that each of the claims is foreclosed by clear, binding precedent. This Court concludes that under such precedents, Richard has failed to make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2). This Court therefore concludes that Richard is not entitled to a certificate of appealability on his

claims.

V. Order

For the foregoing reasons, it is ORDERED as follows:

Respondent Janie Cockrell's Motion for Summary Judgment is GRANTED;

Petitioner Michael Wayne Richard's Petition for Writ of Habeas Corpus is in all respects DENIED, and Richard's Petition is DISMISSED;

No Certificate of Appealability shall issue in this case.

The Clerk shall notify all parties and provide them with a true copy of this Order.

SIGNED at Houston, Texas, on this 30 day of Dec., 2002.

DAVID HITTNER
UNITED STATES DISTRICT JUDGE

EXHIBIT C

73 Fed.Appx. 84, 2003 WL 21757442 (C.A.5 (Tex.))

United States Court of Appeals,
Fifth Circuit.
Michael Wayne RICHARD, Petitioner-Appellant,
v.
Janie COCKRELL, Director, Texas Department of Criminal Justice, Institutional Division, Respondent-Appellee.

No. 03-20125.
June 27, 2003.

Appeal from the United States District Court for the Southern District of Texas (02-CV-469).

Before JONES, STEWART, and DENNIS, Circuit Judges.

EDITH H. JONES, Circuit Judge.[FN*]
FN* Pursuant to 5TH CIR. R. 47.5, the Court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

*1 Michael Wayne Richard (Richard) was convicted of capital murder and sentenced to death. Richard seeks a certificate of appealability (COA) on two claims to challenge the district court's denial of his 28 U.S.C. § 2254 petition for habeas corpus relief. We deny a COA on his claims.

I. BACKGROUND

Richard was convicted in Texas state court for fatally shooting Marguerite Lucille Dixon in the course of a burglary. The Texas Court of Criminal Appeals reversed the conviction for failure to comply with *Penry v. Lynaugh*, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed.2d 256 (1989). On retrial, Richard was again sentenced to death for capital murder; the Texas Court of Criminal Appeals affirmed Richard's conviction and denied him habeas corpus relief. The United States Supreme Court denied Richard's petition for writ of certiorari. In February 2002, Richard filed a federal petition for writ of habeas corpus. The district court denied the petition and refused to issue a COA. Richard asks this Court to grant a COA on two claims; each requested COA is denied.

II. DISCUSSION

Richard's 28 U.S.C. § 2254 habeas petition, filed in February 2002, is subject to the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA). *See Penry v. Johnson,* 532 U.S. 782, 792, 121 S.Ct. 1910, 1918, 150 L.Ed.2d 9, 22 (2001). Richard must obtain a COA before he can appeal the district court's denial of habeas relief. 28 U.S.C. § 2253(c)(1); *Slack v. McDaniel,* 529 U.S. 473, 478, 120 S.Ct. 1595, 1600, 146 L.Ed.2d 542, 551 (2000).

To obtain a COA, Richard must make a "substantial showing of the denial of a constitutional right." 28 U.S.C. § 2253(c)(2); *Slack,* 529 U.S. at 483, 120 S.Ct. at 1603, 146 L.Ed.2d at 554. When a district court rejects a constitutional claim on the merits, a COA will be granted only if the applicant "demonstrate[s] that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong." *Miller-El v. Cockrell,* 537 U.S. 322, 123 S.Ct. 1029, 1040, 154 L.Ed.2d 931, 950-51 (2003) (quoting *Slack,* 529 U.S. at 484). When the denial of relief is based on procedural grounds, *Slack* provides a two-prong test for determining whether a COA should issue: the applicant must show (1) that "jurists of reason would find it debatable whether the petition states a valid claim of the denial of a constitutional right" and (2) that "jurists of reason would find it debatable whether the district court was correct in its procedural ruling." *Slack,* 529 U.S. at 484. Each prong of the test is part of a threshold inquiry, and a court may dispose of the application by resolving the issue whose answer is more apparent from the record and arguments. *Id.* at 485.

A. Richard's appointed counsel

Richard argues that he was denied the right to counsel and due process under the Sixth and Fourteenth Amendments when the state trial court removed his court-appointed second-chair attorney, Stephen Taylor, and appointed Christopher Goldsmith to represent Richard. The district court concluded that the nonretroactivity rule of *Teague v. Lane,* 489 U.S. 288, 109 S.Ct. 1060, 103 L.Ed.2d 334 (1989), barred Richard's claim, and that, in any event, his claim was meritless. Because reasonable jurists would debate neither the district court's *Teague* ruling nor the district court's assessment of Richard's constitutional claim, we deny a COA on this claim.

*2 Richard argues that under *Cuyler v. Sullivan,* 446 U.S. 335, 100 S.Ct. 1708, 64 L.Ed.2d 333 (1980), and *Wheat v. United States,* 486 U.S. 153, 108 S.Ct. 1692, 100 L.Ed.2d 140 (1988), a court may not interfere with an indigent defendant's right to "counsel of his choice" absent a conflict of interest or serious potential for a conflict. This court has "repeatedly held that the right to counsel guaranteed by the Sixth Amendment *does not* include the right to counsel of one's choice." *United States v. Breeland,* 53 F.3d 100, 106 n. 11 (5th Cir.1995). In *Yohey v. Collins,* 985 F.2d 222 (5th Cir.1993), for example, when a Texas trial court, against Yohey's wishes, replaced his counsel with another attorney, this court held that the "right to counsel guaranteed by the Sixth Amendment does not include the right to counsel of Yohey's choice." *Id* at 228.

Here, Richard does not complain of the adequacy of his ultimate representation. He simply argues that an indigent defendant has a right to appointed "counsel of choice." Reasonable jurists

would not debate the district court's conclusion that this rule was not "*dictated* by precedent existing at the time [Richard's] conviction became final" *Teague*, 489 U.S. at 301, and therefore cannot serve as a basis for habeas relief.

The district court also concluded that even if the rule Richard seeks were not barred by *Teague*, any error in this case would be harmless because it did not result in "actual prejudice." *Brecht v. Abrahamson*, 507 U.S. 619, 637, 113 S.Ct. 1710, 123 L.Ed.2d 353 (1993) (concluding that "habeas petitioners may obtain plenary review of their constitutional claims, but they are not entitled to habeas relief based on trial error unless they can establish that it resulted in 'actual prejudice.' "). Richard does not contend that Goldsmith's performance was in any way deficient. Because Richard received competent representation, jurists of reason would not find debatable the district court's conclusion that neither Richard's Sixth nor Fourteenth Amendment rights were violated.

B. Opportunity to inform the jury of parole eligibility and to explain or deny certain statements made at trial

Richard argues that he was denied the effective assistance of counsel and due process guaranteed by the Sixth and Fourteenth Amendments because he was not allowed to inform the jury of Texas law governing parole ineligibility and because "he was unable to explain or deny" certain statements made at trial concerning the future dangerousness of prisoners released from death row. Because jurists of reason would not debate the district court's conclusion that Richard's arguments are meritless and barred by *Teague*, we deny a COA.

In *Simmons v. South Carolina*, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed.2d 133 (1994), the Supreme Court held that at the time of death penalty deliberations, the jury should be informed that a defendant is ineligible for parole. This court "has repeatedly refused to extend the rule in *Simmons* beyond those situations in which a capital murder defendant is statutorily ineligible for parole." *Green v. Johnson*, 160 F.3d 1029, 1045 (5th Cir.1998). *Simmons* does not apply to the present case because if Richard received a life sentence, he would be eligible for parole after he served a minimum of 20 years in prison.

*3 Richard's reliance on *Skipper v. South Carolina*, 476 U.S. 1, 106 S.Ct. 1669, 90 L.Ed.2d 1 (1986), and *Gardner v. Florida*, 430 U.S. 349, 97 S.Ct. 1197, 51 L.Ed.2d 393 (1977), does not support his argument. *Skipper* held that evidence of a defendant's good behavior in prison should be admitted during the punishment phase of a capital sentencing hearing as relevant mitigating evidence, 476 U.S. at 8, and *Gardner* held that a death sentence could not constitutionally be based on portions of a presentence investigation report that were not disclosed to counsel for the parties, *Gardner*, 430 U.S. at 351. Richard relies on these cases to argue that his due process rights were violated when he was unable to explain or deny certain statements made during trial Specifically, he complains of testimony elicited by the State on cross-examination of a professor at the Criminal Justice Center at Sam Houston State University that at least one former death row inmate released from prison killed a person in free society and of the prosecutor's reiteration of that statement during the State's punishment argument.

Simmons involves application of the principles of *Skipper* and *Gardner* to the South Carolina sentencing scheme, *Simmons*, 512 U.S. at 164-65, but this court has repeatedly distinguished the Texas sentencing scheme. An opportunity to explain or deny statements with information regarding parole eligibility is "*required* only where state law provides for life imprisonment without possibility of parole as an alternative to the death penalty." *Woods v. Cockrell*, 307 F.3d 353, 361 (5th Cir.2002).

Although this issue is easily disposed of on the merits, Richard is also not entitled to a COA because reasonable jurists would not debate that Richard's interpretation of *Simmons*, *Skipper*, and *Gardner* would constitute a "new rule" of constitutional law barred by *Teague*. *See Wheat v. Johnson*, 238 F.3d 357, 361 (5th Cir.2001).

III. CONCLUSION

For the foregoing reasons, we deny Richard's request for a COA on both claims.

COA **DENIED.**

C.A.5 (Tex.),2003.
Richard v. Cockrell
73 Fed.Appx. 84, 2003 WL 21757442 (C.A.5 (Tex.))

Briefs and Other Related Documents (Back to top)

• 03-20125 (Docket) (Feb. 4, 2003)
END OF DOCUMENT

EXHIBIT D

Not Reported in S.W.3d, 2007 WL 841768 (Tex.Crim.App.)

ORDER
Do Not Publish

Court of Criminal Appeals of Texas.

Ex Parte Michael Wayne RICHARD.

No. WR-47911-02.

March 21, 2007.

On Application for Writ of Habeas Corpus, In Cause No. 456621 from the 182nd District Court of Harris County.

ORDER

PER CURIAM.

*1 This is a subsequent application for writ of habeas corpus filed pursuant to Texas Code of Criminal Procedure, Article 11.071, Section 5. Applicant asserts that he is mentally retarded and may not be executed. We remanded his claim to the convicting court for resolution.

Applicant was convicted of capital murder on September 4, 1987. Because of error in that trial we reversed the conviction and remanded for a new trial. *Richard v. State,* 842 S.W.2d 279 (Tex.Crim.App.1992). After remand, applicant was again convicted of capital murder and sentenced to be executed. We affirmed the conviction and sentence. *Richard v State,* No. 72,193 (Tex.Crim.App. June 18, 1997). On April 3, 1998, applicant filed his initial application for writ of habeas corpus pursuant to Article 11 .071. We denied relief. *Ex parte Richard,* WR-47,911-01 (Tex.Crim.App. February 2, 2000).

The convicting court has returned the case to this Court with its findings of fact and conclusions of law and a recommendation to deny relief. We have reviewed the record of the proceedings on remand. The convicting court's findings of fact and conclusions of law are supported by the

record and we adopt them as our own. We conclude that applicant has not shown he is mentally retarded and, therefore, relief is denied.

IT IS SO ORDERED THIS THE 21ST DAY OF MARCH, 2007.

PRICE, J., would file and set.

Tex.Crim.App.,2007.
Ex Parte Richard
Not Reported in S.W.3d, 2007 WL 841768 (Tex.Crim.App.)

Briefs and Other Related Documents (Back to top)

- WR-47,911-02 (Docket) (Sep. 11, 2003)

END OF DOCUMENT

EXHIBIT E

DEATH PENALTY CASE

07-20232
No. [redacted]

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re MICHAEL WAYNE RICHARD
Petitioner.

SECOND MOTION FOR AUTHORIZATION TO FILE SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE.

Leslie M. Ribnik
P.O. Box 271507
Houston, Texas 77277
713.665.0771
713.592.6073 (Fax)
ribnik@swbell.net
Federal Bar No. 12673
Texas Bar No. 16826330

Petitioner Michael Wayne Richard asks this Court for authorization to file the attached successive habeas corpus application in the United States District Court for the Southern District of Texas.[1] Mr. Richard wishes to raise the following claim:

I. Execution of the petitioner, a mentally retarded man, is barred by the Eighth Amendment to the United States constitution and the standard s of *Atkins v. Virginia.*

Mr. Richard can make a *prima facie* showing that his *Atkins* claims meet the requirements for filing a successive petition under 28 U.S.C. § 2244(b)(2)(A).

I.

On March 28, 2001, Counsel was appointed by the United States District Court for the Southern District of Texas (Houston Division)for purposes of preparing, filing, and litigating an application for a post-conviction writ of *habeas corpus*.

On December 22, 2002, the federal District Court denied *habeas corpus* relief and a Certificate of Appealability.

On April 14, 2003, on appeal to this court, Applicant filed an Application for Issuance of a Certificate of Appealability.

---

[1] Section 2244(b)(3)(A) requires Mr. Richard to move this Court for authorization to file a successive application in the district court. This Court must determine whether the successive application satisfies the criteria of § 2244(b)(2). 28 U.S.C. § 2244(b)(3)(C). Thus, Mr. Richard has attached his successive application to this motion so that this Court may review it and make the § 2244(b)(3)(C) determination. *See* Appendix A.

On June 20, 2003, Applicant filed in the 182nd district Court of Harris County, Texas, and in the Texas Court of Criminal Appeals a subsequent Application for Postconviction Writ of *Habeas Corpus* (Cause No. 456221-B) stating an Eight Amendment *prima facie Atkins* claim for relief. On the same day, Applicant filed in this court his Motion for Authorization to File Successive Petition for Writ of *Habeas Corpus* raising a *prima facie Atkins* mental retardation claim for relief. Attached to the motion was Applicant's successive petition stating a *prima facie* claim of mental retardation. Also, on the same day, Applicant filed his successive petition in the federal District Court in Houston, Texas.

On June 27, 2003, this court denied Applicant's Application for Issuance of a Certificate of Appealability.

On July 14, 2003, Petitioner filed a motion to abate Consideration of Successive Petition for Writ of *Habeas Corpus*.

On July 17, 2003, this court granted the motion to abate consideration of the successive petition ordering petitioner to refile his application within seven calendar days of completing exhaustion of state remedies.

On October 8, 2003, the Texas Court of Criminal Appeals remanded the case to the trial court for consideration of the *Atkins* claim.

On December 29, 2006, the trial court concluded an evidentiary hearing in

Cause No. 456221-B. The Court executed findings of fact and conclusions of law and the case was returned to the Court of Criminal Appeals.

On March 21, 2007, the Court of Criminal Appeals denied *habeas corpus* relief.

II.

MR. RICHARD'S CLAIMS SATISFY THE REQUIREMENTS, IN 28 U.S.C. § 2244(b)(2)(A), FOR FILING A SUCCESSIVE HABEAS CORPUS APPLICATION.

Section 2244(b)(2), states that "[a] claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless . . . the application shows the claim relies on a new rule of constitutional law, made retroactive on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2).

On June 20, 2002, the Supreme Court banned the execution of the mentally retarded. *Atkins v. Virginia*, 536 U.S. 304 (2002). It is beyond cavil that this prohibition was a new rule made retroactive to cases on collateral review. *See Bell v. Cockrell*, 310 F.3d 330, 332 (5th Cir. 2002); *see also Penry v. Lynaugh*, 492 U.S. 302, 330 (1989). Mr. Richard's *Atkins* claim has not been considered by the federal courts. Because *Atkins* gave rise to a new rule of law that applies retroactively to cases on collateral review, Mr. Richard should be authorized to

file the attached successive petition in the district court.

While the language of 28 U.S.C. § 2244(b)(2) makes no reference whatsoever as to any requirement of proof of the underlying claim raised in a successive application, it appears to leave evaluation of the merits of a successive claim to the district court; and in this instance, does not require a determination of the merits of applicant's underlying claim of mental retardation. The inquiry to be conducted by this court at this juncture should be limited to whether Applicant has shown that he has never before presented his *Atkins* claim and whether the claim relies on a previously unavailable new rule of constitutional law made retroactive to cases on collateral review. The record in this case clearly shows both requirements are satisfied.

CONCLUSION

ACCORDINGLY, Mr. Richard asks this Court to:

1. Find that he has made a prima facie showing that he meets the requirements for filing a successive habeas petition and grant him authorization to file the attached habeas corpus application in the United States District Court for the Southern District of Texas;

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

Respectfully submitted,

Leslie M. Ribnik
P. O. Box 271507
Houston, Texas 77277
713.665.0771
713.592.6073
ribnik@swbell.net
Federal bar No. 12673
Texas Bar No. 16826330

CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of March, 2007, a true and correct copy of the foregoing motion was served by United State Postal Service Certified Mail, Return Receipt Requested upon the Office of the Attorney General of Texas, Capitol Litigation Division, P.O. Box 12548, Capitol Station, Austin, Texas 78711-2548.

Leslie M. Ribnik

APPENDIX A

APPENDIX A

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

MICHAEL WAYNE RICHARD,	§	
	§	
Petitioner,	§	
	§	
	§	
-VS-	§	CAUSE NO. _____
	§	
	§	
NATHANIEL QUARTERMAN,	§	
Director, Texas Department of	§	
Criminal Justice, Institutional Division,	§	
	§	
Respondent.	§	

SUCCESSIVE PETITION
FOR WRIT OF HABEAS CORPUS

LESLIE M. RIBNIK
State Bar No. 16826330
Federal Bar No. 12673
P.O. Box 271507
Houston, Texas 77277
713.665.0771 (office)
713.592.6073 (fax)
ribnik@swbell.net (e-mail)

ATTORNEY FOR PETITIONER
MICHAEL WAYNE RICHARD

SUBJECT INDEX

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CASES

STATUTES AND RULES

LEARNED TREATISES

TO UNITED STATES DISTRICT JUDGE:

COMES NOW, MICHAEL WAYNE RICHARD, Petitioner herein, by and through his Attorney of Record, Leslie M. Ribnik, and Pursuant to 28 U.S.C. Sec. 2254 files this petition for writ of habeas corpus.

STATEMENT OF JURISDICTION

Petitioner is currently being illegally restrained of his liberty under a sentence of death pursuant to the judgment in Cause No. 456621 in the 182nd Judicial District of Harris County, Texas, at the Polunsky Unit of the Texas Department of Criminal Justice, Institutional Division, by the Director of said department.

This Court has jurisdiction pursuant to 28 U.S.C. Secs. 2241(c)(3) and 2254.

IDENTIFICATION OF PARTIES

The parties to this action are:

(1) Michael Wayne Richard, Petitioner;

(2) Nathaniel Quarterman, in his official capacity as Director of the Texas Department of Criminal Justice, Respondent. Mr. Quarterman may be served with process through his attorney, Mr. Baxter Morgan, Assistant Attorney General of Texas, P.O. Box 12548, Austin, Texas 78711-2548.

PROCEEDINGS TO DATE

In August, 1987, Petitioner was convicted and sentenced to death for the capital offense of murder in the course of committing burglary, in Cause No.456621 in the 182nd District Court of Harris County, Texas.

In 1992, the Texas court of Criminal Appeals reversed the judgment of the trial court and remanded the cause for a new trial.

In June, 1995, Petitioner was convicted by a jury of the offense of capital murder on a plea of not guilty. The jury assessed punishment at death.

On June 18, 1997, the Texas Court of Criminal Appeals affirmed the conviction in an unpublished decision in *Richard v. State*, No. 72,193 (Tex. Crim. App. June 18, 1997)(not designated for publication).

On April 1, 1998, Petitioner filed his petition for writ of habeas corpus pursuant to TEX. CODE CRIM. PROC. ANN. Art.11.071 (Vernon Supp. 1997).

The trial court did not conduct an evidentiary hearing.

On July 3, 1998, the United States Supreme Court denied Petitioner's petition for writ of certiorari in *Richard v. Texas*, ___U.S.___, 118 S.Ct. 2376, 141 L.Ed.2d 743 (1998).

On February 7, 2001, The Texas Court of Criminal Appeals denied habeas relief.

On February 2, 2002, Petitioner filed a petition for writ of habeas corpus in the United States District Court for the Southern District of Texas, Houston, Division.

On December 31, 2002, the U.S. District Court denied habeas relief and denied a certificate of appealability on Mr. Richard's claims.

On January 24, 2003, Mr. Richard filed his Notice of Appeal.

On April 14, 2003, Mr. Richard, on appeal to the United States Court of Appeals for the Fifth Circuit, filed an application for Issuance of a Certificate of Appealability.

On June 20, 2003, Mr. Richard filed in the 182nd district Court of Harris County, Texas, and in the Texas Court of Criminal Appeals a subsequent Application for Postconviction Writ of *Habeas Corpus* (Cause No. 456221-B) stating an Eight Amendment *prima facie Atkins* claim for relief. On the same day, Petitioner filed in the United States Court of Appeals for the Fifth Circuit his Motion for Authorization to File Successive Petition for Writ of *Habeas Corpus* raising a *prima facie Atkins* mental retardation claim for relief. Attached to the motion was Applicant's successive petition stating a *prima facie* claim of mental retardation. Also, on the same day, Applicant filed his successive petition in the federal District Court in Houston, Texas.

On June 27, 2003, the Court of Appeals denied Applicant's Application for Issuance of a Certificate of Appealability.

On July 14, 2003, Petitioner filed in the Court of Appeals a motion to abate Consideration of Successive Petition for Writ of *Habeas Corpus*.

On July 17, 2003, the Court of appeals granted the motion to abate consideration of the successive petition ordering petitioner to refile his application within seven calendar days of completing exhaustion of state remedies.

On October 8, 2003, the Texas Court of Criminal Appeals remanded the case to the trial court for consideration of the *Atkins* claim.

On December 29, 2006, the trial court concluded an evidentiary hearing in Cause No. 456221-B. The Court executed findings of fact and conclusions of law and the case was returned to the Court of Criminal Appeals.

On March 21, 2007, the Court of Criminal Appeals denied *habeas corpus* relief.

QUESTIONS FOR REVIEW

Petitioner raises the following grounds for review:

1. Whether the Eighth Amendment to the United States Constitution and *Atkins v. Virginia*, 536 U.S. 304, 122 S.Ct. 2242 (2002), prohibits the execution of Petitioner, a mentally retarded man?

FIRST GROUND FOR HABEAS CORPUS RELIEF

EXECUTION OF PETITIONER, A MENTALLY RETARDED MAN, IS BARRED BY THE EIGHTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND THE STANDARDS OF ATKINS V. VIRGINIA

I.

STANDARD OF REVIEW

A.

The Standard for Determining Mental Retardation

The American Association on Mental Retardation ("AAMR") defines mental retardation as: (1) subaverage general intellectual functioning (*i.e.*, an I.Q. of approximately 70 or below) existing concurrently with (2) related limitations in two or more of the following applicable adaptive skill areas: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics, leisure, and work; and (3) onset before the age of eighteen. AMERICAN ASSOCIATION ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, AND SYSTEMS OF SUPPORTS 5 (9th ed. 1992) [hereinafter AAMR, MENTAL RETARDATION]. The Diagnostic and Statistical Manual of Mental Disorders ("DSM-IV-TR") employs a definition that is nearly identical.[1] Each of the three elements is an essential

[1] The DSM-IV-TR defines mental retardation as follows:

> The essential feature of Mental Retardation is significantly subaverage general intellectual functioning (Criterion A), that is accompanied by significant limitations in adaptive functioning in at least two of the following skill areas: communication, self-care, home living, social interpersonal skills, use of community resources, self-direction, functional academic skills, work, leisure, health and safety (Criterion B). The onset must occur before age 18 years (Criterion C).

American Psychiatric Association, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL

component of a professional diagnosis of mental retardation. The Supreme Court has expressly relied on the AAMR's three-prong definition of mental retardation, *Penry v. Lynaugh*, 492 U.S. 302, 307-09, n.1 (1989) ("Penry I"), as has this Court. *Ex parte Tennard*, 960 S.W.2d 57, 60-61 (Tex. Crim. App. 1997).

The crux of the clinical assessment of mental retardation is measuring the magnitude of the individual's intellectual impairment. To be classified as mentally retarded, an individual must be found to be functioning at the very lowest intellectual level encountered in the general population, as measured by standardized intelligence tests. The intellectual functioning of any individual with mental retardation will fall within the lowest three percent of the entire population.[2] Thus, the first prerequisite for a diagnosis of mental retardation is severely impaired cognitive functioning.

The second requirement serves to confirm the reality of the psychometric measurement of the individual's severe impairment. The impairment must be observed to have "real-world" effects on the individual's life functioning. As the Supreme Court has noted, all people with mental retardation "have a reduced ability to cope with and function in the everyday world." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985). The requirement of real, identifiable disabling consequences in the individual's life – of reduced ability to "cope with common life demands," DSM-IV-TR 42 – assures that the diagnosis applies only to persons with

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DISORDERS 41 (4TH ed., text rev. 2000) ("DSM-IV-TR").

[2] See, e.g., Amici Curiae Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in McCarver v. North Carolina, No. 00-8727, at 7 ("studies invariably put the number [of people with mental retardation] at less than 3% of the general population, usually in the 1% to 3% range"); DSM-IV-TR 46 ("The prevalence rate of Mental Retardation has been estimated at approximately 1%.").

an actual, functional disability. *See* AAMR, MENTAL RETARDATION 38. Previous versions of the definition of mental retardation expressed this requirement in terms of "deficits in adaptive behavior," *see Penry I*, 492 U.S. at 308 n.1 (citing an earlier edition of the AAMR's classification manual), while more recent formulations employ the terms "related limitations" in "adaptive skill areas." AAMR, MENTAL RETARDATION 5; see DSM-IV-TR 42. Both sets of terms reflect the same concept: that the impairment in intellectual ability must have an actual impact on everyday functioning.

The third defined requirement is that the disabling condition must have manifested itself during the developmental period of life, before the individual reaches the age of eighteen. Requiring the disability to have occurred at birth or during childhood means that the individual's mental development during his or her crucial early years was affected by the impairment of the brain's ability to function. This element of the definition is derived from the understanding of modern neuroscience about the way the brain develops and the implications of its arrested development for cognitive impairment. See AAMR, MENTAL RETARDATION 16-18. In practical terms, it means that any individual with mental retardation not only has a measurable and substantial disability now, but that he or she also had it during childhood, significantly reducing the ability to learn and gain an understanding of the world during life's formative years.

II.

Factual Background

Michael Wayne Richard is Mentally Retarded.

In both the 1985 trial, defense counsel during both the guilt-innocence and punishment stages of trial put on testimony and evidence showing mental retardation. Counsel presented substantial evidence of mental retardation. This evidence showed that: (1) Applicant's I.Q. measured 62, well below 70; (2) he had significant limitations in his adaptive functioning; and

(3) he manifested these diagnostic features at an early age.

A.

Intellectual Functioning

Applicant has significant subaverage intellectual functioning. On December 16, 1986, and May 15, 1987, psychologist Jerome B. Brown, Ph.D.,[3] interviewed and examined Mr. Richard pursuant to a court order for the purposes of determining competency to stand trial and sanity. A battery of psychological tests were administered by Dr. Brown, including a mental status examination, the Rohrshach Technique, Memory for Designs Test, the Wide Range Achievement Test, and the Ammons IQ Test (which is readily comparable to the Wechsler Intelligence Scale for Children (WIC-III) and the Wechsler Adult Intelligence Scale -Revised (WAIS-R). Dr. Brown reported that Applicant had an I.Q. of 62, placing him in the "upper limits of the mentally defective range." (App. A). He also reported, "[e]stimates of reading ability place this individual in the upper third grade level (3.9)." Dr. Brown testified accordingly at trial that Applicant proved to have "an IQ score of 62, which places him in the upper limits of the mentally defective range." He explained that "[an] IQ below 69 or 70 is obtained only by about three percent of the population and is considered quite low." [Statement of Facts (1987) VII, 1030: 12-24]. He went on to testify that Applicant fell into the category of the "educable mentally retarded," meaning Applicant "would only be able to learn fairly unskilled or, at best, semiskilled kinds of jobs."[Statement of Facts (1987) VII, 1033:10-20]. Furthermore, he testified that Applicant's "Memory is generally poor [and] [t]hat's consistent with his lower intellectual ability." [Statement of Facts (1987) VII, 1033:20-23]. Dr. Brown also testified that Applicant

[3]Dr. Brown is the same psychologist who testified at the competency hearing in *Penry I.*

was functionally illiterate, "mean[ing] he does not read and write well enough to operate independently in the world around us. [Statement of Facts (1987) VII, 1108:3 -21].

B.

Adaptive Functioning

Mr. Richard also clearly meets the second prong of the definition of mental retardation: He suffers from significant concurrent impairments in intellectual ability that have an actual impact on his everyday functioning. The records also reveal that Mr. Richard suffers from profound deficits in other areas of adaptive functioning which contribute directly to his inability to cope with life's day-to-day demands.

Psychiatrist Fred Fason, M.D., testified at trial that he had diagnosed Mr. Richard as a "sociopathic personality, antisocial type," or to use the DSM-3 term for it, "antisocial reaction" (also, formerly referred to as "psychopathic behavior"). [Punishment Statement of Facts (1987) X 180:19-22; 181:6-9]. More in particular, he further testified, in relevant part, that those with a sociopathic personality:

> were individuals that appeared to be rational when you talked to them, but their behavior patterns through life were self-destructive and irrational. [Punishment Statement of Facts (1987), X 181:15-18].

> Gratitude is not an emotion that is very consistent with sociopathic personality or antisocial responses. They tend to be manipulative, they tend not to have their behavior much influenced by guilt or shame and at time not even influenced very much with the consequences of the behavior. They are notoriously self-defeating in the pattern of their lives . . . {T}hese individuals who are very narcissistic or self-centered individuals and by that I mean they have big egos, so to speak, in lay terminology. They feel entitled to whatever it is they want. {Punishment Statement of Facts (1987), X 181:25 – 182:14].

In this narcissistic development can be either primary narcissism, which is kind of where all of us are when we are babies. We feel like we're the center of the world and entitled to what we get. Most of us around the age of 2 and a half or 3 discover that our mothers take care of us because they love us, not because they have to and we make a transition from seeing ourselves as a center of the earth to viewing ourselves as dependent upon our parents for loving and caring and attention. The sociopathic personality either, or the narcissistic individual, either does not make the transition from primarily narcissism to relating to others with love and what's called primary narcissism. If a person never made the transition or at times they will make the transition and they will experience love and gratitude and later trauma in their lives of one sort of another will cause them to regress back to this primitive narcissistic position where they will consider what they want and their egos to be the most important things in the world and that they are entitled to whatever they want. [Punishment Statement of Facts (1987), X 183:3 – 184:1].

Now, in normal development we made a transition from relating to the world from the point of view of the narcissistic way of relating to the world, to psychoanalytic language of relations or relations of love with others. No, the sociopath either has difficulties, if it's a primary narcissistic disorder that underlays it, has never made this transition of learning to consider other people as being like himself or looking at the world through other people's eyes; if he has made the transition, then there is later trauma that has occurred of a variety of sorts that causes him to regress back to that narcissistic phase of development. [Punishment Statement of Facts (1987), X 186:10 -23].

There are a number of things that can cause the regression back. Abuse is certainly one of them. Coldness can cause it, but there are other conflicts as well that can lead to it and it's not so much what triggers it, it's much like coronary artery, for example, or a heart attack, if you ask me what are all the things that can cause a heart attack in an individual in terms of external stimuli or types of stress, you could go on and on and on and it may be anger, may be exertion, may be diet or a lot of things, but the important thing is the stress occurs and the infarct occurs. The important thing in the antisocial reaction is that the regression back to the narcissistic level occurs. [Punishment Statement of Facts (1987), X 188:4-19].

So, most of us, when we are – have an emotion and we have a desire associated with that emotion, before we act upon it we consider what it says

about us. We consider how it affects others, particularly individuals that we care about and is our conscience and we consider the consequences about our behavior . . . . The sociopathic mind works in a different way. At an early age the essential ingredient that is added to the narcissism of the sociopath is an attitude of saying to themselves . . . [a]nd this is characteristic of almost all sociopathic personal disorders that I interviewed over the last 30 years and this is, if you will, the indulgence of the court, to quote, it is a quote, "Fuck it. I don't care," they say to themselves. [Punishment Statement of Facts (1987), X 192:8 – 193:21].

Now, all of us at one time or another may say that or most of us at

one time or another, we may say it under specific situations. The difference between normal individuals who may say it occasionally and the sociopathic personality disorder is it becomes an ingrained defended characteristic way of dealing with impulses . . . . The sociopath, it's long since been an ingrained automatic way of responding to impulses, so that they quit deliberating each time they get an impulse . . . . After awhile the process becomes unconscious and they don't even thing anymore about the consequences or they don't even thing about how it affects people or what it says about them. They just react and this is the impulsivity of the sociopath and that's why they are in trouble with the law and everything else. [Punishment Statement of Facts (1987), X 194:10 – 195:23].

The sociopathic sina qua non of the character disturbance is it becomes a habitual ingrained way of responding rather than an occasional thing. [(Punishment Statement of Facts (1987), X 212:15-18].

[T]he deliberation about acting upon emotion, the process of deliberation the normal person goes through before we act upon our emotions get short circuited in the psychopath. Now, if the emotion's not there, its – they may think and they may deliberate and they may plan and they may scheme and they may do a lot of things, but when they get the strong emotion that it short circuits the process of deliberation. [Punishment Statement of Facts (1987), X 263:15-25).

Most people in the borderline mentally retarded range, that is an IQ of 60, 75, or 80, manage to function in life by dependency on someone who has a normal intelligence . . . . Individuals who have sociopathic personality disturbance of limited intelligence have especially difficult problems to deal with because of their sociopathic personality disturbance, their difficulties in respecting authority, and have a great deal of difficulty for forming the kind of relationship of someone who becomes like a guide or mentor and they are prone to be rebellious

> against that, so, they don't have – very rarely do they have someone like that they can depend upon and lean on for guidance or counsel. . . . the low IQ, in and of itself affects a person's ability to deliberate because of little intelligence, but it doesn't preclude it. The sociopathic element that is added to it makes – when he's under strong emotion or strong desire, he is prone to just react without deliberation and that's because the sociopathic defense of not caring that it's become habitual. So, the deliberation process, under strong emotion, becomes, or strong desire, becomes superfluous to the sociopath. That's why there is self-destructive lives. [Punishment Statement of Facts (1987), X 215:2–216:24].

In its 1992 decision reversing Mr. Richard's conviction, the Court of Criminal Appeals summarized much of the testimony regarding events and circumstances of his childhood as follows:

> At the punishment phase of trial appellant presented testimony from his mother and one of his three sisters. Their testimony establishes an extensive history of physical and emotional abuse at the hands of appellant's father. When appellant was a child his father worked as a 'long-haul truck driver' transporting grain and livestock. Consequences he 'stay[ed] up on alcohol and drugs,' viz: amphetamines. Appellant's father drank 'every day,' and when drinking, he was violent and quick to anger over trivial matters. Appellant's mother was sent to the hospital an unspecified number of occasions with broken ribs, a broken nose, broken foot and lumps on her head, one where appellant's father had struck her with a .38 caliber pistol. She cataloged her many scars for the jury. Appellant, youngest child, was his mother's favorite, and drew his father's ire for that reason. His father called him a 'punk,' and accused him of having sexual relations with his mother even as a child. When appellant would try to protect his mother, he suffered beatings for his troubles. The authorities would not intervene, considering the situation to be a 'domestic disturbance.'
>
> At times, appellant's father would openly co-habitate with other women, to the shame of his children. Other times he kicked his wife and children out of the house, forcing them to stay with appellant's aunt. Appellant's mother suffered a nervous breakdown when appellant was four or five years old, and was hospitalized for three months. Since that time she has

been under psychiatric care, suffering from anxiety and depression.

> All of the children were beaten from about the age of eight years old. Appellant' father used bull whips, cattle prods and leather belts. Appellant was beaten once with a 'hanger.' Appellant reportedly never cried out during these beatings. His father sexually abused each of his sisters from the age of puberty on. Once he fired a shotgun at one of appellant's sisters when she refused his advances. Appellant was aware of these abuses. He left home for good at fourteen when '[h]is daddy had whopped him with a lead rope and he said he wasn't going see that anymore.' All of his siblings had run away by the age of fifteen. Appellant's brother is an unemployed alcoholic. Two of his sisters are under psychiatric care.
>
> Appellant was a premature baby, and spent the first month of his life in the hospital. When he was finally released, 'he still was sick and we had to put him in the hospital practically every year until he got 6 years.' He has asthma and was allergic to milk. In school appellant was 'slow,' earing D's and F's. He did not make it past the ninth grade, and read without comprehension. His father taught him to steal, directing him to take livestock from rodeos. Not surprisingly, appellant developed into an angry adolescent with a bad temper.

Richard, 842 S.W.2d at 281, 282. As the court wrote, "the instance record contains evidence from which a rational jury could infer that appellant's conduct in this case was 'attributable to' his sociopathic personality disorder, which is turn was brought on by trauma emanating from his 'disadvantaged background:' " *Richard,* at 283.

C.

Manifestation during developmental period of life

As the Court of Criminal Appeals noted, Mr. Richard did not make it past the ninth grade and earned D's and F's. Mr. Richard's mother, who died in 2002, reported to undersigned counsel that Mr. Richard had been assessed by an expert for the Waller Independent School District as mentally retarded and, beginning the fifth grade, he had been placed in special

education classes; and that he remained in special education until he dropped out of school in the ninth grade. She also reported that Mr. Richard attended school in the Houston Independent School District for The seventh, eighth, and ninth grades. Mr. Richard, when asked by undersigned counsel, also reported that he had been in "special classes" from the fifth grade onward.. Upon investigation by undersigned counsel, it was found that Mr. Richard's school records had been destroyed by both the Waller Independent School District and the Houston Independent School District. The Waller Independent School District had and has a policy of retaining a student's records for eight years past the last date of service to the student except for high school transcripts for students who have graduated from high school. The Houston Independent School District had and has a policy of retaining a student's records for seven years past the last date of service to the student, except for high school transcripts for students who have graduated from high school. Waller Independent School District did maintain special education records past its usual eight years, but sometime during the 1980's, its "old" special education student records were destroyed. Similarly, while Houston Independents School District

did retain the records of special education students past the usual seven years, during or about May, 2001, the special education records more than seven years old were destroyed.

However, from the testimony of Drs. Brown and Fason, (significant portions of which are quoted by the Court of Criminal Appeals in support of its 1995 decision to reverse and remand) and the evidence as summarized by the Court of Criminal Appeals, manifestations of low intelligence and a lack of adaptive skills during Mr. Richard's formative years is apparent. At the very least, it is apparent that his mentally retarded level of intelligence and his manifest

sociopathic personality originates in his earliest and later formative years.

The evidence set out in detail *supra* demonstrates that Mr. Richard is mentally retarded. At the very least, it raises a prima facie case that Mr. Richard meets the definition of mental retardation developed by the AAMR and the DSM-IV-TR, and adopted by the Supreme Court and this Fifth Circuit Court of Appeals. Mr Richard's claim in a proposed successive habeas corpus application has not been previously presented in any prior application. The claim relies on *Atkins*, a decision that stated a new, retroactively applicable rule of constitutional law that was previously unavailable to Mr. Richard. And Mr. Richard could be categorized as mentally retarded within the understanding of *Atkins* and *Penry I*.

III.

Argument and Authorities

The question of whether Mr. Richard is mentally retarded has never been directly addressed or resolved by any jury. The facts and issue of his mental retardation was not raised by his trial counsel in the retrial of the case. However, Mr. Richard raises a *prima facie* case of mental retardation, which is "simply a sufficient showing of possible merit to warrant a fuller explanation by the district court." *Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442 (1985)

A.

Mental retardation impairs understanding and functioning in ways that substantially reduce personal culpability.

Mental retardation is a distinct and readily diagnosable form of mental disability. Because the cognitive impairment is present during the individual's childhood, it has a compounding effect. Negative feedback received in early social development operates to further

impair emotional and adaptive growth. Johnny L. Matson & Virginia E. Fee, Social Skills Difficulties Among Persons With Mental Retardation, in HANDBOOK OF MENTAL RETARDATION 471 (Johnny L. Matson & James A. Mulick eds., 2d ed. 1991); see generally Harvey N. Switzky, Mental Retardation and the Neglected Construct of Motivation, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 194, 195 (1997). A "history of failure, social deprivation, and cognitive deficiencies" leads to "high levels of anxiety regarding . . . [the] ability to cope with . . . life experiences." Harvey N. Switzky, Individual Differences in Personality and Motivational Systems in Persons with Mental Retardation, in ELLIS' HANDBOOK OF MENTAL DEFICIENCY, PSYCHOLOGICAL THEORY, AND RESEARCH 343, 346 (William E. MacLean, Jr., ed., 1997).

The resulting emotional and behavioral problems cause mentally retarded individuals to display disruptiveness, attention deficit problems, low self-esteem, overactivity, distractibility, and difficulties with interpersonal relationships. MARY BEIRNE-SMITH, JAMES R. PATTON & RICHARD ITTENBACH, MENTAL RETARDATION 216 (1994); see generally Josephine C. Jenkinson, Factors Affecting Decision-Making by Young Adults with Intellectual Disabilities, 104 AM. J. MENTAL RETARDATION 320, 321 (1999). Mentally retarded persons often act impulsively, as it is "difficult for them to control, direct, or modify their drives and impulses effectively." Rachel Levy-Shiff, Peri Kedem & Zamira Sevillia, Ego Identity in Mentally Retarded Adolescents, 94 AM. J. MENTAL RETARDATION 541, 547 (1990) (noting that behavioral problems are often reported among retarded adolescents); see also, e.g., Thomas L. Whitman, Self Regulation and Mental Retardation, 94 AM. J. MENTAL RETARDATION 347, 360 (1990); James W. Ellis & Ruth A. Luckasson, Mentally Retarded Criminal Defendants, 53 GEO. WASH. L. REV. 414, 429 (1985). This interplay between cognitive and adaptive deficiencies during the developmental period impairs moral development as well. AAMR, MENTAL RETARDATION 9, 40; see generally

Richard M. Gargiulo & Janet A. Sulick, Moral Judgment in Retarded and Nonretarded School Age Children, 99 J. PSYCHOL. 23, 25 (1978) (noting that "cognitive development serves as a mediator of moral judgment"); Joan E. Perry & Dennis Krebs, Role-Taking, Moral Development, and Mental Retardation, 136 J. GENETIC PSYCHOL. 95, 102 (1980).

B.

A sentence of death is grossly disproportionate to the personal culpability of defendants afflicted by mental retardation.

The Supreme Court has repeatedly emphasized the central importance of personal culpability in capital sentencing and has identified four principles to guide the inquiry whether an individual's behavior is sufficiently culpable to warrant a death sentence consistently with the Eighth Amendment's prohibition of "'excessive'" punishments.[4] First, the death penalty "takes as its predicate the existence of a fully rational, choosing agent." *Thompson v. Oklahoma*, 487 U.S. 815, 825-26 n.23 (1988). This predicate is grounded in the fundamental principle that "the more purposeful is the criminal conduct, . . . the more seriously it ought to be punished." *Tison v. Arizona*, 481 U.S. 137, 156 (1987). As a result, the death penalty is an appropriate punishment for those who deliberate or act with calculus, *Enmund v. Florida*, 458 U.S. 782, 799 (1982) (internal quotation omitted), but is a disproportionate penalty for those with "an immature, undeveloped ability to reason," *Thompson*, 487 U.S. at 835 n.43 (internal quotation omitted), or those without the capacity to make a fully reasoned choice.

Second, capital punishment is appropriate only for one who has the capacity to "evaluate the consequences of his conduct," *Penry I*, 492 U.S. at 322, both in terms of the consequences of the crime (the likelihood of death; the gravity of loss of life), and in terms of the connection between that crime and the punishment for it. For example, the Supreme Court has held that the

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[4] Gregg v. Georgia, 428 U.S. 153, 173 (1976) (lead opinion).

death penalty is appropriate for a person who "knowingly, engage[s] in criminal activities known to carry a grave risk of death," *Tison*, 481 U.S. at 157, and who thus appreciates the causal connection between his criminal act and the death of his victim. Conversely, the Court has said that death is inappropriate for those who "wholly lack[ ] the capacity to appreciate the wrongfulness of their actions," *Penry I*, 492 U.S. at 333 (discussing the common law prohibition on executing "idiots"), or who lack the "comprehension of why . . . [they have] been singled out" for the punishment of death. *Ford v. Wainwright*, 477 U.S. 399, 409 (1986).

Third, the punishment of death is sufficiently related to an individual's personal culpability only when he or she can fairly be expected to conform to the behavior of a responsible, mature citizen. Society presumes that individuals are capable of conforming to its basic norms and deserve the fullest measure of punishment if they fail to do so. Nevertheless, there are exceptions to this presumption. Children who commit murder, for example, are not as culpable as adults because they are "less mature and responsible" and often have "less capacity to control their conduct." *Eddings v. Oklahoma*, 455 U.S. 104, 115-16 & n.11 (1982) (plurality opinion). Because adolescence is "a time of great . . . stress," and children often lack the tools to manage these stresses adequately, they are "not prepared to assume the full responsibilities" of adulthood. *Thompson*, 487 U.S. at 835 n.42 and at 825. For this reason, "their irresponsible conduct is not as morally reprehensible." *Id.* at 835. Consequently, even those minors under the age of sixteen who can be convicted of murder cannot constitutionally be sentenced to death.

Finally, the death penalty is proportionate only when a defendant's individual culpability and personal responsibility warrant the sanction of death. *Tison*, 481 U.S. at 149; *Enmund*, 458 U.S. at 801; *see id.* at 798 ("The focus must be ***his*** culpability . . . ."). On the one hand, the law recognizes that reckless behavior resulting in death – even if the death was "caused" by another – can be sufficiently culpable to warrant the death penalty. *Tison*, 481 U.S. at 157. On the other

hand, the law recognizes that a defendant's culpability is diminished – though not extinguished – by the wrongful and negligent conduct of others. Youth crime, for example, "is not exclusively the offender's fault," because it also represents "a failure of family, school and the social system." *Eddings*, 455 U.S. at 115 n. 11 (internal quotation omitted). Similarly, the Supreme Court has held that a person is less culpable when, by his very nature, he is more "susceptible to influence" by others. *Id.* at 115.

In light of these four principles – all tied to the touchstone of "personal culpability" – the Eighth Amendment requires that individuals with mental retardation, like Mr. Richard be excluded as a class from the sanction of death:

I. Individuals with mental retardation do not have the same capacity as others to make reasoned choices. The most fundamental feature of mental retardation is impaired intellectual capacity – specifically, a level of intelligence that places the individual at the very bottom of the population in terms of reasoning ability. This impairment affects the most basic skills, such as fact retention, problem solving, and concentration. It also impedes more abstract thought processes, such as the ability to reason and make logical connections (a process requiring transference of information and generalization skills). AAMR, MENTAL RETARDATION 9, 15, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

Reasoned choice of a course of action involves many steps: sustaining a certain level of attention; focusing on the relevant and avoiding distraction by the irrelevant; assessing the situation correctly (e.g., understanding language and reading social cues); generating a set of alternative possible responses; choosing among them; and then exercising control to act consistently with that choice. The acquisition of these skills is seldom complete until the end of normal childhood, and such skills will ordinarily remain fragmentary at best in a mentally retarded individual. Jenkinson, 104 AM. J. MENTAL RETARDATION at 321. Moreover, the

deficits in language and communication that commonly accompany mental retardation may limit the range of responses that a person has, meaning that a person with mental retardation might not, for example, take the ordinary step of asking for more information in response to a puzzling situation. See AAMR, MENTAL RETARDATION 15; Jenkinson, 104 AM. J. MENTAL RETARDATION at 321. For these and other reasons, mentally retarded individuals commonly demonstrate rigid thought processes and "exhibit an inflexible pattern of problem-solving," Michael L. Wehmeyer & Kathy Kelchner, Interpersonal Cognitive Problem-Solving Skills of Individuals with Mental Retardation, 29 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITIES 265, 267 (1994), a seeming inability "to realize that similar situations often require similar responses and . . . that dissimilar situations may require different responses." Whitman, 94 AM. J. MENTAL RETARDATION at 348. The death penalty is inappropriate for those who "have [a] reduced capacity for considered choice." *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring).

2. In addition, individuals with mental retardation are less able to appreciate the consequences of their actions. Appreciating consequences involves several discrete steps: considering alternative possible responses; predicting the consequences of each alternative; evaluating the different consequences (which includes applying abstract standards of principle and values to the predicted consequences); and choosing among the appraised consequences. A mentally retarded individual's decreased ability to reason and understand cause-and-effect impairs his or her ability to take even the simplest of these steps (foreseeing that Y will follow from X, and that Y may cause harm to one or more others, thereby affecting the judgment about X), let alone to follow the more advanced steps or to comprehend the ultimate connection between a harmful act and any resulting punishment. As the Supreme Court has noted, "less intelligence" means that an individual "is less able to evaluate the consequences of his or her

conduct." *Thompson*, 487 U.S. at 835.

3. Like young children, persons with mental retardation do not possess the requisite levels of maturity and responsibility to make death an appropriate punishment. Because of their impairments in intellectual functioning and their "reduced ability to cope with . . . the everyday world," *Clebourne*, 473 U.S. at 442, persons with mental retardation do not have the same capacity – "the experience, perspective, and judgment," *Eddings*, 455 U.S. at 116 – to navigate life's stresses. Lacking these tools, they are often unable to "control . . . or modify their . . . impulses effectively," Levy-Shiff et al., 94 AM. J. MENTAL RETARDATION at 547, and, like juveniles, are "much more apt to be motivated by mere emotion." *Thompson*, 487 U.S. at 835. Because the intellectual impairment of those with mental retardation manifests itself during the developmental period, there is often a "chain reaction," with adaptive problems leading to further adaptive problems, see, e.g., Matson & Fee, Social Skills Difficulties Among Persons With Mental Retardation, in HANDBOOK OF MENTAL RETARDATION at 471, resulting in "serious emotional problems," *Eddings*, 455 U.S. at 116, and "arrested emotional development," *Penry I*, 492 U.S. at 324. This cycle traps them in the posture of an "emotionally disturbed . . . [individual] with a disturbed child's immaturity." *Eddings*, 455 U.S. at 116.

As with children, the moral reasoning of individuals with mental retardation is only partially developed: The significantly sub-average intellectual functioning that is a defining characteristic of mental retardation translates into serious impairments of moral understanding. See AAMR, MENTAL RETARDATION 9, 40. Underlying the growth of moral reasoning is not only the ability to learn and retain information, but also the ability to think abstractly instead of concretely. The development of abstract thinking and moral reasoning occurs in adolescence. See, e.g., JEAN PIAGET, THE MORAL JUDGMENT OF THE CHILD 27-29, 96-98 (Free Press ed. 1997). When a toddler misbehaves, we respond with concrete commands (e.g., "Don't hit."). We

save lower-level abstractions (e.g., "We have a rule against hitting.") for somewhat older children. See id. at 27-29, 178-85. A young child might understand the lower-level abstraction that there are things called rules and they are not to be broken, but will not be able to reason about rules (e.g., "There is a rule against hitting, which is really a rule about not hurting people, so doing other things that hurt people is also off limits."). *See id.* at 27-29, 89, 134. Once moral reasoning has developed, a person can recognize that there are rules, and also principles underlying those rules, embodying values against which rules might be measured. *See id.* at 27-29, 95. Only at this stage of moral development does an individual function as an independent moral being, responding to his or her own developed system of morals, and not merely submitting to the authority of another. *See generally id.* But this stage is beyond what those with mental retardation can achieve. See AAMR, MENTAL RETARDATION 9, 40; see also Jenkinson, 104 AM. J. MENTAL RETARDATION at 321.

4. Finally, persons who have mental retardation do not possess the requisite level of individual culpability to warrant death. Due to their impairments, mentally retarded individuals are "susceptible to influence." *Eddings*, 455 U.S. at 115. More importantly, the intellectual impairment of adults with mental retardation is permanent, immutable, and beyond the individual's control. *See Cleburne*, 473 U.S. at 442. While the adaptive behavior of mentally retarded individuals can improve, *Penry I*, 492 U.S. at 338 – indeed, mentally retarded individuals often do well in structured environments – the possibility for improvement is largely, if not entirely, outside their control. It depends on educational and support services, which their familial, social, and economic circumstances may or may not make possible and actually deliver. From this standpoint, individuals with mental retardation simply do not possess the level of responsibility for their own destiny that is the Eighth Amendment predicate for the punishment of death, a penalty that sums up an individual's life and declares it forfeit.

C.

Executing individuals with mental retardation serves no legitimate penal objective.

Not only is the death penalty always out of proportion to the culpability of persons with mental retardation, but death for such persons does not – and cannot – comport with the "two principal social purposes [of punishment]: retribution and deterrence of capital crimes by prospective offenders." *Thompson*, 487 U.S. at 836 (internal quotations and citation omitted). As the Supreme Court has recognized, the death penalty cannot serve the goals of deterrence if a person cannot reason through the consequences of actions or understand the link between his or her actions and the ordained punishment. See, e.g., *id.* at 837. The inability to imagine and assess competing courses of action is a core aspect of mental retardation. This limitation dramatically reduces the ability of mentally retarded persons to engage in the sort of self-controlled reasoning process that makes deterrence a real constraining force. Nor can removing persons with mental retardation from the universe of those who are subject to execution conceivably reduce any deterrent effect the death penalty may have on the rest of the population. *See Ford*, 477 U.S. at 407.

Similarly, "[t]he heart of the retribution rationale is that a criminal sentence must be directly related to the personal culpability of the criminal offender." *Tison*, 481 U.S. at 149; see *Ford*, 477 U.S. at 409 ("we may seriously question the retributive value of executing a person who has no comprehension of why he has been singled out and stripped of his fundamental right to life"). Given the diminished level of personal culpability of defendants with mental retardation, executing them cannot fulfill the goal of retribution. Thus, it "is nothing more than the purposeless and needless imposition of pain and suffering," *Penry I*, 492 U.S. at 335, in violation of the Eighth Amendment.

D.

The system of case-by-case determination in capital cases has not protected defendants with mental retardation from improvident death sentences.

As experience since *Penry I* has demonstrated, several factors heighten the risk that the death penalty may be imposed on persons with mental retardation despite *Penry's* assurance that they can plead their disability in mitigation. These factors include (a) the breakdown in procedural protections that results from a defendant's possession of the cognitive and behavioral impairments characteristic of mental retardation; and (b) jurors' lack of experience with, and faulty stereotypes regarding, persons with mental retardation, coupled with the potential for prosecutors to exploit such ignorance or stereotypes. The upshot is an inherently unreasonable "risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty." *Lockett v. Oklahoma*, 438 U.S. 586, 605 (1978) (plurality opinion); see generally Carol Steiker & Jordan Steiker, Defending Categorical Exemptions to the Death Penalty: Reflections on the ABA's Resolutions Concerning the Execution of Juveniles and Persons with Mental Retardation, 61 LAW & CONTEMP. PROBS. 89, 98-104 (Autumn 1998).

Breakdown of procedural protections. The substantial cognitive and behavioral impairments that are at the core of mental retardation severely hamper a retarded defendant at every stage of the criminal process. See generally RONALD W. CONLEY, RUTH LUCKASSON & GEORGE N. BOUTHILET, eds., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (1992). These handicaps are so pervasive and so insidious that they undermine confidence that a death sentence imposed on such a defendant was the product of a fair procedure that adequately weighed the mitigating effects of his or her mental retardation. In an alarming number of cases that have come to light since *Penry I*, even the reliability of the guilty verdict has been put in doubt.

In many cases, these problems begin during the investigative phase, and in particular with the questioning of suspects who have mental retardation. Confessions and inculpatory statements made by mentally disabled suspects are particularly problematic regarding not only their

voluntariness, but also their reliability. The propensity of many individuals with mental retardation to do whatever is asked of them by figures of authority has been widely documented in the clinical literature,[5] and this has generated well-founded concern about the process by which confessions are obtained. See, e.g., AMERICAN BAR ASSOCIATION, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS, Standards 7-5.8 through 7-5.10 (1989), and accompanying Commentary.

Even more pervasive difficulties are encountered in the representation of defendants with mental retardation at trial. The limitations inherent in a defendant's mental retardation can place substantial obstacles in the way of a fair trial.[6] And in many cases, the defendant's limited ability to make a meaningful contribution to his or her defense is compounded by an extraordinarily tenacious desire to ensure that no one – including defense counsel – discovers the extent of her

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[5] See, e.g., L. W. Heal & C. K. Sigelman, Response Biases in Interviews of Individuals with Limited Mental Ability, 39 J. INTELLECTUAL DISABILITY RESEARCH 331 (1995); Carol K. Sigelman, Edward C. Budd, Cynthia L. Spanel & Carol J. Schoenrock. When in Doubt, Say Yes: Acquiescence in Interviews with Mentally Retarded Persons, 19 MENTAL RETARDATION 53 (1981).

[6] The relevant limitations are abundantly documented in the clinical literature on mental retardation. They include deficits in memory, see, e.g., CECIL D. MERCER & MARTHA E. SNELL, LEARNING THEORY RESEARCH IN MENTAL RETARDATION 94-141 (1977); James M. Bebko & Helen Luhaorg, The Development of Strategy Use and Metacognitive Processing in Mental Retardation: Some Sources of Difficulty in JACOB A. BURACK, ROBERT M. HODAPP & EDWARD ZIGLER, eds. HANDBOOK OF MENTAL RETARDATION AND DEVELOPMENT 382, 384-95 (1998) (hereafter BURACK HANDBOOK); Richard L. Luftig & Ronald E. Johnson, Identification and Recall of Structurally Important Units in Prose by Mentally Retarded Learners, 86 AM.J. MENTAL DEFICIENCY 495, 501(1982); deficits in receptive and expressive language skills, see, e.g., Anne E. Fowler, Language in Mental Retardation: Associations with and Dissociations from General Cognition in BURACK HANDBOOK at 290; inattention and impulsivity, see, e.g., Whitman, 94 AM. J. MENTAL RETARDATION at 347; Johnny L. Matson & Virginia E. Fee, in HANDBOOK OF MENTAL RETARDATION 468; and problems regarding motivation, see, e.g., J. Merighi, M. Edison & Edward Zigler, The Role of Motivational Factors in the Functioning of Mentally Retarded Individuals in R. M. HODAPP, J. A. BURACK, & EDWARD ZIGLER, eds., ISSUES IN THE DEVELOPMENTAL APPROACH TO MENTAL RETARDATION 114 (1990); Jenkinson, 104 AM. J. MENTAL RETARDATION at 321-28; Harvey N. Switzky, Mental Retardation and the Neglected Construct of Motivation, 32 EDUC. & TRAINING IN MENTAL RETARDATION & DEVELOPMENTAL DISABILITY 194 (1997).

impairment or even that she suffers from mental retardation.[7] This tragically misguided instinct, which occurs in case after case, thwarts counsel's ability to explain, and the jury's opportunity to consider, the significance of a defendant's mental retardation.

Jurors' unfamiliarity. Juries often have difficulty understanding the intellectual and behavioral deficits characterizing a defendant with mental retardation. While the physical immaturity and youthful appearance of juvenile defendants call attention to their likely emotional immaturity, the limitations on the cognitive and adaptive skills of individuals with mental retardation are hidden behind the facade of an adult physique. Apart from individuals with Down's Syndrome or some similar condition that results in distinctive facial features – rarely encountered in capital cases – mentally retarded defendants cannot be identified by their physical appearance alone. Jurors see someone who looks normal, who is not manifestly "crazy," and they do not grasp the profound yet subtle ways a person with retardation is limited in his capacity to understand the world and to act appropriately. They see a defendant who is not acting in a visibly "remorseful" fashion in the courtroom and they attribute it to callousness or heartlessness, rather than understanding that a person with mental retardation may have no real comprehension of what is going on.

To make matters worse, defendants with mental retardation often behave in ways that are contextually inappropriate, and this may impair their case at trial and sentencing. Mentally retarded defendants frequently smile where others would display gravity; they fall asleep; they stare at jurors. This inappropriate behavior – which is often intended to mask the defendant's lack of understanding of the courtroom proceedings – can convey a false impression of

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[7] This phenomenon, too, has been fully documented in the clinical literature. See, e.g., JAMES R. DUDLEY, CONFRONTING THE STIGMA IN THEIR LIVES: HELPING PEOPLE WITH A MENTAL RETARDATION LABEL (1997); Judith Cockram, Robert Jackson & Rod Underwood, People with an Intellectual Disability and the Criminal Justice System: The Family Perspective, 23 J. INTELLECTUAL & DEVELOPMENTAL DISABILITY 41 (1998); S.E. Szivos & E. Griffiths, Group Processes in Coming to Terms with a Mentally Retarded Identity, 28 MENTAL RETARDATION 333 (1990).

callousness or lack of remorse. The prosecution can, and often does, use this behavior against the defendant with mental retardation. The prosecution also may exploit defendants' mental retardation by arguing that their pronounced deficit in intelligence makes them more dangerous, and that this is an additional reason to impose the death penalty. See, e.g., *Penry I*, 492 U.S. at 323; Steiker & Steiker, 61 LAW & CONTEMP. PROBS. at 101-02. Prosecutors have no difficulty in exploiting common stereotypes of mentally retarded individuals, characterizing them as "subhuman" and "without self-control." Jurors may be unable to escape the grip of such prejudicial images when they have had no occasion to encounter people with mental retardation under the circumstances of ordinary living and to overcome the stereotypes that make "the mentally retarded" an unfamiliar, alien, and repellent group.

The unreliability of the process. These various problems combine to produce an unacceptable risk that defendants who have mental retardation and are innocent have been, and will continue to be, sentenced to death. Reports of the recent cases of Earl Washington and Anthony Porter, among others, provide sobering cautionary tales.

In 1983, Earl Washington, who has mental retardation, was arrested in the state of Virginia on a charge of assault. Under interrogation, Washington confessed to the rape and murder of a young woman – as well as to numerous other crimes that police recognized he could not possibly have committed. Notwithstanding many inconsistencies in his statements, Washington was convicted of murder and sentenced to death. In 1994, only days before his scheduled execution, Governor Douglas Wilder commuted his death sentence to life imprisonment because DNA evidence created doubt about Washington's guilt. On October 2, 2000, Governor James Gilmore granted Washington a full pardon, stating that a jury presented with modern DNA evidence "would have reached a different conclusion" in his case despite his

confession.[8]

Anthony Porter, an Illinois man with an IQ of 51, was on the verge of being executed in 1998 when his lawyers obtained a stay of execution in order to raise the issue of his competence to be executed (under *Ford*) and the question whether execution of an individual with mental retardation was precluded by the Illinois Constitution. During the period of the stay, conclusive evidence establishing Porter's innocence fortuitously came to light. This incident was a primary factor in Governor George Ryan's decision to institute a moratorium on the execution of death sentences in Illinois.[9]

The arbitrariness of the process. The Supreme Court in *Penry I* optimistically assumed that juries would be able to make reliable sorting decisions among defendants with mental retardation, culling the more culpable from those whose disabilities precluded a determination that they were the "worst of the worst," deserving only of death. But the experience of the last decade belies that forecast. Instead, case-by-case administration of the death penalty has turned on factors other than juries' "reasoned ***moral*** response to the defendant's background, character, and crime." *Franklin v. Lynaugh*, 487 U.S. 164, 184 (1988) (Justice O'Connor, concurring) (internal quotation omitted).

Where there is a grave risk that the death penalty will be meted out irrationally among a particular subclass of capital defendants, not only "in spite of factors which may call for a less

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[8] See Francis X. Clines, Virginia Man Is Pardoned in a Murder; DNA Is Cited, N.Y. Times, Oct. 3, 2000, at A20.

[9] See generally Eric Zorn, Questions Persist as Troubled Inmate Faces Electrocution, Chi. Trib., Sept. 21, 1998, at 1. While Washington and Porter were sentenced to death before the Supreme Court's decision in Penry I, the fact that neither man received postconviction relief in the wake of that decision indicates that the capital sentencing processes employed in Virginia and Illinois already comported with the safeguards required by the Court in Penry I, and therefore that such procedures did not eliminate the risk of executing an innocent man with mental retardation.

severe penalty," *Lockett*, 438 U.S. at 605, but also in ignorance of realities which may cast unperceived doubts upon some defendants' guilt, the exclusion of that category from the pool of constitutionally death-eligible defendants serves a critical "narrowing" function. *See Zant v. Stephens*, 462 U.S. 862, 877-78 (1983); *Arave v. Creech*, 507 U.S. 463, 475-78 (1993). It is also necessary to prevent the random and infrequent application of the death penalty within the subclass. Juries do not generally sentence mentally retarded defendants to death when the jurors understand the defendant's disabilities or the moral issue at stake. They do so fortuitously, largely as a consequence of the difficulties that some retarded defendants and their lawyers have in getting the jurors to see the defendant as she is. "[T]he infrequent and haphazard handing out of death sentences by capital juries was a prime factor underlying [the Court's] judgment in *Furman* . . . that the death penalty [when] . . . administered in unguided fashion, was unconstitutional." *Thompson*, 487 U.S. at 831 (citations omitted). Only a categorical rule can avert the demonstrated danger that death is being meted out in such an unconstitutional manner to persons with mental retardation.

E.

Executing persons with mental retardation offends "evolving standards of decency."

When the Supreme Court first considered the constitutionality of executing the mentally retarded in 1989, it concluded that, as of that time, there was insufficient evidence of a national consensus against the execution of persons with mental retardation to justify a constitutional prohibition. *See Penry I*, 492 U.S. at 335. Justice O'Connor recognized, however, that "a national consensus against execution of the mentally retarded may someday emerge reflecting . . . 'evolving standards of decency.'" *Id.* at 340.

That day has arrived. Much has occurred since the Supreme Court decided *Penry I*. The great weight of evidence now demonstrates that American society overwhelmingly opposes the execution of persons with mental retardation, and that this national consensus is shared by nearly every other society in the world. The emergent national consensus is most immediately evident

in the actions of state legislatures, which, the Court has said, provide "[t]he clearest and most reliable objective evidence of contemporary values." *Penry I*, 492 U.S. at 331. At the time *Penry I* was decided, only two States – Georgia and Maryland – and the federal government had enacted legislation outlawing the imposition of the death penalty on defendants with mental retardation. In little more than a decade, that number of States has grown nine-fold.

The first new enactments came in legislative sessions immediately after the Supreme Court's *Penry I* decision called attention to the issue. In 1990, Tennessee and Kentucky implemented legislation banning the execution of persons with mental retardation. Between 1991 and 2000, nine more States – New Mexico, Arkansas, Colorado, Washington, Indiana, Kansas, New York, Nebraska, and South Dakota – passed such statutes. (This roster includes both of the States that enacted the death penalty anew after many years without it.) In 2001, no fewer than five States – Arizona, Missouri, Florida, Connecticut, and North Carolina – have enacted statutes to prevent the execution of persons with mental retardation.[10] This brings the current total of States to eighteen,[11] plus the federal government.[12] When these eighteen States

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[10] It was, of course, the enactment of legislation with retrospective effect that led this Court to dismiss the writ in McCarver v. North Carolina, No. 00-8727, as improvidently granted. 122 S.Ct. 22 (2001).

[11] 2001 Ariz. Sess. Laws 260; ARK. CODE ANN. § 5-4-618 (Michie 1993); COLO. REV. STAT. ANN. § 16-9-403 (West 1993); 2001 Conn. Acts 151 (Reg. Sess.); 2001 Fla. Laws, ch. 202; GA. CODE ANN. § 17-7-131(j) (1988); IND. CODE ANN. § 35-36-9-6 (Michie 1994); KAN. STAT. ANN. § 21-4623 (1994); KY. REV. STAT. ANN. § 532.140 (Banks-Baldwin 1990); MD. ANN. CODE art. 27, § 412(g) (1989); 2001 Mo. Laws 267; NEB. REV. STAT. § 28-105.01 (1998 & Suppl. 2000); N.M. STAT. ANN. § 31-20A-2.1 (Michie 1991); N.Y. CRIM. PROC. LAW § 400.27 (McKinney 1995); 2001 N.C. Sess. Laws 346; S.D. CODIFIED LAWS § 23A-27A-26.1 (Michie 2000); TENN. CODE ANN. § 39-13-203 (1990); WASH. REV. CODE ANN. § 10.95.030(2) (West 1993).

[12] Federal Anti-Drug Abuse Act of 1988, 21 U.S.C. § 848(l) (1988); Federal Death Penalty Act of 1994, 18 U.S.C. § 3596(c) (1994). (The first of these statutes preceded this Court's decision in Penry I, while the second was subsequent to it.)

are added to the twelve States that do not have the death penalty,[13] it is evident that the statutes in only a minority of States now allow the possibility of executing an individual with mental retardation.[14] And on the world-wide stage, the few jurisdictions in the United States that

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[13] In dicta the Supreme Court has cast doubt upon the relevance of States that do not have the death penalty when surveying jurisdictions to ascertain whether there is a national consensus regarding a particular capital-sentencing practice: See Stanford v. Kentucky, 492 U.S. 361, 370 n.2 (1989). However, it would be inappropriate to exclude the people of those States from any national consideration of whether it is acceptable to execute an individual with mental retardation. All public opinion polling, both state and national, indicates a broad and widespread national consensus against executing anyone with mental retardation. See, e.g., Dan Parker, Most Texans Support Death Penalty, Corpus Christi Caller-Times, March 2, 2001, at A1 (66% oppose consideration of the death penalty for defendants with mental retardation; 17% support). There is no reason to suspect that the people of Maine or Hawaii, for example, share that view less fully than the people of Georgia or Florida. And with regard to this particular issue, there is also some evidence about the sentiment in States without the death penalty in the form of bills in their legislatures proposing reinstatement of the penalty. During recent efforts to restore the death penalty in several States, the proponents of the bills drafted them with explicit provisions that the penalty would not be imposed on individuals with mental retardation. See, e.g., Iowa H.F. 2, 76th Gen. Assem. (1995); Mass. H.B. 4003, 2001 Gen. Court, Reg. Sess. (2001); Minn. H.F. 4136, 81st Leg. Sess. (2000). This is fully consistent with the fact that both of the States that have reinstituted the death penalty since Penry I, Kansas and New York, have included provisions to protect defendants with mental retardation.

[14] It would be erroneous to assume that the people of the twenty States which have not yet enacted a statutory ban on executing individuals with mental retardation ***approve*** such executions. In two of those States, Texas and Illinois, the legislatures passed bills protecting people with mental retardation but the bills were vetoed by their governors after opponents argued forcefully that the legislation was unnecessary because mentally retarded individuals were not being executed in the State now. See, e.g., Mike Tolson, A Deadly Distinction Part IV: Death Penalty Reforms Sought, Houston Chronicle, Feb. 7, 2001, at A1 ("'We don't execute mentally retarded people,' [Harris County District Attorney Chuck] Rosenthal said."); Veto Message, H.B. 236, Tex. House J., 77th Sess., at 5215 (2001) ("This legislation is not about whether to execute mentally retarded murderers. We do not execute mentally retarded murderers today."). In a third state, Oregon, the legislature passed a bill which was intended to protect people with mental retardation from the death penalty, but because the language of its final version failed to accomplish that goal, it was vetoed by Governor Roberts (at the request of disability advocates). Governor's Message, Senate J., 1st. Legis. Sess., at SJ-218 (Or. 1993) ("The original intent of Senate Bill 640 was to exempt mentally retarded individuals from the death penalty. I wholeheartedly support this goal.") There is no evidence of widespread support for the use of the death penalty in such cases in ***any*** State.

continue to execute mentally retarded persons now stand all but alone.[15]

These enactments by Congress and the legislatures in State after State accurately reflect the consensus among the American people on this subject.[16] That consensus is also revealed in public opinion polls and in the positions taken by relevant organizations in both the mental retardation and legal fields.[17] Such nonlegislative evidence of the consensus is even more abundant now than it was in 1989.[18]

Of course, the Supreme Court in *Penry I* expressed concern not only about the quantity of

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[15] Among countries that have the death penalty, the practice of executing defendants with mental retardation is essentially unknown in the 21st century. Recent reports of the information put before the Supreme Court in the McCarver briefs indicating that only the United States, Japan, and Kyrgyzstan still allowed the execution of persons with mental retardation stimulated a published response by Kyrgyzstan's Ambassador to the United States declaring that such executions are no longer permitted in his country. Baktybek Abdrisaev, Penalties in Kyrgyzstan, N.Y. TIMES, June 30, 2001, at A14 (Letter to the Editor). And numerous international and regional intergovernmental bodies have passed resolutions and other statements expressing strong opposition to the execution of any individuals who have mental retardation. See Amicus Curiae Brief of the European Union in McCarver v. North Carolina, No. 00-8727; Amici Curiae Brief of Diplomats Morton Abramowitz, *et al.* in id.

[16] It is also worth noting that since Penry I, no state has affirmatively legislated that the death penalty *is* appropriately imposed on persons with mental retardation. Cf. Thompson, 487 U.S. 815, 849 (Justice O'Connor, concurring) ("[Where] such a large majority of the state legislatures has unambiguously outlawed capital punishment for 15 year-olds and where no legislature in this country has affirmatively and unequivocally endorsed this practice, strong counterevidence would be required to [demonstrate] that a national consensus against this practice does not exist.").

[17] See, e.g., Amici Curiae Brief of American Psychological Association, American Psychiatric Association, and American Academy of Psychiatry and the Law in McCarver v. North Carolina, No. 00-8727; Amici Curiae Brief of American Association on Mental Retardation et al. in id.; Amici Curiae Brief of American Bar Association in id.

[18] In discerning the society's evolving standards of decency, the Supreme Court has sometimes considered the conduct of sentencing juries. Analyses of juries' performance in this area is particularly difficult to conduct systematically because juries are not ordinarily required to return special verdicts or specific findings of mitigating circumstances. But the available evidence from social science studies about juror attitudes is fully consistent with the recent legislative developments. See, e.g., Stephen P. Garvey, Aggravation and Mitigation in Capital Cases: What Do Jurors Think?, 98 COLUM. L. REV. 1538, 1564 (1998) (reporting mental retardation as among the most powerful mitigating factors).

the evidence then available but also about its form. In particular, legislation was identified as "an objective indicator of contemporary values upon which we can rely." 492 U.S. at 335. But there can no longer be doubt about whether the public sentiment "may ultimately find expression in legislation." Id. The remarkable events of the last dozen years have answered that question.[19]

III.

PRAYER FOR RELIEF

Applicant's limited intellectual functioning as reflected in his IQ score has been a daily fact of his entire life. It is excessive and disproportionate to inflict a sentence of death upon such a person, whose ability to reason and make judgments, to function as a fully mature and responsible adult, is impaired by a disability beyond his control and not of his choosing. Execution of the mentally retarded violates the Eighth Amendment.

The legal basis of the instant claim was not previously available at the time Applicant filed his initial application. Accordingly, this Court should:

1. Grant relief by issuing a writ of *habeas corpus*; and

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

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[19] The consensus that has manifested in the last dozen years is also remarkable for the consistency with which it defines the class of people who should be protected from the death penalty. In Penry I, the Court speculated that the group of people ineligible for execution at common law might roughly correspond to the more recent subcategories of "severe" or "profound" mental retardation. 492 U.S. at 333. While there may be ambiguity about where the boundary was drawn two centuries ago, there is none regarding the modern consensus: that dichotomy has commended itself to no modern authority. Since Penry I, not a single state legislature or foreign jurisdiction addressing the issue of the death penalty has adopted a provision that would treat individuals with "severe" and "profound" mental retardation differently from others who have mental retardation. It should also be noted that the taxonomy of "mild/moderate/severe/profound," which merely restated IQ scores in categorical form, has been abandoned by the American Association on Mental Retardation and replaced with categories that focus more directly on an individual's practical impairment and service needs. AAMR, MENTAL RETARDATION 34.

Respectfully submitted,

Leslie M. Ribnik
Texas Bar No. 16826330
P. O. Box 271507
Houston, Texas 77277
713.665.0771 (O)
713.592.6073 (F)

ATTORNEY FOR APPLICANT
MICHAEL WAYNE RICHARD

VERIFICATION

BEFORE ME, the undersigned authority, appeared Leslie M. Ribnik, a person known to me, and after being duly worn, did then and there state the following:

> "My name is Leslie M. Ribnik. I am the attorney of Record for the petitioner in the instant cause. I prepared the Petition for Writ of Habeas Corpus in the instant cause. The facts contained therein are true and correct to the best of my knowledge and belief. The documents attached hereto as exhibits are true and correct copies of the originals."

_____
Leslie M. Ribnik

SWORN AND SUBSCRIBED before me on this the 27th day of March, 2007.

_____
NOTARY PUBLIC, in and for
The State of Texas

CERTIFICATE OF SERVICE

I hereby certify that the foregoing pleading was served on the State by mailing via the United States Postal Service by Certified Mail, Return Receipt Requested, to the Capital Litigation Division, Office of the Attorney General, P.O. box 12548, Capitol Station, Austin, Texas 78711-2548, on this the 27th of March, 2007.

_____
Leslie M. Ribnik

EXHIBIT F

United States Court of Appeals

FIFTH CIRCUIT
OFFICE OF THE CLERK

CHARLES R. FULBRUGE III
CLERK

TEL. 504-310-7700
600 S. MAESTRI PLACE
NEW ORLEANS, LA 70130

May 15, 2007

MEMORANDUM TO COUNSEL OR PARTIES LISTED BELOW:

No. 07-20232 In Re: Richard
USDC No.

Enclosed is an order entered in this case.

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: Monica R. Washington
Monica Washington, Deputy Clerk
504-310-7705

Mr Michael Ribnik
Mr Baxter Morgan

IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 07-20232

U.S. COURT OF APPEALS
FILED
MAY 15 2007
CHARLES R. FULBRUGE III
CLERK

In Re: MICHAEL WAYNE RICHARD

Movant

Motion for an order authorizing
the United States District Court for the Southern
District of Texas to consider
a successive 28 U.S.C. § 2254 application

Before JONES, Chief Judge, STEWART, and DENNIS, Circuit Judges.

IT IS ORDERED that Movant's motion for authorization to file a successive habeas petition is DENIED; *

IT IS FURTHER ORDERED that attorney's motion to withdraw as counsel of record is GRANTED;

IT IS FURTHER ORDERED that attorney's motion for appointment of successor counsel, Mr. Jerome Godinich is DENIED AS UNNECESSARY.

* Judge Dennis would grant the motion.

EXHIBIT G

07-20693

No. _____

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In re Michael Wayne Richard
Petitioner.

MOTION FOR AUTHORIZATION TO FILE SUCCESSIVE PETITION FOR WRIT OF HABEAS CORPUS

THIS IS A DEATH PENALTY CASE.

MICHAEL WAYNE RICHARD IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 25, 2007.

Gregory W. Wiercioch
Texas Defender Service
430 Jersey Street
San Francisco, California 94114
(832) 741-6203

Counsel for Michael Wayne Richard

General Docket
United States Court of Appeals for the 5th Circuit

Court of Appeals Docket #: 07-20693
In Re: Richard
Appeal From: United States District Court for the Southern District of Texas at Houston

Docketed: 09/17/2007
Termed: 09/21/2007

Case Type Information:
1) Original Proceedings
2) Successive Habeas Corpus
3)

Originating Court Information:
District: 0541-4 :
Date Filed:

Prior Cases:
None

Current Cases:
None

Panel Assignment: Not available

In re: MICHAEL WAYNE RICHARD Movant	Gregory William Wiercioch Direct: 415-285-2472 Email: gwooch@texasdefender.org Fax: 415-285-2472 [NTC Retained] Texas Defender Service 430 Jersey Street San Francisco, CA 94114-0000

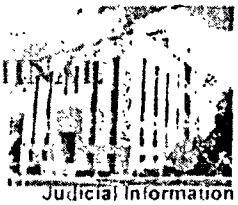
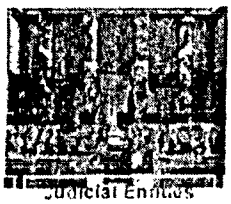
In re: MICHAEL WAYNE RICHARD,

Movant

09/17/2007		Original Proceeding case docketed involving a death penalty. Execution Date: 9/25/07 [07-20693]
09/17/2007	☐	Motion filed by Movant Michael Wayne Richard for authorization to file a successive habeas petition. [5849877-1] Date of COS: 9/15/07 Sufficient [Y/N]: Y [07-20693]
09/17/2007	☐	Motion filed by Movant Michael Wayne Richard to stay execution [5849878-1] Date of COS: 9/15/07 Sufficient [Y/N]: Y [07-20693]
09/18/2007	☐	Response/opposition filed by State of TX to motion to file a successive habeas petition [5849877-1] by Movant Michael Wayne motion to stay execution [5849878-1] by Movant Michael Richard Date of COS: 9/18/07 Sufficient [Y/N]: Y [5851098-1] [07-20693]
09/20/2007	☐	Reply filed by Movant Michael Wayne Richard to response/opposition [5851098-1], motion to file a successive habeas petition [5849877-1], motion to stay execution [5849878-1] Sufficient [Y/N]: Y [5852391-1] [07-20693]
09/21/2007	☐	COURT Order filed denying motion to file a successive habeas petition [5849877-1] denying motion to stay execution [5849878-1] (IN DETAIL) Judge Initials: EHJ CES JLD Copies to all counsel. [07-20693]

EXHIBIT H

TEXAS COURT OF CRIMINAL APPEALS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Case Number: AP-69,896
Date Filed: 11/4/1987
Case Type: Death Penalty
Style: Richard, Michael Wayne aka Marcus Lee Richard
v.:

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Date	Event Type	Description
12/28/1992	Created for Data Conversion -- an event inserted to correspond to the mandate of a process	
12/28/1992	MANDATE ISSD	
12/9/1992	REHEAR DISP	State
12/9/1992	REHEAR DISP	State
11/23/1992	WORKUP COMPLETE	
10/19/1992	REHEAR FILED DP	State
10/19/1992	REHEAR FILED	State
10/2/1992	REHEAR EXT MOTION	State
10/2/1992	REHEAR EXT MOTION	State
9/16/1992	OPINION ISSD	
9/16/1992	OPINION ISSD	
6/20/1991	SUPP BR RECEIVED	Appellant
5/23/1991	SUBMITTED	

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- **Court of Criminal Appeals**
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  7-Amarillo | 8-El Paso | 9-Beaumont
  10-Waco | 11-Eastland | 12-Tyler
  13-Corpus Christi | 14-Houston
- **Appellate Statistics**

5/23/1991	Created for Data Conversion -- an event inserted to correspond to the submitted of a process	
4/24/1991	EXTRA REMARKS	
3/20/1991	SET FOR SUBMIS DP	
3/20/1991	Created for Data Conversion -- an event inserted to correspond to the submission of a process	
3/18/1991	BRIEF FILED	State
3/5/1991	EXT BRIEF FILED	State
3/5/1991	EXT BRIEF DISP	State
2/5/1991	EXT BRIEF DISP	State
2/4/1991	EXT BRIEF FILED	State
12/3/1990	EXT BRIEF FILED	State
12/3/1990	EXT BRIEF DISP	State
9/27/1990	EXT BRIEF FILED	State
9/27/1990	EXT BRIEF DISP	State
8/31/1990	BRIEF FILED	Appellant
6/27/1990	EXT BRIEF FILED	Appellant
6/27/1990	EXT BRIEF DISP/NFE	Appellant
6/25/1990	SUPP SF FILED	
6/5/1990	NOTICE SHOW CAUSE	
6/4/1990	LETTER RECEIVED	Appellant
5/2/1990	MOTION FILED	Appellant
5/2/1990	MOTION	Appellant
5/2/1990	EXTRA REMARKS	
4/3/1990	MOTION FILED	Appellant
4/3/1990	MOTION	Appellant
2/20/1990	EXT BRIEF FILED	Appellant
2/20/1990	SUPP RECORD MOT TO	Appellant
2/20/1990	SUPP RECORD MOT TO	Appellant
2/20/1990	EXTRA REMARKS	
1/10/1990	EXT BRIEF DISP/NFE	Appellant

1/10/1990	EXT BRIEF FILED	Appellant
11/13/1989	EXT BRIEF FILED	Appellant
11/13/1989	EXT BRIEF DISP	Appellant
10/16/1989	SUPP SF FILED	
9/12/1989	EXT BRIEF FILED	Appellant
9/12/1989	EXT BRIEF DISP	Appellant
9/6/1989	MOTION	Appellant
9/5/1989	MOTION FILED	Appellant
7/17/1989	EXT BRIEF FILED	Appellant
7/17/1989	EXT BRIEF DISP	Appellant
5/17/1989	EXT BRIEF FILED	Appellant
5/17/1989	EXT BRIEF DISP	Appellant
3/16/1989	EXT BRIEF FILED	Appellant
3/16/1989	EXT BRIEF DISP	Appellant
2/13/1989	SF FILED DP	
1/12/1989	EXT SF FILED	Appellant
1/12/1989	MOTION FILED	Appellant
1/12/1989	EXT SF DISP/NFE	Appellant
1/12/1989	MOT PLACED IN FILE	Appellant
11/15/1988	EXT SF DISP/NFE	Appellant
11/14/1988	EXT SF FILED	Appellant
9/13/1988	EXT SF FILED	Appellant
9/13/1988	EXT SF DISP	Appellant
7/14/1988	EXT SF FILED	Appellant
7/14/1988	EXT SF DISP	Appellant
5/26/1988	EXT SF DISP	Appellant
5/25/1988	EXT SF FILED	Appellant
3/14/1988	EXT SF FILED	Appellant
3/14/1988	EXT SF DISP	Appellant
2/16/1988	EXT SF DISP	Appellant
2/12/1988	EXT SF FILED	Appellant
1/14/1988	EXT SF FILED	Appellant

1/14/1988	EXT SF DISP	Appellant
12/10/1987	EXT SF DISP	Appellant
12/8/1987	EXT SF FILED	Appellant
11/4/1987 12:05:00 AM	EXTRA REMARKS	Appellant
11/4/1987 12.04.00 AM	EXT SF DISP	Appellant
11/4/1987 12.03:00 AM	EXT SF FILED	Appellant
11/4/1987 12 02:00 AM	TRANSCRIPT FILED	
11/4/1987 12:01.00 AM	DP BEGIN	
11/4/1987	DP BEGIN	

Calendars:

Set Date	Calendar Type	Reason Set
12/28/1992	STORED	CASE STORED

Parties:

Party	Party Type
RICHARD, MICHAEL WAYNE AKA MAR	Applicant (writs)/Appellant...
STATE OF TEXAS	State

Court of Appeals Case Information:

COA Case Number:

COA Disposition:

Opinion Cite:

Court of Appeals District:

Trial Court Information:

Trial Court: 180th District Court

County: Harris

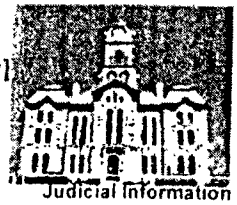
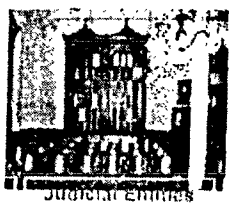
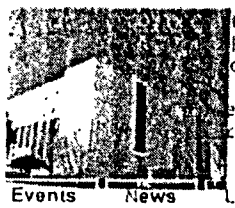
Case Number: 456621

Judge: PATRICIA R. LYKOS

Court Reporter:

Hint: Click on the folder icons above for more case information.

TEXAS
COURT OF CRIM
APPEALS

Case Search Results on Case # AP-72,193

Add to CaseMail | Printer-Friendly Version

Case Information:

Case Number: AP-72,193
Date Filed: 10/13/1995
Case Type: Death Penalty
Style: RICHARD, MICHAEL WAYNE
v.:

Case Events:

Date	Event Type	Description
8/28/2008	ARCHIVED	
9/25/2007	EXECUTED	
6/15/2007	EXECUTION DATE SET	
11/9/2006	TC APPT COUNSEL	Habeas Corpus - Capital Death
10/5/1998	CLAIM SER/EXP MADE	Habeas Corpus - Capital Death
10/1/1998	CLAIM SER/EXP DISP	Habeas Corpus - Capital Death
9/24/1998	CLAIM SER/EXP RECD	Habeas Corpus - Capital Death
9/24/1998	WRIT FILED	Habeas Corpus - Capital Death
7/3/1998	WRIT OF CERT USSC	
3/11/1998	WRIT OF CERT USSC	Appellant
10/17/1997	MANDATE ISSD	

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  7-Amarillo | 8-El Paso | 9-Beaumont
  10-Waco | 11-Eastland | 12-Tyler
  13-Corpus Christi | 14-Houston
- **Appellate Statistics**

	10/17/1997	Created for Data Conversion -- an event inserted to correspond to the mandate of a process	
	10/3/1997	APPT COUNSEL/ORDER	Habeas Corpus - Capital Death
	10/1/1997	REHEAR DISP	Appellant
	10/1/1997	REHEAR DISP	Appellant
	9/5/1997	WORKUP REH COMPLET	
	7/28/1997	REHEAR FILED DP	Appellant
	7/28/1997	REHEAR FILED	Appellant
	7/9/1997	REHEAR EXT MOTION	Appellant
	7/9/1997	REHEAR EXT MOTION	Appellant
	6/18/1997	OPINION ISSD	
	6/18/1997	OPINION ISSD	
	6/2/1997	SUPP TR FILED	
	4/30/1997	SUBMITTED	
	4/30/1997	Created for Data Conversion -- an event inserted to correspond to the submitted of a process	
	4/25/1997	NOTICE OF COUNSEL PRESENTING ARGUMENT	Appellant
	4/4/1997	NOTICE OF COUNSEL PRESENTING ARGUMENT	State
	3/26/1997	Created for Data Conversion -- an event inserted to correspond to the submission of a process	
	3/26/1997	SUPP RECORD MOT TO	State
	3/26/1997	BRIEF FILED	State
	3/26/1997	SET FOR SUBMIS	
	3/26/1997	SUPP RECORD MOT TO	State
	12/31/1996	EXT BRIEF DISP	State
	12/30/1996	EXT BRIEF FILED	State
	12/2/1996	BRIEF FILED	Appellant

11/7/1996	TC NOTICE RECEIVED	Habeas Corpus - Capital Death
10/30/1996	SUPP RECORD MOT TO	Appellant
10/30/1996	SUPP RECORD MOT TO	Appellant
10/30/1996	SUPP SF FILED	
10/23/1996	REINSTATED	Appellant
10/23/1996	REINSTATED DP	Appellant
10/23/1996	SUPP TR FILED	
10/9/1996	FINE RECEIVED	Appellant
10/7/1996	OFFICER RETURN REC	
10/2/1996	OPINION ISSD	
10/2/1996	MANDATE ISSD	
10/2/1996	OPINION ISSD	
10/2/1996	Created for Data Conversion -- an event inserted to correspond to the mandate of a process	
9/25/1996	JUDGM OF CONTEMPT	Appellant
9/23/1996	EXT BRIEF FILED	Appellant
9/23/1996	SUPP RECORD MOT TO	Appellant
8/28/1996	EXT BRIEF FILED	Appellant
8/28/1996	EXT BRIEF DISP	Appellant
8/26/1996	AFFIDAVIT FILED	Appellant
8/21/1996	OFFICER RETURN REC	
8/2/1996	NOTICE SHOW CAUSE	Appellant
6/17/1996	EXT BRIEF FILED	Appellant
6/17/1996	EXT BRIEF DISP/NFE	Appellant
5/6/1996	EXT BRIEF FILED	Appellant
5/6/1996	EXT BRIEF DISP	Appellant
3/20/1996	EXT BRIEF FILED	Appellant
3/20/1996	EXT BRIEF DISP	Appellant
1/22/1996	SF FILED DP	
12/18/1995	EXT SF FILED	Appellant

	12/18/1995 EXT SF DISP	Appellant
	10/25/1995 EXT SF FILED	Appellant
	10/25/1995 EXT SF DISP	Appellant
	10/13/1995 DP BEGIN	
	10/13/1995 TRANSCRIPT FILED	
	10/13/1995 DP BEGIN	

Calendars:

	Set Date	Calendar Type	Reason Set
	8/28/2008	STORED	ARCHIVED

Parties:

	Party	Party Type
	RICHARD, MICHAEL WAYNE	Applicant (writs)/Appellant...
	STATE OF TEXAS	State

Court of Appeals Case Information:

COA Case Number:
COA Disposition:
Opinion Cite:
Court of Appeals District:

Trial Court Information:

Trial Court: 182nd District Court
County: Harris
Case Number: 456621
Judge: ROBERT BURDETTE
Court Reporter:

Hint: Click on the folder icons above for more case information.

Case Search Results on Case # WR-47,911-01

Add to CaseMail | Printer-Friendly Version

Case Information:

Case Number: WR-47,911-01
Date Filed: 11/22/2000
Case Type: 11.071
Style: Richard, Michael
v.:

Case Events:

Date	Event Type	Description
2/7/2001	11.071 WRIT DISP	Habeas Corpus - Capital Death
2/7/2001	11.071 WRIT DISP	Habeas Corpus - Capital Death
1/10/2001	WRIT SUBMITTED	Habeas Corpus - Capital Death
1/10/2001	Created for Data Conversion -- an event inserted to correspond to the submitted of a process	
11/22/2000	11 071 WRIT RECD	Habeas Corpus - Capital Death
11/22/2000	11 071 WRIT RECD	

Calendars:

Set Date	Calendar Type	Reason Set
2/7/2001	STORED	WRIT STORED

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  10-Waco | 11-Eastland | 12-Tyler
  13-Corpus Christi | 14-Houston
- **Appellate Statistics**

Parties:

Party	Party Type
Richard, Michael Wayne	Applicant (writs)/Appellant...

Court of Appeals Case Information:

COA Case Number:

COA Disposition:

Opinion Cite:

Court of Appeals District: 01

Trial Court Information:

Trial Court: 182nd District Court

County: Harris

Case Number: 456621-A

Judge:

Court Reporter:

Hint: Click on the folder icons above for more case information.

Case Search Results on Case # WR-47,911-02

Add to CaseMail | Printer-Friendly Version

Case Information:

Case Number: WR-47,911-02
Date Filed: 9/11/2003
Case Type: 11.071
Style: Richard, Michael
v.:

Case Events:

Date	Event Type	Description
3/21/2007	11.071 WRIT DISP	Habeas Corpus - Capital Death
3/7/2007	WRIT SUBMITTED	Habeas Corpus - Capital Death
1/18/2007	MISC DOCUMENT RECD	
1/18/2007	MISC DOCUMENT RECD	
1/18/2007	SUPP/11.071 WRIT RECD	Habeas Corpus - Capital Death
12/29/2006	FF&CL RECEIVED	Habeas Corpus - Capital Death
9/12/2006	MISC DOCUMENT RECD	Habeas Corpus - Capital Death
8/31/2006	EXT FF/CL DISP	Habeas Corpus - Capital Death
8/17/2006	EXT FF/CL FILED	Habeas Corpus - Capital Death
6/28/2006	ORDER FILED	Habeas Corpus - Capital Death
10/8/2003	11.071 WRIT DISP	Habeas Corpus - Capital Death
9/15/2003	WRIT SUBMITTED	Habeas Corpus - Capital Death
9/11/2003	11.071 WRIT RECD	Habeas Corpus - Capital Death

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- **Appellate Statistics**

	Set Date	Calendar Type	Reason Set
	3/21/2007	STORED	WRIT STORED

Parties:

	Party	Party Type
	Richard, Michael Wayne	Applicant (writs)/Appellant .

Court of Appeals Case Information:

COA Case Number:

COA Disposition:

Opinion Cite:

Court of Appeals District:

Trial Court Information:

Trial Court: 182nd District Court

County: Harris

Case Number: 456621-B

Judge: ROBERT N. BURDETTE

Court Reporter:

Hint: Click on the folder icons above for more case information.

EXHIBIT I

No. 07A265

CAPITAL CASE

SEP 25 2007

EXECUTION DATE

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 2006

IN RE MICHAEL WAYNE RICHARD,

Petitioner

MOTION FOR STAY OF EXECUTION

THIS IS A DEATH PENALTY CASE.

MR. RICHARD IS SCHEDULED TO BE EXECUTED ON SEPTEMBER 25, 2007.

Gregory W. Wiercioch
Texas Defender Service
430 Jersey Street
San Francisco, California 94114
TEL (832) 741-6203
FAX (512) 477-2153

Member, Supreme Court Bar
Counsel of Record for Michael Wayne Richard

TO THE HONORABLE JUSTICES OF THIS COURT:

Petitioner Michael Richard requests that this Court grant a stay of execution pending the consideration and disposition of a petition for writ of *certiorari*.

A stay of execution is warranted where there is (1) a reasonable probability that four members of the Court would consider the underlying issue sufficiently meritorious for the grant of *certiorari* or the notation of probable jurisdiction; (2) a significant possibility of reversal of the lower court's decision; and (3) a likelihood that irreparable harm will result if no stay is granted. *Barefoot v. Estelle*, 463 U.S 880, 895 (1983); *Moore v. Texas*, 535 U.S. 1110 (2002). All three criteria are met in this case.

First, four members of this Court should consider the underlying issue sufficiently meritorious for *certiorari* Mr Richard seeks to raise a challenge to the lethal injection protocol that the State of Texas intends to use in carrying out his execution. This morning, this Court agreed to review precisely the question that Mr. Richard seeks to raise Baze v. Rees, No. 07-5439 (cert. granted, Sept. 25, 2007).

The State of Texas's highest court has previously indicated that where a death row inmate raises an issue before the Supreme Court that the Supreme Court agrees to review, it is impermissible to carry out that inmate's execution until the Supreme Court addresses the merits. See *Ex parte Herrera*, 828 S.W.2d 9 (Tex. Cr. App. 1992). Mr Richard sought to file a writ in the state court, arguing that, in view of this Court's action this morning, coupled with the *Herrera* doctrine, Mr. Richard's execution should be stayed pending a ruling on the merits. *Although he himself did not previously present the issue, the issue, as presented in* Baze, is identical to the issue he seeks to present, and his execution therefore should not proceed. However, the clerk of the Court refused to

remain open past 5 o'clock to permit Mr. Richard's counsel to file the pleadings. Consequently, Mr. Richard filed the petition in a state district court, which, at this time, has not ruled.

Second, there is a significant possibility that this Court will reverse the lower court's judgment, if the lower court enters a judgment. Mr. Richard will seek review in the state's highest court, when that court reopens. If that court refuses to grant relief, this Court's decision to review the merits of the issue in another case, raising the identical issue, would surely warrant a reversal of the lower court's judgment.

Third and finally, Mr. Richard is entitled to a stay from this Court because there exists a likelihood that he will suffer irreparable injury if a stay of execution is denied. Without a stay of execution, Respondents will be free to inject plaintiff with superfluous chemicals that unnecessarily and intolerably increase the risk that he will experience a form of torture during the lethal injection process, in violation of the Eighth and Fourteenth Amendments

CONCLUSION

Mr. Richard does not seek to avoid execution. He requests only that this Court order that his execution by lethal injection not include chemicals that are unnecessary to the effectuation of his death and that present a substantial risk that he will suffer excessive, unnecessary, and excruciating pain during the process of the execution. His right not having been protected by the courts below, Mr. Richard now requests a stay of execution from this Court, pending the consideration and disposal of a petition for writ of *certiorari*.

Respectfully Submitted,

GREGORY W. WIERCIOCH
Texas Bar No. 00791925
TEXAS DEFENDER SERVICE
430 Jersey Street
San Francisco, California 94114
TEL (832) 741-6203
FAX (512) 477-2153

DAVID R. DOW
Texas Bar No. 06064900
TEXAS DEFENDER SERVICE
412 Main St., #1150
Houston, TX 77007
TEL (713) 222-7788
FAX (713) 222-0260

Counsel for Michael Wayne Richard

EXHIBIT J

IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS
AND
IN THE 182nd JUDICIAL DISTRICT COURT
OF HARRIS COUNTY, TEXAS

EX PARTE	)	Writ No.
MICHAEL WAYNE RICHARD	)	

MOTION FOR STAY OF EXECUTION

Michael Wayne Richard asks this Court to stay his execution, scheduled for September 25th, 2007. In the accompanying Petition for Writ of Prohibition, Mr. Richard has demonstrated that his Eighth Amendment right to be free from "cruel and unusual punishment" will be violated if the State of Texas proceeds with his execution because the Texas lethal injection procedure creates and unnecessary and medically unacceptable risk that an inmate will experience excruciating pain and suffering. Because this method of execution has not been deemed constitutional by the United States Supreme Court, Mr. Richard seeks a stay of execution until such time as the merits of the dispute have been resolved.

The United States Supreme Court has today agreed to review the constitutionality of the manner that the State intends to use to administer Mr. Richard's execution. *See Baze v. Rees*, 07-5439. This Court has recognized that

when the Supreme Court has agreed to review an issue presented by an inmate on death row, the State, out of respect for the Supreme Court's authoritative role, ought not to carry out the execution of that inmate until the Supreme Court has completed its review. *See Ex parte Herrera*, 828 S.W.2d 9 (Tex. Crim. App. 1992) (because the Supreme Court had granted the petition for writ of certiorari, "we find under the present circumstances that it would be improper for this Court to allow applicant's execution to be carried out before his petition for writ of certiorari is fully reviewed by the Supreme Court.")

Although Mr. Richard did not himself present to the Supreme Court the legality of the State's lethal injection protocol, the Supreme Court, in a different case, has agreed to review precisely that question. That question, moreover, is as applicable to Mr. Richard's case as it is to the case of the inmate from Kentucky. Pursuant to the reasoning of *Herrera*, this Court should grant Mr. Richard a stay to insure that he not be executed pursuant to a protocol that the Supreme Court might declare to be unconstitutional.

For the foregoing reasons, this Court should stay Mr. Richard's execution pending the consideration of Mr. Richard's accompanying Petition for Writ of Prohibition, or alternatively, pending the Supreme Court's consideration on the merits of *Baze v. Rees*, 07-5439.

CONCLUSION

ACCORDINGLY, Mr. Richard asks that this Court stay his execution, currently scheduled for September 25, 2007.

Respectfully submitted,

GREGORY W. WIERCIOCH
Texas Bar No. 00791925
TEXAS DEFENDER SERVICE
430 Jersey Street
San Francisco, California 94114
TEL (832) 741-6203
FAX (512) 477-2153

DAVID R. DOW
Texas Bar No. 06064900
TEXAS DEFENDER SERVICE
412 Main St., #1150
Houston, TX 77007
TEL (713) 222-7788
FAX (713) 222-0260

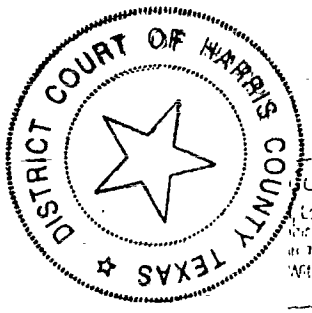
Counsel for Michael Wayne Richard

CERTIFICATE OF SERVICE

I, Gregory W. Wiercioch, hereby certify that true and correct electronic versions of Petitioner's Motion for Stay of Execution, was served on opposing counsel on September 25, 2007, via e-mail to:

Mr. Baxter R. Morgan
Office of the Attorney General
Capital Litigation Division
Price Daniel, Sr. Building, 7th Floor
209 West 14th Street
Austin, Texas 78701
Baxter.Morgan@oag.state.tx.us

/ s/ Gregory W. Wiercioch
Gregory W. Wiercioch
Counsel of Record



I hereby certify that
this is a true and correct copy of the original record filed and or recorded
in my office, electronically or hereon stamped, and was found duly recorded in my office on this date.
Witness my official hand and seal of office this 7 day of 2009

HARRIS COUNTY, TEXAS

D. Nunez Deputy

EXHIBIT K

No. 07A265
Title: In Re Michael Wayne Richard, Applicant
v.

Docketed:

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 25 2007	Application (07A265) for a stay of execution of sentence of death, submitted to Justice Scalia.
Sep 25 2007	Application (07A265) referred to the Court by Justice Scalia.
Sep 25 2007	Application (07A265) denied by the Court.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Gregory William Wiercioch	430 Jersey St. San Francisco, CA 94114	(832) 741-6203
Party name: Michael W. Richard		
Attorneys for Respondent:		
Gena B. Bunn	Assistant Attorney General Office of the Attorney General P.O. Box 12548, Capitol Station Austin, TX 78711	(512) 936-1400
Party name: Texas		

(ORDER LIST: 551 U.S.)

TUESDAY, SEPTEMBER 25, 2007

ORDER IN PENDING CASE

07A265 IN RE MICHAEL W. RICHARD

The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is denied.

No. 07-6705 *** CAPITAL CASE ***
Title: In Re Michael Wayne Richard, Petitioner
v.
Docketed: September 24, 2007

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 24 2007	Petition for writ of habeas corpus and motion for leave to proceed in forma pauperis filed.
Sep 24 2007	Application (07A259) for a stay of execution of sentence of death, submitted to Justice Scalia.
Sep 25 2007	Brief of respondent in opposition filed.
Sep 25 2007	Application (07A259) referred to the Court by Justice Scalia.
Sep 25 2007	Reply of petitioner filed.
Sep 25 2007	Application (07A259) denied by the Court.
Sep 25 2007	Petition DENIED.

~~Name~~~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~~Address~~~~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Gregory William Wiercioch	430 Jersey St. San Francisco, CA 94114	(832) 741-6203
Party name:		
Attorneys for Respondent:		
Gena B. Bunn	Assistant Attorney General Office of the Attorney General P.O. Box 12548, Capitol Station Austin, TX 78711	(512) 936-1400
Party name:		

128 S.Ct. 37, 168 L.Ed.2d 803, 76 USLW 3153

Supreme Court of the United States
In re Michael Wayne RICHARD, applicant.

No. 07A265.
Sept. 25, 2007.

Application for stay of execution of sentence of death presented to Justice SCALIA and by him referred to the Court denied.

U.S.,2007
In re Richard
128 S.Ct. 37, 168 L.Ed.2d 803, 76 USLW 3153

END OF DOCUMENT

In re Richard 128 S.Ct. 37, 168 L.Ed.2d 803, 76 USLW 3153 (U.S.2007)

(ORDER LIST: 551 U.S.)

TUESDAY, SEPTEMBER 25, 2007

HABEAS CORPUS DENIED

07-6705 (07A259) IN RE MICHAEL W. RICHARD

The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is denied. The petition for a writ of habeas corpus is denied.

No. 07-6706 *** CAPITAL CASE ***
Title: In Re Michael Wayne Richard, Petitioner
v.
Docketed: September 24, 2007

~~Date~~	~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~
Sep 24 2007	Petition for a writ of mandamus and motion for leave to proceed in forma pauperis filed. (Response due October 24, 2007)
Sep 24 2007	Application (07A260) for a stay of execution of sentence of death, submitted to Justice Scalia.
Sep 25 2007	Brief of respondent in opposition filed.
Sep 25 2007	Application (07A260) referred to the Court by Justice Scalia.
Sep 25 2007	Reply of petitioner filed.
Sep 25 2007	Application (07A260) denied by the Court.
Sep 25 2007	Petition DENIED.

~~Name~~~~~~~~~~~~~~~~~~~~~~	~~~~~~~Address~~~~~~~~~~~~~~~~~~~~	~~Phone~~~
Attorneys for Petitioner:		
Gregory William Wiercioch	430 Jersey St. San Francisco, CA 94114	(832) 741-6203
Party name:		
Attorneys for Respondent:		
Gena B. Bunn	Assistant Attorney General Office of the Attorney General P.O. Box 12548, Capitol Station Austin, TX 78711	(512) 936-1400
Party name:		

(ORDER LIST: 551 U.S.)

TUESDAY, SEPTEMBER 25, 2007

MANDAMUS DENIED

07-6706 IN RE MICHAEL W. RICHARD
(07A260)

The application for stay of execution of sentence of death presented to Justice Scalia and by him referred to the Court is denied. The petition for a writ of mandamus and/or prohibition is denied.

EXHIBIT N

IN THE 197TH JUDICIAL DISTRICT COURT
OF CAMERON COUNTY, TEXAS
AND
IN THE COURT OF CRIMINAL APPEALS OF TEXAS
IN AUSTIN, TEXAS

Rec'd
6:25 pm
8.6.03
Tex Cr. App

EX JOSE ALFREDO RIVERA,

Applicant

CAUSE No. 27,065-03

RSW

SUCCESSOR APPLICATION FOR A WRIT OF HABEAS CORPUS AND STAY OF EXECUTION

THIS IS A DEATH PENALTY CASE

MR. RIVERA'S EXECUTION IS SCHEDULED FOR 6:00 P.M., August 6, 2003

TEXAS DEFENDER SERVICE
510 S. Congress, Suite 307
Austin, Texas 78704
(512)320-8300

SERGI & ASSOCIATES, P.L.L.C.
109 E. Hopkins, Suite 200
San Marcos, Texas 78666

EXHIBIT RIC-10

000213

EXHIBIT O

HOUSTON CHRONICLE ARCHIVES

Paper: Houston Chronicle
Date: Mon 09/24/2007
Section: B
Page: 1 MetFront
Edition: 3 STAR

Slaying saga nears an end / Execution Tuesday to close two decades of legal battles

By MIKE TOLSON
Staff

Back in the bad old days of the 1980s, when the Texas prison system was bursting at the seams, a small-time crook named Michael Wayne Richard caught a break.

Sentenced to a five-year prison term for auto theft, he was released after serving less than 18 months, the second time in a decade he had his sentence cut well short because of crowding.

His parole did not seem like much of a risk at the time. Richard, whose name is pronounced in the French style because of Louisiana roots, was a nonviolent offender.

Two months after getting out, however, Richard made a huge jump in class, in so doing, pointing out the danger of assuming that nonviolent criminals stay that way.

On Aug. 18, 1986, he broke into the Hockley home of 53-year-old Marguerite Dixon, raped and shot her, then stole two television sets and a van parked in the driveway. He was arrested two days later and eventually convicted of capital murder and sentenced to die.

After most of two decades, one retrial and a lengthy bout of appeals, Richard, 48, finally faces execution in Huntsville on Tuesday evening.

It is little consolation to Dixon's family that crimes like his helped spur public outrage over mandatory releases, which, along with federal court intervention, led to the construction of more Texas prisons.

"This was a guy who wanted to not work, to rob and steal, do drugs and live an irresponsible life," said Steve Dixon, the victim's son.

"He didn't have to kill her. There were numerous other things he could have done other than kill her."

Dixon is the only family member who will witness the execution, though his aunt, Mary E. Chance, wishes she could.

"I'm 79 years old, and I have prayed every day that I would live long enough to see that man die," said Chance, Marguerite's sister.

Dixon, a registered nurse, was the mother of seven children She often worked at night, which is why she was at home when Richard broke in

Though Richard gave police a confession during interrogation, he now denies having killed her, saying a detective tricked him into signing a document he could not read.

"I was a thief - I ain't gonna lie to you - because that's what I was taught by my father," Richard said in an interview last week. "But I've been trying to tell everybody I didn't break in that house or kill that woman."

Plea refused

The prosecutor in his first trial, Lee Coffee, scoffed at Richard's comments.

"There never was an issue of identity or culpability, never a question of innocence," said Coffee, who is now a judge in Memphis, Tenn. "He never said he didn't do it. There was more than enough evidence It was just a brutal, nasty killing."

Despite that, Coffee offered Richard a life sentence at the request of Dixon's family. Richard said he accepted and Coffee reneged. Coffee said it was always on the table

"He just flat-out refused the plea," Coffee said. "I told him point blank you have an indefensible case. We offered him life because the family did not want to go through the trial He said he wasn't pleading to anything. He said the death penalty is the last, ultimate high."

IQ questions

Richard's appeals have centered on the issue of his intelligence. His attorneys in his first trial argued that his low IQ, measured in the low to mid-60s, made him incapable of understanding the Miranda warnings given to him by police.

Richard's conviction was reversed in 1992 for an error made in the jury instructions. He was convicted again three years later, with the arguments concerning his limited intellect failing to convince a jury that his life should be spared.

When the U.S. Supreme Court banned the execution of the mentally retarded in 2002, Richard's chances of a permanent reprieve improved, especially after a psychologist for the state, George Denkowski, reviewed tests performed on him and declared him to be retarded.

That led to a hearing last December in which Harris County prosecutor Lynn Hardaway submitted additional information to Denkowski, who then changed his opinion and said Richard did not meet the state's criteria for retardation.

"We gave him a great deal of records regarding Mr Richard," Hardaway said. "A woman testified in his retrial about being a pen pal with him. We had photographs of his cell showing books There was evidence of chess playing. He had had a typewriter at one time He had stamps and writing paper There never was any indication from early years that he had been diagnosed as retarded "

She said the low IQ test by itself was not conclusive of retardation.

Covering up?

"A lot of these guys have a low IQ, and that is partly the result of a poor education," Hardaway said "They can have ADHD They are not good students, and consequently they are not going to do well on IQ tests "

Richard said he had others write the letters for him and he just copied them As for the books and stamps, they were items he traded with other inmates for favors, he said

"The psychiatrist (sic) man changed all those numbers and he never came back and talked to me," Richard said. "There's a lot of things I can't do, but if I sit and watch you I can learn to do a little."

After a weeklong hearing, State District Judge Mary Bacon ruled that Richard was not retarded. Les Ribnik, Richard's attorney at the hearing, said the DA's office pressured Denkowski into changing his opinion.

"We had (psychologist) Jerome Brown testify, and he said you can't re-score the test results without going back to the subject and asking the questions again," Ribnik said. "If you have been around the high functioning retarded, they are good at covering up. Richard is a talker - he is very verbose. That's how he gets by."

Bacon's ruling was a relief to some of Marguerite Dixon's children, but not all. Celeste Dixon, 43, said that she has changed her views on the death penalty over the years.

"After it happened, I spent a lot of time really angry," she said. "Finally, I reached a point where I realized that if I let it go, my life would be a lot better. I was actively wishing for another person to die, and I don't like that feeling. I think that people who grab onto execution as a way of dealing with their grief get stuck in their anger."

...

TIMELINE

Aug. 18, 1986: Broke into Hockley home of 53-year-old Marguerite Dixon, raped and shot her, then stole two television sets and a van.

Aug. 20, 1986: Arrested in case.

1992: Conviction was reversed for an error made in the jury instructions.

1995: Convicted again with arguments concerning his limited intellect failing to convince a jury that his life should be spared.

2002: U.S. Supreme Court banned the execution of the mentally retarded

December 2006: Hearing determined that Richard did not meet the state's criteria for retardation.

Tuesday: Scheduled for execution.

EXHIBIT P

OUTLOOK SECTION MOVES TO CITY/STATE SECTION, PAGE B10

HOMEWORK When is a little help too much? Experts say parents eager to assist Junior with his lessons need to exercise some restraint instead. **PAGE G1**

OUTLOOK
CREATE 'CAT FUND' TO SPEED RECOVERY

HOUSTON CHRONICLE

chron.com

SUNDAY, MARCH 22, 2009 ★★★ VOL. 108 • NO. 160 • $1.75

ANIMAL ER HOUSTON

Receiver finding rough reception

Lawyer toiling on Stanford case hit from all sides

By KRISTEN HAYS
HOUSTON CHRONICLE

The court-appointed receiver in the Stanford Financial mess won't win any popularity contests. But that's not what Ralph Janvey is about.

He's on a mission to squeeze every penny from what's left of Texas native R Allen Stanford's Houston-based empire and distribute it to victims of Stanford's alleged $8 billion fraud.

"We want them to know that we are aware of their hardship. We know that in many cases their needs are urgent, and we are trying to address them as quickly and completely as we can," Janvey wrote in response to a series of written questions from the Chronicle as part of his first media interview.

The 58-year-old Dallas lawyer is the target of anger for thousands of Stanford investors who see him as a man in the shadows with ultimate

Please see **STANFORD,** *Page A8*

TEXAS DEATH ROW

Andrew Cantu Tzin
Executed 02/16/1999

Spencer Corey Goodman
Executed 01/18/2000

Leonard Urresti Rojas
Executed 12/4/2002

Robert Andrew Lookingbill
Executed 01/22/2003

Willie Marcel Shannon
Executed 11/8/2006

Johnny Ray Johnson
Executed 02/12/2009

LAWYERS' LATE FILINGS DEADLY TO INMATES

Tardy paperwork denies final appeals for 9 men, 6 of whom have been executed

By LISE OLSEN
HOUSTON CHRONICLE

NCAA TOURNAMENT

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The 58-year-old Dallas lawyer is the target of anger for thousands of Stanford investors who see him as a man in the shadows with ultimate

Please see **STANFORD,** *Page A8*

Tardy paperwork denies final appeals for 9 men, 6 of whom have been executed

By LISE OLSEN
HOUSTON CHRONICLE

Three men on Texas' death row — and six others already executed — lost their federal appeals because attorneys failed to meet life-or-death deadlines, essentially waiving the last constitutionally required review before a death sentence is carried out.

Johnny Johnson, executed in February for a Houston murder, was the most recent: His lawyers missed a federally mandated filing deadline by 24 hours.

One of his attorneys made the same mistake in the case of death row inmate Keith Steven Thurmond, a former Montgomery County mechanic now on death row awaiting execution, according to case records.

In both cases, the lawyer waited until after business hours on the last day an appeal could be filed and then blamed a malfunctioning filing machine for his tardiness, according to a 5th Circuit Court of Appeals opinion issued last week. The court chastised the attorney for using the same excuse twice.

The opinion pointed out that based on the problems in the previous capital case, the lawyer already knew the machine was broken and could have easily filed electronically by using his computer.

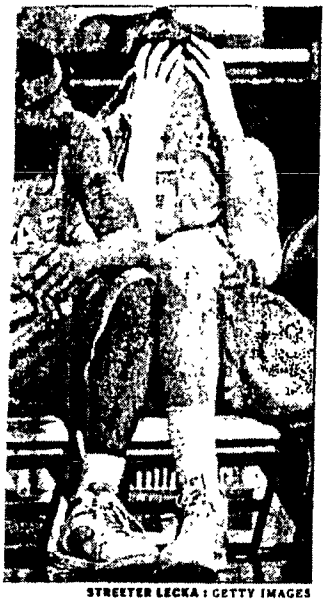
Most of the late filings came in death row cases overseen by federal judges in the Southern District of Texas. In an interview, U.S. District Judge Hayden Head, the Corpus Christi-based chief judge of the Southern District, said he was unaware of the problem and could not comment.

The Houston Chronicle reviewed records in nine appeals that were filed too late. In some cases, lawyers or judges appear to have miscalculated or misunderstood the dates of the deadlines, which generally fall one year after

Please see **CASES,** *Page A8*

NCAA TOURNAMENT

ns, Aggies bow out



STREETER LECKA / GETTY IMAGES

tin Mason, left, and Clint Chapman of Texas
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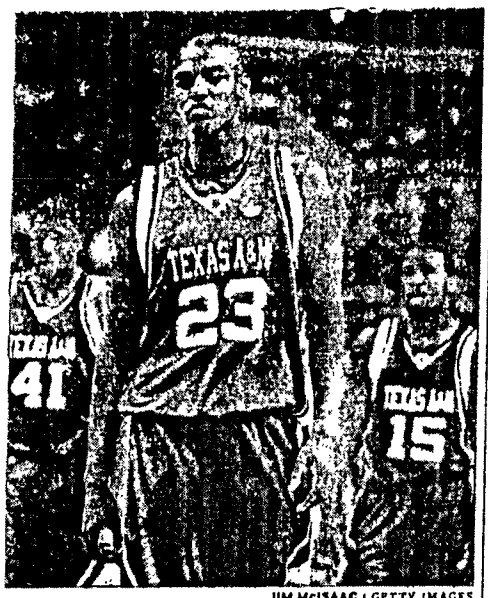
Saturday night.



JIM McISAAC / GETTY IMAGES

... OF DEFEAT: Aggie senior Josh Carter, center, trudges off the court with teammates Chinemelu Elonu, left, and Donald Sloan after Texas A&M lost to Connecticut on Saturday.

evils Duke just short

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ORY ON PAGE C1

Huskies torch A&M early, often

CONNECTICUT easily reached the Sweet 16 as it never trailed in a 92-66 rout of Texas A&M. **STORY ON PAGE C1**

.com **THE ROAD TO THE FINAL FOUR:** Keep up with your favorite teams and your brackets in the Chronicle's coverage of the NCAA Tournament. Go to **chron.com/sports**

iege by gangsters, rural Mexican villages dig moats

on't always deter raids, roops can't be spared

EXICO— has never seemed truer than in this gangster-besieged village and a neighboring one in the bean fields and desert scrub a long day's drive south of the Rio Grande.

ıout tur-
ımunities

Since right before Christmas, armed raiders repeatedly have swept into both villages to carry away local men. Government help arrived too late, or not at all.

Terrified villagers — at the urging of army officers who couldn't be there around the clock — have clawed moats across every access road but one into their communities, hoping to repel the raids.

"This was a means of preservation," said Ruben Solis, 47, a farmers' leader in Cuauhtemoc, a collection of adobe and concrete houses called home by 3,700 people. "It's better to struggle this way than to face the consequences."

But shortly after midnight last Sunday, villagers said, as many as 15 SUVs loaded with *pistoleros* attacked nearby San Angel, population 250, and kidnapped five people. Four victims were returned unharmed a few days later. The fifth hostage, a teenage boy, was held to exchange for the intended target the raid-

Please see **MOATS,** *Page A23*

MAYRA BELTRÁN/ CHRONICLE

D: Dallas attorney Ralph Janvey has conducted four hips, but none was as large as Stanford Financial.

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viser, a forensic accounting and information technology expert, a brokerage specialist, a security consultant and a public relations firm.

Within days of the freeze, he set up a Web site, www.stanfordfinancialreceivership.com., and an e-mail address, info@stanfordfinancialreceivership.com.

Some investors take little comfort in that.

"My family and I have suffered the pain, stress, and hardship only you have caused. I have had bounced checks for my mortgage, semi-annual car insurance, heating bill, and various medical bills while you have been protecting me," North Carolina investor William Allen wrote in an e-mail last week that he shared with the Chronicle.

'Just an impossible task'

Michael Goldberg, a Florida attorney who specializes in receiverships, said the lifting of the freeze on most investor accounts shows that Janvey is trying to move quickly, but communication is key for frightened investors.

"All of a sudden he appears, the money stops flowing and they take their emotions out on the receiver ...," Goldberg said. "I'm sure he would love to have the ability to speak to everybody, but that's just an impossible task."

Alan Bromberg, a law professor at Southern Methodist University who once had Janvey as a student, said Janvey carefully considers problems and makes tough decisions.

In the Stanford case, Bromberg said, money Janvey is trying to recover likely has changed hands many times, and all who touched it might have claims. "I think he's got the brains, and he's got the intelligence to work away at it," he said.

"But receiverships never come out making everyone happy."

kristen.hays@chron.com

CASES: Reasons vary for missing deadline

CONTINUED FROM PAGE A1

state appeals are concluded. In others, computer failures or human foibles are blamed, records show.

"Any decent judges would be deeply ashamed of the quality of legal representation in most capital cases in Texas," said Stephen Bright, a leading specialist in capital case law and who directs the Southern Center for Human Rights in Atlanta. "The very least they could do about it would be to prohibit lawyers who miss the statute of limitations from taking another case and referring them to the Bar for disciplinary proceedings."

One last chance

A federal writ of habeas corpus – a right guaranteed by the Constitution – usually gives an inmate a last chance to have the courts review errors or overlooked evidence that could invalidate a conviction or death sentence.

Jerome Godinich, the attorney in both Johnson and Thurmond's cases, appears to be the only Texas attorney to have filed too late in more than one recent death row appeal, based on the nine cases reviewed. He also filed late in a third Texas death row case, records show.

In the third case, however, a Houston-based U.S. district judge took so long to appoint Godinich that the appellate deadline already had lapsed. Court records show Godinich requested more time but took 162 days to file the appeal. The judge then ruled that it, too, was too late to be considered, records show.

Godinich did not respond to several telephone and e-mail requests for an interview. He has faced no fines or other public penalties from the Houston-based federal judges who both appointed and paid him to represent the three men.

Late appeals not tracked

In the case of Johnson, the inmate executed in February for a 1995 rape and murder, Harris County Assistant District Attorney Roe Wilson said the federal district judge considered other legal arguments, though the appeal ultimately was rejected for being filed too late. She said such mistakes were rare in Harris County cases.

The Texas Attorney General's Office, which handles federal appeals, has moved aggressively in several cases to get late filings dismissed on behalf of the state. But

JULIO CORTEZ/ CHRONICLE

SPEAKING OUT: Texas death row inmate Keith Steven Thurmond talks from the Polunsky Unit in Livingston on Wednesday about his lawyer, who blamed a malfunctioning machine for his failure to file Thurmond's final appeal in time.

DEADLINES MISSED IN CAPITAL CASES

Six men have been executed who lost final federal appeals because of blown deadlines:

- **Johnny Ray Johnson:** Executed Feb. 12, 2009, for the rape murder of a Houston woman.
- **Willie Marcel Shannon:** Executed Nov. 8, 2006, for a carjacking killing at a Houston shopping center.
- **Robert Andrew Lookingbill:** Executed Jan. 22, 2003, for the beating death of his grandmother in Hidalgo County.
- **Leonard Urrutl Rojas:** Executed Dec. 4, 2002, for the shooting deaths of his common-law wife and his brother in Alvarado.
- **Spencer Corey Goodman:** Executed Jan. 18, 2000, for the abduction murder of a woman in Fort Bend County.
- **Andrew Cantu Tzin:** Executed Feb. 16, 1999, for the stabbing deaths of three people in Abilene.

At least three living death row inmates' lawyers also filed federal appeals late:

- **Keith Steven Thurmond:** sentenced to death in 2002 for the murders of his estranged wife and a neighbor in Montgomery County.
- **Quintin Phillippe Jones:** sentenced to death in 2001 in Tarrant County for killing his great-aunt.
- **Martin Enos Nelson:** sentenced to death for a 1987 murder.

– FROM STAFF REPORTS

Thurmond, who had no previous criminal history, shot and killed his wife and neighbor in 2001, the same day that his wife sought a protective order and took their son to live with the neighbor.

Thurmond says he is innocent. But the only issues raised by his lawyer in his appeal, filed too late, were that his trial attorney failed to investigate allegations that Thurmond was abused as a child and a jury might have spared his life because of it.

James Marcus, an expert in capital case law who teaches in the Capital Punishment Clinic at the University of Texas School of Law, said missing the deadline for a federal writ of habeas corpus – thereby waiving all federal review – is the equivalent of "sleeping through the trial."

Federal courts, he noted, have overturned several recent Texas death cases for errors overlooked by state judges, including one involving allegations of discriminatory jury selection by Harris County prosecutors. Federal judges also awarded a new trial to another Montgomery County death row inmate this year based on new evidence presented about forensic errors in his case.

Sought new attorney

Quintin Phillippe Jones, another Texas death row inmate who also recently lost

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The Texas Attorney General's Office, which handles federal appeals, has moved aggressively in several cases to get late filings dismissed on behalf of the state. But spokesman Jerry Strickland said the office does not keep track of how often or how many federal appeals have been filed too late.

Thurmond, a Montgomery County mechanic on death row for the murders of his estranged wife and his neighbor, said Wednesday he had never been told that his federal appeals had been denied both by the U.S. District Court in Houston last year and by the 5th Circuit last week.

He said he hadn't seen or heard from his attorney in more than a year.

"So what am I supposed to do now?" he asked.

A jury concluded that Thurmond, who had no previous criminal history, shot and killed his wife and neighbor in 2001, the same day that his wife sought a protective order and took their son to live with the neighbor.

Thurmond says he is innocent. But the only issues raised by his lawyer in his appeal, filed too late, were that his trial attorney failed to investigate allegations that Thurmond was abused as a child and a jury might have spared his life because of it.

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JULIO CORTEZ/ CHRONICLE

LOSING OUT: Texas death row inmate Quintin Phillippe Jones, shown Wednesday, says he's the one paying for his attorney's failure to file on time.

Sought new attorney

Quintin Phillippe Jones, another Texas death row inmate who also recently lost his federal appeal because of an attorney's tardiness, said he did everything he could to alert the federal courts to report problems months before his Fort Worth attorney blew his federal deadline. Jones wrote letters to the judge, filed two motions with the help of other prisoners in an attempt to get another attorney, and even sent two separate complaints to the state bar. Nothing worked.

"I heard he didn't file (on time) through another lawyer," Jones said. "I'm the one who pays for his mistake. It cost a lot, and I'm paying for it."

lise.olsen@chron.com

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- **Marlin Enos Nelson:** sentenced to death for a 1987 murder.

— FROM STAFF REPORTS

N.D. city braces for record flooding

■ Fargo fills 1.5 million sandbags as river rises

By DAVE KOLPACK
ASSOCIATED PRESS

FARGO, N.D. – The city of Fargo is racing to fill 1.5 million sandbags to prepare for record flooding as a nearby river is expected to crest more than 20 feet above flood stage.

Volunteers were being bused to a city utility building the size of a football field where they will fill sandbags, officials said. The city also bought two machines that resemble large spiders and can produce about 5,000 sandbags an hour.

"It looks a little *Star Wars*-ish in here," said Bruce Grubb, Fargo's enterprise director.

The National Weather Service projected that the Red River would crest between 37 and 40 feet between March 28 and April 1. That's about 22 feet above flood stage and about a half-foot higher than the 1997 spring flood that swamped several homes. A storm also was expected to drop one or two inches of rain in the Red River Valley starting today.

"If we go to 40 feet, we're going to be tested," Fargo Mayor Dennis Walaker said Saturday after touring sandbagging operations with North Dakota Gov. John Hoeven and other officials.

Officials said it would be difficult to predict the extent of flooding. Walaker said an aerial tour of the river basin indicated the situation "didn't look as threatening as we've been hearing."

City officials said 225 National Guard soldiers have been called in ahead of the flooding, and the mayor said the North Dakota State University football team was scheduled to help with the sandbagging process.

DAVE KOLPACK/ AP

READY: Sandbags are lined up outside a city utility building in Fargo, N.D., on Saturday.